

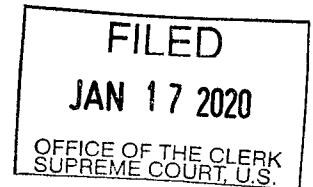
19-7432

No. 19A563

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN DAVID CALLIGAN – PETITIONER
VS.
STATE OF INDIANA – RESPONDENT



On Petition for a Writ of Certiorari to the
Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTIONS PRESENTED

1. Whether this Court should reconsider the reasonableness of its premise in *Michigan v. Long*, 463 U.S. 1032 (1983), that officers could reasonably fear that after a suspect is told he is free to go and permitted to reenter his automobile he would then retrieve a weapon from the automobile and attack police, when he did not take the opportunity to do so when he was first stopped.
2. Whether, under *Michigan v. Long*, 463 U.S. 1032 (1983), the possibility that if a suspect is not placed under arrest he will be permitted to reenter his automobile and have access to any weapons inside is a valid justification for a protective sweep of the automobile, when the officer knows at the time of the protective sweep that the suspect will be arrested and will not be permitted to reenter his automobile, even though at the time of the protective sweep the suspect has not yet been placed under full custodial arrest.
3. Undecided Question of Law: Whether the 4th Amendment allows officers to legally circumvent the "reaching distance" rationale as established in *Arizona v. Giant*, 129 S.Ct. 1710 (2009), whereby, officers strategically leaves a motorist unrestrained and nearby a vehicle, after a traffic stop, in order to justify the conducting of a "protective sweep," under the purview of officer safety.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished. The judgment of conviction of the trial court appears at Appendix B to the petition and is unpublished. The order of the state supreme court denying discretionary review appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was August 22, 2019. A copy of that decision appears at Appendix C. An extension of time to file the petition for a writ of certiorari was granted to and including January 19, 2020 on November 20, 2019 in Application No. 19A563. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Fourth and Fourteenth Amendments. The Fourth Amendment provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

The Fourteenth Amendment provides in relevant part:

... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the early morning hours of March 25, 2016, two detectives affiliated with the Gang and Violent Crime Unit of the Fort Wayne Police Department were working in a high-crime area in the city of Fort Wayne, Indiana, and initiated a traffic stop of the vehicle the petitioner, Edwin David Calligan, was driving, with two passengers. As one of the detectives approached the vehicle and began to speak with Calligan, he immediately smelled the odor of alcohol emanating from Calligan. The front-seat passenger was determined to have an active warrant and was arrested, while Calligan and the rear-seat passenger were directed to exit the vehicle and sit on the curb a few feet behind the vehicle, unhandcuffed. Another officer then searched the interior of the vehicle "for the purpose of officer safety" and found a loaded handgun between the driver's seat and the center console. Only then was Calligan handcuffed and arrested. He was charged with and convicted after a jury trial of Level 4 felony unlawful possession of a firearm. Prior to trial, he filed a motion to suppress the results of the search, which was denied.

According to the Affidavit for Probable Cause filed in the trial court, Calligan "was asked to stop [sic] from the vehicle to continue with the OWI investigation and so a tow inventory and protective sweep for firearms could be completed." At the evidentiary hearing on Calligan's motion to suppress, the arresting officer testified

that at the time the protective search of Calligan's vehicle was performed he already had probable cause to believe that Calligan was driving under the influence, since he "could smell the alcohol on his breath," and therefore didn't need to perform a portable breath test or any field sobriety tests. Transcript of Hearing on Motion to Suppress, p. 64-65.

In the trial court, Calligan first raised a Fourth Amendment challenge to the search of his vehicle in a memorandum of law in support of a motion to suppress filed on August 9, 2016. Following an evidentiary hearing held on September 23, 2016, the trial court denied the motion to suppress in an order signed on October 13, 2016. Calligan also objected to the admission of the gun at trial based on the same grounds raised in the prior motion to suppress, which the trial court overruled and noted as a continuing objection.

In affirming the judgment of the trial court, the Indiana Court of Appeals held that the search of Calligan's vehicle did not violate the Fourth Amendment based on *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983), which set forth a two-prong test:

Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" [1] the officers in believing that the suspect is dangerous *and* [2] the suspect may gain immediate control of weapons. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

Id. at 1049-50 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968)) (emphasis added).

The Indiana Court of Appeals concluded that Long's first prong was satisfied because the officers had reasonable suspicion to believe that Calligan was dangerous at the time they searched the car, and that Long's second prong was satisfied because the officers had reasonable suspicion to believe that Calligan or his rear-seat passenger could have regained immediate control of "the weapon in the vehicle," since "[n]either man was handcuffed and both men were sitting on a curb a few feet behind the vehicle."

REASONS FOR GRANTING THE WRIT

Calligan does not take issue with the two-prong test set forth in *Michigan v. Long*, as quoted above. Rather, he takes issue with, and asks this Court to re-examine, the essential nullification of the second prong by the notion that, until the suspect is actually *arrested*, "the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed." *Arizona v. Gant*, 129 S.Ct. 1710, 1724 (2009) (SCALIA, J., concurring). Therefore, even if the circumstances are such that the suspect would have no realistic possibility of access to weapons in the vehicle until he is told he is free to go by officers, the officers will still have free rein to do a "protective search" of the vehicle. The idea appears to be that after a driver is stopped and removed from the automobile, and after he is questioned and after it is determined that there is no basis for detaining him and he is told that he is free to

go, that he might at that point return to his vehicle, retrieve a weapon, and then attack the officers with it as they presumably prepare to leave the scene of the stop. One might legitimately ask if such a thing has ever happened in the entire history of law enforcement. If the driver did not attack the officers with the weapon at the time of the initial confrontation, it is hard to imagine under what circumstances he would do so after being told that he is free to go. “Law enforcement officers face a risk of being shot whenever they pull a car over. But that risk is at its height at the time of the initial confrontation” *Id.*

But *Long’s* second prong is also essentially nullified and made a dead letter if officers can simply circumvent it by tactically delaying the arrest of a suspect they have already decided to arrest, just long enough to conduct a “protective” search – not indeed for officer safety, but in hopes of turning up incriminating evidence in the search. That is precisely what happened in this case. It is what created the conditions upon which the Indiana Court of Appeals relied to find that Calligan could have regained immediate control of a weapon in his vehicle, and therefore that *Long’s* second prong was satisfied. If Calligan had been arrested as soon as the officers on scene had decided to arrest him, he would have been handcuffed in the back of a squad car, instead of unhandcuffed and conveniently “sitting on a curb a few feet behind the vehicle.” Appendix A, p. 13. (Although the Indiana Court of Appeals found that Calligan’s rear-seat passenger, who was also unhandcuffed and seated by the police on a curb a few feet behind the vehicle, also could have regained

immediate control of any weapon in the vehicle, it did not find that he satisfied Long's first prong by creating a reasonable suspicion of dangerousness.)

The late Justice Scalia articulated well and often the potential for abuse and manipulation by officers to justify "protective searches" when the suspect has been arrested. But it stands to reason that the same very same potential for abuse and manipulation to justify "protective searches," for the real purpose of finding incriminating evidence, is present in the decision by officers whether and when to place the suspect under full custodial arrest in the first place.

"Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." *Thornton v. United States*, 541 U.S 615, 627 (2004) (SCALIA, J., concurring in judgment).

When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety — and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Arizona v. Gant, 129 S.Ct. 1710, 1724 (2009) (SCALIA, J., concurring).

CONCLUSION

~~The petition for a writ of certiorari should be granted.~~

REASONS FOR GRANTING THE WRIT

QUESTION #3

Police should not be allowed to conduct their investigation in a way that allows them to create their own exigent circumstances in order to justify a warrantless search. Here, the non-routine handling of Calligan, where officers strategically ordered him to sit by the vehicle, unrestrained, just to manufacture authority to search his vehicle violates the 4th Amendment.

When removed from the vehicle, Calligan was not placed in handcuffs for officer safety reasons by the officer despite him using "handcuffs on past suspects for officer safety." Transcript of Hearing on Motion to Suppress, p. 107. After conducting a pat down of Calligan's body, acting in concert, officers then "directed" Calligan to sit on the curb near the rear of the vehicle, unrestrained that in order to create conditions later justified the search. Specifically,

the Indiana Court of Appeals found that "Calligan or his rear-seat passenger could have regained immediate control of the weapon in the vehicle, since neither man was handcuffed and both men were sitting on a curb a few feet behind the vehicle."¹

Appendix A, p. 13. Yet, these conditions only arose due to the non-routine handling of Calligan. Tellingly at the trial court level, in its response to Calligan's Motion to Suppress, the State mentioned how it anticipated criticism of "the placement of [Calligan] on the curb by the vehicle [as being] improper—or perhaps a guise to perform a protective search of the vehicle."

Further evidence that officers created circumstances

¹ Calligan is perplexed as to the Court's finding of "both men" when the record is completely devoid of any reference to whether or not the "rear-seat passenger" was placed in handcuffs or not and during the entire video of the traffic stop the "rear-seat passenger" is never seen sitting on the curb—only Calligan.

to search the vehicle can be found when considering the deliberate placement of the other two passengers. Why is it that these two passengers were either handcuffed or placed in one of the multiple squad cars on the scene but Calligan, the driver was not? During the time of the search of the vehicle, Calligan is the only one of the vehicle's occupants sitting on the curb, nearby the vehicle, despite the Court's findings. (See footnote 1). If officer safety was truly a concern, officers would have immediately handcuffed Calligan, removed him farther from the vehicle, or placed him in a squad car instead of taking the more intrusive route of searching his vehicle.

In Thornton v. United States, 541 U.S. 615, 627 (2004)

this Court held, "If sensible police procedures require that

Suspects be handcuffed and put into squad cars, then police should handcuff suspects, put them in squad cars and not conduct the search." Amazingly, that Court, almost two decades ago had the ability to foresee future police misconduct holding, "Indeed if an officer leaves a suspect unrestrained nearby, just to manufacture authority to search a vehicle, one could argue that the search is unreasonable precisely because of the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." *Id.* at 627. This is the argument of Calligan that is being presented to this Court for review as it is a question of law that has not been previously decided.

In the Brief of Appellant Calligan, p. 25-26, Calligan neatly and clearly presented this argument for the

Indiana Court of Appeals' consideration. However, in its unpublished memorandum decision, the Court completely ignored and refused to address the issue. On Petition to Transfer to the Indiana Supreme Court, p. 8-9 and 11, this issue was again presented for review of the state's highest court, with transfer being denied without a memorandum decision. Appendix C. As it stands, no state or federal court nor court of appeals has addressed this issue and it remains an undecided question of law that should be given the attention of this mighty Court. Or at the bare minimum, this Court should issue an order, directing the Indiana Supreme Court to review and decide this issue of first impression. If no action at all is taken, a great miscarriage of justice will occur and the 4th Amendment's guarantee of the

constitutional right against unreasonable searches and seizures will be threatened, for all.

The importance of accepting this case extends beyond Calligan and will protect all current and future motorists all across the United States of America. If this Supreme Court does not intervene, the floodgates to illegal search and seizures during traffic stops will open up all across the United States, also giving rise to the number of pretext traffic stops regardless of the officer's motives. With no probable cause at all, an officer would be granted the power to search any car, during any minor traffic violation, just by purposely leaving the driver (or any passenger) unrestrained and nearby the vehicle. These concerns are real. Five years after the Thornton decision,

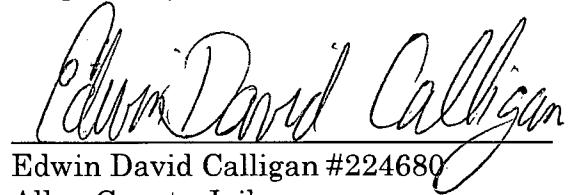
in Arizona v. Grant, 556 U.S. 332 (2009) similar scrutinizing concerns were echoed by the late Justice Scalia whose concurrence stated, “[it] leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search.” *Id.* at 353.

Consequently, if this issue of first impression is not addressed by this Supreme Court, it would effectively be overruling the “reaching-distance” rationale established in Thornton v. United States and Arizona v. Grant, because it is a crucial factor in justifying a protective sweep of a vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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