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## Constitutional Law - The United States Supreme Court Holds That Police Officers May Order Passengers out of a Lawfully Stopped Vehicle without Reasonable Suspicion of Criminal Activity - Maryland v. Wilson

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## Case Notes

**CONSTITUTIONAL LAW—The United States Supreme Court holds that police officers may order passengers out of a lawfully stopped vehicle without reasonable suspicion of criminal activity. *Maryland v. Wilson*, 117 S. Ct. 882 (1997).**

### INTRODUCTION

Trooper David Hughes of the Maryland State Police was patrolling near Baltimore on June 8, 1994. Around 7:30 p.m., he noticed a white 1994 Nissan Maxima speeding southbound on I-95. Hughes got behind the car and “paced”<sup>1</sup> it for about a mile.<sup>2</sup> The car was going nine miles over the speed limit<sup>3</sup> and was missing its rear license plate.<sup>4</sup> Hughes activated his siren and lights, but the car did not slow down or stop for about one and a half miles. During the “chase,” Hughes noticed that there were three occupants in the car. The two passengers were constantly looking back at him suspiciously and then disappearing behind their seats, out of Hughes’ view. Eventually, the car stopped and the driver, a Mr. McNichol, hurriedly stepped out of the car and met Hughes behind their vehicles. McNichol appeared extremely nervous. After explaining why he had stopped the car, Hughes asked McNichol for his driver’s license and registration card. McNichol produced a valid Connecticut driver’s license and then stated that the rental papers were in the car. Hughes instructed him to retrieve the papers and McNichol got back into the driver’s seat.<sup>5</sup>

Hughes noticed that the passenger in the right front seat, a Mr. Jerry L. Wilson, was sweating and appeared extremely nervous. With the driver still in the car, Hughes ordered Wilson to exit the vehicle.<sup>6</sup> When asked why he did this, Hughes answered that with the suspicious movement inside the vehicle, he suspected that there could be a handgun or other weapon and wanted each occupant out in turn so that he could talk to each one individually. Officer Hughes cited safety as the primary reason for ordering Wilson

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1. The practice of an officer in a squad car following a vehicle for a short period of time in order to determine a constant rate of speed is referred to, in the colloquial usage, as pacing.

2. *State v. Wilson*, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995).

3. 64 miles-per-hour in a 55 miles-per-hour zone. *Id.*

4. There was a paper tag barely hanging onto the back of the car which said “Enterprise Rent-A-Car.” *Id.*

5. *Id.*

6. *Id.*

out of the vehicle.<sup>7</sup>

As he stepped out of the vehicle, Wilson dropped a quantity of crack cocaine onto the ground.<sup>8</sup> Hughes drew his weapon and placed Wilson under arrest.<sup>9</sup> Wilson was charged with possession of cocaine with intent to distribute.<sup>10</sup> Before trial, Wilson moved to exclude the cocaine from evidence because Hughes had unreasonably seized him by ordering him from the vehicle.<sup>11</sup>

The Baltimore County court had to decide if Trooper Hughes' actions constituted a violation of Wilson's Fourth Amendment rights against being unreasonably seized when, as a passenger, he was ordered to leave the vehicle.<sup>12</sup> The State of Maryland argued that Hughes acted properly under *Terry v. Ohio*,<sup>13</sup> which allows officers to stop and search suspects if there is "particularized suspicion that a crime has occurred, is then occurring, or is about to occur."<sup>14</sup> Under *Terry*, Hughes could stop Wilson for questioning or frisk him for weapons if he had any particular fear or suspicion.<sup>15</sup> The court held that Hughes had no such fear and acted with no reasonable suspicion that Wilson was armed and dangerous. Ordering Wilson from the car under these circumstances was a violation of his Fourth Amendment rights.<sup>16</sup>

The State then appealed the suppression of evidence to the Court of Special Appeals of Maryland. The Court of Special Appeals upheld the county court's decision and refused to permit the crack cocaine into evidence against Wilson.<sup>17</sup> The State of Maryland petitioned the Court of Appeals of Maryland for *certiorari*, but the petition was denied.<sup>18</sup> The state of Maryland then petitioned for *certiorari* to the United States Supreme Court, and the Court granted *certiorari*.<sup>19</sup> The Court reversed the decision to suppress the evidence, holding that passengers, as well as the driver, pose a potential risk to a patrolman and that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."<sup>20</sup>

7. *Id.* at 3.

8. *Id.* at 2.

9. *Id.* at 3.

10. *Maryland v. Wilson*, 117 S. Ct. 882, 884 (1997).

11. *Id.*

12. *Wilson*, 664 A.2d at 3.

13. 392 U.S. 1 (1968).

14. *Wilson*, 664 A.2d at 3.

15. *Id.*

16. *Id.* at 4.

17. *Id.* at 15.

18. *State v. Wilson*, 667 A.2d 342 (Md. Ct. Spec. App. 1995).

19. *Maryland v. Wilson*, 116 S. Ct. 2521 (1996).

20. *Maryland v. Wilson*, 117 S. Ct. 882, 886 (1997).

This case note will examine the evolution of this issue in the Supreme Court, the shortcomings of the *Wilson* opinion, cases which have cited *Wilson* as binding precedent and potential abuses under *Wilson*. It will further examine the way the Wyoming Supreme Court has dealt with this issue and the practical implications of this case to trial practice in Wyoming. This note concludes that although *Wilson* was correctly decided for this particular situation, the holding was over inclusive to the point that the rights of all automobile passengers are in jeopardy of regular and unreasonable invasion by law enforcement officers.

#### BACKGROUND

The U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . .”<sup>21</sup>

#### *United States Supreme Court*

In *Terry*,<sup>22</sup> the Supreme Court held that a law enforcement officer may stop and search an individual if there is a probability that a crime is about to be committed.<sup>23</sup> In *Terry*, a veteran law enforcement officer, noticed three suspicious persons across the street engaging in an activity that made the officer believe that they were “casing a job.” Approaching them for further investigation, the officer identified himself and began questioning the three individuals. When he got a mumbled answer, he grabbed the suspect nearest him, spun him around and frisked the outside of his overcoat to see if he carried a concealed weapon.<sup>24</sup> A revolver was found and the Court ruled that such a search was permissible because the officer had reason to believe that the suspect might be armed and posing a threat to the officer.<sup>25</sup> The Court stated that it is “unreasonable to require that police officers take unnecessary risks in the performance of their duties.”<sup>26</sup> Evidence located during searches where the officer finds that it is “necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized” may be admitted against the defendant.<sup>27</sup> So long as the officer carefully restricts his search “to what was appropriate for discovery of the particular items which he sought,” it is an appropriate search and the suspect’s rights have not been violated.<sup>28</sup> In other

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21. U.S. CONST. amend. IV.

22. 392 U.S. 1 (1968).

23. *Id.* at 28.

24. *Id.* at 6.

25. *Id.* at 30.

26. *Id.* at 23.

27. *Id.* at 30.

28. *Id.*

words, once an officer has reason to believe that an individual may be armed, he can pat down the outside of a person's clothing to determine if there are hidden weapons but may not automatically conduct a full search of the person.<sup>29</sup>

In *Whren v. United States*,<sup>30</sup> the Court held that the "actual" motives of officers in conducting routine traffic stops are not subject to judicial review on Fourth Amendment grounds.<sup>31</sup> Whren and another petitioner were stopped by undercover police officers, after the officers observed the petitioners' vehicle violate several traffic laws.<sup>32</sup> Petitioners argued unsuccessfully that because driving is such a regulated activity, it is impossible to obey all traffic laws, and therefore police officers may be able to stop practically any motorist. With this power, officers may be able to target certain motorists because of impermissible factors, such as race.<sup>33</sup> Justice Scalia, writing for the Court, stated that the reasonableness of the stop was not dependent upon any actual motivations held by the police officers, but upon objective facts which allowed them to articulate a reasonable suspicion.<sup>34</sup>

### *Relating to Drivers*

Twenty years before the Court was asked to decide if an officer could routinely order a passenger out of a vehicle which had been stopped for a routine traffic violation, the Court in *Pennsylvania v. Mimms*<sup>35</sup> decided whether law enforcement officers could order a driver out of a vehicle under similar circumstances. When Harry Mimms was pulled over by an officer, he was asked to exit the vehicle<sup>36</sup> and produce his driver's license and vehicle registration. The officer noticed a bulge under Mimms' jacket and immediately frisked him and found a revolver. Mimms was later convicted of illegal possession of a firearm. The Pennsylvania Supreme Court overturned the conviction, saying that the officer acted correctly in searching the suspect, but had no right to initially order him from the car. Had Mimms not left the vehicle, there would have been no suspicion and no arrest.<sup>37</sup>

On appeal, the United States Supreme Court decided, *per curiam*, that it was "too plain for argument that . . . the safety of the officer is both le-

29. A limited search of this nature is referred to as a *Terry frisk*.

30. 116 S. Ct. 1769 (1996).

31. *Id.* at 1774.

32. *Id.* at 1772.

33. *Id.* at 1773.

34. *Id.* at 1774.

35. 434 U.S. 106 (1977).

36. The police officer who asked Mimms to step out of the vehicle had no reason to suspect foul play. It was his practice to ask all drivers to exit their vehicles after he stopped them. *Id.* at 109.

37. *Id.* at 107.

gitimate and weighty.”<sup>38</sup> The Court pointed out that even routine traffic stops can be dangerous for law enforcement officers. Citing *United States v. Robinson*,<sup>39</sup> the Court stated that “a significant percentage of murders of police officers occur when the officers are making traffic stops.”<sup>40</sup> Pointing to *Adams v. Williams*,<sup>41</sup> the Court cited a study<sup>42</sup> that suggested that thirty percent of police shootings occur when an officer is approaching a suspect seated in an automobile.<sup>43</sup> The Court further noted that the danger of accidental injury to an officer standing on the driver’s side of a stopped vehicle near moving traffic is also significant.<sup>44</sup> Given the weight of these hazards to police officers, the Court weighed the interest of officer safety against the “intrusion to the driver’s personal liberty occasioned . . . by the order to get out of the car.”<sup>45</sup> The Court held that because the driver is already lawfully stopped, there is little further inconvenience. The Court further noted that “[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.”<sup>46</sup>

In his dissent in *Mimms*, Justice Marshall noted that a police search was justified only when the officer expects foul play or senses an impending act of violence.<sup>47</sup> When nothing specific is suspected, the search is unreasonable.<sup>48</sup> Marshall held that there were no such suspicious circumstances in *Mimms* which would justify such a search.<sup>49</sup>

Justice Stevens, also dissenting, noted that to prevent arbitrary harassment, an officer should always be able to articulate a reasonable justification for searching an individual and to eliminate this requirement leaves “police discretion utterly without limits.”<sup>50</sup> Stevens further noted that such arbitrary activity on the part of law enforcement officers would open the door to showing different classes of citizens different treatment by individual law enforcement officers.<sup>51</sup>

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38. *Id.* at 110.

39. 414 U.S. 218, 234 (1973).

40. *Mimms*, 434 U.S. at 110.

41. 407 U.S. 143, 148 n.3 (1972).

42. Allen P. Bristow, *Police Officer Shooting—A Tactical Evaluation*, 54 J. CRIM. L. C. & P. S. 93 (1963).

43. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

44. *Id.* at 111.

45. *Id.*

46. *Id.*

47. *Id.* at 112.

48. *Id.* at 113.

49. *Id.* at 114.

50. *Id.* at 122.

51. *Id.*

The Court responded in a footnote to Justice Stevens' criticisms by stating that

[c]ontrary to the suggestion in the dissent of our Brother Stevens we do not hold today that 'whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car.' We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.<sup>52</sup>

### *Relating to Passengers*

Prior to *Wilson*, the Court never specifically addressed the issue of whether or not a police officer could automatically order a passenger out of a lawfully stopped vehicle.<sup>53</sup> By way of *dictum*, Justice Powell, in *Rakas v. Illinois*,<sup>54</sup> wrote that "this Court determined in [*Mimms*] that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made."<sup>55</sup>

### *Wyoming Supreme Court*

The language in the Wyoming Constitution, prohibiting unreasonable searches and seizures, is identical to the Fourth Amendment of the United States Constitution with only a minor change in punctuation.<sup>56</sup> In *Parkhurst v. State*,<sup>57</sup> the Wyoming Supreme Court acknowledged in *dictum* that passengers, as well as drivers, have an expectation of privacy while in a vehicle. After a homicide, police officers conducted an investigatory stop of a vehicle which matched the description of the one seen driving away from the crime scene.<sup>58</sup> After getting permission from the driver, Dennis Parkhurst, to search the trunk, the officers found what appeared to be the murder weapons and the suspects were immediately arrested and later convicted.<sup>59</sup>

The Wyoming Supreme Court stated that under the state's constitution, drivers do not give up their expectation of privacy when they get behind the

52. *Id.* at 111 n.6.

53. Brief of Respondent at 3, *Maryland v. Wilson*, 117 S. Ct. 882 (1997) (No. 95-1268) (on file with the *Land & Water Law Review*).

54. 439 U.S. 128 (1978).

55. *Id.* at 155 n.4.

56. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." WYO. CONST. art. 1, § 4.

57. 628 P.2d 1369 (Wyo. 1981).

58. *Id.* at 1372.

59. *Id.*

wheel.<sup>60</sup> The court further said that passengers can reasonably expect that the car in which they are a guest will “be free from state encroachment.”<sup>61</sup> The reason that Dennis and Derrick Parkhurst’s convictions for first degree murder and assault and battery with felonious intent were upheld was that they had consented to a search of the vehicle even after they were advised by an officer that they were free to consent or refuse the search.<sup>62</sup> In this case, the Wyoming Supreme Court acknowledged a passenger’s right to privacy while riding in a vehicle, a right which had not been recognized in the federal courts. *Parkhurst* has not been overruled.<sup>63</sup>

The Wyoming Supreme Court adopted the automatic companion rule in *Perry v. State*,<sup>64</sup> which allows officers to search the companion of an arrestee.<sup>65</sup> The automatic companion rule has not been applied by the Wyoming Supreme Court to include *Wilson* situations, where the person seized was not arrested.

### *Maryland v. Wilson*

In affirming the suppression of Wilson’s crack cocaine, the Court of Special Appeals of Maryland pointed out that the focus of *Mimms* allowing officers to order drivers from their vehicles was very narrow.<sup>66</sup> In *Mimms*, the Court exclusively focused on the rights of drivers and went out of its way to avoid discussing the “rights and vulnerabilities” of passengers.<sup>67</sup> The Maryland court also pointed out that the Court’s holding in *Terry* was that to precipitate a reasonable search, an officer had to be able to reasonably articulate the justification in “terms of a suspected crime.”<sup>68</sup>

Even though the court felt that his justification was shaky, Officer Hughes was able to articulate a reason for ordering Wilson out of the car. “[D]ue to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety.”<sup>69</sup> Even with this seemingly reasonable justification, the court ruled that Hughes was only trying to remove the suspect from the proximity of a suspected weapon. Because he was not trying to conduct a *Terry* frisk, it was unreasonable to

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60. *Id.* at 1374.

61. *Id.*

62. *Id.* at 1378.

63. For further information on Wyoming’s constitutional law, SEE ROBERT B. KEITER & TIM NEWCOMB, 7 THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE (1993).

64. 927 P.2d 1158, 1159 (Wyo. 1996).

65. *Id.* at 1163.

66. *State v. Wilson*, 664 A.2d 1, 5 (Md. Ct. Spec. App. 1995).

67. *Id.*

68. *Id.* at 3.

69. *Id.*



order Wilson out of the vehicle.<sup>70</sup>

While urging the Court to reverse the Maryland court's decision and admit the evidence, the State of Maryland argued that a "passenger in a car enjoys only minimal privacy and liberty interests because travel on the roadways is highly regulated."<sup>71</sup> Further, the passenger and the driver are equally delayed during a traffic stop. When this passenger is then asked to get out of the vehicle, he "suffers only a minor incremental intrusion upon his already diminished privacy and liberty interests."<sup>72</sup>

Counsel for Wilson exhorted the Court to uphold a passenger's right to privacy unless there is an articulable cause for an officer to search and seize him.<sup>73</sup> Counsel further argued that if this principle went unheeded, it would result in extending "unfettered discretion to the police and would unconstitutionally place the conduct of the police beyond judicial review."<sup>74</sup>

#### PRINCIPAL CASE

Justice Rehnquist, writing for the Court,<sup>75</sup> acknowledged that the Court had never definitively ruled whether or not a passenger could be ordered from a lawfully stopped vehicle.<sup>76</sup> The majority agreed that the case for passenger privacy was stronger than for driver privacy, because during a routine traffic stop, there is probable cause that the driver has at least committed a minor traffic violation.<sup>77</sup> The Court stated that, as a practical matter, since the passenger is already stopped, the only difference is whether he or she will wait inside or outside of the vehicle. The Court did not characterize Hughes' order for Wilson to leave the vehicle as a seizure.<sup>78</sup> It noted that a passenger is already stopped, and because his or her immobility is a by-product of the traffic stop, any "additional intrusion to the passenger is minimal."<sup>79</sup>

According to the Court, the possibility for violent encounters stems not from the normal reaction of a motorist, but from "the fact that evidence of a more serious crime might be uncovered during the stop."<sup>80</sup> As a result, pas-

70. *Id.*

71. Brief of Petitioner at 4, *Maryland v. Wilson*, 117 S. Ct. 882 (1997) (No. 95-1262).

72. *Id.* at 5.

73. Brief of Respondent at 18, *Wilson*, 117 S. Ct. 882.

74. *Id.* at 32.

75. Justice Rehnquist was joined by Justices O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer. *Maryland v. Wilson*, 117 S. Ct. 882, 884 (1997).

76. *Id.* at 885.

77. *Id.* at 886.

78. *Id.*

79. *Id.*

80. *Id.*

sengers are every bit as likely as drivers to employ violence during a routine traffic stop.<sup>81</sup> Noting the inherent danger of routine traffic stops, the Court cited Federal Bureau of Investigation statistics<sup>82</sup> which stated that “in 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.”<sup>83</sup> The Court pointed out that because a potentially violent passenger who is outside the vehicle will not have access to hidden weapons inside the vehicle, the danger is minimized if an officer can order passengers out of the vehicle.<sup>84</sup> Because the passenger is already stopped, the minimal intrusion into a passenger’s privacy is far outweighed by the interest in officer safety.<sup>85</sup> Thus, passengers may be ordered out of vehicles at the discretion of an officer.<sup>86</sup> Although the majority did not specifically mention *Whren*,<sup>87</sup> it seemed that the memory of the case was fresh in their minds. Instead of addressing Hughes’ actual motives, the Court simply stated that the interest in officer safety outweighed the interest of a passenger to be left alone during the encounter<sup>88</sup> and that it was permissible for them to “order passengers to get out of the car pending completion of the stop.”<sup>89</sup>

In his dissent, Justice Stevens differentiated *Mimms* from *Wilson*. In *Mimms*,

the Court answered the ‘narrow question’ whether an ‘incremental intrusion’ on the liberty of a person who had been lawfully seized was reasonable . . . . This case, in contrast, raises a separate and significant question concerning the power of the State to make an initial seizure of persons who are not even suspected of having violated the law.<sup>90</sup>

While he acknowledged that under *Terry* an officer could order a suspected passenger out of a vehicle, Stevens opined that the “Fourth Amendment prohibits routine and arbitrary seizures of obviously innocent citizens.”<sup>91</sup>

Stevens also took issue with the Court’s use of Federal Bureau of Investigation crime statistics, which tell nothing of how many incidents in-

81. *Id.*

82. *Id.* at 885 (construing Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71, 33 (1994)).

83. *Id.*

84. *Id.* at 886.

85. *Id.*

86. *Id.*

87. *Whren* was decided less than a year before *Wilson*.

88. *Wilson*, 117 S. Ct. at 886.

89. *Id.*

90. *Id.*

91. *Id.* at 887.

volved passengers or how ordering unsuspected passengers out of vehicles could increase officer safety. In his opinion, such information only shows that routine traffic stops can be dangerous encounters.<sup>92</sup> Stevens continued:

Assuming that many of the assaults were committed by passengers, we do not know how many occurred after the passenger got out of the vehicle, how many took place while the passenger remained in the vehicle, or indeed, whether any of them could have been prevented by an order commanding the passengers to exit.<sup>93</sup>

Stevens further pointed out that the intrusion into a passenger's liberty occasioned by the lawful stop of the vehicle is acceptable as it is only a "necessary by-product of the lawful detention of the driver."<sup>94</sup> The additional seizure of that passenger without any evidence that he or she has committed a crime or poses a threat to an officer is unnecessary and Constitutionally dangerous.<sup>95</sup> With the Court taking "the unprecedented step of authorizing seizures that are unsupported by any individualized suspicion whatsoever," Stevens feared that such action "may pose a more serious threat to individual liberty than the Court realizes."<sup>96</sup>

Justice Kennedy, also dissenting, stated that the criterion for ordering passengers to exit is: the specific circumstance requires it for the officer's safety or "to facilitate a lawful search or investigation,"<sup>97</sup> because the "distinguishing feature of our criminal justice system is its insistence on principled, accountable decision making in individual cases."<sup>98</sup> An officer must be able to give an acceptable reason for the search of a person, and this can be "accommodated even where officers must make immediate decisions to ensure their own safety."<sup>99</sup> *Wilson* puts "tens of millions of passengers at risk of arbitrary control by the police."<sup>100</sup> When the Court's holding in *Whren*, which puts the motives of officers in traffic stops beyond judicial review on Fourth Amendment grounds, is combined with this present holding, the "practical effect . . . is to allow the police to stop vehicles in almost countless circumstances."<sup>101</sup> While many officers may show restraint in the use of their new leeway granted by the Court, the real point, in Kennedy's opinion, is that "liberty comes not from officials by grace but by the Con-

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 890.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

stitution by right."<sup>102</sup>

#### ANALYSIS

Virtually everyone agrees that officer safety is a legitimate concern which must be protected. Instead of granting police officers the power to order any and all passengers from a lawfully stopped vehicle,<sup>103</sup> the Court could have protected officer safety in this case by simply using *Terry*, which allows officers to conduct an investigatory search if they observe a person acting suspiciously.<sup>104</sup> Instead of limiting its holding to only include persons who act suspiciously, the Court framed the issue in terms of the rights of passengers to be free from harassment versus the rights of officers to protect their safety.<sup>105</sup> In trying to determine whose interest to protect, the Court took the test which it applied to drivers in *Mimms*<sup>106</sup> and applied it to passengers in *Wilson*,<sup>107</sup> even while it acknowledged that the passenger's interests were stronger than the driver's.<sup>108</sup>

Although the majority did not characterize an officer's order directing a passenger to step out of the vehicle as a seizure, the definition of seizure would appear to include such an order.<sup>109</sup> Simply characterizing the order to leave a vehicle as a seizure is not automatically enough to warrant Constitutional protection from such an order. According to the Fourth Amendment, officers are forbidden to conduct unreasonable searches and seizures.<sup>110</sup> The rule laid down in *Terry* provides an officer with a way to protect his safety should the situation warrant such concern while still protecting an individual's right to be free from police intervention when there is no specific concern.<sup>111</sup>

Because *Wilson* was acting suspiciously when Officer Hughes approached the vehicle, and because Hughes could articulate a specific concern for his safety,<sup>112</sup> it would have been reasonable, under *Terry*, for Hughes to have asked *Wilson* to get out of the vehicle. The Court could have accomplished its purpose by narrowly holding that Hughes had adequate suspicion to order *Wilson* from the vehicle and conduct a *Terry* frisk for weapons.

102. *Id.* at 891.

103. *Id.* at 885.

104. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

105. *Wilson*, 117 S. Ct. at 885.

106. *Id.*

107. *Id.* at 886.

108. *Id.*

109. BLACK'S LAW DICTIONARY 1359 (6th ed. 1990).

110. U.S. CONST. amend. IV.

111. *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

112. *State v. Wilson*, 664 A.2d 1, 3 (Md. Ct. Spec. App. 1995).

*Maryland v. Wilson in Action*

Several federal and state courts have already used *Wilson* to justify removal of passengers from vehicles during routine traffic stops. In at least one non-vehicular setting, the Tenth Circuit held that *Wilson* gives law enforcement officers the authority to order individuals from place to place.<sup>113</sup>

Less than two months after the *Wilson* decision, the Court of Appeals for the Third Circuit reversed a suppression of evidence, holding that it was lawful for law enforcement officers to require passengers to exit a lawfully stopped vehicle. The appellate court did not seriously question the issue, as the Supreme Court's "bright-line" ruling in *Wilson* had upheld a similar order.<sup>114</sup>

Likewise, state courts in California,<sup>115</sup> Connecticut<sup>116</sup> and Texas<sup>117</sup> have cited *Wilson* in recognizing the power of police officers to order passengers out of lawfully detained vehicles, without requiring police officers to be able to articulate any particular suspicion of a crime being or about to be committed.<sup>118</sup>

*Potential Abuses of Maryland v. Wilson*

As Justice Kennedy pointed out in his dissent to *Wilson*, many officers may show restraint in using their recently affirmed authority.<sup>119</sup> Conversely,

113. *Beall v. McGaha*, No. 96-2095, 1997 WL 234786 \*1 (10th Cir. May 7, 1997). In *Beall*, the plaintiffs were bathing nude in a hot springs which had been closed by Forest Service Regulations to nude bathing. When Ranger McGaha found them, he had probable cause to believe that they were bathing nude in violation of this regulation, even though their nudity was obscured by murky water. McGaha ordered the plaintiffs out of the murky water, thereby removing them from the protection of the murky water and exposing their nudity. *Id.* at \*1. The *Wilson* holding was stretched to include non-vehicular situations in this unpublished civil case. The district court ruled that because the Forest Service law enforcement officer was acting reasonably in seizing plaintiffs, his order to remove themselves from the hot springs was also reasonable. The ranger's actions were necessary to make sure that the suspects did not escape and were not seen in the nude by others that may have been in the vicinity of the hot springs. *Id.* at \*4. Even though the defendant's order caused the plaintiffs to expose themselves in the nude, he did not force them to disrobe, as they were nude when he first found them. *Id.* at \*5. This court drew a parallel between seizing suspected criminals, such as the bathers in *Beall* and innocent passengers who are riding in a vehicle with a driver who is exceeding the speed limit by a few miles per hour.

114. *United States v. Moorefield*, 111 F.3d 10, 12 (3d Cir. 1997).

115. *People v. Tello*, 933 P.2d 1134, 1136 (Cal. 1997).

116. *State v. Wilkins*, 692 A.2d 1233, 1237 (Conn. 1997). In *Wilkins*, the court held that, under *Terry*, an officer may "conduct an investigative stop of the suspect in order to confirm or dispel his suspicions." No requirement of suspicion is necessary to remove a passenger from the vehicle.

117. *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. 1997). Even though there was reasonable suspicion to remove the passenger from the vehicle, the state court held that under *Wilson*, there was no reason to question the officer's authority to seize the passenger. *Id.*

118. Although these courts held that suspicion was not required to order passengers from lawfully detained vehicles, the defendants in each of the above cases were acting suspiciously at the time and the arresting officers could have articulated reasonable suspicion.

119. *Maryland v. Wilson*, 117 S. Ct. 882, 891 (1997).

many officers may not show restraint. The ability of police officers to arbitrarily order drivers and passengers from vehicles after a lawful traffic stop is unchecked. Unethical law enforcement officers will now be able to conduct "fishing expeditions" of routinely stopped vehicles by ordering driver and passengers from the vehicle, even though they have no particularized suspicion of a crime being or about to be committed.<sup>120</sup> The potential inconvenience to passengers who are ordered from stopped vehicles could be immense. Justice Stevens feared that even the infirm are not immune from an arbitrary order to exit a vehicle.<sup>121</sup> While the Court did not wish to inconvenience or harm the infirm, the orders that could create such situations are now removed from judicial review. By not limiting police power and refusing to protect the right of passengers to choose to remain in the safety of their vehicle, the Court has opened a big barn door.

Empirical evidence suggests that minority motorists are often singled out for routine traffic stops on I-95 between Delaware and Florida,<sup>122</sup> the section of road where Wilson was seized. An officer's uninhibited ability passengers after a lawful traffic stop could lead to a disparate impact against certain classes of motorists. Minority motorists should not have to worry about being pulled over for a D.W.B. (Driving While Black).<sup>123</sup>

#### *Potential Effects in Wyoming*

Because the due process clause<sup>124</sup> creates a floor and not a ceiling for state courts, Wyoming may award defendants a greater amount of protection than they would receive in federal courts, but not less protection. As outlined by Justice Stevens in his concurrence to *Massachusetts v. Upton*,<sup>125</sup> state authorities remain the "ultimate guardian of individual rights."<sup>126</sup> The high courts of each state are allowed to interpret their own constitutions any way they choose. So long as states don't deny the accused their due process rights under the Constitution of the United States,<sup>127</sup> they may determine that their own constitutions award the accused a greater measure of protection. Conversely, states may not use the Constitution of the United States to award greater rights than the Supreme Court of the United States has recognized. As Stevens pointed out, such a move on a state's part is "an ill-

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120. Brief of Respondent at 36, *Wilson*, 117 S. Ct. 882.

121. *Wilson*, 117 S. Ct. at 888 n.6.

122. Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 551 (1997).

123. *Id.*

124. U.S. CONST. amend. XIV, § 1.

125. 466 U.S. 727 (1984).

126. *Id.* at 739.

127. U.S. CONST. amend XIV, § 1.

advised entry into the federal domain.”<sup>128</sup> To illustrate Wyoming’s independence in interpreting its own constitution, Justice Macy of the Wyoming Supreme Court wrote, in his concurrence to *Saldana v. State*,<sup>129</sup> that he would not condone the Wyoming court in blindly following “the United States Supreme Court’s interpretation of the Fourth Amendment to the United States Constitution when we interpret the Wyoming Constitution.”<sup>130</sup>

Justice Golden, in another concurring opinion to *Saldana*, wrote that “the Wyoming Supreme Court continues to be willing to independently interpret the provisions of the Wyoming Constitution. But it is imperative that Wyoming lawyers properly brief this court on relevant state constitutional questions.”<sup>131</sup> Quoting *State v. Gunwall*,<sup>132</sup> Golden suggested that state constitutional analysis must “spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.”<sup>133</sup> Golden further suggested that Wyoming, like many other state supreme courts, require that a litigant raise a state constitutional question in the lower courts if he wishes the Wyoming Supreme Court to consider it.<sup>134</sup> Golden’s suggested analysis has been ratified in several subsequent opinions, including *Gronski v. State*.<sup>135</sup>

As a side note, it would have been unlikely for the Court to overrule the Court of Special Appeals of Maryland had that court used the Maryland Constitution to suppress the evidence against Wilson. In fact, had the Maryland courts cited the Maryland Constitution, the Court would most likely have denied *certiorari*.

It is unclear whether the Wyoming Supreme Court would apply its automatic companion rule to *Wilson* type situations. In *Perry*, the court only held that an arrestee’s companion could be searched for possible concealed weapons.<sup>136</sup> The court gave no indication how it would hold in a case where the seized individual is cited but not arrested.

Since the Wyoming Supreme Court has recognized a greater right to privacy for automobile passengers under the Wyoming Constitution<sup>137</sup> than has the Supreme Court of the United States under the federal Constitution,<sup>138</sup>

128. *Upton*, 466 U.S. at 739.

129. 846 P.2d 604 (Wyo. 1993).

130. *Id.* at 621.

131. *Id.* at 624.

132. 720 P.2d 808 (Wash. 1986).

133. *Saldana*, 846 P.2d at 622.

134. *Id.* at 623.

135. 910 P.2d 561, 565 (Wyo. 1996).

136. *Perry*, 927 P.2d at 1163.

137. *Parkhurst v. State*, 628 P.2d 1369, 1374 (Wyo. 1981).

138. *Maryland v. Wilson*, 117 S. Ct. 882, 886 (1997).

*Wilson* will not have a direct effect upon Wyoming state cases citing the state's Constitution unless the Wyoming Supreme Court chooses to adopt the *Wilson* approach. *Wilson* has not yet been cited by the Wyoming Supreme Court. All federal cases and any case applying the Fourth Amendment<sup>139</sup> would be governed by *Wilson*.

#### CONCLUSION

In *Terry*, the Court held that a law enforcement officer could stop and frisk an individual if he could articulate a reasonable suspicion that the person posed a threat to the investigating officer. In *Mimms*, the Court held that a law enforcement officer could direct a driver to exit a lawfully detained vehicle, because the driver of the stopped vehicle was suspected of at least a minor traffic violation. The Court, relying heavily on these two cases, then decided in *Wilson* that it was acceptable for a law enforcement officer to order a passenger out of a lawfully stopped vehicle without necessarily articulating a reasonable suspicion. Added to the holding in *Whren*, which removed "actual" motive in traffic stops from judicial review, any passenger in any vehicle on any road at any time is liable to be removed from the relative safety of the vehicle at the whim of a policeman, once the vehicle has been lawfully detained.

Even though Officer Hughes seemed to be able to articulate a reasonable suspicion against passenger Wilson, the Court ruled that such articulation was unnecessary. While police powers were not abused in this particular case, the Court seems to have placed this particular police action beyond judicial review, thus creating a great potential for police abuse. The Court could have reversed the suppression of Wilson's cocaine and made him stand trial under *Terry* without exposing the rest of the nation's passengers to the possibility of arbitrary harassment by officers of the law.

J. KETSCHER

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139. U.S. CONST. amend IV.