2002 Supplement to

AMERICAN CRIMINAL PROCEDURE

CASES AND COMMENTARY

Sixth Edition

Stephen A. Saltzburg
Daniel J. Capra

American Casebook Series®

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610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-328-9352

Printed in the United States of America.

ISBN 0-314-26444-2

TEXT IS PRINTED ON 10% POST CONSUMER RECYCLED PAPER

West's Law School Advisory Board

Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.

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Table of Contents

Part I

RECENT DEVELOPMENTS

Chapter One

BASIC PRINCIPLES

I. A CRIMINAL CASE

Page 5. Add the following at the end of the headnote on Kansas v. Hendricks:

In Seling v. Young, 531 U.S. 250 (2001), a person incarcerated as a sexual predator challenged his confinement on double jeopardy and ex post facto grounds. His challenge therefore depended on whether he was subject to civil or criminal confinement. The sexual predator statute challenged by Young was virtually identical to that upheld as civil rather than criminal in *Hendricks*. He argued, however, that *Hendricks* had upheld a facial challenge to the sexual predator statute, while his challenge went to the statute *as applied*. He contented that the state's sexual offender program in fact provided no treatment and in fact resulted in conditions worse than confinement on a criminal charge. The Court, in an opinion by Justice O'Connor, rejected the possibility of an as applied challenge to the sexual predator statute as "fundamentally flawed." Justice O'Connor reasoned as follows:

> We hold that respondent cannot obtain release through an "as-applied" challenge to the Washington Act on double jeopardy and *ex post facto* grounds. We agree with petitioner that an "as-applied" analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses. Unlike a fine, confinement is not a fixed event. As petitioner notes, it extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively.

> The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.

Justice Scalia wrote a concurring opinion joined by Justice Souter. He elaborated on the problems of an as applied challenge:

> The short of the matter is that, for Double Jeopardy and *Ex Post Facto* Clause purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature; and harsh executive implementation cannot transform what was clearly intended as a civil remedy into a criminal penalty, any more than compassionate executive implementation can transform a criminal penalty into a civil remedy. This is not to say that there is no relief from a system that administers a facially civil statute in a fashion that would render it criminal. The remedy, however, is not to invalidate the legislature's handiwork under the Double Jeopardy Clause, but to eliminate whatever excess in administration contradicts the statute's civil character. When, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive action; if those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal. Such an approach protects federal courts from becoming enmeshed in the sort of intrusive inquiry into local conditions at state institutions that are best left to the State's own judiciary, at least in the first instance. And it avoids federal invalidation of state statutes on the basis of executive implementation that the state courts themselves, given the opportunity, would find to be ultra vires. Only this approach, it seems to me, is in accord with our sound and traditional reluctance to be the initial interpreter of state law.

Justice Thomas wrote an opinion concurring in the judgment. Justice Stevens wrote a dissent.

III. TWO SPECIAL ASPECTS OF CONSTITUTIONAL LAW: THE INCORPORATION DOCTRINE AND PROSPECTIVE DECISIONMAKING

B. RETROACTIVITY

4. Current Supreme Court Approach to Retroactivity

Page 30. After the runover paragraph, add the following:

In Williams v. Taylor, 529 U.S. 362 (2000), the Court, in an opinion by Justice O'Connor, declared that the AEDPA essentially codified a standard of review of state court decisions that is equivalent to the "new

rule" jurisprudence of *Teague*. Under AEDPA, a federal court cannot grant relief unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Williams*, Justice O'Connor declared that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Consequently, if a habeas petitioner is claiming that a state court misapplied constitutional law that was not clearly established by the United States Supreme Court at the time, the habeas petition must be denied—because the state court decision is not "contrary to" clearly established law as defined by the Supreme Court. It follows that the *Teague* "new rule" jurisprudence has been codified, for all practical purposes, by AEDPA.

Chapter Two

SEARCHES AND SEIZURES OF PERSONS AND THINGS

II. THRESHOLD REQUIREMENTS FOR FOURTH AMENDMENT PROTECTIONS: WHAT IS A "SEARCH"? WHAT IS A "SEIZURE"?

C. APPLICATIONS OF THE *KATZ* PRINCIPLE

3. Access by Members of the Public

h. Manipulation of Bags in Public Transit

Page 57. At the end of the section, add the following case:

The Supreme Court overruled the Fifth Circuit's holding in *Bond* that Agent Cantu's squeezing of the bag did not constitute a search.

BOND v. UNITED STATES

Supreme Court of the United States, 2000.
529 U.S. 334.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's proscription against unreasonable searches. We hold that it did.

Petitioner Steven Dewayne Bond was a passenger on a Greyhound bus that left California bound for Little Rock, Arkansas. The bus stopped, as it was required to do, at the permanent Border Patrol checkpoint in Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu boarded the bus to check the immigration status of its passengers. After reaching the back of the bus, having satisfied himself that the passengers were lawfully in the United States, Agent Cantu began walking toward the front. Along the way, he squeezed the soft luggage which passengers had placed in the overhead storage space above the seats.

Petitioner was seated four or five rows from the back of the bus. As Agent Cantu inspected the luggage in the compartment above petitioner's seat, he squeezed a green canvas bag and noticed that it contained a "brick-like" object. Petitioner admitted that the bag was his and agreed to allow Agent Cantu to open it. [The Government has not argued here that petitioner's consent to Agent Cantu's opening the bag is a basis for admitting the evidence.] Upon opening the bag, Agent Cantu discovered a "brick" of methamphetamine. The brick had been wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants.

Petitioner was indicted for conspiracy to possess, and possession with intent to distribute, methamphetamine in violation of 21 U.S.C. § 841(a)(1). He moved to suppress the drugs, arguing that Agent Cantu conducted an illegal search of his bag. Petitioner's motion was denied, and the District Court found him guilty on both counts and sentenced him to 57 months in prison. On appeal, he conceded that other passengers had access to his bag, but contended that Agent Cantu manipulated the bag in a way that other passengers would not. The Court of Appeals rejected this argument, stating that the fact that Agent Cantu's manipulation of petitioner's bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. Thus, the Court of Appeals affirmed the denial of the motion to suppress, holding that Agent Cantu's manipulation of the bag was not a search within the meaning of the Fourth Amendment. We granted certiorari, and now reverse.

The Fourth Amendment provides that "[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. . . ." A traveler's personal luggage is clearly an "effect" protected by the Amendment. See United States v. Place, 462 U.S. 696 (1983). Indeed, it is undisputed here that petitioner possessed a privacy interest in his bag.

But the Government asserts that by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated. The Government relies on our decisions in California v. Ciraolo, and Florida v. Riley, for the proposition that matters open to public observation are not protected by the Fourth Amendment. In *Ciraolo*, we held that police observation of a backyard from a plane flying at an altitude of 1,000 feet did not violate a reasonable expectation of privacy. Similarly, in *Riley*, we relied on *Ciraolo* to hold that police observation of a greenhouse in a home's curtilage from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment. We reasoned that the property was "not necessarily protected from inspection that involves no physical invasion," and determined that because any member of the public could have lawfully observed the defendants' property by flying overhead, the defendants' expectation of privacy was "not reasonable and not one that society is prepared to honor."

But *Ciraolo* and *Riley* are different from this case because they involved only visual, as opposed to

tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection. For example, in Terry v. Ohio, we stated that a "careful [tactile] exploration of the outer surfaces of a person's clothing all over his or her body" is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly." Although Agent Cantu did not "frisk" petitioner's person, he did conduct a probing tactile examination of petitioner's carry-on luggage. Obviously, petitioner's bag was not part of his person. But travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand.

Here, petitioner concedes that, by placing his bag in the overhead compartment, he could expect that it would be exposed to certain kinds of touching and handling. But petitioner argues that Agent Cantu's physical manipulation of his luggage "far exceeded the casual contact [petitioner] could have expected from other passengers." The Government counters that it did not.

Our Fourth Amendment analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that "he [sought] to preserve [something] as private." Smith v. Maryland, 442 U.S. 735 (1979) (internal quotation marks omitted). Here, petitioner sought to preserve privacy by using an opaque bag and placing that bag directly above his seat. Second, we inquire whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

The judgment of the Court of Appeals is

Reversed.

JUSTICE BREYER, with whom JUSTICE SCALIA joins, dissenting.

Does a traveler who places a soft-sided bag in the shared overhead storage compartment of a bus have a "reasonable expectation" that strangers will not push, pull, prod, squeeze, or otherwise manipulate his luggage? Unlike the majority, I believe that he does not.

Petitioner argues—and the majority points out—that, even if bags in overhead bins are subject to general "touching" and "handling," this case is special because "Agent Cantu's physical manipulation of [petitioner's] luggage far exceeded the casual contact [he] could have expected from other passengers." But the record shows the contrary. Agent Cantu testified that border patrol officers (who routinely enter buses at designated checkpoints to run immigration checks) "conduct an inspection of the overhead lug-