The Burger Court Opinion Writing Database

Michigan v. Long

463 U.S. 1032 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1983

Re: No. 82-256, Michigan v. Long

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 7, 1983

RE: No. 82-256 Michigan v. Long

Dear Thurgood, Harry and John:

We four are in dissent in the above. Will you, Harry, be willing to undertake the dissent?

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1983

Re: No. 82-256, Michigan v. Long

Dear Thurgood and John:

We voted at conference, along with Lewis, to Krivda this case. I asked Lewis to undertake the dissent. After further study and consideration, however, Lewis has advised me that he has changed his view. Frankly, on initial review, I find his reasoning, which is reflected in the attached letter, to be persuasive. I would be interested in your reactions.

If you are as impressed with Lewis' arguments as I am then I plan to wait for the Court's opinion before deciding what to do on the merits.

Sincerely,

WJB, Jr.

Justice Marshall

Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1983

MEMORANDUM TO THE CONFERENCE

Re: No. 82-256, Michigan v. Long

Although I am awaiting further writing on the jurisdictional issues in this case, I plan to file the enclosed dissent on the merits.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 6/23/83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

JUSTICE BRENNAN, dissenting.

The Court today holds that "the protective search of the passenger compartment" of the automobile involved in this case "was reasonable under the principles articulated in *Terry* and other decisions of this Court." *Ante*, at 1. I disagree. *Terry* v. *Ohio*, 392 U. S. 1 (1968), does not support the Court's conclusion and the reliance on "other decisions" is patently misplaced. Plainly, the Court is simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause. See *United States* v. *Place*, —— U. S. ——, —— (1983) (BRENNAN, J., concurring in the result). I, therefore, dissent.

On three occasions this Term I have discussed the limited scope of the exception to the probable cause requirement created by *Terry* and its progeny. See *Florida* v. *Royer*, —— U. S. ——, —— (BRENNAN, J., concurring in the result); *Kolender* v. *Lawson*, —— U. S. ——, —— (1983) (BRENNAN, J., concurring); *United States* v. *Place*, —— U. S. ——, —— (BRENNAN, J., concurring in the result). I will not repeat those discussions here and note only that "*Terry*, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion." *Id.*, at ——. However, the Court's opinion

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

1, 3 Footnotes Renumbered

From: **Justice Brennan**

Circulated: _____

Recirculated: 6/29/83

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today holds that "the protective search of the passenger compartment" of the automobile involved in this case "was reasonable under the principles articulated in *Terry* and other decisions of this Court." *Ante*, at 1. I disagree. *Terry* v. *Ohio*, 392 U. S. 1 (1968), does not support the Court's conclusion and the reliance on "other decisions" is patently misplaced. Plainly, the Court is simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause. See *United States* v. *Place*, —— U. S. ——, —— (1983) (BRENNAN, J., concurring in the result). I, therefore, dissent.[1]

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[1] I agree that the Court has jurisdiction to decide this case. See *ante*, at 11, n. 10.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1983

Re: 82-256 - Michigan v. Long

Dear Sandra,

Please join me.

Sincerely yours,

Justice O'Connor

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1983

Re: No. 82-256-Michigan v. Long

Dear Sandra:

I await the dissent.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1983

Re: No. 82-256-Michigan v. Long

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 7, 1983

Re: No. 82-256 - Michigan v. Long

Dear Bill:

I am afraid I cannot undertake the dissent in this case because I was not one of the four who voted to give the case Krivda treatment. I think Lewis is the one who voted with you, Thurgood, and John.

Sincerely,

Harry

Justice Brennan

cc: Justice Marshall
Justice Stevens

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: JUN 29 1983

Recirculated: _____

No. 82-256 - Michigan v. Long

JUSTICE BLACKMUN, concurring.

I join Parts I, III, IV, and V of the Court's opinion. While I am satisfied that the Court has jurisdiction in this particular case, I do not join the Court, in Part II of its opinion, in fashioning a new presumption of jurisdiction over cases coming here from state courts. Although I agree with the Court that uniformity in federal criminal law is desirable, I see little efficiency and an increased danger of advisory opinions in the Court's new approach.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 2 9 1983

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

JUSTICE BLACKMUN, concurring.

I join Parts I, III, IV, and V of the Court's opinion. While I am satisfied that the Court has jurisdiction in this particular case, I do not join the Court, in Part II of its opinion, in fashioning a new presumption of jurisdiction over cases coming here from state courts. Although I agree with the Court that uniformity in federal criminal law is desirable, I see little efficiency and an increased danger of advisory opinions in the Court's new approach.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 28, 1983

Re: No. 82-256 - Michigan v. Long

Dear Sandra:

This will confirm the fact, apparent from my separate concurrence, that I join Parts I, III, IV, and V of your opinion.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 8, 1983

82-256 Michigan v. Long

Dear Bill:

I will be glad to undertake a dissent.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: Justice Marshall
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
LEWIS F. POWELL, JR.

March 15, 1983

82-256 Michigan v. Long

Dear Bill:

Since undertaking the dissent in this case, I have looked more thoroughly at Michigan law. This has led me to question my initial view that the judgment below rested on independent and adequate state grounds.

As a general matter I believe Michigan has interpreted art 1, §11 independently of the Fourth Amendment. As the Supreme Court of Michigan explicitly stated in People v. Secrest, 413 Mich. 521, 525 (1982), "we have imposed a higher standard under the state provision than the federal when the item seized is not one within the proviso of the third sentence of art 1, §11." But I do not believe that Secrest controls this case.

The problem arises from the proviso to art 1, §11 that states "[t]he provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." Thus, even if a search otherwise would be unreasonable under art 1, §11, the proviso purports to prevent certain categories of evidence obtained during the search from being excluded at criminal trials.

As a state constitution cannot authorize the admission of evidence that the federal constitution would exclude, Michigan has recognized that the effect of the proviso is to "preclud[e] a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the provision than the United States Supreme Court has held applicable under the Fourth Amendment." People v. Moore, 391 Mich. 426, 435 (1974). The exclusion of evidence of the types specified in this proviso therefore is governed by the federal constitution. Thus, the issue on which this case ultimately turns appears to be whether marijuana (the drug involved here) is a "narcotic drug" within the meaning of the proviso.

The respondent's brief asserts that the proviso is not applicable because Michigan no longer classifies marijuana as a narcotic. See 1978 Mich. Pub. Acts 368 (codified at Mich. Comp. Laws Ann. §333.7107). The Michigan courts have held consistently, however, that state constitutional

provisions should be interpreted in light of the laws existing when the provisions were ratified. See Bacon v. Kent-Ottawa Authority, 354 Mich. 159, 170-171 (1958). Indeed, the state courts appear to have been rather strict about not construing constitutional provisions in light of subsequent statutory changes. See Walker v. Wayne Circuit Judge, 2 Mich. App. 145, 148-149 (1966); Jones v. City of Ypsilanti, 26 Mich. App. 574, 578-579 (1970). As marijuana was classified as a narcotic drug when the state constitution was ratified in 1963, see 1961 Mich. Pub. Acts 206, I doubt that the subsequent statutory change alters the coverage of the proviso.

Although the state courts have not addressed the specific question whether marijuana is a narcotic, they appear to have assumed that marijuana falls within the coverage of the proviso. In People v. Monroe, 3 Mich. App. 544 (1966), the state court did not bother to consider whether the search that led to the discovery of marijuana was prohibited by the first part of art 1, §11 but simply admitted the marijuana into evidence on the basis of the proviso. See also People v. Barker, 18 Mich. App. 544 (1969) (Levin, J., concurring). But cf. People v. Smith, 31 Mich. App. 366, 373 (1971) (apparently holding that the Fourth Amendment voided the proviso to art 1, §11).

Even if the state courts were to disregard the law existing at the time the constitutional provision was ratified, the purpose of the proviso clearly appears to have been to allow the admission of contraband at criminal trials. This being so, it is unlikely Michigan would apply its "higher standard" to any type of contraband drug. In this case, the Michigan court stated that the search was invalid under both the federal and state constitutions. Equating the two provisions suggests that the court had in mind its recognition that the proviso, which is applicable to contraband-type articles, had been construed to conform to the federal constitution. This perhaps explains why the court did not undertake any independent analysis of the state constitution but relied solely upon this Court's Fourth Amendment decisions.

As you know, Bill, I was inclined to agree with majority on the merits but initially shared your view that the case should be disposed of as resting on independent and adequate state grounds. Since I now have substantial questions about the independence of the state grounds, I am afraid I must give up the dissent.

Sincerely,

Lewis

Justice Brennan

lfp/ss

May 16, 1983

82-256 Michigan v. Long

Dear Sandra:

I have read with special interest your first draft of an opinion in this case, a draft not yet circulated. I make the following observations:

Your "plain statement" rule for determining this Court's jurisdiction would be: If a state court's decision "fairly appears to rest primarily on federal law," we will presume that this Court has jurisdiction unless the state court has indicated clearly and expressly that its judgment rests on independent and adequate state grounds. As a working principle the rule is salutary and practical considerations strongly support it.

There are, as I am sure you fully appreciate, some theoretical problems with such a rule. It is elementary that this Court has no jurisdiction where a state court's judgment rests on independent and adequate state grounds. As this is a jurisdictional question, we have thought it necessary either to remand a doubtful case to the state court or we have undertaken our own review of state law. I took this approach recently in my dissenting opinion in City of Mesquite v. Alladin's Castle (last Term).

Justice Jackson addressed this problem in Herb v. Pitcairn, 324 U.S. 117 (1945), in which - among other relevant statements - he said:

> "[I]t seems consistent with respect to the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation." Id., at 127-128.

I confess being torn between the obvious advantage to us of your "plain statement" rule and the traditional concern of this Court not to exercise a jurisdiction that might in fact properly lie with a state. After all, we are a court of limited jurisdiction. On balance, however, I would join four other Justices in adapting your rule in view of the strong practical reasons that justify it.

Perhaps it would be desirable for your opinion to address somewhat more specifically what I have called the theoretical problems with a pragmatic rule. In my view, these problems are more theoretical than realistic - since complying with your proposed rule would hardly be burdensome except where a state court may have reason deliberately to pass the buck to us as perhaps the Michigan courts have been doing.

I note that in this case, your footnote 7 actually disposes of any argument that the decision below was based on an independent and adequate state ground.

I appreciate your giving me the opportunity to make advance comments on your opinion. I applaud your purposes and willingness to undertake an answer to this problem.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1983

82-256 Mighigan v. Long

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 17, 1983

Re: No. 82-256 Michigan v. Long

Dear Sandra:

Please join me.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1983

Re: 82-256 - Michigan v. Long

Dear Bill:

It seems to me that there is enough uncertainty about te Michigan law that the proper disposition is to Krivda. I agree that we should wait and see what is written on the merits, but I am still concerned about our jurisdiction.

Respectfully,

Justice Brennan

cc: Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 26, 1983

Re: 82-256 - Michigan v. Long

Dear Sandra:

Because I do not agree with the new approach to jurisdiction over state court judgments that your opinion proposes, I expect to be writing in dissent as soon as I can get to it.

Respectfully,

JPS

Justice O'Connor

Copies the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 23 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

JUSTICE STEVENS, dissenting.

The jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer's search of respondent's car violated the Fourth Amendment. The case raises profoundly significant questions concerning the relationship between two sovereigns—the State of Michigan and the United States of America.

The Supreme Court of the State of Michigan expressly held "that the deputies' search of the vehicle was proscribed by the Fourth Amendment of the United States Constitution and *art. 1, §11 of the Michigan Constitution.*" Pet. for Cert. 19 (emphasis added). The state law ground is clearly adequate to support the judgment, but the question whether it is independent of the Michigan Supreme Court's understanding of federal law is more difficult. Four possible ways of resolving that question present themselves: (1) asking the Michigan Supreme Court directly, (2) attempting to infer from all possible sources of state law what the Michigan Supreme Court meant, (3) presuming that adequate state grounds are independent unless it clearly appears otherwise, or (4) presuming that adequate state grounds are *not* independent unless it clearly appears otherwise. This Court has, on different occasions, employed each of the first three approaches; never until today has it even hinted at the fourth. In order to "achieve the consistency that is necessary," the

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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Recirculated: JUN 24 '83

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

JUSTICE STEVENS, dissenting.

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Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: MAY 17

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[May ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Terry* v. *Ohio*, 392 U. S. 1 (1968), we upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right "to neutralize the threat of physical harm," *id.*, at 24, when he possesses an articulable suspicion that an individual is armed and dangerous. We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest. In the present case, respondent David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court. We also examine Long's argument that the decision below rests upon an adequate and independent state ground, and we decide in favor of our jurisdiction.

I

Deputies Howell and Lewis were on patrol in a rural area one evening when, shortly after midnight, they observed a

pp. 5, 6, 8, 7.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 31

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Stylistic Changes Throughout

PP. 10, 14, 19, 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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Recirculated: JUN 28

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-256

MICHIGAN, PETITIONER *v.* DAVID KERK LONG

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[June ——, 1983]

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