No. 07-1122

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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The Pima County, Arizona, Superior Court denied Respondent Johnson's Motion to Suppress on November 8, 2005. (J.A. 78.) The Arizona Court of Appeals' opinion reversing is reported as *State v. Lemon Montrea Johnson*, 217 Ariz. 58, 170 P.3d 667 (App. 2007). (Pet. App. A.) The Arizona Supreme Court's order denying review without comment is not reported. (Pet. App. B.)

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on September 10, 2007. (Pet. App. A.) The Arizona Supreme Court denied discretionary review on November 30, 2007. (Pet. App. B.) This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves a valid traffic stop for a registration violation and a pat-down search of the backseat passenger. Although the police officer lacked articulable grounds to believe that the passenger was committing, or had committed, a criminal offense, the officer reasonably believed that the passenger might be armed and posed a safety risk.

The Arizona Court of Appeals determined that the pat-down search was unconstitutional. It reasoned that a passenger, temporarily seized in a lawful traffic stop and engaged in a conversation with an officer about street gang activity, is not subject to a pat-down search for weapons even though the officer reasonably believes the passenger is armed and presently dangerous. The state court's opinion violates the spirit and purpose of this Court's prior decisions by substantially inhibiting a search for weapons based on reasonable officer safety concerns while conducting legitimate traffic stops.

A. Suppression Hearing.

Prior to trial, Respondent, Lemon Montrea Johnson, filed a motion to suppress evidence discovered during a pat-down search of his person. (Motion to Suppress/Dismiss, filed 10/31/05.) The trial court

conducted an evidentiary hearing, and Officer Maria Trevizo testified that she was a member of the state gang task force. (J.A. 8.) She had attended basic and advanced training in gang enforcement and had two years' on-the-job experience. (*Id.*) On April 19, 2002, she was on patrol with Detectives Machado and Gittings, fellow members of the gang task force, in the "Sugar Hill" area of Tucson which was known to be a Crips street gang neighborhood. (*Id.* at 10-11.) Street gang members, she testified, were known to possess firearms. (*Id.*) The task force members were in an unmarked vehicle equipped with emergency lights. (*Id.* at 26-27.)

One of the officers ran the license plate number on a vehicle traveling on a major street bounding the Sugar Hill neighborhood, and the plate number came back with a mandatory insurance suspension, a civil infraction warranting a citation. (J.A. 11-12, 44.) The task force initiated a traffic stop of the vehicle. (*Id.*) The vehicle had three occupants – a driver, a front-seat passenger, and a back-seat passenger. While Officer Trevizo approached the vehicle on foot, she noticed Johnson, the back-seat passenger, look back at the police vehicle, say something to the people in the front seat, then continue to look back at the police vehicle. (*Id.* at 12-13.) Trevizo viewed this behavior as unusual because people normally look frontwards during a traffic stop. (*Id.*)

Detective Machado contacted the driver, asked everyone in the car to put their hands where he could see them, and asked the driver to exit the vehicle.

(J.A. 14-15.) Detective Gittings made contact with the front-seat passenger, who remained seated throughout the stop, and Officer Trevizo made contact with Johnson. (*Id.* at 14-15, 30-31.) Either Machado or Gittings asked whether weapons were in the vehicle, and all of the occupants said "no." (*Id.* at 15.) Trevizo asked Johnson whether he had identification with him, and Johnson said "no." (*Id.*) Trevizo testified, "What struck me as highly unusual and cause for concern is there was a scanner in [Johnson's] jacket pocket." (*Id.* at 16.) She testified:

> It caused me concern because most people don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner.

(*Id.*) Although the scanner was not illegal, she said it was unusual in her training and experience for someone to carry a scanner in his pocket. (*Id.* at 17.)

Trevizo also noted Johnson's blue shirt, shoes, and bandanna. (J.A. 17.) She knew that Crips announce their gang affiliation by wearing blue clothing. (*Id.*) She saw particular significance in Johnson's bandanna because bandannas sporting gang colors are an insignia for the gang. (*Id.* at 17-18.) She testified that the colors Johnson wore announced his street gang affiliation. (*Id.* at 27.)

While Johnson was still seated in the back seat, he volunteered that he was from Eloy. (J.A. 19.)

Trevizo knew from experience that the predominant street gang in Eloy was the "Trekkle Park Crips." (*Id.*) Johnson also told Trevizo that he had done prison time for burglary and had been out of prison for about a year. (*Id.*)

Trevizo asked Johnson to exit the vehicle, intending to speak with Johnson away from the other occupants to gather intelligence about his gang. (J.A. 19-20.) She said he could have refused to get out. (*Id.* at 41.) Once Johnson was out of the vehicle, Trevizo asked him to turn around because she was going to pat him down. (*Id.* at 21-23.) Trevizo had not indicated to Johnson her intent to pat him down. (*Id.*) She said she patted Johnson down solely for officer safety "because I had a lot of information that would lead me to believe he might have a weapon on him." (*Id.* at 20.) She stated, "I did not have probable cause at that point to believe that he was involved in criminal activity." (*Id.* at 36.)

Trevizo stated that she did not seek Johnson's permission to pat him down. (J.A. 34-36.) She testified, "I guess he could have said no at that point." (*Id.* at 34.) Johnson turned around and, without direction to do so, raised his arms. (*Id.* at 23.) Trevizo patted down his exterior clothing and felt the butt of a handgun in his pants' waist. (*Id.* at 24.) Only then did Johnson begin to struggle a bit. (*Id.*) Trevizo then handcuffed him. (*Id.* at 39.) She testified that Johnson was not under arrest; she handcuffed him only so that he could not reach his gun. (*Id.* at 40.)

Officer Trevizo's encounter with Johnson took place while Detective Machado dealt with the driver. The prosecutor asked Trevizo, "[D]id [Detective Machado] ask the driver of the vehicle to step out of the car?" (J.A. 14.) Trevizo answered, "Yes, all of this is kind of happening simultaneously." (*Id.*) On cross-examination, Johnson's counsel asked Trevizo, "So Machado is dealing with the driver, Gittings is dealing with the front passenger, you're dealing with my client?" (*Id.* at 31.) Trevizo answered, "Yes, sir." (*Id.*) Later, the judge asked Officer Trevizo, "At the time that you approached the defendant in this case, what was happening to the driver of the vehicle, to your knowledge?" (*Id.* at 42-43.) Trevizo responded, "To my knowledge, Officer Machado was just getting his basic information: driver's license, registration, insurance"; "I did not overhear any conversation between Detective Machado and the driver. They were behind me." (*Id.*)

Officer Trevizo gave eight grounds for believing that Johnson was armed and dangerous: (1) Johnson watched the officers out the rear of the car as they approached the vehicle; (2) Johnson did not have identification on his person; (3) Johnson carried a police scanner in his jacket pocket; (4) Johnson was wearing a blue shirt, shoes, and bandanna; (5) the traffic stop took place near a known Crips neighborhood; (6) Johnson told Trevizo that he was from Eloy,

Arizona;[1] (7) street gang members were known in general to the task force to carry firearms; and (8) Johnson told her he had done time for burglary and had been out for about a year. (J.A. 10-19.) Trevizo said that it was not any one specific circumstance but rather the totality of these circumstances that contributed to her concern for officer safety. (*Id.* at 21.)

At argument on the motion to suppress, Johnson argued that he had consented to talk with Trevizo outside the car but had not consented to the pat down. (J.A. 52-58.) Johnson did not expressly challenge the reasonableness of Trevizo's belief that he was a gang member and may have been armed. (*Id.* at 53-54.)

The trial court denied the motion to suppress, concluding: "I think under the circumstances there was a reasonable basis to believe there was a danger, and a stop allowed them to go ahead and do the pat down." (J.A. 77.) In November 2005, a jury in Pima County, Arizona, found Johnson guilty of possession of a weapon by a prohibited possessor and possession of marijuana.

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[1] Eloy, Arizona, has a population of approximately 10,375 (according to the U.S. Census Bureau's 2000 census) and is located 51.5 miles northwest of Tucson.

B. Arizona Court of Appeals' Opinion.

On direct appeal, Johnson contended that the trial court erred in denying his motion to suppress evidence because Officer Trevizo lacked reasonable suspicion to conduct a protective frisk of his person, and even if supported by reasonable suspicion in this case, a protective frisk was unconstitutional during what he claimed to be a consensual encounter. (Opening Brief, filed 11/13/06.) The Arizona Court of Appeals "assum[ed], without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous." (Pet. App. A at 13-14, ¶ 26.) The court also found that Johnson was seized pursuant to a lawful traffic stop of the driver. (*Id.* at 8-9, ¶ 16.) But the two-judge majority reversed Johnson's convictions, finding that Officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when Johnson exited the back seat of the vehicle to talk with Officer Trevizo. (*Id.* at 14, ¶ 27.) The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" (*Id.* at 15-16, ¶ 29) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in a light favorable to upholding the trial court's determination, Trevizo was lawfully in

Johnson's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat-down of his person." (*Id.* at 22-23, ¶ 39) (citation omitted).

SUMMARY OF ARGUMENT

The pat down in this case, involving a vehicle passenger but no suspicion of criminal activity, fell within the guidelines established in *Terry*. Pat downs are permitted anytime they are reasonable, and they are reasonable when an officer lawfully seizes a person and has a reasonable belief the person is armed and dangerous. A stop to investigate whether "criminal activity is afoot" is only one type of police-civilian encounter in which a pat-down search may be permissible. As long as the officer has a reasonable belief that a passenger is armed and dangerous, the Fourth Amendment allows a pat-down search of a passenger in a vehicle stopped for a traffic infraction even where no criminal activity is suspected.

The traffic stop in this case had not ended by the time the officer conducted the pat-down search of Respondent Johnson based on officer safety. The encounter was not consensual, as the state court found, and Johnson was not free to leave. Moreover, a person's ostensible freedom to leave the scene does not render a safety pat down unconstitutional. There is no prohibition on conducting a pat-down search of a

passenger during a traffic stop as long as the initial seizure is lawful and the officer reasonably believes the passenger is armed and dangerous. This case shows that no other requirements make sense if the sole purpose of a frisk is officer (and public) safety.

ARGUMENT

A Pat-Down Search of a Vehicle Passenger for Officer Safety Following a Lawful Investigative Stop of the Driver Is Permissible under the Fourth Amendment.

This case concerns whether an officer may conduct a pat-down search of an automobile passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but lacks articulable grounds to believe that the passenger is committing, or has committed, a criminal offense. Based on this Court's prior decisions, a pat-down search should be permissible under these circumstances. If a police officer legally stops a vehicle, the officer temporarily seizes all of its occupants. *Brendlin v. California*, 127 S. Ct. 2400, 2406 (2007). A passenger is seized as part of a traffic stop irrespective of any suspicion of wrongdoing focused on that passenger. *Id.* at 2407. As this Court has recognized, roadside vehicle stops are risky and volatile, and pose unique dangers for police officers. *See*, *e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 414 (1997); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam); *United*

States v. Robinson, 414 U.S. 218, 234 n.5 (1973); *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972). When the officer has reasonable grounds to believe that a person seized during a lawful traffic stop is armed and possibly dangerous, the officer is permitted to conduct a pat-down search of that person's outer clothing for weapons. *Long*, 463 U.S. at 1047-48; *Mimms*, 434 U.S. at 111-12; *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

Thus, a police officer like Officer Maria Trevizo in the present case, reasonably fearing for her safety during a lawful roadside vehicle stop, may ensure her own safety and that of others present by patting down a suspicious passenger for weapons.

A. The Fourth Amendment permits an officer to conduct a pat-down search of a passenger during a traffic stop when the officer has reasonable grounds to believe that the passenger is armed and dangerous.

In *Terry*, this Court held that a police officer may conduct a pat-down search of a person if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." 392 U.S. at 30. The police officer may conduct a protective search under these circumstances "regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. The "narrow scope"

of this exception to the warrant requirement limits the officer to search only for weapons and only upon "reasonable belief or suspicion directed at the person to be frisked." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

This Court has since applied *Terry*'s principles to traffic stops, holding that police officers may require the driver to exit the vehicle and may pat down the driver for weapons when the officers have specific and articulable suspicion that the driver is armed and dangerous. *Mimms*, 434 U.S. at 111-12. In *Mimms*, this Court weighed the public's interest in allowing an officer to take precautionary safety measures when he confronts a driver for a traffic violation against "the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109. The Court concluded that the officer's safety takes precedence under these circumstances because the additional intrusion is *de minimis* when an officer asks the driver, a person already lawfully detained, to exit a lawfully stopped vehicle. *Id.* at 111-12. This Court held that, once the driver was out of the car, the pat down of the driver was reasonable in view of the suspicious bulge in the driver's jacket. *Id.*

This Court subsequently extended the bright-line rule in *Mimms* to vehicle passengers, holding that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. *Wilson*, 519 U.S. at 415. In *Wilson*, this Court found that "the same weighty interest in officer safety is present regardless of whether the occupant of the

stopped car is a driver or passenger." *Id.* at 413. In addition, the Court reiterated that the interest in officer safety outweighs the minor intrusion on passengers who are "already stopped by virtue of the stop of the vehicle." *Id.* at 414.

The logical implication of *Wilson* is that an officer may pat down passengers when reasonable grounds exist based on the need for officer safety. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (acknowledging in *dictum* that police officers "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.").

This Court's recent decision in *Brendlin* confirmed the soundness of the *Knowles dictum*. In *Brendlin*, the Court held that a passenger is seized equally with the driver during an automobile stop. 127 S. Ct. at 2406. Accordingly, because the traffic stop constituted a seizure of the car passenger, the passenger in that case had standing to challenge the reasonableness of the stop. This Court wrote:

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion

> owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

Id. at 2407 (internal citation omitted).

Together, this Court's precedents, from *Terry* to *Brendlin*, support permitting a pat-down search of a passenger of a vehicle following a lawful stop of the vehicle if the officer has a reasonable belief the passenger is armed and dangerous. *See Mimms*, 434 U.S. at 111-12; *Long*, 463 U.S. at 1047-48. Under these circumstances, the officer need not suspect the passenger of criminal activity to conduct a pat-down search for officer safety. *See Terry*, 392 U.S. at 30. Rather, the issue is whether the interference with the suspect's personal security is reasonable. *See id*. at 19. This Court has framed the inquiry as a dual one: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. Courts will analyze what a reasonably prudent police officer would have done under the same circumstances. *Id.* at 27.[2]

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[2] Not surprisingly, lower courts have approved protective pat-down searches of vehicle passengers in the absence of any individualized suspicion of criminal activity. *See*, *e.g.*, *United*

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While in general the suspicion that "criminal activity is afoot," *Terry*, 392 U.S. at 30, often provides grounds for an initial investigative stop, this will not necessarily be the case with investigative traffic stops where the suspected wrongdoing is often a driving or registration infraction. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996).

In the present case, there is no dispute that the investigative traffic stop "was justified at its inception" based on an insurance suspension. Therefore, during this traffic stop, Officer Trevizo could pat Johnson down if she had reasonable safety concerns that justified the pat down. *Mimms*, 434 U.S. at 111-12.

States v. Rice, 483 F.3d 1079, 1084 (10th Cir. 2007) (reasonable suspicion existed for pat-down search of vehicle passenger where no criminal activity suspected); *Holeman v. City of New London*, 425 F.3d 184, 192 (2nd Cir. 2005) (officers were justified in performing a pat down of passenger even though circumstances did not reasonably indicate crime was afoot); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (without reason to believe car's occupants were engaged in criminal activity, police officers lawfully ordered passenger to remain in the car and put his hands in the air while the traffic stop was being conducted); *United States v. Fryer*, 974 F.2d 813, 819 (7th Cir. 1992) (search of passenger compartment and occupants of vehicle in absence of criminal activity justified by passenger's furtive movements); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (police lawfully searched passenger after stopping car for seatbelt infraction).

Even though Johnson was not the target of the officers' initial inquiry, he was seized as part of the traffic stop. *See Brendlin*, 127 S. Ct. at 2406. Johnson's gang colors, his lack of identification, his prison record, the police scanner in his jacket pocket, his furtive observation of the officers, as well as the neighborhood in which the incident occurred, considered in their totality, raised reasonable safety concerns for Officer Trevizo as she spoke with Johnson pending completion of the investigation. No obvious criminal activity was present or necessary to conduct the pat down. Rather, the legitimate concern for officer safety justified the pat down in this case.

B. The Arizona Court of Appeals erred when it held that the pat down of Johnson violated the Fourth Amendment because the court erroneously assumed Johnson was no longer seized when the officer conducted the pat down.

Terry inquires "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. With respect to the second inquiry, the Arizona court erred by concluding that Johnson believed he was free to leave his encounter with the officer because "Trevizo's questioning of Johnson was wholly unrelated to the stop and constituted a separate, and consensual, encounter." (Pet. App. A at 12, ¶ 23.) The Arizona Court of Appeals erred in two respects. First,

its premise was wrong because Johnson was still seized when Officer Trevizo frisked him. Second, even if the encounter somehow became consensual, that did not prohibit Trevizo from frisking Johnson based on her reasonable belief that he was armed and dangerous.

1. Johnson was still seized when the officer conducted the frisk.

In light of this Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), a police officer can validly ask questions during a lawful traffic stop that are unrelated to the stop as long as the separate questioning does not prolong the stop. *See id.* at 100-01. In *Mena*, officers executing a search warrant of premises for deadly weapons and evidence of gang membership detained and questioned an individual on the premises about her immigration status. This Court approved the questioning:

> We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991); *see also INS v. Delgado*, 466 U.S. 210, 212, 104 S. Ct. 1758, 80 L.Ed.2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick*, *supra*, at 434-435, 111 S.Ct. 2382 (citations omitted). As the Court of Appeals did

> not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment.

544 U.S. at 101.

That the passenger voluntarily provides information at the officer's request does not turn the encounter into a consensual one. Questioning alone does not constitute a seizure of a person, *Bostick*, 501 U.S. at 434, and it does not transform the initial seizure into a consensual encounter. When a police officer "orders one particular car to pull over," the officer "acts with an implicit claim of right based on fault of some sort." *Brendlin*, 127 S. Ct. at 2407. The moment a driver submits to an officer's show of authority and stops his car, the passenger has no discretion to terminate the encounter and go about his business. *See id*. Even when the only fault is the driving, the passenger's "attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id.*

The state court's conclusion that Officer Trevizo's encounter with Johnson became consensual was premised on Trevizo's subjective belief that, as far as she was concerned, Johnson "could have refused" her request to get out of the car. (Pet. App. A at 11, ¶ 21; J.A. 41.) But the inquiry is an objective one, not dependent on the particular officer's subjective beliefs. *Brendlin*, 127 S. Ct. at 2408-09. "The intent that

counts under the Fourth Amendment is the 'intent [that] has been conveyed to the person confronted.'" *Id.*, quoting *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988). Generally, "a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). In broader terms, the test probes the "coercive effect of the encounter" to ask whether a reasonable driver or passenger pulled over during a traffic infraction "would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 435-36.

Using an objective standard, *Delgado*, 466 U.S. at 215, a reasonable person in Johnson's situation would not believe he was free to leave. The gang task force deployed their vehicle's emergency lights to make the stop. Three officers dressed in tactical vests approached the vehicle, asked if anyone had weapons, ordered the occupants to display their hands, and ordered the driver to exit the car. (J.A. 12-15.) Johnson was in no position to "ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437.

Although Officer Trevizo stated that Johnson could have refused to get out of the car or be patted down, she never indicated to him he was free to leave, she never told him he did not have to answer her questions, and she never sought Johnson's permission to talk with him or pat him down. (J.A. 34-36, 45.)

Absent any objective indication from Trevizo that the detention had ended, Johnson had no reason to believe he was free to leave.

Moreover, merely getting out of the car in response to a request (rather than an order) from a police officer did not transform the seizure into a consensual encounter. Officer Trevizo explained that she asked Johnson to exit the car to speak with him away from the other passenger still in the car. (J.A. 20.) She was not releasing him or otherwise indicating his freedom to leave. Although Trevizo did not order Johnson out of the car, the coercive character of their encounter did not change because he exited the vehicle upon the officer's request.

The state court also cited the cooperative tone between Johnson and the officer and the absence of commands conveying to Johnson the fact that he was not free to leave. (Pet. App. A at 11-12, ¶ 22.) But an officer need not give explicit directives that a passenger is not free to leave during a traffic stop. *See Brendlin*, 127 S. Ct. at 2407. In addition, a civil and cooperative tone between the officer and passenger does not alter the fact that the passenger is seized at the time of the stop. In fact, it generally serves the officer's and the detainee's interests to maintain civilities during a traffic stop.

Officer Trevizo testified that her encounter with Johnson was "happening simultaneously" with Detective Machado's questioning of the driver. (J.A. 14.) Machado was dealing with the driver outside the car,

Detective Gittings was dealing with another passenger seated in the front seat, and Trevizo was talking to Johnson. (*Id.* at 31.) Officer Trevizo testified that Detective Machado and the driver "were behind me" during the time she spoke with Johnson. (*Id.* at 43.) Therefore, all of the interactions with Johnson, including the pat down, occurred while Johnson was seized as part of the traffic stop. The Arizona Court of Appeals erred in concluding otherwise.

2. An officer may, consistent with the Fourth Amendment, pat down a stopped passenger whom the officer reasonably believes is armed and dangerous even when the passenger is no longer seized.

Even if Johnson was no longer seized when the pat down occurred, the pat down satisfies constitutional requirements. *Terry* establishes the fundamental principle that a pat-down search must be reasonable. 392 U.S. at 19. Even if the seizure of Johnson ended when he got out of the vehicle at the request of Officer Trevizo, a pat-down search of Johnson under these circumstances was reasonable.

The Arizona court's two-judge majority agreed that based on *Brendlin*, Johnson was initially seized as a passenger. (Pet. App. A at 8-9, ¶ 16.) But it stated that this Court's holding in *Brendlin* failed to "inform[ ] us when a passenger seizure ends, or if and when it can become a new, separate, and unrelated encounter, or whether such an encounter may be

consensual." (*Id.* at 10, ¶ 18 n.3.) In the absence of guidance from *Brendlin* on "when a passenger seizure ends," the Arizona Court of Appeals borrowed from the analytically distinguishable line of cases addressing the suspect's consent to search for evidence. Presumably, the court did so because this analysis often turns on when the seizure ends. *See Bostick*, 501 U.S. at 434-36. This approach is flawed because it ignores the totality of the circumstances analysis necessary to determine the reasonableness of the pat down for officer safety.

Here, there is no question that Johnson was seized as a result of the traffic stop at least until the time he exited the vehicle, which was only moments before Officer Trevizo conducted the pat-down search. The pat down occurred in the context of a conversation between Trevizo and Johnson that began while he was seized as a result of the traffic stop. There is no evidence that the encounter between Trevizo and Johnson extended the duration of the traffic stop. Rather, it occurred while the driver and the other passenger were talking to the other officers.

Even assuming the seizure technically ended when Johnson exited the vehicle at Officer Trevizo's request, a pat-down search was reasonable.[3] An

[3] Applying *Terry*'s principles, lower courts have upheld pat-down searches that were not even part of an investigative stop. *See*, *e.g.*, *United States v. Orman*, 486 F.3d 1170, 1173 (9th Cir. 2007) (off-duty officer working in a mall lawfully lifted defendant's shirt and seized weapon during consensual encounter);

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assessment of the reasonableness of the pat down requires a balance of the occupant's "mere inconvenience . . . against legitimate concerns for the officer's safety." *See Mimms*, 434 U.S. at 111. When the initial encounter is lawful, as it was in this case, a reasonable fear for safety provides sufficient grounds to conduct a frisk under *Terry*. Even if, as the state court concluded below, the initial lawful seizure had "evolved" into a consensual encounter, the officers were entitled to stop the car carrying Johnson, and Officer Trevizo could conduct a pat down following the lawful stop based on her reasonable belief Johnson was armed and dangerous.

The state court's two-judge majority suggested that under the circumstances presented by the facts "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous." (Pet. App. A at 8, ¶ 15) (citing *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). But avoiding an armed person is frequently not an option when the police perform their duties. Officer Trevizo could not exclude Johnson from the investigative stop of the driver and thus

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United States v. Davis, 202 F.3d 1060, 1062 (8th Cir. 2000) (pat down valid where the stop was based on seeing two men attempting to open a locked door); *United States v. Flett*, 806 F.2d 823, 828 (8th Cir. 1986) (valid pat-down search of individual visiting the home of the subject of a separate arrest warrant); *Hicks v. State*, 631 A.2d 6, 10 (Del. 1993) (valid pat-down search of spectator at scene of traffic stop); *People v. Laube*, 397 N.W.2d 325, 328 (Mich. App. 1986) (valid pat down of hitchhiker who voluntarily stayed in the area, not subject to detention).

avoid contact with him. Also, requiring Officer Trevizo to retreat from a potentially armed and dangerous passenger would do nothing to address the potential hazard to the officers and the public. In this instance, if Trevizo had walked away, she would have left the two other officers present in the same danger. The facts of this case establish that Officer Trevizo conducted a reasonable pat-down search for weapons based on her reasonable belief that Johnson might be armed and might pose a risk to the safety of the officers.

There is no prohibition on conducting a pat-down search of a passenger during a traffic stop as long as the initial seizure is lawful and the officer reasonably believes the passenger is armed and dangerous. This case shows that no other requirements make sense if the sole purpose of a frisk is officer (and public) safety.

CONCLUSION

This Court should reverse the judgment of the Arizona Court of Appeals and hold that officer Trevizo's pat-down search of Johnson for weapons was reasonable under the Fourth Amendment.

Respectfully submitted,

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