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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

A. The Fourth Amendment permits an officer to conduct a pat-down search of a passenger in a lawfully stopped vehicle.

Contrary to Respondent's assertions, the facts of the present case do not require this Court to consider the validity of a protective pat down in any circumstance other than the pat down of a vehicle passenger seized during a lawful traffic stop. (*See* Resp. Br. 25-26.) Johnson virtually concedes that, if he was seized at the time of the frisk, the frisk was lawful. (Op. Br. 7-8; Resp. Br. 10, 12, 20-21.)

That concession is a wise one in view of the prior decisions of this Court upholding a variety of police practices on the ground that their minimal intrusion on privacy rights is outweighed by the public interest in officer safety. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (permitting frisk for officer safety in the absence of probable cause for arrest); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam) (police may routinely order a driver from his vehicle); *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) (police may conduct a protective search of passenger compartment of motor vehicle during investigatory stop of occupant of vehicle); *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (extending the *Mimms* rule to passengers); *Brendlin v. California*, 127 S. Ct. 2400, 2406-07 (2007) (a vehicle passenger is seized along with the driver, and a reasonable passenger would not feel free to leave the scene). *See also Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (stating 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.").

Johnson argues, however, that a different result obtains here because he was no longer seized when he stepped out of the car. According to Johnson, in such circumstances pat-down searches are permissible only when (1) the officer has reasonable suspicion of criminal activity, or (2) the police are exercising "command of the situation" per *Michigan v. Summers*, 452 U.S. 692, 703 (1981). (Resp. Br. 2, 21.)

But in this case, Johnson was seized throughout the duration of his encounter with Officer Trevizo. This is because, as *Brendlin* states, the stop of a car communicates to a reasonable passenger that he is not free to terminate the encounter with the police and move about at will. 127 S. Ct. at 2407. Indeed, if a passenger stays at the scene of the traffic stop, this Court has indicated that the passenger has affirmatively submitted to the seizure of his person:

> [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Id. at 2409. Accordingly, Johnson was seized as long as he remained, absent some action from the officers that would have communicated to him that he was free to leave. That did not happen in this case. Officer Trevizo never indicated to Johnson that he was free to leave, never told him he did not have to answer her questions, and never sought Johnson's permission to talk with him or pat him down. (J.A. 34-36, 45.) Nothing Trevizo did or said told Johnson he was free to leave.

Johnson's argument also fails because *Terry*, *Mimms*, *Long*, *Wilson*, *Brendlin*, and *Knowles* collectively establish that passengers can be frisked when an officer has a reasonable belief that the passenger is armed and dangerous. The logic of those cases is not limited to facts in which the officer has reasonable suspicion of criminal activity or the officer is exercising "command of the situation."

First, the suspicion of criminal activity is not a necessary prerequisite to a pat down, particularly in a traffic stop situation. In *Mimms*, for example, the officer "had no reason to suspect foul play" and saw "nothing unusual or suspicious about the [driver's] behavior." 434 U.S. at 109. Nevertheless, requiring the driver to exit the vehicle was *per se* reasonable because of the dangers of the traffic stop situation. *Id.* Once the driver had exited the car, the bulge in his jacket provided a reasonable basis for the pat down. Although *Mimms* involved the driver of the vehicle, this Court has not limited the protective search to drivers. *See Long*, 463 U.S. at 1047 ("*Terry* need not

be read as restricting the preventative search to the person of the detained suspect.").

Johnson cites Justice Harlan's concurrence in *Terry* for his proposition that criminal activity is a prerequisite for a pat down. (Resp. Br. 15, 29.) In *Terry*, Justice Harlan wrote: "I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." 392 U.S. at 32-33 (Harlan, J., concurring). As Professor LaFave points out, however, "Harlan's basic point is eminently sound," but "*there will sometimes be some other proper reason* (e.g., *. . . to conduct an investigatory stop of some other person*) for being in the presence of the person who is believed to present the risk." 4 W. LaFave, Search and Seizure § 9.6(a), p. 616 (4th ed. 2004) (footnotes omitted; emphasis added). It suffices that "the officer's action was justified at its inception." *Terry*, 392 U.S. at 20. In this case, the stop of the car for an insurance infraction justified the officer's actions at the inception. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (noting that a routine traffic stop is "analogous to a so-called *Terry* stop"). Thus, if an officer develops a safety concern during a legitimate traffic stop, further reasonable suspicion of criminal activity is not necessary. *See, e.g., Mimms*, 434 U.S. at 111-12.

Second, contrary to Johnson's assertions (Resp. Br. at 36), Officer Trevizo was exercising "command of the situation" when she patted Johnson down for weapons. Johnson contends otherwise because Officer

Trevizo was conducting a separate investigation into his gang affiliations. (*Id.*)

Reasonableness is the standard for a pat down. *Terry*, 392 U.S. at 19. Reason dictates that the authority to conduct a pat down of a lawfully detained passenger is coincident with the risk of possible danger posed by that passenger. If an individual who may be armed and dangerous is at the scene, the scene is not secure. *See Brendlin*, 127 S. Ct. at 2407 ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.").

Moreover, in this case the traffic stop was ongoing (*see* Pet. Br. 18-21), so the need to exercise command of the situation continued. There is no evidence in the present case that the driver's license and registration had been returned at the time of Johnson's pat down. In a lawful traffic stop, unlike a consensual street encounter, an officer's authority to control a passenger is presumed. *Wilson*, 519 U.S. at 415; *Brendlin*, 127 S. Ct. at 2407 ("unquestioned [police] command" is "at odds with any notion that a passenger would feel free to leave . . . without advance permission") (internal quotes and citation omitted). Johnson was seized when the gang task force pulled the car over, he remained seized when he exited the car, and Officer Trevizo was exercising "command of the situation" when she frisked him upon her reasonable belief that he was armed and dangerous.

B. An officer may conduct a pat down based on the reasonable belief that a person is armed and dangerous even absent an initial seizure founded upon suspicion of criminal activity.

Johnson claims that to satisfy *Terry*, there must be both an initial seizure founded upon reasonable suspicion of criminal activity *and* the reasonable belief that the person is armed and dangerous. (Resp. Br. 28-30.) Because there is no dispute in this case about the legality of the initial traffic stop, there is no question that the initial seizure of Johnson was justified. *See Brendlin*, 127 S. Ct. at 2406; *Mimms*, 434 U.S. at 111-12. So this Court need not reach the broader issue whether a pat down may be justified independent of an initial seizure founded upon suspicion of unlawful activity.

Should this Court nonetheless reach that issue, we agree with the United States that "it is constitutionally reasonable for officers who have reasonable concerns for their own safety to take protective measures," irrespective of the basis for the initial stop. (U.S. Br. 16-17.) In *Terry* this Court upheld the constitutionality of the pat down without resolving whether an investigative stop supported by reasonable suspicion preceded the protective frisk. 392 U.S. at 19 n.16. The Court wrote:

> Obviously, 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. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id. The Court looked at the pat-down search independent of the reason for the investigative stop. This demonstrates that "an officer's interest in protecting the officer's own safety is distinct from – and may justify actions that could not be supported by reference to – the general societal interest in investigating crime." (U.S. Br. 17-18.)

Johnson specifically takes issue with this and other points advanced on pages 17-21 of the United States' brief. (Resp. Br. 28-30.) As the United States notes, *Terry* clearly distinguishes a protective search for weapons, conducted strictly for officer safety, from the more general search of a person or place, the principal purpose of which is to locate evidence of crime.[1] 392 U.S. at 25-26, 29. The distinction is also

[1] In its brief in support of Respondent, the National Association of Criminal Defense Lawyers reviews the pre-Revolution history of hostility toward warrantless searches which the amicus says informed the drafting of the Fourth Amendment. (Crim. Def. Lawyers Br. at 6-10.) This traditional hostility was directed at "writs of assistance," or general warrants purporting

(Continued on following page)

seen in numerous other Fourth Amendment contexts in which the danger facing officers will have no connection to the investigation into criminal activity. (*See* cases cited in U.S. Br. 18-21.) This Court's oft-repeated view that officer safety concerns may exist independent of a criminal investigation cannot be squared with Johnson's assertion that the suspicion of criminal activity is a necessary precondition to conducting a pat-down search. (Resp. Br. 25-27.)

Even if Johnson was no longer seized when he left the vehicle, Officer Trevizo was entitled to frisk him based on her reasonable belief that he was armed and dangerous. As noted in the United States' brief, "this Court has never held that a police officer's ability to conduct a *Terry* frisk is contingent upon the officer having reasonable suspicion that a person with whom the officer is dealing has committed or is committing a crime." (U.S. Br. 16.) Pat-down searches

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to search persons and places for suspected uncustomed goods. (*Id.*) Such general searches for evidence bear no relation to the narrowly proscribed protective search for weapons at issue in the present case. *See Terry*, 392 U.S. at 25-26 (expressly distinguishing the search for evidence incident to arrest from the protective search for immediately accessible weapons). According to Professor LaFave, as recently as 1960, the stop and frisk as we now think of it "had been largely ignored by commentators and dealt with ambiguously by most courts." 3 W. LaFave, Criminal Procedure § 3.8(a), p. 300 (3rd ed. 2007) (internal quotation and footnote omitted). Indeed, prior to the *Terry* decision, the "troublesome issues" involved in a stop and frisk "ha[d] never before been squarely presented to this Court." *Terry*, 392 U.S. at 9-10.

are bound by one limitation: they must be reasonable under the totality of the circumstances. *Terry*, 392 U.S. at 19. The "sole justification" for a pat down is to protect police officers and others. *Id*. at 29. This concern for officer safety does not terminate at a point certain, unlike an investigative detention which generally terminates when "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.). Whether Johnson felt free to leave the investigative detention is irrelevant to whether he reasonably posed a danger to the officers. The need for a pat down arises from concern about officer safety, and as long as "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger," *Terry*, 392 U.S. at 27, a pat down is justified regardless of the status of the investigative detention. *See Long*, 463 U.S. at 1052 ("a *Terry* investigation . . . involves a police investigation at close range, when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger") (internal quotes and citation omitted).

C. Officer Trevizo reasonably believed that Johnson was armed and dangerous.

Johnson argues in the alternative that he should prevail even if officers participating in traffic stops may frisk passengers whom they reasonably believe

are armed and dangerous because, in his view, Officer Trevizo lacked reasonable suspicion that he was armed and dangerous. (Resp. Br. 49-53.) The Arizona Court of Appeals did not reach this issue, and, as Johnson admitted in his Brief in Opposition (p. 6), it is not fairly subsumed within the Question Presented.

If this Court decides to reach the issue, the evidence supports the trial court's judgment. (J.A. 76-77.) At the suppression hearing, Officer Trevizo provided specific and articulable facts known to her which justified her belief that Johnson might be armed and potentially posed a danger. Johnson watched the officers out the rear of the car as they approached the vehicle. (J.A. 13-14.) This alerted Trevizo because in her experience most people involved in a traffic stop look frontward instead of maintaining eye contact with officers who are behind them. (*Id.*) Johnson did not have identification on his person. (*Id.* at 15.) Johnson carried a police scanner in his jacket pocket. (*Id.* 16-17, 20.) Trevizo said this strongly indicated possible criminal activity because of the ready nature of the device for the purpose of evading law enforcement. (*Id.*) Johnson was wearing blue clothing, colors affiliated with the Crips street gang. (*Id.* at 17-18.) Moreover, the traffic stop took place near a known Crips neighborhood, and Johnson said he was from Eloy where Officer Trevizo knew the Crips were a dominant gang. (*Id.* at 10, 19.) She testified that gang members were known to possess firearms. (*Id.* at 10.) Johnson also told her he had

done prison time for burglary, from which she inferred he was a convicted felon. (*Id.* at 19, 21.)

Johnson complains that these are "generic observations that could apply to a very substantial number of unarmed individuals." (Resp. Br. 53.) But this Court has emphasized that a "totality of the circumstances," or "whole picture," evaluation of the facts under the Fourth Amendment does not focus on potential innocent explanations for each individual factor. *United States v. Arvizu*, 534 U.S. 266, 266-67 (2002); *United States v. Cortez*, 449 U.S. 411, 418 (1981). "The process does not deal with hard certainties, but with probabilities," and includes "consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Cortez*, 449 U.S. at 418. Thus, a trained officer is permitted to draw "inferences and deductions that might well elude an untrained person." *Id.* Officer Trevizo was trained and experienced in dealing with street gangs, and she articulated a reasonable basis for her belief that Johnson was armed and posed a potential danger to the officers.

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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