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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan, Plaintiff-Appellee, v. Matthew Scott Duff, Defendant-Appellant.	Supreme Court No. 163961 Court of Appeals No. 354406 Circuit Court No. 2018-267140-FH

Plaintiff-Appellee's Supplemental Brief

Oral Argument Requested

KAREN D. McDONALD
PROSECUTING ATTORNEY,
OAKLAND COUNTY

MARILYN J. DAY
CHIEF, APPELLATE DIVISION

By: Louis F. Meizlish (P75168)
Assistant Prosecuting Attorney
West Wing — Building 14E
1200 N. Telegraph Road
Phone: 248-858-0656
Fax: 248-975-4265
Email: *meizlishl@oakgov.com*

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COUNTER-STATEMENT OF JURISDICTION

The People charged Defendant with the offense of operating while intoxicated—third offense, MCL 257.625(1), (9) and/or (11). The circuit judge suppressed evidence and dismissed the case. The People filed an appeal of right in the Court of Appeals, which reversed the circuit judge's suppression and dismissal orders. *People v Duff*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2021 (Docket No. 354406) (4-8b).

Defendant's application to this Court followed. The Court ordered supplemental briefing and scheduled a mini oral argument on the application. *People v Duff*, __ Mich __, __ NW2d __ (2022) (docket event No. 45). The People do not dispute that this Court has jurisdiction over Defendant's appeal. See MCR 7.303(B); MCL 600.215; MICH CONST art VI, § 4.

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COUNTER-STATEMENT OF QUESTION PRESENTED

I. Is a parked motorist seized when officers park nearby and approach the driver on foot — without activating flashing lights or sirens, without drawing their weapons, without commanding the driver to do anything, and without preventing the vehicle's egress from the parking area?

The People answer, "No."

Defendant contends the answer should be, "Yes."

The Court of Appeals answered, "No."

The circuit judge answered, "Yes."

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SUMMARY OF THE ARGUMENT

The legal proposition before this Court is an unremarkable one: "'[U]nless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave.'" *Duff*, unpub op at 4 (7b) (quoting *United States v Carr*, 674 F3d 570, 572-73 (CA 6, 2012)). The intermediate appellate court's ruling was correct, and, notably, consistent with every published state and federal appellate court decision the People could find that analyzes whether a seizure occurred under analogous circumstances: police parking near a parked motorist, without blocking the vehicle's egress from the parking area, and approaching the motorist on foot without activating lights or sirens or issuing any commands to stay in place.

The public expects that police officers will investigate strange circumstances that catch their attention, especially those where someone could be ill or in danger. Police officers do not act unlawfully when they do this. "The purpose of the Fourth Amendment is not to eliminate *all contact* between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v Mendenhall*, 446 US 544, 553-54; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (emphasis added) (quoting *United States v Martinez-Fuerte*, 428 US 543, 554; 96 S Ct 3074; 49 L Ed 2d 1116 (2016)).

Here, sheriff's deputies eyed an unusual circumstance: an occupied vehicle sitting in a public place — the parking lot of a closed elementary school at 10 p.m. on a Sunday night. 94b. They did what every citizen expects of policer officers: they investigated suspicious circumstances.

The deputies' approach of the vehicle and consensual interaction with Defendant was not a seizure, thus there was no violation of Defendant's Fourth Amendment rights. After parking behind Defendant at an angle that did not block his egress from the parking spot, deputies approached and interacted with him through the open driver-side window. 57b, 103b, 113b. The deputies did not park in such a way as to block in the driver, 112b, 116-17b, and if the driver did not wish to engage, he was free to roll up his window. 118b.

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"Not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Mendenhall*, 446 US at 552 (cleaned up). When there is no seizure, the Fourth Amendment's requirements do not apply. *People v Lucynski*, __ Mich __, __ NW2d __ (2022) (Docket No. 162833); slip op at 2.

Consider what the deputies did *not* do when they approached Defendant's vehicle in a public place:

- They did not activate their sirens
- They did not activate their flashers
- They did not draw their weapons
- They did not issue any orders (*e.g.*, to "halt," "stay where you are," or "keep the window down")
- They did not ambush or startle Defendant out of the darkness
- They did not corner, block, or box in Defendant's vehicle
- They did not otherwise block Defendant's egress from the parking lot

So, contrary to Defendant's argument, police officers parking *near* — without preventing egress — a parked motorist in a public place, absent a show of authority (sirens, flashers, drawn weapons, or orders to stay put) does not constitute a seizure. A holding to the contrary would not only expose officers to civil liability for doing their jobs, see, *e.g.*, 42 USC 1983, but would require them to park some vague unspecified distances away from parked motorists to whom they wish to talk.

This case is distinguishable from others this Court has heard or reviewed under similar circumstances which constituted seizures *because the officers blocked the motorists' egress from the parking space*, thus telegraphing to the parked parties they were not free to leave or terminate the encounter. See *Lucynski*, __ Mich at __, slip op at 13 (emphasis added) ("Robinson pulled onto the driveway behind defendant, and *blocked the exit*"); *United States v See*, 574 F3d 309, 312

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(CA6, 2009) (emphasis added) ("After noticing See's car [backed into a parking space], Williams pulled his patrol car in front of See's car and parked the patrol car in front of See's car *so that See could not move his vehicle*."); and *United States v Gross*, 662 F3d 393, 399 (CA 6, 2011) (emphasis added) ("Williams's act of parking his marked police car *directly behind* the Oldsmobile, *thereby blocking the car in the parking spac*e, would cause a reasonable person not to feel free to leave the area and therefore constituted a Terry stop.").

When motorists have a reasonable path to exit the space, and officers have not done anything to signal a parked motorist he *must* remain, no seizure has occurred. Here, the driver needed only turn his wheel, back out and drive away. In other words, the driver could have exited the space the same way drivers usually exit a space when a police car is *not* nearby.

The Court of Appeals correctly held that "'*unless there is other coercive behavior*, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave." *Duff*, unpub op at 4 (7b) (emphasis added) (quoting *Carr*, 674 F3d at 572-73). As the U.S. Supreme Court explained years ago in reversing Michigan's intermediate appellate court, the absence of coercive behavior is *critical*:

> The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement. *While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure.*

Michigan v Chesternut, 486 US 567, 575; 108 S Ct 1975; 100 L Ed 2d 565, 573 (1988) (cleaned up, emphasis added), rev'g *People v Chesternut*, 157 Mich App 181; 403 NW2d 74 (1986).

Here there was no coercive behavior. The police did not "engag[e] in conduct significantly beyond that accepted in social intercourse."

O'Malley v City of Flint, 652 F3d 662, 66 (CA 6, 2011) (citing LaFave, 4 Search and Seizure, § 9.4 (4th ed)). The police did not go beyond what a civilian bystander could do in checking on a parked motorist. Thus, this Court should reject Defendant's analysis as inconsistent with federal, sister-state and Michigan precedent, and deny leave.

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COUNTER-STATEMENT OF FACTS

The People charged Defendant with the offense of operating while intoxicated—third offense, MCL 257.625(1), (9), for his conduct on March 4, 2018, in Oakland County. A preliminary examination and evidentiary hearing occurred on May 31 and October 2, 2018, respectively.

Deputy Jason Pence of the Oakland County Sheriff's Office was on routine patrol in Pontiac on Sunday, March 4, 2018, at 10:09 p.m. 94b. While traveling westbound on Montcalm Street, he observed a vehicle parked in the parking lot of Whitman Elementary School. 95b. The school was closed this Sunday night. 96b.

Pence testified, "I didn't know if someone was in there having an emergency or what the reason why someone would be parked there in an elementary parking lot at 10:00 at night." 74b. Pence could tell the car was occupied because the interior lights were on. 97b. Pence did not activate his siren or his overhead lights but did point a spotlight at the suspect vehicle for his and his colleague's safety. 100b.

Pence testified he parked the nose of his patrol vehicle at a 45-degree angle pointing at the driver-side rear bumper of the suspect vehicle, about 10 feet away. *Id.* Defendant could back out of the parking space without hitting the patrol car if he turned his wheel while in reverse. 112b, 116-17b.[1]

Pence approached the driver's-side door and noted that Defendant's window was all the way down. 57b, 103b, 113b. He was not parking in such a way as to block Defendant's egress, and if the driver did not wish to engage, he was free to roll up his window. 118b.

When the deputy first began speaking with Defendant, he observed that "his eyes were bloodshot and glossy which, with my experience, tends to lean towards someone that had been drinking that night." 103b,

[1] The deputy testified that if the motorist had begun to back out of the parking space, "he would have been able to leave, but I would have then activated my emergency lights and sirens." 119b.

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113b.[2] As he spoke with Defendant, the deputy observed that Defendant was slurring his words and an odor of alcohol was emanating "out of * * * the vehicle and out of him." 103-04b. The deputy asked for the driver's registration, driver's license and proof of insurance. 114b.

Defendant was slurring his words, his hands were shaking, and he had a difficult time removing his driver's license from his wallet. 32b, 58b. It took about 20 seconds for Defendant to "fumble" through the wallet to produce the license. 60b. Defendant told the deputy that he had been drinking that night, that he had pulled over and he was resting in the parking lot. 32b.

The deputy asked Defendant to exit the vehicle to perform field sobriety tasks, but first requested Defendant consent to a search of his vehicle. 61b. Defendant did consent, and Pence found nothing of note in the vehicle. 61b. He then asked Defendant to recite the alphabet, and the driver did so, but slurred his speech and missed a letter. 62b. After receiving directions to count backward from 75 to 59, Defendant stopped at 60 rather than 59. *Id.* While performing the heel-to-toe evaluation, Defendant took one step and then fell off the line while taking his second step. 34b. Defendant was unable to perform the one-leg stand because "as soon [as] he lifted his leg he wasn't able to gain his balance." *Id.* The deputy then placed Defendant under arrest. 34-35b. After the arrest, Defendant consented to a blood draw at McLaren Oakland Hospital. 40b. The result of the blood draw was .339 percent. 42b.

[2] The deputy had been a police officer for 23 years before the day of Defendant's crime. 94b.

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A screenshot from the deputy's in-car video recording. People's Ex 1, at 00:00.

The circuit judge held an evidentiary hearing at which she admitted two items — People's Exhibits 1 and 2 (video recordings) — and took Pence's testimony. The court denied Defendant's motion to suppress evidence. 13-14b.

Defendant filed a delayed interlocutory application for leave to appeal the circuit judge's decision in the Court of Appeals, which denied leave. *People* v *Duff*, unpublished order of the Court of Appeals, issued March 27, 2019 (Docket No. 347603) (16b). Thereafter, Defendant appealed to this Court, which, on October 29, 2019, remanded the case

> to the Oakland Circuit Court for reconsideration of the defendant's motion to suppress. On remand, the circuit court shall determine when the defendant was first seized for Fourth Amendment purposes. See *People v Jenkins*, 472

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> Mich 26, 32; 691 N2d 759 (2005) ('A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave.'). This is the relevant point in time for assessing whether the deputies had probable cause to justify an arrest or a reasonable suspicion of criminal activity to justify a stop under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

People v Duff, 504 Mich 995, 995; 934 NW2d 214 (2019).

The circuit judge held no hearing pursuant to the remand order for four months. When the parties appeared, the judge appeared confused as to why the parties were there and had to be reminded by the parties of this Court's remand order. 129-30b. Neither party presented any additional evidence or testimony at the hearing; there was only argument.

The circuit judge said she would issue an opinion by March 12. 146b. The court issued a three-page opinion on July 15, 2020. The circuit judge opined that, after observing Defendant's vehicle:

> Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver (pg. 16). The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car (pg. 28). The defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020). Under those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure.

19-20b. The circuit judge thereupon granted Defendant's motion to suppress, concluding that there was no reasonable suspicion for the stop. *Id.* Given the suppression and the absence of any remaining evidence, the judge granted Defendant's motion to dismiss. 23-24b, 153-54b.

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The People filed a timely appeal of right. See docket event No. 1. The Court of Appeals reversed. The court introduced its analysis by observing that "not every interaction with law enforcement constitutes a seizure triggering the Fourth Amendment. An officer may approach a citizen 'on the street or in other public places' and ask the citizen to voluntarily answer questions without violating the Fourth Amendment." *Duff*, unpub op at 3 (6b) (quoting *United States v Drayton*, 536 US 194, 200-01; 122 S Ct 2105; 153 L Ed 2d 242 (2002)).

The appellate court then noted the circuit judge's factual finding that the patrol vehicle parked 10 feet behind Defendant's vehicle — not directly behind but at a 45-degree angle. *Id.* It then proceeded to find clear error in the circuit judge's opinion that "defendant's only means to exit [was] driving over the grass in front of him." *Id.* The appellate court found no support for this finding in the record, and noted that the circuit judge based this conclusion on a statement Defendant's attorney made at a status conference,[6] not on any sworn testimony or exhibits:

> This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, 'If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle.' Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear[ed] the deputy's vehicle if defendant 'turned his wheel as he was backing out.'

Id.

Given its conclusion that the deputies did not block in Defendant, the court then noted that "'unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in

[6] The circuit judge wrote, "The defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020)." 19b.

a manner that allows the defendant to leave." *Id.* at 4 (7b) (quoting *Carr*, 674 F3d at 572-73). The appellate court concluded there was no such behavior, hence the police did not seize him when they parked 10 feet behind Defendant at a 45-degree angle. *Id.* Thus, the court ruled, after parking behind Defendant, approaching his vehicle and observing indicia consistent with intoxication, the police could properly detain Defendant for further investigation on reasonable suspicion of drunk driving. *Id.* at 4-5.

One panel judge dissented. He opined that Defendant's ability to exit the parking area was of little relevance to the Fourth Amendment inquiry. *Duff*, slip op at 2-3 (SHAPIRO, J., dissenting) (10-11b).

Defendant's application to this Court followed. The Court ordered supplemental briefing and a mini oral argument on the application. *Duff*, __ Mich at __ (docket event No. 45). Additional facts may appear in the Argument portion of this brief.

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ARGUMENT

I. A parked motorist is not seized when police officers park nearby without preventing the person's egress from the parking area, without activating flashing lights or sirens, without drawing their weapons, and without issuing verbal commands to remain in place or participate in an investigation.

Standard of Review and Issue Preservation

An appellate court reviews de novo a lower court's decision on a motion to suppress evidence on Fourth Amendment grounds. *Jenkins*, 472 Mich at 31. Review of a trial court's findings of fact is for clear error. *Id.* The People do not dispute that Defendant preserved this issue.

Discussion

The Court of Appeals did not err in reversing the circuit judge's suppression of evidence and dismissal of the case. Police need only reasonable suspicion or probable cause *when they seize a person*: "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage — provided they do not induce cooperation by coercive means." *Drayton*, 536 US at 200-01 (2002). And, "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Immigration & Naturalization Serv v Delgado*, 466 US 210, 216; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

And "if there is no detention — no seizure within the meaning of the Fourth Amendment — then no constitutional rights have been infringed." *Florida v Royer*, 460 US 491, 498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (opinion of WHITE, J.)). In other words, "'the safeguards of the Fourth Amendment, with respect to police/citizen contact, vest only after a citizen has been seized.'" *O'Malley*, 652 F3d at 668 (quoting *Smoak v Hall*, 460 F3d 768, 778 (CA 6, 2006)).

Here, the police did nothing to telegraph to Defendant that he had to stay where he was and cooperate in an investigation. Even without

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reasonable suspicion, offers "may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage, *as long as the police do not convey a message that compliance with their requests is required*." *Florida v Bostick*, 501 US 429, 434-35; 111 S Ct 2382; 115 L Ed 2d 389 (1991) (cleaned up, emphasis added).

This Court should deny leave to appeal.

A. The Court of Appeals correctly held that Defendant was not seized when deputies approached his parked vehicle without telegraphing to him that he had to remain in place and cooperate in the investigation.

The uncontested testimony at the evidentiary hearing was that Defendant's car was *parked* (already stopped) when the sheriff's deputy approached Defendant's vehicle and interacted with him through his open window. 57b, 96b, 97b, 99b, 101b, 103b. The deputies did not park in such a way as to block in the driver, 112b, 116-17b, and if the driver did not wish to engage with them, he was free to roll up his window. 118b.

When Defendant did not roll up his window or leave, the deputies observed Defendant emitting an odor of alcohol, having bloodshot eyes, slurring his words, fumbling through his wallet, sitting behind the wheel of a running vehicle, and admitting to having consumed alcohol that evening. 32b, 45b, 58b, 60b.[7] This led to field sobriety tasks on which Defendant performed poorly and, ultimately, an analysis of Defendant's blood revealing a concentration of .339 percent, more than four times the legal limit. 32-34b, 42b.

None of these observations were the product of an unlawful seizure *because no seizure had occurred*. "The Fourth Amendment is not implicated when a law enforcement officer merely approaches an individual and directs questions to that person." *People v Ward*, 491 Mich 932, 932; 814 NW2d 292 (2012) (citing *Royer*, 460 US at 497-98;

[7] There is no dispute that the sheriff's deputy seized Defendant when he *later* ordered him out of his parked vehicle to perform field sobriety tasks. 31b, 60b.

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Jenkins, 472 Mich at 26; and *People v Shankle*, 227 Mich App 690; 577 NW2d 471 (1998)).

The circumstances here were not analogous to a traffic stop. Unlike a traffic stop, the police did not divert Defendant from his path of travel. Indeed, unlike *Lucynski*, the defendant was not in motion from the car. See slip op at 4. Upon their approach, the deputies did not flash their overhead lights, run their sirens or issue any orders (*e.g.*, to "halt," "stay where you are," or "keep the window down"). They used no physical force and made no show of authority when they approached his parked vehicle. Thus, there was no seizure when the police observed Defendant with bloodshot and glossy eyes and asked for his identification.

The officers did what any civilian could do. Yet, under Defendant's interpretation of the Fourth Amendment — at odds with several federal circuits and numerous sister states — police officers *cannot* do what any civilian may do — observe and interact with a parked motorist — unless the officers park a far distance away. This Court should reject an invitation to hold that parking *near* a parked motorist, without activating sirens or flashing lights, and without drawing weapons or issuing orders, is somehow a seizure of the parked motorist. This is because police contact only amounts to a seizure if the police "engag[e] in conduct significantly beyond that accepted in social intercourse." *O'Malley*, 652 F3d at 669 (citing LaFave, 4 Search and Seizure, § 9.4 (4th ed)).

It is unlikely, moreover, that Defendant — who was resting —had any intent to leave the parking area. 32b. See *Delgado*, 466 US at 218 (observing that federal agents' presence at a work site was not a seizure where the employees had their own reasons for remaining at the factory — namely their "voluntary obligations to their employers."); and *Brendlin*, 551 US at 255 (cleaned up) ("[W]hen a person has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.").

The U.S. Supreme Court has explained that "a person is seized by the police and thus entitled to challenge the government's action under

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the Fourth Amendment when the officer, *by means of physical force or show of authority*, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin*, 551 US at 254 (cleaned up, emphasis added). A seizure requires "an intentional acquisition of physical control." *Brower*, 489 US at 596.

> circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person*.

Mendenhall, 446 US at 554-55 (cleaned up, emphasis added).

Thus, when "an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there has been no restraint on the person's liberty and the person is not seized." *Shankle*, 227 Mich App at 693 (cleaned up). See also *Delgado*, 466 US at 216 ("[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation.").

"[P]olice may rely on the moral and instinctive pressures of citizens to cooperate and that a confrontation is a seizure only if the officer *adds* to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse." *O'Malley*, 652 F3d at 669 (emphasis added) citing LaFave, 4 Search and Seizure, § 9.4 (4th ed). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 US at 216.

Case law is clear that approaching civilians, *without more*, is not equivalent to seizing them:

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- In *Shankle*, which this Court cited in *Ward,* the Court of Appeals held that a police/driver encounter was consensual and did not implicate the Fourth Amendment where an officer approached a driver sitting in a parked car in a private driveway and requested the driver produce identification. *Id.* at 699. The court explained that "a police approach for questioning on the street amounts to a consensual encounter, not a *Terry* stop, unless there exist intimidating circumstances leading the person to reasonably believe he was not free to leave[.]" *Id.* at 695-96.

- The U.S. Supreme Court observed that no Fourth Amendment activity occurred when two detectives approached a passenger in a Miami Airport, identified themselves as officers and asked for a moment to speak with him. *Royer*, 460 US at 493-94, 497.

- This Court held that officers who encountered an individual seated on the steps of the site of a loud party had not seized him for the purposes of the Fourth Amendment when they requested his identification. *Jenkins*, 472 Mich at 28, 33-34. "The Fourth Amendment was not implicated until Officer Spickard actually hindered defendant's attempt to leave the scene, thereby 'seizing' him within the meaning of the Fourth Amendment." *Id.* at 33-34 (emphasis added).

- The U.S. Supreme Court held that police driving alongside a pedestrian who had just run away did not seize the person. *Chesternut*, 486 US at 569. "The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement. While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." *Id.* at 575.

- In *Delgado*, the high court held that immigration agents did not seize employees at a work site after showing up and questioning the employees because the employees had their own reasons for remaining at the factory — namely their "voluntary obligations to

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their employers." 466 US at 218. In concluding that the employees were not seized, the Supreme Court emphasized that the agents did not hinder the employees' movements. See *id.* at 218 ("While the surveys did cause some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories."); and 219 ("Since most workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.").

These federal and state cases establish that the police must take some *coercive* action to telegraph to the parked motorist that he cannot leave and that he *must* cooperate, or else there is no "seizure" for Fourth Amendment purposes. See, *e.g.*, *Commonwealth v Livingstone*, 174 A3d 609, 624 (Pa, 2017) (emphasis added) ("Numerous other jurisdictions, including Arkansas, California, Connecticut, Florida, Idaho, Maryland, Montana, North Dakota, Oregon, Tennessee, Vermont, Virginia, Washington, and Wyoming, have likewise concluded that a seizure occurs when a police officer pulls his police vehicle, *with its emergency lights activated*, behind a parked or stopped vehicle").

The People readily concede that preventing a person's egress from a parking area usually does send such a message, but not parking nearby *without* preventing the person's egress.[9] Indeed, the *overwhelming*

[9] Pence testified that if the motorist had begun to back out of the parking space, "*he would have been able to leave*, but I would have *then* activated my emergency lights and sirens." 119b (emphasis added). The officer's intent in hypothetical circumstances does not affect the legality of what he did *in the actual circumstances*. See *Lucynski*, slip op at 13 ("Because [the police officer] did not outwardly communicate his subjective intentions to defendant, they are not relevant in determining when defendant's encounter with [the police officer] became a seizure.") and *Ohio v Robinette*, 519 US 33, 38; 117 S Ct 417; 136 L Ed 2d 347 (1996) (cleaned up, emphasis added) ("The fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify

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weight of state and federal authority holds that parking near a stationary vehicle — without preventing the vehicle's egress and without flashing emergency lights or sounding sirens, and without issuing commands to stay put — is not a seizure. And this is true even if the officers use (non-flashing) lights on their vehicle or handheld flashlights to illuminate the subject vehicle.[10] See *People v Cascio*, 932 P2d 1381, 1384-86 (Colo, 1997); *Harris v State*, 12 A3d 1154 (Del, 2011); *State v Randle*; 276 P3d 732, 735-38 (Idaho Ct App, 2012); *People v Luedemann*, 857 NE2d 187, 199-208 (Ill, 2006); *State v Wilkes*, 756 NW2d 838, 844-45 (Iowa, 2008); *State v McGinnis*, 233 P3d 246, 251-57 (Kan, 2010); *Commonwealth v Doulette*; 609 NE2d 473, 475-476 (Mass, 1993); *Richter v Dep't of Trans*, 786 NW2d 716, 722-23 (ND, 2010); *State v Thomas*, 100 NE3d 899, 902-03 (Ohio Ct App, 2017); *State v Calhoun*, 792 P2d 1223, 1225 (Ore Ct App, 1990); *Amin v Cnty of Henrico*, 733 SE2d 661, 665-67 (Va Ct App, 2012), rev'd on other grounds, 749 SE2d 169 (Va, 2013); *Commonwealth v Au*, 42 A3d 1002, 1008-09 (Pa, 2012); *State v Johnson*, 231 P3d 225, 228-29 (Wis Ct App, 2010); *United States*

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that action. * * * *Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.*")

[10] See *Au*, 42 A3d at 1008 (observing that use of headlights and flashlights "was in furtherance of the officer's safety, and we conclude it was within the ambit of acceptable, non-escalatory factors."); and *Wilkes*, 756 NW2d at 844 (citing *Calhoun*, 792 P2d at 1225) (observing that the use of headlights and spotlights "is simply not coercive in the same manner as the activation of emergency lights which invoke police authority and imply a police command to stop and remain."); and *Luedemann*, 857 NE2d at 207 (quoting *State v Baker*, 107 P3d 1214, 1218 (Idaho, 2004) ("If we adopted the appellate court's view that the use of a flashlight is inherently coercive and analogous to a tone of voice indicating that compliance is compelled, that would make a seizure of any nighttime encounter in which an officer uses a flashlight or spotlight. This would leave the officer with a dilemma that we are not prepared to require: 'an officer is not constitutionally required to choose between a consensual encounter in the dark or turning on a spotlight and thereby effectuating a detention that may not be supported by reasonable suspicion.'").

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v Encarnacion-Galvez, 964 F2d 402, 410 (CA 5, 1992); *United States v Hendricks*, 319 F3d 993, 999 (CA 7, 2003); *United States v Pajari*, 715 F2d 1378, 1381-84 (CA 8, 1983); and *United States v Kim*, 25 F3d 1426, 1430-31 (CA 9, 1994).

Here, the deputies did not block Defendant's egress from the parking area. Indeed, the circuit judge *found* that the deputy "park[ed] his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle[.]" 19b (citing 100b). There was ample space by which Defendant could exit the parking area.

And the mere fact that Defendant had to turn his wheel to back out is of no moment, as perpendicular parking usually requires a person to turn the wheel when he or she wishes to exit the space.[11] Notably,

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[11] The circuit judge, as the Court of Appeals noted, clearly erred when she commented that "[t]he defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020)." 19b. The *uncontroverted* testimony refuted this, as the Court of Appeals noted in finding clear error:

> The trial court cited this statement to 'status conference 3/4/2020,' which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing—only argument by the parties. It therefore appears that this finding by the trial court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, 'If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle.' Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems

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Defendant has not identified any published Fourth Amendment authority for the notion that a person is seized under the circumstances in the instant case. Because the deputy did not employ "intimidating circumstances" — see *Shankle*, 227 Mich App at 695-96 — Pence's encounter with Defendant through the latter's open window was not a seizure.

B. Because Defendant could have easily maneuvered out of the parking area, coercive circumstances — the kind the Court identified in *Lucynski* — were not present. Thus, this police-citizen encounter retains its consensual nature.

When a motorist exits a perpendicular-parking space, he or she usually begins by driving in reverse *at an angle* so that the car is positioned to drive straight away once the vehicle has exited the space. Here, at the time of the consensual encounter, that is all Defendant had to do to exit the parking area: turn his wheel, proceed in reverse, exit the space, and drive toward the street. This case is distinguishable from others this Court has heard or reviewed under similar circumstances which constituted seizures *because the officers blocked the motorists' egress from the parking space*, thus telegraphing to the parked parties they were not free to leave or terminate the encounter.

> common sense that defendant would have been able to * * * clear the deputy's vehicle if defendant 'turned his wheel as he was backing out.'

Duff, slip op at 3 (6b). The appellate court added that the video recording from Pence's patrol vehicle supported its conclusion. *Id.* at 3 n2 (6b). The circuit judge did not question the deputy's credibility on this point — see 100b, 112b, 116-17b — or his veracity generally. See *Shankle*, 227 Mich App at 692 n1 ("In concluding that the evidence at issue should be suppressed, the district court did not question the honesty or basic accuracy of Officer Millikin's testimony, but rather accepted his version of events. Accordingly, we accept Officer Millikin's testimony as credible in reviewing the issue before us.").

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In *Lucynski*, the police officer "followed defendant in a marked patrol vehicle and turned onto the same one-lane driveway that defendant had entered, parking a few feet behind defendant's car and blocking the only path of egress." Slip op at 4. In other words, the officer "blocked the exit." *Id.* at 13. With the driver having exited his own vehicle and seeing his egress from the driveway blocked, "the other options available to [him] would have been to attempt to enter a home that [he] did not own (and without knowledge whether the owner was home) or wander off into a frozen field some distance from town." *Id.* at 21.

In contrast to *Lucynski*, Defendant in the instant case was still in his vehicle and had an easy exit from the parking area. Notably, he had *another* option to terminate the consensual encounter that Lucynski lacked: roll up his window. 118b. Lastly, of course, is the fact that Defendant was in a public place (an open parking lot). A person standing between a private residence and a police officer while on private property knows he's "blocked in" against the residence. Not so with a motorist parked on *public property* with a path to exit or an opportunity to *roll up his window*.

In *See*, which the *Lucynski* Court reviewed, a patrol officer observed a stationary vehicle backed into a space in the parking lot of a public housing complex. 574 F3d at 311. The officer then "pulled his patrol car in front of See's car and parked the patrol car in front of See's car *so that See could not move his vehicle*." *Id.* at 312 (emphasis added). The Sixth Circuit observed that "[g]iven the fact that [the officer] blocked See's car with his marked patrol car, a reasonable person in See's position would not have felt free to leave." *Id.* at 313. In a concurring opinion, one of the three judges notably observed that the officer "*should have simply parked his patrol car alongside See's vehicle to carry out the investigation in a consensual manner*. Instead, he parked his patrol car in such a way so as to *block* in See's vehicle, thus transforming the encounter into a Terry stop." *Id.* at 315 (GILMAN, J., concurring).

Two years later, the Sixth Circuit found a seizure when the police officer parked *directly* behind a parked vehicle and "blocked the car in[.]" *Gross*, 662 F3d at 399. The *Gross* Court explained that the officer's "act of parking his marked police car *directly behind* the Oldsmobile, *thereby blocking the car in the parking spac*e, would cause a reasonable person

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not to feel free to leave the area and therefore constituted a Terry stop." *Id.*

Police officers physically *surrounding* a parked vehicle also amounts to a seizure. *People v Armstrong*, __ Mich App __, __ NW2d __ (2022) (Docket No. 360639); slip op at 4 (cleaned up, emphasis added) (finding a seizure where the parked vehicle "was *surrounded on all sides and front and back* by Corporal Eaton and Officers Genaw, Saad, Scott, and Krzyak."). The instant case, however, involved only two officers, who did not surround Defendant's vehicle.

The Michigan Court of Appeals decision in the instant case was consistent with Michigan and U.S. Supreme Court precedent, and also consistent with every published decision the People could find interpreting analogous circumstances: decisions from the Fifth, Sixth, Seventh, Eighth and Ninth circuits and the states of Colorado, Delaware, Illinois, Idaho, Kansas, Massachusetts, North Dakota, Ohio, Oregon, Virginia, Wisconsin, Pennsylvania, and Iowa. There was no error.

C. 'Completely block[ing]' a parked vehicle, in the context of assessing whether a seizure occurred, means that egress from the parking area is impracticable. Where a motorist can *easily* navigate the vehicle from the parking area within a few seconds, he is not 'blocked in' and is not seized.

The Court of Appeals decision in *People v Anthony,* 327 Mich App 24 (2019), was also not in error. In *Anthony*, Detroit officers observed a Ford F-150 in the street and pulled alongside it to investigate a potential traffic violation. *Id.* at 28-29. When the officers pulled alongside the truck, it could drive forward or in reverse and exit the space, as there were no obstructions (vehicular or otherwise) to its front and rear. See *id.* at 50 (GLEICHER, J., dissenting) (photograph showing the vehicles' relative positions, apparently taken after the arrest). The photograph "shows that defendant could have driven forward or in reverse to leave, with little maneuvering, let alone with some maneuvering." *Id.* at 40 (opinion of the court). The *Anthony* Court proceeded to hold that "the parking of the police car in such a manner does not constitute a seizure

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of the F-150 *unless it blocked the F-150's path of egress*." *Id.* at 38 (emphasis added) (citing *Carr*, 674 F3d at 572-73).

In its October 5, 2022, order scheduling a MOAA, this Court directed the parties' attention to another line in *Anthony* wherein the intermediate court commented that "only if officers completely block a person's parked vehicle with a police vehicle is the person seized." *Duff*, __ Mich at __ (docket event No. 45 (quoting *Anthony*, 327 Mich App at 40). A literal interpretation of this one sentence (particularly the use of the word "only") — standing alone — would suggest that even if officers take other action to coerce the motorist to stay, there is no seizure if he *theoretically* could maneuver around a patrol car. But this sentence must be read with a critical line on the preceding page: *"'[U]nless there is other coercive behavior*, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave.'" *Id. at* 39 (emphasis added) (quoting *Carr*, 674 F3d at 572-73).

Here, as in *Anthony*, the police did not engage in "coercive behavior" when they parked *near* a parked motorist. There was no flashing of lights, no airing of sirens, and no orders to halt. When the police do not engage in coercive behavior, and a parked motorist can easily maneuver out of the space and exit the parking area, the parked motorist is not "seized." As the U.S. Supreme Court explained years ago in reversing Michigan's intermediate appellate court, the absence of coercive behavior is critical:

> The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement. *While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure*.

Chesternut, 486 US at 575 (cleaned up, emphasis added).

Anthony is consistent with Fourth Amendment case law. Accordingly, this Court should decline Defendant's invitation to overrule it.

D. Conclusion

Under Defendant's interpretation of the Fourth Amendment, police officers cannot do what any civilian may do — observe and interact with a parked motorist — unless the officers park an unspecified far distance away. This Court should reject an invitation to hold that parking *near* a parked motorist, without preventing the person's egress, without activating sirens or flashing lights, and without drawing weapons or issuing orders, is somehow a seizure of a parked motorist.

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RELIEF

WHEREFORE, Karen D. McDonald, Prosecuting Attorney in and for the County of Oakland, by Louis F. Meizlish, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court DENY Defendant's application.

Respectfully Submitted,

KAREN D. MCDONALD
PROSECUTING ATTORNEY,
OAKLAND COUNTY

MARILYN J. DAY
CHIEF, APPELLATE DIVISION

By: /s/ Louis F. Meizlish (P75168)
Assistant Prosecuting Attorney
West Wing — Building 14-E
1200 N. Telegraph Road
Pontiac, Michigan 48341
Phone: 248-858-0686
Fax: 248-975-4265
Email: meizlishl@oakgov.com

Dated: December 29, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.312 and/or MCR 7.212. I certify that this document contains 7,144 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ Louis F. Meizlish (P75168)
Assistant Prosecuting Attorney
West Wing — Building 14-E
1200 N. Telegraph Road
Pontiac, Michigan 48341
Phone: 248-858-0686
Fax: 248-975-4265
Email: *meizlishl@oakgov.com*