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WYOMING V. HOUGHTON: RETHINKING THE COURT'S VIEW OF A PASSENGER'S PRIVACY INTERESTS ON THE ROAD

I. INTRODUCTION

Imagine. Your husband is driving you and your child down the street one night, when you are suddenly pulled over by a police officer on a routine traffic stop. Imagine. The officer approaches the car and after questioning your husband, he notices a syringe used for drugs in your husband's pocket. Imagine. The officer is now searching the entire car including your families' belongings for other drug paraphernalia. Stop imagining because this is reality. This scenario presents the issue in *Wyoming v. Houghton*, which came before the Supreme Court as a matter of first impression: what are the rights of a passenger in an automobile, when there is probable cause to search the car?¹ In a reversal of the Supreme Court of Wyoming, the U.S. Supreme Court found that a police officer, with probable cause, is entitled to search any space in a car that may contain the objects of the search, regardless of ownership of the container.² This case note explores and critiques the Court's *Houghton* decision on two bases. First, this note will look at the failure by the Court to adhere to traditional notions of probable cause. Second, the casenote will explore the Court's presumption that it is reasonable, despite the fact that an officer is on notice that the purse did not actually belong to the driver, to search the entire automobile.

This casenote will begin by looking at the historical background of the Fourth Amendment. It will then explore the case of *Wyoming v. Houghton*, the case at issue. The casenote will then focus on the authors' analysis of the decision by the Court.

II. HISTORICAL BACKGROUND

A. *The Traditional Approaches*

1. Probable Cause

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

1. *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999).

2. *Houghton v. State*, 956 P.2d 363 (Wyo. 1998); *Houghton*, see *supra* note 1.

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.”³ The protections established by the Fourth Amendment include the general right that the police may not search areas in which a person has a reasonable expectation of privacy without probable cause, whether or not a warrant is required.⁴ The Supreme Court defines probable cause as a “substantial basis for concluding that a search would uncover evidence of a wrongdoing”⁵ from which “a man of reasonable caution”⁶ would believe a crime has been committed.⁷ In essence the probable cause standard is a compromise between two competing interests: safeguarding of citizens from arbitrary and unreasonable invasions of privacy, and the government’s interest in efficient and effective law enforcement.⁸

2. Searches of an Automobile⁹

The Court has determined that under certain circumstances, a warrant is neither needed, nor required to effectuate a valid search or seizure.¹⁰ A search conducted after a valid stop of an automobile is one such circumstance which a warrant is not required. But the scope of a warrantless search is “no narrower or broader than the scope of a search authorized by a warrant supported by probable cause.”¹¹

3. U.S. CONST. amend. IV.

4. *Illinois v. Gates*, 463 U.S. 213, 236 (1983).

5. *Id.*

6. *Id.* at 237.

7. *Id.*; *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (holding probable cause existed to search a car where the evidence rested in the driver’s own admission of possessing illegal alcohol).

8. *Terry v. Ohio*, 392 U.S. 1, 23 (1968); *Brinegar*, 338 U.S. at 176.

9. The issue before the Court in *Houghton* does not examine the facts under the guise of *New York v. Belton* where the Court held that a valid search incident to an arrest in an automobile may be extended to the passenger compartment of the car, nor does this decision fall under the guise of inventory searches, as per *Illinois v. Lafayette*. *New York v. Belton*, 453 U.S. 459, 460 (1981) (finding a bright line rule for a search incident to an arrest allowing the officer to search any and every part of a the passenger compartment after a custodial arrest where the search and the arrest happen within temporal proximity); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory searches); *see also* *Chimel v. California*, 395 U.S. 752 (1969) (general search incident to arrest rule).

10. *See* *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (holding that “the Fourth Amendment proscribes all unreasonable searches and seizures and it is a cardinal principle that searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

11. *United States v. Ross*, 456 U.S. 798, 823 (1982).

The foundation for searching an automobile was set in *Carroll v. United States*.¹² In that case, the police stopped a car of a known bootlegger, on a stretch of highway that is known for bootlegging traffic.¹³ The police proceeded to rip up the car's upholstery in a search for illegal bottles of liquor.¹⁴ The search subsequently revealed sixty-eight bottles of liquor, which were banned under the National Prohibition Act.¹⁵ The case was appealed to the Supreme Court, challenging the validity of the search conducted without a search warrant. The Court's decision established that with probable cause, anything found on the suspect, or in the control of the arrestee, that is unlawful to possess may be seized, regardless of whether a warrant is obtained.¹⁶ The Court's ruling relied heavily on the doctrine of exigent circumstances where if a car is mobile, there is an inherent need to preserve evidence that may be present in the car.¹⁷ The *Carroll* rule, also known as the "automobile exception" to the warrant requirement, has been defined and re-defined in several later decisions, but its basic precept of upholding the validity of a warrantless, probable cause search of an automobile is well delineated. A subsequent case, *California v. Carney*, established other justifications for the automobile exception including the reduced expectation of privacy of a person because the car is in plain view to the public and drives on public streets.¹⁸

In addition, the Court in *United States v. Ross* and *California v. Acevedo* has formed the fundamental foundations for the present day Fourth Amendment scope for searches of automobiles.¹⁹ The *Ross* decision involved the arrest of a drug suspect in a car, based on an informant's tip.²⁰ Following the arrest, the car was then driven to the police station where it was subsequently searched for contraband.²¹ In reversing the Court of Appeals for the District of Columbia, the Supreme Court held that if the police have probable cause to search a vehicle, probable cause exists to search any containers in the vehicle as well.²²

This rule was further extended in *California v. Acevedo*.²³ In *Acevedo*, the police intercepted a package in the mail containing several, wrapped marijuana

12. *Carroll v. United States*, 267 U.S. 132 (1925).

13. *Id.* at 135.

14. *Id.*

15. *Id.* at 134; see National Prohibition Act, *infra* note 74 and accompanying text.

16. *Id.* at 149.

17. *Carroll*, 267 U.S. at 149. "[T]he circumstances that furnish probable cause to search a particular auto for particular autos are most often unforeseeable; moreover the opportunity to search is fleeting since a car is readily moveable." *United States v. Johns*, 469 U.S. 478 (1985).

18. 471 U.S. 386 (1985); see also *Ross*, 456 U.S. at 825.

19. *Ross*, 456 U.S. at 825; *California v. Acevedo*, 500 U.S. 565 (1991).

20. *Ross*, 456 U.S. at 798.

21. *Id.*

22. *Id.* at 799.

23. 500 U.S. at 565.

packages.²⁴ The police then allowed this same package to be delivered to the addressee, who brought it into his home.²⁵ Charles Acevedo visited the addressee, while the police were surveying his home.²⁶ Acevedo emerged from the home after approximately thirty minutes with a bag that was similar in size to the wrapped marijuana packages that the police earlier intercepted.²⁷ After Acevedo placed the package inside his trunk and began to drive off, the police stopped him, searched the trunk, and found the marijuana.²⁸

Based on these circumstances, the Court noted a dichotomy between the rules of *Ross* and the *Chadwick-Sanders* progeny.²⁹ The *Chadwick-Sanders* cases instructed that where a police officer has probable cause to believe the object of a search is directed at a specific bag in a car, a warrant is required.³⁰ Therefore, as the Court notes, the confusion is directed at the conflicting precedents in that on one hand, in *Ross*, “if there is probable cause to search a car, then the entire car B—including any closed container found therein B—may be searched without a warrant.”³¹ On the other hand, in *Chadwick*, “if there is probable cause only as to a container in the car, the container may be held but not searched until a warrant is obtained.”³² In reconciling these inconsistent rules, the *Acevedo* Court, with the practicality of a bright-line rule in mind, held that the police have the authority to search a container located within a car despite the fact there is no authority to search the whole car.³³

III. WYOMING V. HOUGHTON

A. *The Facts*

Defendant-Respondent, Sandra Houghton, was a passenger in David Young’s car.³⁴ Young was pulled over by two police officers for speeding and driving with a faulty brake light.³⁵ While questioning Young, the officer noticed a hypodermic syringe in Young’s shirt pocket, at which time Young volunteered that the syringe was used to take drugs.³⁶ The officer then ordered

24. *Id.* at 566.

25. *Id.*

26. *Id.*

27. *Id.* at 567.

28. *Acevedo*, 500 U.S. at 567.

29. *Chadwick v. U.S.*, 433 U.S. 1, 11-12 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

30. *Id.*

31. *Id.*

32. *Acevedo*, 500 U.S. at 568.

33. *Id.* at 581. In conducting the search of a car, it is enough to have probable cause to believe the bag itself contains the object of the search. *Id.*

34. *Houghton*, 526 U.S. at 298.

35. *Id.* at 297.

36. *Id.* at 298.

Houghton and a third passenger, identified only as Young's girlfriend, out of the car.³⁷ They were asked to produce some identification.³⁸ Houghton claimed she did not have any and produced a pseudo-name, unbeknownst to the officer.³⁹

Based on Young's admissions, the officers began searching the car, which included Houghton's purse, which was found on the back seat.⁴⁰ The police officer removed the wallet and found Houghton's identification.⁴¹ Houghton stated that she lied to the officer "in case things went bad."⁴² The officer also found a black "wallet type container" containing various drug paraphernalia including a syringe with ten cubic centimeters of methamphetamine.⁴³

B. The Majority's Opinion

The U.S. Supreme Court took the case on a writ of certiorari, subsequent to the Wyoming Supreme Court ruling that the police officer:

knew or should have known that the purse did not belong to the driver, but to one of the passengers, [and because] there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse [therefore the search of Houghton's purse was illegal].⁴⁴

The Supreme Court, in an opinion authored by Justice Scalia, joined by Chief Justice Rehnquist, Kennedy, Thomas, and Breyer, who also filed a separate concurrence,⁴⁵ rejected the Wyoming Supreme Court's decision. The Court's analysis begins by assessing the situation under the common law, at the time the Fourth Amendment was written.⁴⁶ The Court concluded that the "Framers would have regarded such a search as reasonable in light of legislation enacted by Congress from 1789 to 1799—as well as subsequent legislation from the Founding Era and beyond—that empowered customs officials to search any ship or vessel without a warrant, if they had probable cause to believe that it contained goods subject to a duty."⁴⁷

37. *Id.*

38. *Id.*

39. *Houghton*, 526 U.S. at 298.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Houghton*, 526 U.S. at 299 (quoting *Houghton*, 956 P.2d at 1998).

45. *Id.* at 297.

46. *Id.* at 299 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (analyzing the requirement under traditional common law of the "knock and announce" rule upon executing a search warrant)).

47. *Houghton*, 526 U.S. at 300.

The Court then turned to an examination of the “search . . . under traditional standards of reasonableness by assessing . . . the degree to which a search intrudes upon an individual’s privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests.”⁴⁸

The Court affirmed that a search is defined by the object of the search and the places in which there is probable cause to believe that it may be found.⁴⁹ In its analysis, the Court distinguished the holdings of *Di Re* and *Ybarra*.⁵⁰ By balancing the interests of the driver and the State, and not requiring individualized suspicion of the passenger,⁵¹ the Court viewed the police officer’s effectiveness as of the utmost importance.⁵²

The Court further gives several theories, in support of its holding that are not explained, nor supported through past case history, such as its reference to the existence of a conspiracy theory.⁵³ The Court also asserts another hypothetical situation in which Aa criminal may be able to hide contraband in a passenger’s belongings as readily as in other containers in the car . . . [even] without the passenger’s knowledge or permission.⁵⁴

Ultimately, the Court’s determination rests on the need for a substantial rule governing the passenger’s belongings. The majority’s decision reveals that it is either not confident in an officer’s ability to discern who the packages belong to, and it fears an increase in litigation based on individualized suspicion of packages in a car.⁵⁵ In as much, the Court declared that “[t]he sensible rule . . . is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car.”⁵⁶ *Houghton* and *Young* were subsequently taken into custody on felony drug charges.⁵⁷

C. *Breyer’s Concurring Opinion*

48. *Id.* at 299.

49. *Id.* at 301 (citing *Ross*, 456 U.S. at 824).

50. *Id.* at 301 (citing *Di Re*, 332 U.S. at 581); *Ybarra v. Illinois*, 444 U.S. 85 (1979).

51. *Houghton*, 526 U.S. at 313 n.4. The dissent said that the majority “crafted an imaginative footnote” claiming that the basis for the *Di Re* decision lay in the “intrusive character of the search” and “not on *Di Re*’s status as a mere occupant of the vehicle and the importance of individualized suspicion.” *Id.*

52. *Id.* at 304 (citing *Carney*, 471 U.S. at 390).

53. *Id.* “A[a] car passenger, unlike the unwitting tavern patron in *Ybarra*, will often be engaged in a *common enterprise* with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.” *Id.* (citing *Maryland v. Wilson*, 519 U.S. 408, 413-414 (1997)) (emphasis added).

54. *Id.* at 305; see *Rawlings v. Kentucky*, 448 U.S. 98, 102 (1980).

55. *Id.*

56. *Houghton*, 526 U.S. at 305.

57. *Id.* at 303.

The concurring opinion, authored by Justice Breyer, agreed with the majority's reasoning, that "[i]f the police must establish a container's ownership prior to the search of that container . . . the resulting uncertainty will destroy the workability of the bright-line rule set forth in" *Ross*.⁵⁸ Despite this agreement, Breyer recognized a few limitations to the majority's analysis.⁵⁹ Breyer points out that the analysis "obviously" only applies to automobile searches and only the search of containers in a car and not to the persons in that car.⁶⁰

More importantly, Justice Breyer also opines that a purse is a "special container," but given that the purse was not with Houghton at the time of the search, any "special" privilege accorded to the container is lost.⁶¹ Breyer stated that had Houghton kept her purse with her, the purse "like a man's billfold . . . might amount to a kind of outer clothing which under the Court's cases would properly receive increased protection."⁶²

D. *The Dissenting Opinion*

Finally, Justice Stevens' dissenting opinion, joined by Justices Souter and Ginsberg,⁶³ took issue with several of the underlying principles of the majority's decision. In his opinion, Stevens sees no difference between the intrusion in the *Di Re* decision where there was a search of the individual's pockets and the search of Houghton's purse.⁶⁴ The lack of comparison between these containers is emphasized in the *Ross* decision, where the majority finds its basis.⁶⁵ There the search was defined by the object of the search and not the place where the object was found; therefore, there is no need to differentiate between containers.⁶⁶ Finally, in balancing the private interests versus the need for effective law enforcement, Stevens disagrees with the

58. *Id.* at 307 (Breyer, J., concurring).

59. *Id.* at 308.

60. *Id.*

61. *Id.*

62. *Houghton*, 526 U.S. at 303 (citing *Di Re*, 332 U.S. at 587). Although it may be true that the if the purse was with Houghton may constitute outer clothing, Justice Breyer recognized that all searches are not foreclosed, as the police may still perform a "limited search of the outer clothing" for weapons. *Id.* (quoting *Terry*, 392 U.S. at 24).

63. *Houghton*, 526 U.S. at 310 (Stevens, J., dissenting).

64. *Id.* at 309.

65. *Id.* (citing *Ross*, 456 U.S. at 824).

66. In *Ross*, "[w]e . . . disapproved of a possible container based distinction between a man's pocket and a woman's pocketbook. Ironically while we concluded in *Ross* that 'probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab, the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle.'" *Id.* (quoting *Ross*, 456 U.S. at 824).

majority's lack of confidence in the police to make individualized probable cause determinations.⁶⁷

IV. ANALYSIS

This analysis sets out to dispel the majority's opinion in accordance with Justice Stevens' dissenting opinion,⁶⁸ the opinion of the Wyoming Supreme Court,⁶⁹ and recent case history. Under the traditional automobile exception and the Fourth Amendment, the *Houghton* decision contradicts established case law.

A. *Inconsistencies With Past Decisions*

In *Carroll*, *Ross*, *Acevedo*, and the plethora of other automobile exception doctrine cases, several factually distinguishable elements were found to pertain to the search of a driver's belongings inside the car with no reference to a passenger or the passenger's individual interests. Furthermore the Court does not set tangible limits on the scope of the search, as the factual situations did not present themselves for such a limitation. These boundaries are foretold briefly in *Ross* where it states: "the scope of a warrantless search based on probable cause is not narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause."⁷⁰ This inevitably begs the question of whether the scope of a warrantless search of a car includes the personal belongings of a passenger or a guest?⁷¹

1. The Carroll Rule

One of the fundamental problems of the Court's treatment of *Houghton* lies in the *Carroll* decision—the foundation for the automobile exception.⁷² The legality of the seizure of alcohol in *Carroll* was the result of the promulgation of the National Prohibition Act. Section 26, title 2 of the Act, in pertinent part states:

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any . . . automobile . . . or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors being transported or possessed

67. *Houghton*, 526 U.S. at 306 n.2.

68. *Id.* at 309-13.

69. *Houghton*, 956 P.2d at 363.

70. *Houghton*, 956 P.2d at 366 (quoting *Ross*, 456 U.S. at 823); *see also* State v. Kelly, 268 P. 571 (Wyo.App. 1928) (holding that a court should be satisfied that probable cause exists before a search is allowed).

71. *Id.*

72. *See supra* notes 12-17 and accompanying text.

illegally shall be seized by an officer, he shall take possession of the vehicle . . . or any other conveyance, and *shall arrest any person in charge therein.*⁷³

From the Prohibition Act is passage the automobile exception to search an automobile based on probable cause was born. The passage is limited, however, to the driver, as evidenced by a strict reading of the end of the paragraph.⁷⁴ Since the founding of the automobile exception is statutorily limited to the driver of the car, the Supreme Court's extension of the automobile exception to passengers in the present case is therefore misplaced.

2. Individual Rights

A "Terry" stop and frisk was established as a narrow exception to the Fourth Amendment to allow police officers to conduct a limited, protective search for weapons.⁷⁵ This doctrine aids the law enforcement officer in securing himself from unnecessary harm if the officer reasonably believes he is in such danger.⁷⁶ If the officer conducts a search beyond the narrow limits of *Terry*, the search becomes a search for evidence and is subject to the probable cause standard. If this is the case, it must be remembered that probable cause must be individualized and cannot be based on the existence of probable cause to search another on the premises.⁷⁷

The starting point for an analysis of the rights of passengers as the *Terry* and probable cause standards are applied, lies in two Supreme Court cases: *U.S. v. Di Re*⁷⁸ and *Ybarra v. Illinois*.⁷⁹ In *Ybarra*, the police executed a valid search warrant against the proprietor of a bar and the bar itself, but carried the

73. 42 Stat. 222, 223, c. 134, §26, title 2 (Comp. St. Ann. Supp. 1923) (repealed 1933) (emphasis added).

74. "But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver." *Houghton*, 526 U.S. at 313 n.4 (Stevens, J., dissenting) (quoting *Di Re*, 332 U.S. at 586-87).

75. *Terry*, 392 U.S. at 26.

76. *Id.*; *Dunaway v. New York*, 442 U.S. 200, 210 (1979). "The Court stressed the limits of it holding: the police officer's belief that his safety or that of others is in danger must be objectively reasonable - based on reasonable inferences from known facts—so that it can be tested at the appropriate time by 'the more detached, neutral scrutiny of a judge and the extent of the intrusion must be carefully tailored to the rationale justifying it.'" *Id.* at 210 n.11.

77. *Ybarra*, 444 U.S. at 91.

78. *Di Re*, 332 U.S. at 581 (finding invalid a search of a defendant where he was present inside a car when an arrest of the driver was made, in which a subsequent search of his person produced contraband on defendant).

79. *Ybarra*, *supra* note 51.

search too far when the bar's patrons were personally searched.⁸⁰ In reversing Ybarra's conviction, the Court held that the Fourth and Fourteenth Amendments protect the legitimate expectations of persons, not places.⁸¹ Therefore it would not have mattered if Ybarra was in a bar or some other place because the protection against unreasonable search and seizure is a personal right, not defined by one's location.

Furthermore, the *Di Re* decision condemns the search of a person for merely being in a car where probable cause existed.⁸² Michael Di Re, a passenger in a car, was convicted of knowingly possessing gasoline ration coupons in violation of the Second War Powers Act of 1942.⁸³ The police searched the car pursuant to an informant's tip pertaining only to Buttitta's, the driver's, counterfeit coupons.⁸⁴ The police subsequently searched Buttitta, Di Re, and the informant, Reed, who was in the back seat of the car.⁸⁵ Di Re was found to have ration coupons during a search of his body, after he was taken to the police station and told to empty his pockets.⁸⁶ The Court concluded that there was an unjustified search given the absence of probable cause to search his person.⁸⁷ This determination was based on the notion that one "by mere presence in a suspected car, [does not lose] immunities of his person to which he would otherwise be entitled."⁸⁸ The Court disallowed searches of one's person on anything less than probable cause, regardless of whether one is a passenger in a car, but the Court failed to extend the decision into the question of privacy interests in a passenger's belongings because the issue was not presented before the Court.

Following the *Ybarra* and *Di Re* decisions the *Ross* decision which is authored by Stevens noted that the scope of the search is defined by the "object of the search and the *places in which there is probable cause to believe that it may be found.*"⁸⁹ It must be remembered that *Ross* was factually limited to the case where was only one person in the car who was searched, following an informant's tip.⁹⁰

Stevens' dissent in *Houghton* emphasizes that the *Houghton* majority misconstrues Stevens' own majority opinion in *Ross*, because the *Houghton*

80. *Id.* at 90.

81. *Id.* at 91.

82. *Di Re*, 332 U.S. at 583-87.

83. *Id.* at 583.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Di Re*, 332 U.S. at 585.

88. *Id.* at 230; *see Sibron*, 392 U.S. at 62 (finding that persons in a parked car are no less likely than those sitting elsewhere "to have been talking about the World Series," which is not suspicious by itself).

89. *Houghton*, 526 U.S. at 310 (citing *Ross*, 456 U.S. at 824) (emphasis added).

90. *Ross*, 456 U.S. at 799.

Court's application of *Ross* merely limits the scope of the search to the "object of the search."⁹¹ Stevens also stated that the scope of the search is also limited by the place "in where there is probable cause to believe that [the object] may be found." Stevens' dissent undermines the majority's distinction of the *Di Re* decision of being merely limited to searching one's person.⁹² When superimposing Stevens' interpretation of *Ross* on the *Di Re* and *Ybarra* cases, where there is no probable cause to search a person's container including his pockets, despite an officer's close proximity to the accused, there is no valid search.

Applying this axiom to *Houghton*, the search of Houghton's purse was misguided. Similar to *Di Re*, the only basis for the officer's probable cause was Houghton's proximity to Young, and not any individualized suspicion. There was no reason to suspect "foul play," nor was there reason to suspect that "the object of the search" was present in Houghton's belongings;⁹³ therefore, there was no probable cause to believe the any drugs were in Houghton's bag.

3. Other Flaws

There are also a number of other flaws with the majority's decision in *Houghton*. Justice Scalia's opinion argues that the *Di Re* decision is distinguishable from the present case because Houghton's purse was simply not part of her clothing; thus Houghton was not subject to the same intrusion that *Di Re* was exposed to with a search of his body.⁹⁴ Justice Breyer recognized the inherit flaw in this proposition. The search of the purse could have been invalidated by Houghton simply keeping possession of the purse. Justice Scalia actually brings this dilemma upon himself in a footnote where he attempts to undermine Justice Stevens' dissent. Scalia stated that Aif the dissent thinks pockets and clothing do not count as part of the person, it must believe that the only searches of the person are strip searches.⁹⁵ Recognizing the Court's reluctance to distinguish between different kinds of containers, Justice Breyer stated "it would not matter if a woman's purse, like a man's billfold, were attached to her person. The purse might then amount to a kind of 'outer clothing' which under the Court's cases [i.e., *Di Re*] would properly receive increased protection."⁹⁶

If Houghton was in possession of her purse, the only means for a search to be legally carried out on Houghton would have been pursuant to the automatic

91. *Houghton*, 526 U.S. at 310 (citing *Ross*, 456 U.S. at 824).

92. The majority interprets *Di Re* to require separate probable cause to search a car passenger's body, but not separate probable cause to search a passenger's belongings. *Id.* at 303.

93. *Mimms*, 434 U.S. at 113.

94. *Houghton*, 526 U.S. at 303.

95. *Id.* at n.1.

96. *Id.* at 308 (Breyer, J. concurring).

companion rule. The courts of appeals have debated the extent of this doctrine as it applies to pat-downs of an arrestee's companion.⁹⁷ Despite the fact that the basic issue of search incident to an arrest,⁹⁸ which the automatic companion rule is premised on is directly inapplicable to the *Houghton* case as there was no arrest of the driver, Young,⁹⁹ the relevance requires a further examination of individualized suspicion. The automatic companion rule, adopted by the Ninth Circuit following *Terry*, established a bright-line rule that an officer is entitled to do a protective search of an arrestee's companion based solely on that individual's relationship with the arrestee.¹⁰⁰ The Fifth, Sixth, and Eighth Circuits have since rejected this rule and instead adopted a "totality of the circumstances test," that would only allow a search of the companion based on reasonable suspicion, consistent with the *Terry* doctrine.¹⁰¹ Consequently, "where there is a valid search incident to an arrest, [case law does] not support the proposition that the search of the passenger compartment of an automobile . . . extends to passengers in a car driven by one who is being arrested pursuant to a warrant."¹⁰²

Despite the relatively high level of disagreement among the Courts of Appeals, the Supreme Court has yet to act directly on the issue. Instead, the Court has faceted general limitations in order to maintain the "narrow scope" of *Terry*.¹⁰³ The best example of this is in *Ybarra* where the Court refused to

97. See *Perry v. State*, 927 P.2d 1158 (Wy. 1996). The Wyoming Supreme Court adopted the automatic companion rule but a dissent was filed claiming "[t]he automatic companion rule replaces the fine line of the *Terry* reasonable suspicion requirement with a broad brush, rendering virtually any search of an arrestee's companions reasonable." *Id.* at 1167.

98. See *supra* note 9.

99. *Houghton*, 956 P.2d at 370 n.5.

100. Jeanne C. Serocke, *The Automatic Companion Rule, An Appropriate Standard to Justify The Terry Frisk of an Arrestee's Companion?*, 56 *FORDHAM L. REV.* 917, 924 (1988); see *United States v. Vaughan*, 718 F.2d 332 (9th Cir. 1983) (holding that under the "bright-line" test that the officer had the right to do a protective search of Vaughan, after the arrest of the driver, but the officer exceeded his authority by searching the contents of Vaughan's briefcase); *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971) (the court affirmed a search an automatic search after stopping the arrestee's car on an arrest warrant for postal violations, the officer also searched the wife, but the court said the officer went too far when searching the woman's purse, as being a reasonable place for a weapon).

101. *Id.*; see *United States v. Bell*, 762 F.2d 495 (6th Cir. 1985) (declining to follow *Berryhill*) (finding that an automobile passenger should not automatically be subject to a pat down search, but the propriety of such a search depends on the "totality of the circumstances"); *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986).

102. *Commonwealth v. Shiflet*, 670 A.2d 128, 131 (Pa. 1995) (quoting *Bell*, 762 F.2d at 499 n.5).

103. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 210 (1979). "The Court stressed the limits of it holding: the police officer's belief that his safety or that of others is in danger must be objectively reasonable—based on reasonable inferences from known facts—so that it can be tested at the appropriate time by 'the more detached, neutral scrutiny of a judge' and the extent of the intrusion must be carefully tailored to the rationale justifying it." *Id.* at 210 n.11.

uphold the protective frisk of a customer in a bar, where there was no basis for any suspicion other than presence in the bar.¹⁰⁴ In addition, given the Court's attempt to distinguish *Di Re*, finding that the a search of a person is highly intrusive when balanced against the interests of the law enforcement officer,¹⁰⁵ it is doubtful that the Court would ever uphold a search of the passenger, where the driver is arrested and there is no reasonable suspicion to search the passenger.

B. A Better Method of Dealing With the Situation

1. Traditional Search Warrant Tests as Applied to Visitors

The various states and federal circuits have developed three distinct tests governing probable cause searches of the belongings of a visitor, pursuant to a search warrant.¹⁰⁶ Each test supports the notion of individualized suspicion, although none of the tests have been adopted by the Supreme Court.

a. The Physical Proximity Test

Courts have based the validity of a search of a guest's belongings on his or her physical possession of the object that is searched, at the time the search is executed.¹⁰⁷ The court in *Teller* upheld a search and seizure of the contents of a woman's purse pursuant to a warrant authorizing a search of the premises.¹⁰⁸ But this rule has been criticized in other jurisdictions¹⁰⁹ because courts have found that an individual assumes an expectation of privacy in their purses or

104. *Ybarra*, 444 U.S. at 93.

105. *Houghton*, 526 U.S. at 303. "Even a limited search of the outer clothing. . .constitutes a severe though brief, intrusion upon cherished personal security, and it must surely be annoying, frightening, and perhaps humiliating experience." *Id.* (quoting *Terry*, 392 U.S. at 24-25).

106. *Houghton*, 956 P.2d at 367.

107. *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968), *cert. denied*, 393 U.S. 937 (1968) (finding a valid search was conducted where a woman entered her home during the execution of a search warrant and placed her purse down on the foot of her bed where it was subsequently searched and illicit drugs were found); *see Walker v. U.S.*, 327 F.2d 597 (D.C. 1963), *cert. denied*, 377 U.S. 956 (1963) (holding that a defendant's purse found on a bed was considered another household item, allowed to be searched with in the scope of the warrant); *Commonwealth v. Reese*, 549 A.2d 909, 911 (Pa. 1988) (finding it would neither be practical to have police officers in the execution of a search warrant to ask individuals who the various items belong to, nor would it be reasonable to expect an honest response).

108. *Id.* at 497.

109. *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973). These jurisdictions determined that the "extent a recognizable personal effect not currently worn, but apparently temporarily put down, such as a briefcase, falls outside the scope of a warrant to search the premises, we would be better advised to examine the relationship between the person and the place." *Id.* at 432.

wallets placed next to them.¹¹⁰ “The practical result of such a rule may be to encourage the government to obtain search warrants for places frequented by suspicious individuals, such as infamous bars, then lie in wait for those individuals to enter and make themselves comfortable.”¹¹¹

b. The Relationship Test

An alternative and less criticized analysis is the relationship test which examines the relationship between the owner of the personal property and the place to be searched. In this test, an individual is considered to have a separate interest in his or her property as a mere visitor; therefore, the visitor will not be subject to a search warrant.¹¹² This rule is faceted on the premise that a search warrant establishes “a protective boundary . . . [which] encompasses those extensions of a person which he reasonably seeks to preserve as private, regardless of where he may be.”¹¹³

In *Bonds v. State*, the Georgia Court of Appeals upheld a search of a purse pursuant to a “no-knock” warrant to search a suspected drug dealer’s home.¹¹⁴ The warrant was obtained after observation of the premises and tips from an informant.¹¹⁵ Upon executing the warrant, the police searched the defendants purse.¹¹⁶ The court found that the search of the purse was valid as there was a “*nexus between [the defendant] and the criminal activity* which gave rise to the warrant.”¹¹⁷

c. The Notice Test

The Wyoming notice test appears to be the most logical of the tests enumerated by the Wyoming Supreme Court. It is a common assertion of the law that a police officer does not have a duty to inquire into the ownership of property where the search is being executed.¹¹⁸ This test allows officers to

110. *Id.* at 432; *State v. Jackson*, 873 P.2d 1166, 1170 (Utah Ct. App. 1994) (Orme, J., dissenting) (rejecting the physical proximity test).

111. *Id.* at 431.

112. *Id.*; *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987) (the prevailing circumstances of the search suggested that the officers could have been aware at the time of the search that the defendant was not a mere visitor or passerby since it appeared that he resided on the premises); *United States v. Giwa*, 831 F.2d 538, 544 (5th Cir. 1987).

113. *Id.* at 432. “The Fourth Amendment protects people not places.” *Katz*, 389 U.S. at 352.

114. 372 S.E.2d 448 (Ga.Ct.App. 1988).

115. *Id.* at 450.

116. *Id.*

117. *Id.* at 452 (emphasis added).

118. *Carman v. State*, 602 P.2d 1255, 1262 (Alaska 1979) (finding no notice of the purse belonging to the visitor because there was a woman living on the premises); *Commonwealth v. Reese*, 549 A.2d 909 (Pa. 1988) (finding it to be unreasonable to require police officers who are executing a warrant to inquire as to the ownership of the personal property). *Id.* at 911.; *State v. Wills*, 524 N.W.2d 507 (Minn. Ct. App. 1994); *Houghton*, 956 P.2d at 368; *State v. Nabarro*, 525

assume that all containers on the premises (or for the purpose of this note: in the car) can be searched unless the officer knows or should know that the container belongs to one that is not subject or within the realm of the probable cause of the search.¹¹⁹ “The notice test provides clear guidance and can be quickly implemented in an emergency situation, but does not necessarily abrogate individualized Fourth Amendment protection.”¹²⁰ A widely accepted version of this test is California’s *McCabe* test.¹²¹ The court allowed police, while executing a search warrant, to search the visitor and his effects on the assumption that the effects belong to the owner of the premises, where: (1) the visitor’s personal items might serve as a plausible repository for the object of the search, unless officers know the property belongs to the visitor; (2) the officers know the property belongs to the visitor, they may not rely on the authority conferred by the search warrant even though it is plausible repository for the contraband; and (3) someone within the premises has had the opportunity to conceal the contraband within the personal effects of the visitor immediately prior to the execution of the search warrant, officers may nonetheless conduct the search.¹²²

An example of this can be found in *Hayes v. State*.¹²³ There the police executed a search warrant for “Mark,” who owned the residence.¹²⁴ The only person in the home, however, was the defendant, who was asleep on the couch, while the rest of the beds were made.¹²⁵ Without inquiring into the defendant’s identity, the police searched the suitcase next to where he was sleeping.¹²⁶ Illegal drugs were found in the suitcase,¹²⁷ but the court concluded that a search of the defendant was inconsistent with any belief that the defendant was a resident.¹²⁸

P.2d 573 (Haw. 1974). “[W]ithout notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within the premises lawfully subject to search under a warrant are a part of those premises for the purpose of executing the warrant.” *Id.* at 577.

119. *Id.* at 370.

120. *Houghton*, 956 P.2d at 370.

121. *People v. McCabe*, 192 Cal.Rptr. 635, 636-37 (Cal. App. 1983).

122. *Id.*; *State v. Thomas*, 818 S.W.2d 350 (Tenn. Crim. App. 1991) (affirming the McCabe rule where upon entering a residence to execute a search warrant, there was no opportunity for the defendant to hide cocaine in a purse, belonging to the only female on the premises, therefore the search of the purse was illegal under the “notice test”); *State v. Nabarro*, 525 P.2d 573 (Haw. 1974); *State v. Kurtz*, 612 P.2d 749 (Or. Ct. App. 1980); *Houghton*, 956 P.2d at 368.

123. 234 S.E.2d 360 (Ga. Ct. App. 1977).

124. *Id.* at 361.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Hayes*, 234 S.E.2d at 363.

2. Application of the Tests to *Houghton*

The Wyoming Supreme Court was correct to invoke the notice test in its application to passengers in automobiles¹²⁹ because its ruling more closely parallels the U.S. Supreme Court's prior conclusions. One such notion is "the proper scope of a warrantless search based on probable cause [should be] 'no broader' than the proper scope of a search authorized by a warrant supported by probable cause."¹³⁰ There is no reason to believe that a search authorized by a warrant, because of Young possession of the drugs would extend to a search of Houghton's belongings, other than being in the same automobile as the one who possesses the drugs. In addition, it should be remembered that because one is dealing with an automobile, an automobile is not a "talisman" for abandoning individual rights.¹³¹ The Court should keep in mind that the distinguishing feature of the criminal justice system necessitates "principled, accountable decision making in individual cases,"¹³² which bright line rules eliminate.¹³³

In addition, the notice test complies with the Supreme Court's basic precepts under the automobile exception's balancing test of weighing the effectiveness and safety of the police against individual rights.¹³⁴ These considerations will not be hindered by utilizing the notice test. The test will yield an assumption that every piece of property will still be able to be searched, absent the officer knowing or has reason to know that the bag does belong to the suspect. Therefore the passenger's interests are protected by applying the traditional warrant requirements which would prevent an overly

129. The Wyoming Supreme Court's application of the notice test seems to be the first time this test has been applied to automobiles. But since Wyoming has handed down its opinion in *Houghton*, the Washington Supreme Court has again used a similar analysis. See *State v. Parker*, 987 P.2d 73, 82 (Wa. 1999).

130. *Houghton*, 526 U.S. at 312 (quoting *Ross* 456 U.S. at 825). "By a parity of reasoning with that on which the government disclaims the right to search occupants of a house, we suppose the government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?" *Houghton*, 526 U.S. at 312 (quoting *Di Re*, 332 U.S. at 587).

131. *Coolidge v. New Hampshire*, 234 U.S. 49, 57 (1973); *Long*, 463 U.S. at 1050 ("[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

132. *Gonsalves*, 711 N.E.2d at 113 (quoting *Wilson*, 519 U.S. at 422 (Kennedy, J., dissenting)).

133. *Id.*; see also *Goettl v. State*, 842 P.2d 549, 558 (Wyo. 1992) (Urbigkit, J., dissenting) (advocating under the Wyoming State Constitution, independent review instead of a bright-line rule); see also *State v. Webster*, 824 P.2d 768 (Ariz. Ct. App. 1991) (Livermore, J., dissenting) (finding that the seizure of passengers, as to whether they should remain in the car or not, requires an individual determination based on the circumstances).

134. *Houghton*, 526 U.S. at 300.

eager officer from taking advantage of the automobile exception, while forcing the officer to make accountable decisions depending on the situation.

Also, the Court's fear that the absence of a bright line rule would cause a proliferation of litigation¹³⁵ is short-sighted. Realistically speaking, most defendants challenge searches in order to exclude evidence. The notice test may in fact *aid* in easing a courts' dockets by excluding a limited number of ill-advised searches, instead of condoning a cavernous right to search. In the end the notice test will not be a bright line rule but closer to a fairly-bright line test.

Where individual decision making is applied to *Houghton*, the notice test would dictate a practical result as an individual's interests are safeguarded while still protecting the efficiency of the police search. In *Houghton's* situation, she would be afforded this protection because there was no reason to suspect that her purse belonged to Young. Using the *McCabe* Test one observes: (1) that while the purse may "serve as a plausible repository of the object of the search"; (2) using common sense the officer should be on notice, and in fact "acknowledged that [the bag] was a 'lady's purse' and that 'men do not carry purses;'"¹³⁶ and (3) there was no "reason to believe"¹³⁷ someone had the opportunity to conceal any contraband in the purse.¹³⁸ Therefore, the search of her purse and the fruits of the search should be suppressed.

The other tests, the proximity and relationship tests, are admittedly unworkable standards under the automobile exception. The proximity test, would merely require a passenger to grab the object of the search as a police officer detains the driver on a routine traffic stop, and in turn claim an expectation of privacy over the container; therefore, the effectiveness of the police would be hindered. Furthermore, the relationship test is also impractical in application to automobiles since its basic precepts involve the persons relationship to the suspect and the place to be searched. The relationship test would cause the counter result from the proximity test, where essentially everyone in a car could be searched. This arises because the officer, and for that matter the Court, could assume that the driver and the passenger were engaged in a "common enterprise."

135. *Id.* at 303.

136. *Houghton*, 956 P.2d at 370.

137. *Id.*

138. The Wyoming Supreme Court noted that the prosecution went out of its way to prove that nothing could have been placed in *Houghton's* purse based on *Houghton's* claim as part of her defense that one of the wallets found in the purse did not belong to her. *Houghton*, 956 P.2d at 371.

V. CONCLUSION

As the principles of the basic doctrines are misconstrued by the Court, one's rights are continually being narrowed as the Court is trying to assert an interest in the efficiency of the police. Applying the notice test provides a safe balance, which helps to protect the concerns of the Court while applying reasoned judgement. In the words of Justice Stevens in his dissent in *Wilson*, one can only surmise "[h]ow far this ground breaking decision will take us . . . I fear, however, that it may pose a more serious threat to individual liberty than the Court realizes."¹³⁹ One can only hope that the Court revisits the issue in the near future in order to reaffirm the protections of the Constitution and to safeguard the rights of your spouse and child.

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139. *Wilson*, 519 U.S. at 422 (Stevens, J., dissenting).

140. J.D., St. Louis University, 2001; B.A., University of Wisconsin - Madison, 1997. The author would like to dedicate this note to his parents, brothers, and sister for their support and patience during the author's years in law school. In addition, many thanks go out to Professor Stephen Thaman for his guidance. Finally, the author would like to thank Greg, Joel, and Aaron for their inspiration in writing this article.