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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

**On Petition for Writ of Certiorari
to the Arizona Court of Appeals**

**PETITIONER'S REPLY TO BRIEF IN
OPPOSITION**

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TABLE OF CONTENTS

| | PAGE |
|---|------|
| TABLE OF AUTHORITIES..... | ii |
| ARGUMENT | |
| THE PASSENGER IN A VEHICLE DETAINED ALONG WITH A LAWFULLY STOPPED DRIVER MAY BE PATTED DOWN FOR WEAPONS WHEN THE PAT DOWN IS BASED ON A REASONABLE BELIEF THAT THE PASSENGER IS ARMED AND POTENTIALLY DANGEROUS..... | 1 |
| CONCLUSION..... | 6 |

TABLE OF AUTHORITIES

| CASES | PAGE |
|--|------|
| Adams v. Williams, 407 U.S. 143 (1972)..... | 3, 4 |
| Brendlin v. California, 127 S. Ct. 2400 (2007)..... | 3 |
| Maryland v. Wilson, 519 U.S. 408 (1997)..... | 5 |
| Michigan v. Long, 463 U.S. 1032 (1983) | 3, 4 |
| Oregon v. Guzek, 546 U.S. 517 (2006) | 5 |
| Pennsylvania v. Mimms, 434 U.S. 106 (1977) | 3, 4 |
| State v. Ault, 150 Ariz. 459, 724 P.2d 545 (1986) | 5 |
| State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (Ariz. 1984)..... | 5 |
| State v. Reyna, 205 Ariz. 374, 71 P.3d 366 (App. 2003) | 6 |
| | |
| CONSTITUTIONAL PROVISIONS | |
| Ariz. Const. art. II, § 8 | 5 |

ARGUMENT

THE PASSENGER IN A VEHICLE
DETAINED ALONG WITH A LAWFULLY
STOPPED DRIVER MAY BE PATTED
DOWN FOR WEAPONS WHEN THE PAT
DOWN IS BASED ON A REASONABLE
BELIEF THAT THE PASSENGER IS
ARMED AND POTENTIALLY
DANGEROUS.

This case provides an opportunity for this Court to make clear that a pat-down search of a passenger of a car for officer safety, conducted while the passenger is detained as part of an investigative stop of the car's driver, is permissible under the Fourth Amendment. In this case, no dispute exists that the police lawfully stopped the car in which Johnson was a passenger to investigate a traffic infraction. Officer Trevizo did not suspect Johnson or the other passengers of criminal activity. She patted him down for weapons strictly based on her observations that he may have been armed and dangerous. Thus, this case turns purely on the question of officer safety, whether the police may pat down a vehicle's passenger based on a reasonable belief that the passenger is armed and potentially dangerous.

In his Brief in Opposition, Johnson mistakenly asserts that "the record does not even establish that the investigative detention of the driver was ongoing at the time of the pat down." Brief in Opposition at 6. The Arizona Court of Appeals never intimated that the investigation of the driver had ended. Moreover, contrary to Johnson's contention, the record of the

suppression hearing establishes that Officer Trevizo's contact with and pat down of Johnson occurred during the ongoing detention of the driver. At the hearing on Johnson's motion to suppress the search, the prosecutor asked Trevizo, "did [Detective Machado] ask the driver of the vehicle to step out of the car?" Trevizo answered, "Yes, all of this is kind of happening simultaneously." (R.T. 11/7/05, at 13.) On cross-examination, the Johnson's defense counsel asked Trevizo, "[s]o [Detective] Machado is dealing with the driver, [Officer] Gittings is dealing with the front passenger, you're dealing with my client?" Trevizo said, "Yes, sir." (*Id.* at 30.) Later, the judge asked Trevizo, "[a]t the time that you approached the defendant in this case, what was happening to the driver of the vehicle, to your knowledge?" Trevizo responded, "[t]o 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.* at 42-43.) The testimony is clear that the other officers were processing the driver and front-seat passenger at the same time Trevizo spoke with Johnson and patted him down. No evidence suggests that the driver or the vehicle had been released. All the evidence shows that Johnson was seized equally with the driver during the investigative stop and that the investigation of the driver occurred "simultaneously" with Trevizo's conversation with and pat down of Johnson.

The Arizona Court of Appeals concluded that 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. Pet. App. A at 14, ¶ 27. But for all the

reasons cited by this Court in *Brendlin v. California*, 127 S. Ct. 2400, 2407 (2007), quoted in the Petition for Writ of Certiorari at 10–11, a reasonable person in Johnson’s position would not believe he was free to leave during an investigative stop of the driver, regardless of his or the officer’s subjective beliefs about the encounter.

Contrary to Johnson’s assertions in his Brief in Opposition at 6–7, the holdings of *Michigan v. Long*, 463 U.S. 1032 (1983), *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and *Adams v. Williams*, 407 U.S. 143 (1972), support the Petition. In *Mimms*, this Court held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous. 434 U.S. at 110–12. The decision rested in part on the “inordinate risk confronting an officer as he approaches a person seated in an automobile.” *Id.* at 110.

In *Adams*, this Court held that the police, acting on an informant’s tip, may reach into the passenger compartment of an automobile to remove a gun from a driver’s waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip. 407 U.S. at 148. Again, the decision rested in part on this Court’s view of the danger presented to police officers in traffic stop situations. *Id.*

Long involved the search of a passenger compartment of a vehicle, but its holding is equally applicable to the facts of the present case. This Court held in *Long* that the protection of police and others

can justify protective searches when police have a reasonable belief that the suspect poses a danger because “roadside encounters between police and suspects are especially hazardous.” 463 U.S. at 1049. Nothing about the underlying facts in *Mimms*, *Adams*, and *Long* suggests that their holdings do not apply equally to the facts of the present case.

Johnson contends that the Arizona Court of Appeals did not expressly decide whether Officer Trevizo had a reasonable belief that Johnson might be armed and dangerous. Brief in Opposition at 6, 15. However, the state court “assume[d], without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous.” Pet. App. A at 13–14, ¶ 26. Indeed, abundant evidence supported Trevizo’s suspicion that Johnson was armed and potentially dangerous: (1) he watched the officers as they approached the vehicle instead of looking front like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips colors; (5) the traffic stop took place near a known Crips area; (6) he told her he was a convicted felon; and (7) she knew from her experience with street gangs that gang members often carry guns. (R.T. 11/7/05, at 20.) In view of the state court’s holding that the encounter was consensual, no express finding was required. But the question whether Trevizo reasonably believed Johnson was armed and posed a potential danger is not disputed in the record.

Johnson asserts that he challenged the pat down not just under the Fourth Amendment but also under “Arizona’s broader right to privacy.” See *Ariz. Const.* art. 2, § 8. Brief in Opposition at 15. He avers that

even if this Court were to grant certiorari and reverse, “the Arizona courts would have to decide this issue.” *Id.* Johnson’s assertion should not affect this Court’s decision to grant certiorari. The mere fact that there is a possible adequate and independent state law ground for the Arizona court’s decision does not bar this Court, on petition for a writ of certiorari, from reaching federal questions where the state court has clearly rested its decision on the United States Constitution.¹ *Oregon v. Guzek*, 546 U.S. 517, 523 (2006).

Based on the facts of this case, a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of an investigative stop, is permissible under the Fourth Amendment. This is consistent with the standards that this Court and many lower courts have enunciated that have upheld

¹ Moreover, no greater protections for passengers of lawfully stopped cars exist under the Arizona Constitution. See *State v. Reyna*, 205 Ariz. 374, 378, ¶ 14, 71 P.3d 366, 370 (App. 2003) (art. 2, § 8 of the Arizona Constitution is of the same effect and purpose as the Fourth Amendment concerning the scope of allowable vehicle searches). Johnson relies on an inapposite case which holds that the Arizona Constitution affords greater protection against *home searches* than the United States Constitution. *State v. Bolt*, 142 Ariz. 260, 264–65, 689 P.2d 519, 523–24 (Ariz. 1984); see also *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986) (the Arizona Constitution is even more explicit than its federal counterpart in safeguarding Arizona citizens from unlawful entry of their homes by law enforcement officers). *Bolt* and *Ault* expressly concern the sanctity of homes under the state constitution and cannot be applied to the rights of vehicular passengers because of the unique issues that arise during traffic stops. *Reyna*, 205 Ariz. 374, 378 n.5, 71 P.3d 366, 370 n.5; see *Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (“the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger”). *Wilson* is controlling law in automobile stops. Therefore, the Arizona courts have no state constitutional issue left unresolved.

limited weapon pat downs of passengers where no criminal behavior is suspected but where the police had individualized suspicion that the passenger might be armed and dangerous.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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