ARIZONA v. JOHNSON: DETERMINING WHEN A *TERRY* STOP BECOMES CONSENSUAL

RYAN THOMPSON*

I. INTRODUCTION

On September 10, 2007, the Arizona Court of Appeals reversed the conviction of Lemon Johnson and remanded the case for a new trial.[1] Johnson had been convicted of unlawful possession of a weapon and possession of marijuana. The illicit items were discovered when police conducted a protective pat-down search of Johnson, who was a passenger in a car that was detained in a routine traffic stop.[2] Johnson argued, *inter alia*, that his conviction should have been reversed because the trial court erred when it denied his motion to suppress the evidence.[3] Specifically, he argued that he was unlawfully "seized" because a routine traffic stop does not automatically seize passengers and, in absence of this seizure, that Officer Trevizo did not have an articulable basis upon which to seize him. Alternatively, he argued that even if he had been seized, by the time he was searched, the limited-duration *Terry*-stop had become a consensual encounter in which Officer Trevizo would have needed an independent articulable basis to search him. Thus, according to Johnson, the search violated his Fourth Amendment rights and the evidence discovered during that search should have been suppressed.[4]

Though a recent and unrelated United States Supreme Court case settled the question of seizure,[5] the Arizona Court of Appeals held that "when an officer initiates an investigative encounter with a

* 2010 J.D. Candidate, Duke University School of Law.

1. State v. Johnson, 170 P.3d 667, 668, 674 (Ariz. Ct. App. 2007).
2. *Id.* at 669.
3. *Id.* at 668.
4. *Id.* at 671.
5. *Id.* (citing Brendlin v. California, 127 S. Ct. 2400, 2410 (2007)).

passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'"[6] On June 23, 2008, the United States Supreme Court granted the State's petition for a writ of certiorari.[7]

II. FACTS

At 9:00 p.m. on April 19, 2002, three Oro Valley police officers, including Officer Maria Trevizo, were on patrol near Sugar Hill, an area of Tucson associated with the Crips street gang.[8] While routinely running the license plates of vehicles in the area, the officers stopped a car that had a mandatory insurance suspension.[9] As she approached the vehicle, Officer Trevizo noticed that the occupant of the back seat, Johnson, was exhibiting unusual behavior.[10] First, she observed that he had a police scanner in his jacket, which she felt was an unusual thing for somebody to be carrying.[11] Additionally, she noticed that Johnson was wearing all blue,[12] the chosen color of the Crips.[13] These factors, combined with the fact that Johnson stated that he did not have any identification and had been convicted of a felony, led Officer Trevizo to suspect that Johnson may have been a gang member.[14]

Johnson's possible gang affiliation disconcerted Officer Trevizo because, due to her extensive training as a gang task force officer, she knew that gang members generally tend to possess firearms.[15] Though she was concerned for her safety, Officer Trevizo did not have any indication that "Johnson was engaged in . . . or about to engage in criminal activity."[16] One of the officers then ordered all of the individuals in the car to display their hands.[17] Additionally, one of the

---

6. *Id.* at 674 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).
7. *Johnson*, 170 P.3d 667, *cert. granted*, 128 S. Ct. 2961 (U.S. June 23, 2008) (No. 07-1122).
8. *Johnson*, 170 P.3d at 668.
9. *Id.*
10. *Id.* at 669. Particularly, Johnson was alternately watching the officers as they approached and making comments to his friends in the front seats, something that struck Officer Trevizo as unusual.
11. Joint Appendix at 16, *Johnson*, 128 S. Ct. 2961 (No. 07-1122).
12. *Id.* at 17.
13. *Id.* at 18.
14. *Id.* at 19.
15. *Id.* at 10.
16. *Id.* at 29.
17. State v. Johnson, 170 P.3d 667, 669 (Ariz. Ct. App. 2007).

officers ordered the driver to exit the vehicle and gathered information from him.[18]

While her colleague dealt with the driver, Officer Trevizo questioned Johnson as he sat in the rear seat of the car.[19] Because he exhibited signs of gang affiliation, Officer Trevizo hoped that Johnson could provide some information that would help the gang task force in combating criminal gang activities.[20] At some point during the dialogue, Officer Trevizo asked Johnson to exit the vehicle so that she and Johnson would not be overheard by the other passenger.[21] Because she suspected that Johnson might have been armed and thus posed a threat to the safety of the officers, Officer Trevizo told Johnson after he exited the car that she was going to pat him down to make sure that he had no weapons.[22] She then conducted the contested search.[23] When the pat-down search revealed that Johnson had a handgun, he began to struggle and Officer Trevizo subdued and handcuffed him.[24] Johnson was promptly disarmed and taken into custody.

III. LEGAL BACKGROUND

All cases in this discrete line of constitutional jurisprudence fall under the umbrella of *Terry v. Ohio*, in which the Supreme Court held that a police officer may stop a person if he reasonably suspects that the person has committed or is in the process of committing a crime.[25] Under *Terry*, a person is seized when, "by means of physical force or show of authority,"[26] police action "terminates or restrains his freedom of movement."[27] Once the officer makes a seizure, he may then conduct a pat-down search to ensure that the suspect is not armed and to preserve evidence.[28]

As law enforcement officials have attempted to constitutionally apply this concept, subsequent cases have further illuminated when

18. *Id.* at 669.
19. *Id.*
20. Joint Appendix, *supra* note 11, at 19.
21. *Johnson*, 170 P.3d at 669.
22. Joint Appendix, *supra* note 11, at 20.
23. *Id.*
24. *Id.* at 24.
25. Terry v. Ohio, 392 U.S. 1, 30 (1968).
26. *Id.* at 19 n.16.
27. Florida v. Bostick, 501 U.S. 429, 434 (1991).
28. United States v. Robinson, 414 U.S. 218, 234 (1973).

seizures occur and who may be seized. As articulated by the Supreme Court in *United States v. Mendenhall*, a person has been seized if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[29] *Delaware v. Prouse* made clear that during a traffic stop, the driver of the vehicle is lawfully seized[30] and, in *Brendlin v. California*, the Supreme Court unanimously voted to adhere to previous dicta, formally expanding the scope of the seizure to include passengers of the vehicle.[31]

A. Recent Supreme Court Cases

Brendlin and *Knowles v. Iowa* are two recent Supreme Court cases that are instructive in applying the *Terry* doctrine to the *Johnson* case. As mentioned, *Brendlin* held that a traffic stop seizes passengers of the vehicle in addition to the driver. In *Knowles*, the Supreme Court disallowed full "field-type" searches in the context of traffic stops but stated that police may order a driver and passengers from the vehicle and conduct pat-down searches "upon reasonable suspicion that they may be armed and dangerous."[32]

In *Brendlin*, police stopped a vehicle with expired registration and an ostensibly legitimate temporary registration (issued while an application for renewal was pending) in order to verify that the permit matched the vehicle.[33] While the driver spoke with the police, one of the officers noticed that the driver's passenger was one of the "Brendlin brothers," one of whom was in violation of his parole.[34] When the police discovered that the passenger was indeed the wayward brother, he was arrested.[35] A search incident to arrest revealed methamphetamine and equipment commonly used to manufacture the drug.[36]

At the trial hearing to suppress the evidence uncovered by the search, Brendlin unsuccessfully argued that he was unlawfully seized

29. United States v. Mendenhall, 446 U.S. 544, 545 (1980).
30. Delaware v. Prouse, 440 U.S. 648, 659–60 (1979).
31. Brendlin v. California, 127 S. Ct. 2400, 2410 (2007).
32. Knowles v. Iowa, 525 U.S. 113, 117–18 (1998).
33. Brendlin v. California, 127 S. Ct. 2400, 2404 (2007).
34. *Id.*
35. *Id.*
36. *Id.*

as a result of the traffic stop.[37] The California Court of Appeals held that the traffic stop effectively seized Brendlin and, because the stop itself was unlawful, the court reversed the denial of Brendlin's motion to suppress.[38] The California Supreme Court reversed, invoking the concepts of power and authority articulated in *Terry* and stating that a passenger cannot meaningfully submit to police authority and therefore cannot be seized in a traffic stop.[39] Instead, the California Supreme Court of California held that a passenger is seized only if the stop is accompanied by some additional facts that would indicate that the passenger was not free to go and was subject to the control of the police.[40]

The *Brendlin* case gave the United States Supreme Court occasion to consider whether police, in executing a traffic stop, seize persons who are passengers within the stopped vehicle.[41] In light of *Terry* and its progeny, the Court framed the analysis as "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to terminate the encounter between the police and himself."[42]

Writing for the unanimous Court, Justice Souter explained that the general public would not expect the police to distinguish between the driver and the passenger during a traffic stop.[43] The Court pointed to a number of cases that support this view, emphasizing that the intentional application of governmental control and the perception of the persons seized were the most important factors for evaluation rather than the subjective intent of the officer to stop the driver and his ambivalence toward the passengers at the time of the stop.[44] Additionally, the Court noted that, as opposed to the obvious seizure that occurs when a fleeing suspect is physically restrained, a stationary

37. *Id.* The trial court determined that he was seized only when the police officer ordered him out of the car immediately prior to his arrest.

38. *Id.*

39. *Id.* at 2404–05.

40. *Id.*

41. *Id.* at 2403.

42. *Id.* at 2405–06 (quoting Florida v. Bostick, 501 U.S. 429, 435–36 (1991)) (internal quotations omitted).

43. *Id.* at 2407 ("If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer than no passenger would feel free to leave in the first place.").

44. *Id.* at 2407–08.

suspect may submit to seizure merely by staying where he is.[45] As a result, the Court held that police had effectively seized Brendlin when they stopped the car, despite the fact that he was merely a passenger and not the target of the stop itself.[46]

The *Knowles* case evaluated an Iowa law that gave officers the option to issue citations for traffic violations or to arrest offending drivers and bring them before magistrates for further proceedings.[47] As interpreted by the Iowa Supreme Court, this statutory option authorized police to conduct a "search incident to citation" if they decided to cite rather than to arrest offenders.[48] In *Knowles*, an Iowa police officer stopped a motorist and cited him for speeding.[49] After issuing the citation, the officer proceeded to conduct a full "field-type"[50] search of the automobile.[51] In the course of his search, the officer discovered marijuana and a pipe, presumably used to smoke the marijuana.[52] The officer arrested the motorist for violation of Iowa's controlled substances laws.[53]

Before trial, the motorist unsuccessfully moved to suppress the evidence and was subsequently convicted.[54] On appeal, the United States Supreme Court analyzed the justifications articulated in *United States v. Robinson*[55] for the sort of full "field-type" exploratory search performed here.[56] The Court invoked the dual concerns of officer safety and of the need to preserve evidence in the context of a lawful arrest, and then proceeded to explore the factual similarities between an arrest and a traffic stop.[57] The Court explained that a traffic stop is more closely related to a traditional *Terry* stop than to a full arrest because the "proximity, stress, and uncertainty" that make arrest so dangerous are not as prevalent in the context of a traffic stop.[58] As a result, the Court held that these traditional concerns do not, by

45. *Id.* at 2408.
46. *Id.* at 2410.
47. *Id.*
48. *Id.* at 115–116.
49. *Id.* at 114.
50. This type of search would encompass the entire automobile, which makes it more expansive than a *Terry* search.
51. *Id.*
52. *Id.*
53. *Id.* at 114–15.
54. *Id.* at 114.
55. United States v. Robinson, 414 U.S. 218, 234–35 (1973).
56. *Id.* at 116–17.
57. *Id.* at 117.
58. *Id.*

themselves, permit police to conduct full investigatory searches during traffic stops.[59]

Citing *Terry*, however, the Court then explained that this still left police officers with several procedures with which to preserve their safety. At the top of a laundry list of possible protections available to police officers during a routine traffic stop, the Court explicitly suggested that an officer may order both the driver and his passengers out of the car and may conduct pat-down searches of all parties "upon reasonable suspicion that they may be armed and dangerous."[60]

B. Arizona Cases

In addition to the Supreme Court cases above, the Arizona Court of Appeals also relied heavily upon two Arizona cases, *In re Ilono H.*[61] and *State v. Navarro*,[62] during its analysis of the *Johnson* case. In both cases, the Arizona Court of Appeals determined that the searches were unconstitutional because they occurred during consensual encounters between law enforcement officials and civilians. *Ilono H.* held that officers cannot lawfully conduct a protective pat-down search in the context of a consensual encounter[63] and *Navarro* yielded the proposition that a legitimate *Terry* stop may become a consensual encounter.[64]

In *Ilono H.*, two officers approached five individuals in a park that had a reputation for drug activity.[65] They noted that many of the individuals were dressed in baggy red clothing, a color associated with gang activity,[66] which caused the officers concern because, as one of the officers later testified, gang members often carry weapons.[67] Following a short dialogue, the officers conducted pat-down searches of the five individuals, found that Ilono was concealing a 40-ounce beer in his clothes, and arrested him for illegal possession of alcohol.[68] While conducting a search incident to the arrest, the officers found

59. *Id.* at 118–19.
60. *Id.* at 117–18.
61. In re Ilono H., 113 P.3d 696 (Ariz. Ct. App. 2005).
62. State v. Navarro, 34 P.3d 971 (Ariz. Ct. App. 2001).
63. *Ilono H.*, 113 P.3d at 699.
64. *Navarro*, 34 P.3d at 297.
65. *Ilono H.*, 113 P.3d at 697.
66. *Id.*
67. *Id.*
68. *Id.*

cocaine in one of Ilono's pockets.[69] The juvenile court rejected Ilono's claim that the search was impermissible under *Terry* and declined to suppress the cocaine evidence.[70] Ilono, after his conviction, appealed.[71]

On appeal, the Arizona Court of Appeals established first that a *Terry* stop is permissible only when officers have reasonable suspicion that the person is or will shortly be engaged in criminal activity.[72] The court contrasted this *Terry* stop with a consensual encounter, which an officer may initiate at any time but is subject to termination at the will of the person detained.[73] From these two propositions, the court reasoned that it would be illogical to suggest that a person who could not be lawfully detained could still be subjected to a pat-down search during a consensual encounter.[74] This is in keeping with the court's earlier articulation of the proposition that "an officer's right to conduct a pat-down search should be predicated on the officer's right to initiate an investigatory stop in the first instance."[75] The court held that the officers had no right to initiate an investigatory stop because they had no reasonable suspicion that Ilono had committed a crime.[76] Because they had no right to stop Ilono, the officers therefore had no right to conduct a pat-down search during the consensual encounter.[77]

In *Navarro*, police stopped a car near the scene of a shooting that had taken place a few hours earlier.[78] One occupant of the car, Navarro, a thin Hispanic man in a red shirt and jeans, matched the description of the shooter and was handcuffed and questioned by police.[79] After a brief discussion, Navarro was relieved of his handcuffs and asked to accompany an officer to the police station.[80] Navarro was never cited for anything and was never told that he was free to go; however, he also never expressed a desire to leave.[81] The officer invited the unrestrained youth to sit in the front passenger seat

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 698.
74. *Id.* at 700.
75. *Id.*
76. *Id.* at 700–01.
77. *Id.*
78. State v. Navarro, 34 P.3d 971, 973 (Ariz. Ct. App. 2001).
79. *Id.*
80. *Id.* It is unclear whether the police removed the handcuffs before, during, or after Navarro decided to go to the station with the officer.
81. *Id.*

of his unmarked car, suggesting that he buckle his seat belt. When they got to the police station, the officer left Navarro unattended in the interrogation room while he left to buy Navarro a drink.[82] Navarro agreed to be photographed and fingerprinted and to have his testimony taped.[83] Navarro acknowledged that he was aware of his *Miranda* rights and signed consent forms to permit the use of his testimony.[84] This information was later used to convict Navarro, who unsuccessfully moved to suppress the evidence on the grounds that it was illegally obtained.[85]

On appeal, Navarro contended that his legal detention for investigatory purposes became an illegal arrest when the police took him to the station and that his compliance with officers' requests exhibited an acceptance of his fate, not consent to the investigation.[86] The court disagreed with both contentions, and held that Navarro was neither in custody nor under arrest when he decided to accompany the officer to the police station because "[u]nder the circumstances, a reasonable, innocent person would have felt free to decline [the officer]'s request to accompany him for questioning downtown."[87] As a result, the Court of Appeals upheld the trial court's determination that the information obtained during the interrogation should not be suppressed.[88]

IV. HOLDING

In *State v. Johnson*, the Arizona Court of Appeals held that the evidence found during Officer Trevizo's search of Johnson should be suppressed and the case remanded for a new trial.[89] The court stated that Johnson was initially seized when police lawfully stopped the car in which he was riding.[90] Though Officer Trevizo could have ordered all passengers from the vehicle at that time, she failed to do so.[91] The lapse in time between the stop and the actual exercise of police authority over Johnson is especially important because, combined

82. *Id.*
83. *Id.* at 973–74.
84. *Id.*
85. *Id.* at 972.
86. *Id.* at 974–75.
87. *Id.*
88. *Id.* at 977.
89. *Id.* at 674.
90. *Id.* at 671.
91. *Id.* at 672.

with Officer Trevizo's polite and unthreatening manner, it caused a lawful *Terry* stop to transition into a consensual stop.[92] Additionally, Officer Trevizo did not have an articulable basis upon which to suspect that Johnson was committing or had committed a crime and so she could not have justifiably initiated a *Terry* stop.[93] Trevizo and Johnson were thus engaged in a consensual encounter that Johnson was free to terminate at any time, and in such a consensual situation Trevizo could not lawfully conduct a search of Johnson without his consent.[94] Therefore, when Officer Trevizo conducted a protective pat-down search and uncovered a firearm, she violated Johnson's Fourth Amendment rights and triggered the exclusionary rule.[95]

In *State v. Johnson*, the Court of Appeals of Arizona first explained the *Terry v. Ohio* framework as it was presented in *In re Ilono H.*[96] In detailing the pertinent facts of that case, the court stressed that, although a lawful investigatory *Terry* stop allows officers to conduct a pat-down search to ensure officer safety, a consensual stop does not.[97] The court pointed out that *Ilono H.* had reaffirmed that the validity of a protective search rests upon the validity of the initial stop.[98]

Drawing on the Supreme Court's holding in *Brendlin v. California*, the court agreed that Johnson had been lawfully seized within the meaning of the Fourth Amendment when the car in which he was a passenger was lawfully stopped.[99] The court then evaluated Johnson's claim that, even if he had been lawfully seized, Officer Trevizo was not entitled to conduct a protective pat-down search because the interaction "had evolved into a consensual encounter before Trevizo patted him down."[100] In evaluating this claim, the court first considered the circumstances under which a custodial detention becomes a consensual encounter. The court cited a number of cases suggesting that a traffic stop becomes a consensual encounter when an officer hands the driver his license and registration and issues him

92. *Id.* at 673.
93. *Id.* at 672.
94. *Id.*
95. *See id.* at 674.
96. State v. Johnson, 170 P.3d 667, 670 (Ariz. Ct. App. 2007).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

a citation or warning.[101] Although the court found no case law establishing such a point regarding passengers, it reasoned that, at some point, a passenger must be free to walk away from the scene of the traffic stop.[102] In deciding exactly when this change of circumstances occurs, the court stated that it was compelled to apply a standard of reasonableness.[103]

Proceeding with a more in-depth analysis, the court then elaborated on consensual encounters, stating that an encounter is consensual if a civilian voluntarily cooperates with police, absent coercive use or threat of power.[104] On the other hand, an encounter is not consensual if a reasonable person would not feel free to disregard law enforcement officials and carry on as he otherwise would.[105] Applying these principles to the facts presented in *Johnson*, the court noted that Officer Trevizo's purpose in speaking with Johnson was unrelated to the traffic stop.[106] The court also emphasized that Officer Trevizo believed that Johnson was free to terminate the encounter at any time.[107] After acknowledging that the subjective belief of an officer is only instructive if the officer communicates it to the civilian in some way, the court pointed out that Officer Trevizo did not communicate "to him [Johnson] that his encounter with her was anything other than consensual."[108]

The court next examined *State v. Navarro* and compared the facts in that case to those in *Johnson*.[109] After deciding that Navarro had been subject to a greater level of coercion than had Johnson, the court held that the encounter was consensual because the reasonable person, in Johnson's position, would have believed himself free to remain in the vehicle.[110] Because it found that the encounter was consensual, the Arizona Court of Appeals held any evidence found during Officer Trevizo's search should be suppressed.[111]

---

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 672.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 672–73.
110. *Id.* at 673.
111. *Id.* at 674.

Judge Philip Espinosa argued in dissent that the majority had not only disregarded settled law but had also placed police in greater peril.[112] The dissent pointed to language in *Ilono H*. that stated that the lawful nature of a pat-down search should rest upon the legality of the original *Terry* stop.[113] Because Johnson was lawfully seized as a result of the traffic stop, the dissent argued that the trial court's decision was correct.[114] Furthermore, the dissent stated that Arizona courts have long recognized that the right of an Arizona police officer to conduct a protective pat-down search of a passenger of a stopped vehicle comes from a "reasonable concern for his safety."[115] During the course of a lawful traffic stop, once Officer Trevizo reasonably believed that Johnson was armed and could pose a threat, she was justified in conducting a protective pat-down search for the weapon that she found.[116] Because of these factors, the dissent concluded that the pat-down search was lawful and that the evidence should not be suppressed.

V. ANALYSIS

The adjudication of this case necessarily requires the balancing of extremely weighty interests. The Fourth Amendment is critical to protecting the right of a person to avoid unreasonable governmental intrusion into his life. Johnson's claim draws on this ideal, which resonates with fundamental ideals of individualism and privacy but which conflicts with the concern for the safety of the men and women who protect citizens from criminals. As a result, rather than interpret the Fourth Amendment to flatly prohibit warrantless searches, the Supreme Court has made the warrant requirement a general rule, but one that has a number of exceptions. In *Terry v. Ohio* and its progeny, the Supreme Court has continued to invoke safety interests to construct a suitable framework that will concurrently protect law enforcement officials from dangerous criminals and innocent civilians from unreasonable governmental interference.

In *Johnson*, the Arizona Court of Appeals has produced a standard that, in addition to being highly attenuated and practically unworkable, disrupts the delicate balance that the Supreme Court has

112. *Id.* at 674 (Espinosa, J., dissenting).
113. *Id.*
114. *Id.*
115. *Id.* (quoting State v. Riley, 992 P.2d 1135, 1140 (Ariz. Ct. App. 1999)).
116. *Id.*

been carefully crafting for decades. Although the Supreme Court has not explicitly held that passengers may be ordered out of a lawfully stopped vehicle and subjected to protective pat-down searches if police suspect that they are armed and dangerous, it has stated in dicta that this and more is permissible.[117] Additionally, in *Brendlin v. California*, the Supreme Court said of traffic seizures that "a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation."[118] By claiming to not reach this issue in *Johnson*, the Arizona Court of Appeals avoided contradicting Supreme Court dicta but propagated a rule that creates tension between the Supreme Court's Fourth Amendment jurisprudence and its own.

If this outcome were the product of adherence to binding precedent or of applying clear and accepted constitutional principles, perhaps the *Johnson* case would be more understandable. The court, however, based its most crucial determinations upon an overly-nuanced reading of the *Navarro* case, which is quite dissimilar from the *Johnson* case.

First, the events in the *Navarro* case, which the Arizona court cited for the proposition that a custodial stop can transition into a consensual encounter, took place over a substantially long period of time.[119] During that time, Navarro was accosted by police, led away from the vehicle for conversation, handcuffed but not given a protective pat-down search, and then was invited back to the police station, un-handcuffed, allowed to ride in the front passenger seat of the police officer's vehicle, left unattended at the police station, and given a beverage.[120] In that situation, the apparent shift in police interaction with the suspect is even more striking than the passage of hours between the original *Terry* stop and the termination of the police interaction. Thus, although the police initiated the encounter with Navarro in a clearly authoritarian manner, the subsequent removal of his handcuffs, a major symbol of police authority, could reasonably be understood to indicate an end to the compelled encounter.

117. Knowles v. Iowa, 525 U.S. 111, 117–18 (1998).
118. Brendlin v. California, 127 S. Ct. 2400, 2407 (2007).
119. *Johnson*, 170 P.3d at 676.
120. State v. Navarro, 34 P.3d 971, 973–74 (Ariz. Ct. App. 2001).

Second, the *Navarro* case did not present the danger, stress, and uncertainty that have long been considered crucial to the justification of protective pat-down searches.[121] In contrast to the events of the *Navarro* case, the *Johnson* case presented a short traffic stop, conducted at night, involving multiple civilians displaying indicia of gang activity, and in which police interaction with civilians was consistent throughout the stop.

To buttress its analysis in *Johnson*, the majority pointed to Officer Trevizo's testimony that, in her opinion, Johnson was under no obligation to get out of the car and could have refused to exit the vehicle when instructed to do so. The court correctly articulated that an officer's subjective intent is only relevant insofar as the officer communicates it, but it did not point to any of Officer Trevizo's actions that would have communicated her subjective belief to Johnson. Instead, the court used a completely opposite rule; it shifted the burden to the state by assuming that the subjective intent was conveyed because Officer Trevizo did not act in a threatening or otherwise coercive manner.

Contrary to the court's assessment, the Joint Appendix indicated that Officer Trevizo's interaction with Johnson, though polite and professional, was not consensual and was never suggested to be consensual. For example, although she did not use any physical force,[122] Officer Trevizo said that she did not ask for Johnson's permission to search him.[123] It is equally clear that Johnson's compliance is most accurately characterized as acquiescence. Johnson never expressed an unwillingness to comply,[124] but it stands to reason that a man currently engaged in a felony would not interact with police to any degree beyond that to which he felt obliged.[125] Furthermore, Johnson contended that he had never consented, as indicated when defense counsel at the suppression hearing said:

121. *See* Knowles v. Iowa, 525 U.S. 111, 117 (1998).
122. Joint Appendix, *supra* note 11, at 50–51.
123. *Id.* at 34.
124. *Id.* at 49–51.
125. This is curiously at odds with a portion of the Supreme Court's *Terry* jurisprudence, in which a significant number of cases have held that felons will often consensually interact with the police. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 199–200 (2002) (evidencing that felons do, in fact, cooperate with police in situations where they felt or should have felt free to terminate the encounter).

"There's not consent here. The context is clearly not indicative of consent."[126]

It is fairly clear that the passage of time and the marked shift in police demeanor toward the civilian, sufficient to signal a transition into a consensual encounter in the *Navarro* case, are simply not analogous to the brief nature of the traffic stop and the polite but unquestioning demeanor of the officer in *Johnson*. Furthermore, the danger, stress, and uncertainty of the stop in the *Johnson* case suggest that police in that circumstance should be given greater leeway than the police in the *Navarro* case. If no communication was made to the civilian that the lawful stop had terminated,[127] it is illogical to suggest that the passage of a few minutes or the use of a polite tone of voice would indicate to the passenger that he is free to ignore police requests or to walk away from the car and pursue his own destiny. As a result, the court should have agreed with Johnson's original position: that the entire encounter between the police and Johnson was not consensual. This, however, would not help Johnson: without the initial *Terry* stop evolving into a consensual encounter, Officer Trevizo was justified in searching Johnson for her safety.[128]

VI. CONCLUSION

For the reasons stated, the Supreme Court will probably reverse the holding of the Arizona Court of Appeals, which was to suppress the evidence against Johnson. Given the unanimity of the Court in deciding *Brendlin v. California* and *Knowles v. Iowa* and its relatively undisturbed ideological composition, it seems very likely that the Court will continue this trend. Furthermore, as detailed above, the Court of Appeals's decision was reached only through a number of novel determinations, any one of which the Supreme Court may reject, resulting in a reversal. For instance, the Supreme Court may hold that, in the context of a traffic stop, police may conduct protective pat-down searches of civilian occupants at any time. Alternatively, it may reject the notion that a consensual encounter may arise out of a lawful traffic stop or hold that, while possible, the

126. *Id.* at 52.

127. For instance, when an officer writes the driver a citation, hands him the citation and his license and registration, and tells him that he is free to leave.

128. Terry v. Ohio, 392 U.S. 1, 30 (1968).

circumstances necessary for such a transition were not present in the *Johnson* case.

The most reasonable disposition that the Court could adopt in reversing the Arizona Court of Appeals would be that a consensual stop may evolve from a valid *Terry* stop, but only under some combination of circumstances that are clearly indicative of a consensual interaction: the passage of a long period of time; a marked shift in police attitudes and interaction; and/or purposive communication to the civilian that he is free to go. Such a decision will continue to safeguard the rights of individual citizens while staunchly preserving the safety of the brave men and women who are sworn to protect and serve.