OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-256

TITLE MICHIGAN, Petitioner
v.
DAVID KERK LONG

PLACE Washington, D. C.

DATE February 23, 1983

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

MICHIGAN,

Petitioner

v.

DAVID KERK LONG

No. 82-256

Washington, D.C.

Wednesday, February 23, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

LOUIS J. CARUSO, ESQ., Solicitor General of Michigan, Lansing, Michigan; on behalf of the Petitioner.

DAVID A. STRAUSS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae.

JAMES H. GEARY, ESQ., Kalamazoo, Michigan; on behalf of the Respondent.

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CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed whenver you are ready.

ORAL ARGUMENT OF LOUIS J. CARUSO, ESQ.

ON BEHALF OF THE PETITIONER

MR. CARUSO: Mr. Chief Justice, and may it please the Court. This case involves the validity of a warrantless search of the Respondent and the auto passenger part of the automobile under his control and possession prior to his arrest for possession of marijuana and of the automobile trunk after his arrest.

The two deputy sheriffs were driving south on a country road in a rural area at midnight and the car that the sheriffs were driving was passed by another automobile going in the opposite direction and was clocked by a radar device at 71 miles an hour in a 55 mile hour zone.

The car was pursued by the two deputy sheriffs with pursuit. In about five or ten minutes they lost sight of the vehicle for approximately five or ten minutes. They did notice the tail lights go left off of the road that they were on and as they made the turn left to follow the car they found the car in the ditch. The front end of the car was in the ditch. The rear end was sticking out over the portion of the traveled road.

The entire incident lasted about five minutes. There was no other traffic that was noticed in the area.

The police car approached the car in the ditch on the passenger side and they saw Respondent seated in the driver's

side of the automobile behind the wheel and was the only occupant.

Respondent exited the automobile, leaving the driver's side door wide open with the dome light on, and met the two police officers at the rear of the automobile. At that time one of the deputies asked Respondent for his driver's license. The deputy did not -- The Respondent did not respond. He didn't say a word, he stared, and he was asked a second time by the deputy to produce his driver's license. After a few seconds he reached in his wallet on his person and produced a driver's license.

Secondly, the deputy sheriff asked Respondent for the certificate of registration and this is required to be produced on demand under the Michigan Vehicle Code. Again, there was no response and a few moments of staring and the second time he was asked for the registration. At that time Respondent made a move toward the open door on the driver's side of the car.

He -- One of the deputies was behind Respondent and the other deputy was at his side. At the time they approached the door, the deputy saw a knife, a large, folded knife in plain view on the floorboard on the driver's side next to the door that was open and in front of the front seat of the car.

Upon seeing that knife, the deputy sheriff, one of the deputies, said, hold it, and he was then moved toward the rear of the car at the side window and with his hands on the

roof of the car he was patted down by one of the deputies.

The other deputy at that point in time looked into the car. He did not enter it. He took his flashlight and he flashed in the interior of the car and as he did that he noticed the armrest -- The front seat is divided by an armrest, divided in half. He noticed something protruding from underneath the armrest. At that point in time, he knelt in and again examined it more closely and he flipped up one side of the armrest. As he flipped up the one side of the armrest, he noticed that this was a pouch of a sort that was open. He did not touch it. He flashed a light on the object and on more close examination he noticed that there was a plastic baggie sticking out of the pouch and out of the plastic baggie in full view, without touching it, he noticed a substance that appeared to him to be marijuana.

At that point in time, he picked up the pouch. He felt it with his hands and he felt another hard object in that pouch. He opened it up and he noticed that the bottle had a powdery substance and there was a pill of some sort that was wrapped up in tinfoil.

At that point in time, the deputy sheriff says, I am arresting you for grass, for possession of marijuana.

QUESTION: Mr. Caruso --

MR. CARUSO: Yes.

QUESTION: Do you think that the officers could have arrested the Defendant in this case for speeding or for driving

while intoxicated or perhaps even for carrying the weapon which they found?

MR. CARUSO: I believe that at that time a violation of Michigan Vehicle Code for speeding --

QUESTION: Before all this search occurred?

MR. CARUSO: Yes. He could have been arrested. There could have been a custodial arrest because violation of speed limit is a misdemeanor.

QUESTION: But, it is your position or you would concede that that did not occur?

MR. CARUSO: That did not occur. As a matter of practice, they do not arrest for speeding violations unless it is something more in addition to --

QUESTION: How about driving while intoxicated? They don't take somebody into custody for that?

MR. CARUSO: Well, they would have to go through a process to make a determination as to whether the party is intoxicated and then go from that point.

But, at this particular point in time, they didn't know really what they had. They noticed a car in the ditch. They had an unresponsive individual who appeared to be under the influence of something and they wanted to determine whether the registration to the vehicle was in the car or on his person as required by the Motor Vehicle Code.

At the time they patted him down, at the time that

the saw the large knife, they picked up and they found the pouch and this sort of thing, they charged him and they arrested him and then they asked for the key, because of the deputies who looked inside had noticed that the car was in the lock position, the driving mechanism, and there wasn't any key in the ignition. He did give one key and then he said at that time, the Respondent, that he did not have a key to the trunk.

So, the deputy walked around back of the trunk and he noticed when he looked at the lock of the trunk the lock had been punched out, there wasn't any lock there. He was able to open up the trunk by simply inserting a small penknife that triggered the mechanism and opened up the trunk. And, when he looked in the truck, he found two large sacks and they were split open, it was a large sack split open into two sections which appeared to him to contain again marijuana, later found out to be about 70 to 75 pounds of contraband marijuana.

At that time they patted him down a second time, they handcuffed him and took him back to the cruiser and called in a wrecker to have the car towed into the Sheriff's Department to secure the vehicle and to bring the Respondent to jail.

Now, it is our position, the State's position here, that the frisk of Respondent and the interior of the automobile under these circumstances is justified by the rationale of Terry v. Ohio. Although Terry allowed an encroachment on the privacy rights of an individual for the protection of police

officers, the frisk in Terry was for weapons that was -- and was confined to the pat down of the individual's outer clothing. Here, the search for weapons was not limited to the frisk of Respondent but extended into the passenger part of the automobile. And, as stated in Adams v. Williams, the whole purpose of the Terry search is not to discover evidence of crime but rather to allow a police officer to conduct an investigation without fear of personal injury.

QUESTION: Mr. Caruso, would you address the question of whether there is an adequate and independent state ground in this case? There is some indication that Michigan imposes a higher standard for illegal search and seizure cases than the Federal Constitution would require.

MR. CARUSO: The Supreme Court in its decision that reversed the Court of Appeals made a reference to Article 1, Section 11 of the Michigan Constituion, but did not discuss it at any time in the opinion. The decision was made on the basis of the 4th Amendment.

So, I would say in chief they discussed only federal cases dealing with the 4th Amendment.

QUESTION: Well, they cited the Michigan Constitution.

MR. CARUSO: They did cite the Michigan --

QUESTION: And the cases and statutes in Michigan and the Michigan Constitution, in fact, require a higher standard in this circumstance than would be required by the Federal

Constitution?

MR. CARUSO: In People v. Moore, a Michigan case, it was held that the particular clause in the Michigan Constitution which permits the introduction into evidence of evidence found that is not subject to the strict requirement of reasonable search and seizure is inconsistent with the 4th Amendment of the United States Constitution and, therefore, it doesn't obtain and it doesn't endure.

So, in this particular case, it was not decided on the basis of that clause in the Michigan Constitution which permits a greater latitude in the search for evidence in connection with narcotics or from an automobile.

QUESTION: Well, I am not sure I understand your answer. If the Michigan Supreme Court were to apply Michigan law, would it reach the result you are asking us to reach under the Federal Constitution?

MR. CARUSO: Yes, yes, it would. Yes, it would.

QUESTION: And, it would allow in your opinion clearly a Terry type search of the --

MR. CARUSO: Yes, it would allow a Terry type search.

QUESTION: -- auto interior?

MR. CARUSO: Yes, it would.

QUESTION: And you base that on what?

MR. CARUSO: I base that on the proposition that the Michigan case law with reference to the reasonableness of a

search really relates to the 4th Amendment of the Constitution. And repeatedly these cases that have permitted searches of this type have relied upon the Terry rationale.

QUESTION: May I ask you if you are familiar with the case of People against Secrest, a 1982 Michigan case which relied only on the Michigan Constitution?

MR. CARUSO: I am not that familiar with it, no, Mr. Justice.

QUESTION: Do you have an explaination of why in this Court, in this particular case, the Michigan Court specifically said it relied on the Michigan Constitution if it didn't mean that?

MR. CARUSO: I think it was just simply -- just added to it as just an afterthought. They didn't discuss it.

QUESTION: Well, didn't Justice Coleman in her dissent also say there was no violation of Michigan Constitution in her view? She thought it necessary to address the Michigan Constitution as well as the majority.

MR. CARUSO: Well, she did find that there is not necessarily any violation of the Michigan Constitution, but just a statement in that sense and then the majority opinion that reversed the Court of Appeals did not really discuss the Michigan Constitution. It simply relied on all of the cases, citing all the cases, analyzing the cases that dealt with the United States Constitution.

QUESTION: But, of course, it did squarely say we find the violation of the Michigan Constitution.

MR. CARUSO: Yes, Mr. Justice, it did.

QUESTION: And, is it not true that the text of the Michigan Constitution provision is rather different from the text of the 4th Amendent?

MR. CARUSO: There is a clause added to that that is totally different than the 4th Amendment, yes, Mr. Justice, that is correct.

QUESTION: Mr. Solicitor General, you several times say the Terry type search of the automobile. There was no automobile in Terry.

MR. CARUSO: No, there wasn't and this is what we are asking the Court to --

QUESTION: Well, why do you keep saying Terry type search of an automobile?

MR. CARUSO: I say to frisk or search the automobile based upon the Terry rationale. It is not a Terry type search of an automobile. The Terry type search I have reference to in using that phrase is reference to a protective search for the protection of the police officers. I indicated in the Terry case --

QUESTION: Well, they put him up against the side of the car.

MR. CARUSO: Pardon?

QUESTION: They put the man up against the side of the car and patted him down.

MR. CARUSO: Yes.

QUESTION: That is a Terry search.

MR. CARUSO: That is a Terry search.

QUESTION: Then you went further. You went in the trunk, you went every place in the world except the tires.

MR. CARUSO: Well, we are asking that the Terry rationale --

QUESTION: Be extended.

MR. CARUSO: -- be extended to go into the passenger compartment of an automobile because on the totality of the facts in this case we feel that the police officers were justified in continuing the search into the passenger compartment of the automobile.

QUESTION: What about Belton and Robbins and the cases that came after this case was decided?

MR. CARUSO: Well, in those cases I don't recall that that really involved a protective search for the benefit of police officers.

QUESTION: It sure did.

QUESTION: I am speaking of the examination of the trunk.

MR. CARUSO: Oh, the examination of the trunk.

QUESTION: Once this car was stopped, he was ultimately

arrested, was he not?

MR. CARUSO: Yes. Forgetting the interior of the car and confining to the search of the trunk after arrest, I would say that today it would governed by probable cause search based on Ross and based on Michigan v. Thomas and also based upon the Belton case, a search incident to arrest.

In this case, we relied on it, as indicated by the question presented in the brief, upon the rationale of Opperman. But, any one of those cases would apply to the trunk search today. There isn't any question about it in my opinion.

But, here, confining my remarks for the moment to the search of the interior of the car after the knife was found, is based upon the Terry rationale, if you please. The Terry rationale had to do with an investigatory, a legitimate investigatory search, and the police officer in this case had found himself in a legitimate, confrontive, investigative search for speeding and for a car in the ditch.

And, the Petitioner suggests, considering the totality of the facts, that it was at night time, in a rural area, an unresponsive individual who would not respond, who made a move toward the open door of the car and found -- And there was a knife in plain view. I think that all of these factors gave rise to an articulable suspicion that would justify a fear and a concern in these two police officers. Both of these officers had considerable experience. One of them had had eight years

service as a deputy sheriff and three years in the Police Department for the City of Detroit. The other had had some experience and training in the Justice Department. And both of these people have testified -- It is very clear from the record that they were concerned at all times during the course of the so-called, on-going investigation.

And, as I submit, the patting down of Respondent and then taking that search from Respondent into the car under these facts and circumstances is part and parcel of a continuous investigation in one incident.

In addition to that, the reason the police officer indicated that he wanted to go into the car to examine the interior of the car, he had not yet received the certificate of registration. He was going to allow the Respondent to go into the car -- he testified to that -- to get that registration of the automobile even after he had found the knife and secured the knife. He went back in there to see if there were any further weapons so that Respondent could go back into the car to see if he could produce that certificate of registration. But, of course, at that point in time, they lifted the armrest, they found the marijuana and the arrest was made on that basis.

And, the area that was searched was an area that has to do with which there is no great expectation of privacy. It is under the armrest. It is an area that could conceal a weapon. And, as I say, the officers were bent on a very limited

intrusion. They were looking -- The officer was looking only for weapons because he intended to let Respondent back into the car.

Now, insofar as the case law on this is concerned, in Pennsylvania v. Mimms this Court gave recognition to the great danger that surrounds an investigative stop by a police officer to the extent that he is permitted to order the driver out of the car. And, if a person orders -- If a police officer orders a driver out of the car, it is for safety purposes and, of course, if nothing is wrong, then he goes back into the car. But, if there are Terry factors that come into being as in this case, the finding of the knife and under these totality of circumstances, then, of course, a search of the interior of the car before letting him back in is justified. It is justified under the reasoning of Pennsylvania v. Mimms. It is justified under the reasoning of the Terry case.

And, the alternative would have been, as suggested by Justice O'Connor, we could have made -- The officer could have made a custodial arrest, but they don't do these things unless they absolutely have to. But, at this point in time, when they observed the person, they were still in the investigative process that was on-going to try to determine just what they had here, a speedster, an unresponsive person, and here you have a car in the ditch.

Now, the search after arrest, it can be justified

under Opperman, because there certainly isn't any pretext involved in this case because the inventory search was made at the scene. It was made at the scene after the arrest had been made and certainly it would be justified in this case. Unlike Opperman, the car was taken in because of the multiple traffic -- parking tickets that the party had had. In this particular case, an arrest had been made on the scene and on the spot.

And, in addition to that, as I say, I believe that the case is also governed by these more recent decisions, particularly Michigan v. Thomas.

QUESTION: May I ask you, Mr. Solicitor General, one other question about our jurisdiction? The case of the People against Secrest that I asked you about earlier says in words that the State Constitution imposes a higher standard of protection than does the Federal Constitution and that the federal cases are merely instructive in analyzing. If that is a correct statement of Michigan law, do you think we have jurisdiction of this appeal?

MR. CARUSO: Yes, I do believe that you have jurisdiction under this -- in this case simply because the Court did apply down below, and the Court did apply in the Court of Appeals the 4th Amendment and the case law, the U.S. case law, pursuant under the 4th Amendment with reference thereto; to wit, specifically the Terry case.

QUESTION: You say that is true even if Michigan imposes a tougher standard than the Federal --

MR. CARUSO: Even if Michigan imposes a tougher standard, yes.

QUESTION: Well, suppose the Court had started out and said we are going -- we are interested in deciding whether there was an illegal search under the Michigan Constitution and then said it might help us to decided that by talking about the federal law and they went through exactly the same discussion of the federal law and then said, as they said, we therefore conclude that the search violated the 4th Amendment and the Michigan Constitution?

MR. CARUSO: Well, under the decision -- I believe it is Delaware v. Prouse. I believe that we had a similar circumstance here before the Court even though it could have been decided on the State Constitution. It was also decided on the Federal Constitution and the Court retained jurisdiction of that matter.

QUESTION: Yes, but suppose it is clear that the state, as Justice Stevens suggests, doesn't necessarily follow -- in applying its own constitution doesn't necessary follow or feel compelled by the federal rulings, have their own view of their own constitution? That wasn't the case in Delaware.

MR. CARUSO: I don't believe it was the case here, Your Honor, Mr. Justice. I think in this case what they did, they really applied the 4th Amendment.

Now, insofar as the 4th Amendment of the U.S. Constitution and the Michigan Constitution, they are almost identical in content except for that final clause and it says "the provision of this section shall not be construed to bar from evidence in any criminal proceedings 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."

And this provision, our courts have said, matched against the 4th Amendment, has no effect.

CHIEF JUSTICE BURGER: Mr. Strauss is going to have his turn next.

Mr. Strauss.

ORAL ARGUMENT OF DAVID A. STRAUSS

ON BEHALF OF THE UNITED STATES

MR. STRAUSS: Mr. Chief Justice, and may it please the Court:

New York against Belton presented circumstances similar to those involved here. Suspects were stopped on the highway. They got out of their car and the police officer subsequently looked into the interior of the car.

The Court in Belton held that the importance of protecting an officer's safety and the need for clear understandable standards required a brightline rule that an officer may conduct a search incident to arrest in such circumstances.

The Court specifically did not inquire into the factors that Respondent and the Michigan Supreme Court would apparently make decisive here, such factors as the precise positioning of the officers and the suspects at the scene or whether there were alternative means available that the officer might have used to control the suspect.

QUESTION: Well, the Belton -- That Belton rule doesn't accrue until there has been an arrest.

MR. STRAUSS: That is right. It deals with searches incident to arrest, Justice, White, and this case only involves the protective search for weapons incident to a Terry stop.

QUESTION: But, if this gentleman had tried to walk away shortly after the police got there but before there was anything said about an arrest, what would have happened to him in your view?

MR. STRAUSS: The officer testified, I believe, that he would not have allowed him to walk away.

QUESTION: So that under what we have said many times, if he can't walk away, he is under arrest.

MR. STRAUSS: Well, he is not necessarily under arrest. In this case I think we very clearly have a stop as opposed to an arrest. The officer also testified they did not place him under arrest until he had seen the marijuana.

But, in many ways, a stop in which a suspect is not placed under arrest and in which the officers are often at the scene with a suspect for an extended period to question him is

an even more volatile and dangerous situation for an officer than one in which a suspect has been fully subdued and arrested.

QUESTION: The search of the trunk came some significant time after the bag of marijuana was discovered on the front seat, is that not so?

MR. STRAUSS: That is right. The search of the trunk followed the discovery of the marijuana and the arrest. And, the search of the trunk, in our view, could have been justified under Belton as a search incident to arrest.

QUESTION: I thought Belton was passenger compartment.

MR. STRAUSS: It was Justice Rehnquist, but in this case we have an unlocked trunk.

QUESTION: So you say that can be treated like the passenger --

MR. STRAUSS: At least as accessible to the suspect as the passenger compartment.

QUESTION: Assume they discovered the marijuane in the passenger compartment and they arrest. Wouldn't that give probable cause to search the entire car?

MR. STRAUSS: I think that certainly would give probable cause to search the --

QUESTION: Under -- Not necessarily under Belton.

QUESTION: Ross.

MR. STRAUSS: If under Ross would give probable cause to search the entire car. They could at that point searched the

entire car as a probable cause search as well as a search incident to arrest under Belton.

QUESTION: Yes.

MR. STRAUSS: But, the initial discovery of the marijuana was the result of what one might call a car frisk, a search for weapons only in the car.

QUESTION: But after that it was no frisk?

MR. STRAUSS: Once the found the marijuana that is right. They placed him under arrest.

QUESTION: They could have handcuffed him?

MR. STRAUSS: That is right.

QUESTION: And he could have hurt whom then?

QUESTION: They did.

MR. STRAUSS: In fact, they did at some point and --

QUESTION: They could have done it before they searched the trunk and they wouldn't have had to search the trunk to find whether there were weapons in it.

MR. STRAUSS: That is right. The search -- No one, as far as I know, Justice Marshall, defends the trunk search as a car frisk, as a search for weapons. That is a search incident to arrest or arguably a probable cause search, at least a search incident to arrest under Belton because he was under arrest at that point.

QUESTION: The difference in the Belton case as I remember is there was one officer and four men, three men or

something. This is two officers with one man.

MR. STRAUSS: I believe those are the facts of Belton, Justice Marshall.

QUESTION: I mean, I think that two officers ought to be able to take care of one man.

MR. STRAUSS: Well, that is precisely the sort of thing, Justice Marshall, as the Court in Belton refused to inquire into and I think that is exactly the sort of thing, that it is very dangerous for a court to try to assess after the fact, to go back and to say, well --

QUESTION: Just leave it up to the officers.

MR. STRAUSS: Well, when the officers were acting with a reasonable apprehension of danger, as no one seems to deny that they had here, and take the step precisely analogous to what the Court said they could take in Belton in a situation that is, as I said, even more dangerous than the Belton situation because the suspect is not arrested, he is not in handcuffs, he is not held at gun point or locked into the back of the car.

QUESTION: But he was told, whoa, and he stopped.

MR. STRAUSS: He was told to stop and his hands were placed on the roof of the car. But, the fact remains that the officers had reason to believe something that wasn't present in Belton. Here there was reason to believe that there was a dangerous weapon in the car that could have been obtained by

the suspect and used against the officers.

QUESTION: Mr. Strauss, if the Court were to adopt this wingspan approach to a Terry search, does the expanded search of the interior of the car of necessity involve a more extensive search than would be the case for a pat down of an individual where we have said you just pat them down and see if there are weapons? To search the interior of the car, are you talking about a more detailed sort of a search, going in the glove compartment and actually looking around, lifting up the bar in the middle between the seats and that kind of thing?

MR. STRAUSS: It is an analogous search, Justice O'Connor.

QUESTION: Would you concede that it would of necessity be more extensive than the pat down that we approved in Terry?

MR. STRAUSS: It would be a search for weapons and it couldn't reach places where a weapon could not be concealed or from which it could not be obtained. For example, they couldn't do what the officers did in Carroll and rip open the seats.

QUESTION: Yes. But, I assume under a Terry pat down -- We have not at least said, I think, that you can pull out a little marijuana baggie if that is what it feels like. All you can pull out is a weapon.

Now, in a search for the weapons in the interior of a

car, you are arguing that you could pull out the baggie of marijuana.

MR. STRAUSS: If in the course of the pat down an officer were to find an unidentifiable, unidentifiable by touch, hard object beneath the outer clothing of the suspect, yes, he certainly could reach in and pull it out and take a look at it which is all that --

QUESTION: But, not a marijuana cigarette or a little baggie or something of that sort, right?

MR. STRAUSS: If it were something that didn't feel like a weapon from the outside, that is right. And, that would be the same principle that would limit on this sort of search. In fact --in sort of a limited search, a weapon search. In fact, it seems fairly clear that an inspection for weapons on the inside of a car whereas the Court has held the expectation of privacy is less and many parts of which are visible from the outside by any passerby is a good deal less intrusive than having an officer actually lay his hands on the suspect's body as the Court described in Terry.

QUESTION: Well, it may be less intrusive in a personal sense, but you may be able to get more objects and make a more thorough search. Would you agree if you were to extend the doctrine?

MR. STRAUSS: I think the principle, the leading principle is exactly the same, Justice O'Connor. You can look

for obtainable weapons and nothing more, but, of course, nothing less if the officer's safety is to be protected.

I think the other difficulty with the approach of the Michigan Supreme Court and of Respondent, in addition to increasing the uncertainty and danger faced by law enforcement officers, is that it would have the effect of imposing much greater burdens on suspects and of impairing values related to the 4th Amendment. That is because if an officer concerned about his safety is unsure of his authority to conduct this sort of car frisk, a limited search for weapons, he will be forced to take other highly intrusive actions such as handcuffing a suspect or locking him in the police car through the duration of the stop or possibly even holding him at gunpoint during the stop.

And, surely, most suspects will consider these to be far more humiliating and unsettling actions than a limited weapons inspection of a car.

But, if Respondent prevails, a prudent officer concerned about both his own safety and the dictates of the 4th Amendment, will have no alternative to taking these actions.

Similarly, and Justice O'Connor alluded to this point earlier, an officer with probable cause to arrest the suspect often will merely stop him and ask him questions to see if there is some exculpatory explanation, but if the consequence -- And that way he can avoid an unnecessary arrest, but if the

consequence of stopping a suspect instead of arresting him, is that there is some question about the officer's ability to protect his own safety, then, of course, the officer simply will not hesitate to make an arrest and conduct a complete search, an undoubtedly more intrusive search, incident to arrest that Belton gives him the right to conduct.

QUESTION: Do you think that Belton applies where the search is not a custodial arrest or where the arrest is not a custodial arrest?

MR. STRAUSS: I am not sure there is --

QUESTION: If the search incident in Robinson and Gustoferson applies only to custodial arrests, do you think Belton nonetheless applies across the board?

MR. STRAUSS: I am not sure I understand the difference between custodial arrests and other sorts of arrests.

QUESTION: Well, I think a custodial arrest is where the police plan to take the person arrested into custody as opposed to simply giving him a ticket.

MR. STRAUSS: If they don't plan to take him and remove him from the scene subsequent to the arrest, I think there is some question from the face of the Belton opinion whether Belton applies to such. Here, of course, we have a stop on the scene and where the suspect and the officers are in continuous contact on the scene and the officers' exposure to danger and exposure to hidden weapons is to that extent.

QUESTION: There is the crucial question whether they do, in fact, intend to take him into custody or whether they are lawfully authorized to do it, whether they do or do not take him into custody.

MR. STRAUSS: Well, for purposes of what happened in this case, even if there were certainly no probable cause and no grounds to take him into custody and only reasonable suspicion to stop him, they would be authorized in taking these limited measures necessary to protect their safety.

QUESTION: Isn't it true that custody is always taken when you arrest a person? How can you arrest somebody and not take him into custody?

MR. STRAUSS: Well, that is why I asked Justice Rehnquist the question. I don't know of any constitutional limitation in this Court's opinions.

QUESTION: If it is an arrest by hypothesis he is in custody, isn't that right?

MR. STRAUSS: It is a matter of definition, Justice Stevens.

QUESTION: Then he may be released on sort of a "parole" to drive his own car home if he is not drunk or if he is not injured. But, as Justice Stevens suggested, he has been arrested as soon as his liberty has been detained or interfered with, is that not so?

MR. STRAUSS: Certainly it would be an odd result if

the officers have probable cause to arrest him. It would be an odd result to say that if they want to conduct a search incident to arrest they must also take him into custody even in circumstances where they would otherwise be inclined perhaps to take bail from him on the spot if that is a permissible procedure in the state.

Thank you.

CHIEF JUSTICE BURGER: Counsel, you may proceed.

ORAL ARGUMENT OF JAMES H. GEARY, ESQ.

ON BEHALF OF THE RESPONDENT

MR. GEARY: Mr. Chief Justice, and may it please the Court. This a state's rights case as well as a search and seizure case and I think that the questions that were asked of Mr. Caruso about the independent state ground for the decision were appropriate.

This Court faced the same issue in City of Mesquite v. Aladdin's Castle, a case in which seven justices agreed. In that case it was argued that the Texas Constitution provided an independent ground for the Court of Appeals judgment and this Court determined that because that possible ground for the judgment existed this Court lacked the jurisdiction to decide whether or not the lower court had made an error in interpreting federal constitutional law.

Justice Stevens has asked about the case of Michigan v. Secrest which is reported in Volume 413 of the Michigan Reports, the same volume that this case was reported in. It is

current Michigan law and the Michigan Supreme Court plainly and unmistakably said that the Michigan Constitution, Article 1, Section 11, provides a higher standard than the standard provided by the State Constitution.

Michigan has had a long history of providing greater protection to citizens under the State Constitution than under the Federal Constitution.

QUESTION: But, if that is true, as I don't doubt it is if you say it is, how does that apply to this particular case where the Supreme Court of Michigan simply mentions the State Constitution in part of a sentence and all of its analysis is in terms of the Federal Constitution?

MR. GEARY: They only mention the Federal Constitution in part of a sentence. They mention the State Constitution three times.

QUESTION: But all the cases are federal cases.

MR. GEARY: The case was Terry v. Ohio. They talk about Canal Zone v. Bender and they also mentioned People v. Reed which is a Michigan case. They cited that in a footnote, and People v. Reed, based on the Michigan Constitution as well as the Federal Constitution.

But, the point I was making about People v. Secrest is in that case the Court says that they use federal cases like Terry v. Ohio as a guide but they don't feel bound by federal cases in ruling on questions of Michigan constitutional law.

QUESTION: Can you give us any reason why they didn't say just that?

MR. GEARY: I don't think they felt it was necessary. I think they meant what they said when they --

QUESTION: Well, didn't we ask them?

MR. GEARY: I beg your pardon?

QUESTION: Didn't we ask them the question?

MR. GEARY: No, this Court has never asked the Michigan Supreme Court --

QUESTION: I think it comes up every other week.

(Laughter)

MR. GEARY: That is true. I think in California v. Krivda, I think --

QUESTION: Don't they know the only thing they have to do is to say this is being decided on the Constitution of the State of Michigan, period.

MR. GEARY: They didn't say that. They said it was being --

QUESTION: I know, but couldn't they have said it?

MR. GEARY: Yes, they could have.

QUESTION: And that would have been the end of the case, wouldn't it?

MR. GEARY: I believe it would have been.

QUESTION: Well, how do we persuade them to say whether they do one or the other?

MR. GEARY: Tell them.

QUESTION: I see.

QUESTION: I think that has been done on a number of occasions.

MR. GEARY: I wish they had decided it solely on Michigan constitutional grounds, but evidently the Court felt that the search was barred -- as I feel the search was barred under both the federal and state grounds.

QUESTION: But, if, as Justice Marshall has suggested, if the State Constitution affords an adequate ground, why isn't that the end of the case or is the Court trying to share the burden with the Federal Constitution?

MR. GEARY: I can't read the minds of the Justices of the Michigan Supreme Court, of course. They have given no indication that they intend to share any burden. They have said quite explicitly in a great number of cases that they regard the Michigan Constitution as --

QUESTION: Well, we have reversed them often enough.

(Laughter)

MR. GEARY: There have been many cases where you haven't reversed them. There are many cases where Certiorari has been denied, where they have decided cases on both state and federal constitutional grounds.

QUESTION: I suppose those reversals just confirm your view that Michigan takes a broader view of the protections

provided by the 4th Amendment and its Constitution.

MR. GEARY: I believe that it does. And, I have mentioned in my brief a few of the many instances where Michigan does take a broader view of citizens' rights under the State Constitution than exist under the Federal Constitution.

Getting to the question of whether or not the so-called protective search of the car violated the Federal Constitution, I think that the Michigan Supreme Court has recently shown that it recognizes the difference between the cases that are cited in the dissent in the Michigan Supreme Court and this sort of a case where there was no articulable facts to which the officers could point to demonstrate danger.

Chief Justice Coleman, in her dissent, listed a great many decisions from other jurisdictions and where searches of automobiles were upheld. I have suggested in our brief that those cases were distinguishable on the facts.

Two days before Christmas the Michigan Supreme Court decided People v. Esters and upheld a warrantless search of an automobile and facts very similar to many of the cases cited by Justice Coleman in her dissent.

In People v. Esters, a dry-cleaning establishment was held up and a young boy who saw the crime take place wrote down the license number of the car that was involved and gave a description of the car and a description of the robber. Within minutes the police had located the car, found it in a driveway,

the license matched the description that was given. There were wet tire tracks coming from the road into the driveway and there were wet footprints from the car into the house. They went into the house, arrested the defendant, who matched the description given by the witness, went out into the driveway and searched the car and found a pistol that matched the description of the pistol that was used in the robbery.

And, of the six Justices of the Michigan Supreme Court who decided that case, five wrote on the question of whether or not the search was lawful and five said that it was.

And, I think that People v. Esters is like Minnesota v. Gilchrist and Uptegraft v. Alaska and U.S. v. Powless and all the other cases cited by Justice Coleman in her dissent, cases where the police officers had some specific reason to believe that the defendant was dangerous as in Uptegraft v. Alaska. It was almost identical on its facts to People v. Esters.

In Powless, the police had received radio information describing a van that was alleged to have been occupied by armed men and one of them had an outstanding arrest warrant on him. He was headed toward an Indian Reservation where there had been some shootings within a few days.

Some of the other cases I have mentioned in the brief are quite similar, Massachusetts v. Almeida. They are all cases in which the police had some reason to believe that a violent crime either had been just committed or was about to be committed.

And, you contrast that case with this one, where the police officers never testified that they regarded Mr. Long as dangerous. You won't find the word "dangerous" in any of the transcripts. They never said they feared for their safety. The most that either of the deputies was willing to say is they were not unconcerned about Mr. Long. Well, one deputy said, "I didn't completely ignore him." That was the extent of his concern about Mr. Long.

Mr. Long was cooperative. He did everything the officers asked. He headed for the car because they asked him to go to the car and get the registration.

QUESTION: Do you feel that articulable spspicion cases turn on the subjective impressions of the particular officers involved rather than kind of an objective standard?

MR. GEARY: I think it is a difficult mix of objective standards and subjective factors. I think if the officer does not have the subjective believe that he should be in fear for his own safety, even if some person might on the basis of the same facts, say there was an objective basis for searching. I don't think that he could.

QUESTION: Do you think our cases support you in that? They refer to articulable suspicion and it seems to me that at least some of them don't focus on subjective.

MR. GEARY: Terry discusses the officer's well-founded belief of fear for his own safety and that is why I say I think

it is a difficult mix.

I think as a minumum -- I think if the officer held an unreasonable belief that his own safety was in danger the search wouldn't be justifiable.

QUESTION: Yes, I think that is probably it. But, I am not sure that the cases support you in requiring both an objective and subjective belief.

MR. GEARY: Even if that is a given, I think that the objective facts that were here -- There was very little that distinguished this case from most traffic stops in Michigan.

QUESTION: Well, how about the knife on the floorboard? Does that happen every time you have a traffic stop in Michigan?

MR. GEARY: No. The knife was not contraband. There was no -- It was a legal knife and as I mentioned in my brief there are a great many lawful articles that are commonly possessed in cars in Michigan and elsewhere that would present at least as much harm to the deputies as this knife did. The deputies ignored the screwdriver that was in the car in their search for weapons. The ignored a hammer.

There is a Michigan case where I have cited in my brief where a traffic detainee returned to his car and used the car to assault the officer.

And, literally, if there is a traffic stop and the justification for the so-called search, protective frisk of the car is that the detainee might return to the car and use

something in it or the car itself to injure the officer, then as a practical matter you are saying that any detainee, traffic detainee that is stopped is going to have his car searched.

QUESTION: Well, is that all bad when you are talking about a search for weapons?

MR. GEARY: I personally don't believe this was a search for weapons as evidenced by the fact the officers never treated the Defendant as a dangerous person and ignored very obvious tools that could have been used to hurt themselves and instead concentrated on a billfold.

QUESTION: But that isn't the ground that the Supreme Court of Michigan went on, that it really wasn't a search for weapons?

MR. GEARY: No, they did not say that. They assumed that it was a protective search.

And, the answer to your question is, yes, I think it would be bad. I think that the framers of the Constitution had in mind the dangers of police work when they drafted the 4th Amendment. They had long experience with smugglers, with the efforts of British revenue officers to enforce tax laws with writs of assistance, and they knew that people sometimes violently resisted the efforts of police to enforce the law and they still passed the 4th Amendment.

I think that the --

QUESTION: Well, the question is whether the 4th

Amendment prohibits this.

MR. GEARY: Exactly so.

I think that this case is much more like Sibron v. New York than it is like Terry v. Ohio. In Sibron, you will recall the Court said that a police officer couldn't just start searching for evidence. They had to have some indication that at least -- that he was actually searching for weapons.

As I just mentioned in this case, the officers gave every indication that they weren't searching for weapons. They ignored the most obvious things in the car that were in plain view that could have been used as weapons, the screwdriver and the hammer, and instead, concentrated on a small leather object that was small enough to be placed in the deputy's back pocket which is where he put it after he picked it up.

QUESTION: What did they do with the knife?

MR. GEARY: I wish I knew. We can't find the knife. As far as I am concerned, it still belongs to Mr. Long. The deputy -- The one deputy who went to the car first picked it up and actually held it in his hand while the other deputy frisked Mr. Long and then I believe one of the deputies put the knife in his pocket. It was not returned to Mr. Long and it was not put in the car. It was used in evidence at the trial, but I don't know where the knife is now.

I would like to point out that Mr. Long was cooperative at all times. He did everything the officers asked. They

described him as cooperative. He was not belligerent.

QUESTION: Well, does the record show where he was going when he turned around and walked away?

MR. GEARY: Not very clearly. He was still not at the doorway.

QUESTION: But they had asked him for his registration statement which he didn't have. It is clear enough that he was headed back to get it?

MR. GEARY: He didn't say anything. He started towards the doorway.

QUESTION: Do the officers say that they anticipated that he was going to go back into the car to hunt for the registration statement to see if he had one?

MR. GEARY: My recollection of their testimony is that they made no assumption as to what he was doing, just described his acts rather than -- They didn't say what they thought he was about to do.

QUESTION: I understood from your colleague that the testimony of the officer was that they thought he was going back to the car to find the registration statement.

MR. GEARY: Well, I can't complain -- They had just asked him for the registration statement and that is the only logical explanation, but I can't recall anything in the record where the deputies specifically testified that they thought that was what Mr. Long was doing.

On the other hand --

QUESTION: Sometimes people keep them in the glove compartment.

MR. GEARY: As a matter of fact, they never did get the registration papers for this particular car. They found the paper that showed the car was titled in someone else's name, two different documents. They never did get the registration paper.

I might point out that under Michigan law, even if he refused -- If he said, no, I won't produce the registration paper, they wouldn't have been entitled to make a custodial arrest, People v. Marshall, People v. 7th District Judge. You are required to carry it, but they can't -- They can give him an appearance ticket for not having his registration, they can't take him into custody.

And, contrary to what Mr. Caruso said, even at the time of this traffic offense, they could not have made a custodial arrest for speeding under the Michigan Motor Vehicle Act. The citation is in the brief. It is MCLA 257. -- I think it is 727. They are required to give an appearance ticket unless there are some facts that weren't present here.

QUESTION: What do they call it in Michigan when you stop a fellow for speeding and insist that he stay there until he gets a ticket? That is just a detention.

MR. GEARY: A traffic stop.

QUESTION: It is a traffic stop, a detention for the purpose of giving a ticket.

MR. GEARY: I think it would be pretty clear that he is not arrested as Michigan courts use that word. If they had arrested him, he would have to comply with the Michigan Interim Bail Act which would have given him an opportunity to post bond before they could have given him the intensive sort of search that they would have done before the admitted him to the jail. I think there are lots of state law reasons why they could not have taken Mr. Long into custody.

QUESTION: Or his car.

MR. GEARY: Or his car. I think there was even less justification for taking his car and impounding it. They didn't have to impound his car. They wanted to impound his car and I think --

QUESTION: Even after they found marijuana in the car?

MR. GEARY: I think that is correct. They could have taken the marijuana and left the car.

Under -- It is important to remember that they never tried to justify the search of the trunk as either a search incident to arrest or as a probable cause search. If they tried --

QUESTION: I know they didn't, but let's assume we disagree with you.

MR. GEARY: They would have lost as a matter of state

law had they made that --

QUESTION: Well, let's assume that we disagree with you and that the -- looking under the armrest was defensible and was not unreasonable and that finding the initial bag of marijuana was defensible and suppose he had been arrested right then, could they have searched the car?

MR. GEARY: We would lose under U.S. v. Ross and New York v. Belton.

QUESTION: And you would lose under federal law.

MR. GEARY: And I think we would win under People v. Hilber which is Michigan law which was exactly that case. They found marijuana in the passenger compartment, wanted to search the trunk and the Michigan Supreme Court said you could not do that. That case is also in our brief.

QUESTION: Without a warrant.

MR. GEARY: Without a warrant. Yes, they could have gone out and got a warrant.

QUESTION: Does Michigan follow Carroll at all if you have probable cause to search a car?

MR. GEARY: There are some Michigan Court of Appeals cases, including some recent ones, that say that they follow Carroll.

QUESTION: What does the Supreme Court of Michican say?

MR. GEARY: I can't recall the People v. Hilber case well enough to know if they even discussed it at all.

QUESTION: Well, it seems to me if you make that arrest we have just described and then say that you can't search the trunk of the car you must not follow Carroll.

MR. GEARY: I don't believe that Michigan does. I just can't recall the opinion in Hilber well enough to say whether it does or does not.

The last point that I would like to mention briefly is the so-called inventory search. I am not so sure how much of an issue it is before this Court, but my understanding is there are two requirements for an inventory search. One, there has to be a search; and, secondly, there has to be an inventory. If you don't have both ingredients, you don't have an inventory search. This search produced no inventory.

When the deputies testified --

QUESTION: I am not sure I know what you mean when they produced on inventory.

MR. GEARY: There was no list of the things that was found in the car. When the deputy testified at the trial, he couldn't describe accurately what was in the car. He had a dim recollection of it.

If the excuse was that they wanted to protect themselves against crimes of theft or intrusion by vandals or that sort of stuff, it was --

QUESTION: You mean they didn't write out a description of items when you say they had no inventory?

MR. GEARY: Yes. They didn't write out a description. The search stopped when they found the marijuana in the trunk. The deputy testified that he had an investigatory motive and most importantly he testified that the Barry County Sheriff's Department did not do an inventory search when he testified at the preliminary examination. There was no standard procedure in their department for inventory searches.

It was plainly a ruse and the Michigan Supreme Court didn't reach that question because they didn't feel they had to.

QUESTION: May I ask you -- You may be repeating, but you said that as a matter of Michigan law the search of the trunk would have been improper under the Hilber case.

MR. GEARY: I believe that it would have, yes.

QUESTION: Is that because the presence of marijuana in the car does not establish probable cause to believe there is marijuana in the trunk or assuming there is probable cause you still can't open the trunk?

MR. GEARY: I think that -- My recollection of Hilber is the former, proving there is marijuana in the passenger compartment is not probably cause to believe that there is marijuana in the trunk.

QUESTION: I see. Is that a Michigan case based on Michigan law or on federal law, do you know?

MR. GEARY: I wish I had read it just before I came today. I just really can't recall.

QUESTION: Okay.

MR. GEARY: I have nothing further unless there are further questions.

CHIEF JUSTICE BURGER: Very well. Thank you, Gentlemen. The case is submitted.

We will resume arguments at 1:00.

(Whereupon, at 11:57 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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MICHIGAN, PETITIONER v. DAVID KERK LONG #82-256

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BY _____
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