

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARYLAND, Petitioner v. JERRY LEE WILSON

CASE NO: 95-1268

PLACE: Washington, D.C.

DATE: Wednesday, December 11, 1996

PAGES: 1-55

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1268, Maryland v. Jerry Lee Wilson.

5 General Curran.

6 ORAL ARGUMENT OF J. JOSEPH CURRAN, JR.

7 ON BEHALF OF THE PETITIONER

8 GENERAL CURRAN: Mr. Chief Justice, and may it
9 please the Court:

10 Nearly 20 years ago this Court held in the case
11 of Pennsylvania v. Mimms that it was reasonable under the
12 Fourth Amendment for a police officer in making a car stop
13 for a traffic violation to require the driver to exit the
14 car. The risk to the officer is such in these stops that
15 it was also permitted for the officer to request the
16 driver to get out without any suspicion that the driver
17 would pose a danger to the officer.

18 The latest figures that we have available
19 demonstrate that the risks are real to police officers in
20 traffic stops. The latest figures in 1994 show that 5,762
21 police officers were assaulted in traffic stops. Indeed,
22 since the decision in Mimms there have been over 200
23 police officers slain in traffic stops.

24 Because passengers, like drivers, have --

25 QUESTION: Excuse me. When you say assaulted in

1 traffic stops does that include those who were assaulted
2 by people who got out of the car and physically assaulted
3 them?

4 GENERAL CURRAN: The -- yes. Yes, Justice --

5 QUESTION: Well, that would cut the other way.
6 I mean, that --they'd be better off to leave them in the
7 car, if that --you know, if that's the assault you're
8 talking about.

9 GENERAL CURRAN: Well, there were a total of
10 some 52,000 assaults during that given year, '94, of which
11 5,700 were in traffic stops.

12 QUESTION: What I'm suggesting is that the
13 relevant figure is how many of the assaults came while a
14 person was in the car, so that they might have been
15 prevented by making the person get out of the car. Many
16 of them may have occurred by taking the person out of the
17 car.

18 GENERAL CURRAN: Those are figures are not
19 available --

20 QUESTION: Okay.

21 GENERAL CURRAN: -- Your Honor.

22 QUESTION: Isn't it true, General Curran --I
23 remember this from the Mimms case -- that there's a split
24 of professional opinion on whether it is safer for the
25 officer to order them out of the car or to tell them to

1 stay in the car? Is there still a respected body of
2 professional law enforcement opinion that says you're
3 safer if you don't ask them to get out of the car?

4 GENERAL CURRAN: Well, Justice Stevens, the
5 typical practice, and I can refer to Maryland, of course,
6 but I believe the briefs will show the typical practice is
7 to control the risk. That's what the training is, to
8 control the risk, and typically they keep the driver and
9 the passenger in the car.

10 However, having said that, as the New York v.
11 Class case indicated, there is this discretion the officer
12 can use, and what we're asking, of course, is the
13 automatic rule for that discretion to be utilized in the
14 Wilson case, as this Court granted in the Mimms case.

15 QUESTION: General Curran, are you saying that
16 if the officer made the decision to keep the person
17 inside, it would be the officer's call, too? Suppose a
18 passenger says, I want out. I'm going to take a car and
19 go home -- take a cab and go home.

20 GENERAL CURRAN: The answer is yes, Justice
21 Ginsburg. We want the officer to be able to require the
22 passenger to get out or, where it's appropriate, to stay
23 in, and in order to control the stop the officer should be
24 able to control the location of the passenger, and the
25 location can be outside the car, or it could be, in an

1 appropriate case, inside the car.

2 QUESTION: How far does the authority extend?
3 Would you say that the passenger would be free to leave if
4 the passenger chose after exiting the car at the officer's
5 request?

6 GENERAL CURRAN: No, Your Honor. We do not take
7 that position. We want the officer to be able to control
8 the risk, control the location.

9 QUESTION: Well, you want more than the right to
10 require the passenger to exit. You want to require the
11 passenger to be detained.

12 GENERAL CURRAN: Yes, Your Honor. We --

13 QUESTION: For how long?

14 GENERAL CURRAN: We want --there is no time
15 frame as -- I can tell you what the typical stop --

16 QUESTION: To be searched?

17 GENERAL CURRAN: No, Your Honor, not a frisk.

18 QUESTION: To be asked any questions?

19 GENERAL CURRAN: Could be asked, but not
20 required to answer. To get out, to step aside, to show
21 your hands.

22 QUESTION: Well, you say there's no time limit.
23 I assume the time can be no more than is reasonably
24 required for the officer to complete the process of
25 issuing the citation.

1 GENERAL CURRAN: Yes, Your Honor. It would be
2 within what is typically 10, or at the outside 20 minutes.

3 QUESTION: Can he order some people in the car
4 and some people out of the car?

5 GENERAL CURRAN: Yes, Your Honor, he could.

6 QUESTION: What would be the reason for
7 detaining the passenger in a situation like that? I can
8 see that safety reasons might suggest that you be able
9 to --the officer be allowed to order the passenger out of
10 the car, but for detaining them if they then wish to
11 leave, what would be the Fourth Amendment reason for that?

12 GENERAL CURRAN: The officer has to -- Mr. Chief
13 Justice, the officer has to be able to control the stop,
14 to complete safely the transaction, getting the
15 information from the driver, the registration, the
16 license, et cetera, and in order to do that safely, he
17 needs to be able to know where any potential danger to him
18 or her lies. Controlling the location of, in this case
19 Mr. Wilson, would have been the appropriate way to do
20 that. He could have seen that he did not pose a
21 particular danger by seeing his hands.

22 We are suggesting that the balancing that this
23 Court went through in *Mimms* is really the same for the
24 Mr. Wilsons, the passengers. There is this compelling
25 governmental interest of police safety, which has been

1 acknowledged, against what is a de minimis intrusion
2 against Mr. Wilson, where there has already been a
3 diminished expectation of privacy by being in the car in
4 the first place.

5 QUESTION: This right to control the site,
6 what's your best citation from this Court giving you that
7 authority, Michigan and Summers, or --

8 GENERAL CURRAN: Well, Michigan and Summers,
9 Justice Kennedy --

10 QUESTION: Is that the closest case, do you
11 think?

12 GENERAL CURRAN: Sir?

13 QUESTION: Is that the closest case to support
14 the proposition that the officer does have this authority
15 to control the location?

16 GENERAL CURRAN: Yes, Your Honor. To control
17 the safe completion of, in that case the search of the
18 house, he had to have the ability to make certain that he
19 could safely and successfully complete the search, and the
20 same weight goes here. The --

21 QUESTION: Well, but there is a difference. I
22 mean, the driver was stopped because there was reason to
23 believe he had violated a traffic law, or requirement,
24 that the driver was speeding while making an illegal turn,
25 or without a license on the car, or whatever.

1 But there is no such suspicion on the part of
2 the passenger, who was not driving the car, and I don't
3 think Pennsylvania v. Mimms, which says yes, you can
4 require the driver to step out and wait until the ticket
5 is issued or a resolution is made on that question, but
6 I'm just not sure what the authority is for detaining a
7 passenger who is required to step out. The passenger is
8 not suspected of an illegal driving offense.

9 GENERAL CURRAN: Justice O'Connor, we would
10 respectfully suggest that it's the Mimms decision that
11 required the driver to exit not because in this case he
12 was speeding, as was the probable cause, or not because
13 there was a faulty tag, but because the Court concluded
14 that there was potential danger, and so for the reason
15 that they wanted -- police safety was the reason Mimms got
16 out of the car, not because there was --

17 QUESTION: Yes, but nevertheless they had a
18 right to stop the car because it was an alleged traffic
19 violation by the driver, isn't that so, otherwise they
20 couldn't have stopped the car at all, presumably.

21 GENERAL CURRAN: That is correct.

22 QUESTION: Okay, and that reason does not apply
23 to the passenger, so I'm trying to understand what is your
24 authority for claiming the right not only to require the
25 passenger to exit, but to detain the passenger.

1 GENERAL CURRAN: If Your Honor please, when
2 there was a stop of the Mimms car or the Wilson car by
3 virtue of physics both are seized, or both are detained,
4 so there the driver and the passenger are identical.
5 They're both seized. They're both stopped.

6 If, in fact, the rationale of Mimms is to be
7 conveyed to the passenger, the safety of the officer, it
8 is equally apparent that the passenger would have had
9 much -- just as much access to the gun as Mr. Mimms would
10 have had.

11 QUESTION: But it's not just physics, it's
12 privacy and dignity, and we all know that the police will
13 take our decisions as far as their language and logic
14 permit, and I'm just concerned that you're going to have
15 routine practices of whole families and four or five
16 occupants of the cars being required to stand outside
17 while the officer lectures the driver. I mean, that's
18 just going to happen, isn't it?

19 GENERAL CURRAN: Well, Justice Kennedy, that
20 would happen now in Mimms, because without any discretion,
21 or any guidelines, the officer now may in that case
22 require someone to exit.

23 QUESTION: Well, but that's what we're here to
24 decide --

25 GENERAL CURRAN: And for the same --

1 QUESTION: And you're proposing a general
2 automatic rule that passengers can always be required to
3 exit at the demand of the officers.

4 GENERAL CURRAN: Yes. Yes, Your Honor, that's
5 the proposal that we have, and the rationale being that
6 the order out in Mimms was not because of the traffic
7 violation but because of the finding that there is --
8 there's a compelling reason for police safety to require
9 the officer to make that --

10 QUESTION: But you have a lesser interest on the
11 part of the driver in privacy or not being free from
12 whatever you -- whether it's searching -- the driver --
13 there's probable cause to believe that the driver has
14 committed an offense, whereas there isn't any probable
15 cause to believe that the passenger has committed offense,
16 an offense, so the calculus, if it's a weighing process,
17 the interests of the passenger would seem stronger than
18 the interest of the driver.

19 GENERAL CURRAN: Mr. Chief Justice, I would take
20 the position that the privacy interests of the driver and
21 the passenger are identical.

22 However, if the Court should so find that there
23 is a minor privacy interest difference, notwithstanding,
24 there still is -- as far as the passenger is concerned he
25 already has a diminished expectation of privacy, and with

1 that diminished expectation of privacy, we're talking
2 about a very diminished intrusion.

3 QUESTION: Well, not necessarily. Suppose it's
4 a driving snowstorm, or a blinding rainstorm, the
5 passenger is a mother with a very young baby, and the
6 officer automatically can order her out of the car, to put
7 the baby down outside where he can see the baby and raise
8 her hands up, and real damage can occur, and there is no
9 reason that the car was stopped because of what that
10 passenger was doing under the circumstances here.

11 Now, maybe an officer can see a passenger in the
12 car holding a gun. Well, that's a different situation,
13 isn't it. But is there any -- and suppose the Court
14 thinks there is a real difference between the driver and
15 the passenger in that the driver can be stopped for what
16 the officer perceives is a traffic violation.

17 GENERAL CURRAN: Yes, Justice O'Connor, I see
18 the point you're trying to raise, and obviously the
19 question of a baby and a young mother out in the rain is
20 obviously not --

21 QUESTION: That's just one example and you want
22 an automatic rule.

23 GENERAL CURRAN: Yes, Your Honor, we do want the
24 automatic rule, and I might add, the same --

25 QUESTION: And it will work automatically, too.

1 GENERAL CURRAN: Yes.

2 QUESTION: Because bureaucracies being what they
3 are, in order to protect themselves from claims of
4 discrimination, making some people get out because of
5 their race or because of whatever else, to be sure that no
6 such claims will be available they will make everybody get
7 out. That will be an invariable rule.

8 GENERAL CURRAN: With respect, Justice Scalia --

9 QUESTION: Even the lady with the baby.

10 GENERAL CURRAN: With respect, Justice Scalia, I
11 appreciate the question. That same scenario, of course,
12 could happen under Mimms, and Mimms has now been with us
13 for 19, almost --

14 QUESTION: The question is, do you have concerns
15 about it? Do you, as the chief law enforcement officer of
16 your State, have concerns about a rule where throughout
17 your State, maybe throughout the country, all the
18 occupants of every vehicle that is stopped for a traffic
19 offense can be ordered to get out of the car and routinely
20 are required to parade the -- required to remain in public
21 view while the citation process is going on? Do you have
22 any concerns about that?

23 GENERAL CURRAN: Well, I obviously have. Yes,
24 Justice Kennedy, I obviously have a concern. The point
25 we're making, though, is that removing a driver doesn't

1 eliminate the danger that we talked about in Mimms. The
2 passenger has equal access to the same revolver that
3 Mr. Mimms would have had, so removing the driver does not
4 eliminate the problem.

5 Yes, I admit, Justice O'Connor --

6 QUESTION: Or suppose the passenger has certain
7 dementia. It's an old parent who, left to his own, will
8 just wander away and not even understand what was being
9 said to him, but automatically you're going to get this
10 passenger out and require him to stay, and if he doesn't
11 understand, shoot him.

12 (Laughter.)

13 QUESTION: You know. I just -- this can be
14 carried to extremes, and you seem to don't even recognize
15 that there might be a difference.

16 GENERAL CURRAN: I do understand, Justice
17 O'Connor, there is a difference. I'm simply suggesting
18 this, that removing the driver does not remove the danger.
19 In fact --

20 QUESTION: Everybody agrees with that. I
21 just -- everybody agrees with that, but the question is
22 the risk of abuse.

23 Now, I notice in the opinion, but I -- maybe
24 it's in the briefs and I didn't see it -- it says several
25 jurisdictions already have extended Mimms to passengers.

1 Is there any indication that there are any of these
2 problems, or there are not these problems, in the other
3 jurisdictions that have already adopted the rule that you
4 want?

5 GENERAL CURRAN: Your Honor, I am not able to
6 say that I have researched the cases in the other
7 jurisdictions, but indeed I will tell you that there are a
8 majority -- there are 20 States that have ruled the way
9 Maryland wishes to rule, and there are five -- including
10 the District of Columbia, so there are 21 areas, including
11 there are five, four or five Federal circuit courts,
12 mostly in the --

13 QUESTION: So we have to look at those.

14 GENERAL CURRAN: There is a --

15 QUESTION: We have to look those up.

16 GENERAL CURRAN: A substantial majority have
17 ruled this way. There's five that have ruled against us,
18 to be honest with you.

19 QUESTION: I have another question which I
20 wanted to ask, which is that I didn't know until this
21 argument that you are suggesting that the police should
22 have the right to detain the passenger.

23 I thought that you were -- after -- suppose the
24 passenger gets out of the car, and the policeman asks him
25 to, and then he says, I'm fed up with this. I want to

1 take a bus. And the bus goes along, and he takes it.

2 Are you arguing that the policeman should be
3 free to tell him no, you can't take the bus?

4 GENERAL CURRAN: Yes, Your Honor.

5 QUESTION: Where is -- I didn't find that in
6 your brief, and I don't know what the rationale for that
7 would be.

8 GENERAL CURRAN: It is in our brief and in our
9 argument in terms of the ability to control, Your Honor,
10 the location. The individual may say, I wish to take a
11 bus and go elsewhere. The officer need not accept that
12 as real. The officer is still concerned about his genuine
13 safety, and the only way he can really make certain it is
14 a safe stop is to control the location --

15 QUESTION: General Curran, you did say that it
16 would only be to show his hands, that he could not be
17 frisked. The officer could not question the passenger
18 without the passenger's consent.

19 GENERAL CURRAN: Yes, Your Honor.

20 QUESTION: So once he shows his hands, then he
21 can walk away and hail a cab?

22 GENERAL CURRAN: No, Your Honor.

23 QUESTION: Well, what can he do, then? Can
24 you --

25 GENERAL CURRAN: Our rule would ask the

1 passenger to get out, to stand in a certain location
2 described by the officer, to show his hands, and to remain
3 there for the 10 minutes while the information is obtained
4 about the license and the registration.

5 QUESTION: So he just has to stand there. He
6 can't be questioned and he can't be frisked, but he's not
7 free to leave until the officer says, okay, I'm done, you
8 can go. That's the rule you want.

9 GENERAL CURRAN: Yes, Your Honor, or the officer
10 may, with discretion, as we've talked about in Class,
11 permit the passenger to remain in the car.

12 QUESTION: General Curran, can I ask this one
13 question? You suggested as a justification for that that
14 the passenger is already seized, just like the driver.
15 They're both forced to stop. But the driver has been
16 lawfully taken into custody during the investigation.
17 There's no lawful authority to take the passenger into
18 custody. He's seized in the sense the car had to stop,
19 but he's not legally seized, is he?

20 GENERAL CURRAN: No, sir.

21 QUESTION: General, as you have put the case,
22 you really just want the officer to have the opportunity
23 to exercise judgment in deciding whether the passenger
24 ought to get out or not.

25 GENERAL CURRAN: Yes, Your Honor.

1 QUESTION: Why doesn't Terry give you the
2 authority for that? I assume, for example, that in this
3 case under the principles of Terry, with all the movement
4 of the car, the ducking around and so on, that the officer
5 probably would have had the authority at least to go as
6 far as Terry would have let him go in asking or satisfying
7 himself that the passenger wasn't a danger. Why isn't
8 Terry enough?

9 GENERAL CURRAN: Your Honor, we would have
10 thought that there was justification for a reasonable
11 suspicion in the Wilson case. However, we don't believe
12 it's appropriate to have the officer try to wait for some
13 level of risk to arise if he or she waits --

14 QUESTION: But I thought your argument was that
15 the officer was going to exercise judgment, and if your
16 argument now is that he doesn't have to wait for some
17 indication of risk, then I think you're really saying the
18 officer as a routine matter is going to order every
19 passenger out of the car, so I think that's a difference
20 in your position.

21 GENERAL CURRAN: I'm not so sure that's the
22 case, Justice Souter, because as I say, the typical
23 training in our manual, which indicates -- and I believe
24 it's typical across the Nation -- is to require both the
25 driver and the passenger to remain in the car.

1 QUESTION: Well, my understanding was that you
2 want a holding that lets the officer at the officer's
3 discretion require all parties to exit or no parties to
4 exit, but if he wants all parties to exit, they must, and
5 you want the right, then, to detain the passengers who
6 have exited.

7 GENERAL CURRAN: That is correct, Your Honor,
8 for this minimal --

9 QUESTION: Well, all right, but the Fourth
10 Amendment, after all, is based on reasonableness. That's
11 been the requirement all along, and should there be no
12 reasonableness requirement on the matter of detaining
13 passengers?

14 GENERAL CURRAN: We believe, Justice O'Connor,
15 that the reasonableness factor is best weighed by the
16 balancing test that the Court has used again and again,
17 the high governmental interest against this minimal
18 intrusion against what is already a de minimis privacy
19 expectation of the passenger.

20 QUESTION: And in circumstances where it isn't a
21 de minimis intrusion.

22 GENERAL CURRAN: Yes, Your Honor.
23 May I be permitted to reserve the balance of my
24 time?

25 QUESTION: Very well, General Curran.

1 We'll hear now from the Attorney General, Ms.
2 Reno.

3 ORAL ARGUMENT OF JANET RENO
4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING THE PETITIONER

6 GENERAL RENO: Mr. Chief Justice, and may it
7 please the Court:

8 Traffic stops present special dangers to police
9 officers. They're faced with an unknown situation, an
10 unknown area, they're faced with little knowledge, if any
11 knowledge of the occupants of the car, and they are
12 vulnerable to attack not just from the driver but from the
13 passenger.

14 In *Mimms*, this Court found that these safety
15 concerns justify a per se rule that an officer in a valid
16 traffic stop can order the driver to exit the vehicle. We
17 submit that *Mimms* should be applied to passengers for
18 three reasons on the issue of order to exit.

19 First, the driver -- the officer has to focus on
20 the driver in implementing the traffic stop and in
21 securing the information with respect to a license or to
22 the vehicle. He cannot monitor the passenger's conduct at
23 the same time.

24 The focus in *Mimms* was on the inordinate risk,
25 and the Court made specific reference to the inordinate

1 risk as an officer approaches a person seated in the car,
2 and the Court specifically said that the officer had no
3 reason in Mimms to believe that the officer was suspect as
4 to foul play, so it was the focus on a person seated in
5 the car that created the danger.

6 QUESTION: General Reno, you want no
7 reasonableness limitation on this. I suppose that means
8 that a police officer could stop a bus and say, everybody
9 off the bus. Or -- you know, does vehicle size come into
10 it?

11 GENERAL RENO: Yes, Your Honor. That might be a
12 more difficult question for the Court, but --

13 QUESTION: Well, not for you. You want no
14 reasonableness limitation.

15 GENERAL RENO: Again, the bus situation can be
16 an unknown situation for that officer, and he needs the
17 opportunity, under our position, to be able to size up the
18 situation, to determine and observe the people involved,
19 and he may determine that he wishes them to stay in or to
20 exit. Police practices indicate that both are
21 appropriate, depending on the stage of the traffic stop
22 and depending on the circumstances of the traffic stop.

23 We are submitting that under the -- this Court's
24 rule in Mimms, it is the persons seated in the vehicle
25 that create the danger and the approach to that danger,

1 and a police officer should not have to calibrate what is
2 in -- critical and what is not critical. He should be
3 able to size up the situation, determine who's there, get
4 full view of them when appropriate, get them out of the
5 car to neutralize the situation, to get them away from the
6 gun, and we submit that the intrusion is de minimis.

7 QUESTION: Well, why isn't Terry enough? I
8 mean, your argument is that he ought to be able to size up
9 the situation. Terry gives him a chance to size up the
10 situation.

11 GENERAL RENO: Terry might not have given, if
12 the passenger had been in the same situation as Mimms with
13 a gun in his -- under his sports coat, he might not have
14 been able to see that seated in the car.

15 QUESTION: Well, then I think what you're really
16 arguing, and I think this was what the Attorney General
17 from Maryland was really arguing, is you really don't so
18 much want him to size up the situation. You simply want
19 to have the right to get him out of the car, period. It's
20 not going to be a question of judgment. It's going to be
21 a question of routine practice, I assume.

22 GENERAL RENO: No, Your Honor. As this Court
23 has pointed out and as police practice points out, in many
24 instances they will want them to stay in the car.

25 If one officer is on the scene, he may want them

1 all in the car so he can better control them, or if the
2 lighting is such or the circumstances are such or the
3 window is such that he wants the passenger whom he has
4 seen looking at him in a curious way, he may want him out
5 of the car to determine whether he has a weapon on his
6 person. It's going to depend on so many different
7 circumstances --

8 QUESTION: But may I interrupt with just this
9 one thought that crosses my mind? Do you think the
10 officer is greater or less danger, if there's a passenger
11 sitting in the car with the gun in his jacket as you
12 describe, if he tells him to get out of the car? Is he
13 less or -- which situation would he be more apt to use the
14 gun in?

15 GENERAL RENO: One cannot say when -- how he
16 would be more apt to use the gun. What he can say is that
17 there would be situations where that gun may not be
18 observed as the passenger --

19 QUESTION: Right. It would certainly help to
20 arrest people who carry guns, that's right. I see you
21 would catch more gun-carriers, but I don't think that's
22 the justification you're advancing.

23 GENERAL RENO: That is -- the justification that
24 I'm advancing is that that officer should have the ability
25 to immediately size up the situation, determine if there

1 is any reasonable suspicion to believe that a person is
2 armed, and then advance to Terry frisk if that is
3 appropriate, but that he should have the opportunity to
4 control the situation if he is the single officer on the
5 scene before the backup comes, to keep them in the car so
6 that he doesn't have a person moving here, here, and here,
7 or to get them out of the car if there are circumstances
8 that dictate that they should be out of the car.

9 QUESTION: General Reno, you are arguing for a
10 bright line test, and I'm wondering how that squares with
11 the very recent decision of this Court in Robinette, which
12 said that reasonableness is always case-by-case totality
13 of the circumstances, and yet here you're saying that it's
14 reasonable in any and all circumstances for the police
15 officer to say, everybody out, or everybody in. That
16 doesn't go case-by-case.

17 GENERAL RENO: In Robinette, Your Honor, the
18 Court specifically cited it would favor the Mimms
19 decision, and concluded -- pointed out that Mimms,
20 considering all the totality of the circumstances, that it
21 was reasonable in light of the safety concern for the
22 officer that was more than balanced against the de minimis
23 intrusion into the passenger's personal security, that in
24 those totality of circumstances it was reasonable, under
25 Mimms, to justify it.

1 QUESTION: General Reno, how much of a problem
2 is it in the States that haven't adopted this rule? How
3 often does a citizen who has been told to stay in the car
4 or told to get out, in those States that require a
5 reasonable suspicion, at least, on the part of the
6 officer, how often have those citizens sued and recovered?
7 I mean, is it a real problem?

8 GENERAL RENO: I don't have any information that
9 I could provide to you, Your Honor.

10 QUESTION: Let me ask you a question on
11 something that frankly I think I should have done some
12 looking into before I came on the bench, but I didn't.
13 Has this Court ever ruled on the authority of an officer
14 to control members of the public generally when making,
15 let's say, an arrest in a public place?

16 GENERAL RENO: I'm not familiar with the
17 opinion, Your Honor.

18 QUESTION: I'm not, either. There may not be
19 one.

20 QUESTION: There are holdings, are there not, on
21 control of a crime scene, to require people to stay away
22 while they assemble evidence and --

23 GENERAL RENO: At a crime scene, if someone
24 entered in beyond the crime rope there would definitely be
25 authority to control, and it would depend on the State

1 law.

2 QUESTION: Do you think a policeman is more at
3 risk from a passenger in the car than from the bystanders
4 who congregate when the stop is made? Why is he more at
5 risk from the passenger, bearing in mind that the car has
6 been stopped only for a traffic vio -- I mean, if the car
7 has been stopped because of suspicion of drugs, that would
8 be something else, but let's assume it's just a speeding
9 violation. Is an officer usually more at risk from the
10 passenger than from bystanders?

11 GENERAL RENO: The issue with respect to a
12 traffic stop, Your Honor, is the unknown, the danger in
13 approaching the vehicle. The danger in approaching people
14 seated in the vehicle is what the Court in Mimms
15 specifically referred to.

16 In the instance where you have people who are
17 bystanders you have an opportunity to observe them to make
18 an appropriate decision, but in the situation with the
19 automobile, he's approaching an automobile. He doesn't
20 know what's in it. He can't see into it from his patrol
21 car. He doesn't know who's there. He can't see their
22 actions fully. That is the issue that makes this
23 situation different than the situation of bystanders who
24 may be in plain view.

25 QUESTION: The concealment thing.

1 QUESTION: Do you agree, General -- Ms. Reno
2 with the Attorney General from Maryland that the
3 passengers who have been told to exit can be required to
4 remain and not take the taxi or leave?

5 GENERAL RENO: That's not the issue before the
6 Court, but we would submit that it would be reasonable
7 under the Fourth Amendment.

8 QUESTION: So that this is a prolonged seizure.

9 GENERAL RENO: It is not a prolonged seizure
10 because this Court in Berkemer has referred to traffic
11 stops. It applies to routine traffic stops. It applies
12 to a brief, temporary stop, and under those circumstances
13 the officer should be able to see the person as they exit
14 the car.

15 QUESTION: Well, we know that when they check
16 licenses on their radio and hold the passenger it can
17 sometimes take 15 or 20 minutes for a routine traffic
18 stop, can it not?

19 GENERAL RENO: It can, and the Court has
20 recognized that is usually of that duration, but that is a
21 limited duration in which the police officer can have the
22 opportunity to size up the situation and see whether the
23 person presents a threat.

24 For example, if the person got out of the
25 automobile, and this is not the issue before the Court,

1 and suddenly ran into the bushes and -- the officer, we
2 submit, ought to be able to control that situation so he
3 can first determine the risk to him before the person
4 departs.

5 QUESTION: Let's assume for the sake of argument
6 that we do not adopt the rule that goes as far as you have
7 just suggested it should, that -- let's assume our --
8 under our rule, once the passenger is out of the car, if
9 the passenger wants to go, he can.

10 If that is the limit of the detention allowed,
11 is the situation of the passenger in any significantly
12 different -- is the situation of the passenger
13 significantly different from that of a bystander in the
14 course of a public arrest somewhere?

15 GENERAL RENO: May I --

16 QUESTION: Yes.

17 GENERAL RENO: -- complete the answer, Your
18 Honor?

19 In that situation, if the person were free to
20 go, again the officer would have the opportunity to
21 observe him, to see whether there was a basis for a
22 reasonable suspicion that would justify a frisk, or
23 justify action to protect the officer's safety in that
24 situation.

25 QUESTION: Thank you, Ms. Reno.

1 Mr. Warnken, we'll hear from you.

2 ORAL ARGUMENT OF BYRON L. WARNKEN

3 ON BEHALF OF THE RESPONDENT

4 MR. WARNKEN: Mr. Chief Justice, and may it
5 please the Court:

6 The State of Maryland asks this Court today to
7 draw a bright line that would permit a compelled detention
8 essentially ultimately equalling perhaps the level of an
9 arrest as to every single passenger in every single
10 vehicle in every single circumstance for every single
11 officer.

12 QUESTION: Well, Mr. Warnken, may I just ask you
13 the same question that I asked Ms. Reno?

14 Let's assume that the bright line rule allowed
15 nothing more than requiring the passenger to get out of
16 the car so that if the passenger then said, I've had
17 enough of this, I'm leaving, the passenger, so far as the
18 bright line rule is concerned, would be allowed to go.
19 Assume that.

20 QUESTION: In fact, the passenger says, thank
21 goodness. This guy was speeding. I am so glad to get out
22 of this car.

23 (Laughter.)

24 QUESTION: Let me catch the nearest cab and
25 go --

1 QUESTION: You can see what Justice Scalia's
2 passengers tend to feel like.

3 (Laughter.)

4 QUESTION: Assuming that Justice Scalia is the
5 one who has been stopped and it's his passenger --

6 (Laughter.)

7 QUESTION: -- who is then free to go, would the
8 bright line rule simply allowing the officer to say, get
9 out, give the officer any greater authority than the
10 officer has in the case of sort of the public arrest, in
11 which people are congregating around and the officer says,
12 stay back, or get away, or something like that?

13 MR. WARNKEN: Justice Souter, I think the answer
14 is that the bright line should not be drawn there. I
15 certainly concede of the various places on the continuum
16 that would be probably the next best place to the one the
17 State of Maryland has asked for.

18 QUESTION: Okay, but I'm not sure that responds
19 to my question, because my question is, if the bright line
20 would allow the officer to go no further than to say
21 either get out or stay in, would the officer have any --
22 be having any greater authority there than the officer
23 presumably does when making a public arrest, in which he
24 is allowed to control bystanders in the crowd by telling
25 them to stay away?

1 MR. WARNKEN: Justice Souter, I think that would
2 be different. The reason that would be different is that
3 in the arrest scenario, where you are arresting one
4 individual, the other people have nothing to do with that
5 and simply you're using the crowd control of letting them
6 not join where you are, if you will.

7 But here we're talking something different in
8 that, as was pointed out earlier, this individual has done
9 nothing wrong. This individual already --

10 QUESTION: No, but in the case of the public
11 arrest the person who is being told to stay back 12 feet
12 would normally -- has done nothing wrong and would
13 normally be able to walk up and down the sidewalk.

14 That person can go back the 12 feet or whatever
15 and say, I don't want to stay here any longer, and walk
16 away, but at least within a certain zone in which the
17 officer is operating, the officer can control people who
18 come along, and those people who come along are no more or
19 less innocent, I suppose, than the passenger, so why
20 shouldn't the passenger be in the same boat with the
21 bystander?

22 MR. WARNKEN: Justice Souter, on first blush it
23 may appear that those situations are similar. I think the
24 reason they are different is that the passenger, once
25 being made to get out, if Your Honors draw the bright line

1 there, as has been pointed out before, the police will
2 push that limit and, in fact, once you have the valid stop
3 of that vehicle, United States v. Sharpe and numerous
4 other cases from this Court would probably permit about a
5 half-an-hour, case-by-case basis, on how long you could
6 detain, which means, Your Honor, that making the passenger
7 get out would have the functional equivalent, particularly
8 if there was a bright line and the police could do
9 anything in any case, allowing the passenger to be
10 detained, even though it started as --

11 QUESTION: Well, the passenger will be detained
12 during the stop unless under Justice Souter's hypothesis
13 the passenger is free to walk away, but it's a voluntary
14 thing. It may not be too voluntary if you're out on the
15 desert somewhere, but if you're in an airport, if you're
16 being driven to the airport by somebody and you have a
17 chance to catch a plane if you get a cab it might make
18 quite a bit of difference.

19 But I don't see why it would necessarily follow
20 that the passenger is detained for 30 minutes if the
21 driver is detained for 30 minutes, under the hypothesis
22 Justice Souter proposes.

23 MR. WARNKEN: If this Court were to draw a
24 bright line, Mr. Chief Justice, wherein the only authority
25 that law enforcement had as to the passenger when there is

1 no evidence of officer safety issues and no wrongdoing on
2 the passengers, if the bright line were only to require
3 that individual to get out of the car momentarily, that
4 would perhaps be permissible.

5 But, Your Honor, once we've got the stop, as
6 Your Honor points out, in most cases the individual would
7 not have the opportunity to walk away. It simply
8 wouldn't --

9 QUESTION: But under your rule he'll be detained
10 anyway. He's sitting in the car rather than standing
11 outside.

12 MR. WARNKEN: Your Honor, although it is not the
13 rule we are asking for, I concede that Justice Souter's
14 drawing -- potential drawing of the bright line is the
15 least onerous of the bright lines that would be possible.

16 QUESTION: And then you --

17 QUESTION: It doesn't help the mother with the
18 baby in the snowstorm very much.

19 MR. WARNKEN: Absolutely correct, which is why,
20 Your Honor, we have urged that to draw a bright line at
21 all will have the unintended effect of overruling Terry v.
22 Ohio and its progeny, Mr. Justice --

23 QUESTION: Isn't the practical answer to this
24 case that officers really aren't going to ask everybody to
25 get out. They're only going to ask them to get out when

1 they're a little worried about the high crime
2 neighborhood, and the darkness, and so forth. Then
3 they've got Terry justification.

4 MR. WARNKEN: Your Honor, that is absolutely
5 correct.

6 QUESTION: Is that correct? Do you know what
7 the practice is in those States that have adopted a you-
8 can-do-it-all-the-time kind of a rule? Do they do it all
9 the time, or don't they?

10 MR. WARNKEN: Justice Scalia, there is no firm
11 information. We have tried to obtain training manuals
12 from various jurisdictions, and it seems to be relatively
13 vague, and seems to extend discretion to the officer.

14 QUESTION: Mr. Warnken, I think that General
15 Curran told us that the more usual practice is to tell the
16 people you must stay inside. Are you disputing that
17 that's so in the cases that give the officer the option?

18 MR. WARNKEN: Justice Ginsburg, I absolutely
19 agree that the custom and usage within law enforcement
20 agencies is, if given the option, to not have the people
21 get out of the car. Keep the people in the car.

22 QUESTION: But you say that's no good, too.

23 MR. WARNKEN: What I'm saying, Your Honor --
24 Justice Scalia, what I'm saying is that to give the police
25 the unfettered standardless discretion is the problem.

1 QUESTION: To -- either to keep them in or to
2 make them get out, either one?

3 MR. WARNKEN: Yes, Your Honor. Justice Scalia,
4 if we examine the case law we already have --

5 QUESTION: I just want to make it clear. In
6 your view, the passengers have a right to exit whether --
7 even if the officer does not want them to?

8 MR. WARNKEN: Justice Kennedy, that is correct,
9 in that there is --

10 QUESTION: I'm not sure we're just -- we have to
11 decide that case here, but it -- I'd like to know what the
12 rule would be. That, it seems to me very -- could be very
13 dangerous to the officers. Or if he was to say, well,
14 we're getting out to see what's going on here, you've got
15 two or three doors opening -- I think that would be a very
16 dangerous rule.

17 MR. WARNKEN: Justice Kennedy, let's examine the
18 continuum. I think that in that this Court must balance,
19 in that this Court has already held that there is a
20 legitimate and weighty interest in public safety for the
21 officer, that's the one side of the equation.

22 The other side of the equation for balancing,
23 Your Honors, is where must the Fourth Amendment and where
24 must the individual interests of the individual be
25 balanced to accommodate that need.

1 And what we are saying, Your Honors, is that the
2 one place this Court's prior case law would not let that
3 line be drawn and the one place reasonableness would not
4 be accommodated, would be to draw the line all the way at
5 the bottom, saying --

6 QUESTION: What about the Attorney General's
7 view? What I heard her say was a brief, temporary stop.
8 I.e., you can tell the passenger to stay inside, you can
9 tell the passenger can come out, as long as it's brief and
10 temporary.

11 I mean, I take it -- I don't know the minutes.
12 It sounded like minutes, not 30 minutes. It sounded like
13 the time it takes to write up a traffic ticket. What
14 about that as a line?

15 MR. WARNKEN: Justice Breyer, one of the
16 potential problems with that as the law is that brief to
17 all of us sounds like, stand outside for a few moments,
18 and I think, Your Honor, that what would happen would be,
19 under the case law from this Court, that will pretty much
20 defer to the natural steps that an officer must take to
21 effectuate a traffic stop, effectuate an arrest. The case
22 law has indicated there is no bright line on time.

23 QUESTION: So what's your line, then? Your
24 line -- is your line that if the man who is the passenger
25 wants to stay in the car he can do it, regardless? If he

1 wants to get out of the car, he can do it, regardless. Is
2 that your line?

3 MR. WARNKEN: Justice Breyer, that is -- that is
4 my line on this case.

5 QUESTION: Yes, but I thought --

6 QUESTION: No, it's not.

7 QUESTION: No, that's not your line on --

8 QUESTION: You say he can keep him in if he has
9 a reasonable suspicion, at least.

10 QUESTION: Sure.

11 MR. WARNKEN: Your Honor, I was saying Justice
12 Scalia, in this case --

13 QUESTION: Ah.

14 MR. WARNKEN: -- because we already have plenty
15 of case law that if there is any evidence of officer
16 safety, if there is any evidence of --

17 QUESTION: But what is that any evidence? I
18 mean, here there was evidence that the officer testified I
19 saw the passenger, and even more so the person in the back
20 seat, ducking, bobbing up and down and making suspicious
21 movements. That was held by the trial judge, or at least
22 some judge in Maryland to be insufficient to allow for a
23 Terry stop.

24 MR. WARNKEN: Justice Ginsburg, you are correct
25 on both counts. That is to say, the judge held it not to

1 be sufficient here, but I certainly agree with Your
2 Honor's implicit statement as part of that that on this
3 record --

4 QUESTION: But I would like to know what would
5 be sufficient, since you said that a passenger fidgeting,
6 ducking, making ducking motions, that wouldn't be
7 sufficient. What would be sufficient to allow the officer
8 to apprehend the passenger?

9 MR. WARNKEN: Justice Ginsburg, I did not
10 necessarily mean that that would be insufficient, because,
11 Your Honor, if the trial judge had on this record
12 determined that there was reasonable suspicion under Terry
13 v. Ohio and its progeny, on this record, probably on
14 appeal that would not have been found to be clearly
15 erroneous.

16 QUESTION: Well, you see, that -- part of that
17 illustrates that -- and sometimes bright line rules
18 actually help our citizens.

19 If we rule in your favor, and it becomes
20 generally known the Supreme Court says you do not have to
21 get out of car, and then there are some ducking motions
22 and the officer says, out, and the citizen says I don't
23 have to get out, what do we have? We have litigation. We
24 have doubt. We have uncertainty. And this is not always
25 helpful to the citizen.

1 MR. WARNKEN: Justice Kennedy, this Court can
2 easily paint -- draw a line to fashion a rule that will
3 fully accommodate the legitimate and weighty interest of
4 Government in the safety of officers and still balance
5 Fourth Amendment interests of the individual.

6 QUESTION: But you just told me --

7 QUESTION: You mean Terry --

8 QUESTION: -- it would be case -- it would be
9 judge by judge, that on this very record one judge might
10 have said, that's enough for Terry, and another judge
11 might have said, no it isn't, and we would have this
12 diversity in practice.

13 MR. WARNKEN: Justice Ginsburg, ever since Terry
14 v. Ohio and its progeny, that's what we have had, and yet
15 the States, the officers, the courts have not had a
16 problem with that.

17 QUESTION: You don't have it in Mimms. Mimms is
18 a bright line rule.

19 MR. WARNKEN: Mr. Chief Justice, that's correct,
20 but the reason Mimms is a bright line rule is a
21 combination of officer safety and the valid underlying
22 stop of the driver. Mimms really requires the both of
23 them in order to work.

24 This, Your Honors, would be I believe the first
25 time this Court would ever draw this type of bright line.

1 QUESTION: Well, it might be the first time that
2 we did it, but I'm not sure that it would be much of an
3 innovation, if at all, because it seems to me that the
4 argument you're making, and in particular in your response
5 to Justice Breyer's last question, you're saying in effect
6 that an officer who stops a car on a highway has less
7 capacity to control the people around him who might hurt
8 him or interfere with what he is validly doing than he
9 does if he makes an arrest in a public shopping mall.

10 And if I'm wrong, tell me, but it seems to me
11 you said he couldn't make him stay in the car, he couldn't
12 make the passenger get out of the car, the passenger
13 basically would have total freedom -- in the absence of a
14 Terry suspicion, articulable suspicion, the passenger
15 would have total freedom to decide what to do.

16 If I'm walking down the street outside this
17 Court and an arrest is going on, I presume I don't have
18 complete autonomy to decide whether to walk up to the
19 officer or between the officer and the person who's
20 getting arrested and circle the scene, so why isn't it the
21 case that on your answer the officer is in a worse
22 position if he stops a car on the highway than if he makes
23 an arrest on the sidewalk?

24 MR. WARNKEN: Justice Souter, my answer to
25 Justice Kennedy must be taken in the context of where I

1 think this Court should fashion a rule.

2 I'm suggesting to Your Honors that if there is,
3 on the limited circumstances where there is no evidence of
4 officer safety, and where there is no --

5 QUESTION: No Terry suspicion, in other words.

6 MR. WARNKEN: That is correct, and again, this
7 Court has deferred to the first level fact-finders. If
8 the fact-finder finds that there is on that record no
9 evidence of officer safety, no evidence of reasonable
10 suspicion of criminal or administrative wrongdoing, then
11 the best place to draw the line, I believe, is the Fourth
12 Amendment would be violated to intrude upon the
13 passengers.

14 QUESTION: Okay. Let's assume we've got an
15 arrest going on on the sidewalk, and I used to be an
16 Attorney General, now I'm a judge. I'm interested in how
17 these things work, so I want to get right up close and
18 hear exactly what's being said between the officer and the
19 person being arrested, so I walk up within 2 feet of
20 what's going on.

21 Does the officer, consistent with the Fourth
22 Amendment, at that point have the authority to say, uh-
23 oh, it's Souter.

24 (Laughter.)

25 QUESTION: Let's get him back where he isn't

1 going to mess things up.

2 Doesn't the officer, consistently with the
3 Fourth Amendment, have the authority to tell me to get
4 back 6 feet?

5 MR. WARNKEN: Justice Souter, the officer
6 probably would have that authority, because, Your Honor,
7 in the alternative to our asking you to draw no bright
8 line at all, what this Court could do to fashion the rule
9 would be to say, all of our continuing case law exists
10 wherever we have any evidence of reasonable suspicion or
11 fear of officer safety, and in addition, we will do as we
12 did in cases like Florida v. Wells and United States v.
13 Sokolow.

14 We will say that even when there is no evidence
15 on that record, we will defer to the expertise of
16 administrative agencies, law enforcement agencies in a
17 profile-type situation. If, based upon their experience,
18 a certain set of scenarios does cause what many courts
19 have referred to as the heightened caution, the heightened
20 caution may be --

21 QUESTION: Mr. Warnken, this Court itself in
22 dicta in Michigan v. Long referred to the right of
23 officers to require all persons in a vehicle to exit, and
24 many courts around the Nation have similarly thought that
25 it -- the Mimms principle extends to everyone in a vehicle

1 at a traffic stop at least to get them out if the officer
2 wants to get them out of the vehicle.

3 I don't think the Court has ever addressed the
4 additional argument raised here by Maryland that it also
5 includes a right to detain. I don't think that has been
6 addressed, really, has it?

7 MR. WARNKEN: Justice O'Connor, you are correct.

8 QUESTION: Have we had any particular problems
9 with the many jurisdictions that say Mimms does allow an
10 officer to require everyone to get out? Have there been
11 problems you can refer to, or statistics that you can
12 indicate that this is a worse situation in such
13 jurisdiction?

14 MR. WARNKEN: Justice O'Connor, I -- as to your
15 last part of your question, I cannot, and that is because
16 the way the statistics appear to be maintained on a
17 national level, it includes all types of situations such
18 as stops as well as pursuits.

19 QUESTION: But you admit that many jurisdictions
20 have followed what this Court at least said in dicta in
21 Michigan v. Long and allowed officers to order people
22 out --

23 MR. WARNKEN: Justice O'Connor --

24 QUESTION: -- in a traffic stop.

25 MR. WARNKEN: Justice O'Connor, you're

1 absolutely correct, there are a number of jurisdictions,
2 as General Curran pointed out --

3 QUESTION: Yes.

4 MR. WARNKEN: -- that believe that your earlier
5 decision --

6 QUESTION: Right.

7 MR. WARNKEN: -- in Mimms was extended to --

8 QUESTION: And that doesn't appear to have
9 offered any particular problems.

10 I think what really troubles me is the point
11 about how long can such a passenger be detained?

12 MR. WARNKEN: Justice O'Connor, you're correct
13 that there's no hard evidence as to one way or the other.
14 There is no hard evidence that having the power since
15 Mimms has caused officer safety to be affected negatively
16 or positively or not affected at all.

17 Your Honor, this Court's dicta in Michigan v.
18 Long was just that. The Court had before it a very
19 different context, determining whether, when you had not
20 only reasonable suspicion of criminal activity but you
21 also had reasonable suspicion of armed and dangerous.

22 In that scenario, the Court was merely
23 addressing what would be the scope of that armed and
24 dangerous, and the Court adopted the rationale from Belton
25 to say that it would be the lunge, reach and grasp.

1 QUESTION: Mr. Warnken, I'm not sure I agree
2 with you -- in this balancing of the various interests you
3 portray the passenger as being, you know, a wholly
4 innocent individual as much a stranger to the whole
5 incident as somebody who was standing on the curb and
6 watched the traffic violation.

7 But in fact, unless you're being kidnapped you
8 have voluntarily placed yourself in a vehicle driven by
9 someone whom you know, and who violates the speed limit.
10 Why isn't it a reasonable consequence of that that when
11 you do that you may trust this driver with a certain
12 amount of your inconvenience? He may cause you to have to
13 get out of the car sometimes, even in the rain.

14 MR. WARNKEN: And Justice --

15 QUESTION: Serve you right for driving with this
16 fellow, or not saying, you know, you're going too fast, or
17 whatever. It's really not a totally innocent person as,
18 oh, gee, you know, how did I get here?

19 MR. WARNKEN: Justice --

20 QUESTION: He drove with a person.

21 MR. WARNKEN: Justice Scalia, he may or may not
22 be a totally innocent person. He's certainly not a total
23 stranger in most cases, as Your Honor just correctly
24 pointed out.

25 I dare say that probably the vast, vast majority

1 of the people in this room within the last 3 to 4 hours
2 have been either a driver or a passenger in a public or
3 private conveyance, and I think when we get in a vehicle
4 as a passenger we certainly have an expectation that in
5 the event that the driver were to violate a traffic rule
6 or regulation that in fact that vehicle will be stopped.

7 What we don't have is an expectation that we can
8 be compelled, demanded to get out of the vehicle and, were
9 we to resist that, we could be forcibly taken from the
10 vehicle.

11 QUESTION: Maybe if you had that expectation
12 passengers would exert some influence over the drivers to
13 drive more safely.

14 QUESTION: For Pete's sake, it's raining out. I
15 don't want to have to get out of the car.

16 (Laughter.)

17 MR. WARNKEN: Mr. Chief Justice and Justice
18 Scalia, that we do have an expectation --

19 QUESTION: What we really want is more back seat
20 drivers, I guess.

21 (Laughter.)

22 MR. WARNKEN: We do have an expectation that we
23 will not be arrested, and I think if you have unfettered
24 discretion, standardless discretion, no requirement as in
25 Wells or Sokolow that the agency promulgate any, some

1 guidance to its officers, you may well have the equivalent
2 of Dunaway v. New York, where this Court has to say that
3 the way an individual has been forcibly detained would
4 become the equivalent of an arrest.

5 QUESTION: Wouldn't one expect to be some kind
6 of witness to what occurred? For example, one would have
7 knowledge whether the driver had a seat belt, whether the
8 driver was engaged in conversation -- one would be a
9 witness to what is a violation of the law.

10 MR. WARNKEN: Justice Ginsburg, I think the
11 example you give and the example many members of this
12 Court have given proves the very point that Justice
13 Stevens noted in his dissent in Pennsylvania v. Mimms, and
14 that is, passengers are not fungible goods.

15 There are a myriad of situations, and in fact we
16 probably have -- and we cite the statistics in our brief
17 as to how we get to this number, but you probably have
18 about 25 millionish passengers in this country per year
19 who are, in fact, in a vehicle where there is no evidence
20 of officer safety and no evidence of any wrongdoing other
21 than a traffic violation of the driver, and that is why --

22 QUESTION: Where do you get the 25 million
23 figure from, since figures seem to be hard to come by in
24 this situation?

25 MR. WARNKEN: Your Honor, as we conceded in our

1 brief, Mr. Chief Justice, it was an interpolation,
2 taking -- using Maryland as a State where statistically it
3 does have 1/50th of the population, 5 million out of 250
4 million, and taking the number of traffic cases that
5 actually get as far as court to be docketed, and then
6 assuming, as we did in our brief, that on the average
7 there would be a passenger in a car probably one time out
8 of two.

9 And of course our numbers could be wrong, but
10 the point is, it shows the extent to which the single
11 biggest probably police-citizen encounter in our society
12 today is a vehicle. We don't have the officer that walks
13 the beat. We don't have the constable in the way we once
14 did, and most of us, when we next meet a law enforcement
15 officer when that individual is in the line of duty, it
16 will be when we are driver or a passenger in a vehicle.

17 QUESTION: May I ask if -- I just don't remember
18 your brief well enough. Do you discuss the hypothetical
19 that Justice Souter gave you about maintaining order near
20 an arrest scene?

21 MR. WARNKEN: No, Justice Stevens.

22 QUESTION: Isn't the proper distinction there --
23 and I'd just like you to comment on it, because I've
24 trying to think it through as he raised the question --
25 that in that situation nobody's seized? They're told to

1 stay away. In your situation, the passenger is seized.
2 He's told to stay where he is, which is a very -- at least
3 analytically a different concept.

4 MR. WARNKEN: Justice Stevens, that's correct.

5 QUESTION: I had not understood Justice Souter's
6 hypothesis -- I thought his hypothesis you can be told to
7 get out of the car but you can't be detained. Once you're
8 out of the -- once you've complied with that request,
9 you're free to leave, unless there's -- there is some
10 Terry suspicion.

11 QUESTION: I didn't express that when I put the
12 hypo to you as distinct, I think, from the way I put it to
13 Ms. Reno, but that's what I was assuming, that the
14 passenger could go if he wanted to.

15 But if the passenger chose to stay at the scene,
16 the officer could say either, you stay in the car or you
17 get out. That was the hypothesis that I --

18 QUESTION: Well, that's the hypothesis I was
19 talking about, too, because by giving that order the
20 police officer is exercising control to tell the person
21 where to be at that particular moment by getting out of
22 the car where he would rather stay in, but that's not true
23 of the bystander who can't approach the scene.

24 MR. WARNKEN: Justice Stevens and Justice
25 Souter, I certainly concede to this Court that were this

1 Court to fashion a rule saying, State of Maryland, we
2 reject your absolute, bright line, unlimited, unfettered
3 discretion in all circumstances, but we will draw a line
4 that would permit unfettered discretion, meaning a bright
5 line to the limited extent of having the passenger exit
6 the vehicle, and then the passenger having the complete
7 discretion whether to get back into the vehicle, whether
8 to leave, or any other reasonable steps the officer would
9 take --

10 QUESTION: Well, how about getting
11 identification of who the passenger is and where they
12 could be reached if they're needed to be a witness?

13 MR. WARNKEN: Your Honor, Justice O'Connor, I
14 think the case law from this Court already would probably
15 give an officer, if that officer had reason to believe
16 that an individual were a witness to the crime, to try to
17 seek that information.

18 QUESTION: Well, we're talking about a traffic
19 stop. Obviously, the passenger is a witness to speeding,
20 or making a wrong turn, or something like that.

21 MR. WARNKEN: Justice O'Connor, that is correct,
22 which is why I stated earlier that this Court could
23 fashion a line between the one end of the spectrum that we
24 would like to see, which is, you need reasonable suspicion
25 in each case, and the other end of the spectrum that the

1 State of Maryland asks for, which is, you need nothing and
2 anything, to say, the line is as follows:

3 Our existing case law applies. Any reasonable
4 suspicion of any wrong activity or officer's safety, of
5 course the officer can then take reasonable steps; in
6 addition, take all of these hypos that we discussed today
7 and defer that back to the law enforcement agencies for
8 them, based upon their expertise, just like you did in
9 Sokolow, just like you did in Wells, for them to say,
10 based upon their experience as experts in the area, what
11 are the kinds of situations that truly create a heightened
12 caution that would permit some type of activity,
13 notwithstanding the failure to have any facts in that
14 particular case.

15 And in fact that's what this Court did when this
16 Court ruled unanimously in Wells that it was not proper to
17 do an inventory search when there was simply no guidance
18 from the agency to the individual officers. This Court
19 referred it back, and since then agencies have had no
20 problem examining those scenarios and coming up with
21 situations just like agencies have since Sokolow in the
22 profile cases.

23 What are the kinds of situations, based on its
24 experience as a law enforcement agency, that makes it
25 reasonable in the following circumstances, following types

1 of situations, the following is likely?

2 This Court has consistently given deference to
3 administrative agencies, their expertise in the area, and
4 we are not suggesting that be any different.

5 What we are suggesting, Your Honor, is, when you
6 weigh out the interest of law enforcement and safety and
7 you weigh out individual rights, you can't give
8 standardless, unlimited discretion to individual officers.
9 The best you should do is to give that discretion to
10 administrative agencies.

11 QUESTION: Which might be different in every
12 State, and suppose -- are you saying that if Maryland had
13 a manual and said, after 5:00 p.m., it's beginning to get
14 dark, the officer at that time can order the passenger
15 out, and then if they had that rule, then we would defer
16 to it and your client would legitimately have been asked
17 to get out because it was after 5:00?

18 MR. WARNKEN: Justice Ginsburg, that is probably
19 correct. This Court has recognized the 50 little
20 laboratories, and we know that in inventory search cases,
21 we know that in profile cases, basically that's what this
22 Court has done now.

23 It has said that even though you don't have
24 anything individualized in that case, if you can draw
25 us --

1 QUESTION: Which would mean that if that's what
2 your answer is, that all they need is a manual that says
3 after 5:00 this is okay, then the next client like yours
4 loses, because in -- with your client it wasn't a question
5 of detention. When your client exited the car the
6 contraband exited with him, right?

7 MR. WARNKEN: It -- yes, Your Honor. Yes,
8 Justice Ginsburg.

9 If Your Honors were to draw the line, for
10 example where Justice Souter was suggesting earlier, or
11 raising as a possibility earlier, of simply exiting, and
12 then if this Court later decided that in fact that was
13 such as to be reasonable, then in fact that would be
14 permissible.

15 But of course, Your Honor, these standards that
16 would be made by agencies, just like the profile cases
17 today, would, of course, be subject to review as to
18 whether they were unreasonable and extended too much or
19 not sufficient guidance to individual officers. Officer
20 safety is at issue, but it cannot take all Fourth
21 Amendment rights away.

22 QUESTION: Thank you, Mr. Warnken.

23 MR. WARNKEN: Thank you, Your Honors.

24 QUESTION: General Curran, you have a minute
25 remaining.

1 REBUTTAL ARGUMENT OF J. JOSEPH CURRAN, JR.

2 ON BEHALF OF THE RESPONDENT

3 QUESTION: General Curran, can you tell me why
4 we -- I resent being put in the position of deciding this
5 case on speculation, as lawyers sometimes -- you look at
6 the ceiling well, if we do this, this will happen.

7 You're telling us that it will increase police
8 safety if we adopt this automatic rule. None of the
9 briefs -- and there's a brief here by 20 States or so --
10 make any attempt to compare the assaults on police in the
11 States that have the rule you're urging us to adopt and
12 the States that don't have that rule, and that's the
13 crucial question.

14 We know we're going to inconvenience citizens to
15 some extent. We don't know whether we're going to
16 increase police safety. Why -- aren't those statistics
17 available? Why doesn't somebody come and say, this is the
18 proof of what we're saying?

19 GENERAL CURRAN: May I answer, Chief Justice --

20 QUESTION: Yes.

21 QUESTION: I don't understand that.

22 GENERAL CURRAN: Justice Scalia, you are right,
23 we don't have the specific numbers, but may I infer from
24 information we do have.

25 Since Mimms, with the authority upheld for the

1 police across the Nation to order the driver out, and
2 since some 25 jurisdictions have believed that Mimms also
3 conveys to the passengers, we do have data that shows that
4 the percentage of deaths in traffic incidents have been
5 reduced from about 30 percent to somewhere around
6 13 percent, so there is an inference that Mimms and its
7 progeny within the States has, in fact, worked.

8 CHIEF JUSTICE REHNQUIST: Thank you, General
9 Curran.

10 The case is submitted.

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

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MARYLAND, Petitioner v. JERRY LEE WILSON
CASE NO. 95-1268

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BY Don Mari Federico

(REPORTER)