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# Supreme Court's 1998-1999 Term: Fourth Amendment Decisions

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Urbonya: Fourth Amendment Decisions

# SUPREME COURT'S 1998-1999 TERM: FOURTH AMENDMENT DECISIONS

Kathryn R. Urbonya\*

JUDGE PRATT:

At this point we are going to move into the Fourth Amendment, Supreme Court developments of last term from Professor Urbonya followed by some commentary by Judge Raggi in this area.

PROF. URBONYA:

Before I begin, how many of you have actually worked on a Section 1983 case involving a traffic stop? What I would like to start with are the traffic stop cases. But I would like to begin with *Whren v. United States* case,<sup>1</sup> which is an old case, just to give us a background of where we are going. Judge Raggi is going to be the commentator after my discussion. She had previously asked me if I had a theme for the cases. Today I respond to her question by stating two themes: expanding police powers and discarding the presumption of a warrant requirement.

How often do we find a Fourth Amendment violation?<sup>2</sup> Very rarely, the Court expanded police powers this term once again and created a paradigm shift. I guess that sounds very academic. Instead of asking, "Where is the warrant?" (we do not ask that question anymore), we ask, "What does the common law have to say?" If the common law does not answer the question, then we look to reasonableness. I can actually say that I have seen this shift in practice occur. I read one of the cases that is pending in the

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<sup>1</sup> 517 U.S. 806 (1996).

<sup>2</sup> U.S. CONST. amend. IV. This section provides in pertinent 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, 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.*

Supreme Court, the *Wardlow* case,<sup>3</sup> and I was surprised to see that every single brief that was submitted talked about the common law. I hope all of us here in this room are historians and like to read dusty old cases, because the Court's Fourth Amendment analysis is rooted in interpreting the common law and expanding police powers. Let us dust off the history books, if we listen to the Supreme Court's commands and start looking at the historical roots of the Fourth Amendment.

The *Whren* case,<sup>4</sup> as many of you may remember, was a traffic stop case. The issue in *Whren* was about pretextual stops.<sup>5</sup> We have all been reading in the newspapers about racial profiling, and many of you in the room have even been subject to it, but the Supreme Court said the issue is not whether the officer engaged in a pretextual traffic stop, the question is: Did the officer have a reason to stop this particular individual for a traffic violation?<sup>6</sup> In a very short paragraph the Supreme Court said, if race is at issue, do not use the Fourth Amendment, use the Equal Protection Clause.<sup>7</sup>

The only question for the Fourth Amendment is: Did the officer have reason to believe the driver committed a traffic offense? As many of us know, that is not only speeding, but faulty lights, or not maintaining your lane correctly. Many reasons cause police officers to pull us over.<sup>8</sup> Prior to the *Whren* case, the question was:

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<sup>3</sup> *People of the State of Illinois v. Wardlow*, 701 N.E.2d 484, (Ill. Dec. 1998), *decided*, 120 S. Ct. 673, 676 (2000) (holding that police officer had reasonable suspicion to forcibly stop a citizen in a high-crime neighborhood after ran "headlong" after seeing police).

<sup>4</sup> 517 U.S. 806 (1996).

<sup>5</sup> U.S. CONST. amend. IV. This section provides in pertinent 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, 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.*

<sup>6</sup> *Whren*, 517 U.S. at 808.

<sup>7</sup> *Id.* (stating that "[s]ubjective intentional play no role in ordinary, probable-cause Fourth Amendment analysis").

<sup>8</sup> *Id.* at 817. The Court acknowledged that an officer may have "probable cause to believe that a driver is violating any one of a multitude of applicable traffic and equipment regulations." *Id.* at 817 (*quoting Delaware v. Prouse*, 440 U.S. 648 (1979)).

What about ordering the driver out of the car? The officer stops us under *Whren* for a traffic case. The next question is: What else can the officer do? Well, the officer can order the driver out of the car under *Pennsylvania v. Mimms*.<sup>9</sup>

The idea is officer safety. Then, a couple of terms ago, the court in *Maryland v. Wilson*,<sup>10</sup> asked what about passengers? The Supreme Court said, you can also order the passenger out of the car.<sup>11</sup> If it is good for driver and officer safety, it is good for passenger and officer safety.

In *Ohio v. Robinette*,<sup>12</sup> an issue arose after the officer stopped the driver, gave him a warning. As the officer returned the license, he said, "One question before you get going: Are you carrying any illegal contraband in the car?"<sup>13</sup> The question before the Supreme Court was: once the officer concluded the traffic stop, did the officer have to say, "The stop is now over, you are free to go?"<sup>14</sup> The Court decided that the officer did not have to say that. Instead a totality of circumstances test applied.<sup>15</sup> We also know from the *Schneckloth*<sup>16</sup> case, under consent doctrine, that the police officer does not have to tell us our right to refuse the consent to the search.<sup>17</sup> So, the officer can stop us, can order the driver out of the car and can order the passenger(s) out of the car.<sup>18</sup> Once it is over, the officer does not even have to tell us that we do not have to consent nor does he have to tell us the traffic stop is now over.<sup>19</sup>

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<sup>9</sup> 436 U.S. 106 (1977).

<sup>10</sup> 519 U.S. 408 (1997).

<sup>11</sup> *Wilson*, 519 U.S. at 414-15.

<sup>12</sup> 519 U.S. 33 (1996).

<sup>13</sup> *Id.* at 35-36.

<sup>14</sup> *Robinette*, 519 U.S. at 35.

<sup>15</sup> *Id.* at 38. The Court explains that in view of the "endless variations in the facts and circumstances' implicating the Fourth Amendment, ... the proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" *Id.*

<sup>16</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>17</sup> *Schneckloth*, 412 U.S. at 249 (holding that the subject's knowledge of a right to refuse consent is a factor to be considered in determining the voluntariness of the consent, but the subject's knowledge of a right to consent is not a prerequisite to establishing voluntary consent).

<sup>18</sup> *See, e.g., Mimms*, 436 U.S. 106; *Wilson*, 519 U.S. 408.

<sup>19</sup> *See, e.g., Robinette*, 519 U.S. 33; *Schneckloth*, 412 U.S. 218.

How does this set the stage for last term's cases? Well, we also have to include *Michigan v. Long*<sup>20</sup>, which is an older case that dealt with searching the car and what the officer can do to search a car.<sup>21</sup> In *Michigan v. Long*, the officer was able to search the passenger compartment of the car because the officer had reasonable suspicion to believe there was a dangerous weapon there.<sup>22</sup> Typically, we think of an officer searching a car after an arrest. The idea is the officer arrests the driver and then searches the car. How many of you have actually been arrested for a traffic offense? Anyone here? There are no hands going up. How many of you have gotten citations?

You have gotten lots of citations, and lots of warnings. In the Iowa case that I have cited in my materials, *Knowles v. Iowa*,<sup>23</sup> there was a state statute that authorized a police officer to search the vehicle incident not to an arrest, but incident to a citation, and the question was the constitutionality of the statute.<sup>24</sup> In an amazing decision, the Supreme Court found a Fourth Amendment violation saying that the police officer could not search the car incident to a traffic citation, and in trying to decide this case, the Supreme Court did not look to history in this case; it just relied on precedent. The Court relied on the "search incident to an arrest" doctrine to say there is difference between arresting someone on one hand and going ahead and issuing a citation on the other hand.<sup>25</sup> The Court said the two rationales that apply to "search incident to an arrest" just do not work in the context of a search incident to a citation.<sup>26</sup>

First, the Supreme Court did recognize that traffic stops can be dangerous and that officers can be subject to some kind of danger, but the Supreme Court said, in contrast to an arrest where there is continuing custody with this person, a traffic stop is a very brief encounter. If the officers have reasonable suspicion to believe that the person is armed and dangerous, then the officers

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<sup>20</sup> 463 U.S. 1032 (1983).

<sup>21</sup> *Long*, at 1034-35.

<sup>22</sup> *Id.* at 1035.

<sup>23</sup> 525 U.S. 113 (1998).

<sup>24</sup> *Knowles*, at 114.

<sup>25</sup> *Id.* at 117.

<sup>26</sup> *Id.* The Court stated: "Neither of these rationales for the search incident to arrest exception is sufficient to justify the search in the present case." *Id.*

can invoke the *Terry* doctrine and subject the person to a pat down in that situation for weapons.<sup>27</sup> The *Knowles* Court explained that a traffic stop does not present that kind of danger to the officers.<sup>28</sup>

The second rationale under the search incident to an arrest doctrine was: What about the need to preserve evidence?<sup>29</sup> When you arrest someone and you are about to go to the police station, the suspect may try to destroy evidence. First of all, the offense in this case was speeding. There is not going to be any further evidence to worry about whether the driver is going to throw this evidence away.<sup>30</sup> Speeding is the offense. The Court said this was not a facial attack to the statute, it was just looking at the particular facts. Under these narrow facts, the search incident to arrest doctrine does not work.<sup>31</sup> So officers cannot search our cars incident to a traffic citation. That is all the *Knowles* Court decided in this particular case.

What about property that is in the car during a traffic stop? That is the *Wyoming v. Houghton* case.<sup>32</sup> I encourage all of you to read that case in detail. That case dealt the property of a passenger, an issue the Supreme Court had not previously addressed. In that case, the officer had stopped the driver, pulled him over for speeding and a faulty brake light, and then noticed

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<sup>27</sup> *Id.* at 117. The Court explained:

The threat to officer safety from issuing a traffic citation, however, is a good deal less than in a case of custodial arrest. In *Robinson*, we stated that a custodial arrest involves “danger to an officer because of the ‘extended exposure which follows the taking of a suspect into custody and transporting him to the police station.’” We recognized that the danger to the police officer flows from the fact of the arrest, and its attendant proximity stress, and uncertainty, and not from the grounds for the arrest. A routine traffic stop on the other hand is a relatively brief encounter and is “more analogous to a so-called *Terry* stop.

*Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 118.

<sup>30</sup> *Id.* The Court explained: “Once *Knowles* was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained.” *Id.*

<sup>31</sup> *Id.* at 119. The Court refused to extend the “‘bright line rule’ to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all.”

<sup>32</sup> 119 S. Ct. 1297 (1999).

there was a hypodermic syringe in the driver's pocket. The officer ordered the driver out, and went to get gloves to protect his hands.<sup>33</sup> As the driver was standing outside of the car, the officer asked the driver, "Why do you have a syringe?" As the Supreme Court says, with "refreshing candor,"<sup>34</sup> the driver said, "for drugs." At that point, the officer had, according to the law, probable cause to believe there were drugs in the car. After the driver made that admission, the officer ordered the other two passengers out of the car, two female passengers; they had been sitting in the front seat. In the back seat, there was a purse.<sup>35</sup>

The male driver and two female passengers were all outside the car now, and the officer asked one of the female passengers in this case, a woman named Sandra, "What is your name?" She said, "My name is Sandra James."<sup>36</sup> Notice the case is *Wyoming v. Houghton*.<sup>37</sup> She lied. The officer went and opened the purse, did not see the name "Sandra James", saw the name "Sandra Houghton", came back and said, "I see this purse says 'Sandra Houghton'. Is this your purse?" At that point she said, "Yes, it is mine." The officer searched the purse again and this time found drugs.<sup>38</sup> So the question for the Supreme Court was: What about the officer's ability to search that purse in the back seat for drugs? The lower court in this case talked about the ownership, did the officer have notice this purse did not belong to the male driver who was stopped for drugs, and the Supreme Court refused to adopt an ownership test for purposes of the Fourth Amendment.<sup>39</sup> All the officer needed was to have probable cause to believe there were

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<sup>33</sup> *Houghton*, 119 S. Ct. at 1299.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 119 S. Ct. 1297.

<sup>38</sup> *Houghton*, 119 S. Ct. at 1299.

<sup>39</sup> *Id.* at 1303. The Court explained:

Once a 'passenger's property' exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation--.... We think [our determinations of reasonableness under the Fourth Amendment] militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.

*Id.*

drugs inside the car, and even though it is a purse, the officer could go ahead and search the purse for the drugs.

One interesting line the Court drew in this case, which is not as clear as it sounds when you read all the opinions together, is that the officer could not search the person. The facts of the case, however, are limited to the searching of the purse that is inside the car.<sup>40</sup> It could be a little confusing about the officer's ability to search the person. Yet the doctrine of *Terry v. Ohio*<sup>41</sup> could apply if officers have reasonable suspicion that the person is armed and dangerous.<sup>42</sup> The Court seems to be implying that officers can search the property inside the car; but when the passengers are outside the car, they could not be subject to a frisk.

This is an interesting line that the Court drew here.<sup>43</sup> Another case deals with the warrantless search of a car. It is a very short opinion: *Maryland v. Dyson*<sup>44</sup>. It was a *per curiam* decision; it is under the automobile exception of the Fourth Amendment. The automobile exception goes back to the *Carroll* case<sup>45</sup>, the bootleg liquor case where the officer drove along the road trying to stop people from transporting illegal alcohol on the road, and the officer had probable cause to believe there was alcohol in a car in the *Carroll* case.<sup>46</sup> In this case, the officer had probable cause to believe there were drugs in the car.<sup>47</sup>

The automobile doctrine originally asked two questions: One, did the officer have probable cause to believe there was contraband in the car? And, two, were there exigent circumstances?<sup>48</sup> The lower court in this case, the Maryland Court of Special Appeals, said that you have to make both findings, that is to say, you had to have both probable cause to believe there are

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<sup>40</sup> *Id.* at 1302. The Court quoted *Terry v. Ohio*, 392 U.S.1, 24-25 (1968) by stating: "Even a limited search of the outer clothing...constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.*

<sup>41</sup> 392 U.S. 1 (1968).

<sup>42</sup> *Id.* at 1304. (Breyer, J., concurring).

<sup>43</sup> See *Houghton*, 119 S. Ct. at 1302.

<sup>44</sup> 119 S. Ct. 2013 (1999).

<sup>45</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>46</sup> *Carroll*, 267 U.S. at 160

<sup>47</sup> *Dyson*, 119 S. Ct. at 2014.

<sup>48</sup> *Id.*



drugs in the car and, also, that there are exigent circumstances.<sup>49</sup> The Supreme Court said in a very short opinion, no, you only need to make one finding, you only need to have probable cause to believe there are drugs inside the car.<sup>50</sup> A very short opinion, *Maryland v. Dyson* is an example of the scope of the automobile exception.

Another important case is *Florida v. White*,<sup>51</sup> which deals with a Florida forfeiture statute. In that case, the officers on several occasions observed the driver use his car for drug dealing.<sup>52</sup>

Under state forfeiture law, that car was contraband and could be seized. The question for the Court was: Could the officers, given all the facts in this case, seize that car in a public place without a warrant?<sup>53</sup> The answer to the question was yes.<sup>54</sup>

It is a car being seized without a warrant. Why not get a warrant? This is part of a paradigm. Justice Stevens in his dissent said, Oh, by the way, what happened to the general rule that warrants are presumptively required?<sup>55</sup> The Supreme Court had previously said that the idea of having police officers ask a magistrate for a warrant is impractical because the officers are often engaged in a “competitive enterprise of ferreting out crime.”<sup>56</sup> Justice Stevens in his dissent said, in this case, the officers are engaged in the “competitive and potentially lucrative enterprise of ferreting out crime.”<sup>57</sup> That is not the question for the Court.<sup>58</sup> The question for the Court was not, whether the warrant is required, but how would we have decided this question at common law?

Cars are a lot like ships, so, therefore, since, they are like ships under our old cases, the *Carroll* case (the bootleg case), let

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<sup>49</sup> *Dyson v. State of Maryland*, 122 Md. App. 413, 424 (1998).

<sup>50</sup> *Dyson*, 119 S. Ct. at 2014.

<sup>51</sup> 119 S. Ct. 1555 (1999).

<sup>52</sup> *White*, 119 S. Ct. at 1557.

<sup>53</sup> *Id.* at 1560.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1561. Justice Stevens said: “Because the Fourth Amendment plainly protects property as well as privacy and seizures as well as searches, ... I would apply to the present case our longstanding warrant presumption.” *Id.*

<sup>56</sup> *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>57</sup> See *White, supra*, note 48, at 1563.

<sup>58</sup> *Id.*

officers go ahead and seize them. It is a five, two, two decision. I already mentioned Justice Stevens' dissent stating that officers should have a warrant. In this case Justice Souter and Justice Breyer agreed to go ahead and concur on this opinion, but warned the states, noting that just because they labeled something it contraband did not mean everything could be subject to an automatic seizure.<sup>59</sup> In this case, the Court allowed forfeiture because the car was definitely related to the drug dealing that was going on. But not all seizures in all situations of contraband are going to be warrantless, according to the two judges.<sup>60</sup> Notice it is a five, two, two decision, so there are five judges not putting any limits on this particular case.

How does the paradigm shift also occur? It also happened in the passenger's property case. There are a lot of defense attorneys here, I would encourage you to look at how the Court frames the Fourth Amendment question there. Five judges very clearly say, the first question we have in a Fourth Amendment analysis is, at common law, would the practice have been unlawful?<sup>61</sup> Five judges say that is the approach we should look at. If it would have been unlawful, we stop the inquiry there, but if we do not know from the common law, the Supreme Court said we can do our general reasonableness kind of balancing we ask for, looking at to see whether it is reasonable within the meaning of the Fourth Amendment. Five judges say we should look at the common law to determine the answer to the Fourth Amendment question.

Another Fourth Amendment cases I want to talk about is *Minnesota v. Carter*,<sup>62</sup> which dealt with the question attorneys would call it "standing," but the Supreme Court told us not to use the word "standing." The question is about whether the defendant's own rights were violated in a particular case. This case involves three individuals. Three individuals were in an apartment, a female and two males. An informant saw three of

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<sup>59</sup> *White*, 119 S Ct. at 1560. (Souter, J., Breyer, J., concurring).

<sup>60</sup> *Id.* (Souter, J., Breyer, J., concurring).

<sup>61</sup> *Id.* at 1558. (Souter, J., Breyer, J., concurring).

<sup>62</sup> 119 S. Ct. 469 (1998).

them sitting around a table and noticed plastic bags and white powder; and the informant told the police officer of this activity.<sup>63</sup>

The police officer was able to look inside the window because it was an apartment near the ground, and he was able to see through the blinds of this enterprise.<sup>64</sup> Based on this information, the officer got a warrant in this case. The question before the Supreme Court did not deal with the leaseholder of the apartment, it dealt with the two males that were present in the apartment and whether their own Fourth Amendment rights were implicated by the officer's observation. The Supreme Court said they were not.<sup>65</sup> The facts were that they were there for two and a half hours, that they were engaging in this criminal enterprise, and that they lived that Chicago, not Minnesota. This was just a fleeting time in this apartment, and, therefore, their own Fourth Amendment rights were not violated, not even implicated.<sup>66</sup>

The Supreme Court, once again, admonished all of us not to refer to this as a question of standing.<sup>67</sup> It is a question of whether the visitor's reasonable expectation of privacy rights were violated in this particular case, and the Supreme Court said no.

Interesting, five different votes, however, decided another issue that is not really directly raised in this case, but tangential to it. Justice Kennedy in his swing vote said, there is a difference, however, between the facts of this case, (involving a criminal enterprise, short-term, visitors who had never been in the apartment before) and social guests. Social guests do have their Fourth Amendment rights implicated by such conduct. With the dissent and Justice Kennedy's vote, if you are social guests inside someone's apartment, you do have your Fourth Amendment rights implicated and you can go ahead and challenge it.<sup>68</sup>

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<sup>63</sup> *Id.* at 471-472.

<sup>64</sup> *Id.*

<sup>65</sup> See generally *Carter*, 119 S. Ct. 469 (1998).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 472. The Court stated: "Central to our analysis [is] the idea that in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Id.*

<sup>68</sup> *Id.* at 480-484.

The Supreme Court never had to get to the legality in this case of the officer peering through the window. Why? Because those individual males who were in the apartment do not have any Fourth Amendment rights even implicated by their presence in the apartment, because they are not social guests.<sup>69</sup> The Supreme Court distinguished the prior case of *Minnesota v. Olsen*<sup>70</sup>, which dealt with an overnight guest, who definitely had “standing.” Now, after *Minnesota v. Carter*<sup>71</sup>, a social guest has “standing.” I am not really supposed to say that. The social guest has an expectation of privacy.<sup>72</sup>

If you are just there briefly, engaging in a criminal enterprise, there is no ability to raise the Fourth Amendment as an issue. That is what the Supreme Court said.

The Supreme Court, granted certiorari in October in *United States v. Bond*<sup>73</sup>. It is a bus case, and it is a reasonable expectation of privacy case. You all remember the standard from *Katz*<sup>74</sup> about when you have a search within the meaning of the Fourth Amendment is that the defendant has a expectation of privacy and has conducted his or her actions in a manner to create a subjective expectation of privacy and the privacy is one that society recognizes reasonable.<sup>75</sup>

This case, *United States v. Bond*, that the Court just granted certiorari in, is about a passenger on a bus. The bus is stopped at a permanent border checkpoint to check for illegal aliens on the bus. The officer went down the bus and checked everyone. As the officer came back up the bus, the officer started, (and this is the technical term) “squeezing” the defendant’s luggage. That’s all the information we get. Why do I say it is a technical term? That is because many lower courts have said -- another technical term -- if you “poof” somebody’s luggage or “prep” somebody’s luggage and you cause the air to circulate, that is not a search within the meaning of the Fourth Amendment.

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<sup>69</sup> *Id.* at 473-474.

<sup>70</sup> 495 US 91 (1990).

<sup>71</sup> *See Carter*, 119 S. Ct. 469 (1998).

<sup>72</sup> *Id.* at 473.

<sup>73</sup> 167 F.3d 225 (5<sup>th</sup> Cir. 1999).

<sup>74</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>75</sup> *See generally, Katz, supra*, note 71.

Why would you “poof” somebody’s luggage? So you can get the air moving, so either the officer can smell it or a dog can smell it. “Poofing” and “prepping” are accepted in the lower courts, but we do not have “poofing” and “prepping” in this case. We have squeezing, and the Fifth Circuit said that the squeezing did not violate or implicate the Fourth Amendment because there is no reasonable expectation of privacy in luggage in this manner.<sup>76</sup> The Fifth Circuit did cite a Tenth Circuit case that went the other way on a different act. The other act was pressing both sides of a luggage.<sup>77</sup> The way the lower courts have looked at it, I had great entertainment reading these cases. Many of the lower courts have asked the question: Is the luggage being touched in a manner that would be different from the way another passenger would touch the baggage? In a Seventh Circuit case, in which there was a dissent, the majority in the Seventh Circuit had allowed the officer to touch the baggage but not pull it out. A judge in this case dissented, stating that he could not imagine -- language of the Court -- that federal judges would allow their baggage to be manipulated, squeezed in a manner to determine what the contents are. But stay tuned, we will find out at the end of the term whether the squeezing is a search within the meaning of the Fourth Amendment with respect to the bus stops we have here. That is *United States v. Bond*.<sup>78</sup>

The other case that was alluded to by Professor Schwartz this morning was *Wilson v. Layne*<sup>79</sup>, the media case where photographers and reporters went inside a house, and in another case we had CNN video taping the search. The Supreme Court said in this case, surprisingly, it did violate the Fourth Amendment to have the media along.<sup>80</sup>

The standard the Court used in this case was, when you have the media along, it is not aiding the execution of a warrant, and it gave a couple of examples of things that are probably

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<sup>76</sup> See *Bond*, *supra*, note 70 at 227.

<sup>77</sup> See *United States v. Nicholson*, 144 F. 3d 632, 639 (10<sup>th</sup> Cir. 1998) (holding that the manipulation of luggage stored in an overhead luggage bin was a search within the meaning of the Fourth Amendment).

<sup>78</sup> See *Bond*, *supra*, note 70.

<sup>79</sup> 119 S. Ct. 162 (1999).

<sup>80</sup> *Id.* at 1699.

permissible. It said, if you, for example, are a person whose property has been stolen and you went along with the police officers to identify stolen property, then you would be aiding in the execution of a search warrant in that particular case. The Court also mentioned that police officers could video tape themselves, for example. Sometimes an officer may video tape for quality control to see what is going on, but the fact the media came in this case, the Court said did not aid in the execution, even though, as the Court said, it may be good PR for the officers, it did not really accept the arguments that the media were somehow going to make the search go a little better, protect the police officer in public.

One last case pending in the Supreme Court, I think is an incredibly important case, is *Illinois v. Wardlow*.<sup>81</sup> This case is about reasonable suspicion. An individual was in an asserted admittedly high crime neighborhood in Chicago around noontime. He stood on a corner, and four officers in a Caravan passed. (It is not clear from the record whether the officers were in marked or unmarked cars.<sup>82</sup>) The first car went past the defendant, who was standing on the corner with a white opaque bag in his hand. (We do not know whether the officers were in uniform or not.) The defendant saw them. Then the second car went past, followed by the third car, and then the fourth.<sup>83</sup> Each car had two had two officers. Wardlow, standing on the corner, looked at the officer and started to run in a high crime neighborhood, and as he ran, the fourth car started to follow him. Wardlow ran down a gangway, and eventually Wardlow ran into the driver the fourth car.<sup>84</sup>

The officer did not identify the purpose of the stop in this case, but immediately frisked him. The question in this case before the Supreme Court is: Does flight alone at the site of a police officer create reasonable suspicion or, if flight alone doesn't create reasonable suspicion, is flight plus being in a high-crime neighborhood enough to create reasonable suspicion?<sup>85</sup> Justice Scalia in a prior decision had relied on an ancient source, the Bible, stating, "the wicked fleeth where no man runneth," and concluded

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<sup>81</sup> 701 N.E.2d 484, (Ill. 1998).

<sup>82</sup> *Id.* at 484-86.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 486.

that flight upon just seeing an officer is enough to create a reasonable suspicion.<sup>86</sup> The Supreme Court decided that question this year and held that that kind of action creates reasonable suspicion for the stop in this case.<sup>87</sup>

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<sup>86</sup> See generally, *Michigan v. Chesternut*, 486 U.S. 567 (1988).

<sup>87</sup> *Illinois v. Wardlow*, 120 S. Ct. 673 (2000). On January 12, 2000, the Supreme Court ruled that a defendant's unprovoked flight in an area of heavy narcotics trafficking supported reasonable suspicion that defendant in criminal activity and justified stop. *Id.*