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Constitutional Law-Search and Seizure- Automobile Search Without Probable Cause (Michigan v. Long)

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—AUTOMOBILE SEARCH WITHOUT PROBABLE CAUSE—*Michigan v. Long* — In the landmark 1967 decision of *Terry v. Ohio*,¹ the Supreme Court declared that a pat-down search of a criminal suspect made without probable cause is lawful under the fourth amendment, provided the police officer conducting the search has a reasonable fear that the suspect is carrying a weapon.² In *Michigan v. Long*,³ the Court for the first time addressed whether such a protective search, in the absence of probable cause, could extend to an area beyond the person.⁴ Where an automobile is concerned, the Court has now ruled strongly in favor of the police, granting them authority to search the passenger compartment, including concealed areas, whenever they reasonably fear weapons are in the car.⁵ Beyond this extension of already significant police dominance over automobiles,⁶ the *Long* decision has important implications for future searches of other areas, such as the home.

The Supreme Court has declared that under the fourth amendment⁷ warrantless searches are per se unreasonable, “subject to only a few specifically established and well-delineated exceptions.”⁸ “Whenever practicable,” police must obtain advance judicial approval for a search by obtaining a warrant.⁹ In *Terry*,

1. *Terry v. Ohio*, 392 U.S. 1 (1967).

2. *Id.* at 27.

3. 463 U.S. 1032 (1983).

4. *Id.* at 1034.

5. *Id.* at 1049.

6. Beginning with *Carroll v. United States*, 267 U.S. 132 (1925), which permitted the warrantless search of a car where police had probable cause to believe it contained contraband, the Supreme Court has consistently regarded the automobile as an exceptional area enjoying generally less protection under the fourth amendment. See *infra* notes 27-41 and accompanying text.

7. The fourth amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST., amend. IV.

8. *Katz v. United States*, 389 U.S. 347, 357 (1967).

9. *Terry v. Ohio*, 392 U.S. 1 at 20. (The Court stated that they were not retreating from “holdings that the police must, whenever practicable, obtain advance approval through the warrant procedure”).

however, the Court recognized that there are times when effective police work requires affirmative acts of investigation under circumstances which fall outside the warrant requirement.¹⁰ In such cases, the police conduct will be measured by the fourth amendment's general proscription against unreasonable searches and seizures, and not by the more rigid warrant clause.¹¹

In *Terry*, the suspicions of a police detective with 30 years experience in patrolling downtown Cleveland¹² were aroused by the actions of two men who appeared to be "casing" a store and planning a "stick-up."¹³ The detective testified that after he observed the men making repeated trips to the store window to peer inside and then walking away to confer with a third man, he considered it his duty to investigate further and confront the suspects.¹⁴ The Court agreed that it would have been "poor police work" to have failed to inquire into their suspicious behavior.¹⁵ When the detective approached the three men and asked what they were doing, he received a mumbled, inarticulate response.¹⁶ Fearing that they were armed, he patted down all three men by running his hands over their outer clothing.¹⁷ On two of the suspects he felt something hard underneath the clothing, and in each case he reached inside the garments and recovered illegally possessed handguns.¹⁸

The Court recognized that at the time the detective stopped and questioned the three suspects in *Terry*, he did not have probable cause to arrest them for any crime.¹⁹ Yet the stop, and the subsequent pat-down search and seizure of the weapons, were held to be reasonable under the fourth amendment.²⁰ The Court's rationale was that a police officer is entitled to protect himself during potentially dangerous encounters with criminal

10. *Id.*

11. *Id.*

12. *Id.* at 5.

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 23.

16. *Id.* at 7.

17. *Id.* at 6-7.

18. *Id.* at 7.

19. *Id.* at 24. The trial court found that it "would be stretching the facts beyond reasonable comprehension" to conclude the officer had probable cause to arrest the men. *Id.* at 7-8.

20. *Id.* at 30.

suspects.²¹ Such a pat-down search of the person of a suspect is permissible when the officer has a reasonable suspicion that the suspect is armed with a weapon.²²

While *Terry* had not been extended beyond the pat-down search of the person of a suspect, the Court, in *Chimel v. California*,²³ granted police clear authority to search the immediate area surrounding a suspect once he is actually under arrest.²⁴ Under this "search incident to arrest" principle, as narrowly prescribed in *Chimel*, the search of the person of the arrestee, and the immediate area within his control, is considered reasonable for the protection of the police, who may be injured should the arrestee grab a nearby weapon.²⁵ The rationale for the *Chimel* decision would prove to have great significance for the Court twelve years later in *Long*.²⁶

Several other cases laid important groundwork for the decision in *Long*. Beginning with *Carroll v. United States*,²⁷ the

21. *Id.* at 23-24. Said the Court:

Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id.

22. *Id.*

23. 395 U.S. 752 (1969).

24. *Id.* at 763. In *Chimel*, police officers obtained a warrant for Chimel's arrest for burglary and, with permission of the defendant's wife, entered Chimel's home and waited for him to return from work. When he arrived home, he was handed the warrant and informed that he was under arrest. The police, who had no search warrant, asked for permission to look around the house, which Chimel denied. The police searched the entire house anyway, seizing from several locations various items that may have come from the burglary. *Id.* at 753-54. The evidence seized was ultimately suppressed by the Supreme Court. *Id.* at 768.

25. *Id.* at 763. In addition to concern for the safety of the officers, the Court cited another reason for allowing police to search areas within reach of a defendant incident to his arrest: that the arrestee might use the opportunity to reach and destroy valuable evidence. *Id.*

26. 463 U.S. at 1049 n.14.

27. 267 U.S. 132. See *supra* note 6.

Court had said that the automobile will not be as readily shielded from police scrutiny by the fourth amendment as other constitutionally protected areas such as the home.²⁸ The rationale, said the Court, is that an automobile, and any contraband inside it, can easily and quickly be moved to another locale while police attempt to comply with the time-consuming process of obtaining a search warrant.²⁹ *Carroll*, therefore, permits the warrantless search of a car for contraband once the police establish probable cause.³⁰

In *Katz v. United States*,³¹ the Court said that the fourth amendment "protects people, not places,"³² and that whether a warrantless search is proper does not depend on "the presence or absence of a physical intrusion into any given enclosure,"³³ but rather upon the reasonableness of the person's expectation of privacy.³⁴ Constitutional respect for that expectation of privacy, said the Court in subsequent decisions, is greatly diminished once the person steps into an automobile or conceals articles inside it.³⁵ Said the Court in *Cardwell v. Lewis*:³⁶

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.³⁷

Despite this lesser expectation of privacy, the Court had yet

28. "At least since *Carroll v. United States* . . . the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles." *Cardwell v. Lewis*, 417 U.S. 583, 589-90 (1974).

29. 267 U.S. at 153.

30. *Id.* at 155-56.

31. 389 U.S. 347.

32. *Id.* at 351.

33. *Id.* at 353.

34. *Id.* at 351-53.

35. *Chambers v. Maroney*, 399 U.S. 42, 48-52 (1970); also, "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring).

36. 417 U.S. 583.

37. *Id.* at 590.

to address whether *Terry* applied to a search of an automobile for weapons. Yet the Court proceeded to significantly expand police dominance over the automobile in post-*Terry* decisions. For example, the Court subsequently held that: a police officer is justified in reaching inside a parked car and conducting a *Terry* frisk and seizure of a weapon from the waistband of the seated driver;³⁸ police are empowered to order suspects *out* of a car to conduct a *Terry* search of their persons;³⁹ when a car occupant is arrested, the search-incident rule allows police to examine the entire passenger compartment and any containers therein without a warrant;⁴⁰ and when police have probable cause to believe a vehicle contains contraband, they may conduct a warrantless search of every part of the auto and all containers therein that might reasonably conceal the contraband.⁴¹

38. *Adams v. Williams*, 407 U.S. 143 (1972).

39. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

40. *New York v. Belton*, 453 U.S. 454 (1981). But where a car occupant is arrested, and contraband is concealed in the *trunk*, whether police can search without a warrant is dependent on the manner in which the contraband is packaged or concealed. *Robbins v. California*, 453 U.S. 420 (1981). Justice Powell's concurring opinion, which was controlling, stated this test:

[Police are required] to obtain a warrant to search the contents of a container only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny.

Id. at 432.

When confronted with the claim that police should have obtained a warrant before searching an ambiguous container, a court should conduct a hearing to determine whether the defendant had manifested a reasonable expectation of privacy in the contents of the container. Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing or binding the container, that indicates a desire to prevent the contents from being displayed A prudent officer will err on the side of respecting ambiguous assertions of privacy

Id. at 434 n.3.

41. *United States v. Ross*, 456 U.S. 798 (1982); consider also *Texas v. Brown*, 460 U.S. 730 (1983), where the Court held that the plain-view doctrine allows for the warrantless seizure of a suspicious item in an auto when a police officer has prior, justifiable access to the automobile under the fourth amendment.

While the automobile does not enjoy as complete protection from warrantless searches as other areas, such as the home, the Court has prescribed some significant limits for the police. For example: the warrantless search of a car in a driveway is not justified as a search incident to an arrest which took place in the nearby house. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the warrantless search of an automobile by the U.S. Border Patrol twenty-five miles north of the Mexican border, made without proba-

Michigan v. Long also concerned an automobile search. Deputies Howell and Lewis of the Barry County Sheriff's Department were on routine patrol shortly after midnight on August 25, 1977, when they observed a vehicle pass them traveling in the opposite direction at a speed they measured with a radar device at seventy-one miles per hour, sixteen miles per hour over the limit.⁴² The deputies turned their patrol car around to pursue the speeding vehicle.⁴³ They watched the car turn down a side road and swerve, and when they came upon the car, it was stopped in a ditch off to the side, with its rear end protruding onto the roadway.⁴⁴

As the deputies got out of their patrol car and approached the vehicle, the defendant, Long, who was the driver and sole occupant, also exited his car and walked toward the deputies, meeting them at the trunk area of his car.⁴⁵ The defendant left the driver's door open and the dome light inside the passenger compartment on.⁴⁶ Deputy Howell requested that Long produce his driver's license, but Long did not respond.⁴⁷ Howell made a second request, and Long, still without speaking, handed the deputy his license.⁴⁸ Howell next asked for proof of registration and insurance for the vehicle, again receiving no response from Long.⁴⁹ When Howell asked a second time, the defendant began walking toward his open car door.⁵⁰ At this point, Deputy Howell concluded that Long "appeared to be under the influence of something."⁵¹

ble cause or consent and solely because the occupant was a Mexican national, is unconstitutional. *Almeida-Sanchez v. United States*, 413 U.S. 266; the stopping of an automobile by police for a "routine" traffic check is unreasonable under the fourth amendment absent at least some articulable and reasonable suspicion that the vehicle is involved in a crime or a traffic infraction. *Delaware v. Prouse*, 440 U.S. 648 (1979).

42. *People v. Long*, 94 Mich. App. 338, 341, 288 N.W.2d 629, 630 (1979).

43. *People v. Long*, 413 Mich. 461, 468, 320 N.W.2d 866, 868 (1982).

44. *Id.* at 468, 320 N.W.2d at 868.

45. *People v. Long*, 94 Mich. App. at 341, 288 N.W.2d at 630.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *People v. Long*, 413 Mich. at 469, 320 N.W.2d at 868.

The deputies followed the defendant toward the open door,⁵² and as they approached, Howell observed a "large, folding knife" on the front floor of the vehicle.⁵³ Howell ordered the defendant to halt and immediately conducted a pat-down search of Long while his partner retrieved the knife from the auto.⁵⁴ No weapons were found on the defendant's person.⁵⁵ Deputy Howell then shined his flashlight into the front seat of defendant's car for the purpose of "looking for another weapon,"⁵⁶ at which point he noticed what appeared to be a leather article protruding from beneath the folded-down armrest between the front seats.⁵⁷ The deputy reached inside the auto, lifted the armrest, and recovered an open leather pouch that contained a small plastic bag filled with marijuana.⁵⁸ Howell then placed the defendant under arrest for possession of marijuana.⁵⁹

Defendant Long contested the validity of the search as an unacceptable extension of the *Terry* doctrine. *Terry*, he argued, was never meant to be extended beyond the frisk of the person.⁶⁰ The trial court⁶¹ and the Michigan Court of Appeals⁶² disagreed. Neither court had any difficulty accepting the *Terry* doctrine as the basis for Deputy Howell's search of the front seat.⁶³

52. *Id.*

53. *People v. Long*, 94 Mich. App. at 341-342, 288 N.W.2d at 630. The knife, a Browning brand folding knife with a four-inch blade, was not illegal, and defendant Long was never charged with any violation in connection with its possession. 413 Mich. at 469 n.1, 320 N.W.2d at 868 n.1.

54. *People v. Long*, 94 Mich. App. at 342, 288 N.W.2d at 630.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See infra* notes 80-83 and accompanying text.

61. *People v. Long*, No. 78-100-FY, slip op., (Mich. Circ. Ct., Barry Co., Oct. 5, 1978).

62. *People v. Long*, 94 Mich. App. 338, 288 N.W.2d 629.

63. In the District Court's ruling, following the preliminary hearing, to admit the marijuana seized from the front seat, Judge Hansen relied exclusively on the *Terry* doctrine:

Without any explanation, the Defendant started walking toward the open door of his vehicle. The deputies followed and it was at this point that they saw the knife on the floor. The Defendant was then frisked which was consistent with *Terry v. Ohio* After the knife was confiscated and before allowing the Defendant back into the interior of the car to get the registration, the deputies conducted the search which produced the pouch. After a review of the facts involved in this search, it is the Opinion of the Court that the deputies acted reasonable [sic] in conducting a search of the vehicle.

People v. Long, File no. A-506-77, slip op. at 52 (Mich. Dist. Ct., Barry Co., Dec. 28,

The court of appeals called the facts surrounding the car stop and the demeanor of the defendant "ominous" for the officers and sufficient to justify their limited search of the passenger compartment to protect themselves from any more weapons.⁶⁴ The court of appeals implied that a full search of the interior of the car might have been unlawful, but said the actual "carefully circumscribed intrusion" by the deputies was proper under *Terry* because the defendant was about to re-enter the car.⁶⁵

The Michigan Supreme Court reversed the lower courts, limiting *Terry* to a pat-down search of the *person* of a suspect, and refusing to extend *Terry* to a search of the interior of an automobile.⁶⁶ The court further reasoned that *Terry* could not be invoked because the defendant posed no threat to the deputies, as he possessed no weapons, was under their complete control, and was away from his car and out of reach of any potential weapons inside it.⁶⁷

The Supreme Court granted certiorari⁶⁸ to consider whether a police officer has the authority to conduct a protective search of the passenger compartment of an automobile during a lawful investigatory stop of the occupant.⁶⁹ Jurisdiction was based

1977). The Michigan Court of Appeals also addressed *Terry* directly:

The salient question presented for our resolution is whether . . . Deputy Howell's precautionary lifting of the frontseat armrest prior to allowing [the] defendant to re-enter his automobile was constitutionally valid as a protective search under the *Terry* doctrine. We answer this question in the affirmative

People v. Long, 94 Mich. App. at 344, 288 N.W.2d at 631.

64. *Id.* at 345, 288 N.W.2d at 631-32.

65. 94 Mich. App. at 345, 288 N.W.2d at 632.

66. *People v. Long*, 413 Mich. at 471, 320 N.W.2d at 869.

67. *Id.* Said the court:

Any weapon which might have been hidden in the car would have been out of the reach of the defendant and thus not a danger to the deputies. Therefore, the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case.

Id.

68. *Michigan v. Long*, 459 U.S. 904 (1982).

69. 463 U.S. at 1037. A second issue, on which the Court remanded without deciding, was whether a subsequent inventory search of Long's car was proper under the fourth amendment. The inventory search revealed more than 70 pounds of marijuana in the trunk. *People v. Long*, 94 Mich. App. at 343, 288 N.W.2d at 631.

The Supreme Court said it would not consider whether the inventory search was valid because Michigan's highest court had not addressed the issue. 463 U.S. at 1053. The Michigan Supreme Court had ruled that the search of the passenger compartment by Deputy Howell was prohibited by the fourth amendment, and that the inventory

upon the heavy reliance the Michigan Supreme Court placed on federal law in its decision.⁷⁰

The arguments before the Court went directly to the applicability of *Terry*. Petitioner argued that the rationale of the *Terry* decision was to provide reasonable protection for police officers,⁷¹ and that while *Terry* applied to the frisk of a *person*,

search of the trunk was therefore unjustified as the "fruit" of illegal police action. *People v. Long*, 413 Mich. at 473, 320 N.W.2d at 870. The Supreme Court reversed, finding the search of the front seat proper, and remanded the question of the inventory search, 463 U.S. at 1053, instructing the Michigan court to determine its validity under *South Dakota v. Opperman*, 428 U.S. 364 (1976).

The test of admissibility in *Opperman* is whether the inventory is conducted pursuant to standard police procedure, where the owner is not available to claim the car or cannot be determined. *Id.* at 375. The inventory can never be used as a pretext to search where a warrantless intrusion by police is otherwise unjustified. *Id.* at 376.

70. 463 U.S. at 1040-44. The question of jurisdiction stirred a vigorous debate among the justices. Justice O'Connor, writing for the majority, appeared to set a new "plain-statement" standard whereby the Court would assume that any matters brought before it were decided by the lower state courts using primarily federal law, therefore automatically subjecting them to potential Supreme Court review. To avoid such a result, Justice O'Connor wrote, the state's highest courts must clearly indicate the independent state law grounds for a decision.

If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1041.

Justice Stevens, dissenting, argued that the Court's emerging rule on jurisdiction has lead to a "docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens." *Id.* at 1070. The Court, said Stevens, should be more concerned with those instances where a federal right has been *denied* a citizen, not where a state has merely lost a criminal case.

In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other state might provide or, indeed, than this Court might require throughout the country.

I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.

Id. at 1068. Justice Blackmun concurred in the validity of the search in *Long*, but objected to the majority's "fashioning [of] a new presumption of jurisdiction." *Id.* at 1054.

71. Brief for Petitioner at 6, *Michigan v. Long*, 463 U.S. 1032.

the Court left open for future case development what additional areas could also be "frisked."⁷² *Michigan v. Long*, argued the petitioner, was just such a case for the kind of extension of the *Terry* doctrine the Court had envisioned.⁷³ Furthermore, said the petitioner, the armrest frisk was less intrusive for the respondent than a frisk of his person.⁷⁴ Also, *Adams v. Williams*⁷⁵ and *Pennsylvania v. Mimms*⁷⁶ clearly indicated that where cars are concerned, the Court considers police safety paramount and will allow *Terry*-like intrusions as reasonable to reveal to the officers the dangers hidden in a car.⁷⁷

Finally, petitioner argued that the Michigan Supreme Court incorrectly relied on *Canal Zone v. Bender*,⁷⁸ which failed to address the larger question of what happens when a suspect is allowed to return to his car, which may have weapons inside, after police have concluded a lawful stop but are still in the vicinity and vulnerable.⁷⁹

72. *Id.*

73. *Id.*

74. *Id.* at 7.

75. See *supra* note 38 and accompanying text.

76. See *supra* note 39 and accompanying text.

77. Brief for Petitioner at 6-7, *Michigan v. Long*, 463 U.S. 1032.

78. *Government of Canal Zone v. Bender*, 573 F.2d 1329 (1978). This case involved a similar car stop in which an officer searched the passenger compartment and found marijuana while the occupants stood outside and away from the car. *Id.* at 1330. The defendants were convicted by the United States District Court for the Canal Zone, but the Fifth Circuit reversed on the grounds that the officer's search was not proper under *Terry*. *Id.* at 1332. The court reasoned that if the officer was truly concerned for his safety, he would have frisked the person of each of the occupants for weapons first rather than immediately searching the car. *Id.* The court also reasoned that since the occupants were standing away from the car and being watched by another policeman, any weapons inside the car were out of reach and posed no danger to the police. *Id.*

The Michigan Supreme Court concluded that *Canal Zone v. Bender* was a "similar case" and adopted its reasoning in deciding *People v. Long*. 413 Mich. at 472 & n.7, 320 N.W.2d at 869 & n.7.

79. Brief for Petitioner at 7-8, *Michigan v. Long*, 463 U.S. 1032. Petitioner distinguishes *Canal Zone v. Bender* as follows:

However, *Canal Zone* ignores the danger to investigating officers where no arrest is made but the investigation is ongoing and one weapon was already seen and seized, and the defendant may be allowed to re-enter his vehicle to obtain further identification. In this short span of time, under these circumstances, the deputy here [in *Long*] reasonably frisked the front armrest of defendant's car. Other state and federal cases, dealing with automobile frisks where the suspect[s] were outside the car, would uphold the armrest search.

Id. at 8.

In addressing the applicability of *Terry*,⁸⁰ respondent offered two arguments echoing the Michigan Supreme Court's analysis of the case.⁸¹ First, respondent argued for a narrow reading of *Terry*, stating that the doctrine only applied to the pat-down search of the *person* of a criminal suspect and was never meant to be applied to searches of property such as a car.⁸² Second, respondent argued that the basis for a *Terry* search never existed because he at no time presented a danger to the deputies.⁸³ Two amici briefs, both in support of petitioner, were also filed with the Court.⁸⁴

80. Brief for Respondent at 6-9, *Michigan v. Long*, 463 U.S. 1032.

81. Brief for Respondent at 7-8.

82. *Id.* at 6-7.

83. *Id.* at 7. Respondent argues that Deputies Howell and Lewis were unable in their testimony to point to any "particular facts" from which they could infer that Long was actually a threat to their safety:

[The deputies] never testified that they believed [Long] was armed or dangerous. He was cooperative at all times. He was never suspected of anything more serious than a traffic offense. The folding knife which prompted the initial pat-down was not illegal [One deputy] admitted that Long had given the deputies no reason to draw their weapons or to take him to the patrol car. The pat-down search of Long showed that he was not armed

Id.

The defendant, at the time of the search of the car, was outside it being detained by one of the deputies, who would not have permitted him to get into the car while he was watching. Although the deputies claimed that their search was for weapons, they ignored screwdrivers, hammers and other legal but potentially dangerous objects [on the floor of the car].

Id.

84. Brief for the United States as Amicus Curiae supporting Petitioner, *Michigan v. Long*, 463 U.S. 1032; and Brief of Amici Curiae, Gulf & Great Plains Legal Foundation of America, joined by Americans for Effective Law Enforcement, Inc., In Support of Petitioner, *Michigan v. Long*, 463 U.S. 1032 (hereinafter cited as Law Enforcement Brief).

The Department of Justice argued that the case provided the Court with a unique opportunity to guide police officers by creating a simple, workable rule allowing the search of a car when the police have reasonable suspicion that weapons are inside. Brief for United States at 9-10. Citing the rule established for search of a car incident to arrest in *New York v. Belton*, see *supra* note 40 and accompanying text, the Department of Justice reasoned that such a solution is a "practical alternative" and "far less intrusive" than the current status of the law, where a police officer may feel pressure to make an arrest in order to justify a search. *Id.* at 10. A limited search in these circumstances might actually *avoid* arrests. *Id.*

The Law Enforcement Brief also maintained that a police officer might feel forced, in discretionary situations, to make full-scale arrests because of the unavailability of a less intrusive measure such as the limited search of the passenger compartment. Law Enforcement Brief at 3-4, 14-15. The effect of the Michigan Supreme Court's decisions, said the Law Enforcement Brief, is that a police officer must physically block a suspect from returning to his car rather than neutralize the perceived danger inside the car. *Id.*

The Supreme Court's majority opinion, written by Justice O'Connor, reversed Michigan's highest court and upheld Deputy Howell's search of the passenger compartment of Long's car.⁸⁵ In so doing, the Court for the first time applied the principles of *Terry* to an area search.⁸⁶ Justice O'Connor reasoned that *Terry* searches were never meant to be restricted solely to the person of a suspect,⁸⁷ but are permitted where reasonable to protect police officers in investigatory stops where they lack probable cause to arrest.⁸⁸ Said the Court:

Although *Terry* itself involved the stop and subsequent pat-down of a person, we were careful to note that "[w]e need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases."⁸⁹

So, concluded Justice O'Connor, "[c]ontrary to Long's view, *Terry* need not be read as restricting the preventive search to the person of the detained suspect."⁹⁰

The majority further stated that the safety of police officers in investigatory stops is a paramount concern of the Court and has been, in several post-*Terry* decisions, sufficient ground for permitting warrantless searches.⁹¹ *Pennsylvania v. Mimms*⁹² and *Adams v. Williams*⁹³ are indicative, said the Court, of the inherent danger for police in vehicle stops.⁹⁴ Also, *Chimel v. California*⁹⁵ and *New York v. Belton*,⁹⁶ although they deal with searches incident to arrest, are examples of the Court's reliance on the concern underlying *Terry*, that the area immediately sur-

at 3. Clearly, searching the car is a lesser intrusion. *Id.*

85. 463 U.S. at 1049.

86. *Id.* at 1046-49.

87. *Id.* at 1047.

88. *Id.* at 1047-48.

89. *Id.* at 1047.

90. *Id.*

91. *Id.* at 1047-49.

92. 434 U.S. 106.

93. 407 U.S. 143.

94. 463 U.S. at 1047-48 & n.13.

95. 395 U.S. 752.

96. 453 U.S. 454.

rounding a suspect/arrestee is potentially fraught with danger for the investigating policeman.⁹⁷

Whether the search is incident to arrest, as in *Chimel* or *Belton*, or during a lawful investigatory stop, as in *Terry* or *Long*, the danger that a suspect may reach for a hidden weapon is the same, and therefore the permissible scope of the police search should be the same.⁹⁸ Said the majority:

If a suspect is "dangerous," he is no less dangerous simply because he is not arrested. If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.⁹⁹

In the instant case, said the majority, Deputies Howell and Lewis acted reasonably in searching Long's car for more weapons as a preventive step before allowing him to re-enter his vehicle.¹⁰⁰ In conducting this search, the deputies were entitled to seize any contraband they discovered.¹⁰¹ The Court reached this conclusion by applying the "balancing test" of *Terry*.¹⁰² The individual's interest in freedom of movement must be weighed against the policeman's interest in crime detection and self-protection.¹⁰³ Allowing the search in *Long*, concluded Justice O'Connor, is a proper extension of the *Terry* doctrine:

[T]he balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as

97. 463 U.S. at 1049 n.14. Said the Court:

What we borrow now from *Chimel v. California* and *New York v. Belton* is merely the recognition that part of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity. This recognition applies as well in the *Terry* context.

Id. at 1050.

98. *Id.* at 1049-50 & n.14.

99. *Id.* at 1050.

100. *Id.*

101. *Id.*

102. 392 U.S. at 21.

103. 463 U.S. at 1046-47.

they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous.¹⁰⁴

Justice O'Connor further reasoned that the Michigan Supreme Court's majority view that Long was not a potential threat to the deputies¹⁰⁵ was "mistaken" in lieu of the facts of this particular investigatory stop.¹⁰⁶ Long was still a threat, she stated, because he could have broken away from the deputies and retrieved a weapon from his car,¹⁰⁷ or, if not placed under arrest at the conclusion of the investigation, he could have retrieved a weapon when he re-entered his car.¹⁰⁸

Citing the analysis of *Terry*,¹⁰⁹ the majority stated that while a police officer is conducting a proper investigatory stop, he is at "close range" to a suspect and particularly vulnerable and should not be burdened with having to make snap decisions on how to avoid a *Terry* search and yet protect himself.¹¹⁰ "In such circumstances," concluded the majority, "we have not required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter."¹¹¹

Justice Brennan, with whom Justice Marshall joined in dissenting on fourth amendment grounds,¹¹² repeated two of the arguments of the Michigan Supreme Court¹¹³ and added several of

104. *Id.* at 1051.

105. *See supra* note 67 and accompanying text.

106. 463 U.S. at 1051.

107. *Id.*

108. *Id.* at 1052.

109. *Id.*

110. *Id.*

111. *Id.* at 1052 & n.16. In footnote 16, the majority makes an important distinction between a search for weapons, which is permissible under *Terry*, and a search for other evidence or contraband, which is not. Where a police officer confronts a suspect, he is not permitted to pat down that person on the reasonable suspicion that the suspect is carrying contraband, but only on the suspicion that the person is carrying a weapon. *Sibron v. New York*, 392 U.S. 40 (1968). Furthermore, when an officer pats down outer clothing and feels an object that is clearly *not* a weapon, he cannot reach inside the clothing and recover the item. *Ybarra v. Illinois*, 444 U.S. 85 (1979). Claiming that the dissent misunderstands this distinction, the majority states, "Justice Brennan quotes at length from *Sibron*, but fails to recognize that the search in that case was a search for narcotics, and not a search for weapons." *Id.* at 1053 n.16.

112. *See supra* note 70 for discussion of Justice Stevens' dissent, which addressed solely what he perceived to be a lack of jurisdiction to hear *Michigan v. Long*.

113. *See supra* notes 66-67 and accompanying text.

his own. In support of the state court, Brennan argued, first, that *Terry* was intended to apply only to the search of the person of a suspect and never to an area of property,¹¹⁴ and second, that *Terry* could not be invoked in Long's case in any event because Long never posed a threat to the deputies.¹¹⁵

The heart of Justice Brennan's dissent is his effort to distinguish the search-incident rule, as applied in *Chimel*¹¹⁶ and *Belton*,¹¹⁷ from any merger with the *Terry* doctrine.¹¹⁸ Said Brennan: "The critical distinction between this case [*Long*] and *Terry* on the one hand, and *Chimel* and *Belton* on the other, is that the latter two cases arose within the context of lawful custodial arrests supported by probable cause."¹¹⁹ The majority's claim that the rationale for *Chimel* and *Belton* should apply to *Long* and *Terry* is fundamentally inconsistent, said Brennan, since one kind of search is based on probable cause while the other is not.¹²⁰ The majority, said Brennan, "deliberately ignores" this distinction.¹²¹

Justice Brennan further reasoned that the intrusion into Long's car was precisely the kind of intrusion associated with a full-scale arrest.¹²² The effect of Justice O'Connor's majority opinion, said Brennan, is that it creates an exception to the fourth amendment that is so broad as to swallow the entire prohibition against unreasonable searches as it relates to automobiles.¹²³ The "balancing test," said Brennan, is a failure and a "threat" to the fourth amendment.¹²⁴ He concluded: "There is no reason in this case why the officers could not have pursued less intrusive, but equally effective, means of insuring their

114. 463 U.S. at 1056.

115. *Id.* at 1061-62. Justice Brennan stated that based on the fact that Long was apparently drunk and could not even drive the car properly, having steered it into a ditch, it "requires imagination" to conclude that he posed a threat to two policemen. *Id.* at 1062.

116. *See supra* notes 23-25 and accompanying text.

117. *See supra* note 40 and accompanying text.

118. 463 U.S. at 1057-60.

119. *Id.* at 1057.

120. *Id.* at 1059.

121. *Id.*

122. *Id.* at 1063.

123. *Id.* at 1064.

124. *Id.* at 1063.

safety."¹²⁵ As an example, he suggested that the deputies should have asked Long where his registration was, and once told of a specific location within the car, looked only in that area and retrieved it.¹²⁶

The majority's decision to uphold Deputy Howell's armrest search is a reasonable solution given the particular facts and circumstances of *Michigan v. Long*. Each of the alternatives facing the deputies as Long stood beside them outside the car posed problems. If they allowed Long to re-enter the car himself to get the registration, the officers would have unnecessarily exposed themselves to added risk.¹²⁷ Justice Brennan's solution, that of asking Long where the registration was located,¹²⁸ had already been tried and Long had not answered.¹²⁹ The facts indicate that another alternative for the deputies, given Long's erratic driving and unstable demeanor, was to arrest Long for driving while intoxicated, thus automatically permitting a passenger compartment search as incident to arrest under *Belton*.¹³⁰ Nothing in the record, however, indicates that the deputies were willing to take such a drastic step so early in their investigatory stop.¹³¹

The solution chosen by the deputies and upheld by the Court was a limited search of the auto based on a reasonable fear that more weapons were inside. Accepting the majority's opinion that *Terry* was never meant to be strictly limited to the frisk of the person but could be expanded to other areas in future cases,¹³² *Long* is a particularly appropriate situation in which to extend the *Terry* rule. The automobile has the unusual

125. *Id.* at 1065.

126. *Id.* at 1065 n.7. Note that this solution conveniently ignores the facts in *Long*. The deputies asked Long repeated questions and received no response. See *supra* text accompanying notes 47-50.

127. 463 U.S. at 1051-52. Note that even Justice Brennan, in dissenting, did not suggest that the deputies actually allow Long to go back into the car. Brennan implicitly acknowledged the unreasonable risk that would entail. *Id.* at 1065 n.7.

128. See *supra* note 126 and accompanying text.

129. See *supra* text accompanying notes 46-51.

130. 463 U.S. at 1035 n.1, which includes the majority's consideration of this hypothetical. See *supra* note 84 for discussion of two amici briefs, supporting petitioner, which also discussed arresting Long for intoxication, thereby permitting the deputies to search his car.

131. Deputy Howell stated that he had *not* thought to arrest Long at this point, but rather was "detaining" the defendant under his police authority to make investigatory traffic stops. Joint Appendix at 30a-31a, *People v. Long*, 413 Mich. 461, 320 N.W.2d 866.

132. See *supra* notes 87-90 and accompanying text.

status of being less protected under the fourth amendment than other areas.¹³³ Given this status, and the Court's concern with police safety,¹³⁴ the *Terry* doctrine is properly extended here to include protective searches of automobiles.

Yet the Court in *Long* makes no effort to draw the line for searches without probable cause at automobiles. In footnotes 14¹³⁵ and 16,¹³⁶ the Court refers to future "area searches" by police without considering whether the "areas" are limited solely to the passenger compartment of automobiles. The majority decision gives no guidance as to what additional areas of property a police officer may search for his protection despite a lack of probable cause.

If a similar level of reasonable suspicion developed while an officer was properly in the *home* of a criminal suspect, what would be the Court's decision? Suppose a policeman is properly admitted to the home of Long, perhaps to aid his father in a sudden heart attack. While in the house, the officer realizes that Long bears a remarkable resemblance to the armed-robbery suspect whose picture is on a wanted poster in the precinct. Although he is not certain Long is the wanted man, the officer does have a very legitimate, reasonable suspicion, and suddenly fears that Long is either armed, or has a weapon hidden nearby *in the living room*. Are these the proper circumstances for another "area search"? What if the officer, with the same suspicions, encounters Long on his front lawn, ten feet from an open door to his house? Can the officer rush inside and conduct an area search before Long reaches a weapon?

The majority decision in *Long* opens a Pandora's Box of future search-and-seizure cases. Allowing *Terry* to apply to automobiles is an action grounded in the decisions concerning the car's unusual status under the fourth amendment.¹³⁷ By deliberately refusing to limit *Long* to automobiles, the Court has sig-

133. See *supra* notes 27-41 and accompanying text.

134. 463 U.S. at 1046-49.

135. *Id.* at 1049 n.14. Without confining the rule to automobiles, the Court said: "[W]e require that officers who conduct area searches during investigative detentions must do so only when they have the level of suspicion identified in *Terry*." *Id.* at 1050.

136. *Id.* at 1052 n.16. A second time, without confining the rule to automobiles, the Court stated: "To engage in an area search, which is limited to seeking weapons, the officer must have an articulable suspicion that the suspect is potentially dangerous." *Id.*

137. See *supra* notes 27-41 and accompanying text.

nalled to the police that they have broad discretionary power to conduct "area searches" without probable cause.

The Court will be faced with a tougher, more direct challenge to the fourth amendment when such a search, this time of a home, is inevitably brought before it on appeal. Yet the same line of decisions that articulated the lesser expectation of privacy in a car¹³⁸ will support the contrasting argument that a home or office is still shielded by the fourth amendment. The doctrine enunciated in *Long* provides an important tool for police when stopping cars, but reason dictates that, ultimately, *Long* also works to retain the vitality of the home as an area inviolate to a reasonable-suspicion search.

Daniel Oates

138. *Id.*