

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARIZONA, :

4 Petitioner :

5 v. : No. 07-1122

6 LEMON MONTREA JOHNSON. :

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8 Washington, D.C.

9 Tuesday, December 9, 2008

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 a.m.

14 APPEARANCES:

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20 supporting the Petitioner.

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22 the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1122, Arizona v. Johnson.

Mr. Parkhurst.

ORAL ARGUMENT OF JOSEPH L. PARKHURST

ON BEHALF OF THE PETITIONER

MR. PARKHURST: Mr. Chief Justice, and may it please the Court:

Petitioner asks that this Court apply the principles established in Pennsylvania v. Mimms to uphold the pat-down search of a vehicle passenger seized during a lawful traffic stop. Mimms established that a traffic stop satisfies Terry's first prong as to suspicion of criminal activity, and it also established that a pat down of a driver is justified if the officer has a reasonable suspicion that the driver is armed and dangerous.

Fourth Amendment searches must be reasonable, and the pat down in this case was reasonable. And it is common -- it's a commonsense principle that the principles in Mimms also apply to passengers in the context of a traffic stop.

JUSTICE KENNEDY: I -- I didn't hear your --

1 your first -- in your opening. Did you say that Mimms
2 established that it's likely that he's armed and
3 dangerous? I missed that.

4 MR. PARKHURST: No, no. That's not what I'm
5 saying, Justice Kennedy.

6 JUSTICE KENNEDY: I'm sure it wasn't, but I
7 -- I missed what you said on that point.

8 MR. PARKHURST: What I said is that Mimms
9 establishes that a pat down is justified in the context
10 of a traffic stop if the officer believes that the
11 driver is armed and dangerous.

12 JUSTICE KENNEDY: Thank you.

13 MR. PARKHURST: Correct.

14 CHIEF JUSTICE ROBERTS: Do you agree that
15 there's a point in an interaction that begins with a
16 traffic stop, begins with a seizure, at which the nature
17 of that interaction is changed so that it's no longer --
18 so that it becomes a consensual interaction and --

19 MR. PARKHURST: That -- yes, Chief Justice.
20 That can happen in a -- in a traffic stop. There's no
21 evidence in this particular case that there was any kind
22 of evolution to a consensual encounter.

23 CHIEF JUSTICE ROBERTS: Maybe I should
24 rephrase the question. Do you agree that it would be
25 unconstitutional for an officer to conduct a pat down

1 after an initial seizure while that same interaction
2 still continues?

3 MR. PARKHURST: No, I disagree with that,
4 Your Honor. An officer can conduct a pat down any time
5 it is reasonable in light of factors that the officer
6 may notice about the individual. If the -- if the
7 individual presents an immediate danger to the officer
8 or to the public, a pat down may be reasonable under the
9 broad Fourth Amendment principles, even if this happens
10 to be a consensual encounter or a --

11 JUSTICE KENNEDY: So -- so in your view, or
12 I suppose the government's view -- well, I'll let the
13 government argue for itself. In your view, if the
14 officer is just looking for the man in the gray overcoat
15 and he stops someone on the street and says, have you
16 seen a man with a gray overcoat, and the person says,
17 well, I saw something like that, can he just suddenly
18 spin him around and pat -- and pat that person?

19 MR. PARKHURST: If -- if the officer
20 possesses articulable facts that this person is
21 immediately dangerous to that officer.

22 JUSTICE GINSBURG: Then you're doing away
23 with the first Terry factor altogether. You're saying
24 all you need is a reasonable suspicion that the person
25 is armed and dangerous. What happened to the reasonable

1 suspicion that a crime has just been committed or is in
2 the course of being committed?

3 MR. PARKHURST: Well, the first prong of the
4 Terry analysis, Justice Ginsburg, is whether the
5 officer's action is justified at its inception, and one
6 way that it may be justified is if the officer possesses
7 suspicion that criminal activity is afoot. But we also
8 know from other case law that another way the officer's
9 actions may be justified is during a traffic stop where
10 there's no criminal activity at all.

11 JUSTICE SCALIA: Of course, for a Terry --
12 for a Terry pat down you don't need, do you, articulable
13 suspicion that the person is armed and dangerous? So
14 long as you have a suspicion of unlawful activity, you
15 can stop the individual and pat down. Do you have to
16 have, in addition to stopping the individual, an
17 articulable suspicion that he's armed and dangerous?

18 MR. PARKHURST: I believe that's what Terry
19 says, that you --

20 JUSTICE SCALIA: Both armed and dangerous?

21 MR. PARKHURST: Yes.

22 JUSTICE SOUTER: Well, in your view if an
23 officer was going down the street and he saw an
24 individual as to whom he had no suspicion that a crime
25 was being committed, had been or was about to be, but he

1 said that -- that guy looks like -- like trouble for
2 anybody who has anything to do with him. So he goes up
3 to him and he says, I want to talk to you. And because
4 he has reasonable suspicion that the individual looks
5 like trouble, he pats him down. Is that a good pat
6 down?

7 MR. PARKHURST: Well, he would also have to
8 possess articulable reasons that a prudently -- a
9 reasonably prudent person would be satisfied with that
10 this person is an immediate danger to him.

11 JUSTICE SOUTER: Well, the individual
12 gives him -- gives him mean looks and he has a bulge of
13 something on his hip?

14 MR. PARKHURST: Well, that -- that could
15 very well support a pat down.

16 JUSTICE GINSBURG: Then you are doing away
17 with the first Terry factor. There are two factors, you
18 recognize: one, reasonable, articulable suspicion that
19 a crime is afoot; and, two, this person is reasonably
20 suspected of being armed and dangerous. Your answer to
21 Justice Souter suggests that you don't need the first
22 one. You don't need to have any suspicion that a crime
23 is afoot; it's enough for you to reasonably suspect that
24 the person is armed and dangerous.

25 MR. PARKHURST: What -- what I'm suggesting,

1 Justice Ginsburg, is that the first prong of Terry is
2 much broader than just suspicion of criminal activity.

3 JUSTICE SOUTER: No, but in my hypothesis,
4 there was nothing that would satisfy the first prong of
5 Terry. There's -- there's no lawful traffic stop.
6 There is no indication that the individual has committed
7 a crime or is about to or is doing so. So -- so Terry 1
8 is blank in my hypothesis, and you nonetheless conclude
9 that as a result of dirty looks and the -- the bulge of
10 a probable gun on the hip, the officer can in effect
11 initiate the -- the action with the individual and pat
12 him down.

13 MR. PARKHURST: Well, what I'm suggesting,
14 Justice Souter, is that in the officer's community
15 caretaking function, the officer is authorized to
16 approach an individual that he -- he thinks is trouble,
17 and in the course of asking neutral questions, if the
18 officer believes that this person is immediately
19 dangerous to the officer, then a pat down would be
20 appropriate in that instance. I'm not --

21 JUSTICE ALITO: Doesn't the officer need --
22 need justification for a stop, for a Fourth Amendment
23 seizure, whether because of a traffic violation or
24 because of suspicion of criminal activity and then, in
25 addition to that, reason to believe that the person is

1 dangerous?

2 MR. PARKHURST: In almost --

3 JUSTICE ALITO: I thought that would be -- I
4 thought that was your argument.

5 MR. PARKHURST: Well, that's --

6 JUSTICE ALITO: In the context of a traffic
7 stop, you don't need -- as to the passenger and the
8 driver, you don't need suspicion of criminal activity.
9 The person has been seized as a result of the stop, and
10 then if you add on to that the reasonable suspicion of
11 danger to the officer, that would be sufficient.

12 MR. PARKHURST: What -- what I'm saying,
13 Justice Alito, is that in this particular case we
14 certainly have a legitimate stop, and under Brendlin we
15 -- we also know that the passenger is seized during a
16 reasonably routine traffic stop until the passenger is
17 released. So what we have here is a presumption that
18 the officer has the authority to control the passenger
19 during the routine traffic stop, and we also have an --
20 an instance in a traffic stop where an officer cannot
21 avoid the individual, be it a driver or passenger.

22 So in our case, it seems like the easy case
23 where Mr. Johnson and Officer Trevizo were placed in
24 close proximity, she detected things about him that she
25 believed made him a threat to her, an immediate threat,

1 and therefore all we're asking in our case is that she
2 be -- she have the entitlement under the Fourth
3 Amendment to pat him down.

4 JUSTICE GINSBURG: But Officer Trevizo
5 herself testified that she thought the seizure part was
6 over. She asked him would he get out of the car, and
7 then she said -- I think she used the word "consensual"
8 herself, that it was a consensual encounter.

9 MR. PARKHURST: Well --

10 JUSTICE GINSBURG: That after the initial
11 seizure was over, and then she wanted to question him
12 about gang -- his gang affiliations -- and didn't she
13 testify? I seem to remember she did, and she said it --
14 it was voluntary.

15 MR. PARKHURST: She said that he could have
16 refused to get out of the car. There's two things about
17 that, Justice Ginsburg. One is we don't need to credit
18 necessarily the officer's own subjective beliefs as to
19 the -- whether the subject was free to leave or not.
20 The second thing is, we know from Brendlin that unless
21 the officer has given or the individual has asked for
22 permission to leave, there's -- there is really no
23 release.

24 So Officer Trevizo was certainly entitled to
25 enter a consensual conversation with Mr. Johnson during

1 the lawful seizure, but there was no indication that he
2 was free to leave. Moreover, even if he reasonably felt
3 free to leave, it's irrelevant to whether he reasonably
4 posed a danger to the officer.

5 JUSTICE KENNEDY: I guess what you're saying
6 is that if there is a -- a stop of the passenger and an
7 interrogation of the passenger, the passenger can't say,
8 incidentally, this is consensual, and thereby avoid a
9 pat down?

10 MR. PARKHURST: Correct. Correct. And
11 whether or not --

12 JUSTICE KENNEDY: And -- and it seems to me
13 there is some indication that that's what happened here
14 if you credit the police officer's testimony.

15 MR. PARKHURST: Right. Certainly --

16 JUSTICE KENNEDY: In other words, you can
17 have consent within the -- the context of a stop that
18 has not yet ceased.

19 MR. PARKHURST: Correct. It would be
20 analogous to, say, a -- an inmate in a prison offering
21 to give information to one of the prison guards.
22 There's no question that the inmate is still in custody,
23 even though the conversation itself is consensual.

24 JUSTICE STEVENS: May I ask if your -- your
25 view of the law that, if the officer is pretty sure that

1 the -- the -- that the person he's having a consensual
2 encounter with has a gun -- he could see the bulge or
3 something -- is that sufficient or does he have to have
4 some fear the -- that the person is about to use the
5 gun?

6 MR. PARKHURST: It would be -- in the
7 context of a traffic stop, because of all the unknowns
8 that an officer must face, a bulge is usually sufficient
9 to justify a pat down.

10 JUSTICE STEVENS: What about just meeting on
11 -- on the street? The officer meets the man on the
12 street and asks him where he's going or something like
13 that, and he sees a -- a bulge in the pocket that is --
14 convinces the officer he has a gun, but that's all.
15 That's the only evidence of a threat to the officer. Is
16 that enough?

17 MR. PARKHURST: In that instance, it may be
18 the prudent course to at least ask whether the person is
19 armed. On a -- on a random --

20 JUSTICE STEVENS: What if he says yes?

21 MR. PARKHURST: Well, then the officer could
22 ask something along the lines of whether he has a permit
23 to carry a gun. And whether or not the person has a
24 permit to carry the gun or is lawfully in possession of
25 the gun, it's a matter of basically the totality of the

1 circumstances whether --

2 JUSTICE SCALIA: Well, but I -- I thought
3 you said that there has to be an articulable suspicion
4 that he is armed and dangerous.

5 MR. PARKHURST: Right --

6 JUSTICE SCALIA: A bulge would not be enough
7 to conduct a pat down after a Terry stop, therefore.

8 MR. PARKHURST: That -- that's exactly --
9 exactly what I'm --

10 JUSTICE SCALIA: Well, then why should it be
11 enough to -- to justify a pat down here?

12 MR. PARKHURST: Well, because -- well, there
13 was no bulge in this case. However, it's a matter of
14 all the factors. It's a weighing of all the factors
15 together.

16 JUSTICE SCALIA: No, I understand. I weigh
17 all the factors, and there's nothing but a bulge.

18 MR. PARKHURST: Okay. Well, it's a matter
19 of whether you believe that the person is dangerous.

20 JUSTICE SCALIA: Okay. So the bulge alone
21 -- well, whether I believe? There has to be, you know,
22 a reasonable basis for --

23 MR. PARKHURST: Right.

24 JUSTICE SCALIA: -- an articulable basis for
25 the belief, right?

1 MR. PARKHURST: Yes.

2 JUSTICE SCALIA: So I don't see why a bulge
3 alone would -- would satisfy --

4 MR. PARKHURST: Well, in Mimms it was just a
5 bulge in the -- the driver's jacket that justified the
6 pat down. However, a person may possess a gun lawfully,
7 and that person may or may not be a danger. For
8 instance, an off-duty police officer, they often carry
9 their sidearms with them. They are not going to -- even
10 if another officer knows that they're armed, they don't
11 perceive them as a danger, and therefore no pat down is
12 going to ensue.

13 JUSTICE SCALIA: We have a whole separate
14 line of cases apart from the Terry stop cases which
15 allow officers to protect themselves by conducting a
16 search of the surrounding area when they arrest
17 somebody. And that justifies a pat down of the person
18 that they arrest also, doesn't it?

19 MR. PARKHURST: Yes.

20 JUSTICE SCALIA: Whether or not they think
21 that -- that he's about to -- to draw the gun and shoot
22 them.

23 MR. PARKHURST: Correct. It's -- it's a
24 matter --

25 JUSTICE SCALIA: Why wouldn't that line of

1 cases be extendable to this kind of a situation?

2 MR. PARKHURST: Well, it's a matter of,
3 during a traffic stop -- Brendlin even says that
4 officers must be able to exercise unquestioned command
5 of the situation.

6 JUSTICE SCALIA: Why -- why during a traffic
7 stop shouldn't they be able to ensure their own safety
8 by -- by patting down the people who have been stopped,
9 whether or not they have an articulable suspicion that
10 they are about to draw and shoot? But that's not what
11 you're proposing, is it?

12 MR. PARKHURST: Well, what I'm proposing is
13 the -- the standard Terry test, that --

14 JUSTICE SCALIA: Yes.

15 MR. PARKHURST: -- the suspicion must be
16 that they're armed and dangerous.

17 JUSTICE SCALIA: Why -- why go the Terry
18 route instead of the route that -- that covers search of
19 the area around the person who is arrested?

20 MR. PARKHURST: Well, I believe that this --
21 the facts of this case fall pretty much under Terry. A
22 -- a traffic stop will -- will impose circumstances that
23 you're not going to get in a -- in a normal street
24 encounter, because basically an officer -- we presume
25 that an officer has the authority to control any of the

1 occupants of a car. And "control" means not just
2 ordering them out, as in Mimms and Wilson, but also
3 making sure that one of the occupants doesn't get behind
4 you while you're dealing with the traffic investigation.
5 It's -- it's --

6 JUSTICE GINSBURG: When -- when did this
7 end? I mean, you said -- you said when the car is
8 stopped everyone is seized, the driver and the
9 passengers as well. The seizure ends at some point. Is
10 that when the driver is ticketed and the police cruise
11 off or --

12 MR. PARKHURST: That's the normal situation,
13 and usually that's the analysis that bears on whether
14 the driver has given valid consent to a search of the
15 automobile or something like that. We -- we must bear
16 in mind that a pat-down search is not an evidence
17 search. This is not a full search. It's just a search
18 of the outer clothing for an immediately accessible
19 weapon.

20 JUSTICE STEVENS: General Parkhurst --

21 JUSTICE GINSBURG: Then how did the -- how
22 did the officer come up with the marijuana as well as
23 the gun?

24 MR. PARKHURST: Well, because once he was
25 arrested for the gun, then they did a search incident to
26 arrest.

1 JUSTICE STEVENS: General Parkhurst, I -- I
2 seem to be a little confused about the facts of this
3 case. I had the -- remember the testimony that she
4 thought the -- that the encounter had become consensual,
5 which meant that he was no longer -- in her view, no
6 longer under -- in custody. But are you also saying she
7 also thought he was about to assault her and, therefore,
8 she was in danger?

9 MR. PARKHURST: She did not --

10 JUSTICE STEVENS: There seems some tension
11 between being both in danger and saying, well, the
12 arrest was all over.

13 MR. PARKHURST: No, she -- she did. She
14 believed that he posed an immediate danger to her based
15 on the numerous factors that she cited in her testimony.
16 So she was -- she was afraid. She was afraid from the
17 outset, as a matter of fact, because of the way that he
18 made eye contact with the officers.

19 However, we don't want our officers to avoid
20 their law enforcement functions just because they're in
21 contact with a possibly dangerous person.

22 JUSTICE SCALIA: Why -- why had this
23 descended from a -- a seizure to a post-seizure
24 consensual encounter? Why was the seizure over?

25 MR. PARKHURST: Well, we're arguing that the

1 seizure was not over.

2 JUSTICE SCALIA: Well, it seems to me you're
3 -- you're acknowledging that she said that it was a
4 purely -- you're not arguing it as based on a purely
5 consensual encounter? I thought that that's what you --

6 MR. PARKHURST: No. No, Your Honor. We're
7 suggesting that the seizure had never ended in this
8 case. The Arizona Court of Appeals --

9 JUSTICE SCALIA: Even though she said so?

10 MR. PARKHURST: Correct, because we don't
11 have to necessarily take her word for that.

12 JUSTICE SCALIA: Okay.

13 MR. PARKHURST: That's a -- that's a legal
14 --

15 JUSTICE KENNEDY: The white light is on. I
16 don't want to -- but your opening argument that you
17 presented indicated that a seizure is not necessary.
18 You -- you wanted a further rule.

19 MR. PARKHURST: I -- well --

20 JUSTICE KENNEDY: If the officer believes
21 that a person is armed and might be dangerous, then they
22 can pat down. That's -- that's the rule that you
23 proposed, I thought.

24 MR. PARKHURST: We believe that that is
25 true. That's not the rule that necessarily arises from

1 the facts of this case, because we believe that there is
2 a seizure throughout the entire encounter, and that
3 there's really -- there's no question that, as a seized
4 passenger, Officer Trevizo could pat him down.

5 And unless the Court has any other
6 questions, I'd like to reserve the rest of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Heytens.

9 ORAL ARGUMENT OF TOBY J. HEYTENS
10 ON BEHALF OF THE UNITED STATES,
11 AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONER

13 MR. HEYTENS: Mr. Chief Justice, and may it
14 please the Court:

15 The decision in this case should be reversed
16 for one of two independent reasons. First, at the time
17 that Officer Trevizo performed this frisk, the Arizona
18 Court of Appeals erred when it held that the seizure
19 that had been caused by the initial traffic stop was
20 already over. This seizure was still ongoing at the
21 time of the frisk.

22 Second, regardless of the answer to that
23 question, under this Court's decisions in *Mimms* and
24 *Wilson*, it is constitutionally reasonable for a police
25 officer to order any occupant out of a vehicle during a

1 lawful traffic stop and to frisk that individual if the
2 officer has a reasonable suspicion that that individual
3 is armed and presently dangerous to the officer. In
4 this case --

5 CHIEF JUSTICE ROBERTS: Do you agree that
6 there is a point at which the encounter initiated by the
7 traffic stop changes in some way that a pat down is no
8 longer justified?

9 MR. HEYTENS: We certainly agree, Mr. Chief
10 Justice, that at some point the encounter is over, and
11 that if it's in fact not over, the --

12 CHIEF JUSTICE ROBERTS: Well, if the
13 encounter is -- by "the encounter is over," do you mean
14 that they separate; they're no longer together? My
15 question is whether or not it's a continuing encounter
16 but transforms somehow in its quality so that the pat
17 down is no longer justified.

18 MR. HEYTENS: We agree that at some point a
19 seizure can morph into a consensual encounter. We don't
20 have any dispute with that. We would say that the
21 fundamental reality of this situation is what the Court
22 recognized in Brendlin, which is that, at the time the
23 car pulls over, a reasonable person would understand
24 himself to not be free to leave unless and until the
25 police officer says something that makes fairly clear

1 that the seizure is over and he's free to go.

2 CHIEF JUSTICE ROBERTS: I suppose there's an
3 argument, anyway, that even though the initial seizure
4 is over, the consensual encounter continues. And at
5 some point the officer, as a result of whatever happens
6 during that consensual exchange, becomes concerned for
7 her safety.

8 MR. HEYTENS: Absolutely, Mr. Chief Justice,
9 and that's our -- the second argument, which is at the
10 end of the day, we don't think it matters whether he's
11 seized. Because whether he's seized or not, this is
12 still a roadside encounter with a person who was a
13 passenger in a vehicle that was pulled over for some --

14 JUSTICE STEVENS: Let me ask you -- suppose
15 it's a roadside encounter in which the driver is
16 changing a flat tire and the officer stops and wants to
17 talk to him for a while and then he suddenly thinks,
18 well, maybe this guy's armed. Is it okay for him to go
19 ahead and search him?

20 MR. HEYTENS: Well, I guess the first thing
21 I want to say, Justice Stevens, is it's not okay to
22 think maybe he might be armed. The officer has to have
23 articulable suspicion.

24 JUSTICE STEVENS: Well, maybe he has an
25 articulable suspicion.

1 MR. HEYTENS: Okay. Under those
2 circumstances we think absolutely, and we think your
3 hypothetical --

4 JUSTICE STEVENS: Is that any different from
5 meeting somebody on the -- on the street corner?

6 MR. HEYTENS: It is different in the sense
7 that --

8 JUSTICE STEVENS: The flat -- my flat tire
9 example.

10 MR. HEYTENS: It is different because it's a
11 roadside encounter, and this Court has recognized again
12 and again and again --

13 JUSTICE STEVENS: But those are roadside
14 encounters after a traffic violation.

15 MR. HEYTENS: I -- I agree with you, Justice
16 Stevens, which is why at the end of the day we don't --
17 we think that the officer, in basically those facts,
18 should be able to perform a frisk on the street as well.
19 I guess just -- again to say, I don't think the Court
20 needs to reach that issue, because I --

21 JUSTICE STEVENS: So you don't rely at all
22 on the fact this is a traffic stop?

23 MR. HEYTENS: We do rely on the fact --

24 JUSTICE STEVENS: On your second point, that
25 is.

1 MR. HEYTENS: We think this case is
2 substantially easier because it's a traffic stop,
3 because this --

4 JUSTICE STEVENS: Why is it easier?

5 MR. HEYTENS: Because this Court has
6 recognized again and -- let me give you the example of
7 Wilson. Wilson is the case where the Court holds that
8 it is per se reasonable for an officer to order a
9 passenger to get out of the car.

10 JUSTICE STEVENS: Yes, but those are all
11 cases in which there's a violation of law that preceded
12 the activity.

13 MR. HEYTENS: I --

14 JUSTICE STEVENS: I asked you about cases in
15 which there's nothing other than the officer's interest
16 in patting down the guy because he thinks he has a gun.

17 MR. HEYTENS: Justice Stevens, I think
18 Wilson is highly significant in this regard, because the
19 Court went out of its way in Wilson to point out that
20 there's no reason to suspect a passenger with any
21 illegal activity at all. The Court said you could
22 distinguish Mimms on the ground that with regard to the
23 driver you have suspicion that he's --

24 JUSTICE KENNEDY: No, I disagree with that.
25 The holding there was that the passenger was stopped,

1 the passenger was seized, so this was a pat down in the
2 context of an ongoing seizure.

3 MR. HEYTENS: Justice Kennedy, I guess I
4 would say we disagree with this. The Court didn't hold
5 until Brendlin that a passenger is seized by virtue of
6 the initial traffic stop. The Court went out of its way
7 in Brendlin to say that none of its previous decisions
8 had answered the question of whether the passenger is
9 seized by virtue of the original traffic stop. And the
10 Court didn't even identify --

11 JUSTICE KENNEDY: Well, even -- even if
12 that's true, why don't we accept Mimms with the gloss of
13 Brendlin?

14 MR. HEYTENS: We think that Brendlin is of
15 course absolutely correct, and we think the passenger
16 was seized, and we think fundamentally that's why this
17 case is fairly easy.

18 JUSTICE GINSBURG: But you say -- your brief
19 goes much, much further. And I'm looking at page 9
20 where you say, police have to be able to protect "the
21 officer's safety from a person reasonably believed to be
22 armed and dangerous whenever the officer encounters that
23 person in a place where the officer has a lawful right
24 to be."

25 I read that to mean if the law officer is on

1 the street, in a pub, any place where he has a lawful
2 right to be, that officer can, on the basis of a
3 suspicion of armed and dangerous, pat down. And you
4 don't need the first Terry. It's only -- it's only the
5 armed and dangerous.

6 MR. HEYTENS: Justice Ginsburg, we agree
7 that that is ultimately the correct Fourth Amendment
8 rule, but what we're saying is that the Court doesn't
9 need to decide whether it agrees with us on this
10 point -- that point, excuse me, to resolve this case,
11 because there are two very important distinctions
12 between this case and that one.

13 The first one is that we know that Mr.
14 Johnson was seized. This was not a consensual
15 encounter. We know under this Court's holding in
16 Brendlin that there was a seizure of Mr. Johnson in this
17 case. And the question is whether anything happened in
18 this case to unseize him, and we think that the answer
19 to that question is clearly no.

20 And then the second reason is this Court has
21 recognized over and over again that traffic stops pose
22 unique heightened dangers to police officers, and so
23 regardless of what the rule is outside the traffic
24 stop --

25 JUSTICE STEVENS: Yes, but you'd apply the

1 same rule if the -- if the officer just stopped to help
2 the guy change his tire.

3 MR. HEYTENS: We do think that at the end of
4 the day, Justice Stevens, the overriding command of the
5 Fourth Amendment is that a police officer's conduct must
6 be judged by a reasonableness standard, and we think
7 that overriding command allows police officers to take
8 limited and appropriate steps to protect their own
9 safety.

10 JUSTICE SOUTER: But I take it, if I
11 understood your earlier answer, you would extend the
12 application of the rule as you understand it to the
13 encounter simply on the sidewalk by a police officer who
14 has no suspicion that the individual he wants to talk to
15 has been, is, or is about to commit a crime, but if the
16 -- if the officer chooses to initiate the conversation,
17 he then, in effect, if he can articulate any suspicion,
18 like we'll say the dirty look and the bulge on the side,
19 he can go ahead and -- and pat down. Is that -- that
20 your view?

21 MR. HEYTENS: At the end of the day, Justice
22 Souter, that is our view. I think that case is harder
23 than this case, and let me explain why.

24 It seems like the argument on the other side
25 is predicated expressly on the notion that unless a

1 police officer has suspicion of crime, he can just avoid
2 dangerous people, like any of the rest of us can choose
3 to avoid them.

4 JUSTICE STEVENS: May I ask you if the
5 Department of Justice has ever taken this position
6 before?

7 MR. HEYTENS: I'm not aware of whether we've
8 had to take this position before, Justice Stevens.

9 JUSTICE STEVENS: I'm asking you whether you
10 have. You don't think they have, do you? It's a rather
11 extreme position.

12 MR. HEYTENS: I'm not aware of whether we've
13 taken this position or not in any previous case, because
14 I'm not aware of any case that raises the issue that's
15 raised by the going up to someone on the street
16 hypothetical.

17 We have certainly consistently taken the
18 position that, in the context of traffic stops, it is
19 constitutionally reasonable for police officers to
20 perform Terry frisks whenever they have reason to
21 believe that their safety is in danger. As I was saying
22 to Justice Ginsburg, I think -- excuse me, Justice
23 Souter, I believe -- I think the problem in the
24 hypothetical where the officer goes up to someone on the
25 street is it's predicated on the assumption that the

1 police officer, like you and me, should just avoid
2 dangerous people.

3 We think that's fundamentally wrong about
4 what the nature of a police officer's job is.

5 JUSTICE SOUTER: Well, there's something
6 fundamentally wrong probably about that, but the --
7 the -- I think the problem that sort of drives the
8 questioning is that if you extend the rule as far as you
9 want to extend it, we have to take into consideration
10 that the standard of articulable suspicion is the
11 standard that, in practical terms, can pretty well
12 always be met.

13 You can -- you know, Benjamin Franklin's
14 remark: It's great to be a reasonable person because
15 you can think of a reason for anything you do.

16 (Laughter.)

17 JUSTICE SOUTER: And that's -- that's what's
18 driving -- at least driving my questions.

19 MR. HEYTENS: Well, I -- I certainly would
20 add, Justice Souter, that it has to be a reasonable
21 person. It's not that a police officer can recite some
22 reason. It's whether a reason that a reasonable person
23 in that position would find reasonable.

24 JUSTICE SOUTER: Yes, but what the officer
25 cites is going to be a matter of fact, and the facts at

1 that point are gone. They're in the past. And all
2 you've got is the officer saying, you know, this is --
3 this is what I perceived. And maybe you've got the -- a
4 defendant somewhere saying, oh, no, it wasn't like that.
5 But in a -- in a situation like that, if -- if
6 articulable suspicion, in effect, can justify a sidewalk
7 pat down without any articulation of a basis to think
8 crime is afoot, then you've got a -- you've got a pretty
9 wide open standard in the real world.

10 MR. HEYTENS: Well, I -- I guess, Justice
11 Souter, to the extent you're concerned about that, I
12 would say the same thing is true about whether you have
13 articulable suspicion of criminal activity, and the
14 Court has decided that that risk is worth, you know,
15 dealing with under the context of that question. So I
16 don't really understand why in principle articulable
17 suspicion of armed and dangerousness is any different.

18 I would also say that in this case,
19 regardless of whether there will be hard cases, the
20 decision that this Court is reviewing is expressly
21 predicated on the view that Officer Trevizo had
22 reasonable suspicion Mr. Johnson was armed and
23 dangerous. That's on pages 13 and 14 of the petition
24 appendix.

25 It is also the predicate of the question on

1 which this Court granted review. The question which
2 this Court granted review presupposes that she had a
3 reasonable suspicion.

4 Thank you very much.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE RESPONDENT

9 MR. PINCUS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 I think the other side made clear that its
12 principal argument is that Terry should be revisited and
13 that the two tests that Terry prescribed for a pat-down
14 search, that there be reasonable suspicion -- a crime is
15 afoot and reasonable suspicion of armed and dangerous be
16 revised so that all that is required for a pat-down
17 search is the second Terry standard. We think --

18 CHIEF JUSTICE ROBERTS: What if -- we've
19 been talking about the officer approaching somebody on
20 the street who has the bulge in his pocket. What if the
21 person with the bulge in his pocket approaches the
22 officer? Can the officer at that point, even if he has
23 no suspicion that crime is afoot, conduct a pat down?

24 MR. PINCUS: No, I don't think so, Your
25 Honor. I think that -- first of all, let me --

1 CHIEF JUSTICE ROBERTS: This is -- this is
2 like the rule in the Old West that the sheriff has to
3 wait for the defendant to draw first?

4 MR. PINCUS: No, I think the officer can --
5 if -- I think it's important to make clear that the
6 sliver of cases we're dealing with here are cases where
7 there is a reasonable suspicion of armed and
8 dangerousness but not a reasonable suspicion that
9 crime -- criminal activity is afoot.

10 CHIEF JUSTICE ROBERTS: So in response to my
11 --

12 MR. PINCUS: If there really is --

13 CHIEF JUSTICE ROBERTS: One moment. In
14 response to my hypothetical, even though the officer
15 reasonably thinks he is in a situation where he could be
16 shot, he can't do anything about it, not even a simple
17 pat down, even though he did not initiate the contact,
18 somebody comes up to him?

19 MR. PINCUS: If he reasonably believes he
20 could be shot, Your Honor, then probably there is
21 reasonable suspicion of criminal -- that criminal
22 activity may be afoot because he'll have --

23 CHIEF JUSTICE ROBERTS: No, no, let's just
24 say it's like this case: The guy coming up -- he's
25 wearing the colors of the -- of the Crips gang, and he

1 has a bulge in his pocket. It's not a crime to wear
2 that type of clothing. It may not be a crime to have a
3 bulge in your pocket, but he nonetheless has a
4 reasonable suspicion that he's being -- he's in a
5 threatening situation, even though he has no basis for
6 thinking that a crime is being committed.

7 MR. PINCUS: Well, Your Honor, I think this
8 goes a little bit to Justice Souter's comment in the
9 first part of the argument. These two standards are --
10 are somewhat -- are mutually reinforcing, as we discuss
11 in our brief. And if, indeed, as here, the State is
12 only arguing armed and dangerousness, and not arguing
13 that criminal activity is afoot, it's clearly putting
14 itself at the low end of the armed and dangerousness
15 scale.

16 JUSTICE GINSBURG: But that's not what Mr.
17 -- Mr. Parkhurst said in his opening that the traffic
18 stop is the equivalent of the articulable suspicion that
19 a crime was afoot. It justifies this stop, and then you
20 have to have something further to justify the pat down,
21 but this -- the car, the seizure of the car and its
22 passengers, that is the equivalent of the first Terry.
23 And why isn't that so? It's a stop. It's a legitimate
24 stop.

25 MR. PINCUS: I -- I think that you're right,

1 Justice Ginsburg, that's the second argument that they
2 make, and -- and our answer to that argument is that we
3 don't think that Mr. Johnson was seized at the time the
4 pat down occurred, as the court of appeals here found.
5 The other side seems to ignore the fact that there is an
6 actual determination by the court of appeals, looking at
7 the facts of the situation, that there wasn't a seizure.
8 And so--

9 JUSTICE SOUTER: Can we pursue that for a
10 minute? What -- I guess we -- we all start with the
11 common assumption that -- that there was at least a
12 legitimate stop to start with.

13 MR. PINCUS: Yes.

14 JUSTICE SOUTER: And my -- my question which
15 -- which goes to who's right about whether the seizure
16 -- the legitimate seizure had stopped and the consensual
17 encounter had begun, my question is what is it beyond
18 the conclusory statement of the officer that in effect
19 justifies drawing that conclusion, that the stop was
20 over?

21 MR. PINCUS: Well, a couple of things, Your
22 Honor. First of all, the Court has never discussed --
23 in Wilson, it actually reserved the question of what is
24 the duration of the seizure of a passenger --

25 JUSTICE SOUTER: Do we know -- do we have

1 any evidence about duration here?

2 MR. PINCUS: We don't have any duration, but
3 the question -- but I think an important question is
4 does the seizure of the passenger necessarily in all
5 cases coextend with the seizure of the driver? This
6 stop was in an urban area. It might be one thing if
7 it's a stop on a highway where there's really no place
8 for the passenger to go. This was a stop in a -- and
9 where there are concerns about the safety of a passenger
10 who is allowed to wander off and the potential liability
11 of the police. Here the stop was in an urban area, and
12 -- and if the -- Brendlin says that initially, clearly
13 the passenger was seized, but the question is how long
14 does that -- that seizure last? If the State --

15 JUSTICE SOUTER: My -- my problem in this
16 case, I guess, in taking your position is I don't think
17 we have got an evidentiary basis to conclude that what
18 we start by assuming is a legitimate stop has in fact
19 run its course. I don't see how we can draw that
20 conclusion.

21 MR. PINCUS: Well, let me tick off some --

22 JUSTICE SOUTER: That's what I'm getting at.

23 MR. PINCUS: -- the factors that we -- we
24 rely on, Your Honor. First of all, just as a legal
25 matter, the Court has said in Caballes and other cases

1 that the scope of a Fourth Amendment intrusion turns on
2 the purpose.

3 Here we say the scope of the seizure of the
4 passenger should turn on the ability to secure the
5 scene. If the passenger is not involved in what -- in
6 the facts that gave rise to the stop -- if it's clear,
7 for example, quickly that the passenger doesn't own the
8 vehicle, the reasons that -- the driver owns the
9 vehicle, the stop -- the basis for the stop relates to
10 the passenger -- we don't see what the basis is for, in
11 an urban setting at least, for any further seizure of
12 the passenger. There's a --

13 JUSTICE SOUTER: Well, then, in other words,
14 you -- you are -- I -- I'll be candid with you. I would
15 have started with the assumption, based on Brendlin,
16 that if the stop of the car and its driver also effects
17 a stop and a seizure of the passenger, that you start
18 out with the assumption that the seizure of the
19 passenger is going to last for the same duration as the
20 seizure of the car and the driver unless you have a good
21 reason to draw some line and say, no, it doesn't. And I
22 take it that you are not making that initial assumption.
23 Am I correct there?

24 MR. PINCUS: We're not relying entirely on
25 -- on what I just said. But we don't --

1 JUSTICE SOUTER: Well, I think -- I think
2 you're rejecting it, aren't you?

3 MR. PINCUS: No, we're not relying -- we're
4 rejecting that assumption. We -- we don't rest entirely
5 on the notion that the -- that the seizure of the
6 passengers as a matter of law has to end. We think
7 there are special facts here that show that -- that
8 support the idea that the seizure was over. But I think
9 one of them --

10 JUSTICE SOUTER: Okay. What are those --
11 what are those special facts?

12 MR. PINCUS: Well, basically there was this
13 interaction separate from the interaction with the
14 driver to the extent the passenger -- Brendlin says the
15 passengers -- one of the reasons the passenger would
16 feel that he or she is seized is because of his or her
17 relationship to the driver and to the stop here. This
18 interaction --

19 JUSTICE SOUTER: Are you saying --

20 MR. PINCUS: -- proceeded separately.

21 JUSTICE SOUTER: Are you saying if there's
22 -- if there's a driver and a passenger and there are two
23 police officers, and one police officer is dealing with
24 the driver, saying, you know, where's your insurance
25 papers and so on, and at the same time the other officer

1 is questioning the -- the passenger, are you saying that
2 that independent questioning of the passenger in effect
3 eliminates the -- the passenger's seizure as -- as
4 following from the seizure of the driver?

5 MR. PINCUS: I think it's -- I think it's
6 part -- as the lower court found here, it's part -- it's
7 a relevant circumstance. This is a
8 totality-of-the-circumstance test. The court of appeals
9 here looked at that as one fact, looked at the officer's
10 subjective intention --

11 JUSTICE SOUTER: I -- I don't get it. Why
12 should the fact that an officer -- a separate officer is
13 talking to the passenger ultimately have anything to do
14 with the duration of the passenger's seizure, absent a
15 situation in which officer two says, "by the way, you're
16 totally free to go"? We don't have that kind of strange
17 situation. But short of a strange situation like that,
18 why does the conversation with the passenger have
19 anything much to do -- have any bearing on the -- on the
20 length of the passenger's seizure?

21 MR. PINCUS: To the extent -- I think the
22 question here is what's -- one question is what's
23 communicated to the passenger.

24 JUSTICE SOUTER: Yes.

25 MR. PINCUS: If the officer had said in

1 terms, would you mind stepping out of the car so I can
2 ask you some questions unrelated to the stop about your
3 hometown, it seems to us that that statement by the
4 officer would provide some pretty strong indication that
5 the seizure was over and that this was a separate
6 investigation, having nothing to do with the seizure.

7 JUSTICE SOUTER: But we accept as hornbook
8 law when they are -- when the police are -- are
9 questioning one individual whom they've stopped, let's
10 say for a traffic violation, that during that period of
11 seizure, the reasonable period of seizure, the officer
12 can ask questions about other subjects, and that doesn't
13 end the seizure.

14 MR. PINCUS: Well, the --

15 JUSTICE SOUTER: So why should --

16 MR. PINCUS: The Court has said that the
17 officer --

18 JUSTICE SOUTER: -- it be any different for
19 the passenger?

20 MR. PINCUS: The Court has said that the
21 officer can ask those questions. The Court hasn't said
22 the -- what the impact of that is on the seizure. And
23 here the officer certainly believed that her conduct and
24 her words and her conversation -- which we don't know
25 how long it lasted or if there were a number of

1 questions -- communicated to the -- to the individual,
2 to Mr. Johnson, the idea that this was a consensual
3 encounter.

4 JUSTICE SOUTER: I don't want to -- I don't
5 want to take up your whole argument on this hobbyhorse
6 of mine, but I mean my -- my only problem is I don't see
7 that we have got an evidentiary basis here to say that,
8 because of the duration or the mere fact of the
9 questioning, there is a reason to say that as to the
10 passenger, a reasonable passenger would say, I am no
11 longer seized, and -- and this encounter is totally
12 consensual.

13 The -- the officer testified, no question
14 about it, but the test is subjective.

15 MR. PINCUS: It is subjective. And I guess
16 I would also point, Your Honor, to the Court's decision
17 in -- in Drayton, which dealt with the question in a
18 somewhat different context, at a bus search and whether
19 or not passengers on a bus would feel that they were
20 seized when there were officers in the front of the bus
21 and they were asking questions. And to us, although
22 this is obviously the converse, a lot of the analysis in
23 Drayton, which showed that -- which concluded that there
24 wasn't a seizure there, because of the -- because people
25 ultimately would feel free to come and go, given the

1 nature of the interaction --

2 JUSTICE GINSBURG: And then don't you lose
3 under that line of cases, Bostick and -- this is the
4 picture that the officer was painting, or I thought it
5 was, to bring this within the "Mind if I search your
6 luggage" category of cases.

7 MR. PINCUS: Right.

8 JUSTICE GINSBURG: So he says yes. So she's
9 got him on consent. She doesn't have to -- she said,
10 he said okay, he would get out and talk to me; he said
11 okay when I began to pat him down; it's only in the
12 middle of it he began to wriggle a little bit.

13 MR. PINCUS: I think it's quite clear,
14 Justice Ginsburg, that there's no question here that --
15 that there was a consent to the pat down. I think the
16 lower courts concluded and the other side hasn't sought
17 review that there was no consent to the pat down here.

18 I think the reason that Drayton is -- is
19 relevant is that that's a case where the question for
20 the Court was, would these people feel free to terminate
21 the encounter? And the Court concluded yes, they would.

22 And we think, given the different
23 situation of the passenger, it's true that -- that
24 Brendlin found the passenger seized. To some extent,
25 that was to give the passenger a shield, not to be used

1 as the sword for further interrogation of the passenger.
2 It recognized the reality that at the outset surely the
3 passenger is seized. If --

4 CHIEF JUSTICE ROBERTS: You're giving up a
5 shield here, I take it? Instead of -- if instead of a
6 pat down, the officer said, where were you last night at
7 10 o'clock, without Miranda warnings, you would say,
8 well, that's just -- that's just fine?

9 MR. PINCUS: Well, you know, Berkemer says,
10 in the context even of a -- of a traffic seizure,
11 Miranda warnings aren't necessarily necessary.

12 But -- but what we are saying is that, given
13 the -- the different basis for the seizure here, it's
14 that initial conclusion that at the outset, yes, but --
15 but that person, unlike the -- unlike the driver who is
16 the target of the police activity and therefore a
17 reasonable conclusion for the driver is he's seized
18 until the end of that activity, the passenger is not the
19 target of the traffic stop.

20 JUSTICE BREYER: What are the facts that
21 show that a reasonable person in the passenger's
22 position would have believed himself free to terminate
23 the encounter?

24 MR. PINCUS: I'm sorry, Justice Breyer --

25 JUSTICE BREYER: What are the facts that

1 show that the person who was searched, what's his name?
2 Mr. Johnson -- is that right?

3 MR. PINCUS: Yes.

4 JUSTICE BREYER: Well, what are the facts
5 that suggest that he thought he was free to terminate
6 that encounter with the police?

7 MR. PINCUS: That the -- that the
8 interaction with the officer had nothing to do with the
9 subject of the stop.

10 JUSTICE BREYER: All right. I would say
11 we've held a lot that that's just beside the point. If
12 you stop a car for a traffic stop, you can search it for
13 all kinds of things. You can do all kinds of things not
14 related. So if that's what they're relying on, I
15 suspect that that's not right, that it had to do with a
16 different subject matter.

17 MR. PINCUS: Well, I --

18 JUSTICE BREYER: I was lawfully stopped.
19 All right. Go ahead. I want to get all of them in
20 front of me.

21 MR. PINCUS: That the officer herself
22 believed that she had communicated the fact that the
23 interaction was voluntary.

24 JUSTICE BREYER: The question is, how did
25 she do that?

1 MR. PINCUS: Well --

2 JUSTICE BREYER: She said, "You can leave
3 whatever time you want"?

4 MR. PINCUS: She did not do it that way.

5 JUSTICE BREYER: No. No.

6 MR. PINCUS: Although the court --

7 JUSTICE BREYER: So you're standing there
8 and the policeman is in front of you, and they have
9 stopped the car, and the woman who is the policeman
10 says, I want to search you. Do you think you're free to
11 leave?

12 (Laughter.)

13 MR. PINCUS: No, Your Honor, but --

14 JUSTICE BREYER: Okay, then. So now we have
15 got two of them. What's the third?

16 MR. PINCUS: Well, the third is that it was
17 in -- it was not a road stop in an abandoned area, where
18 a --

19 JUSTICE BREYER: No, it was on the highway.

20 MR. PINCUS: No, it was in an urban area,
21 actually --

22 JUSTICE BREYER: It was in an urban area.
23 Okay.

24 MR. PINCUS: -- where the --

25 JUSTICE BREYER: You're stopped in an urban

1 area. The policeman says you are stopped, and you are
2 stopped lawfully. Will you get out of the car? Yes.
3 The policeman begins to search for the -- the gun.
4 Fine. You think you're free to leave?

5 MR. PINCUS: Well, obviously it wasn't --

6 JUSTICE BREYER: What's the fourth?

7 MR. PINCUS: Well --

8 JUSTICE BREYER: What's the fourth? I just
9 want to get them all out here. Is there anything else?

10 MR. PINCUS: I think we've gotten them all
11 out onto the table.

12 JUSTICE BREYER: Okay. So, what they say is
13 a reasonable person would have found -- felt that he
14 could just say good-bye, and he would have felt this
15 even though the car was stopped lawfully, she asked him
16 to get out of the car, and she began to search him for a
17 gun.

18 MR. PINCUS: Well, Your Honor --

19 JUSTICE BREYER: I -- can we not reverse
20 that?

21 MR. PINCUS: Well, Your Honor, a couple of
22 things. I don't think that the question is at the
23 moment -- clearly, at the moment she was conducting the
24 pat-down search, he was seized. But if that were the
25 test, then even in the -- in the Terry situation, the

1 person is obviously in fact seized at the time that the
2 pat-down search is conducted, but that's not -- the
3 question is whether there was -- in the moments before,
4 there was a basis to immobilize that person.

5 JUSTICE BREYER: No, I'm saying if the
6 question is whether the person reasonably thought at the
7 time of the search he could leave, there's certainly a
8 strong claim here that he could not reasonably or he did
9 not reasonably think he could leave. As long as that is
10 so, the issue in front of us is when you stop a person,
11 a policeman in the course of your duties, and that
12 person thinks that he cannot reasonably leave, and you
13 believe reasonably that he's armed, can you pat him
14 down? Well, asked that way, certainly a strong
15 argument, the answer is yes, if you don't want to be
16 killed.

17 MR. PINCUS: Well, I -- I guess a couple of
18 answers to that, Justice Breyer: I mean, first of all,
19 if this is just a case about whether the lower court
20 made a correct determination about whether there was a
21 seizure or not, there's not -- maybe there's not much to
22 the case. We think the lower court did make the right
23 determination for the -- for the reasons that I gave.

24 And I should say, it seems -- it does seem
25 to me, and I was trying to get at this point in response

1 to Justice Souter's question, there are two related
2 questions here. One is the -- what a reasonable person
3 in Mr. Johnson's position would believe? One is what is
4 the authority of an officer in terms of the duration for
5 which a passenger may be seized?

6 One answer --

7 CHIEF JUSTICE ROBERTS: Well, if you look at
8 the first part of that, what somebody in Mr. Johnson's
9 position would believe, how does he tell? I mean, even
10 if the other officer goes to the window and starts
11 asking the driver, "Can I see your insurance papers,"
12 there's no representation that's why we stopped you,
13 that's all we're interested in. They may have stopped
14 him because they have reason to believe that that car
15 was involved in criminal activity. They don't have to
16 disclose immediately what's involved.

17 So how can the passenger know why the
18 officer is stopping the person in the first place?
19 Let's hypothesize that he has been involved in criminal
20 activity. He may think, well, they've caught me and
21 they're just going through this charade to try to get
22 information about it and make the people feel
23 comfortable, whatever. I mean, just because he says,
24 you don't have insurance papers, that's -- I don't think
25 it's reasonable for the passenger to say, oh, this is

1 not about me. I can get up and leave.

2 MR. PINCUS: Well, I -- that may not be --
3 by itself, it may not be enough. We think, together
4 with the other factors here, the fact --

5 CHIEF JUSTICE ROBERTS: Well, what else?

6 MR. PINCUS: Well, the fact that the officer
7 believed, therefore her tone, we have to assume, the way
8 she -- that she spoke in the way her subjective intent
9 indicated, that she believed that what was going on here
10 was a conversation in -- in an effort to get gang
11 information --

12 CHIEF JUSTICE ROBERTS: He is supposed to
13 assume that it's not about him because of her tone?

14 MR. PINCUS: No, he was supposed to assume
15 that -- that it was consensual because of her tone,
16 because that's -- that was her intent.

17 JUSTICE BREYER: Suppose we go beyond. I
18 mean, once we go beyond, I become a little at sea as to
19 what the answers are because policemen do things other
20 than investigate crime.

21 A policeman is on protective duty. The
22 individual he is protecting is approached by a member of
23 the Crips gang who has a bulge in his pocket. Can the
24 police, with reasonable grounds to think that that
25 person is armed, pat down that person? Or is he

1 supposed to wait until the gun comes out of the pocket
2 and the person who is being protected is shot?

3 A policeman is on a bridge. Somebody stops
4 the car in the middle of the bridge. Traffic is held up
5 in all directions. The policeman goes to try to remove
6 the car from the bridge. In the back seat is a member
7 of the Crips gang with a bulge in his pocket. Is the
8 policeman supposed to ignore that?

9 I mean, policemen do many things, and once
10 you tell me that we're going beyond the facts of this
11 case, I can think of all kinds of hypotheticals that
12 aren't so hypothetical, and I become uncertain about
13 when the policeman can and when he cannot.

14 So, how do you respond?

15 MR. PINCUS: Well, Your Honor, I -- I think
16 that -- first of all, a couple of reactions: First of
17 all, I think that it is important, and I -- I alluded to
18 this earlier, the -- the sliver of cases we're dealing
19 with here are cases in which there is reasonable --
20 allegedly a reasonable suspicion that someone is armed
21 and dangerous, but not reasonable suspicion that
22 criminal activity is afoot. Those two standards are
23 mutually reinforcing. In most cases where there is
24 serious evidence that someone is armed and dangerous,
25 you're going to have a very -- almost certainly you will

1 have a reasonable suspicion that crime is afoot because
2 the dangerousness part requires -- means you'll have
3 suspicion of an assault or some other kind of activity.
4 So I --

5 JUSTICE SCALIA: Mr. -- Mr. Pincus, I want
6 to go back to the previous subject for a minute. We
7 certainly didn't take this case to decide whether the
8 passenger was free to leave or not. That -- that was
9 not the issue on which we took the case. And you claim
10 that that issue has already been resolved by findings of
11 the lower courts?

12 MR. PINCUS: That the -- the court of
13 appeals here determined -- its decision rested on the
14 fact that this was a consensual encounter.

15 JUSTICE KENNEDY: But that -- but that --

16 JUSTICE SCALIA: Now, in order to contradict
17 that, would we have to find that that's clearly
18 erroneous?

19 MR. PINCUS: Well, I think it's a mixed
20 question of fact and law, Your Honor. So I think, with
21 respect to the underlying facts, you probably have to
22 find that -- that --

23 JUSTICE BREYER: Is there any dispute on the
24 underlying facts?

25 MR. PINCUS: No --

1 JUSTICE BREYER: No.

2 MR. PINCUS: -- I don't think the underlying
3 facts are disputed.

4 JUSTICE STEVENS: Well, there is a dispute
5 as to whether the man thought he was free to leave.
6 That's a big -- a big dispute, isn't it?

7 MR. PINCUS: That is -- that is the disputed
8 question: Whether -- or whether a reasonable person in
9 his position --

10 JUSTICE STEVENS: Did he testify?

11 MR. PINCUS: No, not at the suppression
12 hearing.

13 JUSTICE STEVENS: So nobody asked him
14 whether he thought he was free to leave -- which would
15 have solved a lot of problems.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: Your hypothesis
18 about why she -- why he was free to leave is because of
19 the tone of the arresting officer? The tone of the --

20 MR. PINCUS: Well, it's the totality of the
21 circumstances: the tone of the officer, the fact it was
22 in an urban area where there were some place to --

23 CHIEF JUSTICE ROBERTS: And there's no
24 finding about the tone of the officer, right?

25 MR. PINCUS: Well, the -- the officer

1 herself testified about what her intent was. And I
2 think most people, when they -- if that's their intent,
3 it's carried through in how they interact with someone.

4 JUSTICE ALITO: Well, you keep emphasizing
5 that this is an urban area, and it seems to me that's
6 going to lead to a test that's impossible to administer.
7 I can think of a lot of circumstances in which the
8 passenger in a car that is stopped will not think for
9 practical reasons that there's much alternative but to
10 wait until the driver is permitted to get back in the
11 car and drive away.

12 All of those would fall under your -- your
13 urban category, wouldn't they? If it's night -- suppose
14 this was a dangerous area. Suppose this was in an area
15 that was the turf of a rival gang, so it really wouldn't
16 be very practical for this person to start walking down
17 the street. There are not just urban areas and rural
18 areas; there are expressways in urban areas; there are
19 suburban areas.

20 MR. PINCUS: Well, Your Honor --

21 JUSTICE ALITO: All of those things would --
22 you'd have to draw a line taking all of those things
23 into account?

24 MR. PINCUS: It -- it would be a factual
25 question in every case as it is in the typical Fourth

1 Amendment court case about whether someone is seized.

2 In the --

3 JUSTICE KENNEDY: Well, we didn't think it
4 was a factual question in -- in Brendlin. In -- in
5 Brendlin, we said "even when the wrongdoing" -- this is
6 at page 7 -- "even if the wrongdoing is only bad
7 driving, the passenger will expect to be subject to some
8 scrutiny, and his attempt to leave the scene would be so
9 obviously likely to prompt an objection from the officer
10 that no passenger would feel free to leave in the first
11 place." And that's why we held there was a seizure.
12 You're basically arguing with the premise of Brendlin.

13 MR. PINCUS: No, Your Honor, I'm absolutely
14 not. I think Brendlin clearly holds that there is a
15 seizure at the outset. The question that Brendlin does
16 not explicitly address, and it's one the Court
17 explicitly reserved --

18 JUSTICE KENNEDY: Brendlin says no passenger
19 would like -- would feel free to leave during the course
20 of the investigation. And -- and I would have to agree
21 with that as a -- as a commonsense matter.

22 It would be amazing to me that this fellow
23 said: I'm not going to talk to you anymore. I am
24 leaving. And -- and the -- and the police officer would
25 allow it, particularly when the police officer, we know,

1 searched the person.

2 MR. PINCUS: Well, I mean, I think it -- it
3 may depend upon the other facts in that -- in that
4 situation, Your Honor. This --

5 JUSTICE BREYER: Here, what are the facts?
6 That is, this happened quite close to the beginning of
7 the -- of the stop, didn't it?

8 MR. PINCUS: We don't know.

9 JUSTICE BREYER: We don't know. I -- I read
10 this. But it said -- I mean I thought, from judging it,
11 that it did happen within a few minutes of the -- of the
12 beginning. They were still talking to the driver. We
13 know that.

14 MR. PINCUS: We -- we actually don't, Your
15 Honor.

16 JUSTICE BREYER: We don't?

17 MR. PINCUS: We don't. We know that the --
18 that the conversation seemed to be -- the interaction
19 seemed to have started shortly after the interaction
20 with the driver.

21 JUSTICE BREYER: Yes.

22 MR. PINCUS: We don't know how they -- how
23 long they --

24 JUSTICE BREYER: Well, is there any reason
25 to think it was half an hour?

1 MR. PINCUS: We just don't know. The record
2 doesn't say. We don't know.

3 JUSTICE STEVENS: Mr. Pincus, do you agree
4 with your opponents that if you lose on the seizure
5 issue, you lose?

6 MR. PINCUS: Well, Your Honor, we think if
7 -- if there was a seizure, then -- then we think there
8 is a second question, which is even if the person was
9 seized, the -- it's not clear to us that the Court's
10 precedents say that -- that that automatically permits a
11 pat down on armed and dangerousness.

12 My friends rely on Mimms. The Court in
13 Mimms made very clear -- and, in fact, as we recite on
14 pages 31 to 32 of our brief -- footnote 5 in Mimms says
15 that the reason for the pat down there was that "once
16 the driver alighted, the officer had independent reason
17 to suspect criminal activity and present danger," and it
18 was on that basis that the pat-down search was
19 permissible.

20 So the Court hasn't said that in the context
21 of a roadside stop, once you are seized in this -- at
22 least for a passenger -- a somewhat different sense than
23 a Terry seizure based on articulable suspicion about
24 that person's criminal activity, that is enough. We
25 think the relevant standard there is supplied by the

1 Court's decisions in -- in Summers and associated cases,
2 which is -- which say the officer can control the scene,
3 and that might allow a pat-down search if that's what
4 the officer is trying to do.

5 JUSTICE SCALIA: I guess what about -- I --
6 I guess if we held that you could do this, this pat-down
7 search here, it would probably carry forward to any
8 other kind of seizure like a -- a roadblock to inspect
9 for drunken driving or anything like that?

10 MR. PINCUS: Well, that's -- that's part of
11 the concern, Your Honor, that --

12 JUSTICE SCALIA: We would say the same
13 thing: That if there is a passenger in that car, you
14 could tell the passenger to get out and conduct a
15 pat-down search.

16 MR. PINCUS: Yes, even though -- even
17 though, again, there's no particularized suspicion about
18 that passenger. So this is a pretty dramatic expansion
19 of the officer's ability to -- to search, and we think
20 it should be cabined very closely to those situations in
21 which there really is a threat of armed and dangerous.

22 And I was saying before, it -- "armed and
23 dangerousness" it's "a reasonable suspicion that a crime
24 is afoot" are mutually reinforcing. If one isn't
25 present, if the State, as here, is arguing that one

1 isn't present, it tends to cast doubt on whether the
2 other is present.

3 CHIEF JUSTICE ROBERTS: Why isn't the -- why
4 isn't the "seizure" and the "consensual" aspect also
5 mutually reinforcing but kind of blurring into each
6 other? It seems to me it's an awfully difficult
7 decision for the officer to make: Well, I stopped this
8 person. I know under Brendlin that he is seized, and
9 I'm engaged in a dialogue, and I have to worry that at
10 some point he thinks he's free to leave.

11 MR. PINCUS: I'm -- I'm not sure that I
12 understand what you are -- what you are getting at in
13 your -- in your question --

14 CHIEF JUSTICE ROBERTS: Well, you seem --
15 your argument assumes a fairly bright line between the
16 point at which the individual is seized and the point at
17 which the interaction becomes a consensual search. And
18 I'm just saying that in the run mine of cases, that line
19 is going to be very blurry.

20 MR. PINCUS: As it is blurry when the -- in
21 the converse situation when the question is --

22 CHIEF JUSTICE ROBERTS: No. The converse
23 situation is that so long as the interaction continues,
24 it is a seizure, and the officer can take reasonable
25 steps, the pat down, to protect her safety. That

1 doesn't have a line-drawing issue. Your position does.

2 MR. PINCUS: No, I'm talking about the
3 Drayton situation, Your Honor. When the -- when the
4 question is, has a consensual interaction morphed into a
5 seizure, then there is also a -- a -- it's an uncertain
6 line. But the Court has said that there it's a
7 totality-of-the-circumstances test and, obviously --
8 sort of the shoes are all on the other feet there,
9 because the law enforcement doesn't want that to happen.
10 And so it's arguing that the facts don't amount to a
11 seizure, and here we're sort of in the converse
12 situation.

13 JUSTICE KENNEDY: You -- you don't concede
14 in this case, or do you, that Trevizo had a reasonable
15 suspicion that Johnson was armed and dangerous? That
16 has not been found? We're just assuming that --

17 MR. PINCUS: Absolutely not.

18 JUSTICE KENNEDY: -- for purposes of --

19 MR. PINCUS: The lower court assumed it for
20 the purposes of decision --

21 JUSTICE KENNEDY: So even if you do not
22 prevail, we would have to remand on that point?

23 MR. PINCUS: Yes, that point would have to
24 be remanded so that the court below could address it.

25 Just to -- just to return to the final

1 point, the -- the sliver of cases we're talking about
2 here, "armed and dangerousness, but not crime afoot,"
3 it's a very small sliver. The government hasn't shown
4 that that's a real problem that has to be taken care of.

5 In fact, in this case, if the officers
6 really had believed that -- that there was proof of
7 armed and dangerousness, why wouldn't they have argued
8 that they had proof that crime was afoot, given that
9 they knew that Mr. Johnson was a felon? We think that
10 the reason that the State took that off the table was it
11 doesn't have a lot of confidence in --

12 JUSTICE BREYER: Is it lawful to possess a
13 firearm?

14 MR. PINCUS: If you're a convicted felon?
15 No.

16 JUSTICE BREYER: Was he a convicted felon?

17 MR. PINCUS: He had admitted to the officer
18 that he had engaged in burglary. In fact, that's one of
19 the reasons to show that he's not dangerous is that he
20 was very forthcoming about the fact that he had a
21 conviction.

22 So the fact that the State took that off the
23 table and didn't rely on it, we think, shows (a) that
24 they don't have a lot of confidence that there's real
25 armed and dangerousness here and the danger, in a

1 systemic sense, as Justice Souter pointed out, of
2 relying only on that prong as the basis for cabining
3 officer discretion. As Justice Kennedy said in a
4 separate opinion in *Wren*, it's very easy to -- to
5 conduct a lawful search --

6 JUSTICE STEVENS: Mr. Pincus, I have
7 difficulty accepting your suggestion that there is a
8 sliver of cases. It seems to me there are a multitude
9 of cases in which officers might suspect somebody is
10 armed but not think criminal activity is afoot, but
11 decide they would like to pat him down.

12 MR. PINCUS: I think it is the dangerousness
13 element, Your Honor, if they are "armed and
14 dangerousness," which is the test that the Court set out
15 in *Terry* and that the -- it's the test that my
16 colleagues are asking for. "Dangerous," to me, connotes
17 a threat to someone. And it's a very small step, I
18 think, between being a threat to someone and having a
19 reasonable suspicion that an assault may be committed.

20 JUSTICE STEVENS: Well, do you argue that in
21 -- in all of this, this guy was not dangerous?

22 MR. PINCUS: We -- we agree. We argue very
23 strenuously that he wasn't dangerous, but -- but I -- I
24 think the key point here is -- is that it -- it may well
25 be a sliver of cases, but removing the sort of mutually

1 reinforcing nature of these two tests threatens to
2 really downgrade the standard in a way that officer
3 discretion --

4 JUSTICE GINSBURG: How could he not be
5 dangerous? I mean, first, she said: I suspected him
6 because he was looking behind. But then she said he was
7 wearing the clothes of a gang. And then he admits to
8 having been convicted of a burglary. Why isn't it very
9 normal for a person to be apprehensive?

10 MR. PINCUS: Well, let me give three quick
11 answers to those: First of all, he looked -- this was
12 an unmarked car, Your Honor. I -- I think a -- a very
13 reasonable inference is he looked behind because he was
14 surprised that there were all of a sudden flashing
15 lights and a siren on a car.

16 The gang colors, as the lower court -- the
17 court of appeals here noted, although Mr. Johnson was
18 wearing blue, the driver was wearing red. If these were
19 really gang colors, it -- it's not consistent with the
20 conclusion that they were gang colors to have people of
21 different colors who were rival gangs in the same car.

22 And the third thing is, as lower courts have
23 found, acknowledging prior criminal convictions is a
24 basis for concluding that someone is not dangerous
25 because they were forthcoming.

1 Thank you.

2 JUSTICE SCALIA: Not so fast.

3 (Laughter.)

4 JUSTICE SCALIA: What -- what -- the "armed
5 and dangerous" requirement, does the "dangerous"
6 requirement mean endangering the policeman, or is it not
7 -- is it enough if -- if you think this -- this fellow
8 is -- you know, he's just a dangerous character. Is
9 that enough, or does it have to be an immediate threat
10 to the policeman?

11 MR. PINCUS: I don't think this Court has
12 come down one way or -- or the other, Your Honor.

13 JUSTICE SCALIA: What do you think?

14 MR. PINCUS: I -- it seems to me there --
15 there is a requirement of immediate danger.

16 JUSTICE SCALIA: It's -- it's not enough if
17 you think he's -- he's Al Capone?

18 MR. PINCUS: I don't think if he's just a
19 fishy character, it's enough. I think the reason is
20 immediate threat to safety.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. PINCUS: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Parkhurst, you
24 have a minute remaining.

25 REBUTTAL ARGUMENT OF JOSEPH L. PARKHURST

1 ON BEHALF OF THE PETITIONER

2 MR. PARKHURST: This -- this case falls
3 directly under Mimms and Wilson. Mimms and Wilson both
4 hold that the officer has the authority to control the
5 occupants of an automobile with or without suspicion of
6 any wrongdoing by the occupant.

7 In this case, also, the traffic stop
8 satisfies the first prong of Terry, as we know from
9 Mimms. Also, there's no reason to suggest that this was
10 any more than the normal length of a traffic stop here.
11 In fact, the evidence was that the -- one officer was
12 still talking with the driver while Officer Trevizo was
13 conversing with Mr. Johnson.

14 JUSTICE SCALIA: What do you -- what do you
15 say about the other -- the other side's point that in
16 the case of a Terry stop, there's a -- a mutually
17 reinforcing aspect?

18 You have a suspicion that -- that there is
19 crime afoot to begin with, plus the --

20 MR. PARKHURST: Well --

21 JUSTICE SCALIA: -- the suspicion that the
22 person is armed and dangerous; whereas, here, you know,
23 it's a traffic stop, is all.

24 MR. PARKHURST: The -- yes, that's true.

25 However, we --

1 JUSTICE SCALIA: So what -- what is required
2 where you think criminal activity is afoot is not
3 necessarily going to be the same as what's required when
4 you -- when there's just a traffic stop.

5 MR. PARKHURST: She -- Officer Trevizo
6 testified repeatedly at the hearing that she did not
7 believe he was actually about to commit a crime. She
8 could not put her -- put her finger on exactly what it
9 was that he was doing at the moment.

10 However, we believe that, in the context of
11 a traffic stop, we -- the State has satisfied the first
12 Terry prong here because traffic stops frequently don't
13 involve any kind of criminal activity, just as -- as in
14 this case, a civil violation. However, that was enough
15 to put the officer and the individual in close
16 proximity, and if she noticed enough indicia of -- that
17 he was dangerous, she certainly was authorized to
18 conduct a pat-down search.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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