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Federal Courts - Criminal Law - Scope of Terry Search Includes Automobile Passenger Compartment - Court Will Find Jurisdiction Despite Possible State Ground

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FEDERAL COURTS — CRIMINAL LAW — SCOPE OF TERRY SEARCH INCLUDES AUTOMOBILE PASSENGER COMPARTMENT — COURT WILL FIND JURISDICTION DESPITE POSSIBLE STATE GROUND

Two police officers, observing a car swerve off a county road and come to a stop in a ditch, stopped to investigate.[1] The officers found David Long, the driver, outside the car and, after spotting a hunting knife through the open car door, subjected him to a patdown search for other weapons.[2] They found no other weapon.[3] Nevertheless, one of the officers shined his flashlight into the car and retrieved an open pouch that was visible beneath the armrest.[4] After inspecting the pouch's contents, the officers arrested Long for possession of marijuana.[5] The trial court denied Long's motion to suppress the marijuana and convicted him of possession of marijuana.[6] The Michigan Court of Appeals affirmed the conviction.[7] The Michigan Supreme Court reversed the decision, however, and held that the officers' search of the car was

1. Michigan v. Long, 103 S. Ct. 3469, 3473 (1983). The officers were on night patrol and began to follow the car, which was speeding. *Id.*

2. *Id.* The United States Supreme Court previously approved a patdown search of a person for weapons in the absence of either a search warrant or probable cause to arrest. *See* Terry v. Ohio, 392 U.S. 1 (1968).

3. 103 S. Ct. at 3473.

4. *Id.* Long stood at the rear of the car with Deputy Lewis while Deputy Howell conducted the flashlight search for other weapons. *Id.* Deputy Howell entered the car only when the light partially revealed a container under the armrest; he lifted the armrest to remove the container. *Id.*

5. *Id.* After arresting Long, the deputies opened the trunk of Long's car, which was closed but missing its lock. *Id.* They found approximately 75 pounds of marijuana in the trunk. *Id.* The contents of both the pouch and the trunk were admitted as evidence at trial. *Id.*

6. People v. Long, 94 Mich. App. 338, ____, 288 N.W.2d 629, 630 (1979).

7. *Id.* at ____, 288 N.W.2d at 634. The Michigan Court of Appeals reasoned that the patdown search of Long was reasonable because of the discovery of a large knife on the floor of the car. *Id.* at ____, 288 N.W.2d at 631-32.

unreasonable and the evidence seized should have been suppressed.[8] The United States Supreme Court reversed the Michigan Supreme Court[9] and *held* that when officers conduct a protective search for weapons on the reasonable belief that a suspect may be armed, such a search may reasonably extend beyond the suspect's person to the parts of the passenger compartment in which a weapon might be hidden.[10] *Michigan v. Long*, 103 S.Ct. 3469 (1983).

A police officer's authority to subject an individual to a "patdown" search for weapons is a limited exception to the requirement that an officer have probable cause to believe a crime is being committed before he can invade an individual's privacy.[11] The requirement of probable cause is itself an exception to the prohibition against search or seizure without a particularized warrant.[12] Commonly known as a *Terry* search,[13] its justification is the need for law enforcement officers to protect themselves and others from possible violence in the context of a limited

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8. People v. Long, 413 Mich. 461, ___, 320 N.W.2d 866, 870 (1982). The Michigan Supreme Court ruled that both the fourth amendment to the United States Constitution and Article 1, § 11 of the Michigan Constitution prohibited a search of the vehicle in *Long*. *Id.* at ___, 320 N.W.2d at 869 & n.4. The circumstances deemed significant to the court's rationale were (1) the frisk of Long revealed no weapons and (2) since Long was outside the car, any weapons hidden within the car were outside his reach and thus posed no danger to the officers. *Id.* at ___, 320 N.W.2d at 869.

9. 103 S. Ct. at 3483.

10. *Id.* at 3480. The Court distinguished a protective search for weapons in this context from a search incident to a custodial arrest, which involves a need to preserve evidence, and suggested that its decision was not a blanket authorization to search the passenger compartment whenever a vehicle was stopped for routine investigation. *Id.* n.14.

11. *See* Terry v. Ohio, 392 U.S. 1, 25-26 (1968). The Supreme Court in *Terry* stated that without probable cause to arrest, a search for weapons "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26.

12. U.S. CONST. amend IV. The fourth amendment to the United States Constitution provides as follows:

> The right to 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.

Id.

The North Dakota Constitution contains a nearly identical provision. The text 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 warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

N.D. CONST. art. I, § 8.

The history of exceptions to the warrant requirement has been extensively chronicled. *See generally* J. HALL, SEARCH AND SEIZURE §§ 7:1-9:34 (1982 and Supp. 1983) (discusses the exceptions for exigent circumstances, search incident to arrest, and search of a vehicle when probable cause exists to believe criminal evidence is located therein).

13. Terry v. Ohio, 392 U.S. 1 (1968). The *Terry* Court reviewed the argument that a brief investigative stop and frisk did not implicate fourth amendment concerns. *Id.* at 10-11 & n.5. The Court concluded, however, that such activity did constitute a "search" and "seizure" within the meaning of the Constitution. *Id.* at 16.

investigation without probable cause to make an arrest.[14]

Although the *Terry* doctrine arose out of a street confrontation,[15] it frequently has been applied in the context of the automobile stop. In *Adams v. Williams*[16] a policeman reached through an open car window and removed a gun from the occupant's waistband.[17] The Supreme Court ruled that the officer acted justifiably on reasonable suspicion produced by a reliable informant's tip.[18] In *Almeida-Sanchez v. United States*[19] the Supreme Court invalidated a stop and search conducted by the Border Patrol without either probable cause or reasonable suspicion, even though a federal statute authorized such searches.[20] The *Terry* principles justified the search of a driver stopped for a traffic violation in *Pennsylvania v. Mimms*.[21] The Supreme Court found that concerns for the safety of the investigating officer justified the routine practice of ordering traffic violators out of their cars.[22] Since no question existed concerning the legality of the stop for a traffic violation, the Court found no serious intrusion in the additional requirement that the driver get out of his car during the normally brief detention.[23]

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14. *Id.* at 24. The Supreme Court stated that it would seem "clearly unreasonable" to prevent an investigating officer from acting on a justifiable belief that a suspect may be armed. *Id.*

15. *Terry,* 392 U.S. at 5. In *Terry* a police officer noticed two men on a downtown Cleveland street and became suspicious when they took several turns walking past a store window and looking inside, then meeting at the street corner to confer. *Id.* at 5-6. The police officer followed and confronted them, identified himself, and "frisked" Terry when the men only mumbled in response to his request for their names. *Id.* at 6. The officer felt a gun in Terry's overcoat and subsequently recovered another gun from the second suspect. *Id.*

16. 407 U.S. 143, 145 (1972). In *Adams* a policeman was approached by an acquaintance who pointed out a nearby car and said that the person seated inside had narcotics and a gun at his waist. Adams v. Williams, 407 U.S. 143, 144-45 (1972).

17. *Id.* at 145. The officer found the gun exactly as indicated by the informant. *Id.*

18. *Id.* at 146. The Court noted that the officer in *Adams* knew the informant personally, had received reliable information from him in the past, and that the information in this case was immediately verifiable. *Id.*

19. 413 U.S. 266 (1973). In *Almeida-Sanchez* Border Patrol officers stopped and searched a Mexican citizen on a California highway about 25 miles north of the Mexican border. Almeida-Sanchez v. United States, 413 U.S. 266, 267-68 (1973). He was convicted of a marijuana offense as a result of the patrol's search of his vehicle, from which a large quantity of the drug was recovered. *Id.* at 267.

20. *Id.* at 268. The Court in *Almeida-Sanchez* recognized the Government's authority to conduct routine warrantless searches at border checkpoints or their equivalent but refused to extend that authority beyond these points in the absence of probable cause or consent. *Id.* at 272-73. *See* 8 U.S.C. § 1357 (a) (3) (1982) (allows border patrol searches without a warrant).

21. 434 U.S. 106, 111-12 (1977). In *Mimms* the halting officer stopped Mimms to issue a citation for driving with an expired license plate. Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977). The officer asked Mimms to get out of the car and produce his driver's license and registration. *Id.* Noticing a bulge under Mimms' jacket, the officer suspected a weapon; the resulting frisk produced a loaded gun. *Id.* Mimms was then arrested for carrying a concealed weapon. *Id.*

22. *Id.* at 110. The Pennsylvania Supreme Court reversed Mimms' conviction because the event leading to the discovery of the weapon — the order to get out of the car — was not supported by reasonable suspicion of criminal activity. *Id.* at 107-08.

23. *Id.* at 111. The Supreme Court stated, "What is at most a mere inconvenience cannot prevail when balanced against legitimate concern for the officer's safety." *Id.* (footnote omitted). The Court thereupon had no difficulty in concluding that the bulge in the driver's jacket justified the patdown search for weapons. *Id.* at 112.

The Supreme Court articulated the limits of a *Terry* seizure in a different context in *Dunaway v. New York.*[24] In *Dunaway* the police picked up a suspect for questioning regarding an attempted robbery and homicide although the police did not have enough information to request a warrant for his arrest.[25] The interrogation produced a confession, and Dunaway was convicted after the trial court denied his motion to suppress his incriminating statements and sketches.[26] The Supreme Court ruled that the detention for interrogation was a "seizure" within the meaning of the fourth amendment[27] and held that the seizure without probable cause to arrest violated the defendant's constitutional rights.[28]

In *New York v. Belton,*[29] another automobile stop and search case decided in the 1980 term, the Supreme Court approved a police search of a zippered jacket pocket within the passenger compartment although the car's occupants were then outside the vehicle and the jacket was not within their reach.[30] The *Belton* Court relied on its interpretation of *Chimel v. California*[31] in concluding that the search was properly conducted incident to a valid arrest.[32] The dissent in *Belton* charged that the Court had

24. 442 U.S. 200 (1979).

25. Dunaway v. New York, 442 U.S. 200, 203 (1979). In *Dunaway* a detective talked to a jail inmate after an informant implicated the inmate along with someone named "Irving." *Id.* & n.1. The inmate denied involvement, but also referred to an "Irving" as someone who might have been involved. *Id.* Based on those statements and the informant's identification of Dunaway's picture in a police file, the police picked up the defendant, Irving Jerome Dunaway, and took him to the police station for questioning. *Id.*

26. 442 U.S. at 203. The United States Supreme Court considered the case twice, first vacating the judgment for reconsideration by the New York courts in light of *Brown v. Illinois. See* Brown v. Illinois, 422 U.S. 590 (1975) (*Miranda* warnings did not per se cure violation of arrest without probable cause). In *Brown* the county court on remand granted defendant's motion to suppress. *Id.* at 205-06. The New York Supreme Court, Appellate Division reversed and held that even if the detention was illegal, attenuating circumstances overcame the illegality. *Id.* at 206. When the New York Court of Appeals dismissed the defendant's appeal, the Supreme Court again granted certiorari. *Id.*

27. *Id.* at 207. The State contended that "reasonable suspicion" was sufficient to support the detention since no arrest had been made. *Id.*

28. *Id.* at 216. The Supreme Court reviewed *Terry* and cases following. *Id.* at 208-12. The Court noted that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Id.* at 210. The Court found that Dunaway's detention was an arrest in all but name and went far beyond the limited intrusion based on reasonable suspicion allowed by *Terry. Id.* at 212-13.

29. 453 U.S. 454 (1981). The initial stop in *Belton* was for a speeding violation. New York v. Belton, 453 U.S. 454, 455 (1981). The scent of burnt marijuana led to the occupants' arrests for unlawful possession of marijuana. *Id.* at 455-56.

30. *Id.* at 462-63. The search of a closed jacket pocket revealed cocaine; Belton was indicted for criminal possession of a controlled substance and pleaded guilty to a lesser included offense after the trial court denied his motion to suppress the cocaine taken from the jacket. *Id.* at 456. However, he reserved his right to appeal the search and seizure. *Id.* The New York Court of Appeals reversed and the United States Supreme Court granted certiorari. *Id.* at 456-57.

31. 395 U.S. 752 (1969). In *Chimel* the defendant was arrested pursuant to a warrant, and was later convicted in part on the support of evidence that the police obtained in a contemporaneous search, over defendant's objections, of his entire house. Chimel v. California, 395 U.S. 752, 753-54 (1969).

32. *Belton,* 453 U.S. at 460. The *Chimel* Court reversed the defendant's conviction because it found the search unreasonable in scope. In so doing it enunciated the principle that a search incident to arrest must be limited, in the absence of a particularized search warrant, to the arrestee's person and the area within which he might obtain a weapon or evidence of crime. *Chimel,* 395 U.S. at 768.

abandoned the underlying principles of *Chimel*: that a warrantless search incident to arrest be limited to acts necessary to secure the safety of the arresting officer and preserve evidence that the arrestee could easily conceal or destroy.[33] The Supreme Court's expansive treatment of the "search incident" exception in *Belton* foreshadowed its decision in *Michigan v. Long*.[34]

The *Long* Court analyzed *Terry v. Ohio*[35] and declared that *Terry* did not articulate the limits of a protective search for weapons.[36] Therefore, a *Terry* search need not be limited to the person of the suspect.[37] The Court then noted that it had applied *Terry* to approve searches based only on reasonable suspicion in the context of automobile stops.[38] Part of the rationale underlying those decisions, the Court stressed, was that automobile investigations pose a great danger for police officers.[39]

The *Long* Court next discussed its decision in *Chimel v. California*[40] and stated that the decision established the reasonableness of searching the area within an arrestee's immediate control when making a valid arrest.[41] The Court noted, however, that a workable definition of such an area for purposes of automobile stops eluded the courts until *New York v. Belton*.[42] The Court explained that the *Belton* decision provided a general rule that police arresting an occupant of an automobile may search the passenger compartment and any container found therein.[43] The Court then extended the *Belton* rule to situations in which a police officer possesses a reasonable suspicion "that the suspect is dangerous and the suspect may gain immediate control of weapons."[44] Applying the *Belton* rule to the facts of *Long*, the

33. *Belton*, 453 U.S. at 463-64 (Brennan, J., dissenting). Justice Brennan cited *Terry* for the proposition that a valid fourth amendment search must be strictly limited according to the circumstances justifying its initiation. *Id.* at 464. He criticized the *Belton* majority decision as a substantial expansion of the search incident to arrest exception to the warrant requirement and noted that since all the arrestees were outside the car, none of them could have reached the jackets that were searched. *Id.* at 466.

34. 103 S. Ct. at 3480 & n.14.

35. See *supra* notes 11-15 and accompanying text for a discussion of *Terry v. Ohio*.

36. *Long*, 103 S. Ct. at 3479. The Court in *Long* quoted from the dissenting opinion by Chief Justice Coleman of the Michigan Supreme Court who speculated that the search in *Terry* would have been equally permissible if the defendant had carried, rather than worn, the searched overcoat. *Id.* n.12.

37. 103 S. Ct. at 3479.

38. *Id. See* Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (driver stopped for expired license plate asked to get out of car; bulge sighted in jacket reasonably led to search for weapon); Adams v. Williams, 407 U.S. 143, 146 (1972) (gun seized from person seated in car on basis of reliable tip).

39. *Long*, 103 S.Ct. at 3479.

40. *Id.* at 3480. *See* Chimel v. California, 395 U.S. 752, 768 (1969).

41. 103 S. Ct. at 3480. The Court stated that its holding in *Chimel* explicitly relied on *Terry*. *Id.*

42. *Id. See* New York v. Belton, 453 U.S. 454, 460 (1981).

43. *Long*, 103 S.Ct. at 3480. The *Belton* Court's rationale was that if the passenger compartment was generally within the arrestee's control for access to weapons or evidence, the same was true for any container inside the passenger compartment. *Belton*, 453 U.S. at 460.

44. 103 S. Ct. at 3480 (footnote omitted). Noting that the *Terry* standard based reasonableness

Supreme Court found that the nighttime hour and rural area, the unresponsiveness of the driver, the knife on the car floor, and Long's impending re-entry of the car to retrieve his registration card all pointed to the reasonableness of the officers' taking preventive measures to ensure the absence of any other weapons within Long's reach.[45]

The dissenters in *Long* disputed the majority's conclusion that *Terry* provided authority for the vehicle search.[46] The dissent also distinguished *Chimel v. California* and *New York v. Belton* as being searches incident to lawful arrests and supported by probable cause.[47] In these cases, the dissent pointed out, the authority to search stems from the lawful arrest, at which point an individual's privacy interest is abated.[48] As the dissent noted, however, Long was not arrested until after the search of his vehicle.[49] The dissent accused the majority of perverse reasoning in validating the search based on reasonable suspicion because no probable cause to arrest existed.[50]

Thus, the United States Supreme Court has expanded the *Terry* doctrine to allow the search of a passenger compartment and seizure of contraband found in it on less than probable cause. The investigating officer need only reasonably believe an occupant or recent occupant of the automobile is dangerous and might gain access to weapons.[51]

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on all the circumstances, the Court stated, "If a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested." *Id.* at 3481.

45. *Id.* The Court referred to *Terry* as authority for balancing the intrusiveness to the individual against the need for the search, and concluded that the balance weighed in favor of searching a passenger compartment if reason existed to believe the occupant was dangerous. *Id. See* Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

46, 103 S. Ct. at 3483 (Brennan, J., dissenting). Justice Brennan argued that the "frisk" authorized by *Terry* was narrowly limited to the suspect's outer clothing to discover any concealed weapons. *Id.* at 3484. Justice Brennan also questioned the Court's reliance on *Mimms* and *Adams* and noted that both cases involved searches of the person only. *Id.* n.2.

47. *Id.* at 3484-85. Justice Brennan quoted extensively from the *Terry* Court's distinction between a search incident to arrest and a protective "frisk" for weapons. *Id.* at 3485. The quoted passage states in part:

> An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.

Id. (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968)) (footnote omitted).

48. 103 S. Ct. at 3485 (Brennan, J., dissenting). *See, e.g.*, United States v. Robinson, 414 U.S. 218, 234 (1973) (*Terry* standards for search stricter than those governing search incident to lawful arrest).

49. 103 S. Ct. at 3485 n.4 (Brennan, J., dissenting).

50. *Id.* at 3487.

51. *Id.* at 3480. The Court emphasized that it did not view its decision as authorizing an

To reach the search and seizure issue, the *Long* Court first needed to resolve the contention that it lacked jurisdiction to review the decision of the Michigan Supreme Court.[52] The *Long* Court agreed that its jurisdiction would fail if the state court decision rested on adequate and independent state grounds.[53] The Court reviewed and then discarded its prior "ad hoc method" of dealing with state court decisions involving mixed state and federal grounds.[54] The Supreme Court announced a new rule: when a state court decision appears to rely on federal grounds, "and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Supreme Court will conclude that the federal ground was necessary to the decision and will find jurisdiction to review.[55]

The *Long* Court recognized that the history of the United States Supreme Court's approach to review of ambiguous state court decisions is somewhat inconsistent.[56] In *Lynch v. New York*[57] the Supreme Court denied review because the record did not affirmatively show[58] that the state court had based its decision on federal constitutional grounds.[59] Similarly, the Supreme Court refused to review a federal question in *Minnesota v. National Tea Co.*[60] because it was uncertain whether the decision of the

automobile search during every investigative stop, but only when officers "have the level of suspicion identified in *Terry*." *Id.* n.14.

52. *Id.* at 3474. The defendant argued that the Michigan Supreme Court relied on the state constitution, which supplied an adequate and independent state ground and thus precluded the United States Supreme Court's exercise of jurisdiction. *Id.*

53. *Id.* at 3476. Section 1257 of Title 28 of the United States Code authorizes the United States Supreme Court to review state court decisions. *See* 28 U.S.C. § 1257 (1976). This grant of jurisdiction rests on the presence of a "federal question." *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 107 (4th ed. 1983) (reviews the history of federal jurisdiction over the state courts and notes criteria for determining existence of substantial federal question and whether adequate state ground for decision bars review by federal courts).

54. 103 S. Ct. at 3474-76. The Court stated that doctrinal consistency is necessary with respect to "sensitive issues of federal-state relations." *Id.* at 3475.

55. *Id.* at 3476. The Supreme Court stated that its decision in *Long* was motivated by its respect for the independence of state courts and its desire to avoid advisory opinions. *Id.* at 3475-76.

56. *Id.* at 3474. *Compare* Delaware v. Prouse, 440 U.S. 648, 652 (1979) (even if adequate state ground existed, Supreme Court took jurisdiction on finding that Delaware Supreme Court did not intend state ground to be independent) *with* Durley v. Mayo, 351 U.S. 277, 281 (1956) (Supreme Court would not take jurisdiction if state court decision might have been based on independent state ground).

57. 293 U.S. 52 (1934). *Lynch* involved an appeal by the New York State Tax Commissioner from a judgment annulling his determination that rental income from out-of-state property should be considered for purposes of determining a resident's state income tax liability. Lynch v. New York, 293 U.S. 52, 53 (1934).

58. *Id.* at 54. The trial court in *Lynch* issued a brief opinion citing exlusively decisions of the United States Supreme Court and related annotations. Pierson v. Lynch, 237 App. Div. 763, ____, 263 N.Y.S. 259, 260 (1933). The Court of Appeals of New York affirmed in a memorandum decision. People *ex rel* Pierson v. Lynch, 263 N.Y. 533, 189 N.E. 684 (1933).

59. 293 U.S. at 54. The *Lynch* Court noted that it could have been surmised that the state court rested its decision on federal grounds, but that "jurisdiction cannot be founded upon surmise." *Id.*

60. 309 U.S. 551 (1940). The Minnesota Supreme Court had affirmed lower court judgments granting refunds of a gross sales tax imposed by the state on chain stores. Minnesota v. National Tea Co., 309 U.S. 551, 552 (1940).

Minnesota Supreme Court rested on state or federal grounds.[61] Instead of dismissing the writ as in *Lynch*, however, the *National Tea* Court vacated the decision and remanded the case so the state court could more explicitly state the basis for its decision.[62]

Sixteen years after *National Tea*, the Court dismissed a state prisoner's petition for habeas corpus in *Durley v. Mayo*[63] because of the possibility that the state court decision was based on an adequate state ground.[64] Although the Florida Supreme Court's decision was filed without an opinion,[65] on oral argument in the United States Supreme Court the State argued that the decision could have rested on adequate state grounds.[66] The dissenters in *Durley* argued that the Florida courts had not rigidly applied the state bar raised in that case[67] and further, that the claims below clearly had been dismissed on their merits.[68] For those reasons, the dissent would have taken jurisdiction over the federal claims.[69]

In recent cases the Supreme Court has more readily accepted jurisdiction to review ambiguous state court decisions.[70] In *Delaware v. Prouse*[71] the Court made an independent determination that "the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution and that we have jurisdiction of this case."[72] The Court summarily rejected a

61. *Id.* at 554-55. The Court noted that the Minnesota court referred to both state and federal constitutions, but it appeared to rely on federal court interpretations of the fourteenth amendment. *Id.*

62. *Id.* at 557. On remand, the Minnesota Supreme Court reinstated the judgments in a brief opinion stating that the state constitution compelled its decision. National Tea Co. v. State, 208 Minn. 607, ____, 294 N.W. 230, 231 (1940).

63. 351 U.S. 277 (1956). In *Durley v. Mayo* Durley had been sentenced to 30 years in prison for stealing cattle. Durley v. Mayo, 351 U.S. 277, 278 (1956). On appeal he claimed violations of the fifth and fourteenth amendments. *Id.* at 279.

64. *Id.* at 278. A Florida circuit court had quashed Durley's petition for a writ of habeas corpus and the Supreme Court of Florida dismissed his appeal without filing an opinion. *Id.* at 279.

65. *Id.* The Florida Supreme Court also denied a second petition of Durley without opinion three years later. The Supreme Court subsequently granted certiorari. *Id.* at 280.

66. *Id.* The Court placed the burden of establishing jurisdiction on the petitioner, stating that he "must demonstrate that neither of these state grounds can account for the decision below." *Id.* at 281.

67. 351 U.S. at 290 (Douglas, J., dissenting). The State contended that the issues raised were res judicata. *Id.* at 280. Justice Douglas noted, however, that the Florida Supreme Court itself had refused to apply that doctrine "where to do so would 'defeat the ends of justice.' " *Id.* at 290 (quoting Universal Const. Co. v. City of Ft. Lauderdale, 68 So. 2d 366, 369 (Fla. 1953)) (footnote omitted).

68. 351 U.S. at 290 (Douglas, J., dissenting).

69. *Id.* at 291.

70. *See* Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals — A State Judge's Solution to a Continuing Problem.* 1981 B.Y.U.L. REV. 545, 558 (1981). The commentator notes that some form of federal review of state court decisions is essential and state judicial systems would ultimately benefit from creation of a National Court of State Appeals that would review decisions of the highest state courts in which federal questions were raised and state remedies have been exhausted. *Id.*

71. 440 U.S. 648 (1979). *Prouse* involved a state appeal from the Delaware Supreme Court's judgment that random stops of motorists without reason to suspect any violation of the law were unconstitutional. Delaware v. Prouse, 440 U.S. 648, 651-52 (1979).

72. *Id.* at 652. The Delaware Supreme Court had found violations of the fourth and fourteenth amendments to the United States Constitution and Art. I, § 6 of the Delaware Constitution. *Id.* at 651-52.

challenge to its jurisdiction in *Oregon v. Kennedy*[73] and noted that the Oregon court had relied on decisions of the United States Supreme Court with only one exception.[74] The Supreme Court affirmed the decision of the Delaware court,[75] but reversed the Oregon court[76] and found that it had taken an "overly expansive view of the application of the Double Jeopardy Clause."[77]

The *Long* Court found unacceptable all its prior approaches to determining whether a state court judgment was based on adequate and independent state grounds.[78] The new rule, the Court stated, is grounded in respect for the independence of state courts.[79] A state court can maintain its independence by making "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."[80]

Justice Blackmun did not join the part of the opinion that stated the new jurisdictional rule,[81] and Justice Stevens filed a dissenting opinion.[82] Justice Stevens characterized the Court's approach as an abandonment of the historical presumption that adequate state grounds are independent unless it clearly appears

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73. 456 U.S. 667 (1982). In *Kennedy* the Oregon Court of Appeals held that the State's retrial of the defendant after a mistrial constituted double jeopardy, and the United States Supreme Court reversed. Oregon v. Kennedy, 456 U.S. 667, 669-70 (1982).

74. *Id.* at 671. In taking jurisdiction, the Court stated, "Even if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits." *Id.* (citation omitted). *See also* South Dakota v. Neville, 103 S. Ct. 916, 919 n.5 (1983) (recognizes that South Dakota court's decision rested on *adequate* state ground, but concludes that South Dakota Constitution had not provided *independent* state ground).

75. *Prouse*, 440 U.S. at 663. The Court stated that it granted certiorari in *Prouse* to resolve a conflict among various jurisdictions. *Id.* at 651 (citation and footnotes omitted).

76. *Kennedy*, 456 U.S. at 669.

77. *Id.* Justice Brennan noted that nothing in the Court's opinion would prevent the state court on remand from reinstating its judgment based on its interpretation of its own constitution. *Id.* at 680-81 (Brennan, J., concurring).

78. *Long*, 103 S. Ct. at 3475. In disapproving its historical approaches, the Court rejected dismissal because it failed to satisfy the need for uniformity in federal law, rejected remand for clarification because it led to delay and decreased efficiency of judicial administration, and rejected independent examination because it required the Court to interpret unfamiliar state laws. *Id.*

79. *Id.* at 3475-76. A second basis of the new rule is the Court's desire to avoid rendering advisory opinions. *Id.* The Supreme Court has interpreted the constitutional assignment of federal court jurisdiction to "cases" and "controversies" as forbidding advisory opinions. *E.g.*, Preiser v. Newkirk, 422 U.S. 395, 402, 404 (1975) (when reason for prisoner's petition removed before district court action, no present controversy existed and complaint should have been dismissed). *See* U.S. CONST. art. III, § 2 (judicial power extends to controversies between states or citizens of different states).

80. 103 S. Ct. at 3476. The Court explained that a "plain statement" of state grounds would avoid federal court intrusions into state law. *Id.* The Court, however, warned that when "clarification is necessary or desirable, [the Court] will not be foreclosed from taking the appropriate action." *Id.* n.6.

81. *Id.* at 3483 (Blackmun, J., concurring). Justice Blackmun suggested that the new approach posed an increased danger of the Court issuing advisory opinions. *Id.*

82. *Id.* at 3489-92 (Stevens, J., dissenting). Justice Stevens' dissent in *Long* focused solely on the jurisdiction question. *Id.*

otherwise.[83] In his view, the dictates of federalism and judicial efficiency militate *against* review by the United States Supreme Court of state court decisions with ambiguous grounds.[84]

Justice Stevens advanced the "novel view," in the words of the majority,[85] that the Court should usually refrain from review in cases in which a state complains "that the state court interpreted federal rights too broadly and 'overprotected' the citizen."[86] Drawing an analogy between a sovereign state and a foreign country, Justice Stevens suggested that the United States would have reason to intervene in internal affairs only if an American citizen were deprived of some basic right.[87] He noted that the need for uniformity in federal law was present whether or not a state court decision was based on adequate and independent state grounds.[88] However, he contended, unless the Court's intervention would change the state court decision, the Court should not interfere.[89]

The *Long* Court's extension of the *Terry* doctrine should surprise no one who has followed the gradual erosion of the exclusionary rule.[90] The question after *Long*, then, is what will

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83. *Id.* at 3489. Justice Stevens reasoned that if the Court rejected the "intermediate approaches" of vacation and remand or independently assessing state law, stare decisis demanded a return to the restraint evidenced by *Lynch*. *Id.* at 3489-90.

84. *Id.* at 3490. Justice Stevens' counsel for restraint in *Long* has some support in prior United States Supreme Court decisions. *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947) (Court has avoided passing on many constitutional questions within its jurisdiction unless such decisions are unavoidable, that is, the record presents no other ground on which the case may be resolved).

85. 103 S. Ct. at 3477 n.8.

86. *Id.* at 3490 (Stevens, J., dissenting). In support of his view, Justice Stevens cited a decision that stated the Supreme Court had a duty to review state court decisions " 'where a Federal right has been denied.' " *Id.* at 3491 (quoting Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912)).

87. 103 S. Ct. at 3490. In the present case, Justice Stevens pointed out, "[t]he 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." *Id.*

88. *Id.* at 3491-92.

89. *Id.* at 3492. Since the *Long* Court rejected the vacate and remand technique exemplified by Minnesota v. National Tea Co., 309 U.S. 551 (1940), Justice Stevens suggested that the dissenting opinion in *National Tea* should be applicable. He quoted from that opinion, which includes the following language:

> The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provisions of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference . . . . [T]he judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. . . .

103 S. Ct. at 3492 n.4 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 558-59 (1940) (Hughes, C.J., dissenting)).

90. *See* Michigan v. Long, 103 S. Ct. 3469, 3483 (1983) (Brennan, J., dissenting). Justice Brennan listed three related cases decided during the current term. He stated, "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." *Id.* (citation omitted).

suffice as a "plain statement" of reliance on state grounds within "the four corners of the opinion."[91] If the decision forces state courts to express more clearly the grounds of their decisions, such clarity would no doubt benefit all who must interpret them. It appears, however, that the *Long* decision also provides state courts with an open invitation to evade federal review.[92] While such a course may foster efficiency of judicial administration, it is arguable whether it will serve the objective of uniform interpretation of federal law.

In the area of search and seizure alone, the North Dakota Supreme Court routinely interprets the federal constitution.[93] Although the North Dakota Constitution contains a provision nearly identical to the fourth amendment to the United States Constitution,[94] the great wealth of federal cases gives state courts a substantial source of references. Thus, it is not surprising that the federal constitution is typically cited more frequently.[95] Whether the *Long* decision will result in state courts placing more reliance on interpretations of their own state statutes and constitutions is uncertain. If not, the result may be to encourage states to appeal more decisions of their own highest courts,[96] thus increasing the workload of the United States Supreme Court.

NANCY J. JAMISON

91. 103 S. Ct. at 3475-76.

92. *Id.* at 3476. Explaining how the need for federal review might be obviated, the Court stated: "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.*

93. *E.g.*, State v. Anderson, 336 N.W.2d 634, 640 (N.D. 1983) (interpreted decision of United States Supreme Court as allowing involuntary testing of blood only when suspect is already arrested; thus, evidence derived from chemical testing without arrest must be suppressed); State v. Koskela, 329 N.W.2d 587, 590-92 (N.D. 1983) (affirmed robbery conviction on grounds that *Terry* and other federal cases permitted initial stop of defendant and seizure of evidence in plain view of officers).

94. For the text of both state and federal constitutional provisions, see *supra* note 12.

95. In one recent advance sheet of the Northwestern Reporter, citations to the United States Constitution occurred thirty-one times. 340 N.W.2d No. 3 at IX (Jan. 3, 1984). In contrast, the seven states represented cited their own constitutions a total of nine times. *Id.* at IX-XIII.

96. *See* Michigan v. Long, 103 S. Ct. 3469, 3491 n.3 (1983) (Stevens, J., dissenting). Justice Stevens noted that the number of appeals by states from state court decisions heard by the Court had increased from one in 1953 to thirteen in the 1982 term, and that states had filed at least 80 petitions for certiorari during the latest term. *Id.*