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## Fourth Amendment Issues in Section 1983 Litigation

Kathryn R. Urbonya  
*William & Mary Law School*

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## FOURTH AMENDMENT ISSUES IN SECTION 1983 LITIGATION

*Kathryn R. Urbonya\**

*Honorable George C. Pratt:*

The next item on the program is Professor Urbonya who is going to discuss Fourth Amendment Supreme Court developments.

*Professor Kathryn R. Urbonya:*

Good morning. How many of you work in the Fourth Amendment area? How many of you are familiar with the *Whren v. United States*<sup>1</sup> decision regarding traffic stops? To begin, I want to give you a brief road map that will explain where I am going. First, I will discuss the 1996 *Whren* case, because it is a very important case in Fourth Amendment litigation for what it has to say about reasonableness under the Fourth Amendment. Second, I will discuss three cases pending in the Supreme Court that deal with Fourth Amendment issues which I think will be very important for civil rights litigation. Lastly, I will discuss an area that New Yorkers have been reading about in the newspapers. This area consists of the “knock and announce” decisions from the Supreme Court which I think are just another form of excessive force litigation.

The *Whren* case is an incredibly important case in a number of respects. You just listened to a discussion on equal protection and how difficult it is to prove an equal protection violation. In *Whren*, motorists wanted to challenge their traffic stop by arguing that they were not stopped for a traffic offense, although, they said, the driver did commit a traffic offense.<sup>2</sup> They argued that they were stopped because of their skin color and that the police officers

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\* Professor of Law at the College of William and Mary, Marshall-Wythe School of Law.

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

<sup>2</sup> *Id.* at 813.

really acted in a pretextual manner.<sup>3</sup> The Supreme Court made it very clear in *Whren*, that if you have a racial challenge, do not use the Fourth Amendment, use the Equal Protection Clause.<sup>4</sup> You just listened to how difficult it is to prove an equal protection violation, but that I think this is an incredibly important part of the decision. What does it mean for Fourth Amendment analysis?

Basically, the Supreme Court stated in *Whren*, it was not going to engage in a reasonableness analysis in this context.<sup>5</sup> I always thought reasonableness was something we considered under the Fourth Amendment: we have a reasonableness clause. The Court explained that in a Fourth Amendment case, when probable cause is present, that "probable" means that the challenged actions were "reasonable" and the officers acted in a reasonable manner. This is the reason my written materials divide the doctrine into areas where the police officers have probable cause and areas where the police officers do not have probable cause.<sup>6</sup> The Supreme Court noted that if an officer conducts a search or seizure without probable cause, then we may consider pretextual analysis.<sup>7</sup>

In addition, the Court explained, where there is probable cause, only in extraordinary circumstances will it evaluate reasonableness because the presence of probable cause itself generally signifies that the challenged action was reasonable. The Court articulated four of these extraordinary areas where, even though probable cause is present, we still engage in a reasonableness analysis.<sup>8</sup>

First, this reasonableness inquiry was present in *Tennessee v. Garner*,<sup>9</sup> a case dealing with deadly force. I think that that would

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<sup>3</sup> *Id.* at 814.

<sup>4</sup> *Id.* at 813.

<sup>5</sup> *Id.* at 814-15.

<sup>6</sup> Kathryn R. Urbonya, *Fourth Amendment: Selective Supreme Court Developments*, 14 NO. 2 PRACTICING LAW INSTITUTE, 14TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 59 (1998).

<sup>7</sup> *Whren*, 517 U.S. at 817.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 818 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

include *Graham*,<sup>10</sup> the nondeadly force cases as well. The Court created balancing tests.<sup>11</sup>

The second, the next extraordinary area involves “unannounced entries” and the “knock and announce” requirement.<sup>12</sup> This situation occurs when a police officer goes into someone’s home without a warrant, and without knocking.<sup>13</sup> This would constitute an extraordinary circumstance where the Court separately evaluates reasonableness.

The third area is when an officer goes into a home saying that he or she has probable cause and extraordinary circumstances. This situation existed in *Welsh v. Wisconsin*.<sup>14</sup> There, the Court held that the home is an area of traditional protection and we will consider a reasonableness analysis as well.<sup>15</sup>

The fourth area involves the case of *Winston v. Lee*,<sup>16</sup> which dealt with the question of reasonableness: even if there is probable cause to believe that a bullet in a person’s body is evidence of a crime, and even if a magistrate would authorize the removal of it, it does not necessarily mean that it is reasonable within the meaning of the Fourth Amendment surgically removing the bullet. This is because of the risk associated with surgery. The government has so much evidence anyway that it does not need the bullet; so in those contexts, the Supreme Court states, when there is probable cause you have to have an extraordinary circumstance to consider whether the conduct was reasonable within the meaning of the Fourth Amendment. I think that is an important qualification. I have always thought reasonableness was an aspect of all that.

Where does *Whren* take us? It takes us to some of the pending cases in the Supreme Court, and some decided cases. *Whren* holds that if a traffic offense is committed, a police officer can lawfully stop the car.<sup>17</sup> The Court said that it was not going to decide

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<sup>10</sup> 490 U.S. 386 (1989).

<sup>11</sup> *Id.* at 395-96.

<sup>12</sup> *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

<sup>13</sup> *See id.*

<sup>14</sup> 466 U.S. 740 (1984).

<sup>15</sup> *Id.* at 748-50.

<sup>16</sup> 470 U.S. 753 (1985).

<sup>17</sup> *Whren*, 517 U.S. at 818.

whether the officers acted in a pretextual manner.<sup>18</sup> Next, *Maryland v. Wilson*<sup>19</sup> came up and asked whether a police officer can order a passenger outside a car.<sup>20</sup> The Supreme Court had previously decided, in *Pennsylvania v. Mimms*,<sup>21</sup> that once the driver of a car is lawfully stopped for a traffic offense within the meaning of the Fourth Amendment, the driver could be ordered outside the car.<sup>22</sup> The interesting aspect of *Mimms* was that the Supreme Court did not determine whether there was a seizure, and whether it was reasonable under the meaning of the Fourth Amendment.<sup>23</sup> The Court stated that this invasion was de minimus, do not worry about it, you are already lawfully stopped and in the name of police safety we are going to allow the police officer to order the driver outside the car.<sup>24</sup>

The Supreme Court in *Maryland v. Wilson* used the same kind of analysis and said, "what is good for the driver is good for the passenger."<sup>25</sup> Thus, the Supreme Court noted that it was going to go ahead and allow the police officer to have the authority to order a passenger out of the car in order to protect officer safety.<sup>26</sup>

In any event, once the officer orders a passenger outside the car, what else can the officer do with the passenger? In *Wilson*, there was oral argument and discussion about whether a passenger can be put in a cruiser, et cetera.<sup>27</sup> The Supreme Court explained in a footnote that all that was being decided was that the officer had the authority to order the passenger out. It was not deciding whether the officer could detain a passenger during the seizure of the driver.<sup>28</sup>

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<sup>18</sup> *Id.* at 817.

<sup>19</sup> 117 S. Ct. 882 (1997).

<sup>20</sup> *Id.* at 884.

<sup>21</sup> 434 U.S. 106 (1977).

<sup>22</sup> *Id.* at 111.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Wilson*, 117 S. Ct. at 886.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 886 n 3.

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

There are already lower court decisions holding that an officer can go ahead and order a passenger to stay because the officer has to be able to watch the passenger's movement.<sup>29</sup> The reason for this, according to the lower courts, is because the purpose of ordering a passenger out of the car is officer safety, an officer should be able to watch the passenger to know what the passenger is doing.<sup>30</sup> Others argue the contrary position, saying that the passenger has not committed any crime, that he is just present in the car and as a result, the passenger should be free to walk away.<sup>31</sup> Also, it may be safer for the officer to get rid of one person on the scene.<sup>32</sup> So there is going to be litigation about the passenger as well.

We have had prior cases dealing with police officers ordering passengers to lie down on the ground and separating them.<sup>33</sup> It is all going to be the question of how we look at this particular act of ordering the passenger out of the car. For the most part, passengers have sat in the front seat or back seat unless there are lots of passengers in the car and the officer orders back up before he or she deals with the passengers.

Now we have the car stopped for a traffic offense. Professor Chemerinsky thought that ordering a person out of the car during a traffic offense stop was just outrageous because police officers are going to be able to stop all of us. People commit traffic offenses every day. I thought about my five minute drive to school, and decided Professor Chemerinsky is right. I commit three traffic offenses just driving to school in five minutes. Putting that aside, we are all going to become better drivers after the *Whren* decision.

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<sup>29</sup> See, e.g., *N.Y. v. Robinson*, 74 N.Y.2d 773, 543 N.E.2d 733, 545 N.Y.S.2d 90 (1989) (holding that a passenger may be ordered to exit a lawfully stopped motor vehicle for the safety of the officers); *N.Y. v. McLaurin*, 70 N.Y.2d 779, 515 N.E.2d 904, 521 N.Y.S.2d 218 (1987) (holding that a de minimis intrusion upon the passenger's liberty was acceptable to protect officer safety).

<sup>30</sup> *McLaurin*, 70 N.Y.2d at 780, 515 N.E.2d at 905, 521 N.Y.S.2d at 219; see also *People v. Gonzalez*, 184 Ill.2d 402, 704 N.E.2d 375, 235 Ill. Dec. 626 (1998) (collecting cases).

<sup>31</sup> *People v. Gonzalez*, 184 Ill.2d 402; 704 N.E.2d 375, 235 Ill. Dec. 26 (1998) (Heiple, J., dissenting).

<sup>32</sup> *Id.* (Heiple, J. dissenting)

<sup>33</sup> *Courson v. McMillian*, 939 F.2d 1479, 1485 (11th Cir. 1991).

We also have *Ohio v. Robinette*.<sup>34</sup> *Robinette* involved the situation where, once one is lawfully stopped for a traffic offense and the officer is nice and gives a warning because of speeding, but then says, here is my warning, but before you leave, do you mind if I search your car? The issue before the Supreme Court in *Robinette* was whether the officer must tell the driver, hey, you are free to go, it is all over, I am just having a friendly encounter with you and you are free to leave?<sup>35</sup> What way do you think the Supreme Court held? The Supreme Court held that the officer does not have the duty to tell a person that the traffic stop is over and a friendly encounter is now taking place.<sup>36</sup> So under the "consent doctrine,"<sup>37</sup> established in *Schneckloth*,<sup>38</sup> the police officer does not have a duty to tell a person that she has a right to refuse the officer's request, and now under *Ohio v. Robinette*, the officer does not have a duty to tell a person that a traffic stop is over and she is free to go. The officer is just asking in a friendly manner, whether he can search her car.<sup>39</sup>

The Supreme Court explained it does not like bright lines and it wanted to have the question about seizures open-ended.<sup>40</sup> However, in *Robinette*, the Supreme Court held that the officer can go ahead and ask that question and we will determine whether, looking at the circumstances, the person was seized within the meaning of the Fourth Amendment.<sup>41</sup>

A very important case in the Supreme Court dealing once again with traffic stops is *Knowles v. Iowa*<sup>42</sup> which makes the question of consent irrelevant. The facts of *Knowles* are that a police officer

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<sup>34</sup> 117 S. Ct. 417 (1996).

<sup>35</sup> *Id.* at 421.

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

<sup>37</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that the Fourth Amendment test for a valid consent to search is that the consent be voluntary, which "is a question of fact to be determined from all of the circumstances.").

<sup>38</sup> *Id.*

<sup>39</sup> *Robinette*, 117 S. Ct. at 421.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 119 S. Ct. 484 (1998).

stopped someone for a typical traffic offense.<sup>43</sup> The police officer walked up to the driver, asked him for identification and registration, went back to the cruiser, saw there was no problem, then went back to the driver and said that he was going to search the driver's car.<sup>44</sup> What happened to the consent?

Next, the officer issued the individual a citation and searched the car.<sup>45</sup> We know from prior Fourth Amendment law that a police officer can search a car if the search is incident to an arrest.<sup>46</sup> Why incident to an arrest? The idea is to further officer safety, to guard against the destruction of evidence, and to be able to search the area in the immediate control of the defendant.<sup>47</sup> In *Knowles* the individual was not arrested; he was just issued a traffic citation.<sup>48</sup> The police officer was acting pursuant to an Iowa statute that said when issuing a citation, the officer has the authority to go ahead and search the area of the person as long as the officer has the authority to arrest the individual.<sup>49</sup>

When I researched this case, I called to get the briefs. I talked to someone who works for the state but whose name I will not mention. This person told me that although the statute had been on the books since 1983, litigation involving its application had first surfaced this year. This person told me that the reason for this was that attorneys for the State think the statute is unconstitutional, so officers were trained not to search vehicles when issuing traffic violations. The officer in *Knowles* did search and now the State has to defend the statute.<sup>50</sup>

The issue is whether the officer had the authority to search incident to the citation.<sup>51</sup> The defendant did not challenge the officer's authority to arrest him for a traffic citation.<sup>52</sup> Therefore,

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<sup>43</sup> *Id.* at 486.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *U.S. v. Robinson*, 414 U.S. 218 (1973).

<sup>47</sup> *Id.* at 225-26.

<sup>48</sup> *Knowles*, 119 S. Ct. at 486.

<sup>49</sup> *Id.* at 486-87.

<sup>50</sup> *Id.* at 487.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



the assumption was that the officer could arrest this individual. Since he could arrest him, was the search lawful? The government's brief indicated that twenty-six states authorize police officers to arrest individuals for traffic offenses and sixteen others have minor restraints.<sup>53</sup> Therefore, the majority of state courts do allow police officers to make arrests for traffic violations.

What was the argument in this case? The government read *Whren* and said we do not worry about searching cars in an arbitrary and discriminatory manner because we had probable cause to stop.<sup>54</sup> Since we had probable cause to stop you, that means we were not acting in an arbitrary and discriminatory manner and, therefore, we should be able to do the search.<sup>55</sup> The government also stated it was protecting the individual's privacy, and that there was no arrest; there was just a search of the car, something that is also good for the individual.<sup>56</sup> The government explained that officers are safer in searching the car incident to a traffic citation.<sup>57</sup>

Lastly, the government argued that the statute preserves evidence.<sup>58</sup> Preserve evidence, what evidence is there to preserve? Asking for identification makes sure you really are who you say you are and searching the car confirms you are actually the person you say you are.<sup>59</sup> So the government relied on *Whren*, to show that the officer was not acting in a discriminatory manner. Since there was probable cause, the officer had the authority to arrest under state law. Therefore, the search was lawful.<sup>60</sup>

The criminal defendant in *Knowles v. Iowa* argued that he was not arrested and the search incident to arrest doctrine is built upon the notion of being in custody. Thus that is the reason the officer gets to search the area of immediate control; the defendant, when arrested, is in the officer's custody on the way to the station.<sup>61</sup>

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<sup>53</sup> 1998 WL 541975 (U.S. Iowa Resp. Brief).

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Further, the defendant argued, when someone receives a traffic citation, there is no real threat to the officer, so a search of the car should not be allowed. If the officer were, in fact, in danger, then the *Terry v. Ohio*<sup>62</sup> doctrine should work.<sup>63</sup>

The *Terry* doctrine states that if an officer has reasonable suspicion to believe that a person possesses a weapon, the officer can do a pat-down.<sup>64</sup> I would be happy to predict how the Supreme Court would decide that issue, but I tried to predict how the Supreme Court would decide *Clinton v. Jones*<sup>65</sup> and I was wrong. I think this is an easy case since I agree with the attorneys from Iowa that the statute is unconstitutional, but one never knows. So, this could be a blockbuster case. The authority to stop a driver is easy to obtain. But authority to search a car should not apply in this case.

That aside, there is another case dealing with traffic stops in the Supreme Court. Even if Iowa loses this case, there is another good case lying ahead. The case is *Wyoming v. Houghton*.<sup>66</sup>

In *Houghton*, once again, individuals were stopped for speeding and the car's brake lights were out.<sup>67</sup> The police officer walked up to the car and noticed a male driver and two female passengers.<sup>68</sup> As he approached the driver, he saw a syringe in his pocket and went back to the cruiser to get some gloves in order to protect himself.<sup>69</sup>

He then went back to the car and talked to the driver and asked what the syringe was for and the driver responded that it was for drugs.<sup>70</sup> That is what the driver said. In this case, one of the

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<sup>62</sup> 392 U.S. 1 (1968).

<sup>63</sup> *Knowles*, 119 S.Ct. at 488.

<sup>64</sup> *Terry*, 392 U.S. at 30.

<sup>65</sup> 117 S. Ct. 1636 (1997). In this case the Court held that the President does not have immunity from civil litigation arising out of events prior to his taking office, nor does separation of powers require the Court to avoid prosecution until after he leaves office. *Id.*

<sup>66</sup> 119 S. Ct. 31 (1998); *see also* *Houghton v. State*, 956 P.2d 363 (Wyo. 1998).

<sup>67</sup> *Houghton*, 956 P.2d at 365.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

passengers, who ultimately became a criminal defendant, did not challenge whether the information obtained by the officer amounted to probable cause that there were drugs in the car.<sup>71</sup>

Under prior Supreme Court case law, if an officer had probable cause to believe that there were drugs in a car, the officer, without a warrant, could go ahead and search the area as long as a magistrate would have issued a warrant based on the facts presented.<sup>72</sup> So the officer's theory of the case was, since there was probable cause to believe there were drugs in the car, he had the authority to search the whole car.<sup>73</sup> The passenger argued that all of the facts of the case must be looked at.<sup>74</sup> Everyone was ordered out of the car at the point the defendant said that the syringe was for his drugs, and the officer did a pat-down of all of them.<sup>75</sup> How often are pat downs done when there is no reasonable suspicion? The Wyoming Supreme Court said the officer should not have done the *Terry* frisks because the officer had no reason to believe the potential defendants were armed and dangerous.<sup>76</sup> That is all the court said and no more, that it was an impermissible frisk.<sup>77</sup>

When the passengers were outside of the car, the officer asked the individuals who they were and the one woman passenger said that her name was Sandra Jones and that she did not have any identification.<sup>78</sup> In response to this, the officer walked up to the car, looked inside the car and saw a purse lying in the front.<sup>79</sup> The police officer opened the purse, pulled out an ID, which the officer read, and it read Sara Houghton not Sara Jones.<sup>80</sup> At that point, the woman said that the purse was hers.<sup>81</sup>

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<sup>71</sup> *Id.* at 366.

<sup>72</sup> *Id.* See also *U.S. v Ross*, 456 U.S. 798 (1982).

<sup>73</sup> *Houghton*, 956 P.2d at 366.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 365.

<sup>76</sup> *Id.* at 372.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 365.

<sup>79</sup> *Id.*

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

<sup>81</sup> *Id.*

The basis of her challenge in the Supreme Court was that once she said that the purse was hers, the police officer did not have the authority to be able to search the purse for drugs.<sup>82</sup> Essentially, she said that the officer should have stopped, instead of continuing to search the purse and finding the drugs.<sup>83</sup>

The lower courts, according to the Wyoming Supreme Court and Professor LaFave, have applied three different tests to determine whether the officer could search that purse.<sup>84</sup> The first is the physical relationship test which asks how close the person was to the particular object at the time of the search.<sup>85</sup> The Wyoming Supreme Court noted that the physical relationship test was silly because many people leave their valuables someplace else.<sup>86</sup> The court said, if you are ordered outside of the car, do you take your purse, your briefcase, your wallet with you, and where do you have it. The court said that it was not going to use that as a test.<sup>87</sup>

The other test is the relationship test which asks is it in fact, your purse, your wallet, your briefcase?<sup>88</sup> The Wyoming Supreme Court said that it is just too difficult for a police officer to know whether an item belongs to a particular individual so the court rejected the relationship test.<sup>89</sup>

The Wyoming court decided to adopt a third test called the notice test.<sup>90</sup> The notice test asks whether the officer had notice that the object belonged to somebody else and that they had no authority to search unless the somebody else could have had access to that particular belonging.<sup>91</sup> What is interesting about this particular case is that there was another police officer who was watching the passengers and the driver to make sure that there was no movement

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<sup>82</sup> *Id.* at 366.

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

<sup>84</sup> *Id.* at 367. See generally 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 4.10 (b) (3rd ed. 1996).

<sup>85</sup> *Houghton*, 956 P.2d at 367-68.

<sup>86</sup> *Id.* at 368.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 369.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

going on.<sup>92</sup> This is done because police officers are worried about hand movement and reaching for objects on the floor. In this case, there were no allegations that the drugs had moved from the driver over to the passenger's purse and so the Wyoming Supreme Court said that because of that, the drugs should be suppressed.

That is the issue up for the Supreme Court and in a nutshell, the question is whether the officer had the authority to search the passenger's purse when she identified it as her own. Therefore, either we will get to see what the Court has to say about searching a car generally in *Knowles v. Iowa*,<sup>93</sup> or searching of a particular object in this case.

The third case in the Supreme Court was *Minnesota v. Carter*.<sup>94</sup> This is another important case because it deals with the question of standing, which the Supreme Court does not like, and the question of reasonable expectation of privacy.<sup>95</sup> The question about whether there is standing to challenge something, according to the Supreme Court, is whether there is a reasonable expectation of privacy which has been violated.<sup>96</sup> That in turn asks whether there is actually a Fourth Amendment violation, not an actual violation, but whether there is an interest protected by the Fourth Amendment.<sup>97</sup>

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<sup>92</sup> *Id.* at 365.

<sup>93</sup> 119 S. Ct. 484 (1998).

<sup>94</sup> 119 S. Ct. 469 (1998).

<sup>95</sup> *Id.* at 474-73.

<sup>96</sup> *Id.* at 474 (concluding that "respondents had no legitimate expectation of privacy in the apartment.").

<sup>97</sup> *Id.* (concluding that "any search which may have occurred did not violate their Fourth Amendment rights."). *See also* *Rakas v. Illinois*, 439 U.S. 128 (1978). In this case, petitioners were passengers in a car stopped by police after receiving a robbery report. Upon search of the car, the police found rifle shells in the glove box and a shot gun under the front seat. These items were later admitted into evidence against them at trial. The petitioners argued that this was a violation of the Fourth Amendment. The Court in an opinion by Justice Rehnquist disagreed and held the fact that the petitioners "were 'legitimately on [the] premises' in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched." *Id.* at 148.

In *Minnesota v. Carter*, there were individuals in an apartment where the blinds were not pulled down very well.<sup>98</sup> These individuals were wrapping white powder in baggies.<sup>99</sup> A police officer had received a tip about someone seeing these three people putting white powder in bags, so he went to the apartment complex.<sup>100</sup> The record is very unclear as to exactly where the officer was standing, but the way it was litigated was that the officer was standing in a public place.<sup>101</sup> Why is that an issue? It is an issue because the question is whether the officer was on the curtilage when he was standing right up against the window and looking through the cracks. The court characterized it as if he were standing in a public place, looking through the cracks in the blinds.<sup>102</sup> The defendants in this case were not the homeowners but were the homeowner's friends who were engaging in the criminal activity with the homeowner.<sup>103</sup>

The question is, when the officer looked through the blinds, did he violate the homeowner's friend's reasonable expectation of privacy?<sup>104</sup> It is an important case because many years ago the Supreme Court put some clarity in this area in *Minnesota v. Olson*.<sup>105</sup>

The question in *Olson* dealt with an overnight guest in somebody's home and whether the guest had a reasonable expectation of privacy in another's home.<sup>105</sup> The Minnesota Supreme Court looked at the government's twelve factor test which determined whether the guest had a sufficient connection to the place in order to determine whether the guest had a reasonable expectation of privacy.

The Supreme Court drew a bright line, and said that if one is an overnight guest, that person has a reasonable expectation of

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<sup>98</sup> *Carter*, 119 S. Ct. at 471.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 472.

<sup>104</sup> *Id.*

<sup>105</sup> 495 U.S. 91 (1990).

<sup>106</sup> *Id.* at 93.

privacy.<sup>107</sup> However, in *Minnesota v. Carter*, the case pending before the Supreme Court, the defendants were not overnight guests; they were there for a few hours and engaging in criminal activity.<sup>108</sup> The American Civil Liberties Union ("ACLU") in its amicus brief discussed morality.<sup>109</sup> The ACLU asked, when trying to look at whether these individuals have a reasonable expectation of privacy in another person's apartment, should there be a rule where the Fourth Amendment gives protection to someone engaged in illicit sexual activity, who stays over night, but not to the person who actually has sex during the afternoon and leaves, so that one would actually have to stay over night in order to have an expectation of privacy?<sup>110</sup>

I have no idea which way the Court will hold in this situation. We may revisit the proposed twelve factor test or maybe the Court will say that because the defendants were engaged in a brief, criminal enterprise, they do not have an expectation of privacy. So those are important cases concerning the definition of what a search is, and if there were a reasonable expectation of privacy, then the Court will also talk about the officer's authority to peek through the blinds.

There are three extraordinary cases which the Supreme Court has discussed the *Whren* case concerning the issue of "knock and announce." The three important "knock and announce" cases in this area are *Wilson v. Arkansas*,<sup>111</sup> *Richards v. Wisconsin*<sup>112</sup> and *United States v. Ramirez*.<sup>113</sup>

The first two cases deal with actions by state officials and the third deals with federal officials. Why is this important? It is important because in the final case, *Ramirez*, the Supreme Court made a very important announcement saying that the federal "knock and announce" statute really just represents the common law "knock and announce" principle that is embodied in the Fourth

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<sup>107</sup> *Id.* at 100.

<sup>108</sup> *Carter*, 119 S. Ct. at 472.

<sup>109</sup> 1998 WL 310723 (U.S. Amicus Brief).

<sup>110</sup> *Id.*

<sup>111</sup> 514 U.S. 927 (1995). See also 317 Ark. 548, 878 S.W.2d 755 (1994).

<sup>112</sup> 117 S. Ct. 1416 (1997).

<sup>113</sup> 118 S. Ct. 992 (1998).

Amendment.<sup>114</sup> So this ties the federal “knock and announce” statute to the Fourth Amendment. How does it do so?

First of all, in *Wilson v. Arkansas*, the Court laid the foundation for saying that the Fourth Amendment incorporates the “knock and announce” common law requirement, that an officer, before executing a search warrant to come into a home, has to “knock and announce,” revealing the officer’s presence and purpose.<sup>115</sup>

The reasons for this rule are obvious. It is like classic excessive force litigation in some sense. It is the idea that, first, if we “knock and announce,” we will not have to break down a door, and second, it is a little safer for police officers to say that the person walking through the door right now is a police officer, not some stranger, because if presence is not announced, there might be an unwanted forceful response by the occupant. Third, it is designed to protect the privacy of an individual in these situations. So all the Court did in *Wilson v. Arkansas* was hold that when looking at the Fourth Amendment, it does incorporate the common law rule of knocking and announcing one’s purpose and presence.

Next comes *Richards v. Wisconsin*,<sup>116</sup> a 1996 case that dealt with the question of no knock warrants when looking for drugs in a house.<sup>117</sup> The Wisconsin Supreme Court, in this case, held that if the reason law enforcement officials want to execute the search warrant is to search for drugs, they are automatically going to be able to enter a home without knocking and announcing their presence.<sup>118</sup> The Wisconsin Supreme Court rationalized this by stating that drugs are dangerous and usually drugs go with guns.<sup>119</sup>

Well, *Richards* went up to the United States Supreme Court. The Court held that just because the police have a search warrant for drugs, it does not mean that they can forego the “knock and announce” requirement in every single case.<sup>120</sup> The Court held that

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<sup>114</sup> *Id.* at 997-98.

<sup>115</sup> *Wilson*, 514 U.S. at 934-35.

<sup>116</sup> 520 U.S. 385 (1997). *See also* 201 Wis.2d 845, 549 N.W.2d 218 (1996).

<sup>117</sup> *Id.* at 388.

<sup>118</sup> *Id.* at 387-88.

<sup>119</sup> *Id.* at 388-89.

<sup>120</sup> 520 U.S. 385 (1997).



that kind of generalization can be a slippery slope: if no-knock entries apply to searches for drugs, than what stops such entries in other cases?<sup>121</sup> So the Court in *Richards* reaffirmed the reasonableness principle that says one always has to look at the particular facts of the case to determine what constitutes a "reasonable" manner.

The interesting part of this case is that the officers involved in the case had asked a magistrate to give them a no-knock warrant which would have given them the ability to just walk right in and the magistrate refused.<sup>122</sup> The Supreme Court explained that what has to be looked at are the particular circumstances at the time the officers executed the warrant.<sup>123</sup> It created a new rule.<sup>124</sup>

The Court held that, under the Fourth Amendment, even though the magistrate refused to grant the no-knock warrant, an officer can enter the home if he or she has reasonable suspicion to believe one of three things. First, when evidence is about to be destroyed in a particular case.<sup>125</sup> Second, when it is dangerous to the officer,<sup>126</sup> and third, when it is futile for the officer to knock and announce his or her presence.<sup>127</sup> Therefore, if the officer has reasonable suspicion concerning one of these three things then the officer can forego the knocking and announcing as he or she enters the particular home.

How did this apply in the *Richards* case? Well, the magistrate had been asked to give a no-knock warrant for a search that ultimately occurred at 3:40 in the morning in a hotel room.<sup>128</sup> A bunch of police officers went to the hotel room with only one of them dressed in uniform.<sup>129</sup> The police knocked on the door and one officer announced himself as the maintenance man.<sup>130</sup> When

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<sup>121</sup> *Id.* at 388.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 394.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 388.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

the defendant opened the door with the chain on, he expected to see a maintenance man, but instead he saw a uniformed officer instead.<sup>131</sup> This fact becomes important since the defendant acknowledged having seen a uniformed officer, he acknowledged the officer's presence. Next, the defendant slammed the door and the police officers contemporaneously announced their presence and purpose as they broke open the door.<sup>132</sup>

The Supreme Court held that under this set of circumstances, the officers had reasonable suspicion.<sup>133</sup> The Court did not particularly identify what the exact circumstances here were, but I assume the destruction of evidence, the futility and the fact that the criminal defendant had recognized the police officer demonstrates that the defendant obviously knew about their presence. Therefore, what the Court did in *Richards* was hold that first, there can be no blanket rule concerning "knock and announce" cases for drugs, and second, if a police officer has reasonable suspicion as to one of the three circumstances, the officer can forego the "knock and announce" requirement that the Court recognized in *Wilson*.<sup>134</sup>

The third case was *United States v. Ramirez*.<sup>135</sup> In *Ramirez*, the police officers believed they were searching for a very dangerous person. The person they were looking for had threatened to torture individuals, claimed he would not do federal time, and that he was going to get away with this at all costs.<sup>136</sup> The police believed this individual was in a third party's home and, as a result, they went to the third party's home early in the morning with a loud speaker.<sup>137</sup>

The police announced who they were while simultaneously breaking open a window with a gun.<sup>138</sup> The individual inside the house heard the window breaking and thought there was a burglary going on, shot at the garage ceiling in order to try and scare off the burglar, and at that point, he received a response from the police

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 395.

<sup>134</sup> *Id.* at 396.

<sup>135</sup> *Ramirez*, 118 S. Ct. 992 (1998).

<sup>136</sup> *Id.* at 995.

<sup>137</sup> *Id.* at 995-96.

<sup>138</sup> *Id.* at 995.

officers.<sup>139</sup> The police officers entered the home and discovered some guns which the defendant was not supposed to have since he is a felon.<sup>140</sup> The question was, can the officers really go into the house under such circumstances?<sup>141</sup>

The Supreme Court held that the federal "knock and announce" statute really incorporates the common law principle that in certain circumstances the police officers do not have to wait a certain amount of time to hear from the individual in order to go into the house.<sup>142</sup> The Court held that, in this situation, the police officers had reasonable suspicion as articulated in the *Richards* decision.<sup>143</sup>

What does this mean for Section 1983 litigation<sup>144</sup> and criminal litigation? The first question is how long do police officers have to wait if they are not using the no-knock provision articulated in *Richards*? It is not very clear. Professor LaFave, in his treatise, states that the courts have not required police officers to wait very long before entering.<sup>145</sup> Generally, courts have required the police to wait ten to twenty seconds before entering.<sup>146</sup>

More recent cases from the federal circuits are less generous than ten to twenty seconds and many cases state that five seconds is probably going to be okay.<sup>147</sup> However, the courts have refused to create a bright-line rule as to what would be a reasonable amount of time to wait, saying it is necessary to look at the circumstances.<sup>148</sup> For example, in *United States v. Knapp*,<sup>149</sup> the question was, if you know the person inside is an amputee, how long do you have to wait, twelve seconds?<sup>150</sup> According to the court, twelve seconds is

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 996-97.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 997.

<sup>144</sup> 42 U.S.C.A. § 1983 (1994).

<sup>145</sup> 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, §4.8 (c) at 608 (3d ed. 1996) (stating that "courts have been unduly lenient on this score").

<sup>146</sup> *Id.*

<sup>147</sup> *U.S. v. Mendosa*, 989 F.2d 366 (9th Cir. 1993).

<sup>148</sup> *Id.*

<sup>149</sup> 1 F.3d 1026 (10th Cir. 1993).

<sup>150</sup> *Id.* at 1030.

enough because the amputee does not have to go to the door, the person just had to say that they know the police are present.<sup>151</sup>

Another issue concerns what is meant by an announcement. One court has held that mumbling does not count as an announcement because if people near you can not hear you, then the person inside can not.<sup>152</sup> Also, the court stated that in terms of what is an announcement, one does not have to believe that a defendant heard the announcement, because it is not a subjective test.<sup>153</sup> In one case, the residents surrounding a particular home heard the bull horn and the announcements and they ran outside. The court held that since the residents in the area heard the sound, then an assumption can be made that the defendant, who was inside the home, also heard the announcement.<sup>154</sup>

Another issue concerns how many doors have to be knocked at? The Seventh Circuit says only one and you can go and coordinate your entry at the same time.<sup>155</sup>

What does this mean for Section 1983 litigation? Well, the way it stands right now is that some courts have said that until 1995 with the decision in *Wilson v. Arkansas*, the law of knocking and announcing was not clearly established. If the conduct being looked at occurred prior to 1995, there is circuit court authority saying the law was not sufficiently clear.<sup>156</sup> These are hard cases in some ways, because what is really being looked at is the question of reasonable suspicion concerning the circumstances at the time. This creates fact questions of how close a particular case is to another case so that the court could say the officers should have known in this particular case that what they were doing violated the constitution.

However, there are cases that talk more about the manner of arrest and I believe that we are going to have more cases in this area. For example, the New York Times highlighted the problem of

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<sup>151</sup> *Id.*

<sup>152</sup> *See, e.g.,* *People v. Ortiz*, 569 N.W.2d 653, 659, 224 Mich.App. 468, 479 (1997).

<sup>153</sup> *Id.*

<sup>154</sup> *U.S. v. Spikes*, 158 F.3d 913 (6th Cir. 1998).

<sup>155</sup> *U.S. v. Braggs*, 138 F.3d 1194 (7th Cir. 1998).

<sup>156</sup> *Matis v. Davila*, 135 F.3d 182, 190 (1st Cir. 1998).

using a battering ram. I have found only one case that requires prior judicial authorization before using a battering ram.<sup>157</sup>

The Supreme Court case law says that it is not a question of what the magistrate authorizes; it is the question of whether it was reasonable under the particular circumstances. Police officers sometimes use flash bangs, which can cause severe injury. Police officers have toned down some of the devices that are used to avoid serious injuries.<sup>158</sup> This is like excessive force litigation, but in the home context. That is, did the police officers act in a reasonable manner? We know that it is actually a question because *Whren* told us that when the police enter a house without knocking and announcing, the manner is something we can look at under the Fourth Amendment. So I think we are going to see more of this type of litigation when, and if, this happens in a home where the police either have the wrong house or there really are no drugs.

In summary, I have been reading International Association of Chief of Police materials. One of its journals states, if officers really want to invite litigation, just go ahead and have a no knock entry."<sup>159</sup> Thank you.

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<sup>157</sup> *Langsford v. Superior Court*, 233 Cal.Rptr. 387, 43 Cal.3d 21, 729 P.2d 822, cert. denied, 484 U.S. 824 (1987).

<sup>158</sup> *Id.* at 391, 43 Cal.3d at 26, 729 P.2d at 825.

<sup>159</sup> Policy Review "Destruction of Property During No-Knock Entries," (Spring 1998) (International Association of Chiefs of Police/National Law Enforcement Policy Center).