

Sample Brief

#1

QUESTION PRESENTED

Whether the Fourth Amendment requires police questioning at a traffic stop to be reasonably related to the initial justification for the stop.

STATEMENT OF THE CASE

On July 17, 2003, Petitioner Peter Gibbons was driving through Flair City on Highway 7 when he was stopped by Flair City Police Officer William Lumbergh. (R. at 5). Officer Lumbergh suspected a violation of § 420 of the Initech Vehicle Code, Init. Rev. Stat. § 420-420 (2000), which specifies that objects on the window of a vehicle must be limited in size to allow for adequate driver visibility. (R. at 5). Mr. Gibbons had a Grateful Dead sticker affixed to the exterior of his rear window, which Officer Lumbergh believed exceeded the size specifications allowed for such objects. *Id.* Officer Lumbergh checked Mr. Gibbons's driver's license and vehicle registration and requested a background check over the police radio. Officer Lumbergh then inspected the Grateful Dead sticker and issued a verbal warning that the sticker might be in violation of the vehicle traffic code, recommending that it be removed. *Id.*

While the background check was being processed, Officer Lumbergh engaged Mr. Gibbons in casual conversation, noting that Mr. Gibbons was sweating and acting nervously. *Id.* Officer Lumbergh inquired as to what Mr. Gibbons did for a living,

whether he was coming from a rock concert, and whether the sticker was something that a lot of his friends identified with. *Id.* Mr. Gibbons did not directly respond to any of Officer Lumbergh's questions. *Id.* Officer Lumbergh then asked Mr. Gibbons whether he had any illegal drugs in the vehicle. *Id.* Mr. Gibbons answered that he did, at which point Officer Lumbergh searched the interior of the car and found a cardboard box on the back seat containing fifty (50) grams of crack cocaine. *Id.* Upon finding the drugs, Officer Lumbergh arrested Mr. Gibbons for a class A1 felony offense. *Id.* A grand jury subsequently indicted Mr. Gibbons for unlawful possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(a). *Id.*

ARGUMENT

I. The drugs found in Petitioner's car should not be suppressed because the officer's line of questioning, which was unrelated to the initial justification for the traffic stop, did not violate the second prong of *Terry* and was, therefore, constitutional under the Fourth Amendment.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV. The stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment. *United States v. Sharpe*, 470 U.S. 675, 682 (1985). An ordinary traffic stop is a limited seizure, however, and is more akin to an investigative detention than a custodial arrest. *Berkemer v. McCarty*, 468 U.S. 420,

438-39 (1984). Accordingly, courts have judged the reasonableness of traffic stops under the principles pertaining to investigative detentions announced in *Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, the judicial inquiry into the reasonableness of a search or seizure "is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

Petitioner argues that when Officer Lumbergh questioned him regarding drug possession, the questioning exceeded the reasonable scope of the stop's original purpose. This argument effectively asserts that Officer Lumbergh's conduct violated *Terry's* second prong. While this court reviews questions of law *de novo*, in reviewing a trial court's ruling on a motion to suppress, the trial court's purely factual findings must be accepted unless clearly erroneous, and the evidence must be viewed in the light most favorable to the party prevailing below. *United States v. Coleman*, 969 F.2d 126, 129 (5th Cir. 1992). Thus, given the lawfulness of the initial stop, the Court should affirm the decisions below unless the District Court committed clear error.

A. Officer Lumbergh's questioning was not extensive, occurred during the pendency of a computer check, and did nothing to prolong the duration of the initial, valid seizure.

As a preliminary matter, it is worth noting that mere police questioning does not, in itself, violate the Fourth Amendment. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure”). Rather, *Terry*’s second prong is concerned with detentions. *See Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (“The scope of the detention must be carefully tailored to its underlying justification”). In the case at bar, Officer Lumbergh asked Petitioner a number of questions, several of which were unrelated to the initial justification for the stop. (Lumbergh Aff. ¶ 7). All of the questioning, however, occurred while Officer Lumbergh awaited the results of Petitioner’s background check, and, therefore, did not extend Petitioner’s detention beyond that permitted by law. *See United States v. Gonzalez*, 763 F.2d 1127, 1130 (10th Cir. 1985) (holding an officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation). Thus, Officer Lumbergh’s questioning, although unrelated to his initial justification for the stop, did not violate the Fourth Amendment.

Support for this conclusion is found in the case of *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (en banc), the facts of which mirror those of the present case. In *Childs*, police stopped Childs for violating a section of the Illinois

Vehicle Code because his car windshield had a spider web of cracks that may have obstructed the driver's vision. 277 F.3d at 949. The officer stopped Childs's vehicle twice for the same offense. *Id.* The second time, Childs, as passenger, was not in violation of the same section of the vehicle code. *Id.* Childs was, however, in violation of a different section of the code for failing to wear his seat belt. *Id.* During the course of performing license and warrant checks on the driver, the officer asked Childs several questions including, why Childs had not fixed the windshield, whether he was carrying any marijuana, and whether he would consent to a search. *Id.* In response to such police conduct, the Court held the following: "By asking one question about marijuana, officer Chiola did not make the detention of Childs an 'unreasonable' seizure. What happened here must occur [daily] across the nation: Officers ask persons stopped for traffic offenses whether they are committing any other crimes. That is not an unreasonable law-enforcement strategy." *Id.* at 954.

Similarly, in *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), defendants-appellants were stopped by police for exceeding the speed limit. The officer asked the driver, Shabazz, to exit the vehicle and produce his driver's license. *Id.* at 433. While running a computer check, the officers questioned Shabazz and his companion individually. *Id.* Based

on these facts, the Court determined that the questioning did nothing to extend the duration of the initial, valid seizure. Thus, the Court held that “[b]ecause the officers were still waiting for the computer check at the time that they received consent to search the car, the detention to that point continued to be supported by the facts that justified its initiation.” *Id.* at 437. Moreover, the Court asserted that “[w]hile appellants were under no obligation to answer the questions, the Constitution does not forbid law enforcement officers from asking.” *Id.*

Although consent to search is not an issue presented in this case, this Court should nonetheless adopt the reasoning of both *Shabazz* and *Childs* and find that because Officer Lumbergh’s questioning did nothing to prolong the duration of a valid seizure, his conduct did not violate the Fourth Amendment.

While Petitioner may rely on cases such as *United States v. Kelly*, 981 F.2d 1464 (5th Cir. 1993), *United States v. Walker*, 993 F.2d 812 (10th Cir. 1991), and *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), in support of the proposition that Officer Lumbergh’s question regarding drug possession violated the Fourth Amendment, important distinctions exist between these and the present case. In *Kelly*, the court did not decide whether questions posed to the driver exceeded the scope of the Fourth Amendment because it concluded that the defendant’s

consent to the search cured any violation that might have occurred. Moreover, the court articulated that "under appropriate circumstances, *extensive questioning* about matters wholly unrelated to the purpose of a routine traffic stop may violate the Fourth Amendment." *Kelly*, 981 F.2d at 1470 (emphasis added). In the present case, however, Officer Lumbergh's questioning was by no means extensive.

With respect to the *Walker* and *Guzman* cases, both of which involved questioning during the course of a routine traffic stop, the decisions turned on the fact that the questioning extended beyond the period of time necessary to issue a citation. The same is not true of the case at bar, where the officer was awaiting the results of Petitioner's background check when he asked the contentious question. Significant for purposes of the present case is the following statement by the *Walker* court:

[O]ur determination that the defendant was unlawfully detained might be different if the questioning...*did not delay the stop beyond the measure of time necessary to issue a citation.* This case would be changed significantly if the officer asked the same questions *while awaiting the results of a...license or registration inquiry.*

933 F.2d at 816 n.2 (emphasis added). In light of the above, this Court should find that Officer Lumbergh's question,

although unrelated to the initial justification for the traffic stop, did not violate the Fourth Amendment.

B. Officer Lumbergh's training and experience suggested that Petitioner's behavior, along with the year and model vehicle he was driving and the vehicle's out-of-state license plates, was indicative of criminal activity, and therefore provided the necessary justification for further questioning.

The legal standard justifying an officer's authority to detain an individual during a traffic stop is reasonable suspicion. *Terry*, 392 U.S. at 21. To satisfy the requirements of reasonable suspicion a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* This standard is much lower than that required for probable cause. *See Illinois v. Gates*, 462 U.S. 213, 227 (1983) (defining requirements for probable cause). Therefore, even if this Court finds that Officer Lumbergh did not have the requisite legal authority at the time of the stop to ask Petitioner about his drug possession, Officer Lumbergh's question still did not exceed the scope of the Fourth Amendment. Petitioner's conduct subsequent to the initial stop, and conclusions drawn by Officer Lumbergh based on his eight years of experience, (Lumbergh Aff. ¶ 1), provided the further reasonable suspicion necessary to question Petitioner on other criminal matters.

Officer Lumbergh testified in his affidavit that Petitioner was driving a 1984 Cadillac El Dorado that bore out-of-state license plates. (Lumbergh Aff. ¶ 2). Officer Lumbergh also testified, and the facts affirm, that while being questioned Petitioner was sweating heavily and acting nervously. (Lumbergh Aff. ¶ 6; R. at 5). Additionally, Officer Lumbergh stated that in response to the questions, Petitioner's "answers were curt." (Lumbergh Aff. ¶ 6). Based on his eight years of training and experience, Officer Lumbergh relied on these specific, articulable facts, and his knowledge that drug couriers often transport drugs across state lines in rented, older-model vehicles, and are often anxious when confronted by law enforcement, to conclude that Petitioner was possibly transporting drugs in his car. Such facts, along with Officer Lumbergh's experiential knowledge, surely satisfy the reasonable suspicion standard articulated in *Terry*.

Although Petitioner, and the Circuit Court, relied on the day's heat, the absence of air conditioning in the car, and the presence of law enforcement to explain why Petitioner may have been sweating and nervous, this does not negate the existence of reasonable suspicion.

In *Terry*, where two men were standing together on a street corner, strolling up and down the street, and pausing for long periods of time to look into store windows, the Supreme Court

had the following to say: “[The Officer] had observed [the men] go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.” 392 U.S. at 22. The Court hereby acknowledged that merely because conduct is equally consistent with innocent behavior does not mean reasonable, articulable suspicion does not exist. Rather, the Court further noted that “[i]t would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores...to have failed to investigate this behavior further.” *Id.* at 23.

Likewise, in the present case, the fact that Petitioner’s conduct could have innocent explanations does not, when coupled with Officer Lumbergh’s training and experience in the area of drug trafficking, eliminate the requisite justification for questioning Petitioner about drug possession. Therefore, the Court should adopt the reasoning espoused in *Terry* and find that Officer Lumbergh’s question, regardless of its relation to the initial stop, was supported by reasonable suspicion and did not violate the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Circuit Court’s decision and find that the content of Officer Lumbergh’s question has no bearing on the constitutionality of the traffic stop.

Sample Brief #2

QUESTION PRESENTED

Can the state justify violating a motorist's Fourth Amendment freedom from unreasonable search and seizure during a routine traffic stop where the police ask questions unrelated to the initial justification for the stop, where the question is posed after the traffic violation is resolved, and where there is no probable cause or reasonable suspicion of other unlawful misconduct?

STATEMENT OF THE CASE

On July 17, 2003, Petitioner Peter Gibbons ("Gibbons") was driving in the privacy of his own vehicle when Officer Lumbergh ("Lumbergh") pulled him to the side of the highway for violating a strict liability traffic code. (Order Den. Appeal ¶ 4). Specifically, Lumbergh believed a Grateful Dead sticker on Gibbons' rear windshield was too large. (Lumbergh Aff. ¶ 2). While Gibbons sat in his un-air conditioned vehicle, (Tr. at ¶ 12) he produced his driver's license and vehicle registration when prompted. (Lumbergh Aff. ¶ 3). Lumbergh verified Gibbons' license and registration and requested a background check over the police radio on his shoulder. (Id. at ¶ 4). Lumbergh then inspected the Grateful Dead sticker and subsequently issued a verbal warning to Gibbons. (Order Den. Appeal ¶ 4).

After Lumbergh issued the warning and after he verified Gibbons was the vehicle's registered owner, he remained at the

side of Gibbons' vehicle where he began a new line of questioning. (Lumbergh Aff. ¶ 7). He inquired about Gibbons' occupation, his point of origin, and his friends' musical interests. (Order Den. Appeal ¶ 5). During the post-citation questioning, Lumbergh noticed that Gibbons' vehicle was an older model, that his answers were curt, that he was acting nervously, that he had out-of-state license plates, and that he was sweating. (Id.). Lumbergh also noticed that drug couriers tend to use out-of-state rental vehicles, although he previously had learned that Gibbons was the owner of this automobile. (Lumbergh Aff. ¶¶ 3, 6). These factors led Lumbergh to ask whether Gibbons possessed any drugs. (Id. at ¶ 8). After Gibbons replied in the affirmative, Lumbergh instructed Gibbons to exit the vehicle while he searched the entire car. (Id. at ¶ 9). As a result of the search, Lumbergh found a cardboard box containing 50 grams of a controlled substance. (Order Den. Appeal ¶ 5). After Lumbergh placed Gibbons under arrest, dispatch announced that the background check did not find anything unusual. (Lumbergh Aff. ¶ 10).

Gibbons filed with the United States District Court a motion to suppress evidence found as a result of the police questioning. (Order Den. Appeal ¶ 1). The motion was denied and Gibbons subsequently appealed to the United States Court of Appeals for the Twelfth Circuit. (Id.). The Court of Appeals

denied Gibbons' request on the basis that reasonableness of the scope of questioning only can apply to the duration of the stop and that all aspects of the interaction during the stop are admissible since the stop was not prolonged. (Id. at ¶ 9).

ARGUMENT

I. PETITIONER'S MOTION TO SUPPRESS SHOULD BE GRANTED BECAUSE OFFICER LUMBERGH'S QUESTION CONSTITUTED AN UNREASONABLE SEARCH AND SEIZURE AND THEREFORE VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment requires that police questioning during a routine traffic stop be related reasonably to the initial justification for the stop on the grounds that individual privacy interests outweigh state desires to intrude on those interests. This subject is a current source of tension among the lower circuits. As a consequence, that tension defines the structure of this argument. First, this brief addresses how the nature of police questioning in the context of a routine traffic stop invokes the protection of the Fourth Amendment because motorists are compelled to respond to the police before being permitted to depart. Second, the argument explains that the police interrogatory in this case violated the Petitioner's protections under the Fourth Amendment because it was unreasonable when the minimal state interests are weighed against crucial individual privacy interests. In reviewing the case, this Court accepts the District Court's factual findings

unless they clearly are erroneous. United States v. Higgins, 282 F.3d 1261, 1269 (10th Cir. 2002). In evaluating the appeal, this court considers the totality of the circumstances and views the evidence in the light most favorable to the government, although the ultimate determination of reasonableness under the Fourth Amendment is reviewed de novo. Id.

A. The officer's question invoked the protections of the Fourth Amendment because a reasonable person would have felt compelled to respond before receiving permission to depart.

Officer Lumbergh's conduct invoked the protections of the Fourth Amendment because he pulled Gibbons to the side of the road and did not grant him permission to leave even after he had received his warning.

The Fifth and Seventh Circuits incorrectly would hold to the contrary. These circuits would so hold on grounds that mere police questioning cannot constitute a seizure under the Fourth Amendment unless the officer's question prolongs the stop.

United States v. Childs, 277 F.3d 947, 949 (7th Cir. 2002);

United States v. Crain, 33 F.3d 480, 485 (5th Cir. 1994).

However, the Eighth, Ninth, and Tenth Circuits have held that police questioning in this context serves as a constitutionally protected seizure because traffic stops are analogous to "Terry stops." United States v. Holt, 264 F.3d 1215, 1217 (10th Cir. 2001); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir.

2001); United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994). This Court should agree with the Eighth, Ninth, and Tenth Circuits on the grounds that a seizure takes place when a reasonable person feels compelled to comply with police requests. The Fifth and Seventh Circuits have adopted a "bright-line" approach which this Court should reject because it is antithetical to precedent.

The Fifth and Seventh Circuits, and this Court, cannot deny that a constitutional seizure occurs when the police pull to the side of the road a motorist. This Court previously has held that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. Terry v. Ohio, 392 U.S. 1, 16 (1968). This Court has extended this standard to persons detained during routine traffic stops. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). The officer's question invoked the Fourth Amendment because it infringed a reasonable expectation of privacy to be free from police invasion, which conveyed to Gibbons that compliance was compulsory before Lumbergh would end the interrogatory and permit Gibbons to drive away. Florida v. Bostick, 501 U.S. 429, 435 (1991); United States v. Jacobsen, 466 U.S. 109, 113 (1984).

The case at bar demonstrates that the officer's question in this context deserves Fourth Amendment protection. When Gibbons was driving along one of the nation's highways, he felt a

reasonable expectation of privacy within the confines of his vehicle. Up until the moment when Lumbergh questioned Gibbons about the presence of drugs in his car, Lumbergh was standing by the vehicle, indicating to Gibbons that he was not yet free to leave. "Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." Berkemer v. McCarty, 468 U.S. 420, 436 (1984). Without telling Gibbons he could leave, Lumbergh conveyed a message that compliance with his interrogation was required before he would grant Gibbons the permission to depart.

The freedom to depart is determinative in deciding the existence of a seizure. To that end, this Court must acknowledge that police encounters in the cases of detained motorists differ from those in the cases of other police-citizen encounters. In the instance of pedestrian-police situations, when an officer approaches and asks questions to pedestrians, this activity does not invoke the Fourth Amendment on the grounds that the police conduct fails to communicate to a reasonable person that he is not at liberty to ignore the police presence. Michigan v. Chesternut, 486 U.S. 567, 569 (1988). Nor does police activity invoke the Fourth Amendment when officers board a bus to ask passengers investigatory questions, because a "reasonable person would feel free to decline the

officers' requests or otherwise terminate the encounter."

Florida v. Bostick, 501 U.S. 429, 436 (1991).

Unlike the situations in Chesternut and Bostick where the police were investigating potential misconduct, motorists pulled to the side of the road have already committed a traffic violation, which requires police investigation and motorist compliance. There are no consequences for noncompliance in the cases of pedestrians and bus passengers. However, noncompliance in the case of a traffic violation can result in custodial arrest and the loss of individual liberty. Empowered with this threat of deprivations, Lumbergh expanded the scope of his interrogation to probe further into Gibbons' private life. Therefore, the police questioning in this case invokes the protection of the Fourth Amendment.

B. The officer's question violated the Fourth Amendment on the grounds that Petitioner's individual privacy concerns outweighed the public interest.

It is unreasonable to permit the police to question without inhibition motorists on the nation's highways in order to find evidence of some other crime, when the police have no warrant, probable cause, or reasonable suspicion to do so. The Eighth, Ninth, and Tenth Circuits have held unreasonable police questioning unrelated to the initial justification for the traffic stop because individual privacy concerns outweigh state desires to infringe on those concerns. United States v. Holt,

264 F.3d 1215, 1218 (10th Cir. 2001); United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001); United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994). When deciding whether a search and seizure is reasonable, this Court balances against state interests the individual's right to personal security and freedom from arbitrary police interference. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). This court long has held that, in the absence of any basis for suspecting a motorist of additional misconduct, the balance between the public interest and the right to personal security and privacy tilts in favor of freedom from police interference. Brown v. Texas, 443 U.S. 47, 52 (1979).

The police commit an unreasonable search when they ask unrelated questions during routine traffic stops. It is not a valid state interest to use the probable cause of a minor traffic violation to interrogate motorists about their private lives. Individual privacy rights far outweigh any minimal state desire to seek out potential evidence of yet undetected crimes. This Court has defined the public interest in the context of traffic stops in terms of officer safety and evidence preservation. Neither of these purposes is served here.

The Court applied these principles in Knowles v. Iowa, 525 U.S. 113, 116-19 (1998). In Knowles, the police stopped a motorist for speeding and issued a citation rather than

arresting him, which was a permissible practice under Iowa state law. Id. at 113-16. The police proceeded to conduct a full, nonconsensual search of the vehicle that uncovered illegal substances, which led to Knowles' subsequent arrest under the state drug laws. Id. at 116. The Court refused to acknowledge the validity of the search on the grounds that individual privacy rights outweighed the small interests of officer safety and the non-existent concerns for evidence preservation that exist in a routine traffic stop. Id. at 118-19.

The situation in Knowles substantially is comparable to the instant case. Here, as in Knowles, the officer safety interests in issuing a minor traffic citation are not the same as those involving a full custodial arrest, which involves a more serious offense, longer contact between the officer and the suspect, and transportation to the stationhouse. Nor is there an interest in evidence preservation because both Knowles and the present case involved strict liability traffic offenses. The Court wrote that in terms of such offenses a concern for "loss of evidence is not present at all." Id. at 119. There is a notable difference, however, in that the conduct the Court held unconstitutional was a general search of Knowles' vehicle. In our case, the police search was only for drugs. Such a search, as compared with a general vehicular search, has no bearing on officer safety and serves absolutely no interest of evidence

preservation because a general vehicular search provides the opportunity of discovering a hidden danger to officer safety while the question in the case at bar had nothing to do with safety concerns. Since there was no basis to suspect Gibbons for misconduct, the balance between state concerns and individual privacy interests must tilt in favor of freedom from police interference. Consequently, the Court's decision should be the same as that in Knowles: the search was unreasonable and therefore violative of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant Gibbons' motion to suppress on the grounds that the officer's question invoked and violated the protections of the Fourth Amendment.

Respectfully Submitted,

Attorney for Petitioner