

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRUCE EDWARD BRENDLIN, :

4 Petitioner :

5 v. : No. 06-8120

6 CALIFORNIA. :

7 - - - - - x

8 Washington, D.C.

9 Monday, April 23, 2007

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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 11:03 a.m.

14 APPEARANCES:

15 ELIZABETH M. CAMPBELL, ESQ., Sacramento, Cal; on behalf  
16 of the Petitioner.

17 CLIFFORD E. ZALL, ESQ., Deputy Attorney General,  
18 Sacramento, Cal; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 06-8120, Brendlin versus California.

Ms. Campbell.

ORAL ARGUMENT OF ELIZABETH M. CAMPBELL, ESQ.

ON BEHALF OF THE PETITIONER

MS. CAMPBELL: Mr. Chief Justice, and may it please the Court:

When an officer makes a traffic stop, activates his flashing lights, he seizes not only the driver of the car but also the car and every person and everything in that car. This unremarkable conclusion is what Petitioner asks this Court to rule on, rule today. This simple rule is not only firmly rooted in this Court's precedence, it also protects police officers and the liberty interests of everyone traveling on a public State highway.

CHIEF JUSTICE ROBERTS: Well, it wouldn't apply in a taxicab, right? I mean, the cab is driving erratically, the officer pulls it over. If I'm a passenger in the cab, I think I can get out and catch another cab, right?

MS. CAMPBELL: Whether or not you can get out and catch another cab is sort of a separate issue,

1 but at the moment that the car comes to a stop you've  
2 been stopped by a Government means intentionally  
3 applied, and I believe you are seized at that point.  
4 After that it may become a factual question with the  
5 totality of the circumstances and it may be  
6 significantly different from that, from the question we  
7 face in a case like this where it's a passenger in a  
8 private car.

9 JUSTICE ALITO: And would that apply if a  
10 bus was pulled over?

11 MS. CAMPBELL: If a bus --

12 JUSTICE ALITO: Everybody on the bus is  
13 seized?

14 MS. CAMPBELL: Once again, a forward motion  
15 stopped by government means intentionally applied is a  
16 seizure under this Court's holding in *Brower*.

17 CHIEF JUSTICE ROBERTS: But you would have  
18 no reason if you were a passenger on a bus in the normal  
19 case to assume that the officer was concerned about you.  
20 Your view would not be that they are stopping me, you'd  
21 think they're stopping the bus because the driver ran a  
22 red light or whatever.

23 MS. CAMPBELL: With all due respect, I  
24 believe at that point what you believe is not  
25 necessarily the dispositive issue. The dispositive

1 issue is that your freedom of movement has been  
2 curtailed by government action.

3 JUSTICE SOUTER: Well, are you saying then  
4 that in a case in which the bus is stopped, the car is  
5 stopped and so on, the role for the test about whether a  
6 reasonable person would regard himself as free to leave  
7 is a test to determine when the, when the seizure ends,  
8 as distinct from when the seizure begins?

9 MS. CAMPBELL: Exactly, Your Honor.

10 JUSTICE SOUTER: There's no other role for  
11 that test.

12 MS. CAMPBELL: Exactly, Your Honor. And I  
13 believe that's the rule we apply with respect to  
14 drivers. We don't normally formulate it that way  
15 because usually there's a directive from the officer  
16 saying okay, you're free to leave, there's a clear point  
17 where the seizure ends. But --

18 JUSTICE SOUTER: Yeah, but you're taking the  
19 position that whenever you are in a vehicle that is  
20 stopped, you are seized?

21 MS. CAMPBELL: Exactly. Yes, Your Honor.

22 JUSTICE ALITO: In this case, is it correct  
23 to view this as -- to view it this way: As soon as the  
24 officer approached the car, as I understand it, he  
25 recognized the Defendant as a potential parole violator.

1 MS. CAMPBELL: Yes.

2 JUSTICE ALITO: And there would be  
3 reasonable suspicion then from that moment on, for at  
4 least a brief detention of the individual to determine  
5 whether in fact there was a warrant for the individual.  
6 So all we're talking about, the only period of potential  
7 seizure that we have to worry about is up to the moment  
8 when the officer sees Mr. Brendlin.

9 MS. CAMPBELL: In terms of determining when  
10 Mr. Brendlin was seized, yes. The -- there --

11 JUSTICE ALITO: In other words, any seizure  
12 after that point would be supported by reasonable  
13 suspicion?

14 MS. CAMPBELL: Well, except in this case of  
15 course, it would be fruit of the poisonous tree, since  
16 the State has continued --

17 JUSTICE KENNEDY: Well, that's the question.  
18 Do you concede that this arrest was lawful?

19 MS. CAMPBELL: The arrest itself -- the  
20 arrest itself is still a product of the exploitation.

21 JUSTICE KENNEDY: Do you concede that the  
22 arrest was lawful? The officer was obligated to arrest  
23 this person, knowing what he did, was he not?

24 MS. CAMPBELL: Yes. We concede that the --

25 MS. CAMPBELL: Yes.

1 JUSTICE KENNEDY: Do you have any case in  
2 which we exclude the evidence seized incident to an  
3 arrest when the arrest is lawful?

4 MS. CAMPBELL: Well, Your Honor, I don't  
5 have a case that has these specifics in it. This is a  
6 new --

7 JUSTICE KENNEDY: I didn't think you did,  
8 and that's my concern. I assumed that this officer was  
9 required to arrest the person, and we can have  
10 hypotheticals, he sees somebody wanted for multiple  
11 murders and so forth. But I'm just not aware of  
12 authority which says that when the arrest is lawful and  
13 the search is incident to that arrest, that the evidence  
14 is excluded. What's your best -- what's your closest  
15 case you can give me on that?

16 MS. CAMPBELL: Well actually, I would turn  
17 to the cases that talk about searches incident to arrest  
18 and also, go back to the rationale for the intended --

19 JUSTICE KENNEDY: Can I have one please?

20 MS. CAMPBELL: Well actually, let's look at  
21 Thornton and --

22 JUSTICE KENNEDY: Thornton, I'm not familiar  
23 with immediately. I'll look it up.

24 MS. CAMPBELL: Thornton and Knowles are two  
25 cases that this Court has decided relatively recently

1 where you talk about the rationale for searches incident  
2 to arrest. They're not cases that I would have  
3 considered to be directly on point for the seizure issue  
4 in this case, but in Knowles the Court held that you  
5 can't search a car incident to arrest on a minor traffic  
6 stop because --

7 JUSTICE KENNEDY: No, no. This was the  
8 search of a person incident to an arrest, and I really  
9 jumped a little bit ahead of the questions that Justice  
10 Alito was proposing. There may have been a moment in  
11 which the officer did not have the authority to act and  
12 he did, but it seems to me that once he has this  
13 knowledge, there is now an intervening cause and the  
14 arrest is proper, and the search as well.

15 MS. CAMPBELL: If I can divide this into two  
16 issues. First we have the issue of the arrest itself,  
17 and I am aware of no mechanism by which Mr. Brendlin  
18 would be entitled to suppress the arrest itself, to not  
19 be arrested on the parole warrant, or to get out of jail  
20 free, so to speak. That is a separate issue, however,  
21 than discussing whether or not the evidence that comes  
22 out of this auto search which is a direct product of the  
23 illegal stop should be admissible. And --

24 JUSTICE SCALIA: Well, it's a direct product  
25 of the arrest, and if the arrest is legal, then it seems

1 to me the search incident to the arrest is legal. And  
2 are you acknowledging that the arrest is legal, that  
3 whatever the exclusionary rule does, it does not require  
4 you -- when you've engaged in an unlawful seizure and  
5 you find an ax murderer sitting there in the car, you  
6 don't have to say sorry, I shouldn't have stopped the  
7 car. You can arrest the person, right?

8 MS. CAMPBELL: And --

9 JUSTICE SCALIA: So the arrest is legal. If  
10 the arrest is legal, then the search incident to it must  
11 be legal.

12 MS. CAMPBELL: Well, I think we have to  
13 look, as I said, at the purpose -- the rationales for  
14 allowing a search incident to arrest are the need to  
15 disarm the suspect or take him into custody, and the  
16 need to preserve evidence for trial. In this specific  
17 case he's arrested on a parole warrant. I can't imagine  
18 what evidence in that car would be needed to be  
19 preserved in order to proceed on the parole warrant.

20 JUSTICE KENNEDY: What authority do you have  
21 that the operation of the exclusionary rule depends on  
22 the offense for which he was arrested?

23 MS. CAMPBELL: Well, the search incident to  
24 an arrest is an exception to -- to the exclusionary  
25 rule.

1 JUSTICE KENNEDY: Do you have any authority  
2 for the proposition you just offered?

3 MS. CAMPBELL: The proposition --

4 JUSTICE KENNEDY: The search incident to an  
5 arrest leads to an exclusion in one case and not in  
6 another case, depending on the charge on which he was  
7 arrested?

8 MS. CAMPBELL: Well, if what we are talking  
9 about is whether or not the exclusionary rule should  
10 apply, we look to the purposes of the exclusionary rule  
11 which is to deter unlawful police conduct. If we allow  
12 officers to make a stop on a hunch that someone has a,  
13 has a, has a warrant or whatever, we have essentially  
14 reduced the deterrent effect of the exclusionary rule as  
15 it applies to traffic stops, as it has historically  
16 applied to traffic stops.

17 This is, this is not a new proposition that  
18 if you stop a car and -- if you saw something in plain  
19 view after an illegal stop, it wouldn't be -- it would  
20 still be excluded.

21 JUSTICE SOUTER: Well, but why -- why  
22 doesn't plain view kick in just as readily, once it is  
23 conceded as it has to be, that at the point that he was  
24 making the arrest, the officer was acting lawfully? And  
25 if he was acting lawfully when he made the arrest, why

1 doesn't he get the benefit of the plain view doctrine to  
2 the extent that he saw any evidence before him at that  
3 point?

4           And I take it the plain view exception would  
5 at least cover the, I forget what it was, but the  
6 materials that were in the, in the passenger well of the  
7 passenger car, that -- that were known to be used as a  
8 source of, of ingredients for making methamphetamine?

9           MS. CAMPBELL: Well, I believe you  
10 misunderstood me. I wouldn't say that the plain view  
11 doctrine would allow admission of that evidence. If the  
12 stop is illegal then anything the officer seized --

13           JUSTICE SOUTER: No, I realize. But we've  
14 got -- we've got a choice here, I mean, I think Justice  
15 Kennedy's questions brought this out. We've got a  
16 choice here of two ways to look at the State action at  
17 the moment of -- of the arrest. One way to look at it  
18 would be to say it was a product of an unlawful stop.  
19 Another way to look at it would be to say it was an act  
20 of executing a validly issued warrant. And you concede  
21 that they at least could lawfully have executed the  
22 arrest, they didn't have the arrest warrant but there  
23 was an arrest warrant issued for them and they could  
24 lawfully execute that warrant and arrest him at that  
25 point.

1           Let's assume that those are our two choices.  
2   On choice number one the State, the police officer, is  
3   acting someplace where he shouldn't have been. On  
4   choice number two, the parole violator, your client, is  
5   in a place where he shouldn't have been because he  
6   should have been arrested and he should have been back  
7   behind bars at that point.

8           If we have a choice between those two ways  
9   of looking at the case, why don't we for any purpose,  
10   give the casting vote to the lawfulness of the arrest,  
11   to the warrant which was issued by a neutral and  
12   detached magistrate at some point? And if we do that,  
13   then why isn't not only a search incident to an arrest,  
14   but the seizure of materials which were in plain view at  
15   the moment of that arrest, subject to a -- an  
16   admissibility rule?

17           MS. CAMPBELL: Well, first, Your Honor, a  
18   slight correction. I don't believe that there is any  
19   evidence that this was an issue issued by an detached  
20   magistrate because what we call in California a Powell  
21   warrant under California Penal Code Section 3000(v)(a)  
22   --

23           JUSTICE SOUTER: Okay. But it was, it was a  
24   warrant that was lawful for Fourth Amendment purposes,  
25   is that conceded?

1 MS. CAMPBELL: Yes. Yes.

2 JUSTICE SOUTER: Okay.

3 MS. CAMPBELL: Issued by the Board of Prison  
4 Terms.

5 JUSTICE SOUTER: All right.

6 MS. CAMPBELL: But in terms of why we don't  
7 do this, it's the reason we exclude evidence in general  
8 when it's unlawfully seized, when it is the direct result  
9 of a -- of a stop that is illegal from its inception.

10 JUSTICE SOUTER: Well, all right, but you're  
11 simply saying we give, we put the greatest emphasis on  
12 act A, stopping the car rather than act B, lawfully  
13 arresting, regardless of the legality of stopping the  
14 car.

15 MS. CAMPBELL: Well -- well actually we have  
16 a test for this. It's the Brown test; it's the Wong sun  
17 test, and the people have the burden. The test is if  
18 the, even there is attenuation, which I -- which is what  
19 the people are arguing, the warrant in this case is,  
20 that's not the end of the inquiry. We also look at the  
21 flagrancy of the officer's misconduct, and we look at  
22 the temporal proximity to the initial illegality. And  
23 in this case that attenuating circumstance is simply not  
24 --

25 JUSTICE SOUTER: But do we, do we have do we

1 have in any of the cases -- I, frankly I don't recall.  
2 I remember Brown but I don't think there was anything in  
3 Brown comparable to the lawful authority to arrest  
4 independent of the stop. And -- and that's what makes  
5 this case unusual. And -- and if we emphasize the  
6 lawfulness of the arrest, quite independent of the  
7 circumstances of the stop, and we also bear in mind that  
8 the point of the exclusionary rule is -- is to deter  
9 police conduct, and you've got another priority here,  
10 the driver, who can invoke the exclusionary rule and  
11 deter police misconduct.

12 I don't see where the interest would lie in,  
13 or where the justification would lie, in our saying  
14 we've got to put, as it were all the eggs in the basket  
15 of the unlawful stop, as opposed to the basket of the  
16 lawful arrest.

17 MS. CAMPBELL: Well, Your Honor, I think,  
18 actually I'm not sure that the driver in this case is  
19 going to have a remedy. If we look at the steps in this  
20 case, first we have this officer who makes an illegal  
21 stop. He continues that detention in order to run  
22 warrant checks on both parties; he finds probable cause  
23 to arrest Mr. Brendlin; he searches the car incident to  
24 the arrest, even though the Belton rationale search  
25 incident to arrest perhaps is a bit shaky in the case,

1 because Mr. Brendlin is in the back of the car, and it's  
2 a parole warrant. But at that point the officer also  
3 searches the driver, and if the evidence is, or if the  
4 taint is attenuated, as to Mr. Brendlin, and this is a  
5 lawful search incident to his arrest, I don't really  
6 understand how the driver is going to have a remedy as  
7 well. And in fact --

8 JUSTICE KENNEDY: Well, do we have an -- an  
9 argument that something was seized from the driver that  
10 should not have been seized from his person?

11 MS. CAMPBELL: The driver is not a party to  
12 the appeal, but she was convicted, and -- and -- and --

13 JUSTICE KENNEDY: Well, but I mean, that's  
14 not before us.

15 MS. CAMPBELL: No, it's not.

16 JUSTICE KENNEDY: We're talking about  
17 evidence seized from the defendant.

18 MS. CAMPBELL: No, Your Honor. I was  
19 responding to the question doesn't the driver have a  
20 remedy? You know, isn't that enough to provide  
21 deterrence? But if we allow a warrant by one person of  
22 the car to attenuate the search, search of the car, then  
23 as I read this Court's precedents, the search is  
24 attenuated, the taint is --

25 JUSTICE BREYER: The California Supreme

1 Court as far as I could tell was thinking that it turns,  
2 if you stop somebody, you stop somebody, if you make him  
3 think he isn't free to go.

4 So you seem to me to give a lot of cases  
5 where he would feel free to go, and you're saying still  
6 that that's a stop. Well, I mean, suppose the policeman  
7 comes along and he sees three people in a car and there  
8 is Jack the Ripper driving. So he says okay, I'm  
9 stopping the car. Now he says the other three people,  
10 I'm not interested in you; my pal and partner here is in  
11 a second squad car; he will take you wherever you want  
12 to go. Have they been stopped?

13 MS. CAMPBELL: Have they been stopped by the  
14 initial seizure?

15 JUSTICE BREYER: No.

16 MS. CAMPBELL: The initial stop of the car,  
17 yes.

18 JUSTICE BREYER: Okay. Well, I don't think  
19 you're going to find authority for that in the law. At  
20 least not in this Court. I mean, I'd like to know what  
21 it is. Maybe you are. I think that would be very  
22 interesting.

23 MS. CAMPBELL: Well, I think the Brower  
24 decision --

25 JUSTICE BREYER: Brower --

1 MS. CAMPBELL: The Brower opinion has a very  
2 --

3 JUSTICE BREYER: What, what were the facts  
4 there?

5 MS. CAMPBELL: Well, in Brower there was a  
6 roadblock --

7 JUSTICE BREYER: There was a roadblock.

8 MS. CAMPBELL: The car crashed into it. But  
9 the, the crucial question, the crucial issue was was  
10 means intentionally applied by the Government.

11 JUSTICE SCALIA: What if the car -- you  
12 know, the car doesn't come to a complete stop. The same  
13 facts that Justice Breyer just gave you. It's creeping  
14 along at, you know, a foot a minute. And then he says  
15 to these other people, you can jump out and go wherever  
16 you like, or you know, or go back to, to my partner's  
17 car. Then they wouldn't have been stopped; is that  
18 right?

19 MS. CAMPBELL: I think then we'd have a  
20 totality of the circumstances test and whether someone  
21 feels free to leave and jump out of a moving car. But I  
22 -- I --

23 JUSTICE SCALIA: So you're putting all the  
24 eggs into the basket that the, the car came to a  
25 complete stop and therefore they have been seized. And

1 what is crucial for the seizure is the elimination on  
2 motion on the part of the car.

3 MS. CAMPBELL: That's how --

4 JUSTICE SCALIA: Any elimination of motion  
5 in a vehicle in which you are the passenger constitutes,  
6 at the request of the authorities, constitutes a  
7 seizure?

8 MS. CAMPBELL: If it is by means  
9 intentionally implied, yes. I think that's, that's how  
10 Hodari --

11 JUSTICE SCALIA: But not if you're still  
12 rolling a little bit, a foot a minute.

13 (Laughter.)

14 MS. CAMPBELL: Well, then it would be  
15 totality of the circumstances test.

16 JUSTICE SOUTER: It seems to me that you're,  
17 you're blending two tests together, and tell me if I'm  
18 wrong. One test is there is no question that if the  
19 police get control over people, those people are not  
20 free to go.

21 MS. CAMPBELL: Yes.

22 JUSTICE SOUTER: And those are the motion  
23 cases. The most extreme example being the -- the  
24 roadblock. Hodari D, did they -- you know, they were  
25 trying to catch him but did they actually get to the

1 point of a seizure for Fourth Amendment purposes?

2 Then you got another category of cases in  
3 which there is no question that someone is stopped, that  
4 a police officer can exercise control, and that control  
5 if so exercised is certainly going to be seizure for  
6 Fourth Amendment purposes. But we don't know whether  
7 the officer really is exercising control, so we ask the  
8 question would a reasonable person in the position of  
9 the individual stopped have believed that he was free to  
10 go?

11 Aren't those two quite distinct tests? The  
12 first test assumes the answer to the question in the  
13 second test. The second test assumes the answer to the  
14 first test, i.e., they're stopped, subject to control.  
15 Aren't they two independent tests?

16 MS. CAMPBELL: I agree with you that they  
17 are two independent tests, and as I went through this  
18 Court's precedents I frankly could not find a single  
19 case in which a person had been in motion and stopped  
20 and came to a stop, the physical stopping of motion, in  
21 which this Court did not find that a seizure had  
22 occurred.

23 JUSTICE SOUTER: Okay. So you were engaging  
24 in shorthand? You, you accept the analytical  
25 distinction but you say look, in the real world once you

1 stop, we -- we know how the person would have felt?

2 MS. CAMPBELL: Well --

3 JUSTICE SOUTER: A reasonable person would  
4 have felt.

5 MS. CAMPBELL: I think that what we have  
6 here, is -- as I said it's really the way we look at it  
7 with drivers as well. There is a bright line. The car  
8 comes to a stop as a result of this display of  
9 authority, you are seized. From that point on when you  
10 would, when a reasonable person would feel --

11 JUSTICE SOUTER: No, but aren't -- you are  
12 saying, I thought by agreeing with you what you were  
13 saying was once the car is stopped, a reasonable person  
14 under those circumstances would not have felt free to  
15 leave.

16 MS. CAMPBELL: I think that's true.

17 JUSTICE SOUTER: Okay.

18 MS. CAMPBELL: I think a reasonable person  
19 would not feel free to leave.

20 JUSTICE ALITO: What if the officer went,  
21 before even approaching the car got on the loudspeaker  
22 and said: "Driver remain in the car; passenger, you're  
23 free to go"?

24 MS. CAMPBELL: I think under the totality of  
25 the circumstances any court would have a hard time

1 saying the passenger is not free to leave then, unless  
2 there is some other intervening, some other factor.

3 CHIEF JUSTICE ROBERTS: But you would state  
4 he is still seized because the car is stopped.

5 MS. CAMPBELL: He is seized by the stop,  
6 absolutely.

7 JUSTICE SOUTER: Well, then you're -- you're  
8 blending the two tests together again.

9 MS. CAMPBELL: Well, the two different --

10 JUSTICE SOUTER: You have either got to  
11 accept their analytical distinction or not.

12 MS. CAMPBELL: I do accept their analytical  
13 distinction, Your Honor. I think it's just -- it's  
14 actually two different fact, two different points in  
15 time. There's the, there's the seizure that occurs when  
16 the car stops; and then there is the continuing seizure  
17 during the course of the traffic stop which for the  
18 driver has a fairly clear ending point; for a passenger  
19 it's going to depend on the facts.

20 JUSTICE ALITO: What's the difference  
21 between that situation where the police officer says on  
22 the loudspeaker passenger remain, driver you're free to  
23 go, and the example that the State has in their brief,  
24 in which a car is stopped and as a result of the way  
25 it's stopped on a narrow road, the other cars behind

1 that car are for some other period of time prevented  
2 from going forward? What's the difference between those  
3 two situations?

4 MS. CAMPBELL: That difference is actually  
5 addressed directly in Brower. Brower addresses that  
6 exact hypothetical. It says a passerby who is  
7 inconvenienced by another stop. There you have  
8 Government, a Government-caused termination of movement  
9 but it's, but there is no intentionally, means  
10 intentionally applied.

11 JUSTICE BREYER: So what it says here,  
12 getting out their quote from it, is it says it does not  
13 occur whenever there is a governmentally caused  
14 termination in individual's freedom of movement, nor  
15 even where there is a governmentally caused and  
16 governmentally desired termination of an individual's  
17 freedom of movement. That only when there is a  
18 termination of freedom of movement through means  
19 intentionally applied.

20 Now, the only way I can -- I mean I say the  
21 difference between desired is that they didn't want to  
22 stop him. They are not interested in stopping him.  
23 That's not our desire to stop him. Our desire is to  
24 stop the driver.

25 So if you don't have the desire and if there

1 is no real restriction of any significance, is there a  
2 stop? I mean I would say Brower, they cited on their  
3 side, for that language.

4 MS. CAMPBELL: Your Honor, where you're  
5 looking at -- we have to look at the objectively  
6 observable facts, which in this case are the flashing  
7 lights. We don't -- I mean the passenger has no  
8 particular way of knowing what the officer's intent is,  
9 which I think is why this Court has consistently held  
10 that the officer's object intent in -- in -- is  
11 irrelevant to the equation.

12 JUSTICE BREYER: Well, the passenger, you  
13 also have to have two things. One they don't  
14 intentionally want to stop him. Two, he doesn't think  
15 his movement is restricted. Where both of those things  
16 are true, then no stop. That's why the people who, say,  
17 are on the railroad car and they stop the whole train,  
18 that the railroad says don't worry, not an  
19 inconvenience: We'll have another train for new 10 or  
20 15 minutes; just get out, except for car one where there  
21 is Jack the Ripper -- you know, those other people are  
22 not stopped.

23 Now that's their argument. What's your  
24 response?

25 MS. CAMPBELL: Well, my response is the same

1 as it has been. The passenger is certainly stopped when  
2 the car comes to a halt. We discuss in our brief that  
3 there are reasons why a passenger could, why the car  
4 could be stopped, as far as the passenger knows, and  
5 particularly in this case where we have -- whereas it  
6 was an unreasonable stop, there was no traffic  
7 violation, neither the passenger nor the driver has any  
8 reason to know why they are being stopped, and --

9 CHIEF JUSTICE ROBERTS: Well, does that make  
10 a difference? Let's say, you know, the car drives  
11 through a red light and the police lights come on. The  
12 passenger surmises that it's because they ran a red  
13 light. So that's a different case? You would say it's  
14 not seized if he reasonably, objectively, reasonably  
15 assumes it's because of what the driver did.

16 MS. CAMPBELL: No, Your Honor. I would  
17 still say that the passenger is seized when the car  
18 comes to a stop.

19 CHIEF JUSTICE ROBERTS: So then why are we  
20 pointing out that they didn't know? It makes no  
21 difference under your view of the case.

22 MS. CAMPBELL: Well, I don't think it makes  
23 a difference one way or the other. I was responding to  
24 the suggestion that the passenger should somehow be  
25 aware of the officer's intent and know when he sees

1 flashing lights that it means the driver -- I don't  
2 think that that's a proper inquiry to determine whether  
3 or not --

4 CHIEF JUSTICE ROBERTS: Well then, if all  
5 that matters is the physical stop, what do you do about  
6 the cases that were talked about earlier where the other  
7 cars have to stop because of the way -- that's a  
8 physical stop and yet our cases indicate you're not  
9 seized in those situations.

10 MS. CAMPBELL: That's a physical stop, but  
11 it's not -- it's not the -- the means intentionally  
12 applied portion of the test doesn't work or it doesn't  
13 satisfy it.

14 JUSTICE ALITO: Well, how do you explain the  
15 justification for stopping if there is the seizure, for  
16 stopping the innocent passenger because the driver has  
17 committed a traffic violation? If that's a seizure of  
18 the passenger, then it's a seizure without reasonable  
19 suspicion of probable cause, right?

20 MS. CAMPBELL: No. I would say that that's  
21 a reasonable, a reasonable stop. That's the risk --  
22 when you get into the car as a passenger, you take a  
23 risk that you may be subject to a reasonable search or  
24 reasonable detention. But the Fourth Amendment doesn't  
25 provide any protection for anyone against reasonable

1 detentions and that would be a reasonable detention.

2 Was there a question?

3 JUSTICE SCALIA: What about a shutdown of an  
4 airport? You know, there is word that somebody has been  
5 seen walking in with a bag of explosives or it looks  
6 like a bag of explosives, so they stop all planes on the  
7 tarmac, shut down all exits to the airport until they  
8 can ascertain what this bag is. Everybody in the  
9 airport and everybody in those planes has been seized  
10 for Fourth Amendment purposes?

11 MS. CAMPBELL: No, Your Honor. Some of  
12 those people in the airport would be in the same  
13 position as the passengers in Bostick and Drayton, where  
14 they weren't going anywhere in the first place, and --

15 JUSTICE SCALIA: Okay, just the people who  
16 were trying to leave the airport. They had just arrived  
17 and they were going to go out to catch a cab and go  
18 home. They have been seized.

19 MS. CAMPBELL: I would say some of those  
20 people would be in the position of the passer-by, the  
21 passers-by identified in Brower. Possibly some of them  
22 would be seized, but it sounds to me like it would be a  
23 reasonable seizure and wouldn't necessarily --I mean a  
24 reasonable seizure, there's no Fourth Amendment  
25 protection against a --

1 JUSTICE SCALIA: Well, it turns out that  
2 there wasn't a bag of explosives and that no reasonable  
3 person would have thought. This was a knitting bag and  
4 some foolish cop thought it was a bag of explosives.  
5 That would have made it unreasonable. So everybody in  
6 the airport who is on the way home has been seized and  
7 has a cause of action.

8 MS. CAMPBELL: Given the extreme leeway  
9 given in airports, if it's so bad that there wasn't  
10 reasonable suspicion to shut it down, I'd say that's  
11 probably a reasonable result for shutting down entire  
12 airports for no reason whatsoever. But under the fact  
13 that you posited, it sounds like it would be exigent  
14 -sent circumstances or something else that would make  
15 that a reasonable suspicion.

16 Going back to our, to the test that  
17 Petitioner asks this Court to adopt, the most important  
18 thing I can say about this test is not only does it  
19 reflect what I think is the real life expectation. It  
20 also protects officer safety by providing a measure of  
21 predictability for both passengers and drivers and as  
22 well for officers.

23 And I'd like to reserve the rest of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Zall.

1 ORAL ARGUMENT OF CLIFFORD E. ZALL

2 ON BEHALF OF RESPONDENT

3 MR. ZALL: Mr. Chief Justice and may it  
4 please the Court:

5 I'd like to respond if I could to Justice  
6 Souter's point earlier. The State sees this as having  
7 two distinct components in a situation where a passenger  
8 is subject to a, in a vehicle that's subjected to a  
9 routine traffic stop. First, you have the stopping of  
10 the vehicle, the physical stopping of the vehicle. In  
11 our view that does not result in a seizure of a  
12 passenger. It's a show of authority much like Hodari D  
13 discussed, which is directed at the driver. The driver  
14 is the operator of the vehicle. When the driver submits  
15 to that show of authority, under this Court's precedents  
16 the driver is seized. The passenger is not seized.

17 JUSTICE SCALIA: Even, even when the reason  
18 the driver is stopped is that a police officer whose car  
19 was alongside, he looks over there and he sees that it  
20 is some notorious felon who is in the back seat, and the  
21 only reason he stops the car is so arrest that felon?  
22 You would still say that, that the show of authority is  
23 only directed at the driver and hence it is only the  
24 driver that's seized?

25 MR. ZALL: Justice Scalia, the way I'd

1 answer that question is to say yes at the outset,  
2 because the driver is in control of the vehicle. By  
3 necessity, the show of authority to stop if it's done in  
4 a routine manner, as was done here, is directed at the  
5 driver. Therefore --

6 JUSTICE SCALIA: That's the right answer. I  
7 think you're being consistent. You have to say that.  
8 You have to say that.

9 MR. ZALL: Thank you.

10 JUSTICE SOUTER: Well, consistent with that  
11 answer, consistent with that answer, what we're  
12 concerned with in these cases is not, in cases like  
13 this, is not literally the moment of the stop, but the  
14 moment of the stop plus one. And in cases like this  
15 the -- I take it you concede the question is would the  
16 passenger, would a reasonable passenger in, in that  
17 situation feel free to leave. And in the absence of a  
18 hypothetical like Justice Alito's in which the  
19 loudspeaker says, all I want is the driver, passenger is  
20 free to go, and so on, absent something like that, what  
21 is the argument that the, that a reasonable person in  
22 the passenger seat would feel free to open the door and  
23 traipse off?

24 MR. ZALL: Justice Souter, I think the, the  
25 pervasiveness and the commonplace nature of a routine

1 traffic stop gives --

2 JUSTICE SOUTER: Have you ever been stopped?  
3 Have you ever been subject to a traffic stop?

4 JUSTICE SCALIA: Tell the truth now.

5 (Laughter.)

6 MR. ZALL: Yes. Yes, I have.

7 JUSTICE SCALIA: Okay.

8 (Laughter.)

9 JUSTICE SOUTER: Okay. The heart rate went  
10 up. The blood pressure went up. But --

11 MR. ZALL: But I was the driver, I was the  
12 driver.

13 JUSTICE SOUTER: Don't you think that a  
14 reasonable passenger at that point would assume that the  
15 officer is in control and that, in the absence of some  
16 affirmative indication that the passenger can go, that  
17 he's supposed to sit there until this thing gets over  
18 with? Isn't that the reasonable response of a  
19 passenger?

20 MR. ZALL: No, Justice Souter, I don't think  
21 so. I think again, because the, the traffic stop is  
22 such a common occurrence and in the overwhelming  
23 majority of cases involving a routine traffic stop, it's  
24 an investigatory stop of the driver. And I think it's  
25 reasonable for the passenger and the driver to see it

1 that way, I would submit that if I am a passenger in a  
2 car and I'm riding with somebody and they, and one  
3 patrol car signals for the driver to pull over, I think  
4 the natural reaction is the driver says, what did I do,  
5 and the passenger says, what did you do? I mean, I  
6 think that's the natural reaction.

7 JUSTICE GINSBURG: The fact that the action  
8 --

9 JUSTICE SCALIA: Well, but the policeman  
10 usually tells the driver and anybody else in the car:  
11 Stay in the car. Policemen don't like people jumping  
12 out of the car. They don't know why they're jumping out  
13 of the car. And I would certainly if I were a passenger  
14 not feel free to immediately open the door and start  
15 walking away, and if I did I would expect the policeman  
16 to tell me: Get back in the car. Isn't that, isn't  
17 that the normal procedure, to keep the occupants in the  
18 car until the policeman investigates?

19 MR. ZALL: Well, I think, Justice Scalia, I  
20 think if the officer did tell you to stay in the car --

21 JUSTICE SCALIA: Well, even if he didn't  
22 tell me. I would have expected him to tell me. I  
23 wouldn't even open the door because I know he would tell  
24 me. I know that I'm not free to leave the car  
25 immediately until he investigates the stop.

1 MR. ZALL: Well, I, I'm not sure that I  
2 agree with that.

3 CHIEF JUSTICE ROBERTS: What if there's a  
4 suitcase in the back seat? Just the driver, the  
5 driver's pulled over, and then somebody comes walking  
6 down the sidewalk, the driver's friend, he opens the car  
7 door, takes the suitcase and starts walking away?  
8 Wouldn't the policeman say, put that back, because he  
9 thought he had seized not just the driver but everything  
10 in the car, too?

11 MR. ZALL: Well, again, Mr. Chief Justice, I  
12 think that if, if the officer -- our position is that if  
13 the officer does something to the passenger to indicate  
14 --

15 CHIEF JUSTICE ROBERTS: I'm talking about  
16 the suitcase. You wouldn't, you wouldn't reasonably  
17 think someone could just take something out of the car  
18 that's been stopped by the officer and walk off with it,  
19 right? Everything, all the contents of the car, are  
20 seized as well as the driver, right?

21 MR. ZALL: I'm not sure that a passenger,  
22 though, is like a suitcase. I mean, a suitcase can't go  
23 anywhere unless somebody does something.

24 JUSTICE KENNEDY: You're representing the  
25 State of California and you want to establish the

1 proposition that any time there is a traffic stop in the  
2 State of California or I guess anywhere in the United  
3 States all the passengers are free to immediately leave,  
4 absent some further countermanding officer -- order by  
5 the officer. I think that's a quite surprising  
6 proposition. Now, we don't have empirical studies and  
7 so forth, but at some point the Court takes judicial  
8 notice and I think indications from the bench are we  
9 just don't think passengers, A, are or, B, should feel  
10 free to leave when there's a traffic stop. I just think  
11 you have no social or empirical documentation for that  
12 position.

13 MR. ZALL: Well, though it's not cited in  
14 our brief, Justice Kennedy, we have talked with the  
15 California Highway Patrol who make over a million stops  
16 a year in California and they treat passengers as free  
17 to leave.

18 JUSTICE BREYER: But I mean, the question --  
19 so I want to know how to decide this case. I understand  
20 what your position is. But I think the normal instinct  
21 of everybody is not about boats, taxis, airports and all  
22 these other examples, but this case. And I, I would say  
23 if you want to go on instinct I wouldn't think of  
24 getting out of a car when I'm the passenger and the  
25 policeman has stopped. But maybe I'm wrong. So when

1 you asked a million policemen, how many instances did  
2 they tell you about where they stopped the car and all  
3 the passengers jumped out and walked away? Was there  
4 one? Was there one.

5 MR. ZALL: Well, I mean -- but I think that  
6 prudent behavior -- just because it's prudent to do  
7 something doesn't make it a seizure.

8 JUSTICE SCALIA: Right. I never pass a  
9 police car. I don't care how slow I'm going. I never  
10 pass a police car. I don't consider myself arrested  
11 just because that's the prudent thing to do, and it may  
12 well be a similar situation when you're sitting in a car  
13 that's been stopped by a traffic policeman.

14 MR. ZALL: I mean, I think, I think again  
15 that --

16 JUSTICE GINSBURG: Mr. Zall, let's say we  
17 have just an intelligent reasonable person reads the  
18 newspaper and says: Oh, they handed down a decision  
19 today that said the police can order me to get out of  
20 the car, the police can order me to stay in the car.  
21 How could such a person feel free to leave knowing that  
22 it is the law that that person can be told, get out, or  
23 if he tries to get out, stay in?

24 MR. ZALL: Well, Justice Ginsburg, I'd say  
25 that, you know, in the Court's seizure jurisprudence

1 there is this notion of a consensual encounter. I think  
2 when an officer approaches a citizen on the street there  
3 is always the apparent authority. The apparent  
4 authority of the police is always present. The police  
5 always have the factual upper hand, if you were, and at  
6 the traffic stop is no different. I mean -- and yet,  
7 this Court has repeatedly said that when the police  
8 approach a citizen, ask for his identification, ask for  
9 his cooperation, even if the police follow him in a  
10 squad car, that that's a consensual encounter.

11 JUSTICE BREYER: Does it matter if they're  
12 on the Santa Monica Freeway?

13 MR. ZALL: I don't think so.

14 JUSTICE BREYER: I mean it would be pretty  
15 dangerous to get out.

16 MR. ZALL: Well, but that would be a reason  
17 why you don't get out. But it doesn't have anything  
18 necessarily to do with the police coercion. I don't, I  
19 don't think -- most of us wouldn't get out. But that  
20 doesn't make it a seizure, just like most of us would  
21 cooperate with the police when the police approach us on  
22 the street. But I don't think -- if anything, I think  
23 the traffic stop is less ambiguous. It's clearer that  
24 the police are not interested in me if I'm a passenger.

25 JUSTICE STEVENS: May I ask this question?

1 Suppose after the stop the passenger in the back seat  
2 starts to get out and the officer says: Stay in the  
3 car. Is he then seized?

4 MR. ZALL: Yes. Yes, because now the police  
5 have directed action at him and in that situation a  
6 reasonable person --

7 JUSTICE STEVENS: Doesn't it mean that the  
8 authority to cause the person to stay in the car existed  
9 throughout the stop?

10 MR. ZALL: The authority? Yes, but I mean,  
11 I think the police always have some degree of authority  
12 over us in any encounter.

13 JUSTICE STEVENS: Let me ask you this. On a  
14 casual street in downtown, if they say, I'd like to stop  
15 and talk to you, you don't have to stop. There's no  
16 authority to make them stop. But there is authority for  
17 the passenger in the back seat of the car.

18 MR. ZALL: Well, it depends, Justice  
19 Stevens. I think, is there legal authority? I mean, I  
20 think police always have the factual authority and I  
21 think that's the way the reasonable person looks at  
22 things. I don't think the reasonable person --

23 JUSTICE STEVENS: Is there a difference  
24 between legal authority and factual authority?

25 MR. ZALL: I don't think in this context

1 there is. I mean, certainly in --

2 JUSTICE STEVENS: If there's no difference  
3 then there's legal authority.

4 MR. ZALL: I'm sorry, Justice Stevens?

5 JUSTICE STEVENS: If there's no difference  
6 then there's legal authority, which would mean the  
7 person is subject, is in custody of the officer.

8 MR. ZALL: No, I don't think so, any more so  
9 than Mr. Drayton was in the Drayton case, where his  
10 compatriot was arrested and the police continued to  
11 engage him, and this Court found that that was a  
12 consensual --

13 JUSTICE BREYER: How are we supposed to -- I  
14 think it's quite interesting. How do you suggest we  
15 decide this/ I don't mean the result, but I'll go, I'll  
16 say yes, you've done your survey of the policemen, a  
17 million policemen think they're not restricting the  
18 movement of the passenger. Very few passengers jump out  
19 of the car, but that may be because they're worried  
20 about being run over. So you say, well, in fact they're  
21 restricted, but they don't think they're being  
22 restricted by the police, or do they? And here we have  
23 no idea, at least I have no idea. I really don't know  
24 what the majority think and yet it would seem totally  
25 relevant. How would we find out?

1 MR. ZALL: Well, Justice Breyer, I mean, I  
2 think that in this Court's -- to be consistent with this  
3 Court's consensual encounter jurisprudence, with  
4 Rodriguez, with Royer, with Drayton, with Bostick --

5 JUSTICE STEVENS: But those are encounters  
6 in an airport where there are pedestrians; there's no  
7 authority to make the person stay, where here I think  
8 you've conceded that there is legal authority to require  
9 the person to stay where he was.

10 MR. ZALL: Yes, yes, I do, Justice Stevens.  
11 But I think the point is that if --

12 JUSTICE STEVENS: And if it wasn't a seizure  
13 what's the source of the legal authority?

14 MR. ZALL: Well, again, I think, though,  
15 that it's a question of seizable versus seized. I don't  
16 think just because the police have some authority that  
17 that makes you seized. I mean, if the police see a  
18 citizen jaywalking that person is not arrested because  
19 the police have the authority to make, to arrest him.

20 So again I think, I think that the seizure  
21 occurs when the police exercise some authority over you.  
22 I just think the traffic stop is less ambiguous. It's  
23 clear that the traffic stop is to deal with the driver,  
24 whereas in the street encounter --

25 CHIEF JUSTICE ROBERTS: If it's not, if the

1 opposite is true, then it is a seizure even though they  
2 stop the car?

3 MR. ZALL: Then, Mr. Chief Justice, I would  
4 say that it's a seizure that at the outset, again per  
5 Justice Scalia's hypothetical, that the, the driver only  
6 is seized at the outset, but then once the police make  
7 it clear that their interest is with the passenger then  
8 the passenger would not feel free to leave, and then the  
9 passenger would be seized.

10 CHIEF JUSTICE ROBERTS: Even if they make  
11 that, even if they make that interest clear prior to the  
12 stop?

13 MR. ZALL: Yes, I think it would sort of  
14 happen instantaneously.

15 CHIEF JUSTICE ROBERTS: No. They pull up  
16 next to them and they see that Brendlin is the passenger  
17 and they yell over: Pull over, Brendlin.

18 MR. ZALL: So they direct their action, they  
19 direct their attention at the passenger at the outset.  
20 Yes, then I would say the driver is seized by the stop,  
21 and then right immediately the passenger, the reasonable  
22 passenger, would not feel free to leave and then he  
23 would also be seized at that point. But again, I harken  
24 back to the Court's consensual encounter jurisprudence.  
25 It seems to me that again the straight encounter is more

1 anxiety-forming for the citizen because the police have  
2 directed their attention at you.

3 JUSTICE GINSBURG: It may be that you can  
4 walk away, you're not in an enclosed space. Suppose the  
5 passenger knows when the police approaches: Oh my  
6 goodness, I didn't buckle up. Would that passenger be  
7 the object of the police authority from the start?

8 MR. ZALL: Well, in your hypothetical,  
9 Justice Ginsburg, the passenger would not be an innocent  
10 passenger and the Court's test presupposes an innocent  
11 person. So we can't really ask the question from the  
12 perspective of the seatbelt violator.

13 JUSTICE GINSBURG: So it could be, it could  
14 be sometimes the attention is directed at the driver,  
15 but that's not always the case.

16 MR. ZALL: Again, I -- as Justice Souter  
17 indicated, I think you have to, you have to break it up.  
18 At the outset, the show of authority is by nature of  
19 the, of the vehicle, is directed at the driver. After  
20 the vehicle comes to a stop, the police could manifest  
21 some interest in the passenger and then that changes  
22 things.

23 JUSTICE KENNEDY: But on your earlier answer  
24 to Justice Ginsburg, there's no authority in this Court  
25 to say that whether you deem yourself stopped or not

1 depends on whether think you're innocent. There's zero  
2 authority for that, right?

3 MR. ZALL: That's correct.

4 JUSTICE KENNEDY: Correct me if I'm wrong.

5 MR. ZALL: No, that's correct. That's  
6 correct. The perspective must be -- we must look at it  
7 from the innocent passenger and whether the innocent  
8 passenger would as a result merely of the stop of the  
9 car feel free to leave.

10 JUSTICE KENNEDY: Going back to Justice  
11 Stevens' question, the passenger knows the minute the  
12 red light goes on that the police can either tell them  
13 to get out or tell him to stay in. He knows at that  
14 very moment. That seems to me to substantially limit  
15 his freedom of action and indicates that --

16 MR. ZALL: Well, again I think factually  
17 citizens when they encounter police always know -- I  
18 mean, the policeman in any encounter is armed, is  
19 typically armed, and has apparent authority over you.  
20 And yet this Court has repeatedly held that that in and  
21 of itself, although it may cause some anxiety on the  
22 part of citizen --

23 JUSTICE STEVENS: Yes, but isn't your case  
24 he doesn't in fact have the authority, he has apparent  
25 authority, but in this case he has actual authority, not

1 just apparent authority?

2 MR. ZALL: But Justice Stevens, again I  
3 don't think that the reasonable innocent passenger is --  
4 this Court has never said it's the reasonable innocent  
5 passenger that knows the Supreme Court's Fourth  
6 Amendment jurisprudence by heart. I mean --

7 JUSTICE SCALIA: You're saying he doesn't  
8 have actual authority. If I understand you, you're  
9 saying he has no authority to stop an innocent passenger  
10 from walking away. Aren't you saying that? Unless  
11 there's some reason to hold a person in the car, he has  
12 no authority to stop him from walking away.

13 MR. ZALL: I think that is the current state  
14 of the law. Yes, that is the current state of this  
15 Court's jurisprudence.

16 JUSTICE SCALIA: What if I feel, even though  
17 that's the current state of the law, I wouldn't think of  
18 opening the door and walking away without asking the  
19 policeman, do you mind if I open the door and walk away?  
20 Does that suggest that I think I've been seized?

21 MR. ZALL: No, I don't think so, Justice  
22 Scalia. That just suggests that you're prudent when  
23 you're dealing with an armed officer.

24 CHIEF JUSTICE ROBERTS: It's not the police  
25 who have authority over the passenger; it's the driver.

1 The driver's exercising authority. Just because the  
2 police say to pull over, the driver can take off and the  
3 passenger isn't seized at that point.

4 MR. ZALL: Absolutely, Mr. Chief Justice. I  
5 think again, though, that the stop and then the after  
6 the stop are discrete.

7 JUSTICE BREYER: So now perhaps I'm having  
8 so much difficulty, and maybe others are, because you've  
9 actually reached a question of law where facts matter.  
10 That is, the law points us to the direction of what  
11 would a person reasonably think in general in such  
12 circumstances, and we can look at five million cases,  
13 but we don't know. So what do we do if we don't know?  
14 I can follow my instinct. My instinct is he would feel  
15 he wasn't free because the red light's flashing. That's  
16 just one person's instinct. Or I could say, let's look  
17 for some studies. They could have asked people about  
18 this, and there are none. Or I could say, well, you're  
19 the State of California, you're the ones able to get the  
20 studies; you could tell some of those professors, you  
21 know, to stop thinking about whatever they're thinking  
22 about and go ask a few practical questions, but you  
23 didn't.

24 What should I do? Hold that against you?  
25 Look for more studies? Follow my instinct?

1 MR. ZALL: I think, Justice Breyer, again I  
2 would keep coming back to the Court's consensual  
3 encounter jurisprudence. I think you could ask some of  
4 the same questions about in the Drayton case, in the  
5 Bostick case, in the Royer case. But if you accept  
6 those at consensual, then I'm not sure that this is any  
7 less consensual here.

8 JUSTICE SCALIA: Maybe we can just pass  
9 until the studies are done?

10 (Laughter.)

11 JUSTICE SOUTER: Mr. Zall, assume, and I  
12 realize you don't assume, but assume for the sake of  
13 argument, that, that there is a seizure here. What's  
14 the significance of the arrest warrant, or -- yes, I  
15 guess there was a warrant as I understand it, although  
16 it was not on the person of the officer who stopped the  
17 car. Is that correct?

18 MR. ZALL: That's correct.

19 JUSTICE SOUTER: Okay. What's the  
20 significance of that for the outcome of this case?

21 MR. ZALL: Well, I think that even were this  
22 Court to rule that the passenger were subject to a  
23 seizure, that the presence of the arrest warrant  
24 attenuates any taint and therefore the evidence was --  
25 was not suppressible.

1 JUSTICE KENNEDY: Well, maybe our questions  
2 took your colleague representing the Petitioner beyond  
3 the question presented. The question presented is only  
4 whether the passenger felt seized. If we agree with the  
5 Petitioner, do we send the case back?

6 MR. ZALL: I wouldn't, I wouldn't think  
7 there would be a need to send the case back. I mean, I  
8 think --

9 JUSTICE KENNEDY: Well, why, if we have  
10 serious doubts whether or not the evidence is  
11 suppressible? All we've been asked in the question is,  
12 is whether the passenger is detained.

13 MR. ZALL: I concede that that's true.

14 JUSTICE KENNEDY: While the questions  
15 indicate that even if the passenger is detained, who  
16 cares, it's a lawful arrest.

17 MR. ZALL: Well, I think that because it's  
18 fairly clear that the arrest would, would remove the  
19 taint from the seizure, that there would be little  
20 reason to send the case back to the California Supreme  
21 Court.

22 JUSTICE BREYER: Well, that question hasn't  
23 been argued here.

24 MR. ZALL: Well, I think it's subsumed in  
25 the question presented and I think it was raised in our

1 opposition and the parties have briefed it.

2 CHIEF JUSTICE ROBERTS: Well, but there's --  
3 you know, our Brown case establishes a multifactor test  
4 for determining when the illegal seizure has been  
5 attenuated and the Court hasn't applied that, the  
6 California Supreme Court hasn't gone through that test  
7 in this case.

8 MR. ZALL: That is correct, but again I  
9 think because the warrant is such a clear intervening  
10 circumstance that has nothing to do, you couldn't in any  
11 way say it's an exploitation of the, of the illegal  
12 stop.

13 JUSTICE SOUTER: But don't we have two  
14 problems if we go to that stage? The first one is we  
15 would be applying a test that was not applied by the  
16 court we're reviewing. And number two, correct me if  
17 I'm wrong, but the, the -- assuming you win, as it were,  
18 on the general point about the significance of the, of  
19 the arrest warrant, there are still going to be  
20 questions about the suppression of the evidence because  
21 there are going to be questions about whether the  
22 legality of the arrest on that theory suffices to  
23 justify the seizure of the evidence. You recall the  
24 colloquy I had with opposing counsel about the  
25 possibility of applying a plain view test here.

1           Aren't those issues that should all be  
2           decided in the first instance in the State courts?

3           MR. ZALL: Certainly you could take that  
4           position, Justice Souter. But it seems to me that  
5           again, that it's relatively straightforward. The arrest  
6           was valid. I mean, unquestionably the arrest was valid.  
7           If the arrest was valid, I'm not sure that there are any  
8           cases --

9           JUSTICE GINSBURG: But the question that's  
10          presented is kind of a standing question. It's who can  
11          complain when the police stop a car? You say the  
12          driver. The question that's been presented in this case  
13          is, can the passenger also complain, and that's the only  
14          thing that we're dealing with. So the -- the arrest  
15          warrant may pose a disqualification for this particular  
16          passenger, but that would be a second question. The  
17          question that is tendered to us and that was answered by  
18          the California Supreme Court is when the car is stopped  
19          by the police who can complain.

20          MR. ZALL: Absolutely, Justice Ginsburg, I  
21          agree. And one further point I'd like to make on that  
22          is, would be to draw a parallel between a parked car  
23          situation, in which the lower courts have uniformly held  
24          that no seizure results when the police turn on their  
25          lights and approach a parked car, and even when they rap

1 on the window to get the attention of the occupants  
2 there is no seizure.

3 CHIEF JUSTICE ROBERTS: No seizure of a  
4 passenger or a driver?

5 MR. ZALL: Of anybody. Lower courts have  
6 uniformly held that, and yet that seems to be a more  
7 ambiguous situation and a situation in which the  
8 occupants' natural reaction would be to turn to each  
9 other and say: What's going on here? Whereas again in  
10 the traffic stop I think it's, it is probably the most  
11 likely place that a citizen encounters a policeman, much  
12 more so than a, an officer approaching me at an airport  
13 and saying, can I see your identification, or  
14 approaching me on a street corner, or, as in Chesternut,  
15 following me as I'm walking home in his squad car.  
16 Those seem to me to be more anxiety-creating and yet the  
17 Court has held that those are consensual encounters.

18 And in the parked car, there's ambiguity  
19 about what the police want, whereas in the routine  
20 traffic stop there isn't that ambiguity, so there's no  
21 reason why the passenger shouldn't feel free to leave.  
22 Now, it might be prudent, as Justice Scalia indicated,  
23 to say, I'm leaving. But that doesn't make it a  
24 seizure, that you should act prudently. I think you  
25 should always act prudently when you're dealing with the

1 police.

2 JUSTICE ALITO: What is this period of time  
3 that we are talking about when Mr. Brendlin might or  
4 might not have felt that he was free to leave? As I  
5 understand the facts, the officer recognized him as one  
6 of the two Brendlin brothers immediately upon  
7 approaching the car. Isn't that right.

8 MR. ZALL: That's -- that right, Your Honor.  
9 But again I think, so I think it's just the mere  
10 presence. It would just be from the time that he got  
11 out of his parked, of his car after he parked it, and  
12 then with his lights on approached the car and then  
13 looks in and sees Mr. Brendlin. So that's the period of  
14 time that Petitioner would have to establish that a  
15 reasonable person would not feel free to leave.

16 And the -- and the comparison with the  
17 parked car and the other consensual encounter cases of  
18 this Court in my view indicate that there is nothing  
19 that's been done to the passenger. I mean, the arrest  
20 of one person as this Court said in Drayton does not  
21 mean that everyone around him is detained so it doesn't  
22 seem to the State that anything has been done to the  
23 passenger. He just was unlucky enough to be in this car  
24 when the driver was stopped for a traffic violation.  
25 And that seems to me fairly unambiguous and we don't

1 feel like a reasonable passenger would not feel free to  
2 leave in that situation.

3 JUSTICE KENNEDY: Well, it may be that we  
4 would say because of the exclusionary rule dynamic, we  
5 have very little interest in applying the exclusionary  
6 rule to this but I'm not so sure that we should bend the  
7 concept of seizure and say that the passenger hasn't  
8 been seized.

9 Perhaps we should be very liberal insofar as  
10 applying the exclusionary rule and in this case it seems  
11 to me there is lawful arrest which is intervening cause  
12 anyway. But I don't know that we should distort the law  
13 of seizure.

14 MR. ZALL: Justice Kennedy, I wouldn't think  
15 you're distorting the law of seizure by saying the  
16 passenger isn't seized. Nothing is done to the  
17 passenger. He happens to be in this stopped vehicle,  
18 but the police have directed no action toward him and so  
19 I'm not sure that you would be torturing the definition  
20 at all.

21 JUSTICE STEVENS: Suppose 10 or 20 years ago  
22 we had this case and we decided your way and decided  
23 passengers are not seized, and then subsequently we had  
24 the question of whether an officer could order a  
25 passenger out of the car. What would be held then?

1 Would we have said we can't because he is not seized?  
2 Or would you say yes, he was seized. I meant if we  
3 decided in your case there is no seizure, would we then  
4 have later on, do you think said, notwithstanding the  
5 absence of a seizure the officer could order the person  
6 out of the car?

7 MR. ZALL: Yeah. Because I think -- because  
8 I think the weighty interest in officer safety would  
9 still allow the officer to have some degree of control  
10 over the situation. But again seizable does not mean  
11 seized. The fact that the officer could seize the  
12 passenger doesn't mean that the passenger is seized.

13 JUSTICE STEVENS: But in most situations  
14 where an officer meets a person, unless there is a crime  
15 scene or something like that, he can't order them to  
16 cross the street or go someplace else, can he? He can't  
17 issue any order to a citizen.

18 MR. ZALL: But again --

19 JUSTICE STEVENS: But he can issue orders to  
20 passengers even though they are not seized.

21 MR. ZALL: But Justice Stevens, I think  
22 that's because of, the Court recognized in *Mimms* and in  
23 *Wilson* that there is something inherently dangerous  
24 about the traffic stop situation, and there may be  
25 weapons in the car that the officer can't see, and so

1 that's why this Court found in Wilson that you could  
2 order the --

3 JUSTICE KENNEDY: Yes, but in that case  
4 there was a blanket rule. The officer didn't have to  
5 have a specific reason. And that it seems to me  
6 indicates that that's because the person as a general  
7 rule knows that he or she is seized. If the officer had  
8 to give a specific reason requiring the person to stand  
9 outside as the dissent said, then you might have had a  
10 point. But I don't think that's what the Court held.

11 MR. ZALL: I don't think, Justice Kennedy,  
12 that the Court ever indicated that the passenger was  
13 seized in Wilson prior to the order out. I know there  
14 was a dissent that indicated that the passenger wasn't  
15 seized and the majority never indicated that they  
16 disagreed with that point. I think that what happened  
17 in Wilson is that the Court just felt that -- may I --

18 CHIEF JUSTICE ROBERTS: Finish your  
19 sentence. Sure.

20 MR. ZALL: -- the Court just felt that the  
21 weighty interest in officer safety justified the order  
22 out, regardless of whether the passenger was seized at  
23 the outset.

24 CHIEF JUSTICE ROBERTS: Thank you Counsel.  
25 Miss Campbell, you have five minutes

1 remaining.

2 REBUTTAL ARGUMENT OF ELIZABETH M. CAMPBELL,  
3 ON BEHALF OF PETITIONER

4 MS. CAMPBELL: Thank you. Just to respond  
5 to that last question very briefly, I agree with Justice  
6 Kennedy that Wilson could not have been decided the way  
7 that it was decided had there not been an underlying  
8 assumption that the passenger is seized, because Wilson  
9 does not require any reasonable suspicion that the  
10 person is posing a danger to the driver.

11 I'd also like to respond to the State's  
12 argument that the passenger in this case simply got  
13 unlucky and he was in a car with someone, that he  
14 happened to be in a car with someone who was stopped for  
15 a traffic offense. This passenger wasn't merely  
16 unlucky; his Fourth Amendment rights were violated by an  
17 unreasonable stop that was unreasonable from its  
18 inception. Not only did the officer have no reason to  
19 make the stop; he had actually called in and verified  
20 and gotten affirmative evidence confirming that there  
21 was no reason for the stop. So it --

22 CHIEF JUSTICE ROBERTS: So that -- so that,  
23 still then, it's just begging the question of whether or  
24 not his Fourth Amendment rights were violated. You're  
25 making a good case that the driver's Fourth Amendment

1 rights were violated, but why isn't the passenger, as  
2 your friend said, just in the unlucky circumstance to  
3 have been in a car whose the driver's Fourth Amendment  
4 rights were violated?

5 MS. CAMPBELL: Because Your Honor, this  
6 Court has -- this Court held in Delaware versus Prouse,  
7 the Court recognized the passengers as well as drivers  
8 have a liberty interest in free travel on the highways,  
9 and because if we look at every case this Court has  
10 decided in the last 20 or 30 years regarding when a  
11 seizure occurs, the case of a passenger in an auto test  
12 -- in an auto stop meets the test. Under Hodari D we  
13 need a show of authority or physical control; in this  
14 case we have both. We have the driver response to the  
15 officer's show of authority and as a result the  
16 passenger is, is subject to physical control, as a  
17 direct line.

18 JUSTICE SCALIA: What have we done in a  
19 case, and maybe we haven't had it, but what have we done  
20 in a case where there is a warrantless entry in  
21 violation of the Fourth Amendment of somebody's  
22 apartment, and there is a suitcase in there that does  
23 not belong to the owner of the apartment? My impression  
24 is that, that the owner of that suitcase has not been  
25 subjected to an unreasonable search and seizure; is that

1 correct?

2 MS. CAMPBELL: If the person has no  
3 expectation of privacy in that suitcase that is correct,  
4 Your Honor. But this Court has recognized in Delaware  
5 vs. Prouse that a passenger does have a privacy liberty  
6 interest in free travel. So it's a different situation.

7 Once again, going back to the Brower case,  
8 the, there was some question about whether or not the,  
9 the seizure of a bystander would be, would be a seizure  
10 under the rule proposed by, by Petitioner in this case.  
11 Brower talks about an entirely accidental seizure.

12 JUSTICE KENNEDY: Well, but there was only  
13 one, there was just the driver in the Brower case.

14 MS. CAMPBELL: Yes, Your Honor.

15 JUSTICE KENNEDY: There was no passenger as  
16 I recall.

17 MS. CAMPBELL: No. But - but under the rule  
18 proposed by the State if there had been a passenger that  
19 passenger would not have been seized. But if we look at  
20 how this Court --

21 JUSTICE KENNEDY: Well, but I mean in the  
22 case it's just not directly on point. That's what we  
23 are arguing about.

24 MS. CAMPBELL: Yes, Your Honor. But if we  
25 look at the case next in line case, the County of

1 Sacramento versus Lewis case, there was a passenger in  
2 that case who was struck by the officer in the pursuit,  
3 and although the Court found no seizure it didn't base  
4 that on the fact that the person was a passenger, but on  
5 the fact that it was an accidental application of force.

6 JUSTICE KENNEDY: So that's just another  
7 case that doesn't help us.

8 MS. CAMPBELL: I think it certainly informs  
9 the discussion, Your Honor.

10 JUSTICE GINSBURG: But what of the question  
11 that was raised about well, a passenger is locked in for  
12 the moment, but so are all the cars that are backed up  
13 behind the car that's been stopped? What's the  
14 difference between the passenger --

15 MS. CAMPBELL: In that case, Your Honor,  
16 there hasn't been an intentional impeding of those  
17 people's free, free movement by the officer. The  
18 officer has intentionally stopped this vehicle. And I  
19 -- I don't think it's really, it's really far-fetched to  
20 argue that it's reasonably foreseeable that automobiles  
21 often have passengers in them, and there is certainly a  
22 large body of statutory law at least in California that  
23 shows that the car can be stopped for reasons related to  
24 the passenger.

25 So it's, it's a different situation. We are

1 not looking at an accidental seizure. We are looking at  
2 an intentional seizure of the car.

3 Just to address for a moment whether or not  
4 remand is appropriate in this case, just to clarify the  
5 procedural posture. The intermediate appellate court in  
6 California did rule this, that the evidence seized in  
7 this case was the fruit of the poisonous tree and should  
8 be suppressed. The California Supreme Court did not  
9 grant review on that issue and it was not, it's not  
10 included in the question presented. Just for  
11 clarification. But if the --

12 CHIEF JUSTICE ROBERTS: The California  
13 Supreme Court didn't have to reach that issue because it  
14 found there was no seizure.

15 MS. CAMPBELL: No. The court did not -- did  
16 not actually request briefing on the issue either.  
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
19 The case is submitted.

20 (Whereupon, at 12:04 p.m., the case in the  
21 above-titled matter was submitted.)

22

23

24

25

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