2000 WL 93453 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

STATE OF FLORIDA Petitioner,
v.
J. L., a juvenile, Respondent.

No. 98-1993.
January 25, 2000.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF AMICI CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA & INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENT

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*i QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's decision on its face constitutes a plain statement that it is alternatively based on bona fide separate, adequate, and independent state grounds, and, therefore, pursuant to *Michigan v. Long,* 463 U.S. 1032 (1983), this Court should not undertake to review the decision of the Florida Supreme Court.

Whether the Florida Supreme Court erred in declining to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution.

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*1 IDENTITY AND INTEREST OF AMICUS CURIAE [1]

1 The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Both petitioner and respondent have graciously consented to the filing of this brief, which supports the position of respondent.

The National Rifle Association of America, chartered in 1871, is a nonprofit, nonpartisan, nationwide membership organization. The NRA is not only the oldest sportsmen's organization in America, but also is an educational, recreational, and public service organization dedicated to the right of the individual citizen to own and use firearms for lawful defense and recreation.

The NRA is a New York not-for-profit corporation and is recognized as a § 501(c)(4) corporation under the Internal Revenue Code. The NRA's principle office is in Fairfax County, Virginia. It is supported by membership dues and contributions from public-spirited members and clubs. It is not affiliated with any arms or ammunition manufacturer nor with any business which deals in firearms or ammunition. It receives no appropriations from Congress.

The NRA has previously filed numerous amicus curiae briefs in both state and federal courts. Recent example are *United States v. Emerson,* U.S. Court of Appeals for the 5th Circuit, Appeal No. 99-10331; *HC Gun & Knife Shows v. City of Houston,* U.S. Court of Appeals for the 5th Circuit, Appeal No. 98-20497; *Kasler v. Lungren,* California Supreme Court No. S069522, reviewing 61 Cal. App.4th 1237, 72 Cal. Rptr.2d 260 (1998); ***2** *Edwards v. City of Goldsboro,* 178 F.3d 231 (4th Cir. 1999). A recent example before this Court is *Printz v. United States,* 138 L.Ed.2d 914 (1997). Furthermore, the NRA is familiar with the questions involved in this case and the scope of their presentation. It will oppose petitioner's invitation to this Court to carve out a firearm or weapons exception to the 4th Amendment.

The Independence Institute is a free market think tank based in Golden, Colorado. Dedicated to the ideals of the Declaration of Independence, the Independence Institute has been rated as one of the four most effective state level think tanks by The Nation magazine. The Institute has previously filed amicus curiae briefs in cases involving the First Amendment, the Second Amendment, and the Colorado Constitution. The Institute's extensive research on criminal justice issues is available at http://i2i.org/crimjust.htm

SUMMARY OF ARGUMENT

The Florida Supreme Court held that "[f]or the reasons expressed below, we decline the State's invitation to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution." *J.L. v. State,* 727 So.2d 204, 205 (Fla. 1998). The Florida Supreme Court relied mainly on two state cases-*Butts v. State,* 644 So.2d 605 (Fla. Ct. App. 1994), and *Commonwealth v. Hawkins,* 692 A.2d 1068 (Pa. 1997)-to find the search and seizure of J. L. to be constitutionally unreasonable. This constitutes a plain statement that the Florida Supreme Court's opinion is alternatively based on bona fide separate, adequate, and independent state grounds. In *Michigan v. Long,* 463 U.S. 1032 (1983), this Court held that it is without jurisdiction to ***3** review a state court decision which rests on an adequate and independent state ground.

J. L. was subject to a search and seizure based on an anonymous tip. The police were unable to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted an intrusion on J. L.'s Fourth Amendment rights. The police were able to corroborate only innocent behavior. The stop and frisk fails to meet the standards enunciated in *Terry v. Ohio,* 392 U.S. 1 (1968). The anonymous tip failed to exhibit sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop under *Alabama v. White,* 496 U.S. 325 (1990). The Florida Supreme Court accordingly found a violation of the Fourth Amendment and the Florida Constitution. It refused to carve out a firearm or weapon exception to the federal and state constitutions. Its decision was correct and should not be disturbed.

ARGUMENT

1. THE FLORIDA SUPREME COURT'S DECISION ON ITS FACE CONSTITUTES A PLAIN STATEMENT THAT IT IS ALTERNATIVELY BASED ON BONA FIDE SEPARATE, ADEQUATE, AND INDEPENDENT STATE GROUNDS, AND, THEREFORE, PURSUANT TO *MICHIGAN v. LONG,* 463 U.S. 1032 (1983), THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE DECISION OF THE FLORIDA SUPREME COURT.

This case presents a jurisdictional question that should be addressed before reaching the Fourth Amendment to the ***4** United States Constitution. The Florida Supreme Court is at liberty to provide state law protection of the rights of the people of Florida above and beyond the protection which is guaranteed by the United States Constitution. This Court has explicitly acknowledged each state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Prune Yard Shopping Center v. Robbins,* 447 U.S. 259, 266-67 (1980). The state law ground in this case is clearly adequate to support the judgment of the Florida Supreme Court, and the state law ground is independent of the Florida Supreme Court's understanding of federal law.

Article 1, § 12 of the Florida Constitution addresses searches and seizures and provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

***5** This means that Florida's constitutional provision on searches and seizures is linked to this Court's Fourth Amendment jurisprudence. Nonetheless, the Florida Supreme Court has interpreted this linkage in such a way that Florida's constitutional provision on searches and seizures has an existence and scope independent of the Fourth Amendment until this Court issues a controlling decision. In the absence of a controlling decision from this Court, Florida courts are still free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. Furthermore, the Florida Supreme Court decides independently for itself whether a decision from this Court is controlling. *Soca v. State,* 673 So.2d 24, 26-27 (Fla. 1996). A misinterpretation by the Florida Supreme Court of the rulings of this Court when construing the Florida Constitution is still an interpretation of the Florida Constitution. An interpretation of state law even under such circumstances is still beyond the jurisdiction of this Court under *Michigan v. Long,* 463 U.S. 1032 (1983).

In *Michigan v. Long,* 463 U.S. 1032 (1983), this Court held that it is without jurisdiction to review a state court decision which rests on an adequate and independent state ground. This Court noted that respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. If a state court chooses merely to rely on federal precedents, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates ***6** clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, this Court will not undertake to review the decision.

In the present case the Florida Supreme Court did consider the rulings of other jurisdictions which appear to recognize a firearm exception to the general rule requiring reasonable suspicion before a pat-down search can lawfully occur. However, the Florida Supreme Court then plainly stated that it joins the Pennsylvania Supreme Court in rejecting this exception. *J. L. v. State,* 727 So.2d 204, 209 (Fla. 1998).

The first paragraph of the Florida Supreme Court's opinion held: "For the reasons expressed below, we decline the State's invitation to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution." *J.L. v. State,* 727 So.2d 204, 205 (Fla. 1998). In reaching this result, the Florida Supreme Court relied on *Butts v. State,* 644 So.2d 605 (Fla. Ct. App. 1994), a state case Furthermore, the Florida Supreme Court unambiguously rejected federal cases-*United States v. DeBerry,* 76 F.3d 884 (7th Cir. 1996); *United States v. Clipper,* 973 F.2d 944 (D.C. Cir. 1992)-appearing to carve out a firearm exception to the reasonable suspicion test to justify a stop and frisk pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968). Instead, the Court joined in the reasoning of the *Pennsylvania Supreme Court in Commonwealth v. Hawkins,* 692 A.2d 1068 (Pa. 1997). Hawkins is a state case that rests on state law. This demonstrates clearly that the Florida Supreme Court looked at federal caselaw, rejected it, and independently embraced state law guaranteeing broader protection to the people than federal law. Under ***7** *Michigan v. Long,* 463 U.S. 1032 (1983), then, this Court should not undertake to review the Florida Supreme Court's decision. This would be in harmony with this Court holding that it is fundamental that state courts be left free and unfettered in interpreting their state constitutions.

In conclusion, the Florida Supreme Court's decision on its face constitutes a plain statement that it is alternatively based on bona fide separate, adequate, and independent state grounds. Therefore, pursuant to *Michigan v. Long,* 463 U.S. 1032 (1983), this Court should not undertake to review the decision of the Florida Supreme Court.

2. THE FLORIDA SUPREME COURT DID NOT ERR IN DECLINING TO CREATE A FIREARMS OR WEAPONS EXCEPTION TO THE LIMITATIONS ON SEARCHES AND SEIZURES SET OUT IN THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This case involves a juvenile. The states treat the possession of firearms by juveniles differently than the possession of firearms by adults for reasons that are so apparent that discussion is not needed. However, the petitioner's sweeping argument, if adopted, would essentially create a firearm or weapons exception to the Fourth Amendment. This sweeping argument was considered by the Florida Supreme Court and was correctly rejected.

The purpose of a police stop and frisk is to prevent criminal activity. Some activity is always criminal. Other activity is only criminal under certain conditions. The peaceful carrying of a firearm falls into the latter category.

***8** Numerous states have nondiscretionary right-to-carry firearm laws. Such state laws allow a responsible law-abiding adult to obtain a license or permit to carry a handgun concealed. Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679 (1995). These laws have had a beneficial impact on crime. John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun-Control Laws 43, 46, 94, 114 (1998 Univ. Chicago Press).

Furthermore, in numerous states a person has a constitutional right to peacefully carry a firearm unconcealed. *Holland v. Commonwealth,* 294 S.W.2d 83, 85 (Ky. 1956). Laws that unduly restrict the right to carry firearms have been voided. *State ex rel. City of Princeton v. Buckner,* 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down firearm carrying law as too restrictive); *Junction City v. Mevis,* 226 Kan. 526, 601 P.2d 1145 (1979)(struck down firearm carrying ordinance as too broad); *City of Lakewood v. Pillow,* 180 Colo. 20, 501 P.2d 744 (1972)(struck down firearm law on sale, possession, and carrying as too

broad); *City of Las Vegas v. Moberg,* 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971)(struck down firearm carrying ordinance as too restrictive); *People v. Nakamura,* 99 Colo. 262, 62 P.2d 246 (1936)(struck down law prohibiting possession of a firearm); *Glasscock v. City of Chattanooga,* 157 Tenn. 518, 11 S.W.2d 678 (1928)(struck down firearm carrying ordinance as too restrictive); *People v. Zerillo,* 219 Mich. 635, 189 N.W. 927 (1922)(struck down statute prohibiting possession of a firearm); *State v. Kerner,* 181 N.C. 574, 107 S.E. 222 (1921)(struck down pistol carrying license and bond requirement law as too restrictive); ***9** *State v. Rosenthal,* 75 Vt. 295, 55 A. 610 (1903)(struck down pistol carrying ordinance as too restrictive); In re Brickey, 8 Idaho 597, 70 P. 609 (1902)(struck down firearm carrying statute as too restrictive).

Therefore, a police officer's knowledge that a person is peacefully carrying a firearm, in and of itself, does not furnish probable cause to believe that the person is illegally carrying that firearm. The resultant stop is improper under Fourth Amendment principles. *Commonwealth v. Couture,* 407 Mass. 178, 552 N.E.2d 538 (1990), cert. denied, 498 U.S. 951 (1990).

Indeed, law enforcement officers receive training which correctly reflects this aspect of the law. Federal officers who receive an anonymous phone tip claiming criminal activity, without more, are not trained to effect a Terry stop or pat-down search. A frisk in a public place is not a petty indignity. Instead, the officers must also possess sufficient information to corroborate the anonymous tip about criminal activity. There must be sufficient facts indicating the anonymous tip is reliable so as to give rise to a reasonable suspicion that criminal activity is afoot. Whether reasonable suspicion exists is determined by the totality of the circumstances test. In this case the anonymous tip stated only "that several young black males were standing at a specified bus stop during the daylight hours.… [T]he one wearing the 'plaid-looking' shirt, was carrying a gun." Further observation by the police revealed no suspicious or illegal conduct and no additional suspicious circumstances. Nonetheless, two police officers, without questioning or other introduction, seized all three young men and subjected them to a frisk. The record fails to disclose that any of the police officers even suspected J. L. of being a juvenile. 727 So.2d at 205. The anonymous tip failed to exhibit sufficient indicia of reliability to provide ***10** reasonable suspicion to make an investigatory stop. *Alabama v. White,* 496 U.S 325 (1990). Therefore, all you had was an anonymous tip about criminal activity and no specific and articulable facts which, taken together with rational inferences from those facts, would reasonably warrant an intrusion on Fourth Amendment rights.

Some will argue for creating a firearm exception to the Fourth Amendment for policy reasons. However, this Court has rejected a flag burning exception to the First Amendment, a crime scene exception to the Fourth Amendment, and a threat of mob violence and popular resistance exceptions to the equal protection guarantee of the Fourteenth Amendment. *Texas v. Johnson,* 491 U.S. 397 (1989); *United States v. Eichman,* 496 U.S. 310 (1990); *Mincey v. Arizona,* 437 U.S. 385 (1978); *Cooper v. Aaron,* 358 U.S. 1 (1958). It should likewise reject a firearm or weapon exception to the Fourth Amendment.

In this light, the Florida Supreme Court correctly decided the case before this Court.

CONCLUSION

For the reasons presented in the argument, amici curiae respectfully submit that the Court should relinquish jurisdiction or affirm the decision of the Florida Supreme Court.