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IN THE SUPREME COURT OF FLORIDA

GREGORY PRESLEY,

Petitioner,

v. **CASE NO. SC16-2089**

STATE OF FLORIDA,

Respondent.
_____________________________/

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PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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______________________________/

PRELIMINARY STATEMENT

Petitioner will refer to the Respondent, the State of Florida, as "the State." The State's Answer Brief will be referred to as "AB" and the Initial Brief will be referred to as "IB". The State's jurisdictional brief will be referred to as "JBR." The State's Answer Brief in the lower tribunal will be referred to as "AB-DCA." Each will be followed by the appropriate volume and page numbers. The record will be referred to as "R" followed by the appropriate volume and page numbers.

JURISDICTION

In its Answer Brief, the State changes its position without explanation with regard to this Court's jurisdiction and the existence of an express and direct conflict. The State contends in its Answer Brief that,

> "this Court should conclude that no conflict exists because Brendlin v. California, 551 U.S. 249 (2007) and Arizona v. Johnson, 555 U.S. 323 (2009) superseded Wilson v. State's holding that officers need additional cause or reasonable suspicion to detain a passenger."

(AB-7). The State concludes that the lower court's reliance on Brendlin and Johnson "resolves any direct conflict between the decisions of Presley and Wilson" and that this case should now be dismissed. (Id.) In its jurisdictional brief, however, the State's position was that because the lower court in the instant case and the Fourth District in Wilson "reached opposite decisions on the question," there *is* jurisdiction in the instant case and that "this Court may choose to accept or decline jurisdiction." (JBR-4-5). The State's change in position is not predicated on new law or circumstance. Moreover, the State cited to Brendlin and Johnson in its Answer Brief in the DCA. (AB-DCA-10-13). The State's position in the lower court was not, however, that Brendlin and Johnson resolve the conflict between Wilson and Aguiar, as it now contends Brendlin and Johnson do with regard to Presley, but that a conflict does indeed exists. The general rule has long been established in Florida that litigants are not permitted to take inconsistent positions in judicial proceedings. See Palm Beach Co. v. Palm Beach Estates, 148 So. 544 (1933)("It is the general rule that, where a party to a suit has assumed an attitude on a former appeal, and has carried his case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in

a pleading filed in a later phase of that same case, or on another appeal, any other or inconsistent position toward the same parties and subject-matter.")

Notwithstanding the unjustified if not impermissible nature of the State's change in position, this Court's dismissal of jurisdiction as improvidently granted, as now requested by the State, would produce an impractical rule. Since Brendlin and Johnson actually do not supersede the rule in Wilson, the result of this Court's not deciding the issue would be to provide Fourth Amendment protection for passengers in some areas of the state, and not in others. Certainly this is not the result the State actually seeks. As further explained, the express and direct conflict between Wilson and the instant case– for which this Court properly accepted jurisdiction– should be resolved in favor of approving Wilson.

ARGUMENT

THIS COURT SHOULD OVERRULE THE DECISION OF THE LOWER TRIBUNAL AND APPROVE THE DECISION OF THE FOURTH DISTRICT COURT IN WILSON v. STATE, 734 So. 2d 1107 (Fla. 4th DCA 1999), FLORIDA v. WILSON, CERT. DENIED, 529 U.S. 1124 (2000).

The State's substantive position in its Answer Brief is that concerns for officer safety take precedence over the rights of individuals under the constitution, and that the United States Supreme Court has already determined that detaining passengers from a traffic stop as a matter of course is acceptable for that reason. To support this position, the State confuses the concepts of *what protections* the Fourth Amendment provides, and *who has access* to the Fourth Amendment. To successfully claim the protections afforded by the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched and that this expectation is reasonable. Rakas v. Illinois, 439 U.S. 128

(1978). As provided in the Initial Brief, that issue, generally framed as one of "standing," is a different concept altogether. It is a necessary precursor to a Fourth Amendment challenge.

The cases of Brendlin v. California and Arizona v. Johnson do not overrule Wilson as the State of Florida implies. In Brendlin, the defendant was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. Brendlin v. California, 551 U.S. 249, 253 (2007). Brendlin did not assert that his Fourth Amendment rights were violated by the search of the vehicle, but claimed only that the traffic stop was an unlawful seizure of his person. Id. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until law enforcement ordered him out of the car and formally arrested him. Id. Brendlin pleaded guilty, subject to appeal on the suppression issue. Id. The California Supreme Court noted the state's concession that the officers had no reasonable basis to suspect unlawful operation of the car, but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority." Id. The court reasoned that Brendlin was not seized by the traffic stop because the driver was its exclusive target, that a passenger cannot submit to an officer's show of authority while the driver controls the car, and that once the car has been pulled off the road, a passenger "would feel free to depart or otherwise to

conduct his or her affairs as though the police were not present." Id. at 254.

The United States Supreme Court was faced with the question of whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure. In reversing the California Supreme Court, the Supreme Court in Brendlin found that the Fourth Amendment protections afforded to the driver apply equally to the passenger to mean that the passenger could also challenge whether the police stop was lawful. Brendlin was an expansion of liberty to passengers in a vehicle, and not a diminution of liberty as the State argues. Brendlin addressed the issue of whether a passenger who chooses to stay at the stop has actually been seized, rather than whether the police officer acted permissibly by requiring the passenger to stay.

Arizona v. Johnson answered the question of whether law enforcement could order a passenger out of the vehicle and perform a Terry patdown for officer safety during a traffic stop in a neighborhood associated with gang membership. The United States Supreme Court held that under these narrow circumstances, the officer's patdown of a passenger, whom she suspected was armed, did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. The Fourth District in Wilson and the instant case do not contain these unique set of facts. Here, Mr. Presley was not suspected to be armed. Yet the State completely misses the important qualification from Johnson, which is that "to justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, *the police must harbor reasonable suspicion that the person subjected* to the frisk is armed and dangerous." Arizona v. Johnson, 555 U.S. 323, 327 (2009)(emphasis added).

Instead, the State focuses on the language "The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." This language is important, but it refers to the first Terry condition, a lawful investigatory stop. It is a reference to standing, not a ruling that it is reasonable under the Fourth Amendment for a police officer to detain a passenger, for whom there is no independent reasonable suspicion.

The most alarming part of the State's analysis is where it concludes that "[T]he main problems with Wilson v. State and Faulker is that those cases undervalue the dangerousness of traffic stop [sic] and disregard the Court's holding in Maryland v. Wilson, that 'any risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.'" (AB-22). In furtherance of this argument, the State contends that the decision from Wilson v. State "conflicts with Maryland v. Wilson by improperly shifting control of the traffic stop from the officer to a passenger by allowing a passenger to decide when or if they were seized during a traffic stop." (AB-23). The State asserts that this "shift in power jeopardizes the safety of everyone by creating an impediment to an officer's control of a traffic stop and the impression that passengers are free to leave at any time without an officer's consent." (AB-23). Again, the State misapprehends the application of Supreme Court precedent to the cases from Florida courts. The Supreme Court in Maryland v. Wilson, supra, was faced with the narrow issue of whether a police officer, as a matter of course, could order passengers of a lawfully stopped automobile to exit the vehicle. The Court answered the question in the affirmative. The Fourth District in Wilson v. State, supra, consistent with Maryland v. Wilson, would not

expand the holding to passengers *wanting to leave* a vehicle because the Court fully appreciated that Maryland v. Wilson was a narrow decision, observing that:

> Logical and reasonable interpretation of Wilson would suggest, then, that a principal risk mentioned therein, i.e., passenger access to weapons potentially concealed inside a car, would be increased if passengers were forced back inside the vehicle. No empirical data was offered in Wilson as justification for ordering passengers back inside the vehicle for safety purposes. In fact, the Supreme Court expressly declined the State of Maryland's invitation to "hold that an officer may forcibly detain a passenger for the entire duration of the stop." Wilson, 117 S. Ct. at 886, footnote 3.

Wilson at 1111. The Fourth District correctly expressed that the United States Supreme Court rejected the notion of expanding the holding in Maryland v. Wilson to allow police officers to order passengers back to the vehicle as in Aguiar. The State's takeaway in synthesizing Wilson v. State and Maryland v. Wilson demonstrates its lack of understanding. The State conjures up a scenario that is distinct from the facts in this case: where a passenger "decides" that he is not seized, and is "free to leave at any time without an officer's consent." (AB-23). Not only does that not make any sense–whether a seizure occurs is not subject to the volition of the individual– but also that is not what happened here. Mr. Presley did not leave without the officer's consent. In fact, he requested consent and was denied, so he stayed. By definition, a seizure occurs when a person is actually subdued by a police officer, or submits to the officer's show of authority. California v. Hodari, 499 U.S. 621 (1991); Florida v. Royer, 460 U.S. 491 (1983); Terry v. Ohio, 392 U.S. 1 (1968). Thus, Mr. Presley was, at that moment, seized.

Moreover, the crux of the State's argument– that everyone would be safer if there were no impediments to police operation– is both unconvincing and

dangerous. It stands to reason that the Fourth Amendment–indeed, much of the constitution–exists to protect individuals from a government that exercises power arbitrarily through the power of the police force. With regard to the State's insistence that the decisions in Wilson and Faulkner don't take seriously the risks facing officers, much of the officer safety argument in the Answer Brief relies on statistics which are not part of the record. (AB-28). And while officer safety is an important, legitimate consideration in the Fourth Amendment's reasonableness framework, officer safety itself is not an exception to the Fourth Amendment. In other words, courts do not dispel with the requirement that officers act reasonably in potentially dangerous situations. See State v. Baez, 894 So. 2d 115, 117 (Fla. 2004)("the totality of the circumstances controls in cases involving the Fourth Amendment.") Since both driver and passengers are "seized" within the meaning of the Fourth Amendment according to Brendlin, a traffic stop "is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." See DeRosa v. Rambosk, 732 F. Supp. 2d 1285 (M.D. Florida 2010) citing Whren v. United States, 517 U.S. 806, 810 (1996). "The courts have fashioned exceptions to the general rule, recognizing that in certain limited situations the government's interest in conducting a search without a warrant may outweigh the individual's privacy interest." U.S. v. Gordon, 231 F.3d 750, 754 (11th Cir.2000). However, it is unreasonable to surrender personal liberty for officer safety in all circumstances, especially when there is no reason to suspect a person is armed or dangerous.

In its application of the law to the facts, the State argues that the cases from the Supreme Court "prove that Officer Pandak's order for Petitioner to stay at the

scene was entirely reasonable, a minimal intrusion to Petitioner's already restrained movement, and justified by the need for safety." (AB-33). In support of this assertion, the State cites the behavior of another passenger, Foster, as well as other individuals who were unrelated to Mr. Presley. (Id.) The State asserts that the "inconvenience" to Mr. Presley to stay at the scene was negligible "since *another passenger* was belligerent." (AB-34)(emphasis added). Further, the "short duration of the conversation and the traffic stop support the conclusion that Officer Pandak and other officers diligently performed their duties throughout the stop, *especially since Foster was belligerent and a bystander also yelled at officers.*" (AB-35)(emphasis added). Additionally, the State once again cites Foster's behavior as justification for Mr. Presley's detention when it claims that "Petitioner's brief detention was also justified based on reasonable suspicion *due to passenger Foster's unprovoked flight* and the stop's location in a high-crime area." (Id.) The State would even have this Court apply the holding from Illinois v. Wardlow, that "a *suspect's* unprovoked flight in a high-crime area provided officers with reasonable suspicion to justify an investigatory detention." (AB-36)(emphasis added) to Mr. Presley, who was not a suspect and who did not flee.

The State's application of the law to the facts is unreasonable. The State relies on the premise that because police have probable cause as to the driver (tail light and stop sign) and reasonable suspicion as to passenger Foster (fled from vehicle in a high-crime area), then there is also reasonable suspicion as to any other person in the car. This is guilt by association. Suspicion does not transfer this way. The State has cited no authority to support the position that suspicion as to one person results in suspicion as to another person. In fact, there are numerous

cases which stand for the opposite proposition.

An example is in cases charging Fleeing to Elude. In order to sustain a conviction the State must prove beyond a reasonable doubt that the defendant was operating a vehicle, knew that he was directed to stop by a law enforcement officer with proper insignia, and drove with wanton disregard for the safety of persons or property. § 316.1935. A passenger has not been held criminally responsible for the flight of the driver. In cases charging resisting arrest by a passenger who left a vehicle, a defendant's mere presence at the scene of a crime and flight therefrom is insufficient to support a conviction for resisting arrest. F.B. v. State, 605 So. 2d 578 (Fla. 3d DCA 1992). In those cases, officers must have founded suspicion of criminal activity as to the passenger in order for the passenger to be properly charged. E.A.B. v. State, 964 So. 2d 877 (Fla. 2d DCA 2007). The general rule is that "if an officer has probable cause to believe that *an individual* has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest *the offender.*" Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)(emphasis added). It follows that the State's argument that Foster's and the driver's conduct resulted in suspicion for Mr. Presley must fail.

The State further argues that Mr. Presley's knowledge as an occupant of the vehicle justified his detention:

> "The totality of the circumstances provided Officer Pandak with reasonable suspicion that Foster committed a crime and that Petitioner would have *some knowledge of any wrongdoing* based on Petitioner's association with the vehicle. Therefore, even if reasonable suspicion was required to justify an investigatory encounter, this Court should affirm."

(AB-36)(emphasis added). With regard to the State's contention that there was suspicion to detain Mr. Presley because he might have knowledge, witnesses are not required to stay at the scene or report to investigating officers. S.G.K. v. State, 657 So. 2d 1246 (Fla. 1st DCA 1995)("passenger's knowledge that state trooper wanted to question him about accident involving vehicle going into ditch was not, by itself, sufficient to sustain conviction for resisting without violence by fleeing.")

The positions asserted by the State create bright-line rules, which are antithetical to the Fourth Amendment: (1) that everybody in a vehicle gets treated the same, regardless of the totality of the circumstances; (2) that generalized officer safety overrides the personal liberty of a person who is not a threat; (3) that the conduct of someone else, over whom you have no control, gives police reasonable suspicion as to you; (4) that your knowledge, or even potential knowledge, of someone else's conduct reasonably results in your detention; (5) that your association with a person who engages in criminal conduct strips you of your own constitutional rights. That is not what the constitution says, as interpreted by the United States Supreme Court. That is not the law in this State.

In summary, this Court should retain jurisdiction and decide this case on the merits because there is a conflict between Wilson and Presley/Aguiar, which Brendlin and Johnson did not supersede. The decisions from the Supreme Court finding that passengers are seized as a result of a traffic stop pertain to "standing", i.e., whether the passenger has access to the protections of the Fourth Amendment, *not*, as the State suggests, whether the police may detain the passengers without the protections of the Fourth Amendment. Standing is simply a fundamental

antecedent to reaching a substantive Fourth Amendment challenge. Johnson allows a police officer to pat down a passenger, whom she suspects is armed, without violating the Fourth Amendment's prohibition on unreasonable searches and seizures. Justice Ginsburg wrote that "to justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, *the police must harbor reasonable suspicion* that the person subjected to the frisk is armed and dangerous." Arizona v. Johnson, 555 U.S. 323, 327 (2009)(emphasis added). The State's rule is an illogical extension that reaches an inverse result: that because a passenger is seized for standing, the police need not have particularized suspicion as to him in order to keep him or search him (arguably, following their rule, maybe even to arrest him.) This is wrong.

Finally, the State's argument that Foster's conduct somehow amounted to reasonable suspicion as to Mr. Presley is not based on authority, and is contrary to the rule of law that each person's conduct must be evaluated on the totality of the circumstances. Neither did Mr. Presley's knowledge of any criminal enterprise of Foster's result in reasonable suspicion as to Mr. Presley. In this great country and in the State of Florida, it is not a crime merely to associate with someone who engages in criminal activity. Prosecutors are prohibited from implying guilt through association in closing argument because it is so prejudicial. See Wheeler v. State, 690 So. 2d 1369 (Fla. 4th DCA 1997). "Every defendant has the right to be tried based on the evidence against *him*, not on the characteristics *or conduct of certain classes of criminal in general*." Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991)(emphasis added). "The jury's perception of the defendant might have

been colored by the knowledge of a *friend's involvement in a collateral matter*. The danger of 'guilt by association' is a real one, which ought to be minimized whenever possible." Fulton v. State, 335 So. 2d 280 (Fla. 1976). Why, then, allow police unreasonably to infer suspicion– or do away with requiring individualized suspicion– during an investigation? Officer safety does not discharge the reasonableness framework for Fourth Amendment analysis. In fact, the opinion in Johnson considers officer safety when it allows for patdowns when officers believe a suspect is armed. But it still explicitly requires reasonable suspicion. Arizona v. Johnson, 555 U.S. 323, 327 (2009)("*the police must harbor reasonable suspicion that the person subjected* to the frisk is armed and dangerous.")(emphasis added).

CONCLUSION

As there was no reasonable suspicion to believe that Mr. Presley was engaged in criminal conduct or presented a threat, he should have been permitted to leave. That he was seized as a passenger in the car from a traffic stop has no bearing on whether there remained reasonable suspicion to detain him when he asked to leave. Reasonableness is required under the Fourth Amendment, and Mr. Presley's detention was unreasonable. This Court should reverse.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by e-mail to Samuel Steinberg, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and by U.S. mail to Mr. Gregory Presley, DC# 816734, Santa Rosa CI, 5850 E. Milton Road, Milton, FL 32583, on this 3rd day of April, 2017.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,

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