

IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,  
Plaintiff-Respondent,  
Petitioner on Review,

v.

JOSEPH LUCIO JIMENEZ, aka  
Joseph L. Jimenez,  
Defendant-Appellant,  
Respondent on Review.

Multnomah County Circuit  
Court No. 110241478

CA A148796

SC S062473

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BRIEF ON THE MERITS OF  
PETITIONER ON REVIEW, STATE OF OREGON

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Review of the decision of the Court of Appeals  
on appeal from a judgment of the Circuit Court for Multnomah County,  
Honorable CHRISTOPHER J. MARSHALL, Judge

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Opinion Filed: May 21, 2014  
Author of Opinion: Schuman, S.J.  
Concurring Judges: Duncan and Wollheim, JJ.

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**BRIEF ON THE MERITS OF  
PETITIONER ON REVIEW, STATE OF OREGON**

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**STATEMENT OF THE CASE**

This case presents a question that this court has explicitly—and repeatedly—left open: whether the Oregon constitution permits officers conducting traffic violation investigations to protect themselves against the potential harms inherent in such stops by asking the detained individual whether she or he has a weapon. The Court of Appeals, openly struggling to understand this court’s Article I, section 9, case law, said no. The court determined that in the absence of reasonable suspicion, an officer’s question about the presence of weapons violated Article I, section 9, unless the inquiry occurs during an unavoidable lull in the traffic stop.

But this court’s case law does not constrain officers to that degree. This court has construed Article I, section 9, as putting some limits on an officer’s ability to ask questions during a traffic stop. Yet those constraints are not so pervasive as to prohibit officers from making brief inquiries about the presence of weapons to ensure both their safety and the safety of those involved in the traffic investigation.

**Question Presented**

During a traffic stop, is a line of inquiry about the presence of weapons reasonably related to processing the stop such that it falls within police

authority to detain persons for traffic infractions and therefore comports with Article I, section 9 prohibition against unreasonable searches and seizures?

Alternatively, even if questions about the presence of weapons are not directly related to processing the traffic stop, are such inquiries nonetheless “reasonable” under Article I, section 9?

### **Proposed Rule of Law**

In the traffic-stop context, police inquiries about the presence of weapons are related to processing the traffic stop; part and parcel of conducting a traffic stop is ensuring that the officer is able to process the stop safely. Moreover, giving due regard to the practical necessities of law enforcement and the individual’s liberty interests, a line of inquiry about the presence of weapons will generally be reasonable under Article I, section 9.

### **Statement of Facts**

Oregon State Police Trooper Caleb Borchers was in his cruiser, mid-day, patrolling the area near 122<sup>nd</sup> and Division in Southeast Portland. (Tr 7-8, 35-37). The trooper knew the area was “high crime,” and home to “gang activity[.]” (Tr 13). Trooper Borchers saw defendant cross the street against a “Don’t Walk” signal. (Tr 8). He concluded that defendant had committed the traffic violation of failing to obey a traffic control device. ORS 814.020(1), (3); (Tr 8).

Trooper Borchers turned his cruiser around and headed back to defendant's location. (Tr 8-9). He saw that defendant was seated at a bus stop. (Tr 9). When Trooper Borchers pulled his cruiser over near defendant, defendant looked over at him "and immediately got up and began to walk away." (Tr 9, 25). The trooper honked his horn and motioned for defendant to come back to him, and defendant complied. (Tr 9). The trooper was in uniform, and he had activated the overhead lights on the cruiser at the time he stopped defendant. (Ex 1; Tr 12-13).

The trooper was alone when he stopped defendant. (Tr 15). He observed that defendant wore an oversized, puffy black jacket, a hoodie sweatshirt with the hood up, very large, baggy gray pants, and white tennis shoes. (Tr 13; Ex 1). Trooper Borchers was not sure that defendant was affiliated with a gang, but he did know "that gang members often will wear gray baggy pants and the white shoes[.]" (Tr 11). He also knew that "[w]ith that big baggy of clothes, I have \* \* \* an idea what he's got under it and [it's] easy to conceal a multitude of weapons[.]" (Tr 26). "[M]ultiple people" had stopped to watch the trooper's encounter with defendant and they were in "very close proximity"; the trooper did not know if they were rival gang members, and he was "afraid of being attacked or being caught in crossfire or something." (Tr 12-14, 18). Defendant's clothing, combined with the area and the other people nearby,

caused the trooper to be concerned that defendant might be an armed gang member who might pose a danger to his safety. (Tr 11).

When defendant approached, Trooper Borchers explained that he had stopped defendant for crossing against the signal. (Tr 9). He asked defendant about the circumstances, and defendant explained that he had thought it was acceptable to cross the street when he did. (Tr 9). Immediately afterward, the trooper asked defendant if he was armed. (Tr 10; Ex 1). He did so for officer safety reasons. (Tr 10). Trooper Borchers explained that he routinely asks about weapons when he encounters pedestrians; he also stated, as shown above, that the area, onlookers, and defendant's appearance had caused him to be particularly concerned for his safety in this situation. (Tr 10-14, 26, 44).

In response to the trooper's inquiry about weapons, defendant said that he had a gun in his right front pants pocket. (Tr 10; Ex 1). Without being asked, defendant separated his feet, leaned forward, and put his hands on the patrol car. (Tr 10). The trooper placed defendant in handcuffs, for his safety and for defendant's safety. (Tr 12). He asked defendant if he had a license to carry the gun, and defendant replied that he did not. (Tr 12). The trooper unzipped defendant's jacket, patted defendant down, felt the gun, and opened defendant's pants pocket and visually confirmed the presence of the gun. (Tr 14-16; Ex 1).

The state charged defendant with one count of unlawful possession of a firearm and one count of possessing a loaded firearm in public. (ER 1).



Defendant moved to suppress evidence of the firearm and ammunition that Trooper Borchers found on defendant, arguing that the trooper had unlawfully extended the traffic stop when he asked defendant about the presence of weapons. (ER 3). The trial court denied the motion to suppress, finding that the trooper's inquiry and the pat-down fell within the officer-safety exception to the warrant requirement. (Tr 72).

Defendant appealed, and the Court of Appeals reversed. *State v. Jimenez*, 263 Or App 150, 326 P3d 1222 (2014). The court began by observing that this court's decision in *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010), which sets forth the controlling Article I, section 9, principles for police conduct during traffic stops, contains contrary directives.<sup>1</sup> *Jimenez*, 263 Or App at 154. On one hand, it states that verbal inquiries, even if unrelated to the reason for the traffic stop, are not searches and seizures. *Id.* On the other hand, this court observed that traffic stops, unlike encounters between individuals and officers on the street, involve a show of authority because the person stopped

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<sup>1</sup> The court noted that both defendant and the state agreed that the stop was a "traffic stop" for crossing against a stop light, a Class D violation under ORS 814.020(1), (3). Although not a traffic stop involving a vehicle, crossing against a stop light is specifically defined as a "traffic violation," *see* ORS 814.020(3), and falls within the definition of a "traffic violation" as defined in the Oregon Vehicle Code. *See* ORS 801.557. Thus, the events in this case are subject to the same kinds of restraints placed on investigations of non-criminal offenses, whether for a traffic violation involving a car or a pedestrian.

for a traffic violation cannot unilaterally terminate the encounter and leave. *Id.* at 154-55. The Court of Appeals ultimately concluded that “when a person is approached by a police officer—whether the person is in an automobile, on a bicycle, or on foot—for committing a noncriminal traffic violation, and the police officer and the person know that is the basis for the stop, then the officer who has approached the person must proceed to process the traffic violation, and may not launch an investigation into unrelated matters unless the inquiries are justified by reasonable suspicion of the unrelated matter, the inquiry occurred during an unavoidable lull in the citation-writing process, or some exception to the warrant requirement applies.” *Id.* at 157. The court then held that because the questioning about weapons did not occur during an unavoidable lull while processing the traffic stop, and the officer did not have reasonable suspicion of another crime in addition to the violation, the officer’s question violated Article I, section 9.<sup>2</sup> *Id.* at 157-58.

### **SUMMARY OF ARGUMENT**

Based on this court’s decision in *Rodgers/Kirkeby*, the Court of Appeals concluded that officers conducting a traffic violation investigation cannot ask about the presence of weapons—in the absence of reasonable suspicion and

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<sup>2</sup> The court also held that the facts of the case did not provide a basis for the officer’s actions under the officer-safety exception. 263 Or App at 158-61. The state does not challenge that ruling here.

when not asked during an unavoidable lull—without running afoul of Article I, section 9’s prohibition against unreasonable seizures. But neither Article I, section 9, nor this court’s case law compels that conclusion. This court has articulated two distinct, but somewhat overlapping, categories of constitutionally permissible questioning during traffic violation investigations: questions that are “related to” the traffic violation investigation and questions that are reasonable when giving due regard to the necessities of law enforcement and the individual liberties at play. Asking about the presence of weapons during the course of a traffic violation investigation is both related to the investigation and otherwise reasonable when considering law enforcement needs and individual liberties.

Asking a person stopped for a traffic violation whether she or he has a weapon is related to the processing of the traffic stop in a way that maintains the safety of those involved. An officer’s control over a traffic stop is significantly enhanced by knowing whether the person that the officer is dealing with has a weapon. With that knowledge, the officer can make intelligent safety-related decisions about how to proceed with the stop in a way that ensures the safety of the officer, the stopped individual, and any people in the vicinity of the stop.

Similarly, inquiries about the presence of weapons satisfy the general “reasonableness” inquiry. Such inquiries, which are necessary to ensure safety,

are typically minimally intrusive. The asking and answering, as reflected in this case, takes only moments and thus does not meaningfully extend the seizure of the motorist or otherwise interfere with the motorist's liberty interests. Thus, giving due consideration to both law enforcement's need to protect everyone involved in the traffic stop and the liberty interests of the stopped individuals, questioning about the presence of weapons is "reasonable" as Article I, section 9, contemplates that term.

### **ARGUMENT**

In *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010), this court outlined the general constitutional limitations on police conduct during a routine traffic stop. But this court did not have the opportunity to answer the question presented here: whether inquiries about the presence of weapons in the due course of the traffic stop are constitutional. Although this court's decision in *Rodgers/Kirkeby* might, as the Court of Appeals noted, "point simultaneously and with equal vigor in different directions" as to the answer to that question, this court's cases that have followed *Rodgers/Kirkeby* and that have built upon its foundation demonstrate that inquiries about the presence of weapons during the course of a lawful traffic stop are constitutional under Article I, section 9.

- A. This court’s recent case law reveals that inquiries about the presence of a weapon during the course of a lawful traffic stop are permissible when they are “related to” processing the stop or are reasonable in the totality of the circumstances.**

Beginning with *Rodgers/Kirkeby*, this court has recently decided four cases that address the constitutionality of police inquiries of citizens who are the subject of a noncriminal detention. Because those cases create the legal backdrop against which the question presented here will be resolved, the state begins by describing those cases in some detail. As elaborated upon below, two principles central to this court’s answer to the question presented here emerge from those cases. The first is that questions that are “related to” processing the traffic stop are permissible under Article I, section 9. The second is that, even if questions asked during the course of the traffic stop are not related to processing the stop, that unrelated questioning does not—without more—render the questions unconstitutional.

In *Rodgers/Kirkeby*, officers stopped the defendant Rodgers for driving a vehicle with a burned-out license plate light. 347 Or at 613. He provided the officer “with a valid driver license and vehicle registration, but was unable to provide proof of insurance.” *Id.* After Rodgers explained that he had borrowed the vehicle and was driving it with the owner’s permission, the officer “returned to his patrol car and radioed a request for a records check.” *Id.* at 614. When the “records check had come back clear” (at which point there was “a sufficient

basis only to issue [Rodgers] a traffic citation”), the officer returned to Rodgers’s vehicle and, rather than issuing a citation, began questioning him about items in the vehicle. *Id.*

Similarly, police stopped the defendant Kirkeby for driving while suspended. As soon as the officer pulled him over, Kirkeby got out of his car and walked towards the officer. *Id.* at 615. The officer told him the reason for the stop, and he handed the officer an Oregon driver’s license. At that point, the officer had all of the information necessary to complete a traffic citation. The officer asked Kirkeby whether he had any weapons, and Kirkeby said that he did not. *Id.* at 616. The officer then asked for consent to conduct a patdown, and after conducting that patdown, asked for consent to examine each of the items he had felt in Kirkeby’s pockets. *Id.*

This court was first careful to note that that officer’s single inquiry about weapons was not at issue in the case and therefore did not address whether that weapons-based inquiry ran afoul of Article I, section 9. *Id.* at 627-28. However, this court ultimately held that the officers unlawfully extended the traffic stops in each case. This court began by noting the axiomatic principle that verbal inquiries, without more, do not implicate Article I, section 9, because they are not searches or seizures, and thus “police inquiries during the course of a traffic stop (including requests to search a person or vehicle) are not searches and seizures.” *Id.* at 622. Equally axiomatically, this court explained

that police conduct that involves physical restraint or a show of authority that restricts an individual's freedom of movement typically *does* implicate Article I, section 9. *Id.*

This court then went on to hold that although questions and conduct unrelated to the traffic stop are not *per se* unconstitutional, “*when combined with physical restraint or a police show of authority*, [those unrelated questions and conduct] may result in a restriction of personal freedom that violates Article I, section 9.” *Id.* at 624 (emphasis added). The court concluded that “[o]ther or further conduct by the police, beyond that reasonably related to the traffic violation, must be justified on some basis other than the traffic violation.” *Id.* at 623. However, this court took care to emphasize that the restriction of movement that implicated Article I, section 9, as to both defendants in that case occurred “after the police officers had completed their investigations reasonably related to the traffic infraction and issuance of the citation.”<sup>3</sup> *Id.* at 627 n5.

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<sup>3</sup> This court expressed no opinion “about the effect of unrelated police inquiries that occur during the course of the traffic violation and that do not result in any further restriction of movement of the individual.” *Id.* at 627 n5. The Court of Appeals addresses those kinds of inquiries under what it refers to as the “unavoidable lull” doctrine. That is, questions asked while the officer is processing the traffic stop, such as during a check on license status or while obtaining insurance information, do not implicate Article I, section 9 because they do not create any further restriction on the stopped individual's freedom of movement by extending the duration of the stop. *See State v. Steffens*, 250 Or App 742, 747, 282 P3d 888 (2012) (“During an unavoidable lull in [the traffic violation] investigation, such as while awaiting the results of a records check,

*Footnote continued...*

In *State v. Backstrand*, 354 Or 392, 313 P3d 1084 (2013), this court reiterated that the officers’ questioning and conduct in *Rodgers/Kirkeby* ran afoul of Article I, section 9, because it occurred when the traffic stop was or should have been over. In *Backstrand*, this court was called upon to determine a more preliminary question, namely, whether questions by officers constituted a “seizure” under Article I, section 9. This court reiterated that questions in and of themselves are not seizures. *Id.* at 403. Instead, in determining whether an officer’s conduct or questioning amounted to a seizure, courts must consider whether the manner or content of the questions, accompanying physical acts, and other surrounding circumstances convey to a reasonable person that police are exercising their authority to detain the individual. *Id.* at 403-04.

In reaching that conclusion, this court explained its decision in *Rodgers/Kirkeby*. This court noted that in both cases, a factor critical to the court’s analysis was that the officers’ authority to detain the individuals had come to an end. That is,

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(...continued)

an officer ‘is free to question [the person] about matters unrelated to the traffic infraction.’” (second alteration in original) (quoting *State v. Rodgers*, 219 Or App 366, 372, 182 P3d 209 (2008), *aff’d sub nom*, *State v. Rodgers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010)). The question about weapons asked here did not occur during an unavoidable lull; rather, the question presented is whether an unrelated line of inquiry, undertaken not during an unavoidable lull and not when the stop was or should have been over, is nonetheless constitutional.



the problem in *Rodgers/Kirkeby* was that the unrelated inquiries at issue were not in the due course of the traffic stop, but came afterwards—that is, they came at a point when the officers no longer had authority to detain the defendants. \* \* \* [W]hen the officers in both cases, after completing the investigation of the traffic offenses, asked unrelated question and asked for consent to search, but did not tell the defendants that they were free to leave, those verbal inquiries communicated a continuation of the traffic stop, even though the officers no longer had authority to detain. In that distinctive context, the verbal inquiries alone continued the seizures, and continuation of the seizures was unlawful.

*Backstrand*, 354 Or at 406-07.

*Backstrand* thus emphasized that the constitutional problem in *Rodgers/Kirkeby* was not that the officers' unrelated questions somehow dissolved the officer's authority to detain the defendants. Nor was the problem that traffic stops inherently involve a degree of force or restraint that renders any questions or conduct not directly related to processing the stop unconstitutional. Rather, the problem was that the officer had asked unrelated questions *after* the traffic stops were over, and thus during a period of time that the officers had no authority to detain the defendants. *Rodgers/Kirkeby* does not stand for the broader proposition (as the Court of Appeals in this case apparently concluded) that *any* inquiry undertaken in the due course of the stop but unrelated to processing the traffic stop is necessarily unconstitutional.

This court most recently addressed the permissible scope of questioning during a traffic stop in *State v. Watson*, 353 Or 768, 305 P3d 94 (2013). There, an officer lawfully stopped the defendant to investigate a traffic violation. The

officer decided to issue the defendant a warning, but nonetheless asked for the defendant's license, registration, and proof of insurance. The officer then contacted dispatch and asked for a record and warrants checks. *Id.* at 770.

While those checks were pending, the officer asked the defendant to step out of his car. The officer and the defendant engaged in conversation, and another officer arrived at the scene. The second officer detected the smell of marijuana emanating from the car. The defendant admitted that he had marijuana in his car, the officers searched the car, and found items that ultimately led to the defendant's arrest. *Id.* at 770-71.

The defendant moved to suppress, arguing that the traffic stop's "intensity and duration" rendered it unconstitutional. *Id.* at 771. This court started from the premise that both Article I, section 9, and Oregon's statutes require that officers have a legal justification for temporarily detaining someone and that the officer's activities during that detention "be reasonably related to that investigation and reasonably necessary to effectuate it." *Id.* at 781; *see also* ORS 810.410 (allowing officers to stop and detain "for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation"). This court then concluded that the records check that the officer performed was reasonably related to the traffic violation investigation because it enabled him to verify that the defendant had valid driving privileges.

*Id.* at 781-82.<sup>4</sup> *Watson* thus recognized the familiar principle that Article I, section 9, permits officers to engage in actions that are “reasonably related” to the traffic violation investigation.

One final case—*State v. Fair*—is significant to the backdrop against which this case must be resolved. 353 Or 588, 302 P2d 417 (2013). *Fair* did not involve a traffic stop, but this court nonetheless addressed the constitutionality of questions that officers asked of an individual seized for an otherwise lawful purpose. More specifically, this court addressed the limits on officers’ ability to question an individual that they had seized because they believed that person might be a witness to, or a victim of, a crime. *Id.* at 590. Noting the fundamental principle that Article I, section 9, embodies—reasonableness—this court held that Article I, section 9, permits officers to detain someone whom they reasonably suspect has material information about a crime: “Knowing the identity of and the information to be provided by a witness to or a victim of a crime is as fundamental to our criminal justice system as is apprehension of a potential offender.” *Id.* at 608-09.

Thus, “a due regard for the practical necessities of effective law enforcement, considered in tandem with a due regard for a person’s protected

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<sup>4</sup> This court twice noted that it was not deciding the issue presented here, namely, the constitutionality of questions unrelated to and asked during the course of a lawful seizure. *Id.* at 779 n 13, 784 n 18.

liberty interests,” permits officers to conduct a “brief, informal” investigatory detention of a potential material witness upon reasonable suspicion. *Id.* This court explained that the officers’ warrant check and question about the defendant’s arrest history did not exceed the constitutional scope of the stop because they were reasonably related to the purpose of the detention, *i.e.*, to investigate a potential crime.

This case—which involves a question about the presence of a weapon asked in the due course of a lawful traffic stop—does not fit neatly under the analysis from any one of these cases. Unlike *Rodgers/Kirkeby*, where the unrelated questions were asked after the traffic stops were concluded, the weapons-based inquiry here was asked at the outset of the traffic stop. Unlike *Fair*, officers did not suspect defendant of being a material witness, and unlike *Backstrand*, the question is not whether officers seized defendant by executing a traffic stop (clearly, they had). And unlike *Watson*, this case does not involve a records or warrant check.

Nonetheless, two essential principles emerge from those cases that inform the question presented here. The first principle is that questions that are “related to” processing the stop are permissible under Article I, section 9. *E.g.*, *Watson*, 353 Or at 781; *see also* ORS 810.410(3)(b) (codifying that same principle).

The second principle is that questions asked in the due course of an investigative detention—even if unrelated to the stop—implicate Article I, section 9, only when they are unreasonable. That is, questions that are “related to” processing the stop do not encompass the entire universe of constitutionally permissible questioning during traffic stops. Unrelated questions are not *per se* unconstitutional. *See, e.g., Backstrand*, 354 Or at 406-07 (verbal inquiries made in the due course of and unrelated to traffic stop are not unconstitutional *per se*); *accord State v. Amaya*, 336 Or 616, 626, 89 P3d 1163 (2004) (rejecting argument that “*every* question by an officer that is unrelated to the reason for a valid traffic stop violates Article I, section 9”) (emphasis in original). Rather, the constitutionality of those questions unrelated to the stop must be assessed by reference to their reasonableness. As *Fair* instructs, determining the reasonableness of police conduct requires giving due regard for both the necessities of law enforcement and individual liberty. 353 Or at 608-09.

To be sure, the same question animates both those principles: whether the officer’s actions are “unreasonable” as Article I, section 9, contemplates that term. But this court has nonetheless created two distinct analytical paths to answer that question in the context of a lawful traffic stop. Questions that are “related to” processing the traffic stop are, in a sense, *per se* reasonable under Article I, section 9 and require no additional justification or examination of their reasonableness. But questions that are not related to processing the traffic

stop require a more fact-bound inquiry into whether, despite being unrelated to the stop, the line of questioning is nonetheless reasonable, balancing due regard to the practical necessities of law enforcement and individual liberties.<sup>5</sup>

Applying those analytical paths here, questioning about the presence of weapons during the course of an ongoing traffic stop is constitutionally reasonable because it is “related to” processing the stop or, if not related to the stop in that way, is otherwise reasonable, as Article I, section 9, contemplates that term.

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<sup>5</sup> The test developed for Fourth Amendment purposes—one that focuses on whether the question measurably extended the stop—is similar to the one under Article I, section 9. Whether the question “measurably extends” the stop takes into account the need for officers to take steps to safely process the traffic stop yet protects individuals from being detained for an unreasonable length of time. The similarity in tests is likely a reflection of the fact that both constitutions embrace “reasonableness” as their touchstones. For many years, this court embraced an Article I, section 9, analytical framework that was distinct, perhaps intentionally so, from the Fourth Amendment. *State v. Davis*, 295 Or 227, 235, 666 P2d 802 (1983). But in recent years, this court has, with increasing frequency, looked to the Fourth Amendment and has adopted its analysis either in part or in whole for purposes of determining the constitutionality of actions that implicate Article I, section 9. *E.g.*, *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014). However, it appears that in this context, the Fourth Amendment test is consonant with the Article I, section 9, test.

**B. Inquiring about the presence of weapons in the course of a lawful and ongoing traffic stop is “related to” processing that traffic stop and therefore reasonable.**

An officer asking an individual stopped for a traffic violation whether she or he has a weapon is “related to” the processing of a safe traffic stop. The inherent dangers to an officer in a traffic stop are undeniable. As the United States Supreme Court observed, at least in the context of vehicle traffic stops, “traffic stops are ‘especially fraught with danger to police officers.’” *Arizona v. Johnson*, 555 US 323, 330, 129 S Ct 781, 172 L Ed 2d 694 (2009) (quoting *Michigan v. Long*, 463 US 1032, 1047, 103 S Ct 3469, 77 L Ed 2d 1201 (1983)). The Court explained that the risk of violence during traffic stops “‘stems \* \* \* from the fact that evidence of a more serious crime might be uncovered during the stop,’” *Johnson*, 555 US at 331 (quoting *Maryland v. Wilson*, 519 US 408, 414, 117 S Ct 882, 137 L Ed 2d 41 (1997)). That risk of violence also stems from the possibility that the stopped individual is wanted and may be arrested for a more serious offense. “‘The risk of harm to both the police and [the detained individual] is minimized \* \* \* if the officers routinely exercise unquestioned command of the situation.’” *Id.* at 330 (quoting *Wilson*, 519 US at 414).<sup>6</sup>

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<sup>6</sup> Although *Johnson* and *Wilson* involved traffic stops of motorists, parallel dangers inhere to officers stopping a pedestrian for a traffic violation. See, e.g., *Maryland v. Buie*, 494 US 325, 334, 110 S Ct 1093, 108 L Ed 2d 276

*Footnote continued...*

Thus, for obvious safety reasons, an officer should have the opportunity—in an already inherently dangerous situation—to ask whether the subject of a traffic stop has a weapon, something that would make the situation even more dangerous. Framed slightly differently, an officer’s control over a traffic stop is significantly enhanced by knowing whether the person that the officer is dealing with has a weapon. With that knowledge, the officer can make intelligent safety-related decisions about how to proceed with the stop in a way that ensures the safety of the officer, the stopped individual, and any people in the vicinity of the stop. Inquiries about weapons are not aimed at “launching” a criminal investigation, as the Court of Appeals concluded, but rather is related to the processing of the traffic stop in a way that maintains the integrity of the safety of those involved.

The legislature has reached the same conclusion: that a line of inquiry about the presence of weapons is part and parcel of conducting a safe traffic stop. ORS 810.410(3)(d) permits a police officer to “make an inquiry to ensure the safety of the officer, the person stopped or other persons present, including

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*(...continued)*

(1990) (recognizing “the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety”). Like stops of individuals suspected of committing traffic violations in cars, those dangers include the reaction of the person stopped, the fact that evidence of a more serious crime might be uncovered during the stop, and the officer’s need to command the situation.



an inquiry regarding the presence of weapons.” As this court has already noted, that statute was intended to codify the constitutional limitations of Article I, section 9. *Watson*, 353 Or at 776. Although this court cannot rest its constitutional decision on that statutory provision, it nonetheless reflects the legislature’s belief that inquiries about the presence of weapons are related to an officer being able to conduct a safe traffic stop. And, this court has already expressed an unwillingness to deem that statute unconstitutional. *Amaya*, 336 Or at 626.

In short, the prevailing weight of constitutional and statutory authority compels the conclusion that questions about the presence of weapons are reasonably related to the *safe* investigation of a traffic violation. Therefore, an officer may lawfully ask about the presence of weapons in the due course of a lawful traffic stop, and that line of inquiry is permissibly within the scope of a routine traffic stop.

Applying that framework here, Trooper Borchers lawfully stopped defendant for a traffic violation. He asked defendant about the circumstances giving rise to the traffic stop, and defendant explained that he had thought it was acceptable to cross the street when he did. (Tr 9). Trooper Borchers then, for safety-related reasons, asked defendant if he was armed. In response to the trooper’s inquiry about weapons, defendant said that he had a gun in his right front pants pocket. The trooper’s question served the exact purpose for which it

was intended, and demonstrates how inquiries about weapons are related to the safe processing of a traffic violation and therefore constitutional.

**C. Even if inquiries about the presence of weapons are not “related to” the traffic stop, such inquiries are still reasonable under Article I, section 9, because they are brief, minimally intrusive, and serve to protect officer safety.**

Even if this court rejects the premise that questions about the presence of weapons are part and parcel of a lawful traffic stop, this court’s inquiry is not at an end. Instead, and as discussed above, unrelated questions in the course of a traffic stop are not necessarily unconstitutional. Instead, this court must determine whether the unrelated questions were nonetheless “reasonable” so as to stay within the confines of Article I, section 9.

“Reasonableness” is, of course, a term that defies precision. But it necessarily entails, as this court recently explained, both “due regard for the practical necessities of effective law enforcement” as well as “due regard for a person’s protected liberty interests[.]” *Fair*, 353 Or at 609. That due regard in turn necessitates consideration of a number of factors in a totality of the circumstances at hand. Although not an exhaustive list, those considerations would include the purpose of the questions, the intensity and duration of the questioning, the scope and level of intrusion of the questions. Each of those factors relates to either the practical necessities of law enforcement (the purpose

of the questions) while still giving due regard to the individual liberty interests (the intensity, scope, duration, and level of intrusion).<sup>7</sup>

In asking an individual who has been stopped for a traffic violation about the presence of weapons, the practical necessities of effective law enforcement are evident, and for many of the same reasons discussed above. As already discussed, traffic stops carry with them the risk for potential danger. Asking about the presence of weapons during the course of a lawful traffic stop helps ensure that the officer can safely process the traffic stop and protect the officer, the driver, and any others nearby. *See also* 810.410(3)(d) (so providing).

Consideration of the individual liberty interests at play in this context similarly demonstrates the reasonableness of an inquiry about the presence of weapons during the course of a lawful traffic stop. Inquiries about whether the motorist has a weapon are minimally intrusive. The question itself, at least as phrased in this case, can be answered either yes or no. The asking and answering of the question, again as reflected in this case, takes only moments and thus does not meaningfully extend the seizure of the motorist or otherwise

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<sup>7</sup> Many of those same considerations are involved in inquiring whether an encounter between an officer and an individual is a seizure in the first instance. *E.g., Backstrand*, 354 Or at 412. That the factors overlap is simply a reflection of the fact that the legal questions—whether a seizure occurred in the first place or whether the questions during a seizure were constitutional—are all borne from the same basic premise: whether the officers’ actions were reasonable.

interfere with the motorist's liberty interests. In fact, asking the question is the least intrusive means of ensuring that the traffic stop can proceed safely.<sup>8</sup>

The majority of courts across the country considering that same question under the Fourth Amendment have similarly concluded that an officer can ask about the presence of weapons so long as that questioning does not “measurably extend” the traffic stop. Although the United States Supreme Court has yet to explicitly address the question, that court has repeatedly emphasized the importance of giving due weight to officers' abilities to conduct traffic stops safely. *See, e.g., Pennsylvania v. Mimms*, 434 US 106, 110, 98 S Ct 330, 54 L Ed 2d 331 (1977) (officer safety concerns must be given a “legitimate and weighty interest”). And the Court has upheld even more intrusive actions during the course of traffic stops. *See Wilson*, 519 US at 413-15 (the Fourth

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<sup>8</sup> To be sure, the facts of this case present an easier application of the balancing inquiry than many cases may present. It is not difficult to imagine a traffic stop where the officer asks the stopped individual whether he or she has a weapon, and then proceeds to ask additional questions about where the person was coming from, where the person is going to, whether the person has any drugs or contraband on his or her person, or whether the individual has been involved in other illegal activity. Whether those kinds of unrelated questions are constitutional is a question that cannot be answered without undertaking a fact-bound inquiry into the circumstances of a particular case. There may certainly be cases where the record reflects a line of unrelated questioning that significantly extends the duration of the traffic stop, that is far afield from the reasons for the traffic stop, and that is not otherwise justified by the necessities of law enforcement. Such cases present a much closer question in terms of whether the unrelated questioning is constitutional.

Amendment permits officers to order passengers out of the car during a traffic stop); *Mimms*, 434 US at 108-09 (the Fourth Amendment permits officers to order the driver out of the car during a traffic stop).

Accordingly, other federal and state courts that have directly considered whether the Fourth Amendment permits officers to ask about the presence of weapons (or take other steps aimed at ensuring their safety) during a traffic stop have given great weight to the importance of officer safety in the context of the danger that inheres in traffic stops. Almost uniformly, those courts—in determining what is “reasonable” by considering the need for officer safety and the extent to which the questions about weapons extend the stop—have permitted questioning about the presence of weapons so long as the questioning does not measurably extend the duration of the stop.<sup>9</sup>

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<sup>9</sup> See, e.g., *United States v. Derverger*, 337 F App'x 34, 36 (2d Cir 2009) (five minutes of unrelated questioning did not significantly extend the duration of the stop); *United States v. Everett*, 601 F3d 484 (6th Cir 2010) (inquiries about weapons and drugs did not measurably extend the stop); *United States v. Taylor*, 596 F3d 373 (7th Cir 2010) (asking about weapons and drugs absent articulable suspicion did not unreasonably prolong the stop); *United States v. Rivera*, 570 F3d 1009, 1013 (8th Cir 2009) (asking questions about weapons did not measurably extend the stop); *United States v. Mendez*, 476 F3d 1077, 1080 (9th Cir 2007) (brief inquiries unrelated to the stop are permitted provided they do not measurably extend the stop); *United States v. Valenzuela*, 494 F3d 886, 890 (10th Cir. 2007) (asking about weapons unrelated to the stop is justified due to officer safety as long as the questions do not unreasonably extend the stop); *United States v. Purcell*, 236 F3d 1274 (11th Cir 2001) (viewing the stop in its entirety, the questioning about weapons, drugs, and criminal histories did not unreasonably extend the stop); *State v. Ramirez*, 145

*Footnote continued...*

Thus, the prevailing weight of constitutional, statutory, and other-court authority supports the reasonableness of questioning about the presence of weapons, so long as that line of inquiry remains minimally intrusive, is brief in time, and does not otherwise significantly interfere with an individual's liberty interests. The line of inquiry here falls easily within that framework: the question that Trooper Borchers asked defendant fits easily within the rubric of reasonableness. It was a single question asked at the outset of the traffic stop, and for the purpose of protecting the trooper's safety. The question itself did not meaningfully interfere with defendant's liberty interest because it was brief

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(...continued)

Idaho 886, 889-90, 187 P3d 1261, 1264-65 (Ct App 2008) ("Brief, general questions about drugs and weapons, in and of themselves do not extend an otherwise lawful detention."); *Lockett v. State*, 747 NE 2d 539 (Ind 2001) (asking about a weapon did "materially extend the duration of the stop"); *State v. Leyva*, 149 NM 435, 445, 250 P3d 861, 871 (2011) ("Questions asked for purposes of ensuring officer safety during a stop generally are proper because [w]hen these measures are not too intrusive, the government's strong interest in officer safety outweighs the motorist's interests.") (internal quotation marks omitted, alteration in original); *cf. United States v. Chaney*, 584 F3d 20 (1st Cir 2009) (asking for a passenger's identification was constitutionally valid due to officer's concerns for safety and it did not measurably extend the traffic stop); *United States v. Kemp*, 214 F App'x 127, 131 (3d Cir 2007) (officers may take additional steps that are "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop"); *People v. Orovitz*, No. F043522, 2004 WL 2094928, at \*26 (Cal Ct App 2004) (under the totality of the circumstances, officers can ask questions unrelated to the stop provided the entire stop consumes a reasonable amount of time); *State v. Jenkins*, 298 Conn 209, 247-48, 3 A3d 806, 832 (2010) (holding that an officer asking about illegal items in the car was permissible because it did not measurably extend the traffic stop).

and limited in its scope. The question was thus reasonable under Article I, section 9, and this court should therefore reverse the Court of Appeals' decision to the contrary.

### **CONCLUSION**

For the reasons described herein, this court should conclude that the Court of Appeals' prohibition on questions about the presence of weapons during a traffic stop finds no basis in the constitution, Oregon's statutes, or this court's case law. To the contrary, such questions permit officers to safely process traffic stops and are "reasonable" as Article I, section 9 contemplates that term.

Respectfully submitted,

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## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on December 12, 2014, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Anne Fujita Munsey, attorneys for appellant, by using the court's electronic filing system.

### **CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,894 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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