No. 07-1122

In the
Supreme Court of the United States
October Term, 2008

STATE OF ARIZONA,
Petitioner,
vs.

LEMON MONTREA JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL SHERIFFS' ASSOCIATION, THE ARIZONA LAW ENFORCEMENT LEGAL ADVISORS' ASSOCIATION and THE ARIZONA ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF PETITIONER.

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INTEREST OF AMICI CURIAE

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Timely notice of intent to file this brief has been served upon Counsel for each party. Consent to file has been granted by Counsel for the Petitioner and Counsel for the Respondent. Letters of consent of the Petitioner and Respondent have been filed with the Clerk of this Court, as required by the Rules.[1]

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: this brief was authored for the amici by James P. Manak, Esq., Counsel of Record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

AELE has previously appeared as amicus curiae over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), was founded in 1893 and is the largest organization of police executives and line officers in the world. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Arizona Law Enforcement Legal Advisors' Association (ALELAA) is an association of attorneys who advise and represent local, state and federal law

enforcement agencies. The Arizona Association of Chiefs of Police (AACP) is an association of all of the municipal chiefs of police in Arizona. Both organizations have a keen interest in any legislation, court decision or statement of public policy that affects the authority, effectiveness, safety and welfare of law enforcement officers in the State of Arizona. The members of the ALELAA also provide a large portion of basic and advanced legal training to Arizona law enforcement officers. The decision of the court below has an adverse effect on the effectiveness and safety of law enforcement officers in Arizona as well as other states. These organizations seek to assist this Court by providing their analysis of the issues and a broader look at the risk to police officers presented by the decision in this case.

Amici are national and state associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of formulating rules and policies on traffic stops of vehicles and the safety of police officers in conducting their sworn duties; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law

enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policies on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

This brief concentrates on policy issues, including the importance of effective rules and procedures for conducting stops of vehicles and the protection of law enforcement officers from injury and death as they perform their duties. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these, especially the issue of officer safety in conducting vehicle stops and dealing with drivers and passengers.

STATEMENT OF THE CASE

Defendant was convicted of criminal possession of a weapon and possession of marijuana. At a suppression hearing officer Maria Trevizo testified that she was a member of the Arizona state gang task force. She had attended basic and advanced training in gang enforcement and had two years of on-the-job experience. She was on patrol with two other members of the gang task force in an area of Tucson, Arizona, known for gang activity by a street gang known as "Crips." Crips gang members, she testified, were known to possess guns.

The task force members initiated a traffic stop on a vehicle for an insurance violation. The vehicle had three occupants. While officer Trevizo approached the vehicle on foot, she noticed defendant, the backseat passenger, look back at the police car, say something to the people in the front seat, and then maintain eye contact with the officers. She testified that this was unusual behavior because in her experience people normally look front during a traffic stop. While her partner made contact with the driver, Trevizo made contact with defendant. The occupants of the car denied that there were any weapons in the vehicle. Defendant had no identification with him, but had a police scanner in his jack-

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

Officer Trevizo also noted defendant's blue shirt, shoes, and bandanna. She knew that members of the Crips gang show their gang affiliation by wearing blue clothing. She testified that there was particular significance in defendant's bandanna because bandannas in gang colors are an insignia for the gang.

While defendant was seated in the back seat, he volunteered that he was from Eloy, Arizona. Trevizo knew from experience in gang interdiction that the predominant street gang in Eloy was the "Trekkle Park Crips." Johnson also told Trevizo that he had a criminal record. She asked Johnson to exit the vehicle, intending to speak with him away from the other occupants of the car to gather intelligence about his gang. She testified that in her opinion Johnson was free to refuse to exit the vehicle. Once Johnson was out of the vehicle, she asked him to turn around because she was going to pat him down. She said she did this solely for reasons of officer safety, "because I had a lot of information that

would lead me to believe he might have a weapon on him." She stated that the search was solely because of her concern for her safety. She patted down defendant's exterior clothing and felt the butt of a handgun in his pants' waist. He was arrested and a subsequent search of his person incident to arrest produced marijuana on his person. The driver was outside the car during the encounter between Trevizo and defendant.

Officer Trevizo testified that the following factors led her to suspect that defendant might have a gun: (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) he told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy. She testified that it was the totality of these circumstances that contributed to her concern for her safety. The trial court denied the motion to suppress.

Defendant was convicted but his conviction was reversed by the Arizona Court of Appeals, State v. Johnson, 217 Ariz. 58, 170 P.3d 667 (App.Div. 2, 2007). Two

judges of the Court of Appeals held that defendant was seized pursuant to a lawful traffic stop of the driver, but that officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when defendant exited the back seat of the vehicle to talk with officer Trevizo. The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a Terry frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot,'" quoting Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968). One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in light favorable to upholding the trial court's determination, Trevizo was lawfully in defendant's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat down of his person."

SUMMARY OF ARGUMENT

In the context of a vehicle stop for a traffic violation, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger is armed and presently dangerous, even if the officer lacks reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The decision below, if affirmed, would prevent a search for weapons based on reasonable officer safety concerns—creating an unworkable, impractical, and dangerous precedent for vehicle stops—and deter officers from acting with appropriate caution when conducting legitimate traffic stops, with the result that officers' lives will be unreasonably endangered.

ARGUMENT

IN A VEHICLE STOP A POLICE OFFICER MAY CONDUCT A PAT-DOWN SEARCH OF A PASSENGER WHEN THE OFFICER HAS AN ARTICULABLE BASIS TO BELIEVE THE PASSENGER IS ARMED AND PRESENTLY DANGEROUS, EVEN IF REASONABLE GROUNDS TO BELIEVE THAT THE PASSENGER IS COMMITTING, OR HAS COMMITTED, A CRIMINAL OFFENSE IS LACKING; THE BALANCING OF THE STATE'S INTEREST AND THE PASSENGER'S PRIVACY INTEREST FALLS ON THE SIDE OF THE STATE DUE TO THE LEGITIMATE AND WEIGHTY CONCERN FOR THE SAFETY OF LAW ENFORCEMENT

OFFICERS WHEN THERE IS AN ARTICULABLE BASIS FOR OFFICERS TO BELIEVE A PASSENGER MAY BE ARMED AND DANGEROUS, AND IN VIEW OF THE UNIQUE DANGERS THAT SUCH STOPS POSE AS DOCUMENTED BY STATISTICS.

Amici will not repeat the legal arguments put forward by the Petitioner in this case; we do, however, support them. As national and state representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court of the following policy considerations from our professional perspective.

This Court and others have long recognized that traffic stops are an inherently dangerous situation for police officers and suspects. Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2137 (2004) (a custodial arrest and incidental search of a vehicle is fluid and the danger to the police officer flows from the fact of the arrest and its attendant proximity, stress, and uncertainty); Maryland v. Wilson, 519 U.S. 408, 413, 117 S.Ct. 882 (1997) ("Regrettably, traffic stops may be dangerous encounters . . . the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer."); Michigan v. Long, 463 U.S. 1032, 1048, 103 S.Ct. 3469 (1983) (noting ". . . inordinate risk confronting an officer as he

approaches a person seated in an automobile."); Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S.Ct. 330 (1977) ("Indeed, it appears that a significant percentage of murders of police officers occurs when the officers are making traffic stops."); Ruvalcaba v. City of Los Angeles, 64 F.3d 1323 (9th Cir. 1995) (investigative detentions involving suspects in vehicles are especially fraught with danger to police officers); United States v. Flores, 359 F.Supp.2d 871, 876 (D.Ariz. 2005) (". . . dangerous situations can arise if recently stopped persons are allowed to confer out of his [officer's] presence."); State v. Ochoa, 189 Ariz. 454, 943 P.2d. 814, 822 (App.Div. 1, 1997) ("Nor does the fact that an investigating officer may have the person 'under his control' diminish the vulnerability of the officer . . ."); State v. Webster, 170 Ariz. 372, 824 P.2d 768, (App.Div. 2, 1991) (the court noted the risks that police officers confront when making traffic stops and agreed that the safety of the police officer is a legitimate and weighty concern).

In order to protect themselves from assaultive conduct of drivers and passengers, police officers can rely upon the protections of Terry v. Ohio to conduct pat downs based upon reasonable suspicion that the subject is armed and dangerous to the officer. Such protection should

apply whether the subject is in a consensual relationship or a detention. The objective in either situation is protection of the officer based on the facts.

Determining which police-citizen contacts fall within the protection of the Fourth Amendment is a fact intensive determination and turns on the unique facts of each case. See Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968) ("[T]he police officer must be able to point to specific and articulable facts"); Sibron v. New York, 392 U.S. 40, 64, 88 S.Ct. 1889 (1968) (the officer "must be able to point to particular facts'; United States v. Griffith, http://caselaw.lp.findlaw.com/data2/circs/8th/071734p.pdf (No. 07-1734, 8th Cir. 7-21-08, p. 5).

In determining whether an officer has a reasonable suspicion of a threat to her personal safety the courts have considered the training and experience of the officer. See United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744 (2002) ("This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."); People v. Frank, 233 Cal.App.3d 1232, 1240 (1991); United

States v. Barlin, 686 F.2d 81, 86 (2nd Cir. 1982) ("[W]e must view the surrounding circumstances . . . through the eyes of a reasonable and cautious police officer on the scene guided by his training and experience."); United States v. Rideau, 969 F.2d 1572, 1575 (5th Cir. 1992) ("Trained, experienced officers like Ellison may perceive danger where an untrained observer would not.").

In the instant case the police officer knew the following facts, based on her observations, experience and training: (1) defendant 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 street gang colors; (5) the traffic stop took place near a known Crips area; (6) he told her he was a convicted felon; (7) defendant told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy; (8) the officer had been trained in gang enforcement and had two years on-the-job experience dealing with gangs; and (9) the officer knew that gang members usually were armed. Based on all these facts, the officer testified that it was the totality of these circumstances that contributed to her concern for her safety and prompted her to do a protective frisk for weapons.

Not to be overlooked in this equation for finding reasonable suspicion for the frisk, was the defendant's reasonably perceived (by the officer) gang membership. In United States v. Garcia, 459 F.3d 1059 (10th Cir. 2006), a court upheld the frisk of the defendant in part because he was a known gang member, and the officer testified that, "based on his training and experience he knew that guns are often part of the gang environment." The court noted: "In our society today this observation resonates with common sense and ordinary human experience." 459 F.3d at 1066. See also, People v. King, 216 Cal.App.3d 1237, 1241 (1989) ("[D]etention of a known gang member would increase the likelihood of harm to an officer and further justify a search for weapons."); People v. Guillermo M., 130 Cal.App.3d 642, 644 (1982) ("The agent knew that appellant had been in trouble before and associated with a gang."); United States v. Osbourne, 326 F.3d 274, 278 (1st Cir. 2003) (defendant "was a member of a violent street gang").

Amici submit that there is no room for doubt that in the instant case the officer had reasonable suspicion to believe she was in danger and needed to protect herself, whether this was a "consensual encounter" or an "investigative detention." To have failed to do so might have cost the officer her life or serious

injury as shown by statistical data on traffic stops.

The incidence of assault and death faced by officers in traffic stops is remarkably high. The latest figures available from the United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Law Enforcement Officers Killed and Assaulted, 2005 and 2006, are found at:
http://www/fbi.gov.ucr/killed/2006/table 67.html
http://www.fbi.gov/ucr/killed/2005/table 67.htm
The figures for 2007 are incomplete.

According to these statistics, officers were assaulted while making traffic stops, 6,360 times during 2005 (Table 67) and 6,490 times during 2006 (Ibid.). In comparison, officers were assaulted while investigating suspicious persons or circumstances some 5,520 times during 2005 and 5,568 times during 2006. (Id.)

Encountering assaultive behavior while making traffic stops was more likely to occur than investigating suspicious persons or circumstances. Additionally, the number of officers involved in a traffic stop is not a guarantee of safety. In fact, most assaults occurred while an officer had a partner or a backup unit.

The situation in Arizona is not markedly different from that in the rest of the country. In 2006, 283 officers were assaulted while making traffic stops, and in 2005, 292 officers were assaulted in the same circumstances. See Crime in Arizona, Arizona Dept. of Public Safety (2007) (Table, "Officer Assaults Traffic Stops").

Amici also point out that this case is not just about the Fourth Amendment exclusionary rule. If officers are not permitted to frisk on reasonable suspicion, suspected gang members in a car that is stopped for a traffic violation, whether in the context of an investigative detention or a consensual encounter, civil rights organizations will seek injunctive relief, sanctions against violations, and substantial attorneys' fees under 42 U.S.C. §§ 1983, 1988. See Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977). We submit that officers should not be put to the choice of risking civil litigation or risking their lives.

Having stated the government's interest in maintaining the effectiveness and safety of law enforcement officers, the other side of the issue is the privacy interest of the individual. There is, of course, an expectation of privacy involved in every frisk and pat down for weapons. Amici submit, however, that this

Court has balanced these interests in Terry v. Ohio and its progeny, and that the fulcrum of this balance is reasonableness and officer safety.

Amici are involved in the training of police officers on legal issues in both recruit classes and advanced officer training programs. Most police recruits have not had prior significant exposure to constitutional issues. They are not lawyers and this Court has stated they are not expected to act as lawyers; that these concepts are practical, non-technical concepts that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302 (1949). Many courts seem to have forgotten this assessment. As a result, it becomes increasingly difficult to train and retrain officers on these concepts.

Amici submit that it is preferable, when possible, for police officers to have a standardized rule that guides them for the sake of their safety and effectiveness and for the sake of the civil rights of those with whom they come in contact. The vast majority of police officers do not want to violate citizens' civil rights, as they realize they enjoy the same rights. Law enforcement officers are taught to respect and protect the

civil rights of all persons. They look to the courts for direction on how best to provide that respect and protection. The adoption of reasonable suspicion for a person involved in a traffic stop—which this Court has said is in the nature of a seizure of both driver and passenger, see Brendlin v. California, 127 S.Ct. 2400 (2007)—as the basis for a frisk for an officer's safety is such a standardized rule.

CONCLUSION

Amici Curiae respectfully request the Court to reverse the Arizona Court of Appeals' decision and preserve an effective legal tool that allows law enforcement officers to properly protect themselves from harm while performing their duty in vehicle stops. We ask the Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

Respectfully submitted,

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