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Notes

Alaska, the Last Frontier of Privacy:
Using the State Constitution to Eliminate
Pretextual Traffic Stops

JEFFREY M. KABAN*

INTRODUCTION

In United States v. Whren, the United States Supreme Court unanimously held that if an officer could objectively make a legal traffic stop, then his subjective intentions were irrelevant.¹ In so holding the Court implicitly decided that pretextual traffic stops do not violate the Fourth Amendment.² A pretextual traffic stop occurs when an officer pulls someone over for a traffic violation for the purpose of investigating a separate crime for which the officer did not have probable cause to stop the vehicle.³ In Atwater v. City of Lago Vista, the Supreme Court held that an officer can conduct a search incident to arrest if she has authority to make a custodial arrest.⁴ The combined effect of these rulings is that

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2. Id.
3. Many courts and commentators have defined the meaning of "pretext" and have come up with different terms. The definition used here is a synthesis of the most common definitions put forth by the courts and commentators. See United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995), cert. denied, 518 U.S. 1007 (1996) (stating pretext occurs when traffic stops are made not for the purpose of enforcing traffic laws but to search a vehicle); United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988) (stating pretext occurs when officers use a legal justification to make a stop to search or interrogate a person for an unrelated crime); Mings v. State, 884 S.W.2d 596, 602 (Ark. 1994) (stating pretextual arrests are unreasonable under the Fourth Amendment); Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1009 (1996) (stating pretext is a legal justification for a legally unjustifiable motive for a seizure).
officers can follow persons until they violate a traffic law, pull them over, and conduct a search of the vehicle as a search incident to arrest.

Prior to the Supreme Court's ruling that pretextual stops are constitutional, the Alaska Supreme Court on a number of occasions held that pretextual traffic stops or arrests are illegal in Alaska. These decisions did not clarify whether the court made its rulings based on Fourth Amendment jurisprudence or state constitutional grounds. Since Whren was decided, the Alaskan appellate court has published one case that dealt with the issue of pretext. A number of unpublished appellate and district court cases have also raised the issue of pretext. Each time the Alaska appellate court has declined to rule whether pretext stops are still illegal in Alaska. None of these cases have made a definitive holding as to the effect of Whren, nor have they clarified what standard the trial courts should apply to determine if a stop is pretextual.

This Note addresses whether the Alaska State Constitution provides more protection against pretextual stops than the United States Constitution. Part I scrutinizes the history of pretext in the courts. It examines the federal standards for pretext prior to Whren and the line of Alaska pretext cases spanning from 1978 to 2002. Part II contends that the Alaska Constitution provides significantly more privacy protection than the United States constitution. This Note argues that, on that basis, the Alaska Supreme Court should reject Whren and find that pretextual stops are unconstitutional under Article I, Section 22 and Article I, Section 14 of the Alaska state constitution. Part III proposes that Alaska should adopt a mixed subjective and modified objective test to determine if a traffic stop is pretextual. Such a test would first look to the officer's

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8. See supra note 7.
9. Article I, Section 14 of Alaska's Constitution provides: "The right of the people to privacy is recognized and shall not be infringed."

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Article I, Section 22 of Alaska's Constitution provides (in part): "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. 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."
subjective intent, and then examine what a reasonable officer would have done in that situation.10

I. BACKGROUND: THE HISTORY OF PRETEXT IN THE COURTS

A. THE OBJECTIVE VERSUS MODIFIED OBJECTIVE TEST AND THE PRETEXT DEBATE PRIOR TO WHREN

The U.S. Supreme Court first mentioned pretext in United States v. Lefkowitz.11 In Lefkowitz, the police had a valid warrant to arrest Lefkowitz for conspiracy to violate the National Prohibition Act.12 The police entered Lefkowitz' office, arrested him, and then proceeded to search the entire office.13 Lefkowitz argued that the warrantless search violated his Fourth Amendment rights.14 The police claimed that it was a valid search incident to an arrest.15 The Court held that, although the officers had a valid arrest warrant, they did not have the authority to do an exploratory search for evidence. The Court stated that "[a]n arrest may not be used as a pretext to search for evidence."16

Almost thirty years later, in United States v. Abel the Court again touched on the issue of pretext.17 In Abel, the Immigration and Naturalization Service (INS) issued a deportation warrant for Abel.18 The INS agents arrested Abel, and in a search incident to the arrest, the INS found evidence of espionage.19 Abel moved to suppress the evidence claiming that the arrest was a pretext to search for evidence of espionage.20 The Supreme Court held that Abel's rights would have been violated if the INS's sole purpose in making the arrest was to search for evidence of espionage.21 The Court held, however, that the evidence in the record did not support this contention.22

Until Whren, the Court did not give any direct guidance to the lower courts as to what constitutes a pretextual stop or arrest. As a result,

10. See State v. Ladson, 979 P.2d 833, 843 (Wash. 1999) (rejecting Whren and holding that courts should consider both the subjective intent of the officer as well as the objective reasonableness of the officer's actions under a totality of the circumstances approach).
12. Id. at 457.
13. Id. at 459-60.
14. Id. at 457.
15. Id. at 462.
16. Id. at 467.
18. Id. at 222.
19. Id. at 218.
20. Id. at 225-26.
21. Id. at 226.
22. Id. at 230.
lower courts looked to three cases from the late 1970s and early 1980s to guide their decisions: *Scott v. United States*,23 *United States v. Villamonte-Marquez*,24 and *Maryland v. Macon*.25 Interestingly, none of these cases dealt directly with pretext. Rather, they examined whether an officer's subjective intent should be taken into account. In all three cases, the Court held that the subjective intent of the officer was not an issue and that courts must examine the objective facts.26

When the pretext issue came before the lower courts, the majority of the circuits held that because the subjective intent of an officer was deemed irrelevant in other areas, the courts needed to adopt an objective test.27 Following this logic, nine circuits and the D.C. Circuit all adopted a "could have" test when examining pretext: If the officer could have legally made the traffic stop, then it was not pretextual.28 Meanwhile, the Ninth and Eleventh Circuits adopted a modified objective test: asking whether a reasonable officer would have made the stop without the improper motive.29

B. THE HISTORY OF PRETEXT IN ALASKA

The Alaska Supreme Court first addressed the issue of pretext in *McCoy v. State*.30 The court held that for a search incident to arrest to be valid, three conditions must be met: (1) the arrest must be valid; (2) the search must be roughly contemporaneous with the arrest; and (3) the arrest must not be a pretext for the search.31 The Alaska court based its holding on federal courts' interpretations of the Fourth Amendment. The court did not do a subsequent analysis of the Alaska constitution.32 The rationale that the arrest must not be a pretext for the search came from *Lefkowitz and Taglavore v. United States*, where the Ninth Circuit

26. *See Scott*, 436 U.S. at 137 (holding courts should make an objective assessment of an officer's actions in light of the facts and circumstances then known to the officer); *Villamonte-Marquez*, 462 U.S. at 584 (rejecting the idea that because customs officials came aboard the ship with a state policeman they could no longer solely rely on the statute that allowed customs officials to board ships with no reasonable suspicion); *Maryland*, 472 U.S. at 470 (holding that whether a Fourth Amendment violation occurs depends on the objective facts, not on the officer's state of mind).
27. *See Leary & Williams, supra* note 3, at 1013.
29. United States v. Cannon, 29 F.3d 472, 475 (9th Cir. 1994); United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986).
31. *Id.*
32. *Id.* at 131.
wrote, "the search must be incident to the arrest, and not vice versa." The *McCoy* court noted that Alaska must start its analysis with the Federal Constitution, the Supreme Court, and Ninth Circuit holdings because these were binding on the state. In *McCoy*, the Alaska court did not have to beyond the Fourth Amendment because at the time pretextual arrests and searches were considered to be a violation of the United States Constitution under the Ninth Circuit's Fourth Amendment case law.

In 1978, the Alaska Supreme Court revisited the pretext issue. In *Clark v. State*, the court reaffirmed its conclusion that an arrest should not be used as a pretext for a search. In *Brown v. State*, the court held that pretextual traffic stops violate the Constitution, stating: "[I]t is true that an arrest (or traffic stop) should not be used as a pretext for a search." In *Brown*, an officer was responding to an armed robbery call when he saw a vehicle in the vicinity of the robbery with the headlights bouncing erratically. According to the officer, this indicated that the vehicle was being driven at an unsafe speed. The officer observed the vehicle make a left turn without signaling or stopping at a stop sign. He followed the vehicle for another block. During this time, he received a physical description of the robbery suspect over the radio. The officer pulled over the car. The driver got out of his car and the officer realized he matched the description and arrested him.

The driver argued that the traffic stop was illegal because it was a pretext to seek evidence of the robbery. The court, while affirming that pretextual stops are illegal, found that there was "substantial evidence to support the trial courts determination that Brown's vehicle was stopped for a violation of traffic regulations, and that this was not a pretext stop." While upholding the trial court's decision that the stop was not pretextual, the Alaska Supreme Court did not take the opportunity to

33. Id. at 138 (quoting Taglavore v. United States, 291 F.2d 262, 265 (9th Cir. 1961)).
34. Id. at 131.
37. Id. at 1175.
38. Id. at 1175-76. It turned out that there actually was no stop sign. The court, however, found that there was no indication that the officer was lying and that it was reasonable for him to think that there was a stop sign at that intersection under the circumstances.
39. Id. at 1175.
40. Id.
41. Id.
42. Id. at 1176.
43. Id.
decide what information the trial courts should use to determine whether a stop is pretextual.\textsuperscript{44}

Ten years later, the Alaska Court of Appeals addressed the pretext issue in \textit{Townsel v. State}.\textsuperscript{45} In \textit{Townsel}, an officer received a dispatch that an armed robbery had taken place at the intersection of Old Seward and Dimond Boulevards. The suspect was a juvenile black male, armed with a rifle, fleeing on foot.\textsuperscript{46} Two minutes after receiving the dispatch, the officer arrived at the intersection of New Seward and Thirty-sixth Avenue.\textsuperscript{47} The officer observed a car going north on New Seward with the following infractions: one headlight was out; the driver’s window was obstructed; a taillight was broken allowing white light to shine through; and the license plate was obscured.\textsuperscript{48} The officer turned onto New Seward and realized that the car was going ten miles per hour over the speed limit.\textsuperscript{49} He pulled the car over and saw a shotgun in the back seat.\textsuperscript{50} When the driver went for the gun, the officer drew his weapon and in the ensuing melee the driver escaped on foot.\textsuperscript{51} He was later arrested and charged with robbery based on the evidence found in the car.\textsuperscript{52}

In \textit{Townsel}, the defendant argued that the traffic stop was a pretext to investigate the robbery.\textsuperscript{53} The court of appeals upheld the trial court’s decision that the stop was not pretextual.\textsuperscript{54} The court of appeals looked to \textit{Brown} as the controlling opinion.\textsuperscript{55} Under \textit{Brown} the court must determine whether “there is substantial evidence to support the trial court’s determination that [the defendant’s] vehicle was stopped for a violation of traffic regulations and that [the stop] was not a pretext stop.”\textsuperscript{56} If the stop meets these requirements, it is not considered pretextual.

Relying upon the reasoning in \textit{Brown}, the court of appeals affirmed the defendant’s conviction. The court primarily relied upon the officer’s testimony, which the trial court had found credible.\textsuperscript{57} At trial, the officer testified that he made the stop because of vehicular and traffic infrac-

\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 1355.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. (quoting \textit{Brown v. State}, 580 P.2d 1174, 1176 (Alaska 1978)).
\item Id.
tions, not because he was investigating a robbery. The officer also testified that he would have made the traffic stop even if he had not been investigating the robbery. The court applied a mixed subjective and objective test looking to both the officer’s subjective intent when he actually pulled the driver over and what he would have done if he was not also investigating a robbery.

In 2002, the court of appeals once again faced the issue of pretext in *Hamilton v. State*. In *Hamilton*, a murder was reported at 2:32 a.m. in Fairbanks just off Old Steese Highway. A state trooper immediately left a Safeway where he was conducting a DWI investigation and headed to the scene of the crime. After the trooper turned north onto Old Steese Highway, he saw two vehicles coming toward him, a snow grader and a sedan. In fact, these were the only two non-police vehicles he had seen since he left the Safeway. The trooper wanted to take down the license plate number of the sedan to contact the driver later for any useful information about the homicide. However, the trooper was unable to see the license plate number so he radioed back to his fellow officers who were further behind him and asked them to record the license plate number.

A fellow officer saw the sedan pass and turned to follow it southbound along Old Steese Highway. The officer tried to record the license plate number but it was obscured by snow. She radioed her su-

58. Id.
59. Id.
60. 59 P.3d 760, 764-65 (Alaska Ct. App. 2002). Between 1988 and 2002 there were a number of unpublished opinions regarding pretextual traffic stops. These opinions did not use a consistent test to determine if a stop was pretextual. See Gonzales v. State, Nos. A-7421, 4273, 2000 Alas. App. Lexis 132 (Alaska Ct. App. Sept. 20, 2000) (using the modified objective test the court held that a reasonable law enforcement officer would have pulled Gonzalez over under the same circumstances, therefore the stop was not a pretext); Johnson v. State, Nos. A-7264, 4258, 2000 WL 1124499 (Alaska Ct. App. Aug. 9, 2000) (using the objective test, the court held that the police had probable cause to arrest Johnson, therefore the arrest was not a pretext); Tapscott v. Municipality of Anchorage, Nos. A-6821, 4063, 1999 WL 396883 (Alaska Ct. App. June 16, 1999) (holding that the stop was legal because the police had probable cause to pull the car over and Tapscott failed to present any evidence as to the officer having an improper motive or what the stop was a pretext for); Pham v. State, No. A-6431, 1997 WL 732654 (Alaska Ct. App. Nov. 26, 1997) (using the objective test, the court held that the officer had an objective reason to stop the vehicle and that the officer’s subjective intentions were irrelevant).
62. Id. at 763.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id. at 763-64.
68. Id. at 764.
pervisor who told her to wait for backup and then pull the driver over. Upon pulling the car over, she observed that the driver's hands were covered in blood. She ordered him out of the car and arrested him.

The driver contended that the stop violated the Constitution because the license plate was a pretext to pull him over to investigate the murder. The state argued that the stop was not pretextual for two reasons: (1) the basis for determining if a traffic stop is legal is an objective test; and (2) it was a proper investigative stop. In dicta, the court of appeals suggested that an objective test should be used to determine the legitimacy of a traffic stop. The court cited the Alaska Supreme Court's decision in Beauvois v. State, which held that the legality of an investigative stop is based on an objective test of whether the facts known to the officer established a legitimate basis for the stop. The court of appeals also noted that the U.S. Supreme Court rejected the "pretext" doctrine in United States v. Whren. The opinion went on to note that Hamilton suggested that the court should reject Whren as a matter of state constitutional law. The court of appeals concluded, however, that it did not need to reach this question because the stop constituted a legitimate investigatory stop.

Under current case law, Alaska Supreme Court cases suggest that officers' subjective intentions are a valid method to determine whether a stop is pretextual. Despite this suggestion, the lower courts remain divided. Some judges apply a "reasonable officer" standard and while have suggested that the standard should be a purely objective one as in Whren.

II. ALASKA'S STATE CONSTITUTIONAL JURISPRUDENCE: A RESPECT FOR PRIVACY AND THE RIGHT TO BE FREE FROM GOVERNMENT INTERFERENCE

A. BACKGROUND ON ALASKA STATE CONSTITUTION JURISPRUDENCE

Early settlers of Alaska often moved north not just to seek a better life but also to escape from trouble and misfortune that they left behind.
Many moved to Alaska because they found the cities and communities in the lower forty-eight states too restrictive and conformist for their values. It is partly from this early tradition of personal freedom and privacy that Alaska's culture and laws have been molded. Alaska became a state in 1959. Since its inception, it has had an enduring and firm commitment to respecting privacy and the right to be left alone. Early opinions from the Alaska judiciary tended to use federal case law to interpret similar provisions of the Alaska Constitution. However, it did not take long for the Alaska Supreme Court to stake out its own territory. In 1969, the Alaska Supreme Court declared its independence, stating "we are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution." Two years later the court reaffirmed the importance of an independent state constitutional analysis, saying, "it would be an abdication of our constitutional responsibilities to look only to the Supreme Court for guidance."

In 1972, Alaska voters passed a constitutional amendment guaranteeing a right to privacy. That same year, the Alaska Supreme Court interpreted the new provision for the first time in Ravin v. State. In Ravin, the court found that outlawing the personal use of marijuana inside one's home violated the state constitution's right of privacy. After finding that ingesting marijuana was not a fundamental right, instead of reverting to mere rational basis review, the Alaska Supreme Court wrote, "[i]f governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial." The court concluded the state did not have a substantial interest in invading the privacy of a person's home because the state's evidence concerning the harms of marijuana to the user was inconclusive.

Since 1972, the Alaska Supreme Court has held that the Alaska Constitution grants its citizens a stronger right of privacy than the United

79. Id.
80. Id.
81. Id.
84. "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22.
86. Id. at 513.
87. Id. at 498.
88. Id. at 511.
States Constitution on a wide range of issues. In addition, the right of privacy has been read in conjunction with other provisions of the Alaska Constitution to create broader state constitutional rights than those that currently exist under federal law. For example, the Alaska Supreme Court has held that “Alaska’s search and seizure clause is stronger than the federal protection because Article I, Section 14 is textually broader than the Fourth Amendment, and the clause draws added strength from Alaska’s express guarantee of privacy.” It is within the Alaska Supreme Court’s purview to hold that the Alaska Constitution affords greater protection against pretextual traffic stops than the U.S. Constitution.

B. ALASKA STATE CONSTITUTION SEARCH AND SEIZURE JURISPRUDENCE

Having determined that the Alaska Supreme Court has the power to read its constitutional provisions more broadly than the United States Constitution, we must next determine whether and in what circumstances the court should constitutionally prohibit pretextual stops. This section will first cover a range of search and seizure issues where Alaska has interpreted its provisions more broadly than the United States Constitution. It will focus on how the Alaska provisions have been applied to traffic stops. The Alaska Supreme Court has placed a higher value on the right of citizens to be free from government interference than the United States Supreme Court. In the types of searches where the United States Supreme Court has consistently found a diminished expectation of privacy and justified warrantless searches, the Alaska Supreme Court has held that the Alaska Constitution affords citizens a greater protection to be free from government intrusion. It is entirely consistent for the Alaska Supreme Court to hold that pretextual traffic stops are unconstitutional and to examine the subjective intent of the officer as a means to determine if the stop was pretextual.

89. See Anchorage Police Dep’t Employees Ass’n v. Anchorage, 24 P.3d 547, 550 (Alaska 2001) (“Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.”); State v. Malkin, 722 P.2d 943, 948 (Alaska 1986) (holding that when a criminal defendant challenges a warrant as being based on false statements then the government bears the burden of showing that the false statements were not made recklessly or intentionally—this standard is more protective than the federal standard); Glass v. State, 583 P.2d 872, 875–76 (Alaska 1978) (holding that Alaska can construe its right of privacy greater than the federal right of privacy, and that a warrant is required for monitoring conversations); Ravin v. State, 537 P.2d 494, 513 (Alaska 1975) (holding that Alaska right of privacy covered smoking marijuana inside one’s own home).

90. Anchorage Police Dep’t Employees Ass’n, 24 P.3d at 550.

91. Id.
I. Search and Seizure in Alaska

The Alaska Constitution grants people greater privacy in their cars than the U.S. Constitution. In 1979, the Alaska Supreme Court in *State v. Daniel* held that a warrantless inventory search of closed containers or packages within a vehicle violated the Alaska constitution. After arresting the driver for drunk driving, a tow truck was called to remove the vehicle. Pursuant to regulations, an officer proceeded to take an inventory of the car. While cataloguing the contents of the car, the officer opened a briefcase that was in the back seat. Inside he found a bag of marijuana, a bag of cocaine and a handgun. The court granted review of this case because it had not previously addressed the scope of police inventory searches under Alaska's constitutional guarantee against unreasonable searches and seizures.

In analyzing this issue, the Alaska Supreme Court looked to both federal and state cases as persuasive authority but ultimately rested its decision on its reading of the Alaska Constitution. The court seemingly rejected the reasoning in *South Dakota v. Opperman*, where the United States Supreme Court held that the inventory search of a closed glove compartment was not unreasonable. In doing so, the court cited extensively from Justice Marshall's dissenting opinion, that took issue with the distinction the majority made between homes and cars. The court concluded that an automobile is not a talisman that causes the Fourth Amendment and its protections to disappear.

Eight years later, the United States Supreme Court examined an identical issue, in *Colorado v. Bertine*. The Court came to a very different conclusion than the Alaska court. The Court held that the search of a closed container was a valid inventory search and not unreasonable under the Fourth Amendment. In addition, the Court ruled that *Opperman* was the controlling case and found that there is a lesser expectation of privacy in a car, sufficient to justify an inventory search of a closed container. In contrast, the Alaska Supreme Court previously held that

93. Id. at 410.
94. Id.
95. Id.
96. Id.
97. Id. at 411.
98. Id. at 417.
101. Id. at 416 (citation omitted).
103. Id. at 372–73.
104. Id.
people had a reasonable expectation of privacy in closed containers whether locked or unlocked in a car. Furthermore, the court reasoned that the purpose of the inventory search could be fulfilled by merely writing down that the car contained a briefcase. Thus, the Alaska Constitution affords people greater privacy and protection against government intrusions when they are in their cars than the U.S. Constitution.

In addition, the Alaska Constitution grants people a greater expectation of privacy in their person than the United States Constitution. In two cases, involving searches of a person after an arrest, the Alaska Supreme Court rejected the notion that a person loses her expectation of privacy after being arrested. In the late 1970s, the court found in both a search incident to arrest and a pre-incarceration inventory search that the Alaska constitution did not permit the police to open containers that they found on the person. The court rejected the notion expressed by the U.S. Supreme Court that people retain no significant Fourth Amendment rights in the privacy of their person once they have been arrested. The Alaska Supreme Court held firm that a search without a warrant is presumptively invalid unless it met one of a few narrowly defined exceptions.

2. Traffic Stops and Investigatory Stops in Alaska

Alaska’s state law identifies two different types of vehicular stops: traffic stops and investigatory stops. A valid traffic stop occurs where there is substantial evidence to support the determination that the vehicle was stopped for a traffic violation and not as a pretext for a search. A legal investigatory stop occurs when there “reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred.” In 1990, the court extended the investigatory stop principle to allow police to stop potential witnesses even when they have no reason to believe that the person was involved in the crime.

106. Id. at 410.
107. Reeves v. State, 599 P.2d 727, 734 (Alaska 1979) (holding an arrested person maintains an expectation of privacy for items carried on him or her that Alaska is prepared to recognize even in a pre-incarceration inventory search); Zehrung v. State, 569 P.2d 189, 199 (Alaska 1977) (holding arrested people maintain an expectation of privacy for items carried on them that Alaska is prepared to recognize in a search incident to an arrest).
108. See cases cited supra note 107.
109. Reeves, 599 P.2d at 734.
110. Id. at 735.
113. Coleman, 553 P.2d at 46.
Alaska investigatory stop doctrine was established before *Terry v. Ohio* and was justified under the Alaska Constitution.

Having dual reasons, with different standards, available to justify a stop makes it even more imperative that Alaska retains its pre-existing law outlawing pretextual traffic stops as violative of the state constitution. The investigatory stop doctrine rightly allows police the authority to pull people over when they have a reasonable suspicion that an imminent public danger exists or serious harm to a person or property has recently occurred. Furthermore, it allows the police to stop cars to look for witnesses if a serious crime has recently occurred in the area.

In *Beauvois v. State*, the Court of Appeals of Alaska upheld the trial court’s decision that the investigatory stop of a car was legal even though there was nothing linking the car to the crime. In *Beauvois*, the defendant robbed a convenience store clerk at knifepoint at approximately 3:00 a.m. After the robbery, he ran out of the store and headed north back toward the campground where his friends were waiting for him. The clerk, meanwhile, called the police, gave a description of the perpetrator, and stated that he was headed north on foot. Within one minute of the call, an officer was heading down the only road to the campground. Seeing no vehicles or pedestrians, the officer assumed that the culprit must have been heading on foot to a vehicle in the campground. He decided to go to the campground and stop any moving vehicle, assuming that anyone awake at 3:00 a.m. might have seen something. The dispatcher informed the officer that the car was stolen and he subsequently found out that the driver was reported as a missing person. During this process, he noticed someone hiding under a blanket in the back seat.

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115. 392 U.S. 1 (1968) (defining the scope of permissible investigatory stops under the U.S. Constitution).
116. *Coleman*, 553 P.2d at 44.
117. *Id.* at 46.
120. *Id.* at 1120.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
He removed the blanket and realized the person fit the description of the robber of the 7-Eleven. The officer arrested the individual.

On appeal, Beauvois challenged the investigatory stop because there was nothing to link the car or its visible occupants to the robbery. At the evidentiary hearing, the officer testified that his intent in stopping the Corvette was to see if anyone inside the car matched the description of the robber. The court held that the officer's subjective intent was irrelevant to this case. The court noted that the appropriate test was whether, under the facts known to the officer at the time, the stop of the car was objectively justifiable. The court further held that the officer was justified in stopping the car because a serious felony had occurred in the vicinity of the campground, the robber had fled toward the campground, and the streets leading to the campground were deserted. Based on these facts, an investigatory stop of the vehicle was objectively reasonable to determine if the occupants were either involved in the crime or could provide the police with any useful information.

In Hamilton v. State, the Alaska court of appeals implied that the legality of the traffic stop hinges on the objective facts known to the officers at the time of the stop. The court, in dicta, stated that the rule announced in Beauvois should govern traffic stops as well as investigatory stops. The court recognized that this was all that was required to be acceptable under the Fourth Amendment and United States v. Whren. However, the court stated that it did not have to decide whether or not this test satisfied the Alaska state constitution because it was able to uphold the search on the ground that it was a valid investigatory stop.

The court's dicta in Hamilton that the Beauvois test applies to traffic stops runs counter to all previous Alaska decisions that recognize the illegality of pretextual traffic stops. Furthermore, the court in Hamilton did not give weight to either the differences in the tests or the purposes behind a traffic stop compared to an investigatory stop. As the court in Hamilton stated, the essence of an inquiry into an investigatory stop is

129. Id.
130. Id.
131. Id.
132. Id. at 1122 n.1.
133. Id.
134. Id. at 1121.
135. Id.
137. Id. at 765.
138. Id.
139. Id. at 767.
whether "a prompt investigation [was] required . . . as a matter of practical necessity." This exigency that requires a prompt investigation coupled with the requirement that "imminent public danger exists or [that] serious harm has recently occurred" place strict limits on when an investigative stop can occur.141

An objective test is satisfactory for investigatory stops because the situational requirements place strict limits on an officer's ability to legally pull a person over. Furthermore, because it is legal for an officer to make an investigatory stop if the person is a witness or a suspect, the officer's subjective intent is irrelevant. Moreover, it does not infringe any further on an Alaskan's right of privacy or the right to be free from search or seizures if the courts ignore the subjective intent of the officer because it is legal to pull someone over to see if she is a possible witness. The key requirement for an investigatory stop is that a serious crime must have recently occurred or that the officer has a reasonable suspicion that imminent public danger exists. It also must be a situation where a prompt investigation is required by necessity. In investigatory stop cases there can be an evidentiary hearing into the facts surrounding the stop to decide whether or not the facts meet the criteria to be a valid stop.

In suggesting that an objective test or an after-the-fact justification was appropriate for a traffic stop, the Hamilton court did not even consider the preexisting state law, the differences in purpose between a traffic stop and an investigatory stop, and that changing the traffic stop doctrine would be an end-run around the investigatory stop doctrine. The purpose of a traffic stop is not to investigate other crimes, but rather to enforce the traffic regulations for the safety of the public. Using a traffic stop to investigate other crimes perverts the underlying purpose of the traffic stop.

If the Alaska Supreme Court adopts the reasoning of the appellate court in Beauvois, it would render the limits on the investigatory stop doctrine useless and provide Alaska's citizens with no more privacy protection than afforded by the United States Constitution. Under preexisting state law, an officer cannot use a traffic stop as a pretext to investigate another crime and can only use the investigatory stop doctrine in limited circumstances. If the pretext doctrine is abandoned, officers will simply follow a car until the driver violates a traffic regulation. The petitioners in Whren argued "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to

140. Id. (citation omitted).
catch any given motorist in a technical violation. Thus, the limitations on investigatory stops would be meaningless. Instead of being restricted by the limitations on investigatory stops, officers will use traffic violations as a pretext to investigate other crimes.

This could lead to increased antagonism between law enforcement and certain communities or people. For example, the petitioners in *Whren* argued that this would allow officers to stop people based on race. This same misuse of the traffic laws could occur in Alaska. In addition, since Alaska contains so many small towns where the officers know the local cars and who drives them—it would make legal the selective harassment of certain individuals that a particular officer might arbitrarily choose.

The Court in *Whren* never addressed the unique nature of traffic regulations; rather it stated that their prior Fourth Amendment jurisprudence invalidates any attempt to use subjective intent of the officer in deciding reasonableness. The Court never addressed the key issue of how allowing pretextual stops affects a citizen's right to privacy and right to be left alone by the government. This is a central value in the Alaska Constitution. Therefore, any attempt to change the pre-existing Alaska law must address how the change will affect the privacy of Alaskan citizens.

It would be inconsistent with Alaskan privacy and search and seizure jurisprudence to find that the Alaska constitution provides no more privacy than the U.S. Constitution in the area of pretextual stops. Not only does Alaska afford people a greater expectation of privacy in their vehicles than required by the U.S. Constitution, Alaska also provides arrested people with greater rights against searches and seizures than required by the U.S. Constitution. To allow an officer virtually unlimited discretion to pull a car over to investigate for crimes would provide a loophole around the greater degree of privacy protected by the Alaska

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143. Id.


145. 517 U.S. at 813.
Constitution. The Alaska Constitution should afford some protection from random stops that are pretexts for ill-conceived motives. Thus, Alaska should retain its preexisting law requiring that a valid traffic stop cannot be a pretext to search for evidence of another crime.

III. ALASKA SHOULD ADOPT A TWO-PART TEST TO DETERMINE WHETHER A STOP IS PRETEXTUAL

The Alaska Supreme Court should create a two-part test to determine if a stop is pretextual. First, courts should examine the subjective intent of the officer. Second, if the subjective intent of the officer is unclear, the court should turn to a modified objective test to see if a reasonable officer would have made a traffic stop in that circumstance.

An examination of an officer's subjective intent is an imperative component for any test for pretext. In examining an officer's subjective intent, the courts should first address the officer's stated reasons for the stop. If the officer admits that he was not stopping the car because it violated a traffic regulation but for alternative reasons the courts should find that the stop is pretextual. If, however, the officer states that his intent was to pull the car over for a traffic violation, the courts should then look at the totality of the circumstances surrounding the stop to decide the officer's subjective intent. They should take into consideration whatever extrinsic evidence is available to shed light on the officer's true intent. For example, courts should examine the officer's prior relationship or encounters with the defendant, what the officer said to the defendant at the time of the stop, or whether the officer pulling the car over for an investigatory stop had a reasonable basis to justify his actions. Courts should then compare the officer's testimony against the other extrinsic evidence of his intent.

There is no Alaska precedent that precludes an examination of the officer's subjective intent. In Brown, the court concluded that the traffic stop was legal because there was substantial evidence to support the trial court's determination that the officer pulled the defendant over for violating a traffic regulation. It is unclear from the court's opinion whether the trial court inquired into the officer's subjective intent. The officer tes-

146. See Leary & Williams, supra note 3, at 1038–39 (proposing a two-part test for pretextual stops: "1) Did the officer have a motive for seizing the defendant that was unrelated to the objective existence of reasonable suspicion or probable cause? 2) Absent that unrelated motive, would the officer have seized the defendant?"); See also State v. Ladson, 979 P.2d 833, 843 (Wash. 1999) (rejecting Whren and holding that courts should consider both the subjective intent of the officer as well as the objective reasonableness of the officer's actions under a totality of the circumstances approach).

147. See Leary & Williams, supra note 3, at 1038–39 (describing a totality of the circumstances standard and a similar two-part test).

tified that after watching the car pass at excessive speed, and turn left without signaling or stopping at the stop sign, he decided to make a traffic stop. The court looked at the evidence of the blatant traffic violations and decided that the officer was justified in making a traffic stop. No pretext appeared to be involved. It is possible that the court did inquire into the subjective intent of the officer. It is also possible that they did not. Nevertheless, it is clear that the decision in Brown did not foreclose the possibility that Alaska courts could inquire into the subjective intent of the officer to determine if a traffic stop is pretextual.

Furthermore, in at least one case the Alaska court of appeals has used an officer’s subjective intent as a basis for evaluating pretext. In Townsel the Alaska Court of Appeals looked to both the officer’s subjective intent and whether or not a reasonable officer would make the stop, when it determined whether or not the stop was pretextual. The officer testified that he stopped the car because it violated a traffic regulation not because he was investigating a robbery. In addition, he testified that even if there had not been a robbery he would have still pulled over a car making those violations. Thus, the officer testified to his subjective intent at the time and also to what a reasonable officer would do.

Courts and commentators have criticized the subjective test by noting that an officer can simply lie and claim his subjective intent was to make a traffic stop. However, as Justice Scalia noted in Whren, it seems odd to make a test for pretext that “cannot take into account actual and admitted pretext.” Furthermore, as Professors Leary and Williams have stated and as the Washington Supreme Court has noted, “Pretext is, by definition, a false reason used to disguise a real motive. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective.” Therefore, it makes sense to look at the officer’s testimony and subjective intent.

Nevertheless, even after looking at all the evidence, the subjective intent of the officer at the time of the stop may not be clear. Therefore, when the first prong of the test is inconclusive the court should use the “reasonable officer” standard that the Ninth Circuit adopted prior to Whren. Again the court should examine the totality of the circum-

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149. Id. at 1175.
151. Id.
152. Id.
155. Leary & Williams, supra note 3, at 1038; State v. Ladson, 979 P.2d 833, 843 n.11 (Wash. 1999).
156. United States v. Cannon, 29 F.3d 472, 475 (9th Cir. 1994).
stances to decide whether a reasonable officer would have made the traffic stop. Having an objective test follow the subjective inquiry protects Alaskan citizens from police deception by basing the decision on more than the credibility of the officer. A two-part test such as this will provide the protection necessary to allow Alaskans to maintain their right of privacy and to continue Alaska’s tradition of respecting an individuals right to be free from unreasonable searches and seizures.

**Conclusion**

Alaska has a long tradition of respecting privacy and the right to be free from unwarranted governmental intrusion. The Alaska Supreme Court has consistently interpreted its constitution to provide more protections from government searches and seizures than the United States Constitution. Based on Article I, Section 22 and Article I, Section 14 of the Alaska Constitution, the Alaska Supreme Court should reject *Whren*. Further, the Alaska Supreme Court should establish a test to guide the lower courts when determining if a traffic stop was pretextual. The court should adopt a test that considers both the subjective intent of the officer making the stop as well as whether a reasonable officer would have made the traffic stop. This test provides the greatest protection for Alaskan citizens by protecting them from traffic stops that violate their right of privacy and right to be free from unreasonable searches and seizures.