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State Responses to the *Whren* Decision

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STATE RESPONSES TO THE WHREN DECISION

Margaret M. Lawton[†]

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INTRODUCTION

Twenty years ago a unanimous United States Supreme Court decided *Whren v. United States*,¹ a narcotics case resulting from a traffic stop, and held that when police officers make a traffic stop based on objective probable cause of criminal activity, the stop is a reasonable one regardless of the officers' "actual motivations" for making the stop.² Under this "could have" test, the officers' "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."³ As the Court has subsequently stated: "Our unanimous opinion [in *Whren*] held that we would not look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire to investigate other potential crimes was the real motive."⁴

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1. 517 U.S. 806 (1996).
2. *Id.* at 808–09, 813.
3. *Id.* at 809, 813.
4. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011).

To say that the *Whren* decision was and continues to be controversial is an understatement.⁵ As two scholars have recently written: “*Whren v. United States* is notorious for its effective legitimization of racial profiling in the United States.”⁶ Many have argued for a return to the “reasonable officer” test that some courts used pre-*Whren* as a means to combat the use of traffic infractions as a pretext for racial profiling.⁷ Under the “reasonable officer” test, also known as the “would have” test, a court reviewing an officer’s decision to perform a traffic stop would focus not on “whether the [officer] validly could have made the stop, but rather, whether a reasonable officer, given the same circumstances, would have made the stop absent the invalid purpose.”⁸ The Supreme Court however has not indicated any movement away from the objective probable cause test.⁹

In the years since the *Whren* decision, only two states, Washington and New Mexico, have determined that their state constitutions provide broader protection than the United States Constitution on this issue.¹⁰ Washington was the first state to do so. Three years after *Whren*, the Washington Supreme Court ruled that its citizens held “a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement.”¹¹ As discussed

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5. See Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 928, n.77 (2008) (reviewing some of the scholarly literature on *Whren*); see also State v. Ochoa, 206 P.3d 143, 151 (N.M. Ct. App. 2008) (“[T]he [*Whren*] Court not only refuses to condemn this bad police conduct [of initiating traffic stops for an unconstitutional reason], it rewards pretextual stops by permitting prosecution with the evidentiary fruits of the stop.”).
 6. Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 (2015); see also Lewis R. Katz, “*Lonesome Road*”: *Driving without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1471 (2013) (arguing that the Supreme Court is “committed to not restraining arbitrary police discretion on our streets and highways”).
 7. Lawton, *supra* note 5, at 931. “Pretextual traffic stops are different from stops where police have falsified” the facts for probable cause or reasonable suspicion to make the stop. *Id.* at 929 n.81.
 8. Diana Roberto Donahoe, “*Could Have*,” “*Would Have*,” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1202 (1997).
 9. See Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013) (“Thus, the defendant will not be heard to complain that although he was speeding the officer’s real reason for the stop was racial harassment.”).
 10. This article addresses traffic stops, not other types of Fourth Amendment seizures.
 11. State v. Ladson, 979 P.2d 833, 842 (Wash. 1999) (holding that while “police may enforce the traffic code . . . [t]hey may not, however, use that authority

below, however, Washington now distinguishes between a “pretextual traffic stop”¹² which would be illegal and a “mixed-motive traffic stop” which might or might not be illegal.¹³

New Mexico was the next state to determine that its state constitution provided protection against pretextual traffic stops. In *State v. Ochoa*,¹⁴ the New Mexico Court of Appeals departed from *Whren* instead finding the “federal analysis unpersuasive and incompatible with our state’s distinctively protective standards for searches and seizures of automobiles.”¹⁵ Alaska courts have considered whether its state constitution provides more protection than the federal constitution, but have not yet decided whether to adopt the pretext doctrine.¹⁶ However, Alaska courts have clarified that if the pretext doctrine did apply, the focus would be on whether a police officer departed from “reasonable police practices” because of the ulterior motive.¹⁷

In Part I, this Article briefly discusses the *Whren* decision. Part II discusses the three states that have considered whether to divert from the *Whren* decision under their own state constitutions. This Article then concludes that while these states have made efforts to combat traffic stops initiated on unconstitutional grounds, such as racial profiling, these state courts are finding it hard to do in the absence of police admission of using a pretext. While this case law suggests that other means of addressing police use of pretext would be more effective than relying on state constitutional law remedies, the Washington mixed-motive test perhaps comes the closest to providing a reviewing court with the means to address whether a police officer has exercised her discretion appropriately.

as a pretext or justification to avoid the warrant requirement for an unrelated criminal investigation”).

12. *Id.* at 843.
13. *State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (noting a “mixed-motive” traffic stop is one that is based on both legitimate and illegitimate grounds).
14. 206 P.3d 143 (N.M. Ct. App. 2008).
15. *Id.* at 148.
16. *See infra* note 78 and accompanying text.
17. *Laschober v. State*, No. A-11302, 2014 WL 7005586, at *4 (Alaska Ct. App. Dec. 10, 2014). Memorandum decisions of the Alaska Court of Appeals do not create legal precedent. *See* ALASKA R. APP. P. 214(d)(1) (“Citation of unpublished decisions . . . is not encouraged. If a party believes, nevertheless, that an unpublished decision has persuasive value . . . and that there is no published opinion that would serve as well, the party may cite the unpublished decision.”).

I. THE *WHREN* DECISION

The Fourth Amendment provides the following:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and 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.¹⁸

A Fourth Amendment seizure occurs when police order the driver of an automobile to stop, and the driver complies with the order.¹⁹ As the Supreme Court held in *Whren*, “[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”²⁰

In *Whren*, police officers stopped the vehicle in which Michael Whren was a passenger for the stated reason that the driver had violated several provisions of the District of Columbia traffic code.²¹ Once the vehicle was stopped, officers observed two large plastic bags of what appeared to be crack cocaine in Whren’s hands.²² The officers arrested Whren and the driver, James Brown, and discovered several types of illegal drugs during a search of the vehicle.²³ Brown and Whren were subsequently convicted for several narcotics violations, and their convictions were upheld on appeal to the District of Columbia Circuit Court of Appeals.²⁴ Regarding the traffic stop, the Court of Appeals held that “regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation.”²⁵

At the time of Whren and Brown’s petition to the U.S. Supreme Court, “most federal circuits followed the rule that, where an officer has objective probable cause to believe that a traffic violation has occurred,

18. U.S. CONST. amend. IV.

19. *Brendlin v. California*, 551 U.S. 249, 255 (2007).

20. *Whren v. United States*, 517 U.S. 806, 810 (1996).

21. *Id.*

22. *Id.* at 808–809.

23. *Id.* at 809.

24. *Id.*

25. *United States v. Whren*, 53 F.3d 371, 375 (D.C. Cir. 1995).

a traffic stop is reasonable under the Fourth Amendment.”²⁶ Two circuits, “[t]he Ninth and Eleventh, however, had held that, when a defendant raised a claim of pretext, ‘the proper inquiry . . . [was] not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.”²⁷ The Tenth Circuit had also adopted the reasonable officer test, but prior to *Whren*, struck the test down “finding that the standard after seven years of application was ‘unworkable’ and led to ‘inconsistent’ results.”²⁸

On appeal to the U.S. Supreme Court, petitioners Whren and Brown accepted that the officers had objective probable cause to believe that Brown had violated several provisions of the traffic code.²⁹ However, they urged the Court to adopt a different Fourth Amendment test for traffic stops, given the large number of traffic rules and the difficulty of complying with all of these rules; the test the petitioners proposed was: “whether a police officer, acting reasonably, would have made the stop for the reason given.”³⁰ Such a test, petitioners argued, would also prohibit officers from using traffic stops as “a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists” and from deciding “which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”³¹ The petitioners framed this approach as being consistent with “the balancing inherent in any Fourth Amendment inquiry. . . weigh[ing] the governmental and individual interests implicated in a traffic stop.”³²

The Court rejected these arguments, noting that “[w]ith rare exceptions not applicable here . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”³³ In addition, the Court stated: “Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”³⁴ While agreeing that selective enforcement of the law based upon race was

26. See Lawton, *supra* note 5, at 922 & n.32 (citing cases).

27. *Id.* at 922 & n.33 (quoting *United State v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991)).

28. *Id.* at 922–23, 923 n.34.

29. *Whren*, 517 U.S. at 810.

30. *Id.*

31. *Id.* Both Brown and Whren are African Americans. *Id.*

32. *Id.* at 816.

33. *Id.* at 817.

34. *Id.* at 812.

constitutionally prohibited, the Court ruled that the Equal Protection Clause, not the Fourth Amendment, was the constitutional basis for objecting to intentional discrimination: “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”³⁵

Some members of the Court have expressed concern about the “disturbing discretion” afforded to a police officer who can “trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.”³⁶ However, the Court has reaffirmed its holding that a police officer’s subjective intentions are not relevant when the officer acts with objective probable cause.³⁷ For example, in *Florida v. Jardines*,³⁸ the Court stated:

a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer’s real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer’s real reason for the stop was racial harassment.³⁹

II. DEPARTING FROM THE FEDERAL APPROACH

After *Whren*, the majority of states that considered a claim under their own state constitutions that the police had made a pretextual traffic stop followed the federal precedent even if the state had used a different test prior to the Supreme Court’s decision.⁴⁰ Nevada, for example, had followed the Ninth, Tenth and Eleventh Federal Circuits in

35. *Id.* at 813.

36. *Arkansas v. Sullivan*, 532 U.S. 729, 772–73 (2001) (Ginsburg, J., concurring) (quoting *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000)).

37. *See* *Lawton*, *supra* note 5, at 926 & n.64 (citing lower court decisions that upheld traffic stops regardless of an officer’s actual motives).

38. 133 S. Ct. 1409 (2013).

39. *Id.* at 1416.

40. *See, e.g.*, *People v. Robinson*, 767 N.E.2d 638, 649–50 (N.Y. 2001) (listing state courts that have analyzed *Whren*); *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997) (finding that because the Florida Constitution conforms to the United States Constitution, the “reasonable officer test . . . is overruled by the objective test of *Whren*”); *State v. Bolduc*, 722 A.2d 44, 45 (Me. 1998) (citing *Whren* and noting that “[w]hether a reasonable police officer would normally have stopped Bolduc for exceeding the speed limit by nine miles per hour is not important to the analysis”); *State v. Harrison*, 846 N.W.2d 362, 366 (Iowa 2014) (noting that although an officer’s motivations for making a traffic stop are not controlling, the “possibility for racial profiling requires [the court] to carefully review the objective basis for asserted justifications behind traffic stops” (quoting *State v. Taylor*, 830 N.W.2d 288, 297 n.4 (Iowa 2013))). *But see* *Harrison*, 846 N.W.2d at 371, 373 (Appel, J., dissenting)

applying the “would have” test to cases in which the defendant alleged a pretextual traffic stop had occurred.⁴¹ Thus, in one case the Nevada Supreme Court vacated the defendant’s drug conviction on the grounds that, “but for the improper purpose of searching defendant’s truck for drugs, a reasonable officer would not have made the stop.”⁴² In another application of the test, the Nevada Supreme Court upheld a defendant’s drug conviction where it concluded that “any reasonable officer, absent suspicion of an unrelated serious crime, would have pulled over [the defendant’s] vehicle.”⁴³ Subsequent to the *Whren* decision, however, and in spite of concerns about “the use of minor traffic infractions as a general law enforcement tool for investigating serious crimes,”⁴⁴ the Nevada Supreme Court concluded that “the Nevada Constitution’s search and seizure clause provides no greater protection than that afforded under its federal analogue, at least in the area of pretextual traffic stops, we now recognize the ‘could have’ test announced in *Whren* as the proper test under the Nevada Constitution as well.”⁴⁵

Only Washington and New Mexico have determined that their state constitutions provide broader protection than the United States Constitution on the issue of when a traffic stop is reasonable. Alaska courts have discussed the issue but have not yet decided the question. Washington, the first state to adopt the “would have” test, has now revisited its decision and uses a somewhat different standard; this is discussed in Part D.

(noting that whether a pretext stop is valid under the Iowa Constitution has not yet been decided, and until then, “[t]he State will likely take the position that the decision to stop a vehicle will rest in the unreviewable discretion of the police regardless of pretext. Sounds a bit like a general warrant, doesn’t it?”).

41. *Gama v. State*, 920 P.2d 1010, 1012 (Nev. 1996) (citing *Alejandre v. State*, 903 P.2d 794, 796 (Nev. 1995)).
42. *Id.* (citing *Alejandre v. State*, 903 P.2d 794, 796 (Nev. 1995)).
43. *Taylor v. State*, 903 P.2d 805, 808 (Nev. 1995), *overruled by Gama*, 920 P.2d at 1012–13.
44. *Gama*, 920 P.2d at 1013 n.3.
45. *Id.* at 1013 (noting that after *Whren*, the “bottom line, therefore, is that the ‘could have’ test prevailed over the ‘would have’ test”). *See also* *State v. Donaldson*, 380 S.W.3d 86, 92 (Tenn. 2012) (holding in the context of traffic stops, the protections afforded by the Tennessee Constitution are coextensive with the Fourth Amendment protections set forth in *Whren*; therefore, “there is no absolute prohibition against a pretextual stop so long as the stop has legitimate underpinnings”); *State v. Mancía-Sandoval*, 361 S.W.3d 835, 839 (Ark. 2010) (noting that as long as the officer had probable cause to make a traffic stop, “this court will not allow a police officer’s ulterior motives to serve as the basis for holding a traffic stop unconstitutional” even if stop is admittedly pretextual).

A. *Washington State Part 1*

In 1999, in *State v. Ladson*,⁴⁶ the Washington Supreme Court addressed the issue of whether pretextual traffic stops violated the Washington State Constitution. A brief description of the facts is warranted. In *Ladson*, two officers on proactive gang patrol recognized the driver in a vehicle based on an unsubstantiated street rumor that he was involved in narcotics.⁴⁷ The officers followed the car and then stopped it on the asserted grounds that the license plate tabs had expired.⁴⁸ Both the driver and the passenger, Thomas Ladson, were African American.⁴⁹ The driver was arrested due to a suspended license and in a search of the vehicle, the officers found Ladson's jacket with a small handgun inside; he was arrested, searched, and narcotics were discovered in his jacket.⁵⁰ Ladson was charged with and convicted of several counts involving the handgun and the narcotics.⁵¹ At the suppression hearing, the officers had not denied that the traffic stop was pretextual, although they did have objective probable cause that a traffic infraction had occurred due to the expired license plate tabs.⁵²

On appeal to the Washington Supreme Court, Ladson argued that the Washington State Constitution provides broader protection against pretextual traffic stops than the Fourth Amendment of the United States Constitution; therefore, he argued, the U.S. Supreme Court's holding in *Whren* was inapplicable to his case.⁵³ The Washington Supreme Court agreed, finding that the state constitution placed greater emphasis on privacy than the Fourth Amendment.⁵⁴ Without a warrant or an exception to the warrant requirement, police action was without the "authority of law" required by the state constitution; a "pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.'"⁵⁵

46. 979 P.2d 833 (Wash. 1999).

47. *Id.* at 836.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 837.

54. *Id.*

55. *State v. Arreola*, 290 P.3d 983, 989 (Wash. 2012) (quoting *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999)).

The Washington Supreme Court held that in determining whether a traffic stop was pretextual, a reviewing court must examine the totality of the circumstances, “including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.”⁵⁶ This test was similar, the court ruled, to one used to determine whether the emergency exception to the warrant requirement applied: “To satisfy the exception, the State must show that the officer, both subjectively and objectively, ‘is actually motivated by a perceived need to render aid or assistance.’”⁵⁷ In essence, the test adopted by the Washington Supreme Court in *Ladson* is the “would have” test: would a police officer, who is actually motivated to make the traffic stop based upon the traffic infraction, have made the stop?

In an article published in 2008, I examined Washington state case law to see how the “would have” test worked in practice a decade after the adoption of the test.⁵⁸ This examination revealed that

although the “would have” test identifies police pretextual behavior in limited circumstances—such as when police admit such behavior—it has not done so as much as commentators had predicted. The reason for this is not clear. It could be that there are not as many instances of pretextual police behavior as commentators had thought or that courts have difficulty discerning pretextual behavior without an admission. A third alternative is that courts have been reluctant to find pretextual behavior without direct testimony from officers, because it is difficult to separate out an officer’s real motives. If, for example, there is objective probable cause of a traffic violation, as well as evidence that an officer’s initial suspicions were not based on the traffic violation, how does a court determine the officer’s actual reason for the stop? Does the court run the risk of suppressing evidence “when there were, in fact, good intentions sufficient to justify the action notwithstanding the bad intentions”? Also, by determining when it is reasonable for a police officer to ignore violations of the law, is the court substituting its own judgment for the police officer’s—and the legislature’s—as to what the officer “should have” done?⁵⁹

In the years since 2008, Washington courts continued to decide traffic stop cases. In the few cases in which the court found the traffic stop to be pretextual, there was a “pattern of the arresting officer having a suspicion of nontraffic related criminal activity and subsequently

56. *Ladson*, 979 P.2d at 843.

57. *Id.* (quoting *State v. Angelos*, 936 P.2d 52, 54 (Wash. Ct. App. 1997)).

58. Lawton, *supra* note 5, at 935–39.

59. *Id.* at 918–19 (footnote omitted).

following an arrestee's vehicle until a traffic infraction occur[ed], initiating the stop, and discovering evidence of an unrelated crime during a search incident to arrest."⁶⁰ In most cases the courts found the traffic stop to be lawful.⁶¹

As discussed below, Washington has now added another layer to its traffic stop jurisprudence, by finding that there is a third type of traffic stop, a mixed-motive stop, which might or might not be legal.

B. *New Mexico*

At the end of 2008, the New Mexico Court of Appeals departed from the *Whren* test and found that pretextual traffic stops violate the New Mexico Constitution.⁶² In doing so, the New Mexico Court of Appeals noted a “distinct characteristic of New Mexico constitutional law” that individuals do not have a lower expectation of privacy when they

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60. *State v. Johnson*, 154 Wash. App. 1043, at *4 (2010). Unpublished decisions of the Washington Court of Appeals do not create legal precedent. *See* WASH. CT. G.R. 14.1(a) (2016) (“A party may not cite as an authority an unpublished opinion of the Court of Appeals.”).
61. *See, e.g.*, *State v. Snapp*, 275 P.3d 289, 301 (Wash. 2012) (finding that a traffic stop was not pretextual when the officer noticed the traffic infraction and immediately stopped the car due to the traffic infraction); *State v. Weber*, 247 P.3d 782, 788 (Wash. Ct. App. 2011) (finding that it was “objectively reasonable for [the patrol trooper] to stop a car [speeding] through a residential area . . . in the middle of the night”); *State v. Das*, 162 Wash. App. 1063, at *4 (2011) (finding that traffic stop was not pretextual because the officer was on routine patrol and pulled car over as soon as he observed traffic violations); *State v. Johnson*, 154 Wash. App. 1043, at *2–4 (2010) (finding that a traffic stop was not pretextual because the officer testified that he stopped vehicle because registered owner’s license was suspended, which is a criminal offense, and evidence did not follow the “classic” pattern of a pretext stop); *State v. Gibson*, 219 P.3d 964, 968 (Wash. Ct. App. 2009) (finding that traffic stop was not pretextual because the officer did not state, nor could it be inferred from the totality of the circumstances, that he used the traffic violation as “an excuse to investigate suspected criminal activity”). *Cf.* *State v. Michaels*, 165 Wash. App. 1031, at *5 (2012) (finding that traffic stop was lawful because it was based upon reasonable suspicion that defendant was involved in drug activity and officers never claimed other motivation for the stop).
62. *State v. Ochoa*, 206 P.3d 143, 146 (N.M. Ct. App. 2008). In *State v. Ochoa*, 182 P.3d 130, 136 (N.M. 2008) (*Ochoa II*), the New Mexico Supreme Court remanded the case to the Court of Appeals instructing that court “determine whether the stop was pretextual and, if so, whether [the New Mexico Constitution] prohibits pretextual stops.” The New Mexico Supreme Court has followed the Court of Appeals on this issue. *See Schuster v. State Dep’t of Taxation & Revenue, Motor Vehicle Div.*, 283 P.3d 288, 297 (N.M. 2012) (“New Mexico has departed from United States Supreme Court precedent in *Whren* . . . by holding that pretextual traffic stops are constitutionally unreasonable.”) (citations omitted).

are in a vehicle.⁶³ Rejecting the “mechanical federal rule” of *Whren*, the court referenced its own precedent: “Our courts reject ‘bright-line rules that would have held certain categories of searches or seizures to be per se reasonable so long as there was probable cause.’”⁶⁴ In light of “the ubiquity of driving in this country,” the “extensive regulation of all manner of driving subjects virtually all drivers to the whim of officers who choose to selectively enforce the traffic code for improper purposes.”⁶⁵

In *Ochoa*, the court described a pretextual traffic stop as “a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but [that] is executed as a pretense to pursue a ‘hunch,’ a different more serious investigative agenda for which there is no reasonable suspicion or probable cause.”⁶⁶ The court noted that “[t]he purpose of the reasonable suspicion [and] probable cause exception to the warrant requirement—to prevent officers from acting on unsupported hunches—is not furthered when our courts refuse to examine the unconstitutional hunch motivating the stop.”⁶⁷

To determine whether a traffic stop was a pretextual “subterfuge,” a court should review “the totality of the circumstances, judge the credibility of witnesses, weigh the evidence, make a decision, and exclude the evidence if the stop was unreasonable at its inception. . . includ[ing] considerations of the objective reasonableness of an officer’s actions and the subject intent of the officer—the real reason for the stop.”⁶⁸ A reviewing court should follow a three-step approach for this inquiry:

First, the State has the burden to establish reasonable suspicion to stop the motorist. If the State fails in its burden, the stop is

63. *Ochoa*, 206 P.3d at 151 (citing *State v. Cardenas-Alvarez*, 25 P.3d 225, 231 (N.M. 2001)).

64. *Id.* at 152–53 (quoting *State v. Rodarte*, 125 P.3d 647, 651 (N.M. Ct. App. 2005)).

65. *Id.* at 150 (noting that the concern with the “practically limitless discretion afforded officers enforcing traffic laws is not merely hypothetical”). See *State v. Peterson*, 315 P.3d 354, 358 (N.M. Ct. App. 2013) (noting that the rationale of *Ochoa* does not apply when officers are executing an arrest warrant, “even when they must first stop the vehicle to do so;” the warrant limits the officers’ discretion and thus a traffic stop to execute the warrant is constitutionally reasonable); *State v. Boynton*, No. 33,373, 2015 WL 4357148, at *2 (N.M. Ct. App. June 29, 2015) (noting that *Ochoa* applies to traffic stops, not to investigatory detentions of citizens on foot). Unpublished decisions of the New Mexico Supreme Court or Court of Appeals do not create legal precedent, but may be cited for persuasive value. See NMRA, R. 12-405 (2015).

66. *Ochoa*, 206 P.3d at 152.

67. *Id.* at 153.

68. *Id.* at 155.

unconstitutional. Second, if the State satisfies its burden, the defendant may still establish that the seizure was unreasonable by proving that the totality of the circumstances indicates the officer had an unrelated motive to stop the motorist that was not supported by reasonable suspicion. If the defendant does not satisfy the burden, the stop is constitutional. Third, if the defendant satisfies the burden, there is a presumption of a pretextual stop, and the State must prove that the totality of the circumstances supports the conclusion that the officer who made the stop would have done so even without the unrelated motive.⁶⁹

However, suppression of evidence “is only required if the ‘unrelated motive . . . was not supported by reasonable suspicion or probable cause.’”⁷⁰

The *Ochoa* court provided a nonexhaustive list of “pretext indicators” that may be relevant to such an inquiry:

whether the defendant was arrested for and charged with a crime unrelated to the stop; the officer’s compliance or non-compliance with standard police practices; whether the officer was in an unmarked car or was not in uniform; whether patrolling or enforcement of the traffic code were among the officer’s typical employment duties; whether the officer had information, which did not rise to the level of reasonable suspicion or probable cause, relating to another offense; the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged suspicion arose or violation was committed the stop was made, how many officers were present for the stop; the conduct, demeanor, and statements of the officer during the stop; the relevant characteristics of the defendant; whether the objective reason articulated for the stop was necessary for the protection of traffic safety; and the officer’s testimony as to the reason for the stop.⁷¹

69. *State v. Gonzalez*, 257 P.3d 894, 898 (N.M. 2011) (citing *State v. Ochoa*, 206 P.3d 143, 155–56 (N.M. Ct. App. 2008)). In *Gonzalez*, the officer had admitted in the trial court that the traffic stop was pretextual. *Id.* On appeal, the New Mexico Supreme Court remanded the case for clarification of whether the officer “lacked a reasonable suspicion for the unrelated motive—a narcotics investigation.” *Id.* “Under *Ochoa III*, this analysis is a necessary prerequisite to concluding that a pretextual stop is unconstitutional.” *Id.* (noting that defendant bears the burden of proving that the “‘real motive’ for the stop was not supported by a reasonable suspicion”).

70. *State v. Alderete*, 255 P.3d 377, 381 (N.M. Ct. App. 2011) (citing *State v. Ochoa*, 206 P.3d 143, 156 (N.M. Ct. App. 2008)).

71. *Ochoa*, 206 P.3d at 156.

In *Ochoa*, the court found that the defendant had established a presumption that the stop was pretextual which the state did not overcome; therefore, the traffic stop was invalid.⁷²

New Mexico courts have subsequently applied this test in a number of cases. However, despite ostensibly applying a more stringent standard than the *Whren* test to review traffic stops, New Mexico courts rarely seem to find that police officers have made traffic stops on pretextual grounds in the absence of an admission of pretext or other circumstance.⁷³

In one case in which the New Mexico Court of Appeals did find the traffic stop to be pretextual and thus unlawful, the officer's testimony regarding motive appeared to be crucial to the court's holding. In *State*

72. *Id.* at 157 (finding that the state did not demonstrate that the officer had a reasonable suspicion to justify his motive for having the defendant stopped).

73. *See, e.g., Alderete*, 255 P.3d at 381 (finding that traffic stop was lawful and that the officers had reasonable suspicion of traffic violations as well as reasonable suspicion for the "unrelated motive" for stopping defendant's car—to investigate suspicions of drug activity); *State v. Flores*, No. 30,024, 2010 WL 4162294, at *3 (N.M. Ct. App. May 11, 2010) (finding that traffic stop was lawful and stating that "[t]he officer's motives for stopping the vehicle . . . matched the 'objective existence of reasonable suspicion'" that the driver was driving while impaired) (quoting *State v. Ochoa*, 206 P.3d 143, 156 (N.M. Ct. App. 2008)); *State v. Allen*, No. 30,367, 2012 WL 5835393, at *4 (N.M. Ct. App. Oct. 31, 2012) (finding that traffic stop was not pretextual because defendant did not establish that officer had an unrelated motive at the time of the traffic stop for a broken headlight); *State v. Vallejos*, No. 30,043, 2011 WL 2042050, at *3-4 (N.M. Ct. App. Mar. 10, 2011) (finding that traffic stop was not pretextual and that defendant's theory of pretext did not appear credible and plausible in light of evidence); *State v. Tapia*, No. 32,868, 2013 WL 5309804, at *1-2 (N.M. Ct. App. Aug. 12, 2013) (noting that under the *Ochoa* decision, an officer is not prohibited from having more than one suspicion about defendant and in the instant case, officer stopped defendant due to traffic safety concerns based upon several facts and thus stop was not pretextual); *State v. Medellin*, No. 32,652, 2013 WL 4537087, at *2 (N.M. Ct. App. May 6, 2013) (finding that traffic stop was not pretextual); *State v. Skippings*, 338 P.3d 128, 130, 132 (N.M. Ct. App. 2014) (noting that parties had stipulated that sole purpose of traffic stop was to investigate informant's tip and, therefore, the question was not whether stop was pretextual but rather was there reasonable suspicion to support the stop); *State v. Scharff*, 284 P.3d 447, 451 (N.M. Ct. App. 2012) (finding that defendant did not meet the burden of demonstrating that traffic stop was pretextual); *State v. Perea*, No. 30,071, 2010 WL 4161011, at *2 (N.M. Ct. App. May 19, 2010) (finding that stop was not pretextual because it was based on reasonable suspicion of drug activity); *State v. Trujillo*, No. 31,860, 2012 WL 2892206, at *1 (N.M. Ct. App. June 4, 2012) (finding that the traffic stop was not pretextual); *State v. Still*, No. 29,378, 2011 WL 2042296, at *5 (N.M. Ct. App. March 16, 2011) (finding that stop was not pretextual because "the officer's initial motive for following the vehicle matched the 'objective existence of reasonable suspicion'").

v. Deleon,⁷⁴ the officer admitted that he made traffic stops for minor infractions to then investigate other offenses.⁷⁵ The defense also presented witnesses whose testimony established a pattern of stops for minor infractions.⁷⁶ Based upon this pattern evidence and the officer's admission, the court found that there was substantial evidence that the officer used a minor traffic infraction "to pursue his hunch that Defendant was driving while intoxicated, for which there was no reasonable suspicion or probable cause."⁷⁷

C. *Alaska*

Alaska courts have determined that it has not yet been necessary to decide whether the doctrine of pretext applied under the Alaska State Constitution, generally because the defendant had failed to allege sufficient facts to raise the question.⁷⁸ Instead, Alaska courts "have clarified that the doctrine does not apply to all instances where a police officer has an ulterior motive for making a traffic stop. Rather, a traffic stop is a 'pretext' only if the defendant proves that, because of this ulterior motive, the officer departed from reasonable police practices by making the stop."⁷⁹

74. No. 30,813, 2013 WL 4511939 (N.M. Ct. App. Feb. 14, 2013).

75. *Id.* at *4.

76. *Id.*

77. *Id.*

78. *See Morgan v. State*, 162 P.3d 636, 638–39 (Alaska Ct. App. 2007) (finding it unnecessary under the facts of the case to decide whether to apply *Whren* or pretext doctrine); *Grohs v. State*, 118 P.3d 1080, 1081–82 (Alaska Ct. App. 2005) (finding that even if pretext doctrine applied, defendant had not alleged sufficient facts to come within doctrine); *Nease v. State*, 105 P.3d 1145, 1148 (Alaska Ct. App. 2005) (finding it unnecessary on facts of case to decide whether to adopt the *Whren* test or the *Ladson* test as a matter of state law). *Cf. Way v. State*, 100 P.3d 902, 905 (Alaska Ct. App. 2004) ("[T]he classic pretext search is one where the police follow a suspect based on the theory, as set out by the *Ladson* court, that the suspect will certainly commit a traffic violation within a short period of time which will give the police the opportunity to stop the suspect for the traffic violation and then search the suspect and the vehicle").

79. *Chase v. State*, 243 P.3d 1014, 1019 (Alaska Ct. App. 2010) (citations omitted); *Nease*, 105 P.3d at 1149 ("[I]f the police stop [a motorist's] car for minor offense A, and they subjectively hoped to discover contraband during the stop so as to establish serious offense B, the stop is nonetheless lawful if a reasonable officer would have made the stop in the absence of the [ulterior] purpose.") (alterations in original) (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e), at 118 (3rd ed. 1996)). The court first has to determine whether there was sufficient justification, either reasonable suspicion or probable cause, to support the stop. If this does not exist, then there is no need for the court to address anything further.

As the court has explained, even under the pretext doctrine, the officer's subjective motivation is not the issue.⁸⁰ Instead, the reviewing court looks to the totality of the circumstances, to determine whether the officer departed from "reasonable police practice," taking into account that:

There are numerous factors that a police officer may properly consider when deciding whether to stop a motorist for a traffic violation, including the egregiousness or seriousness of the violation (*i.e.*, whether it poses a danger to safety), any earlier police contacts with the motorist or the vehicle, the time of day or night, the weather and road conditions, and the press of other business (or lack thereof).⁸¹

Alaska courts have applied the "reasonable police practices" test in a number of cases involving claims that the officer engaged in a pretextual traffic stop, and found that the traffic stop was proper.⁸² Critics argue that use of this standard has "nearly the same effect as the objective standard" set forth in *Whren*.⁸³ These critics argue that Alaska

80. *Nease*, 105 P.3d at 1149.

81. *Id.*

82. *See, e.g.*, *Laschober v. State*, No. A-11302, 2014 WL 7005586, at *5 (Alaska Ct. App. Dec. 10, 2014) (finding that defendant "made no showing that [officer] departed from reasonable police practices by stopping him for driving at night without his lights illuminated and for crossing the centerline"); *Brockway v. State*, No. A-10659, 2011 WL 563082, at *4 (Alaska Ct. App. Feb. 16, 2011) ("Like *Nease*, *Brockway* presented no evidence suggesting that police officers never stop motorists to issue citations for commercial vehicle violations."); *Marley v. State*, No. A-9285, 2006 WL 1195668, at *4 (Alaska Ct. App. May 3, 2006) (finding that defendant "failed to meet the minimum evidentiary" showing to bring the traffic stop into the doctrine of pretext stops because defendant did not show that the state trooper departed from reasonable police practices by making the stop in the circumstances); *Olson v. State*, No. A-8595, 2005 WL 1683588, at *3 (Alaska Ct. App. July 20, 2005) (finding that defendant's claim of pretext failed because she presented no evidence that the stopping officer departed from reasonable police practice); *Bessette v. State*, 145 P.3d 592, 595 (Alaska Ct. App. 2006) (finding that defendant failed to prove that trooper departed from reasonable police practice); *Murphy v. Municipality of Anchorage*, No. A-10345, 2010 WL 986688, at *3 (Alaska Ct. App. Mar. 17, 2010) (finding that defendant failed to prove that officer departed from reasonable police practices due to some ulterior motive); *Polushkin v. State*, No. A-10153, 2009 WL 1259357, at *2 (Alaska Ct. App. May 6, 2009) (finding that defendant did not show that trooper departed from reasonable police practice in making the stop).

83. Jeff D. May, Rob Duke & Sean Gueco, *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 176 (2013). Alaska courts have found that "[i]f the traffic stop was within what would be expected of a reasonable officer in that situation, irrespective of the fact that there were other subjective motivations that could not have been independently acted

should adjust the application of the reasonable officer standard by conforming the standard to other jurisdictions like New Mexico.⁸⁴

D. Washington State Part 2: Another Layer Is Added

In 2012, the Washington Supreme Court revisited the question of what types of traffic stops are legal under the Washington State Constitution pursuant to its *Ladson* decision. In *State v. Arreola*,⁸⁵ the Court was presented with the question of “whether a traffic stop motivated primarily by an uncorroborated tip, but also independently motivated by a reasonable articulable suspicion of a traffic infraction, [was] unconstitutionally pretextual” under the Washington State Constitution and the *Ladson* decision.⁸⁶ In *Arreola*, the trial court had found that the officer’s primary motivation for performing the traffic stop at issue was to investigate a reported drunk driving tip but that a muffler violation was also an “actual reason for the stop.”⁸⁷

The Supreme Court noted that it “is commonly accepted that full enforcement of traffic and criminal laws by police officers is both impossible and undesirable.”⁸⁸ Just as police officers must exercise discretion in determining which criminal laws to enforce, police officers “must exercise wide discretion in deciding which traffic rules to enforce, and when to enforce them, in furtherance of traffic safety and the general welfare.”⁸⁹ In a pretextual traffic stop,

a police officer has *not* properly determined that the stop is reasonably necessary in order to address any traffic infractions for which the officer has a reasonable articulable suspicion; instead, the traffic stop is desired because of some other (constitutionally infirm) reason—such as a mere hunch regarding other criminal activity or another traffic infraction—or due to bias against the suspect, whether explicit or implicit. A pretextual stop thus disturbs private affairs without valid justification and is unconstitutional.⁹⁰

The court interpreted *Ladson* as a case where “the officer abused his discretion by conducting the stop without deeming it reasonably

upon, then the court of appeals has concluded that the stop was not pretext.”
Id. at 186.

84. *Id.* at 186.

85. 290 P.3d 983 (Wash. 2012).

86. *Id.* at 986.

87. *Id.* at 987.

88. *Id.* at 989.

89. *Id.*

90. *Id.* at 990.

necessary to enforce license plate tab regulations.”⁹¹ In the case at hand, however, the trial court had found that the “actual reason for the stop” was the exhaust infraction and that the officer would have stopped for this infraction even without the previous DUI tip.⁹² Thus, this was a mixed-motive stop, based on both legitimate and illegitimate grounds, unlike the stop in *Ladson* which was pretextual.

The court found that a mixed-motive stop does not violate the Washington State Constitution “so long as the police officer making the stop exercises discretion appropriately.”⁹³ If the “officer makes an independent and conscious determination that a traffic stop is reasonably necessary” to address a suspected traffic infraction, to further “traffic safety and general welfare, the stop is not pretextual.”⁹⁴

That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless.⁹⁵

The court noted that police officers “cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation.”⁹⁶ In such a situation, “an officer’s motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.”⁹⁷

To determine whether a challenged traffic stop is pretextual, the reviewing court “should consider both subjective intent and objective circumstances in order to determine whether the police officer actually exercised discretion appropriately.”⁹⁸

91. *Id.* at 991.

92. *Id.* at 987.

93. *Id.* at 991.

94. *Id.*

95. *Id.* at 991–92.

96. *Id.* at 992.

97. *Id.*

98. *Id.*

The trial court's inquiry should be limited to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop. The presence of illegitimate reasons for the stop often will be relevant to that inquiry, but the focus must remain on the alleged legitimate reason for the stop and whether it was an actual, conscious, and independent cause.⁹⁹

In *Arreola*, because the traffic infraction was the “actual, conscious, and independent cause of the traffic stop,” the court found that the stop was not pretextual.¹⁰⁰

Two justices dissented, stating disbelief that “the spirit of *Ladson* will survive the court's opinion in this case.”¹⁰¹ The reasoning used by the majority, Justice Chambers wrote, “is for all practical purposes indistinguishable from the reasoning this court rejected in *Ladson*.”¹⁰² Justice Chambers cautioned, “[g]oing forward, police officers in Washington will be free to stop citizens *primarily* to conduct an unconstitutional speculative investigation as long as they can claim there was an independent secondary reason for the seizure.”¹⁰³ The majority noted though, that Washington courts will continue to review challenged stops for pretext.¹⁰⁴

Washington courts have decided a number of cases in the few years since *Arreola*. In most cases the courts have found the stop to be constitutional as a mixed-motive stop.¹⁰⁵

99. *Id.*

100. *Id.*

101. *Id.* at 993 (Chambers, J., dissenting).

102. *Id.*

103. *Id.*

104. *Id.* at 990–91 (“Although there are concerns that some police officers will simply misrepresent their reasons and motives for conducting traffic stops . . . the possibility that police officers would engage in such wrongdoing only heightens the need for judicial review of traffic stops. . . . [O]fficers are expected to adjust their practices to be consistent with the law.”).

105. *See, e.g.*, *State v. Edwards*, 189 Wash. App. 1039, at *4 (2015) (finding that the traffic stop was not pretextual because the officer “was actually motivated, both subjectively and objectively, by the need to address the traffic violation rather than by some other investigative purpose”); *State v. McGovern*, 187 Wash. App. 1031, at *5 (2015) (finding that traffic stop was not pretextual and, even assuming that officers’ had an “ulterior motive” for stopping the car based on suspicion of drug activity, the traffic stop was lawful in light of the speeding violation); *State v. Jones*, 347 P.3d 483, 487 (Wash. Ct. App. 2015) (finding that traffic stop was not lawful because there was no reasonable suspicion of a traffic violation to support the stop); *State v. Kelly*, 180 Wash. App. 1041, at *3 (2014) (finding that the traffic stop was not pretextual because, under the totality of the circumstances, the gang unit detectives

CONCLUSION

While the *Whren* test does provide “clear guidelines for police, prosecutors, and courts as to what is considered reasonable under the Fourth Amendment, it also has real limitations for constraining . . . abuse of that discretion, such as racial profiling.”¹⁰⁶ However, it is not clear that the states have found the right balance to constrain abuse of police discretion yet. Washington, the first state to use the “would have” test, now recognizes that a traffic stop might be lawful even if the officer is motivated primarily by a hunch or suspicion that is insufficient to justify the stop. Arguably, this is the “could have” test in another guise or with another layer added. And, while New Mexico seems to have the most stringent approach to reviewing traffic stops, in practice New Mexico courts have rarely seemed to find pretext. While Alaska has not yet decided whether to adopt the pretext doctrine, Alaska courts have noted that even under that doctrine, the officer’s subjective motivation is not the decisive factor.

Scholars and others have made various proposals about alternative means to address the use of pretext.¹⁰⁷ Professor Lewis Katz has written that the Supreme Court should, among other suggestions, “limit police from stopping for trivial traffic offenses unrelated to highway safety [and] to forbid police to arrest for traffic offenses without a separate justification.”¹⁰⁸ Whether the Supreme Court will so hold in future cases is to be seen. In the meantime, Washington’s relatively new mixed-motive test, while still a version of the “could have” test, may come the closest to providing a reviewing court the means to consider whether the police used their discretion appropriately.

were motivated both subjectively and objectively by the need to investigate the traffic violation); *State v. Trenary*, 183 Wash. App. 1005, at *3–4 (Wash. Ct. App. 2014) (finding that traffic stop was a “mixed-motive” stop and therefore lawful when the officers, who were in special unit that proactively investigates crime, were motivated by a desire to investigate suspected drug activity, and the stop was “reasonably necessary” to promote traffic safety and general welfare due to suspected traffic infraction); *State v. Burr*, 180 Wash. App. 1045, at *2–3 (2014) (finding that traffic stop was not pretextual because “*Arreola* does not require the officer to explicitly state that this stop [was] ‘necessary for the general welfare’” and here, officer testified that he stopped for traffic infraction although he had suspicions that defendant was driving under the influence); *State v. White*, 177 Wash. App. 1027, at *8 (2013) (finding that White was lawfully stopped and seized when asked to step out of the car); *State v. Bonds*, 299 P.3d 663, 669 (Wash. Ct. App. 2013) (finding traffic stop was lawful when the officers stopped car due to probable cause that driver was committing a misdemeanor); *State v. McLean*, 313 P.3d 1181, 1186 (Wash. Ct. App. 2013) (finding that traffic stop was not pretextual because the officer “had reasonable suspicion that [driver] was driving under the influence” and traffic stop was executed to investigate that crime).

106. Lawton, *supra* note 5, at 958.

107. *Id.* at 958–59 & nn.293–98.

108. Katz, *supra* note 6, at 1471.