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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 street or highway. These are --

CHIEF JUSTICE ROBERTS: Well, it wouldn't apply in a taxicab, right? I mean, a 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 Government means intentionally applied,
3 and I believe you are seized at that point. After that
4 it may become a factual question with the totality of
5 the circumstances and it may be significantly different
6 from that, from the question we'd face in a case like
7 this where it's a passenger in a private car.

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

10 MS. CAMPBELL: If a bus --

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

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

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

22 MS. CAMPBELL: With all due respect, I
23 believe at that point what you believe is not
24 necessarily the dispositive issue. The dispositive
25 issue is that your freedom of movement has been

1 curtailed by government action.

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

8 MS. CAMPBELL: Exactly, Your Honor.

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

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

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

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

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

25 MS. CAMPBELL: Yes.

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

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

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

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

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

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

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

23 MS. CAMPBELL: Yes. We concede that there's
24 --

25 JUSTICE KENNEDY: Do you have any case in

1 which we exclude the evidence seized incident to an
2 arrest when the arrest is lawful?

3 MS. CAMPBELL: Well, Your Honor, I don't
4 have a case that has these specific facts. This is a
5 new --

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

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

18 JUSTICE KENNEDY: There are tons of cases.
19 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 we 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 in this auto search which is a direct product of the
23 illegal stop should be admissible. And a criminal --

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 have 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 to 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 need -- would need to
19 be 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 arrest is an exception to -- to the exclusionary rule.
25 It's a prescription --

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

3 MS. CAMPBELL: To 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 he saw something in plain
19 view after an illegal stop, he 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
7 the passenger car, that -- that were known to be used as
8 a 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 admissibility -- admission of that
12 evidence. If the stop is illegal then anything the
13 officer seized --

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

1 point.

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

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

18 MS. CAMPBELL: Well, first, Your Honor, a
19 slight correction. I don't believe there is any
20 evidence that this was a warrant issued by a detached
21 magistrate. This is what we call in California a Powell
22 warrant under California Penal Code section 3000(v)(a)
23 --

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

1 is that conceded?

2 MS. CAMPBELL: Yes. Yes.

3 JUSTICE SOUTER: Okay.

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

6 JUSTICE SOUTER: All right.

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

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

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

1 not --

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

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

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

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

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

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

15 JUSTICE KENNEDY: Well, but I mean, that's
16 not before us.

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

18 JUSTICE KENNEDY: What we're talking about
19 is evidence seized from the defendant.

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

1 attenuated -- the taint is --

2 JUSTICE BREYER: The California Supreme
3 Court as far as I could tell was thinking that it turns,
4 you search somebody, you stop somebody, if you make him
5 think he isn't free to go.

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

15 MS. CAMPBELL: Have they been stopped by the
16 initial seizure?

17 JUSTICE BREYER: No.

18 MS. CAMPBELL: The initial stop of the car,
19 yes.

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

25 MS. CAMPBELL: Well, I think the Brower

1 decision --

2 JUSTICE BREYER: Brower --

3 MS. CAMPBELL: The Brower opinion has a very
4 clear test.

5 JUSTICE BREYER: What, what were the facts
6 there?

7 MS. CAMPBELL: Well, in Brower, it was a
8 roadblock --

9 JUSTICE KENNEDY: There was a roadblock.

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

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

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

24 JUSTICE SCALIA: So you're putting all your
25 eggs in the basket that the, the car came to a complete

1 stop and therefore they have been seized. And what is
2 crucial for the seizure is the elimination of motion on
3 the part of the car.

4 MS. CAMPBELL: That's how --

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

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

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

14 (Laughter.)

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

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

22 MS. CAMPBELL: Yes.

23 JUSTICE SOUTER: And those are the motion
24 cases. The most extreme example being the -- the
25 roadblock. Hodari D., did they -- you know, they were

1 trying to catch him but did they actually get to the
2 point of a seizure for Fourth Amendment purposes?

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

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

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

24 JUSTICE SOUTER: Okay. So you were engaging
25 in shorthand? You, you accept the analytical

1 distinction but you say look, in the real world once you
2 stop, we -- we know how the person would have felt?

3 MS. CAMPBELL: Well --

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

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

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

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

18 JUSTICE SOUTER: Okay.

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

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

25 MS. CAMPBELL: I think under the totality of

1 the circumstances any court would have a hard time
2 saying the passenger is not free to leave then, unless
3 there is some other intervening, some other factor.

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

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

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

10 MS. CAMPBELL: Well, if it's two different
11 --

12 JUSTICE SOUTER: You have either got to
13 accept their analytical distinction or not.

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

22 JUSTICE ALITO: What's the difference
23 between that situation where the police officer says on
24 the loudspeaker, "Passenger stay, driver you're free to
25 go," and the example that the State has in their brief,

1 in which a car is stopped and as a result of the way
2 it's stopped on a narrow road, the other cars behind
3 that car are for some period of time prevented from
4 going forward? What's the difference between those two
5 situations?

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

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

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

1 stop the driver.

2 So if you don't have the desire and if there
3 is no real restriction of any significance, is there a
4 stop? I mean I would say Brower, they cited on their
5 side, for that language.

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

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

25 Now that's their argument. What's your

1 response?

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

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

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

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

24 MS. CAMPBELL: Well, I don't think it makes
25 a difference one way or another. I was responding to

1 the suggestion that the passenger should somehow be
2 aware of the officer's intent and know when he sees
3 flashing lights that it means the driver -- I don't
4 think that that's a proper inquiry to determine whether
5 or not --

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

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

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

22 MS. CAMPBELL: No. I would say that that's
23 a reasonable, a reasonable stop. That's the risk --
24 when you get into a car as a passenger, you take a risk
25 that you may be subject to a reasonable search or

1 reasonable detention. But the Fourth Amendment doesn't
2 provide any protection for anyone against reasonable
3 detentions and that would be a reasonable detention.

4 Was there a question?

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

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

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

21 MS. CAMPBELL: I would say some of those
22 people would be in the position of the passer-by, the
23 passers-by identified in Brower. Possibly some of them
24 would be seized, but it sounds to me like it would be a
25 reasonable seizure and wouldn't necessarily -- I mean a

1 reasonable seizure, there's no Fourth Amendment
2 protection against a reasonable search.

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Zall.

3 ORAL ARGUMENT OF CLIFFORD E. ZALL
4 ON BEHALF OF RESPONDENT

5 MR. ZALL: Mr. Chief Justice, and may it
6 please the Court:

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

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

1 driver that's seized?

2 MR. ZALL: Justice Scalia, the way I'd
3 answer that question is to say yes at the outset,
4 because the driver is in control of the vehicle. By
5 necessity, the show of authority to stop if it's done in
6 a routine manner, as was done here, is directed at the
7 driver. Therefore --

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

11 MR. ZALL: The driver is seized. Thank you.

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

1 MR. ZALL: Justice Souter, I think the, the
2 pervasiveness and the commonplace nature of a routine
3 traffic stop gives --

4 JUSTICE SOUTER: Have you ever been stopped?
5 Have you ever been the subject of a traffic stop?

6 JUSTICE SCALIA: Tell the truth now.

7 (Laughter.)

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

9 JUSTICE SOUTER: Okay.

10 (Laughter.)

11 JUSTICE SOUTER: Okay. The heart rate went
12 up. The blood pressure went up. But --

13 MR. ZALL: But I was the driver, I was the
14 driver.

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

22 MR. ZALL: No, Justice Souter, I don't think
23 so. I think again, because the, the traffic stop is
24 such a common occurrence and in the overwhelming
25 majority of cases involving a routine traffic stop, it's

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

9 JUSTICE GINSBURG: What about the reaction
10 --

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

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

23 JUSTICE SCALIA: No, even if he didn't tell
24 me. I would have expected him to tell me. I wouldn't
25 even open the door because I know he would tell me. I

1 know that I'm not free to leave the car immediately
2 until he investigates the stop.

3 MR. ZALL: Well, I, I'm not sure that I
4 agree with that.

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

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

16 CHIEF JUSTICE ROBERTS: No, no, I'm talking
17 about the suitcase. You wouldn't, you wouldn't
18 reasonably think someone could just take something out
19 of a car that's been stopped by the officer and walk off
20 with it, right? Everything, all the contents of the
21 car, are seized as well as the driver, right?

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

25 JUSTICE KENNEDY: You're representing the

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

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

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

1 policeman has stopped it. But maybe I'm wrong. So when
2 you asked a million policemen, how many instances did
3 they tell you about where they stopped the car and all
4 the passengers jumped out and walked away?

5 (Laughter.)

6 JUSTICE BREYER: Was there one? Was there
7 one?

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

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

18 MR. ZALL: I mean, I think, I think again
19 that --

20 JUSTICE GINSBURG: Mr. Zall, let's say we
21 have just an intelligent, reasonable person reads the
22 newspaper and says: Oh, they handed down a decision
23 today that said the police can order me to get out of
24 the car, the police can order me to stay in the car.
25 How could such a person feel free to leave knowing that

1 it is the law that that person can be told, get out, or
2 if he tries to get out, stay in?

3 MR. ZALL: Well, Justice Ginsburg, I'd say
4 that, you know, in the Court's seizure jurisprudence
5 there is this notion of a consensual encounter. I think
6 when an officer approaches a citizen on the street there
7 is always the apparent authority. The apparent
8 authority of the police is always present. The police
9 always have the factual upper hand, if you were, and
10 that the traffic stop is no different. I mean -- and
11 yet, this Court has repeatedly said that when the police
12 approach a citizen, ask for his identification, ask for
13 his cooperation, even if the police follow him in a
14 squad car, that that's a consensual encounter.

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

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

18 JUSTICE BREYER: I mean it would be pretty
19 dangerous to get out.

20 MR. ZALL: Well, but that would be a reason
21 why you don't get out. But it doesn't have anything
22 necessarily to do with the police coercion. I mean, I
23 don't think -- most of us wouldn't get out. But that
24 doesn't make it a seizure, just like most of us would
25 cooperate with the police when the police approach us on

1 the street. But I don't think -- if anything, I think
2 the traffic stop is less ambiguous. It's clearer that
3 the police are not interested in me if I'm a passenger.

4 JUSTICE STEVENS: May I ask this question?
5 Suppose after the stop the passenger in the back seat
6 starts to get out and the officer says: Stay in the
7 car. Is he then seized?

8 MR. ZALL: Yes. Yes, because now the police
9 have directed action at him and in that situation a
10 reasonable person --

11 JUSTICE STEVENS: But doesn't that mean that
12 the authority to cause the person to stay in the car
13 existed throughout the stop?

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

17 JUSTICE STEVENS: Not in a meeting -- on a
18 casual street in downtown, if they say, I'd like to stop
19 and talk to you, you don't have to stop. There's no
20 authority to make them stop. But there is authority for
21 the passenger in the back seat of the car.

22 MR. ZALL: Well, it depends, Justice
23 Stevens. I think, is there legal authority? I mean, I
24 think police always have the factual authority and I
25 think that's the way the reasonable person looks at

1 things. I don't think the reasonable person --

2 JUSTICE STEVENS: Is there a difference
3 between legal authority and factual authority?

4 MR. ZALL: I don't think in this context
5 there is. I mean, certainly in --

6 JUSTICE STEVENS: If there's no difference
7 then there's legal authority.

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

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

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

17 JUSTICE BREYER: How are we supposed to -- I
18 think it's quite interesting. How do you suggest we
19 decide this? I don't mean the result, but I'll go, I'll
20 say yes, you've done your survey of the policemen, a
21 million policemen think they're not restricting the
22 movement of the passenger. Very few passengers jump out
23 of the car, but that may be because they're worried
24 about being run over. So you say, well, in fact they're
25 restricted, but they don't think they're being

1 restricted by the police, or do they? And here we have
2 no idea, at least I have no idea. I really don't know
3 what the majority think and yet it would seem totally
4 relevant. How would we find out?

5 MR. ZALL: Well, Justice Breyer, I mean, I
6 think that in this Court's -- to be consistent with this
7 Court's consensual encounter jurisprudence, with
8 Rodriguez, with Royer, with Drayton, with Bostick --

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

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

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

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

24 So again I think, I think that the seizure
25 occurs when the police exercise some authority over you.

1 I just think the traffic stop is less ambiguous. It's
2 clear that the traffic stop is to deal with the driver,
3 whereas in the street encounter --

4 CHIEF JUSTICE ROBERTS: If it's not, if the
5 opposite is true, then it is a seizure even though they
6 stop the car?

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

14 CHIEF JUSTICE ROBERTS: Even if they make
15 that, even if they make that interest clear prior to the
16 stop?

17 MR. ZALL: Yes, I think it would sort of
18 happen instantaneously.

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

22 MR. ZALL: So they direct their action, they
23 direct their attention at the passenger at the outset.
24 Yes, then I would say the driver is seized by the stop,
25 and then right immediately the passenger, the reasonable

1 passenger, would not feel free to leave and then he
2 would also be seized at that point. But again, I
3 hearken back to the Court's consensual encounter
4 jurisprudence. It seems to me that again the street
5 encounter is more anxiety-forming for the citizen
6 because the police have directed their attention at you.

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

12 MR. ZALL: Well, in your hypothetical,
13 Justice Ginsburg, the passenger would not be an innocent
14 passenger and the Court's test presupposes an innocent
15 person. So you can't really ask the question from the
16 perspective of the seatbelt violator.

17 JUSTICE GINSBURG: So it could be, it could
18 be sometimes the attention is directed at the driver,
19 but that's not always the case.

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

1 things.

2 JUSTICE KENNEDY: But on your earlier answer
3 to Justice Ginsburg, there's no authority in this Court
4 to say that whether you deem yourself stopped or not
5 depends on whether you think you're innocent. There's
6 zero authority for that, right?

7 MR. ZALL: That's correct.

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

9 MR. ZALL: No, that's correct. That's
10 correct. It's that the perspective must be -- we must
11 look at it from the innocent passenger and whether the
12 innocent passenger would, as a result merely of the stop
13 of the car, feel free to leave.

14 JUSTICE KENNEDY: Going back to Justice
15 Stevens' question, the passenger knows the minute the
16 red light goes on that the police can either tell him to
17 get out or tell him to stay in. He knows at that very
18 moment. That, it seems to me, substantially limits his
19 freedom of action and indicates that he's seized.

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

1 part of the citizen --

2 JUSTICE STEVENS: Yes, but in the consensual
3 case, he doesn't in fact have the authority, he has
4 apparent authority, but in this case he has actual
5 authority, not just apparent authority.

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

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

17 MR. ZALL: I think that is the current state
18 of the law. Yes, that is the current state of this
19 Court's jurisprudence.

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

25 MR. ZALL: No, I don't think so, Justice

1 Scalia. That just suggests that you're prudent when
2 you're dealing with an armed officer.

3 CHIEF JUSTICE ROBERTS: It's not the police
4 who have authority over the passenger; it's the driver.
5 The driver's exercising authority. Just because the
6 police say pull over, the driver can take off and the
7 passenger isn't seized at that point.

8 MR. ZALL: Absolutely, Mr. Chief Justice. I
9 think again, though, that the stop and then the after
10 the stop are discrete.

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

1 about and go ask a few practical questions, but you
2 didn't.

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

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

12 JUSTICE SCALIA: Maybe we can just pass
13 until the studies are done?

14 (Laughter.)

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

22 MR. ZALL: That's correct.

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

25 MR. ZALL: Well, I think that even were this

1 Court to rule that the passenger were subject to a
2 seizure, that the presence of the arrest warrant
3 attenuates any taint and therefore the evidence was --
4 was not suppressible.

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

10 MR. ZALL: I wouldn't, I wouldn't think
11 there would be a need to send the case back. I mean, I
12 think --

13 JUSTICE KENNEDY: Well, why, if we have
14 serious doubts whether or not the evidence is
15 suppressible? All we've been asked in the question is,
16 is whether the passenger is detained.

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

18 JUSTICE KENNEDY: While the questions
19 indicate that even if the passenger is detained, who
20 cares, it's a lawful arrest.

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

1 JUSTICE BREYER: Well, that question hasn't
2 been argued here.

3 MR. ZALL: Well, I think it's subsumed in
4 the question presented and I think it was raised in our
5 opposition and the parties have briefed it.

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

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

17 JUSTICE SOUTER: But don't we have two
18 problems if we go to that stage? The first one is we
19 would be applying a test that was not applied by the
20 court we're reviewing. And number two, correct me if
21 I'm wrong, but the, the -- assuming you win, as it were,
22 on the general point about the significance of the, of
23 the arrest warrant, there are still going to be
24 questions about the suppression of the evidence because
25 there are going to be questions about whether the

1 legality of the arrest on that theory suffices to
2 justify the seizure of the evidence. You recall the
3 colloquy I had with opposing counsel about the
4 possibility of applying a plain view test here.

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

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

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

24 MR. ZALL: Absolutely, Justice Ginsburg, I
25 agree. And one further point I'd like to make on that

1 is, would be to draw a parallel between a parked car
2 situation, in which the lower courts have uniformly held
3 that no seizure results when the police turn on their
4 lights and approach a parked car, and even when they rap
5 on the window to get the attention of the occupants
6 there is no seizure.

7 CHIEF JUSTICE ROBERTS: No seizure of a
8 passenger or a driver?

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

22 And in the parked car, there's ambiguity
23 about what the police want, whereas in the routine
24 traffic stop there isn't that ambiguity, so there's no
25 reason why the passenger shouldn't feel free to leave.

1 Now, it might be prudent, as Justice Scalia indicated,
2 to say, I'm leaving. But that doesn't make it a
3 seizure, that you should act prudently. I think you
4 should always act prudently when you're dealing with the
5 police.

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

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

20 And the -- and the comparison with the
21 parked car and the other consensual encounter cases of
22 this Court in my view indicate that there is nothing
23 that's been done to the passenger. I mean, the arrest
24 of one person as this Court said in Drayton does not
25 mean that everyone around him is detained so it doesn't

1 seem to the State that anything has been done to the
2 passenger. He just was unlucky enough to be in this car
3 when the driver was stopped for a traffic violation.
4 And that seems to me fairly unambiguous and we don't
5 feel like a reasonable passenger would not feel free to
6 leave in that situation.

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

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

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

25 JUSTICE STEVENS: Suppose 10 or 20 years ago

1 we had this case and we decided your way and decided
2 passengers are not seized, and then subsequently we had
3 the question of whether an officer could order a
4 passenger out of the car. What would be held then?
5 Would we have said you can't because he is not seized?
6 Or would you say yes, you were seized. I mean -- if we
7 decided in your case there is no seizure, would we then
8 have later on, do you think said, notwithstanding the
9 absence of a seizure the officer could order the person
10 out of the car?

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

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

22 MR. ZALL: But again --

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

25 MR. ZALL: But Justice Stevens, I think

1 that's because of -- the Court recognized in Mimms and
2 in Wilson that there is something inherently dangerous
3 about the traffic stop situation, and there may be
4 weapons in the car that the officer can't see, and so
5 that's why this Court found in Wilson that you could
6 order the --

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

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

22 CHIEF JUSTICE ROBERTS: You can finish your
23 sentence. Sure.

24 MR. ZALL: -- the Court just felt that the
25 weighty interest in officer safety justified the order

1 out, regardless of whether the passenger was seized at
2 the outset.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Miss Campbell, you have five minutes
5 remaining.

6 REBUTTAL ARGUMENT OF ELIZABETH M. CAMPBELL,

7 ON BEHALF OF PETITIONER

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

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

1 CHIEF JUSTICE ROBERTS: So that -- so that,
2 still then, it's just begging the question of whether or
3 not his Fourth Amendment rights were violated. You're
4 making a good case that the driver's Fourth Amendment
5 rights were violated, but why isn't the passenger, as
6 your friend said, just in the unlucky circumstance to
7 have been in a car whose driver's Fourth Amendment
8 rights were violated?

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

22 JUSTICE SCALIA: What have we done in a
23 case -- and maybe we haven't had it -- but what have we
24 done in a case where there is a warrantless entry in
25 violation of the Fourth Amendment of somebody's

1 apartment, and there is a suitcase in there that does
2 not belong to the owner of the apartment? My impression
3 is that, that the owner of that suitcase has not been
4 subjected to an unreasonable search and seizure; is that
5 correct?

6 MS. CAMPBELL: If the person has no
7 expectation of privacy in that suitcase that is correct,
8 Your Honor. But this Court has recognized in Delaware
9 versus Prouse that a passenger does have a
10 privacy-liberty interest in free travel. So it's a
11 different situation.

12 Once again, going back to the Brower case,
13 the, there was some question about whether or not the,
14 the seizure of a bystander would be, would be a seizure
15 under the rule proposed by, by Petitioner in this case.
16 Brower talks about an entirely accidental seizure.

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

19 MS. CAMPBELL: Yes, Your Honor.

20 JUSTICE KENNEDY: There was no passenger as
21 I recall.

22 MS. CAMPBELL: No. But -- but under the
23 rule proposed by the State if there had been a passenger
24 that passenger would not have been seized. But if we
25 look at how this Court --

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

4 MS. CAMPBELL: Yes, Your Honor. But if we
5 look at the case next in line, so to speak, the County
6 of Sacramento versus Lewis case, there was a passenger
7 in that case who was struck by the officer in the
8 pursuit, and although the Court found no seizure it
9 didn't base that on the fact that the person was a
10 passenger, but on the fact that it was an accidental
11 application of force, as opposed to --

12 JUSTICE KENNEDY: So that's just another
13 case that doesn't help us.

14 MS. CAMPBELL: I think it certainly informs
15 the discussion, Your Honor.

16 JUSTICE GINSBURG: But what of the question
17 that was raised about well, a passenger is locked in for
18 the moment, but so are all the cars that are backed up
19 behind the car that's been stopped? What's the
20 difference between the passenger --

21 MS. CAMPBELL: In that case, Your Honor,
22 there hasn't been an intentional impeding of those
23 people's free, free movement by the officer. The
24 officer has intentionally stopped this vehicle. And I
25 -- I don't think it's really, it's really far-fetched to

1 argue that it's reasonably foreseeable that automobiles
2 often have passengers in them, and there is certainly a
3 large body of statutory law at least in California that
4 shows that the car can be stopped for reasons related to
5 the passenger.

6 So it's, it's a different situation. We are
7 not looking at an accidental seizure. We are looking at
8 an intentional seizure of the car.

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

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

21 MS. CAMPBELL: No. The court did not -- did
22 not actually request briefing on the issue either.
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 12:04 p.m., the case in the
2 above-entitled matter was submitted.)

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