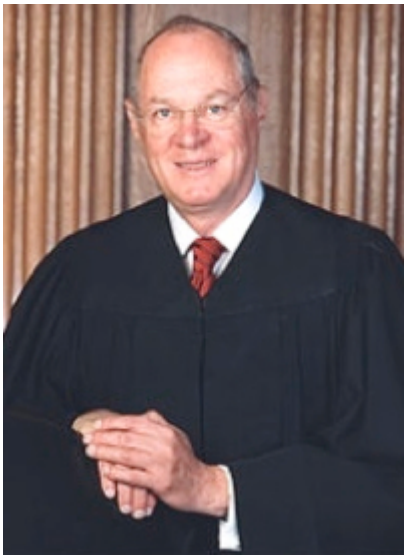
Written by **Jack Kenny** on April 3, 2012

High Court Okays Invasive Strip Search in Minor Offenses



If you are stopped for speeding or arrested for an unpaid fine, you may be subjected to a strip search and thorough inspection of even the most private body parts, the U.S. Supreme Court said Monday in another controversial 5-4 decision. Justice Anthony Kennedy (left) sided with the court's conservative bloc and wrote the opinion of the court in Florence v. Board of Chosen Freeholders of County of Burlington, the case of Albert Florence, a New Jersey man apprehended in a motor vehicle stop and arrested for an allegedly unpaid fine. In fact, Florence had already paid the fine, but the bench warrant for his arrest had, "for some unexplained reason," not been removed from the statewide computer database at the time of the arrest, Kennedy said.

The case was not about the arrest, however, but concerned Florence's treatment at two different detention facilities, where he was subjected to strip searches and inspection of his genitals and body cavities. Kennedy, joined by Chief Justice John Roberts, and Justices Antonin Scalia, Samuel Alito, and Clarence Thomas, judged the searches to be reasonable for security reasons. Justice Stephen Breyer wrote a dissenting opinion, joined by Justices Ruth Bader Ginsburg. Sonia Sotomayor, and Elena Kagan.

Kennedy said someone stopped for even a minor, non-violent offense might turn out to be a dangerous criminal, citing the example of Oklahoma City bomber Timothy McVeigh, who was caught when stopped by a state trooper for driving without a license plate. One of the terrorists in the September 11, 2001 attacks was stopped and ticketed for speeding just two days before taking part in the hijacking of Flight 93, Kennedy noted. "Experience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment," Kennedy added.

Citing the security requirements at prisons and other detention facilities, Kennedy said inmates commit more than 10,000 assaults on corrections officials each year and many more on fellow prisoners. "Something as simple as an overlooked pen case a significant danger," he said. He quoted from a brief filed by New Jersey Wardens, which argued:

> Lighters and matches are fire and arson risks or potential weapons. Cell phones are used to orchestrate violence and criminality both within and without jailhouse walls. Pills and medications enhance suicide risks. Chewing gum can block locking devices; hairpins can open handcuffs; wigs can conceal drugs and weapons.

At the time of his arrest Florence was a passenger in a sport utility vehicle driven by his wife. His four-year-old son was in the back seat. He had been stopped several times before and carried a letter with him explaining that the fine, for fleeing a traffic stop years earlier, had been paid. A state trooper

nonetheless handcuffed him and brought him to Burlington County Jail in southern New Jersey, where he was held for six days before being transferred to a county jail in Newark. The next day a judge dismissed all charges and set him free. Florence's suit alleged that he was strip-searched at both facilities, with his genital and all bodily cavities inspected by corrections officials. Kennedy's opinion noted that Florence was detained with the general jail population, thus increasing the potential security risk from any contraband he might have possessed. In separate concurring opinions, Chief Justice Roberts and Justice Alito said the decision might not apply in a case where the arrestee is detained separately from other inmates.

In his dissent, Justice Breyer argued that the searches were, under the circumstances, unconstitutional invasions of the suspect's privacy.

> In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence — say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor — is an "unreasonable searc[h]" forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.

Breyer also argued that the decision goes against previous Supreme Court decisions, including a 1979 case, *Bull v. Wolfish*, in which the court said, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." He also cited a much more recent precedent, the 2009 decision in *Safford Unified School Dist. #1 v. Redding* that a search of a public school student, far less intrusive than those made of Florence, was unconstitutional. In that case a 13-year-old female student was required to strip to her underwear and to pull her bra and the waistband of her panties away form her body to accommodate a search by school officials for prohibited pain-killing pills. Eight of the justices on that case, with Clarence Thomas the lone exception, found the search a violation of the student's Fourth Amendment rights. Writing the opinion of the court, Justice David Souter, now retired, said the grounds for suspicion were inadequate to justify such an invasive search. In a statement quoted by Breyer in his *Florence* dissent, Souter wrote:

> The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

The decision does not prevent Florence from pursuing other claims, including a possible suit for false arrest. An African-American, Florence has not alleged racial discrimination in connection with the arrest and the week he spent in jails before his hearing. Regarding the Supreme Court's rejection of his Fourth Amendment claim, his attorney, Susan Chana Lask, blamed a political and legal climate in which Congress passed and the President signed last December 31 a National Defense Authorization Act that permits the President to use the military to apprehend suspected terrorists, including U.S. citizens in "the homeland," and hold them indefinitely without trial.

"The 5-4 decision was as close as we could get," said Lask. "… in this political climate with recent law for indefinite detention of citizens without trial that shaves away our constitutional rights every day."