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## **State v. Vandenberg: Lowering the Fourth Amendment Bar While Avoiding the Issue of Pretextual Police Conduct**

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# STATE V. VANDENBERG: LOWERING THE FOURTH AMENDMENT BAR WHILE AVOIDING THE ISSUE OF PRETEXTUAL POLICE CONDUCT

TODD COBERLY\*

## I. INTRODUCTION

In *State v. Vandenberg*,<sup>1</sup> the New Mexico Supreme Court “trace[d] the outer boundary of facts and circumstances sufficient to justify a protective frisk...for weapons during an ordinary traffic stop on the ground of officer safety pursuant to the Fourth Amendment to the United States Constitution.”<sup>2</sup> If only it were so simple. But in an opinion dealing with an anything-but-ordinary traffic stop, the court traced too much—and too little. This Note faults *Vandenberg* on three grounds. First, in its attempt at defining the “outer boundary” of facts justifying a protective frisk, the supreme court cast its net too wide.<sup>3</sup> Second, the ruling effectively enables police officers to pull New Mexican motorists over for purely arbitrary reasons.<sup>4</sup> Finally, the court skirted the issue of pretextual police conduct and, by doing so, missed an opportunity to clarify the scope of article II, section 10 of the New Mexico State Constitution in this context.<sup>5</sup>

## II. STATE V. VANDENBERG: FACTS AND HISTORY

### A. The First Stop

At around 5:00 p.m. on July 29, 1999,<sup>6</sup> Jason Swanson, a young man with long hair,<sup>7</sup> was driving a 1975 Monte Carlo north on U.S. Highway 54 just south of Alamogordo, New Mexico.<sup>8</sup> Riding along with him in the front seat was Shawn Vandenberg.<sup>9</sup> As Otero County Deputy Sheriff Benny House, driving in the opposite direction, passed the Monte Carlo, he briefly observed the car and thought that its license plate was missing.<sup>10</sup> After making a U-turn, Deputy House pulled the car over;<sup>11</sup> however, once he did so, Deputy House realized that the car had a license plate and that it was properly displayed “in a place where the manufacturer had designed it to be.”<sup>12</sup> Nevertheless, Deputy House requested Swanson’s driver’s license, registration, and proof of insurance<sup>13</sup>—all of which came back clear.<sup>14</sup>

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1. 2003-NMSC-030, 81 P.3d 19.

2. *Id.* ¶ 1, 81 P.3d at 21.

3. *See infra* Part V.A.2.

4. *See infra* Part V.A.1.

5. *See infra* Part V.B.

6. *Vandenberg*, 2003-NMSC-030, ¶ 3, 81 P.3d at 22.

7. Defendant-Respondent’s Answer Brief at 2, *State v. Vandenberg*, 2003-NMSC-030, 81 P.3d 19 (No. 27,509).

8. *Vandenberg*, 2003-NMSC-030, ¶ 3, 81 P.3d at 22 (“Highway 54 is an area of heavy drug trafficking.”).

9. *State v. Vandenberg*, 2002-NMCA-066, ¶ 2, 48 P.3d 92, 94.

10. *Id.*

11. *Id.*

12. *Vandenberg*, 2003-NMSC-030, ¶ 3, 81 P.3d at 22.

13. *Id.*

14. *Vandenberg*, 2002-NMCA-066, ¶ 2, 48 P.3d at 94.

Deputy House also asked Swanson where he and Vandenberg had been and where they were going.<sup>15</sup> The two responded that they had just dropped off a friend at the El Paso, Texas, airport and were headed home.<sup>16</sup> At some point, another car “drove by and [its occupants] ‘honked and hollered.’”<sup>17</sup> Without inquiring, Deputy House assumed the car had traveled with the Monte Carlo to the airport.<sup>18</sup> Deputy House thought it odd that two cars had gone to the airport and determined that the story was “inconsistent.”<sup>19</sup>

After Deputy House told Swanson and Vandenberg that they were free to go, another officer with a narcotics K-9 pulled up.<sup>20</sup> Before the two could leave, Deputy House asked Swanson if he would consent to a dog sniff around the exterior of the car.<sup>21</sup> “According to Deputy House, Swanson and Vandenberg...looked at each other, refused to make eye contact with Deputy House, and became very nervous when asked about the canine sniff.”<sup>22</sup> After asking if he had to consent and being informed by Deputy House that he did not, Swanson said that he was in a rush and refused the sniff.<sup>23</sup>

Because of the nervous behavior exhibited by Swanson and Vandenberg while refusing the dog sniff, combined with the “inconsistent” story the two had given, Deputy House’s “suspicions were aroused.”<sup>24</sup> Hence, Deputy House initiated a “be-on-the-lookout (BOLO) to the Alamogordo City Police”<sup>25</sup> as a “courtesy.”<sup>26</sup> Responding to the BOLO, Officer Roberts was told by Deputy House that Swanson and Vandenberg “had seemed nervous, had given an inconsistent story, and had refused to allow a narcotics dog to walk around their car.”<sup>27</sup>

### *B. The Second Stop*

Within a few minutes, Officer Roberts, with a narcotics dog of his own, pulled Swanson over after clocking the Monte Carlo going thirty-five miles-per-hour in a twenty-five miles-per-hour construction zone.<sup>28</sup> Officer Roberts picked the Monte Carlo out of the middle of a stream of cars that were essentially traveling the same speed.<sup>29</sup> According to Officer Roberts, “[t]he license plate was clearly visible [and he] could see that the plate displayed a current license plate renewal sticker,”<sup>30</sup> even

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15. *Id.* ¶ 3, 48 P.3d at 94.

16. *Vandenberg*, 2003-NMSC-030, ¶ 5, 81 P.3d at 22. U.S. Highway 54 links Alamogordo, New Mexico, and El Paso, Texas, so the response by itself should not have been suspicious.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* ¶ 4, 81 P.3d at 22.

23. *Vandenberg*, 2002-NMCA-066, ¶ 4, 48 P.3d at 94.

24. *Vandenberg*, 2003-NMSC-030, ¶ 5, 81 P.3d at 22.

25. *Id.* ¶ 6, 81 P.3d at 22.

26. *Vandenberg*, 2002-NMCA-066, ¶ 6, 48 P.3d at 94 (internal quotation marks omitted).

27. *Id.*

28. *Id.* ¶¶ 7–8, 48 P.3d at 94–95.

29. See Defendant-Respondent’s Answer Brief at 5 & n.3, *State v. Vandenberg*, 2003-NMSC-030, 81 P.3d 19 (No. 27,509).

30. *Vandenberg*, 2002-NMCA-066, ¶ 7, 48 P.3d at 94.

as he was driving down the road.<sup>31</sup> At some point after Officer Roberts had returned to his vehicle with Swanson's documents, Officer Yost arrived on the scene.<sup>32</sup> While writing out a warning citation,<sup>33</sup> Officer Roberts observed the following: (1) Swanson tapping his fingers on the hood of the car, (2) Swanson and Vandenberg glancing back at Officer Roberts in the car's mirrors and over their shoulders, (3) Vandenberg rolling a window up and down several times, and (4) conversation between the two occupants.<sup>34</sup> Because "most people involved in a routine traffic stop" do not exhibit these nervous tics, and in light of the information in the BOLO report, Officer Roberts "became nervous about his safety."<sup>35</sup>

### C. The Frisk

Upon returning to the Monte Carlo to issue the warning, Officer Roberts asked Swanson and Vandenberg if they had any weapons in the car.<sup>36</sup> When they responded in the negative, Officer Roberts ordered them from the Monte Carlo in order to conduct a frisk.<sup>37</sup> When Officer Roberts ordered Swanson to the rear of the car, Swanson backed away, questioning the validity of the frisk.<sup>38</sup> Officer Roberts responded that it was "simply a pat down for weapons" and put his hand on Swanson's shoulder to lead him to the back of the car.<sup>39</sup> Swanson again pulled away but submitted to the frisk after Officer Roberts ordered him to put his hands behind his head.<sup>40</sup> The frisk of Swanson yielded a package of marijuana stuck in his waistband.<sup>41</sup> Vandenberg then volunteered that he too had marijuana stuck in his pants.<sup>42</sup> A further search of the car failed to yield any more drugs or any weapons.<sup>43</sup>

31. *Vandenberg*, 2003-NMSC-030, ¶ 76, 81 P.3d at 38 (Chavez, J., dissenting).

32. There was a discrepancy as to whether Officer Yost came to Officer Roberts' assistance on her own volition after hearing the BOLO or as a response to Officer Roberts' call for backup. *Id.* ¶ 9 n.1, 81 P.3d at 23 n.1 (majority opinion). At the earlier grand jury proceeding, Officer Roberts testified that Officer Yost came to assist on her own after she saw that Officer Roberts had pulled the Monte Carlo over. Later, at the suppression hearing, Officer Roberts claimed that Officer Yost responded to his call for backup because he got nervous during the stop. *Id.* Although Officer Yost "admitted that she was looking for a reason to stop" the Monte Carlo, *id.* ¶ 72, 81 P.3d at 37 (Chavez, J., dissenting), she claimed that she could not remember how it came to pass that she arrived at the scene. *Id.* ¶ 9 n.1, 81 P.3d at 23 n.1 (majority opinion); see *Vandenberg*, 2002-NMCA-066, ¶ 8 n.1, 48 P.3d at 95 n.1.

Interestingly, the court of appeals and the supreme court credited different versions. Compare *Vandenberg*, 2002-NMCA-066, ¶ 8, 48 P.3d at 95 (believing Officer Roberts' earlier grand jury testimony that Yost arrived on her own), with *Vandenberg*, 2003-NMSC-030, ¶ 9, 81 P.3d at 23 (believing Officer Roberts' later testimony that Yost responded after he radioed her out of his concern for safety).

33. *Vandenberg*, 2002-NMCA-066, ¶ 10, 48 P.3d at 95.

34. *Vandenberg*, 2003-NMSC-030, ¶¶ 8-9, 81 P.3d at 22-23. An explanation for the rolling up and down of the window is found in the court of appeals opinion. See *Vandenberg*, 2002-NMCA-066, ¶ 9, 48 P.3d at 95 ("At the time of the stop it was hot, humid, and raining off and on.")

35. *Vandenberg*, 2003-NMSC-030, ¶ 9, 81 P.3d at 23.

36. *Id.* ¶ 10, 81 P.3d at 23.

37. *Id.*

38. *Id.* ¶ 11, 81 P.3d at 23.

39. *Id.*

40. *Id.*

41. *Id.* ¶ 12, 81 P.3d at 23.

42. *Id.* ¶¶ 11-13, 81 P.3d at 23.

43. *Id.* ¶ 13, 81 P.3d at 23. It should be noted that although the Fourth Amendment allows an officer to search an automobile without a warrant after arresting an occupant, *New York v. Belton*, 453 U.S. 454, 460 (1981), New Mexico follows a stricter standard under art. II, § 10 of its constitution. See *State v. Gomez*, 1997-NMSC-006, ¶ 44, 932 P.2d 1, 13 ("Quite simply, if there is no reasonable basis for believing an automobile will be moved or

#### D. Procedural History

Vandenberg and Swanson filed a motion to suppress the marijuana.<sup>44</sup> Even though the district court thought that the circumstances “look[ed] fishy,” and that Deputy House’s testimony “seem[ed] odd,” the district court denied the motion.<sup>45</sup> The lower court was concerned “that to hold otherwise ‘would leave officers in a position of subjecting themselves to unacceptable risks in the context of traffic stops.’”<sup>46</sup>

In a split decision, the court of appeals reversed.<sup>47</sup> Writing for the majority, Judge Alarid held that Swanson’s and Vandenberg’s Fourth Amendment rights were violated by the first traffic stop<sup>48</sup> and by the frisk<sup>49</sup> because, as a matter of law, the objective facts available to the officers did not add up to reasonable suspicion. In dissent, Judge Pickard noted that, had the case been about the investigation of a crime, “individual rights [would] prevail under these facts” when applying current New Mexico precedent.<sup>50</sup> Since the issue was officer safety, however, Judge Pickard would have deferred, as the trial court did, to Officer Roberts’ articulation as to why he feared for his safety.<sup>51</sup>

The New Mexico Supreme Court reversed the court of appeals.<sup>52</sup> Because Officer Roberts was able to articulate why he feared for his safety, combined with the nervous behavior Vandenberg and Swanson exhibited at both stops, the court held the frisk reasonable.<sup>53</sup> Moreover, the majority held the first stop lawful because, although mistaken, Deputy House honestly believed Swanson was violating a traffic ordinance.<sup>54</sup> Finally, believing there was nothing pretextual about Officer Roberts’ conduct, the court dismissed Vandenberg’s article II, section 10 claim.<sup>55</sup> Justice Minzner dissented on her belief that the frisk was unreasonable.<sup>56</sup> Justice Chavez wrote a separate dissent in which he argued that the first stop by Deputy House violated the Fourth Amendment.<sup>57</sup>

its search will otherwise be compromised by delay, then a warrant is required.”); *State v. Arredondo*, 1997-NMCA-081, ¶¶ 28–29, 944 P.2d 276, 284–85 (stating that *Gomez* applies to *Belton*), *overruled on other grounds by State v. Steinzig*, 1999-NMCA-081, 944 P.2d 276. See generally *infra* Part III.B.

44. *Vandenberg*, 2003-NMSC-030, ¶ 14, 81 P.3d at 23.

45. *Id.* ¶ 14, 81 P.3d at 24 (internal quotation marks omitted).

46. *Id.* ¶ 15, 81 P.3d at 24 (quoting the district court).

47. *Vandenberg*, 2002-NMCA-066, 48 P.3d 92.

48. *Id.* ¶ 18, 48 P.3d at 97 (“[T]he evidence elicited at the hearing . . . would not support a finding that Deputy House’s failure to notice the license plate was objectively reasonable.”).

49. *Id.* ¶ 25, 48 P.3d at 99 (“[A]t the point in time that Officer Roberts ordered [Vandenberg] and Swanson out of their car, Officer Roberts lacked a reasonable suspicion that they were armed and prepared to use deadly force. . .”).

50. *Id.* ¶ 33, 48 P.3d at 101 (Pickard, J., dissenting) (discussing *State v. Cardenas-Alvarez*, 2001-NMSC-017, 25 P.3d 225).

51. See *id.* ¶¶ 33–34, 48 P.3d at 101.

52. *Vandenberg*, 2003-NMSC-030, ¶ 1, 81 P.3d at 21.

53. See *id.* ¶¶ 20–37, 81 P.3d at 25–29; *infra* notes 153–167 and accompanying text.

54. See *Vandenberg*, 2003-NMSC-030, ¶¶ 40–42, 81 P.3d at 29–30; see also *infra* Part IV.A.2.a.

55. *Vandenberg*, 2003-NMSC-030, ¶ 53, 81 P.3d at 33; see *infra* Part IV.A.3.

56. See *Vandenberg*, 2003-NMSC-030, ¶¶ 57–68, 81 P.3d at 33–36 (Minzner, J., dissenting); see also *infra* Part IV.B.1.

57. See *Vandenberg*, 2003-NMSC-030, ¶¶ 74–81, 81 P.3d at 37–39 (Chavez, J., dissenting); see also *infra* Part IV.B.2. Concurring with Justice Minzner, Justice Chavez also added points he thought relevant to the analysis

### III. BACKGROUND

Before discussing the rationale of the *Vandenberg* majority and dissents, this Note gives an overview of relevant Fourth Amendment search and seizure jurisprudence.<sup>58</sup> It then discusses how article II, section 10 of the New Mexico State Constitution has been construed to offer New Mexicans broader protections than those provided by the Fourth Amendment.<sup>59</sup>

#### A. *The Fourth Amendment*

The Fourth Amendment to the U.S. Constitution guarantees people the right to be free from unreasonable searches and seizures.<sup>60</sup> In conducting a Fourth Amendment analysis, courts first determine whether any given search or seizure is reasonable.<sup>61</sup> If the police acted unreasonably, the next consideration is whether the exclusionary rule<sup>62</sup> should be used to suppress any evidence resulting from the illegal action.<sup>63</sup>

#### 1. Reasonableness: The “Touchstone”

##### a. Generally

A search or seizure conducted without a warrant issued by a neutral magistrate on probable cause<sup>64</sup> is presumptively unreasonable.<sup>65</sup> This per se unreasonableness rule, however, is subject “to a few specifically established and well-delineated exceptions.”<sup>66</sup> When an exception is implicated, a neutral magistrate may still be called upon to conduct an after-the-fact review in the context of a suppression hearing. Measuring the facts from an objective standard, reviewing courts gauge the reasonableness of an officer’s conduct by balancing the legitimate government

of Officer Roberts’ frisk. See *Vandenberg*, 2003-NMSC-030, ¶¶ 69–73, 81 P.3d at 36–37 (Chavez, J., dissenting).

58. See *infra* Part III.A.

59. See *infra* Part III.B.

60. The Fourth Amendment provides:

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.

U.S. CONST. amend. IV.

61. See, e.g., *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (stating that the Fourth Amendment’s “‘central requirement’ is one of reasonableness”).

62. See *infra* Part III.A.2.

63. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (“Whether the exclusionary sanction is appropriately imposed in a particular case... is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’” (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983))).

64. Probable cause is defined as, “A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime.” BLACK’S LAW DICTIONARY 1239 (8th ed. 2004).

65. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *United States v. Place*, 462 U.S. 696, 701 (1983); *McDonald v. United States*, 335 U.S. 451, 455–56 (1948); see also *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”).

66. *Katz v. United States*, 389 U.S. 347, 357 (1967). See generally Jeffrey Hannigan Kuras et al., *Warrantless Searches and Seizures*, 90 GEO. L.J. 1130 (2002) (listing and summarizing exceptions).

interests furthered by the police conduct with the individual's privacy interest.<sup>67</sup> Depending on the nature of the intrusion, the Fourth Amendment requires that the objective facts sufficed to give the officer probable cause or reasonable suspicion<sup>68</sup> to intrude.<sup>69</sup>

b. *Terry v. Ohio*: Searches and Seizures Beget Stops and Frisks

Up until *Terry v. Ohio*,<sup>70</sup> the reasonableness of a search or seizure hinged solely on a probable cause analysis.<sup>71</sup> The Supreme Court in *Terry*, however, created the reasonable suspicion standard for situations involving less than a "technical arrest" or a "full-blown search."<sup>72</sup> After declining to hold that a "stop and frisk" falls outside the scope of the Fourth Amendment,<sup>73</sup> the Court created a dual inquiry for this new, lesser form of intrusion: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."<sup>74</sup>

The Court held that a protective frisk is justified at its inception if an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion.<sup>75</sup> Moreover, the Court held that the intrusion must be objectively reasonable; that is, "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?"<sup>76</sup>

Thus, taking into account the government's interest in investigating crime safely, if "a police officer observes unusual conduct that leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons

67. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); see also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness... is measured in objective terms by examining the totality of the circumstances.").

68. Reasonable suspicion is something more than an "inchoate and unparticularized suspicion or 'hunch,'" but something short of probable cause. *Alabama v. White*, 496 U.S. 325, 329-30 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). For a discussion of the reasonable suspicion standard, see generally 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(b) (4th ed. 2004). In essence, probable cause deals with probabilities while reasonable suspicion deals with possibilities. *Id.* at 480 n.68.

69. In *Whren v. United States*, 517 U.S. 806, 817-18 (1996), the Court held that the government versus private-interest balancing test is usually not needed when analyzing typical probable cause issues. This is so because "probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Id.* at 818. Nonetheless, the balancing test is required when the search or seizure is "extraordinary," even if probable cause exists. *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995) (unannounced entry into home); *Tennessee v. Garner*, 471 U.S. 1 (1985) (seizure using deadly force); *Winston v. Lee*, 470 U.S. 753 (1985) (physical penetration of the body); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (entry into home without a warrant)).

70. 392 U.S. 1 (1968).

71. See *Dunaway v. New York*, 442 U.S. 200, 207-09 (1979).

72. *Terry*, 392 U.S. at 19; see *Dunaway*, 442 U.S. at 209-10.

73. See *Terry*, 392 U.S. at 16-19. The Court determined that a "stop" falls within the ambit of a "seizure." *Id.* at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). Likewise, the Court declined to find that a "frisk" is not a "search." *Id.*

[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."... It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

*Id.* at 16-17.

74. *Id.* at 20.

75. *Id.* at 21.

76. *Id.* at 21-22 (internal quotation marks omitted). The Court reasoned that "the Fourth Amendment would evaporate" if reviewing judges were to simply rely upon the subjective good faith of an officer. *Id.* at 22.

with whom he is dealing may be armed and presently dangerous," then he may conduct a frisk.<sup>77</sup> Balancing that interest against an individual's interest in avoiding the "annoying, frightening, and perhaps humiliating experience"<sup>78</sup> of being subjected to a frisk, the Court held that the scope of a frisk must be limited to ascertaining whether a person is armed with weapons that could be used to assault the officer.<sup>79</sup>

In his concurring opinion, Justice Harlan wanted to "make it perfectly clear that the right to frisk... depends upon the reasonableness of a forcible stop to investigate a suspected crime."<sup>80</sup> In essence, Justice Harlan was concerned that the Court had failed to fully analyze whether the initial seizure in order to investigate a crime was reasonable.<sup>81</sup>

Four years later, in *Adams v. Williams*,<sup>82</sup> the Supreme Court clarified this concern of Justice Harlan. There, the Court held that an "intermediate response" requiring less than probable cause is appropriate when an officer is investigating criminal activity.<sup>83</sup> Hence, a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."<sup>84</sup>

### c. The Fourth Amendment on Wheels

Later, in *United States v. Brignoni-Ponce*,<sup>85</sup> the Supreme Court applied *Adams* to the context of automobiles and held that an officer may stop a moving vehicle<sup>86</sup>

77. *Id.* at 30. However, "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experiences." *Id.* at 27.

78. *Id.* at 25.

79. *Id.* at 29. Nevertheless, if evidence is found during a protective frisk there is no point in prohibiting its use against the suspect. *See id.* at 13-15; *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993) (holding that an officer conducting a valid *Terry* frisk may seize any object felt that is "immediately apparent" as contraband).

80. *Terry*, 392 U.S. at 33 (Harlan, J., concurring).

81. *See id.* at 32. Justice Harlan pointed out that, because the issue in *Terry* was "whether evidence produced by a frisk is admissible, [the Court only had] to determine what makes a frisk reasonable." *Id.* at 31. Indeed, the majority in *Terry* viewed the seizure as part and parcel of the search. Although there was no doubt that *Terry* was seized, *id.* at 19 (majority opinion), the Court viewed the seizure as protective rather than investigative in nature. *See id.* at 29. Thus, the Court declined to decide whether an investigative seizure could be instituted on anything less than probable cause. *Id.* at 19 n.16.

A person is seized "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.* Mere police questioning, however, does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

82. 407 U.S. 143 (1972).

83. *Id.* at 145.

84. *Id.* at 146. The Court in *Adams* also reiterated that the purpose of a frisk is solely for officer safety; it is not to be conducted as a search for evidence of a crime. *See id.* Recently, in *United States v. Arvizu*, 534 U.S. 266, 266-73 (2002), the Court made clear that, in reviewing an officer's investigative detention based on reasonable suspicion, courts must look to the "totality of the circumstances" when determining whether an "officer has a 'particularized and objective basis' for" making a stop. *Id.* at 273 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). According to the Supreme Court, requiring consideration of the "totality of the circumstances" precludes a "divide-and-conquer analysis" and allows officers to draw upon their experience and training in looking at factors that might, in and of themselves, be innocent. *Id.* at 273-74.

85. 422 U.S. 873 (1975).

86. Although the defendant in *Adams* was in a vehicle when seized by the officer, the vehicle was not moving when the officer approached. *See Adams*, 407 U.S. at 145.



on reasonable suspicion when conducting a criminal investigation.<sup>87</sup> The Court held that, because the intrusion is limited, criminal investigative stops of vehicles “may be justified on facts that do not amount to the probable cause required for an arrest.”<sup>88</sup>

Four years later, in *Delaware v. Prouse*,<sup>89</sup> the Supreme Court ruled on how the new reasonable suspicion standard should play out in the context of automobile stops pertaining to traffic violations. There, the Court held that the state’s interest in ensuring safety on its roads does not justify arbitrary stops of automobiles.<sup>90</sup> Thus, a traffic stop is unconstitutional under the Fourth Amendment “[w]hen there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or... reasonable suspicion that the driver is unlicensed or his vehicle unregistered.”<sup>91</sup>

In *Michigan v. Long*,<sup>92</sup> the Court extended the frisk prong of the stop-and-frisk doctrine to automobiles when it held that an officer can “frisk” the passenger compartment of an automobile on reasonable suspicion that its occupants are dangerous.<sup>93</sup> Moreover, once a police officer has conducted a valid traffic stop, the

87. In *Brignoni-Ponce*, Border Patrol agents conducting a roving-patrol stop near the Mexican border stopped a vehicle solely because the occupants appeared to be of Mexican descent. *Brignoni-Ponce*, 422 U.S. at 874–75. A “roving-patrol” stop is to be distinguished from a “fixed-checkpoint” stop. See generally Alfredo Mirande, *Is There a “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365, 374–81 (2003).

88. *Brignoni-Ponce*, 422 U.S. at 880; see *id.* at 884 (“[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”). The Court required this minimum level of suspicion because it was concerned that holding otherwise would subject border residents “to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.” *Id.* at 882. In *Brignoni-Ponce*, the Court concluded that the officers’ reliance on the single factor of the occupants’ Mexican ancestry did not furnish reasonable suspicion that criminal activity was taking place. *Id.* at 885–86. In a concurring opinion, Justice Douglas continued his attack on the newly created “suspicion test.” See *id.* at 888–90 (Douglas, J., concurring); see also *Terry v. Ohio*, 392 U.S. 1, 35–39 (1968) (Douglas, J., concurring). Justice Douglas was concerned that “the nature of the test permits the police to interfere... with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude.” *Brignoni-Ponce*, 422 U.S. at 889 (Douglas, J., concurring).

89. 440 U.S. 648 (1979). In *Prouse*, a police officer pulled a car over for a “spot check”—a purely arbitrary license and registration check not resulting from any observed traffic violation or suspicion of criminal activity. *Id.* at 650–51.

90. See *id.* at 658–63. The Court pointed out that “[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.” *Id.* at 661 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara v. Mun. Court*, 387 U.S. 523, 532–33 (1967)).

91. See *id.* at 661 (footnote omitted). It should be noted that many courts, including those in New Mexico, hold that a driver may be pulled over on *reasonable suspicion* of a traffic violation. See, e.g., *State v. Munoz*, 1998-NMCA-140, ¶¶ 8–10, 965 P.2d 349, 352; *United States v. Soto*, 988 F.2d 1548, 1554 (10th Cir. 1993); see also Thomas M. Lockney, *Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases*, 72 N.D. L. REV. 967, 974–82 (1996). See generally David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000). These courts are, arguably, quite wrong. Although the Supreme Court has muddled the issue by claiming that stopping a vehicle for a traffic violation is somewhat “analogous” to a *Terry* investigative stop, see, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); see also Moran, *supra*, at 1153–55, the Court has never stated that a vehicle may be stopped on reasonable suspicion of a traffic violation. Instead, an officer needs probable cause to stop a vehicle for violating a simple traffic law, see *Whren v. United States*, 517 U.S. 806, 810, 819 (1996); *Prouse*, 440 U.S. at 661, unless there is a reasonable suspicion “that the driver is unlicensed or [the] vehicle [is] unregistered.” *Id.*

92. 463 U.S. 1032 (1983).

93. *Id.* at 1049.

officer, without any individualized suspicion or justification, may order motorists from their vehicles.<sup>94</sup>

#### d. Consensual Searches

Another exception to the warrant requirement is a consensual search.<sup>95</sup> To show that evidence was obtained during a consensual search, a prosecutor has the burden of proving that consent was given freely and voluntarily<sup>96</sup> in light of all the circumstances.<sup>97</sup> Although a person has the right to refuse to consent to a search, “proof of knowledge of the right to refuse... is [not] a prerequisite to demonstrating a ‘voluntary’ consent.”<sup>98</sup> Similarly, persons stopped for a traffic violation need not be informed that they are free to leave in order for consent to be found voluntary.<sup>99</sup>

The Supreme Court has held that the mere act of refusing a police officer’s request cannot influence that officer’s determination of reasonable suspicion of criminal activity.<sup>100</sup> In the context of a refusal to consent to a search, other courts, including New Mexico’s, have held similarly.<sup>101</sup> Moreover, most courts consider this right to refuse a constitutional right.<sup>102</sup> Left unsaid by the Supreme Court, however, is whether a refusal to cooperate can inform *any part* of an officer’s

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officers in believing that the [motorist] is dangerous and... may gain immediate control of weapons.

*Id.* (quoting *Terry*, 392 U.S. at 21).

94. See *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam); see also *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997) (extending *Mimms* to passengers).

95. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). See generally 4 LAFAVE, *supra* note 68, § 8; Kuras, *supra* note 66, at 1165–77.

96. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

97. *Schneckloth*, 412 U.S. at 227. To determine whether consent was voluntarily given, courts consider numerous factors. See, e.g., *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990) (listing eleven factors). See generally 6 LAFAVE, *supra* note 68, § 8.1.

98. *Schneckloth*, 412 U.S. at 232–33. This is unlike the requirement that a suspect be informed of certain rights after being arrested. See *Miranda v. Arizona*, 384 U.S. 436 (1966). For a synopsis of *Schneckloth*, see generally Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 404–07 (2004).

99. *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996). The confluence of a motorist being asked to submit to a consensual search after a pretextual traffic stop is found in *Robinette*: “[T]raffic stops in [Ohio] were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity.” *Id.* at 40 (Ginsburg, J., concurring in the judgment).

100. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (“[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (“[A] refusal to listen or answer does not, without more, furnish [reasonable suspicion].”).

101. See, e.g., *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (“[I]t should go without saying that consideration of... a refusal [to consent to a search] would violate the Fourth Amendment.”); *State v. Zelinske*, 108 N.M. 784, 788, 779 P.2d 971, 975 (Ct. App. 1989) (holding that a defendant’s constitutional right to withdraw consent to a search does not transform suspicion into probable cause), *overruled on other grounds by State v. Bedolla*, 111 N.M. 448, 806 P.2d 588 (Ct. App. 1991); see also *Garcia v. State*, 103 N.M. 713, 714, 712 P.2d 1375, 1376 (1986) (holding that a refusal to consent to a search of an automobile could not be used to infer guilt at trial).

102. See, e.g., *Zelinske* at 788, 779 P.2d at 975. But see Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionilization of an Evidentiary Issue*, 75 S. CAL. L. REV. 901 (2002). Professor Melilli argues, “there is no constitutional right to avoid the introduction [at trial] of evidence of refusal to consent to a search. In most circumstances, such evidence is inadmissible because it is either irrelevant or insufficiently relevant to overcome its unfairly prejudicial impact.” *Id.* at 941.

formation of reasonable suspicion that criminal activity is underway.<sup>103</sup> That is, can an officer consider the demeanor or behavior of a person when that person refuses to consent to a search as a factor in formulating reasonable suspicion or probable cause? Some courts have suggested so.<sup>104</sup> Others have rejected this analysis.<sup>105</sup>

#### e. Pretextual Police Conduct

Police action is considered “pretextual” when officers “attemp[t] to use valid bases of action against citizens...for pursuing other investigatory agendas.”<sup>106</sup> In *Whren v. United States*,<sup>107</sup> the Supreme Court held that the underlying subjective motivations of an officer conducting a traffic stop based on probable cause are not to be considered when determining if that seizure is unreasonable under the Fourth Amendment.<sup>108</sup> In that case, the petitioners argued that, because automobiles are so minutely regulated to the extent “that total compliance with traffic and safety rules is nearly impossible,” police could easily use any technical violation of the traffic code as a pretext for a criminal investigation when reasonable suspicion is lacking.<sup>109</sup> As such, they suggested a “would have” test—that is, “whether a police officer, acting reasonably, would have made the stop for the reason given.”<sup>110</sup>

103. *United States v. Edmonds*, 948 F. Supp. 562, 567 (E.D. Va. 1996) (“[W]hile the Supreme Court has ruled that a citizen’s refusal to consent to a search can never furnish the sole basis for a brief detention and investigation, it has not yet addressed the question whether a refusal can be part of [its] basis.”); Chanenson, *supra* note 98, at 401, 410–11; *see also* Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1161 (1995).

104. *See United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995) (holding that there may be some cases where the form of a refusal may support probable cause to issue a warrant, but that it cannot be the primary or prominent factor); *United States v. Carter*, 985 F.2d 1095, 1098 (D.C. Cir. 1993) (Wald, J., dissenting) (accusing the majority of considering the manner with which a suspect withdraws consent to support reasonable suspicion in subjecting a paper bag to a dog sniff); *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991) (refusing to rule that “the form of a denial can never be included as a factor to be considered in determining whether an investigative stop was justified”); *see also* Chanenson, *supra* note 98, at 412–16; *cf. Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (holding that unprovoked flight from police in a high-crime area supports reasonable suspicion to detain a person).

105. *See, e.g., Karnes v. Strutski*, 62 F.3d 485, 495–96 (3d Cir. 1995) (concluding that granting consent to search some items but not others cannot be a factor used to support reasonable suspicion of criminal activity even when suspect becomes “argumentative and difficult”).

106. *Whren v. United States*, 517 U.S. 806, 811 (1996); *see 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, 1008 (1996) (defining pretext as “a legal justification that is used to mask the real, legally unjustifiable motive”).

107. 517 U.S. 806 (1996).

108. *See id.* at 809–13. In *Whren*, two African-American men were pulled over by plain-clothed police officers in an unmarked car for failing to signal and for driving at an “unreasonable” speed. *Id.* at 808. The occupants were arrested after one of the officers approached and saw two bags of crack cocaine in plain view. *Id.* at 808–09. Police regulations provided that officers in unmarked vehicles were to only conduct a traffic stop if the “violation [was] so grave as to pose an immediate threat to the safety of others.” *Id.* at 815 (internal quotation marks omitted).

109. *Id.* at 810. In essence, the argument was that an officer lacking reasonable suspicion that a serious crime was being committed, *see supra* notes 85–88 and accompanying text, would nevertheless be able to stop an automobile because of the overinclusiveness of traffic codes. *See, e.g., NMSA 1978, § 66-7-318(A)* (1978) (“The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”). Moreover, the petitioners pointed out the danger of police using minor traffic violations to mask racially discriminatory traffic stops. *See Whren*, 517 U.S. at 810.

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

The Court rejected this approach and, by affirming the U.S. Court of Appeals for the District of Columbia Circuit, adopted a “could have” test.<sup>111</sup> Because “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,”<sup>112</sup> the Court held that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent” of the officer.<sup>113</sup> The Supreme Court distinguished two cases where it found that pretextual conduct did make a difference—the key distinguishing factor being that the cases “address[ed] the validity of a search conducted in the *absence* of probable cause.”<sup>114</sup>

## 2. The Exclusionary Rule

To effectuate the guarantee embodied in the Fourth Amendment, the U.S. Supreme Court developed the exclusionary rule.<sup>115</sup> Generally, this rule means that when criminal evidence is obtained as a result of an unreasonable search or seizure it cannot be used against the person whose Fourth Amendment rights were violated.<sup>116</sup> In *Linkletter v. Walker*,<sup>117</sup> the Court determined that the primary purpose of the rule is to deter police misconduct and “that this purpose would [not] be advanced by” retrospective application.<sup>118</sup> In extending *Linkletter* prospectively, the

111. See *id.* at 809. The court of appeals held that “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.” *United States v. Whren*, 53 F.3d 371, 375 (D.C. Cir. 1995); see also *Leary & Williams*, *supra* note 106, at 1014–19 (describing the pre-*Whren* tests that courts of appeals used for analyzing pretextual stops).

112. *Whren*, 517 U.S. at 813.

113. *Id.* at 814 (citing *United States v. Robinson*, 414 U.S. 218, 236 (1973) (allowing search of person incident to arrest even though officer did not indicate a subjective belief that arrestee was armed); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (holding the same)).

114. *Whren*, 517 U.S. at 811 (discussing *Florida v. Wells*, 496 U.S. 1 (1990); *New York v. Burger*, 482 U.S. 691 (1987); *Colorado v. Bertine*, 479 U.S. 367 (1987)). The searches in *Wells* and *Bertine* were inventory searches. When police impound a vehicle they are allowed to search the car in order “to protect an owner’s property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.” *Bertine*, 479 U.S. at 372. The search in *Burger* was an administrative inspection. “An administrative inspection is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme....” *Whren*, 517 U.S. at 811 n.2.

The Court, however, did not address whether the subjective motivation of an officer acting on *reasonable suspicion* can be considered in determining the reasonableness of an officer’s actions. At least one state court has made this distinction. See *State v. Varnado*, 582 N.W.2d 886, 892 (Minn. 1998) (stating that the “pretext factor is relevant to determining whether [a frisk] is reasonable” since a frisk is based on less than probable cause).

Recently, in *United States v. Knights*, 534 U.S. 112 (2001), the Court signaled that it would not necessarily limit *Whren* to situations involving probable cause. There, the Court held that a warrantless search “supported by reasonable suspicion and authorized by a condition of probation” was reasonable. *Id.* at 122. Quoting *Whren*, the Court stated, “we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.” *Id.* (internal quotation marks omitted). In his concurring opinion, however, Justice Souter would have “reserve[d] the question whether *Whren*’s holding that ‘subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis’ should extend to searches based only upon reasonable suspicion.” *Id.* at 123 (Souter, J., concurring) (quoting *Whren*, 517 U.S. at 813).

115. For a thorough discussion of the exclusionary rule, see generally Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

116. See generally Stewart, *supra* note 115, at 1372–77 (discussing origins of exclusionary rule).

117. 381 U.S. 618 (1965).

118. *Id.* at 637.

Court has refused to apply the exclusionary rule when doing so will not effectively deter police misconduct.<sup>119</sup>

But what happens when a Fourth Amendment violation produces *information* that, in turn, leads to direct criminal evidence? In *Wong Sun v. United States*,<sup>120</sup> the Supreme Court held that “[t]he exclusionary prohibition extends as well to the indirect as the direct products of [illegal searches].”<sup>121</sup> Thus, “verbal evidence which derives so immediately from [a Fourth Amendment violation] is no less the ‘fruit’ of official illegality than the more common tangible fruits of the [violation].”<sup>122</sup> Moreover, it is immaterial whether this verbal “fruit” is inculpatory or exculpatory.<sup>123</sup> The Court, however, refused to “hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police.”<sup>124</sup> Rather, the exclusionary rule will not apply if “the Government [has] learned of the evidence ‘from an independent source,’”<sup>125</sup> or if the “evidence has ‘become so attenuated as to dissipate the taint.’”<sup>126</sup>

### B. *New Mexico’s Article II, Section 10*

New Mexico courts must, of course, follow the U.S. Supreme Court’s interpretation of the Fourth Amendment.<sup>127</sup> They may, however, offer broader protections to those in New Mexico under the state constitutional analog to the Fourth

119. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 918–22 (1984) (holding that the exclusionary rule is inappropriate when an officer acting in good faith performs a search based on a faulty search warrant because there is no police misconduct to deter); *United States v. Calandra*, 414 U.S. 338, 349–50 (1974) (declining to apply exclusionary rule at grand jury proceedings because of the “minimal advance in the deterrence of police misconduct”). The scope of New Mexico’s exclusionary rule is broader. *See infra* notes 135–138 and accompanying text.

120. 371 U.S. 471 (1963).

121. *Id.* at 484 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)). In *Silverthorne*, the police conducted an illegal search and photographed and copied incriminating documents. *Silverthorne*, 251 U.S. at 390–91. After the district court ordered the return of the documents, the district attorney, using the knowledge gained from the search, subpoenaed the documents. *Id.* Writing for the majority, Justice Holmes held that to allow the prosecutor to use the knowledge gained from the illegal act in this manner would “reduc[e] the Fourth Amendment to a form of words.” *Id.* at 392. Importantly, “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” *Id.* (emphasis added).

122. *Wong Sun*, 371 U.S. at 485.

123. *Id.* at 487.

124. *Id.* at 487–88.

125. *Id.* at 487 (quoting *Silverthorne Lumber*, 251 U.S. at 385).

126. *Id.* (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). There are three factors relevant to determining whether statements or evidence, which officers obtain as a result of an illegal seizure, are [sufficiently attenuated]: 1) the temporal proximity of the statements to the Fourth Amendment violation; 2) the existence of intervening causes between the violation and the statements; and 3) the purpose or flagrancy of the official misconduct. *United States v. Olivares-Rangel*, 324 F. Supp. 2d 1218, 1223 (D.N.M. 2004) (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). Another related exception to the general rule is the “inevitable discovery” doctrine. Evidence illegally obtained is not to be suppressed “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.” *Nix v. Williams*, 467 U.S. 431, 444 (1984).

127. *See Ker v. California*, 374 U.S. 23, 33–34 (1963).

Amendment<sup>128</sup>—article II, section 10.<sup>129</sup> In essence, the Fourteenth Amendment's application of the Fourth Amendment to the states establishes the bare minimum, but not the maximum, of protection against overreaching police conduct.<sup>130</sup> Moreover, when a New Mexico court relies solely on its own constitutional prohibition against unreasonable searches and/or seizures, the U.S. Supreme Court cannot review that decision.<sup>131</sup> Over the past three decades, numerous states have interpreted their constitutional analogs more broadly than the Fourth Amendment.<sup>132</sup>

*State v. Cordova*<sup>133</sup> marked the first of New Mexico's many departures from the Fourth Amendment. In that case, the court rejected the U.S. Supreme Court's "totality of the circumstances" test used to determine whether information provided by a confidential informant in an affidavit in support of a search warrant established probable cause.<sup>134</sup>

Later, in *State v. Gutierrez*,<sup>135</sup> the New Mexico Supreme Court clarified the purpose of New Mexico's exclusionary rule by rejecting the U.S. Supreme Court's holding in *United States v. Leon*.<sup>136</sup> The court in *Gutierrez* determined that the New Mexico exclusionary rule is not "a mere 'judicial remedy'" designed to deter police misconduct or preserve judicial integrity.<sup>137</sup> Rather, the court held that the

128. See *Oregon v. Haas*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards.").

129. Article II, section 10 of the New Mexico Constitution provides:

The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue, without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

130. See James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1031 ("States...may accord as much or more protection to individual rights as does the U.S. Constitution, but they may not accord less.").

131. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (requiring a state court to make a "plain statement" that it is not relying on federal grounds so as to protect a decision from federal review).

132. See Gardner, *supra* note 130, at 1028-32 (providing an overview of state constitutional jurisprudence). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan was concerned with the Supreme Court's then recent trend to shrink the protections afforded by the Fourth Amendment. See *id.* at 495. As an example, he noted with disapproval the same cases that the Court in *Whren* later relied upon to uphold the constitutionality of pretextual traffic stops: "[The Court] has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop [and arrest] for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction." *Id.* at 497 (citing *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973)); see also *supra* note 113 and accompanying text.

133. 109 N.M. 211, 784 P.2d 30 (1989).

134. *Id.* at 217, 784 P.2d at 36; see *Illinois v. Gates*, 462 U.S. 213, 230 (1983). After noting that New Mexico's application of the previous rule "has not proved to be a problem," *Cordova*, 109 N.M. at 216, 784 P.2d at 35, the court in *Cordova* decided to retain the prior two-prong test as embodied in New Mexico Rule 5-211(E) that *Gates* had overruled. *Id.* at 217, 784 P.2d at 36; see also Rule 5-211(E) NMRA (providing that an affidavit in support of a search warrant containing hearsay must establish a substantial basis for both (1) "believing the source of the hearsay to be credible," and (2) "believing that there is a factual basis for the information furnished").

135. 116 N.M. 431, 863 P.2d 1052 (1993).

136. 468 U.S. 897 (1984). Relying on the deterrence purpose of the exclusionary rule, see *supra* Part III.A.2, the Supreme Court in *Leon* held that evidence obtained during the execution of an invalid search warrant would not be excluded so long as the executing officers acted in good faith. *Leon*, 468 U.S. at 918.

137. *Gutierrez*, 116 N.M. at 446, 863 P.2d at 1067.

exclusionary rule is constitutionally required in New Mexico *whenever* a citizen's right to be kept free from unreasonable searches and seizures is violated.<sup>138</sup>

Although a full discussion of how New Mexico has deviated from Federal Fourth Amendment jurisprudence is beyond the scope of this Note, one additional case, *State v. Gomez*,<sup>139</sup> requires mentioning. In *Gomez*, the New Mexico Supreme Court formally adopted the "interstitial" approach to independent state constitutional analysis.<sup>140</sup> Under this approach, a New Mexico court will only proceed to analyze a defendant's claim under the state constitution if there is no relief under the Fourth Amendment.<sup>141</sup>

However, notwithstanding the outcry by commentators following the U.S. Supreme Court's *Whren* decision,<sup>142</sup> New Mexico courts, unlike those of some other states,<sup>143</sup> have neglected to decide whether pretextual police conduct is reasonable under the state constitution.<sup>144</sup> That is, although New Mexico may have implicitly adopted the teaching of *Whren* and its progeny under the Fourth Amendment,<sup>145</sup> as it necessarily must,<sup>146</sup> it simply has not considered the question under article II, section 10.

#### IV. *STATE V. VANDENBERG*: THE OPINION

In an opinion authored by Justice Bosson, with Chief Justice Maes and Justice Serna concurring, the New Mexico Supreme Court reversed the court of appeals on

138. See *id.* at 446–47, 863 P.2d at 1067–68. Many possibilities resulting from *Gutierrez* have remained unexplored in New Mexico. For instance, relying on the deterrence purpose of the federal exclusionary rule, the Ninth Circuit has held that evidence obtained from an illegal search can be used to prove knowledge and intent of the defendant when there is no nexus between the prosecuting office and the police that conducted the illegal search. See *United States v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995). In New Mexico, the exclusionary rule inherent within article II, section 10 should preclude the use of evidence obtained in a similarly unconstitutional manner.

139. 1997-NMSC-006, 932 P.2d 1.

140. *Id.* ¶ 21, 932 P.2d at 7. For description of the various approaches to state constitutional analysis, see generally Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206–19 (1988).

141. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7.

142. See, e.g., *Leary & Williams*, *supra* note 106, at 1025 ("*Whren* is a rickety piece of judicial scholarship. It is built upon unreasoned distinctions, perversions of precedent, a question-begging unarticulated and unsupported premise, bootstrapping, logical inconsistencies, and a narrow vision of the Fourth Amendment."); see also *supra* notes 107–114 and accompanying text.

143. See, e.g., *State v. Sullivan*, 74 S.W.3d 215, 220–21 (Ark. 2002) (holding that "pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule" under its state constitution); *State v. Robinson*, 767 N.E.2d 638, 644–45 (N.Y. 2001) (concluding that New York's constitution does not offer more protection than *Whren*); *State v. Ladson*, 979 P.2d 833, 842 n.10 (Wash. 1999) (en banc) (rejecting *Whren* and holding that pretextual traffic stops violate Washington's state constitution).

144. Before *Vandenberg*, the closest the New Mexico Supreme Court got to analyzing the issue of pretext was in the case of *State v. Reed*, 1998-NMSC-030, 964 P.2d 113. In *Reed*, one of the issues was "whether a law enforcement officer who wants to search a vehicle based on a hunch that the vehicle contains illegal drugs may validly stop the vehicle based on personal observations of violations of the Motor Vehicle Code." *Id.* ¶ 1, 964 P.2d at 113. Although the court in *Reed* thought it was an "interesting question[]," it did not reach the issue because the defendant's conviction was reversed on other grounds. *Id.* ¶ 2, 964 P.2d at 113. At any rate, it is unclear if any state constitutional issue was preserved. See *id.* ¶ 12, 964 P.2d at 115.

145. See, e.g., *State v. Martinez*, 1997-NMCA-048, ¶ 15, 940 P.2d 1200, 1204 (citing *Whren* in a case determined under the Fourth Amendment for the proposition that "[t]he state of mind of the...officer is not dispositive in determining the constitutionality of a search or seizure").

146. See *supra* note 127 and accompanying text.

the basis that “Officer Roberts’ frisk...did not violate the Fourth Amendment.”<sup>147</sup> Justice Minzner, with Justice Chavez concurring, dissented.<sup>148</sup> Justice Chavez also authored a dissent.<sup>149</sup>

### A. The Majority

Interestingly, rather than analyzing the case chronologically, the majority analyzed it in reverse by starting with the second stop by Officer Roberts and the ensuing frisk.<sup>150</sup> It then briefly addressed the constitutionality of the first stop by Deputy House and explained how the information in the BOLO report could factor into Officer Roberts’ fear for his safety.<sup>151</sup> The majority concluded by briefly discussing why it would not consider the state constitutional question.<sup>152</sup>

#### 1. The Second Stop and Frisk

The court began its analysis of “this very close case”<sup>153</sup> by quickly ruling that the second stop of the Monte Carlo was constitutional because Officer Roberts “reasonably suspected that Swanson had violated a traffic law.”<sup>154</sup> It then noted that “a weapons frisk must be strictly circumscribed by the exigencies that justify it,”<sup>155</sup> and that the inquiry into whether an officer acted reasonably when faced with exigent circumstances is an objective one.<sup>156</sup> To find that Officer Roberts acted reasonably, the court turned to the “particularly helpful”<sup>157</sup> case of *State v. Chapman*.<sup>158</sup>

The majority relied on three factors to find *Chapman* analogous. First, in both cases “the drivers were more nervous than most people...stopped for a routine traffic offense,” and, in addition, the officers in both cases pointed to facts other than this “extreme nervousness” that made them fear for their safety.<sup>159</sup> Second, the majority noted that the “principle” underlying its opinion and *Chapman*’s was the

147. *State v. Vandenberg*, 2003-NMSC-030, ¶ 55, 81 P.3d 19, 33.

148. *Id.* ¶¶ 57–68, 81 P.3d at 33–36 (Minzner, J., dissenting).

149. *Id.* ¶¶ 69–81, 81 P.3d at 36–39 (Chavez, J., dissenting).

150. *Id.* ¶¶ 20–36, 81 P.3d at 25–28 (majority opinion).

151. *Id.* ¶¶ 37–50, 81 P.3d at 29–32.

152. *Id.* ¶¶ 51–54, 81 P.3d at 32–33.

153. *Id.* ¶ 33, 81 P.3d at 28.

154. *Id.* ¶ 21, 81 P.3d at 25 (agreeing with the district court and court of appeals). Although it may not have mattered in this case, it should be reiterated that, under the Fourth Amendment, an officer needs probable cause, not reasonable suspicion, to stop a vehicle for a traffic violation. *See supra* note 91.

155. *Vandenberg*, 2003-NMSC-030, ¶ 23, 81 P.3d at 26 (citing *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

156. *Id.* (citing *State v. Gomez*, 1997-NMSC-006, ¶ 40, 932 P.2d 1, 12).

157. *Id.* ¶ 27, 81 P.3d at 26.

158. 1999-NMCA-106, 986 P.2d 1122. In *Chapman*, an officer pulled a vehicle over for a seatbelt violation and had the driver get out of his car after noticing the driver’s shaking hand and inability to make eye contact. *Id.* ¶ 2, 986 P.2d at 1123–24. After noticing the driver becoming even more nervous, the officer then asked him if he had any weapons. The driver responded that he did not. Finally, after the driver questioned what the stop was about “in a higher-pitched voice, and in a nervous and aggressive manner,” the officer conducted a pat-down frisk. *Id.* ¶¶ 2–3, 986 P.2d at 1124. The court in *Chapman* deemed the frisk reasonable since, “[i]nstead of just describing Defendant as nervous, the deputy identified specific behaviors and changes in Defendant’s demeanor and attitude that explain[ed] why he believed that Defendant might be armed and dangerous.” *Id.* ¶ 16, 986 P.2d at 1126. Those “specific facts” supported the reasonableness of the frisk. *See id.*

159. *Vandenberg*, 2003-NMSC-030, ¶ 28, 81 P.3d at 26–27. The court is not clear about what “other specific observations” Officer Roberts pointed to. Presumably it was the information in the BOLO report. According to the court, Swanson’s and Vandenberg’s “excessive movement, coupled with the information he received in the BOLO, made Officer Roberts concerned...for his safety.” *Id.* ¶ 29, 81 P.3d at 27.



same: the officers were able to *articulate* why a frisk was necessary.<sup>160</sup> Finally, the court determined that, as in *Chapman*, the situation escalated gradually and the officer proceeded incrementally before initiating a frisk.<sup>161</sup>

Having analogized its facts to those in *Chapman*, the majority held that, under the totality of the circumstances, Officer Roberts' belief that Swanson and Vandenberg may have been armed and dangerous was reasonable enough to justify a protective frisk.<sup>162</sup> Moreover, the majority adopted as a rule of law that, when reviewing similar cases in the future, courts should look to the officer's ability to articulate why nervousness caused a fear of safety, rather than the degree of nervousness a suspect displays.<sup>163</sup>

Before proceeding to explain how the information in the BOLO report could factor into the reasonableness of Officer Roberts' fear,<sup>164</sup> Justice Bosson took pains to make clear that "safety, and safety alone, justified... the protective pat down" and that "[t]his was not a search for evidence."<sup>165</sup> Furthermore, the court emphasized that a police officer may not ordinarily conduct a frisk during a routine traffic stop; a protective frisk is only valid when the officer "meet[s] the exacting burden of presenting exigent circumstances, in sufficient detail and with convincing sincerity."<sup>166</sup>

## 2. The First Stop and the BOLO

The majority in *Vandenberg* recognized that Officer Roberts relied on Deputy House's BOLO report as a justification for conducting the pat-down.<sup>167</sup> Hence, the majority had to squarely face the issue of Swanson's refusal to consent to the dog sniff.<sup>168</sup> Specifically, the court noted that "[i]f Deputy House obtained information illegally and then passed it along to Officer Roberts, who relied on that information in his own assessment of Defendants' behavior, then a motion to suppress may have been in order."<sup>169</sup>

160. *Id.* This articulation consisted of Officer Roberts testifying that, based on information gleaned during his police training, he believed that Swanson's movements meant he was "trying to expel nervous energy." This expulsion of energy could have been an indicator that Swanson and Vandenberg were in a "fight or flight mode" and that this may have been a precursor to unpredictable, dangerous behavior. *Id.* ¶ 29, 81 P.3d at 27 (internal quotation marks omitted).

161. *Id.* ¶ 30, 81 P.3d at 27.

162. *Id.* (adopting Judge Pickard's dissent); see *Vandenberg*, 2002-NMCA-066, ¶ 34, 48 P.3d 92, 101 (Pickard, J., dissenting).

163. *Vandenberg*, 2003-NMSC-030, ¶ 31, 81 P.3d at 27.

164. See *supra* note 159.

165. *Vandenberg*, 2003-NMSC-030 ¶ 33, 81 P.3d at 28. The majority stated that "[t]he officers did not try to make a case for suspicion of drug possession, and with good reason. Nothing...justified a frisk, much less a full blown-search, for evidence of any crime." *Id.*

166. *Id.* ¶ 32, 81 P.3d at 27-28.

167. *Id.* ¶ 37, 81 P.3d at 29 (quoting Officer Roberts' testimony that his nervousness was "based on what [he] observed...as well as the radio transmission [he] had received").

168. See *supra* note 27 and accompanying text.

169. *Vandenberg*, 2003-NMSC-030, ¶ 39, 81 P.3d at 29.

### a. The Legality of the First Stop

To find the first stop by Deputy House constitutional, the court analogized its facts to those in *City of Albuquerque v. Haywood*.<sup>170</sup> The court reasoned that, just as the officer in *Haywood* was mistaken that the vehicle was missing tags, Officer House mistakenly believed that the Monte Carlo was lacking a license plate and, thus, was in violation of section 66-3-18(A) of the Motor Vehicle Code.<sup>171</sup> Because the defendants did not produce “photos or other kinds of demonstrative evidence” to dissuade the trial court, the majority deferred to that court’s determination that Deputy House testified truthfully.<sup>172</sup>

### b. Finding Fear in the BOLO

Turning its attention to Swanson’s refusal of the dog sniff and the ensuing BOLO advisory, the court considered two things. First, the court had to decide “whether any of this information was passed along...unlawfully.”<sup>173</sup> Then, if the relaying of information was lawful, the question became “whether Officer Roberts’ reliance on the BOLO information contaminate[d] the weapons frisk that followed.”<sup>174</sup>

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170. 1998-NMCA-029, 954 P.2d 93. *Haywood* was a case in which an officer stopped a vehicle because the officer did not see a license plate or temporary tag. Only in approaching the vehicle and coming within two to three feet of the car did the officer realize that the vehicle had a valid temporary tag, but that the car’s darkly tinted windows obscured it. *Id.* ¶¶ 11–12, 954 P.2d at 96–97. The court in *Haywood* held that, under those circumstances, the stop was not arbitrary; hence, it did not violate the Fourth Amendment. *Id.* ¶ 12, 954 P.2d at 97 (citing *State v. Reynolds*, 119 N.M. 383, 386, 890 P.2d 1315, 1318 (1995)). It then went on to hold that, once validly stopped, neither the Fourth Amendment nor article II, section 10 precluded the officer from requesting identification from the driver since such further detention was de minimis. *Id.* ¶ 13, 954 P.2d at 97.

171. *Vandenberg*, 2003-NMSC-030, ¶¶ 40–41, 81 P.3d at 29–30.

The registration plate shall be attached to the rear of the vehicle for which it is issued....The plate shall be securely fastened at all times in a fixed horizontal position at a height of not less than twelve inches from the ground, measuring from the bottom of the plate. It shall be in a place and position so as to be clearly visible, and it shall be maintained free from foreign material and in a condition to be clearly legible.

NMSA 1978, § 66-3-18(A) (1998).

172. *Vandenberg*, 2003-NMSC-030, ¶ 42, 81 P.3d at 30.

173. *Id.* ¶ 44, 81 P.3d at 30.

174. *Id.* In a footnote, the court pointed out that the defendants had not preserved any claim as to whether the sniff request unlawfully exceeded the scope of the stop. *Id.* ¶ 44 n.3, 81 P.3d at 30 n.3. To expand the scope of a traffic stop, an officer needs reasonable suspicion that illegal activity above and beyond what justified the stop is involved. *See, e.g.*, *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998); *see also State v. Taylor*, 1999-NMCA-022, ¶¶ 20–21, 973 P.2d 246, 252–53 (holding that questioning a motorist about drugs and alcohol was improper when the officer had no reasonable suspicion that the motorist had drugs or alcohol in the car). On the other hand, the court also questioned whether Swanson had a right to refuse the dog sniff in the first place. *Vandenberg*, 2003-NMSC-030, ¶ 45 n.4, 81 P.3d at 31 n.4. Under the Fourth Amendment, a dog sniff of the exterior of an automobile is not a “search” since an individual lacks a reasonable expectation of privacy in public odors. *Id.* (citing *State v. Cleave*, 2001-NMSC-031, ¶ 12, 33 P.3d 633, 636; *State v. Villanueva*, 110 N.M. 359, 361, 796 P.2d 252, 254 (Ct. App. 1990)); *see City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). The court reasoned that, if no such right existed in the first place, officers might be free to draw any relevant inferences from a refusal to consent to such a non-search. *Vandenberg*, 2003-NMSC-030, ¶ 45 n.4, 81 P.3d at 31 n.4. However, since in this case “no improper inferences were drawn” from Swanson’s refusal, the court neglected to answer that question. *Id.*

After *Vandenberg* was decided, the U.S. Supreme Court decided *Illinois v. Caballes*, 125 S. Ct. 834 (2005). In that case, the Court held that if a car is validly stopped, the Fourth Amendment does not preclude an officer from conducting a dog sniff as a matter of routine so long as the duration of the stop is not extended. *See id.* at 837–38. Here, the duration of the initial stop of the Monte Carlo was extended by the request for the dog sniff—Deputy House had already told Swanson that he was free to leave before requesting permission to run the

In tackling the first question, the court found that Deputy House had merely informed Officer Roberts that “he thought Defendants were acting suspiciously. He did not pass judgment on whether Defendants possessed drugs....”<sup>175</sup> Furthermore, the court found that there is no law that would preclude Deputy House from sharing relevant information “that may later come into play and endanger another officer.”<sup>176</sup>

In order to answer whether the frisk was “contaminated” by Officer Roberts’ reliance on the BOLO, the majority severed the information contained in the report into two parts. One part was “relevant” and the other was “neutral” or, in other words, “irrelevant.”<sup>177</sup> The “relevant” part of the information Deputy House conveyed consisted of the *behavior* of Swanson in refusing to consent to the sniff.<sup>178</sup> The irrelevant, or “neutral,” fact conveyed to Officer Roberts in the BOLO report was the presumed constitutional refusal of the dog sniff itself.<sup>179</sup>

In the process of dividing the BOLO report into relevant and irrelevant components, the court created and relied upon the following syllogism: (1) “It [is] self-evident that Defendant’s refusal is not a probative fact of guilt, suspicion, or dangerousness”;<sup>180</sup> (2) “Defendants’ refusal should not be considered in determining whether Officer Roberts had reasonable and articulable suspicion that Defendants were armed and dangerous”;<sup>181</sup> (3) “Therefore, in determining whether Officer Roberts had reasonable suspicion to believe that Defendants were dangerous, we do not consider Defendants’ refusal to consent as a relevant fact.”<sup>182</sup>

In a nutshell, the majority found that, in concluding that his safety was in danger, Officer Roberts had relied on his own observations coupled with relevant

dog around the car. *See Vandenberg*, 2003-NMSC-030, ¶ 4, 81 P.3d at 22; *see also* *Snow v. State*, 578 A.2d 816, 827–28 (Md. Ct. Spec. App. 1990) (holding that detention of a vehicle for a dog-sniff without reasonable suspicion after the conclusion of a valid traffic stop violates the Fourth Amendment). It should be pointed out that a dog sniff is also not considered a search under article II, section 10. *See Villanueva* at 363, 796 P.2d at 256. *But see* *State v. Tackitt*, 67 P.3d 295, 302–03 (Mont. 2003) (holding that an exterior canine sniff of the trunk of a car is a search under Montana’s state constitution).

175. *Vandenberg*, 2003-NMSC-030, ¶ 44, 81 P.3d at 30. Moreover, Deputy House “did not ask Officer Roberts to detain Defendants....He merely shared his impressions with another law enforcement official.” *Id.*

176. *Id.* ¶ 45, 81 P.3d at 30–31.

177. *See id.* ¶¶ 45–47, 81 P.3d at 30–32.

178. *See id.* ¶ 45, 81 P.3d at 30–31 (citing *United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993); *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991); *United States v. Riley*, 927 F.2d 1045, 1050 (8th Cir. 1991)). The cited cases hold that behavior exhibited by a suspect in refusing to consent to a search can factor into an analysis of whether the expansion of the scope of an investigatory stop is reasonable. *See supra* notes 103–105 and accompanying text. Strangely, the court also cited two cases that have contrary holdings. *See Vandenberg*, 2003-NMSC-030, ¶ 45, 81 P.3d at 31 (citing *People v. Haley*, 41 P.3d 666, 676 (Colo. 2001); *Karnes v. Strutski*, 62 F.3d 485, 495–96 (3d Cir. 1995)).

179. *See Vandenberg*, 2003-NMSC-030, ¶ 46, 81 P.3d at 31–32 (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 498 (1983); *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997); *Garcia v. State*, 103 N.M. 713, 714, 712 P.2d 1375, 1376 (1986); *State v. Zelinske*, 108 N.M. 784, 788, 779 P.2d 971, 975 (Ct. App. 1989), *overruled on other grounds* by *State v. Bedolla*, 111 N.M. 448, 806 P.2d 588 (Ct. App. 1991)). These cases hold that a refusal to consent, by itself, cannot be used by an officer to support an inference of guilt or suspicion. The court also referenced Professor Melilli’s article, which argued that refusing to consent is an evidentiary issue, not a constitutional right. *See Melilli, supra* note 102.

180. *Vandenberg*, 2003-NMSC-030, ¶ 46, 81 P.3d at 31.

181. *Id.*

182. *Id.* ¶ 47, 81 P.3d at 32.

information contained in the BOLO report.<sup>183</sup> According to the court, since that combined information was objectively sufficient to produce a fear in Officer Roberts, “it would be unreasonable for [it] to suppress the fruits of those suspicions” simply because of the inclusion of “one irrelevant fact” in the BOLO.<sup>184</sup>

The majority concluded that the outcome would have been “very different” had Swanson and Vandenberg “established that the officers’ claims were pretextual, fabricated as a means of retaliating against them for the exercise of their constitutional rights.”<sup>185</sup> However, the court “[a]ssum[ed] Officer Roberts [had] acted in good faith” since there was sufficient evidence for the district court to conclude that he had done so.<sup>186</sup>

### 3. The State Constitutional Claim

In the district court and on appeal, Vandenberg argued that the stop and frisk by Officer Roberts was pretextual; that is, Officer Roberts’ motivations in stopping and frisking Swanson and Vandenberg were fueled by a desire to investigate and search for contraband—a desire that was not supported by reasonable suspicion.<sup>187</sup> Acknowledging that the Fourth Amendment allows pretextual police conduct, he argued that New Mexico should not condone such behavior under article II, section 10.<sup>188</sup>

The court, however, declined Vandenberg’s invitation to elucidate on and clarify the state of pretext in New Mexico. This was because “the district court believed Officer Roberts, as it was entitled to do, and did not find anything pretextual about either Officer Roberts’ stop or the protective frisk.”<sup>189</sup> Hence, the claim lacked “factual foundation” and, being “an abstract question,” was not considered.<sup>190</sup>

## B. *The Dissents*

### 1. Justice Minzner: Distinguishing *Chapman*

Justice Minzner, with Justice Chavez concurring, dissented from the majority’s opinion.<sup>191</sup> In essence, while willing to assume that Officer Roberts was subjectively concerned about his safety, Justice Minzner believed that his fear was objectively

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183. *Id.* ¶ 49, 81 P.3d at 32.

184. *Id.*

185. *Id.* ¶ 50, 81 P.3d at 32.

186. *Id.* A motion to suppress is a mixed question of fact and law. *State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994); *State v. Attaway*, 117 N.M. 141, 144–46, 870 P.2d 103, 106–08 (1994) (overruling *State v. Sanchez*, 88 N.M. 402, 540 P.2d 1291 (1975)). A trial court’s historical facts and credibility determinations are upheld if there is substantial evidence supporting that finding. *Attaway*, 117 N.M. at 144, 970 P.2d at 106. The trial court’s application of those facts to the law is reviewed de novo. *Id.* Courts have long struggled with the complexities inherent in reviewing motions to suppress involving so-called mixed questions of fact and law. See 6 LAFAYE, *supra* note 68, § 11.7(c).

187. See *Vandenberg*, 2003-NMSC-030, ¶ 52, 81 P.3d at 33; Defendant-Respondent’s Answer Brief at 31–35, *State v. Vandenberg*, 2003-NMSC-030, 81 P.3d 19 (No. 27,509); see also *supra* Part III.A.1.e.

188. See *Vandenberg*, 2003-NMSC-030, ¶ 52, 81 P.3d at 33.

189. *Id.* ¶ 53, 81 P.3d at 33.

190. *Id.*

191. *Id.* ¶¶ 57–68, 81 P.3d at 33–36 (Minzner, J., dissenting).

unreasonable.<sup>192</sup> For her, the important point in *Chapman* was the fact that the officer in that case could link his concern for safety to his question regarding weapons.<sup>193</sup> As such, Justice Minzner claimed that “[t]he frisk was not automatically justified simply because Officer Roberts asked Defendant Swanson if he had any weapons.”<sup>194</sup> Moreover, she argued that the majority erroneously analogized the incremental approach the officer in *Chapman* took to the instant case.<sup>195</sup> Justice Minzner concluded by noting that Officer Roberts, if genuinely concerned about his safety even after receiving a negative response about weapons, could have simply ordered Swanson and Vandenberg out of the car without conducting a frisk.<sup>196</sup>

## 2. Justice Chavez: Distinguishing *Haywood*

Beyond adding to the evidence he thought relevant to Justice Minzner’s “totality of the circumstances” test concerning the frisk,<sup>197</sup> Justice Chavez argued that the first stop by Deputy House was illegal.<sup>198</sup> Like the majority, Justice Chavez would have accepted the trial court’s determination that Deputy House, at least initially, subjectively believed that the Monte Carlo was missing tags.<sup>199</sup> However, rather than deferring to the trial court on the legal question of whether that belief was reasonable, he would have concluded that Deputy House’s initial suspicion concerning the license plate was not objectively reasonable.<sup>200</sup> Justice Chavez claimed that “Deputy House’s conclusory statement that the license plate was not clearly visible was refuted by the specific, articulable facts testified to by Officer Roberts.”<sup>201</sup> Hence, he agreed with the district court that the first stop was “fishy”; he did not, however, think it to be objectively reasonable.<sup>202</sup>

192. *See id.* ¶ 60, 81 P.3d at 34.

193. *Id.* ¶ 62, 81 P.3d at 35. In *Chapman*, the defendant responded in an “anxious and aggressive manner” to the question of whether he was in possession of weapons. *See Chapman*, 1999-NMCA-106, ¶¶ 17–18, 986 P.2d at 1126–27. In this case, however, Swanson and Vandenberg simply responded that they did not have weapons on them. *See Vandenberg*, 2003-NMSC-030, ¶ 10, 81 P.3d at 23. Immediately thereafter, Officer Roberts ordered them out of the car to submit to a frisk. *Id.*

194. *Vandenberg*, 2003-NMSC-030, ¶ 62, 81 P.3d at 35 (Minzner, J., dissenting) (citing *City of Albuquerque v. Haywood*, 1998-NMCA-029, ¶ 17, 954 P.2d 93, 98 (holding that the officer was not automatically justified in detaining and frisking a motorist who responded in the affirmative to questions about weapons)). Interestingly, the majority used *Haywood* to justify the legality of the first stop, *see id.* ¶ 41, 81 P.3d at 29, but did not cite the case during its frisk analysis.

195. *Vandenberg*, 2003-NMSC-030, ¶¶ 64–66, 81 P.3d at 35–36 (Minzner, J., dissenting); *see supra* note 158.

196. *Vandenberg*, 2003-NMSC-030, ¶ 67, 81 P.3d at 36 (Minzner, J., dissenting) (citing *Pennsylvania v. Mims*, 434 U.S. 106 (1977)); *see supra* note 94 and accompanying text.

197. *See Vandenberg*, 2003-NMSC-030, ¶¶ 69–73, 81 P.3d at 36–37 (Chavez, J., dissenting). Justice Chavez thought three additional factors warranted discussion: (1) Officer Roberts was not initially concerned for his safety and he did not see any signs of weapons, (2) Officer Yost was standing near the passenger door during the stop and she did not see any signs of weapons, and (3) Officer Roberts had already made up his mind to frisk Swanson and Vandenberg when he returned with the warning citation. *Id.* ¶ 70, 81 P.3d at 37.

198. *Id.* ¶ 74, 81 P.3d at 37.

199. *Id.*; *see supra* notes 170–172 and accompanying text.

200. *Vandenberg*, 2003-NMSC-030, ¶ 74, 81 P.3d at 37–38 (Chavez, J., dissenting).

201. *Id.* ¶ 77, 81 P.3d at 38; *see supra* notes 30–31 and accompanying text.

202. *Vandenberg*, 2003-NMSC-030, ¶ 77, 81 P.3d at 38 (Chavez, J., dissenting).

Justice Chavez distinguished *City of Albuquerque v. Haywood*<sup>203</sup> from the present case by noting that, unlike in *Haywood*, an investigatory detention in this case was not necessary to dispel the officer's initial subjective suspicion that the vehicle was lacking a license plate.<sup>204</sup> Here, "[e]ven a cursory investigation from the road would have apparently shown to Deputy House... that the car not only had a license plate, but that the registration was current."<sup>205</sup>

Justice Chavez was concerned that the majority's ruling "would invite pretextual stops."<sup>206</sup> In conclusion, Justice Chavez stated that, because the first stop was illegal, he would not have permitted the State to rely on anything in the BOLO report to justify the reasonableness of Officer Roberts' frisk.<sup>207</sup> Moreover, he noted that the information contained in the BOLO had "a de minimis value in the armed and dangerous calculus" because the report did not contain information suggesting that Swanson or Vandenberg were armed and dangerous.<sup>208</sup> According to Justice Chavez, the only reasonable explanation as to why Deputy House issued the BOLO report was to punish the defendants for exercising their Fourth Amendment rights—something the New Mexico Supreme Court should discourage.<sup>209</sup>

## V. ANALYSIS AND IMPLICATIONS

The issues presented in *Vandenberg* were troublesome for New Mexico courts. Among the eight judges and justices that were involved in the appellate process, five separate opinions were written.<sup>210</sup> However, presumably due to an understandable desire to protect the safety of police officers, the resolution of the case unnecessarily stripped New Mexican motorists of their right to be left free from arbitrary police conduct. Indeed, the outcome in *Vandenberg* falls beneath the protections afforded to citizens of the United States by the Fourth Amendment in two respects. This is surprising and, even more, troubling considering New Mexico's recent history of offering *more* protections to its citizens than the floor set by the Fourth Amendment.<sup>211</sup> Moreover, even though the New Mexico Supreme Court had a golden opportunity to clarify whether article II, section 10 condones pretextual police conduct, the court in *Vandenberg* deftly skirted the issue.

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203. 1998-NMCA-029, 954 P.2d 93; *see supra* note 170.

204. *Vandenberg*, 2003-NMSC-030, ¶¶ 78–79, 81 P.3d at 38–39 (Chavez, J., dissenting).

205. *Id.* ¶ 79, 81 P.3d at 39.

206. *Id.*

207. *Id.* ¶ 80, 81 P.3d at 39.

208. *Id.*

209. *Id.*

210. *See id.* ¶¶ 1–56, 81 P.3d at 21–33 (majority opinion); *id.* ¶¶ 57–68, 81 P.3d at 33–36 (Minzner, J., dissenting); *id.* ¶¶ 69–81, 81 P.3d at 36–39 (Chavez, J., dissenting); *State v. Vandenberg*, 2002-NMCA-066, ¶¶ 1–29, 48 P.3d 92, 93–100; *id.* ¶¶ 30–37, 48 P.3d at 100–02 (Pickard, J., dissenting).

211. *See supra* Part III.B. Perhaps it is more accurate to recognize that article II, section 10 may not exactly be offering "more" protections than the Fourth Amendment. Rather, as the U.S. Supreme Court makes more and more exceptions to the Fourth Amendment's warrant requirement, New Mexico courts have simply used article II, section 10 to hold the line.

### A. Fourth Amendment Issues

#### 1. The First Stop Was Arbitrary

The New Mexico Supreme Court could have—indeed it should have—found the first traffic stop by Deputy House unconstitutional and, using the “fruit of the poisonous tree” doctrine,<sup>212</sup> suppressed the marijuana. Recall that the majority in *Vandenberg* accepted the district court’s conclusion that Deputy House testified truthfully when he claimed that the reason he stopped the car was because he thought it was missing a license plate.<sup>213</sup> This was so even though the district court thought the situation “fishy” and “acknowledged that ‘Deputy House’s testimony... seem[ed] odd.’”<sup>214</sup> In essence, the majority held that the stop was constitutional because Deputy House *subjectively* believed that the vehicle was lacking a license plate.

As Justice Chavez realized, this reasoning is problematic.<sup>215</sup> Both the U.S. Supreme Court and courts in New Mexico have consistently held that whether reasonable suspicion or probable cause exists depends upon an *objective* view of the facts known to the officer.<sup>216</sup> In the context of traffic stops, the Supreme Court in *Delaware v. Prouse*<sup>217</sup> stated, “reasonableness...requires, at a minimum, that the facts upon which an intrusion is based [be] measure[d] against an objective standard, whether this be probable cause or [reasonable suspicion].”<sup>218</sup> This is necessary to ensure that the driver’s “reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’”<sup>219</sup>

In this case, it is difficult to see how the objective facts uphold the constitutionality of Deputy House’s stop. It was undisputed that the Monte Carlo had a valid and current license plate attached to the rear of the automobile where the manufacturer provided for it.<sup>220</sup> Moreover, as Justice Chavez pointed out, not only did Officer Roberts have no problem seeing the license plate, “but...he was able to determine that the registration was current from the color of the registration sticker on the license plate *while he was driving down the road.*”<sup>221</sup> Also, Justice

212. See *supra* notes 120–126 and accompanying text.

213. See *Vandenberg*, 2003-NMSC-030, ¶ 42, 81 P.3d at 30.

214. *Id.* ¶ 14, 81 P.3d at 24 (quoting the district court).

215. See *id.* ¶¶ 75–79, 81 P.3d at 585–86 (Chavez, J., dissenting).

216. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (“[I]t is imperative that the facts be judged against an objective standard.... ‘If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate.’”) (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (footnote and citations omitted); *State v. Cohen*, 103 N.M. 558, 562, 711 P.2d 3, 7 (1985) (“The facts and inferences are to be judged by an objective standard, i.e., would the facts available to the officer warrant the officer as a person of reasonable caution to believe the action taken was appropriate?”).

217. 440 U.S. 648 (1979); see *supra* notes 89–91 and accompanying text.

218. *Prouse*, 440 U.S. at 654 (internal quotation marks and footnotes omitted). Here an argument could be made that, even though a stop based on a traffic violation requires probable cause, see *supra* note 91, Deputy House only needed reasonable suspicion to stop the Monte Carlo because he thought the vehicle was unregistered. See *Prouse*, 440 U.S. at 661 (holding that an officer may stop a vehicle when there is “reasonable suspicion that the driver is unlicensed or his vehicle unregistered”). Regardless of whether the standard used is probable cause or reasonable suspicion, the objective facts in this case show that Deputy House’s stop was unreasonable.

219. *Prouse*, 440 U.S. at 655 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967)).

220. See *Vandenberg*, 2003-NMSC-030, ¶ 3, 81 P.3d at 22; *Vandenberg*, 2002-NMCA-066, ¶ 18, 48 P.3d at 97.

221. *Vandenberg*, 2003-NMSC-030, ¶ 76, 81 P.3d at 585 (Chavez, J., dissenting).

Chavez correctly noted that the majority's chastising of Swanson and Vandenberg for not putting on affirmative evidence to dispute Deputy House's testimony was misplaced.<sup>222</sup> The burden is on the State to prove reasonable suspicion or probable cause<sup>223</sup>—not on the defendant to prove the lack thereof.

The majority's reliance on *Albuquerque v. Haywood*<sup>224</sup> does nothing to dispel the unconstitutionality of the stop. A police officer's action must be reasonable both "at its inception" and "in scope."<sup>225</sup> The inception of the stop in *Haywood* was justified because the facts, viewed objectively, supported the officer's subjective belief that the car was lacking a license and temporary tags.<sup>226</sup> *Haywood* went on to hold that the officer did not exceed the scope of the intrusion by checking the documentation of the driver, since that further intrusion was de minimis.<sup>227</sup> The critical, and distinguishing, factor here is that the court in *Haywood* realized that, before asking the driver for documentation—that is, expanding the scope of a stop—the car must be *validly* stopped.<sup>228</sup>

In short, the majority made the error of assuming that the stop in *Haywood* was valid because that officer "believed that the car was being driven without a license plate or temporary tag."<sup>229</sup> However, when the court in *Haywood* specifically noted that, "[u]nder the circumstances...it was not arbitrary for [the o]fficer to make a traffic stop,"<sup>230</sup> it understood that what matters are the objective facts, not an officer's subjective belief. Indeed, according to the U.S. Supreme Court, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>231</sup> The critical "circumstance" that made the stop valid in *Haywood* was the fact that "the windows were so darkly tinted that the temporary tag was not visible until the vehicle was stopped."<sup>232</sup>

In *Vandenberg*, however, Deputy House's stop was not valid because the circumstances did not require him to stop the car. That is, the objective facts show that Swanson's car had a license plate exactly where it was supposed to be, and that the plate and current registration sticker were discernable from a moving vehicle. Since the initial stop was illegal, the court should have used the "fruit of the poisonous tree" doctrine<sup>233</sup> to suppress the marijuana.<sup>234</sup>

222. *Id.* ¶ 77, 81 P.3d at 38.

223. *See, e.g., United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993) ("The government has the burden of demonstrating 'that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.'" (quoting *Florida v. Royer* 460 U.S. 491, 500 (1983))).

224. 1998-NMCA-029, 954 P.2d 93; *see supra* note 170.

225. *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968); *see supra* notes 74–79 and accompanying text.

226. *See Haywood*, 1998-NMCA-029, ¶¶ 11–12, 954 P.2d at 96–97.

227. *Id.* ¶ 13, 954 P.2d at 97.

228. *See id.* ¶ 12, 954 P.2d at 97 ("[W]henver a driver is validly stopped for whatever reason, it is reasonable for the officer to ask for [documentation].") (citing *State v. Reynolds*, 119 N.M. 383, 388, 890 P.2d 1315, 1320 (1995)).

229. *State v. Vandenberg*, 2003-NMSC-030, ¶ 41, 81 P.3d 19, 29 (emphasis added).

230. *Haywood*, 1998-NMCA-029, ¶ 12, 954 P.2d at 97.

231. *United States v. Whren*, 517 U.S. 806, 813 (1996); *see supra* notes 107–114 and accompanying text.

232. *Haywood*, 1998-NMCA-029, ¶ 12, 954 P.2d at 97.

233. *See supra* notes 120–126 and accompanying text.

234. *Cf. State v. Lowe*, 2004-NMCA-054, ¶ 17, 90 P.3d 539, 543 ("[C]onsent is often held to be the fruit of a poisonous tree when the conduct that precedes it is illegal.").



Both the majority and Justice Chavez believed that if Deputy House's stop was unconstitutional, then Officer Roberts would be precluded from relying on the information in the BOLO to inform the reasonableness of the frisk.<sup>235</sup> Assuming the first stop was illegal, however, neither Justice Chavez nor the majority explained why they would have allowed Officer Roberts to rely on the information in the BOLO to target Swanson's vehicle in the first place. Arguably, if the fruit of the poisonous tree doctrine is to be taken seriously, the stop by Officer Roberts should have been deemed an illegal "fruit" as well.<sup>236</sup> Although there are exceptions to the poisonous tree doctrine,<sup>237</sup> it is difficult to see how they would apply in this case.<sup>238</sup>

Justice Chavez did recognize the essential distinction between *Chapman* and the instant case.<sup>239</sup> Yet, Justice Chavez' dissent is problematic in two regards. First, Justice Chavez feared that the majority's deference to the subjective belief of an officer "would invite pretextual stops."<sup>240</sup> As noted above, however, a pretextual stop presumes an objectively valid stop to begin with.<sup>241</sup> That is, a stop is not pretextual unless the officer "could have" stopped the car. Justice Chavez agreed that, given the objective facts, Deputy House could not have validly stopped the car. Thus, Justice Chavez would have been correct had he stated that the majority's ruling would invite *arbitrary* stops. Arguably, his misuse of terminology is reflective of, and contributes to, the court's general confusion about the nature of pretextual police conduct.<sup>242</sup>

Second, Justice Chavez missed the point when he claimed that "[t]he only logical reason for the BOLO was retribution for Defendants' exercise of their...rights to be free from unreasonable detention."<sup>243</sup> The more logical reason for the BOLO was that Deputy House was simply suspicious that Swanson and Vandenberg possessed drugs and wanted his investigation to continue.<sup>244</sup> Indeed, one of the more frustrating aspects of this case is the entire court's unwillingness to directly confront the obvious possibility that both Deputy House and Officer Roberts were motivated by a hunch that Swanson and Vandenberg were drug couriers. While Justice Chavez should be applauded for challenging the constitutionality of the first stop, it is difficult to believe that the reason Officers Roberts and Yost were looking

235. *Vandenberg*, 2003-NMSC-030, ¶ 39, 81 P.3d at 29; *id.* ¶ 80, 81 P.3d at 39 (Chavez, J., dissenting).

236. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court cited approvingly the statement in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), that "evidence [illegally] acquired shall not be used...at all." *Wong Sun*, 371 U.S. at 485. The Court went on to hold that the exclusionary rule does not distinguish between verbal and physical evidence. *Id.*

237. See *supra* notes 125–126 and accompanying text.

238. As noted at *infra* note 297, it is difficult to argue that Officer Roberts came across the Monte Carlo independently. Moreover, given the temporal proximity of the two stops and the lack of any intervening factors, it is hard to see how the "taint" of the illegal first stop had "dissipated." Finally, Officer Roberts would not have "inevitably discovered" the marijuana without the BOLO report put out by Deputy House.

239. *Vandenberg*, 2003-NMSC-030, ¶ 78, 81 P.3d at 38–39 (Chavez, J., dissenting).

240. *Id.*

241. See *supra* note 106 and accompanying text.

242. See *infra* notes 292–298 and accompanying text.

243. *Vandenberg*, 2003-NMSC-030, ¶ 80, 81 P.3d at 39 (Chavez, J., dissenting).

244. Interestingly, while recounting the facts, the majority did recognize this. See *id.* ¶¶ 5–6, 81 P.3d at 22 (majority opinion) ("Deputy House[']s...suspicions were aroused.... Because Deputy House thought Defendants had acted in a suspicious manner, he issued a...BOLO....").

for a reason to pull over the Monte Carlo<sup>245</sup> was to somehow punish Swanson and Vandenberg for exercising their right to refuse a consensual search.

Although the majority only devoted three paragraphs to discussing Deputy House's initial stop,<sup>246</sup> the implication of its discussion is dire for motorists in New Mexico. Moreover, in her dissent, Justice Minzner did not discuss the legality of the first stop; hence, it is safe to presume that she agreed with the majority's analysis. This means that four out of the five justices on the New Mexico Supreme Court will be likely to uphold future police conduct similar to that of Deputy House. In other words, officers in New Mexico now have the freedom to pull over any motorist on a whim to check documents or to pursue a hunch that the occupants might be involved in criminal activity. All that is required is for police officers to say that they mistakenly believed that the vehicle did not have a license plate. Even if the objective facts show such a statement to be implausible, or, in other words, "fishy," current law in New Mexico after *Vandenberg* places the burden on the motorist to affirmatively show the officer's error.

In sum, the result is that police officers, already given extremely broad leeway under *Whren*,<sup>247</sup> are now free to make purely arbitrary stops in New Mexico. The U.S. Supreme Court deemed this arbitrariness unconstitutional over twenty-five years ago in *Prouse*.<sup>248</sup> Given that the Supreme Court has not changed its mind since then,<sup>249</sup> the holding in *Vandenberg* falls beneath the minimal protections afforded by the Fourth Amendment.

## 2. The Frisk Was Unreasonable

The majority believed this case was simply about "trac[ing] the outer boundary of facts and circumstances sufficient to justify a protective frisk."<sup>250</sup> The court, however, overshot the constitutional mark when it attempted to delineate this outer boundary.

The majority concluded that Officer Roberts' fear was objectively reasonable in light of his direct observations,<sup>251</sup> coupled with the "relevant" information in the BOLO report,<sup>252</sup> and screened through the lens of his experience as a law enforcement officer.<sup>253</sup> Then, perhaps realizing that the enumerated factors added up to

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245. See *id.* ¶ 72, 81 P.3d at 37 (Chavez, J., dissenting) (noting that Officer Yost "admitted that she was looking for a reason to stop" the car); see also *id.* ¶ 6, 81 P.3d at 22 (majority opinion) (stating that Officer Roberts responded to Deputy House's BOLO report).

246. See *id.* ¶¶ 40–42, 81 P.3d at 29–30.

247. See *supra* Part III.A.1.e.

248. See *supra* notes 89–91 and accompanying text.

249. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 39 (2000) ("The officer's conduct in [*Prouse*] was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.'" (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979))).

250. *Vandenberg*, 2003-NMSC-030, ¶ 1, 81 P.3d at 21.

251. See *id.* ¶ 27, 81 P.3d at 26; *supra* note 34 and accompanying text.

252. See *Vandenberg*, 2003-NMSC-030, ¶¶ 45–47, 81 P.3d at 30–32; *supra* notes 177–182 and accompanying text.

253. See *Vandenberg*, 2003-NMSC-030, ¶¶ 29–30, 81 P.3d at 27. The majority also discussed the behavior Swanson exhibited after Officer Roberts ordered him to submit to a frisk. See *id.* ¶ 30, 81 P.3d at 27. After acknowledging that Justice Minzner was troubled by how the majority relied on facts following initiation of the frisk to justify the frisk itself, see *id.* ¶¶ 64–65, 81 P.3d at 35–36 (Minzner, J., dissenting), the majority simply agreed and responded that it was "rely[ing]... on those preudial facts to justify Officer Roberts' frisk." *Id.* ¶ 30 n.2, 81 P.3d at 27 n.2 (majority opinion).

simple nervousness, the majority stated that “nervousness alone [is not] sufficient to justify a frisk for weapons.”<sup>254</sup> Rather, according to the court, what matters is that Officer Roberts was able to articulate *why* that nervousness made him fear for his safety.<sup>255</sup>

It is difficult not to be left with the impression that the majority simply did not want to suppress the evidence. The fact the majority found that Officer Roberts met “the exacting burden of presenting exigent circumstances, in sufficient detail and with convincing sincerity”<sup>256</sup> does little to dispel this notion. After close analysis, the methodology the majority used breaks down and reveals that the boundaries of the protective frisk doctrine were stretched past their breaking point in *Vandenberg*.

#### a. Relevant or Irrelevant?

Besides labeling the relatively minor and easily explained nervous tics that Swanson and Vandenberg displayed<sup>257</sup> as an exhibition of “extreme nervousness,”<sup>258</sup> the court’s splitting of the information in the BOLO report into relevant and irrelevant components is deeply troubling. Although the cases the majority used for support may be read to find that the behavior of a person in refusing to consent to a search is “relevant” to the reasonable suspicion equation, none of them dealt with the issue of officer safety.<sup>259</sup> Rather, all of the cited cases hold that such behavior is, or might be, relevant in the context of a drug investigation.

The need to distinguish between the two contexts becomes especially apparent considering Professor Melilli’s article that the majority used for support.<sup>260</sup> There, Professor Melilli argues that a person’s behavior in refusing to consent is relevant on *evidentiary* grounds;<sup>261</sup> that is, because it is probative of criminal conduct.<sup>262</sup> Professor Melilli simply does not say that such behavior is indicative of dangerousness. Hence, by not differentiating between the two contexts, the majority was able to suddenly deem the act of refusing as “irrelevant.” In doing so, the court managed to avoid addressing the likely possibility that the frisk conducted by Officer Roberts was in fact motivated by a desire to search for evidence.

Recall the syllogism that the court relied upon.<sup>263</sup> First, the court labeled it “self-evident that Defendants’ refusal is not a probative fact of guilt, suspicion, or

254. *Id.* ¶ 31, 81 P.3d at 27.

255. *Id.*

256. *Id.* ¶ 32, 81 P.3d at 28.

257. *See supra* note 34 and accompanying text.

258. *Vandenberg*, 2003-NMSC-030, ¶ 28, 81 P.3d at 26.

259. *See cases cited supra* note 178.

260. *See Melilli, supra* note 102. The majority used Professor Melilli’s article to support its proposition that a refusal to consent itself is irrelevant, *see Vandenberg*, 2003-NMSC-030, ¶ 46, 81 P.3d at 32, *not* for its proposition that behavior in refusing to consent is relevant to the formulation of dangerousness. *See id.* ¶ 45, 81 P.3d at 30–31.

261. *See Melilli, supra* note 102, at 926–28.

262. *See id.* at 927 (“[T]he behavior of the defendants was especially probative of criminal conduct in a way that a less “peculiar” refusal to consent to a search is not.”); *see also id.* at 928 (“[T]he overreaction [when] refusing to consent to search is...especially relevant to a conclusion that the motive for refusal is to avoid detection of evidence of a crime.”). For a critique of Melilli, *see Chanenson, supra* note 98, at 427–32 (explaining why the “reliance on the ‘ordinary rules of evidence’ in the context of reasonable suspicion and probable cause is misplaced”).

263. *See supra* notes 180–182 and accompanying text.

dangerousness.”<sup>264</sup> On its face, this is not problematic. Relying on this statement, however, the court went on to find that the “refusal should not be considered in determining whether Officer Roberts had reasonable...suspicion that Defendants were armed and dangerous,”<sup>265</sup> and, “[t]herefore,... we do not consider Defendants’ refusal to consent as a relevant fact.”<sup>266</sup> The syllogism breaks down on the middle prong. That is, rather than simply saying the refusal to consent “should not be considered,” the majority would have been more correct had it said, “*Officer Roberts* should not have considered the refusal to consent.” By relying on its formulation, however, the court was subtly and deftly able to consider the refusal to consent “irrelevant” to its *own* analysis. At the same time, the court managed to avoid the sticky question of whether Officer Roberts did in fact consider the refusal itself “relevant.”

The problem here is twofold. First, the court did not consider the totality of circumstances as required in *United States v. Arvizu*.<sup>267</sup> Instead, by splitting the information in the BOLO report into two components and only considering one of them, the court employed a “divide-and-conquer” type analysis.<sup>268</sup> A totality of circumstances analysis would have included (1) the “irrelevant” fact that Swanson and Vandenberg had refused consent to run a drug-sniffing dog around the car, (2) they had just been stopped in a tag-team fashion,<sup>269</sup> and (3) the fact that Deputy House also told Officer Roberts that one reason he was suspicious was because Swanson and Vandenberg had given an “inconsistent” story.<sup>270</sup> These facts, known to Officer Roberts but disregarded by the court, better inform Swanson’s and Vandenberg’s simple nervousness.<sup>271</sup> That is, given the level of nervousness displayed, in light of all the circumstances, it is only reasonable to conclude that the two were acting nervously because they sensed they were being targeted, rather than because they were armed and dangerous.<sup>272</sup>

Second, the court was wrong to rely on cases holding that the behavior of a person in refusing to consent might inform an officer’s reasonable suspicion to

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264. *Vandenberg*, 2003-NMSC-030, ¶ 46, 81 P.3d at 31.

265. *Id.*

266. *Id.* ¶ 47, 81 P.3d at 32.

267. 534 U.S. 266 (2002); *see id.* at 273 (holding that in making reasonable suspicion determinations reviewing courts “must look at the ‘totality of the circumstances’ of each case”); *see also supra* note 84.

268. *See Arvizu*, 534 U.S. at 274. *But see Vandenberg*, 2002-NMCA-066, ¶¶ 30–33, 48 P.3d at 100–01 (Pickard, J., dissenting) (arguing that an *Arvizu* analysis would uphold the frisk on officer safety grounds).

269. The majority labeled this second stop as “ordinary” and “routine.” *Vandenberg*, 2003-NMSC-030, ¶¶ 1, 32, 81 P.3d at 21, 27. Arguably, it was anything but. *Cf. State v. Zelinske*, 108 N.M. 784, 788, 779 P.2d 971, 975 (Ct. App. 1989) (stating that a hunch “cannot be transformed into probable cause ‘by reason of ambiguous conduct which the arresting officers themselves have provoked’” (quoting *Wong Sun v. United States*, 371 U.S. 471, 484 (1963))), *overruled on other grounds by State v. Bedolla* 111 N.M. 448, 806 P.2d 588 (Ct. App. 1991); *United States v. Campbell*, 261 F.3d 628, 633 (6th Cir. 2001) (“It is well established that police officers are not free to create exigent circumstances to justify their warrantless searches.”).

270. *See Vandenberg*, 2003-NMSC-030, ¶¶ 5–6, 81 P.3d at 22; *see also supra* notes 15–26 and accompanying text.

271. It should be reiterated that this “nervousness” consisted of “watching Officer Roberts in the rearview mirror, drumming fingers on the roof of the car, speaking to each other, rolling the windows of the car up and down, glancing back at Officer Roberts, and general fidgeting.” *Vandenberg*, 2002-NMCA-066, ¶ 25, 48 P.3d at 99.

272. *See Damato v. State*, 64 P.3d 700, 709 (Wyo. 2003) (stating that nervousness displayed by a motorist in refusing to consent to a search is of no significance because the officer did not treat the traffic stop as routine).

support a criminal investigation<sup>273</sup> since the frisk supposedly had nothing to do with investigating a crime.<sup>274</sup> Simply put, there is no precedent holding that an officer's formulation of reasonable suspicion that a person is armed and dangerous can be informed by that person's demeanor in refusing to consent to search. Unfortunately, in this sense, *Vanderberg* does break new ground.

Only one case, *State v. Robb*,<sup>275</sup> has considered the question, and it came to the opposite conclusion. That court held that "a citizen's nervousness about having his or her property searched and voicing the desire not to have [it] searched [does not] support[t] an inference that he or she is dangerous and can access a weapon."<sup>276</sup> Although that court gave "value and respect [to] a police officer's intuition," it found that those instincts, "even if proven correct, are insufficient to justify a protective search."<sup>277</sup> *Robb* is the better rule, as it is simply more honest and analytically correct.

If the court in *Vanderberg* simply did not want to suppress the evidence, it should have done something else. It would have been better had it directly and openly sided with those jurisdictions holding that an officer can expand the scope of an investigation based on the reaction of a suspect in refusing to consent to a search.<sup>278</sup> That is, rather than deeming the refusal itself "irrelevant," the court could have held that Officer Roberts' actions were justified because the demeanor of Swanson and Vandenberg was indicative of criminal conduct—not because it supported a reasonable suspicion that they were armed and dangerous.<sup>279</sup>

Ultimately, whether or not Officer Roberts had ulterior motives when initiating the frisk,<sup>280</sup> and whether or not the New Mexico Supreme Court recognized this, is beside the point. The point is that, after *Vanderberg*, the court has opened the door for such misconduct. Government officials are now free to mask unsubstantiated searches for evidence behind the façade of "officer safety." New Mexico courts should not allow, let alone create, the possibility of such dishonest behavior. At least if the court had upheld the frisk on the argument that the nervousness was indicative of criminal conduct, it would have put its own credibility on the line rather than passing it on to officers in the field.

#### b. Articulating Fear

The majority's analysis also stretches the constitutional limits of *Terry* past the breaking point by relying on Officer Roberts' ability to articulate why simple nervousness caused him to fear for his safety. The court adopted the following

273. See *supra* note 178.

274. See *Vanderberg*, 2003-NMSC-030, ¶ 33, 81 P.3d at 28 ("[S]afety, and safety alone, justified...the protective pat down...More was at stake here than mere evidence.").

275. 605 N.W.2d 96 (Minn. 2000).

276. *Id.* at 103.

277. *Id.*

278. Cf. David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 38 U.C. DAVIS L. REV. 1, 6 (1994) ("If...we now think that only automatic frisks following every *Terry* stop can make officers safe, we should be willing not only to say so directly, but also to confront the full range of consequences of that conclusion.").

279. It should be pointed out that, if Officer Roberts had not found either weapons or drugs during his frisk, he would have been able to "frisk" the passenger compartment of the Monte Carlo under *Michigan v. Long*, 463 U.S. 1032 (1983). See *supra* notes 92–93 and accompanying text.

280. See Harris, *supra* note 278, at 35–36 (discussing the widespread practice of "testilying" by police).

statement as a rule of law from Judge Pickard's dissent in the court of appeals: "[I]t is not the degree of nervousness that allows the officer to pat a defendant down, but instead it is the articulation by the officer of specific reasons why the nervousness displayed by the defendant caused the officer to reasonably believe that his or her safety would be compromised."<sup>281</sup>

The problem here is that the court suggests that a police officer need only formulate some semi-plausible reason as to why a person's nervousness triggered a fear of safety. This is problematic because the emphasis is on the officer's *subjective* state of mind, rather than on a *de novo* determination of whether that fear was objectively reasonable.<sup>282</sup> U.S. Supreme Court Fourth Amendment jurisprudence has consistently held that the *facts* must be reasonable and articulable. That is, it is not that an officer is able to articulate *why* he feared for his safety; rather, the requirement is that an officer articulate *facts* that, in turn, objectively add up to reasonable suspicion.<sup>283</sup>

Moreover, the court disingenuously termed the nervous behavior of Swanson and Vandenberg as "extreme."<sup>284</sup> When it comes down to it, it is difficult to understand how tapping fingers on the roof of a car, glances over shoulders, conversation, and rolling a window up and down a few times on a hot, humid, and rainy afternoon<sup>285</sup> constitutes "extreme" nervousness.<sup>286</sup> As a result, police officers in New Mexico may now well be allowed to frisk a tremendously large swath of the public.<sup>287</sup> To make sure a frisk is upheld, all an officer now has to do is to give *some* reason as to why nervous behavior created a belief that a person might be armed and dangerous.<sup>288</sup> Not only does this subjective standard fall far below *Terry* as originally understood, but it also falls below the law in numerous other jurisdictions.<sup>289</sup> On the other hand, *Vandenberg* puts New Mexico in line with other courts that have already watered down *Terry* and its U.S. Supreme Court progeny:

281. *Vandenberg*, 2003-NMSC-030, ¶ 31, 81 P.3d at 27 (quoting *Vandenberg*, 2002-NMCA-066, ¶ 34, 48 P.3d at 101 (Pickard, J., dissenting) (quotation marks omitted)); see also *Vandenberg*, 2003-NMSC-030, ¶ 29, 81 P.3d at 27 (finding that Officer Roberts believed Swanson's and Vandenberg's nervous tics "indicated that they may have been in 'fight or flight' mode, a concept he learned at the law enforcement academy").

282. Indeed, this subjective "articulation" test directly contravenes the edicts of the U.S. Supreme Court. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police.") (quoting *Beck v. Ohio*, 379 U.S. 89 (1964) (internal quotation marks omitted)).

283. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). A correct reading of *State v. Chapman*, 1999-NMCA-106, 986 P.2d 1122, supports U.S. Supreme Court precedent. See *supra* note 158.

284. *Vandenberg*, 2003-NMSC-030, ¶ 28, 81 P.3d at 26.

285. See *supra* note 34 and accompanying text.

286. This holds true even if one adds the "relevant" information of general nervousness that Swanson and Vandenberg displayed at the first stop.

287. See *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992) ("It is common knowledge that most citizens... whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness.")

288. Cf. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (stating that a race-neutral justification for the exercising of peremptory challenges "does not demand an explanation that is persuasive, or even plausible").

289. See, e.g., *Smith v. State*, 735 So. 2d 570, 572 (Fla. Dist. Ct. App. 1999) (holding that acting nervous and perspiring without threatening or furtive gestures does not justify a frisk); *Moore v. Commonwealth*, 404 S.E.2d 77, 78 (Va. Ct. App. 1991) (holding that a frisk based on subjective belief of dangerousness due to shaking hands and stuttering and stammering of words is objectively unreasonable).

Although the motive seems laudable—protection of the police—the extent to which these cases give police leeway threatens to shrink the Supreme Court’s high-sounding words into nothing but meaningless small print. The result is that in many jurisdictions police may legally frisk suspects automatically—without any consideration of whether the individual might be armed and often in spite of a total lack of any such indications—in an array of cases so wide that it might astonish the Justices.<sup>290</sup>

### B. Article II, Section 10

Even though *Vandenberg* afforded the New Mexico Supreme Court two opportunities to analyze the issue of pretext under article II, section 10, the court sidestepped the issue by framing it as “an abstract question” lacking factual foundation.<sup>291</sup> First, the court could have analyzed whether the stop by Officer Roberts was constitutional under article II, section 10. Second, the court could have analyzed whether the subsequent pat down of Swanson was pretextual, and, if so, whether such action passes state constitutional muster. That the court did not is unfortunate, if only because it would have clarified this area of law in New Mexico.

#### 1. The Stop for Speeding

At the suppression hearing, the district court stated, “I’m not convinced Officer Roberts lied about speeding as the basis for his stop and if speeding occurred, then that is reasonable suspicion and the officer provided evidence supporting reasonable suspicion for his stop.”<sup>292</sup> Because of this, the majority in *Vandenberg* determined that, “even assuming [it] were to adopt [the] Defendants’ argument about the consequences of officer pretext under the state constitution,” there was no reason to analyze the issue because it was lacking “factual foundation.”<sup>293</sup>

Strangely, even though the issue had been fully briefed,<sup>294</sup> the court misunderstood the issue. Under *Whren v. United States*,<sup>295</sup> police act pretextually when they “use valid bases of action against citizens...for pursuing other investigatory agendas.”<sup>296</sup> Under this standard, the stop by Officer Roberts was a classical pretextual stop. Officer Roberts used a valid basis of action against Swanson—a stop for speeding—to pursue a hunch that the Monte Carlo contained drugs.<sup>297</sup> Since reasonable suspicion that the vehicle was carrying drugs was lacking, Officer

290. Harris, *supra* note 278, at 22.

291. See *Vandenberg*, 2003-NMSC-030, ¶ 53, 81 P.3d at 33; see also *supra* Part IV.A.3. Using the interstitial approach to the analysis of state constitutional issues, the court of appeals was not able to reach the pretext issue since it held the evidence suppressible under the Fourth Amendment. See *Vandenberg*, 2002-NMCA-066, ¶ 25 n.3, 48 P.3d at 99 n.3.

292. *Vandenberg*, 2003-NMSC-030, ¶ 53, 81 P.3d at 33.

293. *Id.*

294. See Defendant-Respondent’s Answer Brief at 31–35, State v. Vandenberg, 2003-NMSC-030, 81 P.3d 19 (No. 27,509).

295. 517 U.S. 806 (1996).

296. *Id.* at 811. For a discussion of pretextual police conduct, see *supra* Part III.A.1.e.

297. After receiving the BOLO, including the information that Swanson and Vandenberg had acted nervously when declining the dog sniff, Officer Roberts specifically targeted the Monte Carlo out of a group of speeding cars. See *supra* notes 28–29 and accompanying text. Given this, there is simply no other explanation for Officer Roberts’ conduct. Officer Roberts did not come across the Monte Carlo by happenstance.

Roberts used an otherwise legal reason to make the stop. In essence, because of the speeding, Officer Roberts *could* stop the Monte Carlo; however, absent his underlying motive, Officer Roberts simply would not have stopped the car. According to the court, however, because it was undisputed that Swanson was speeding, the stop was simply not pretextual.<sup>298</sup> Seemingly, the New Mexico Supreme Court avoided the issue by misunderstanding the definition of a pretextual stop.

The issue that the court in *Vandenberg* avoided is whether New Mexico should allow a police officer to use any violation of the traffic code to conduct a stop when, given the underlying motivation of the officer, the stop would otherwise be illegal. By explicitly adopting *Whren*, most other states allow such conduct.<sup>299</sup> In *State v. Ladson*,<sup>300</sup> however, the Washington Supreme Court held that pretextual traffic stops, like those explicitly authorized in *Whren*, are illegal under its state constitution.<sup>301</sup> After reviewing its case law, the court in *Ladson* found “that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.”<sup>302</sup> The court found that “[p]retex[t] is...a triumph of form over substance; a triumph of expediency at the expense of reason.”<sup>303</sup>

*Ladson*'s reasoning is persuasive and New Mexico should hold pretextual traffic stops illegal as well. Previously, New Mexico courts have refused to follow the U.S. Supreme Court's Fourth Amendment jurisprudence when they believed that doing so would unnecessarily strip New Mexicans of their right to be left free of intrusive police conduct.<sup>304</sup> Since *Whren* allows an officer to make an end run around *Brignoni-Ponce*'s requirement that an officer must have reasonable suspicion that criminal activity is underway before pulling over an automobile, New Mexico courts should use article II, section 10 as a protection against arbitrary police conduct.<sup>305</sup> Unfortunately, by misconstruing the definition of pretext, the court in *Vandenberg* neglected to analyze this important issue. Fortunately, on the other hand, a viable argument for rejecting *Whren* remains.

## 2. A Pretextual Frisk?

Even if the New Mexico Supreme Court explicitly adopted *Whren* and allowed pretextual traffic stops in New Mexico, it could still have decided that a pretextual

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298. See *Vandenberg*, 2003-NMSC-030, ¶ 53, 81 P.3d at 33.

299. For a list of states that have either explicitly or implicitly adopted *Whren*, see *People v. Robinson*, 767 N.E.2d 638, 649–50 (N.Y. 2001).

300. 979 P.2d 833 (Wash. 1999) (en banc).

301. *Id.* at 842 (concluding that Washington citizens “hold 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”).

302. *Id.*

303. *Id.* at 838.

304. See, e.g., *State v. Cardenas-Alvarez*, 2001-NMSC-017, 25 P.3d 225; *State v. Gomez*, 1997-NMSC-006, 932 P.2d 1; *State v. Arredondo*, 1997-NMCA-081, ¶¶ 28–29, 944 P.2d 276, 284–85, *overruled on other grounds* by *State v. Steinzig*, 1999-NMCA-081, 944 P.2d 276.

305. See *supra* notes 85–88 and accompanying text; see also *Ladson*, 979 P.2d at 842 n.10 (noting that if the court “were to depart from [its] holdings and allow pretextual traffic stops, Washington citizens would lose their privacy every time they enter their automobiles”).



frisk violates the Fourth Amendment. A pretextual frisk would occur when, although articulable facts support an objectively reasonable belief that a suspect is armed and dangerous,<sup>306</sup> an officer's motive for conducting the frisk is to search for evidence. Hence, in this situation, after finding that Officer Roberts had a sufficiently legal justification for frisking Swanson and Vandenberg, the court would have asked what his real motivations were. Given the totality of the circumstances, it is not difficult to come to the conclusion that the underlying motivation was to search for evidence of criminal conduct.

Although the issue of pretextual frisks has not received much attention,<sup>307</sup> at least one state court has determined that "the pretext factor is relevant" when considering whether a frisk is reasonable.<sup>308</sup> In *State v. Varnado*,<sup>309</sup> a police officer discovered crack cocaine on a minor traffic violator after he frisked her—ostensibly because he wanted her to sit in his squad car.<sup>310</sup> The Minnesota Supreme Court noted that the district court had "concluded that [the officer's] purported frisk for weapons was pretextual and designed to conduct a warrantless search for narcotics."<sup>311</sup> Because "the reasonableness requirement of the Fourth Amendment [could be contravened] simply by requesting that a person sit in [a] squad car," the court in *Varnado* distinguished *Whren*.<sup>312</sup> It did so by noting that *Whren* only applies "in ordinary, probable-cause Fourth Amendment analysis."<sup>313</sup> Thus, since the frisk had nothing to do with probable cause, the court was free to look at the subjective motivation of the officer.<sup>314</sup>

As noted above, although it is certain that *Whren* does not apply when there is no probable cause, it is uncertain if *Whren* applies when there is reasonable suspicion.<sup>315</sup> Arguably, because a frisk is a greater intrusion on a person's autonomy than is the stop of an automobile,<sup>316</sup> and because the reasonable suspicion standard gives an officer greater discretion than probable cause,<sup>317</sup> the "pretext factor" should be relevant in analyzing frisks. Granted, the frisk in question in *Varnado* was not even based on reasonable suspicion.<sup>318</sup> Nonetheless, because a frisk is a serious

306. As noted above, see *supra* note 290, this is already an extremely low threshold to meet.

307. When invalidating frisks based on the underlying motivations of an officer, courts have generally simply found that the frisk was not objectively reasonable. See, e.g., *Jones v. DEA*, 819 F. Supp. 698, 717–18 (M.D. Tenn. 1993) (finding frisk subjectively done to search for evidence when the objective facts showed the frisk unreasonable). As just noted, a "pretextual frisk" should be understood as being objectively reasonable were it not for the officers' unconstitutional motivation to search for evidence.

308. *State v. Varnado*, 582 N.W.2d 886, 892 (Minn. 1998).

309. 582 N.W.2d 886 (Minn. 1998).

310. *Id.* at 888–89.

311. *Id.* at 892.

312. *Id.* at 891–92.

313. *Id.* at 892 (quoting *Whren*, 517 U.S. at 813). The court in *Varnado* decided this case under the Fourth Amendment—not Minnesota's constitution. See *id.* at 893 (holding that the frisk "was invalid under the Fourth Amendment").

314. See *id.*

315. See *supra* note 114.

316. See *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (stating that a frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment").

317. See *id.* at 38 (Douglas, J., dissenting) (discussing reasonable suspicion as it relates to probable cause and arguing that "[t]o give the police greater power than a magistrate is to take a long step down the totalitarian path").

318. The court in *Varnado* was concerned that a police officer could evade the requirement of reasonable

intrusion on a person's integrity, and because an officer does not need probable cause to conduct one, New Mexico courts should, at the very least, consider the question of whether the "pretext factor" is relevant to frisks. Unfortunately, by misconstruing the nature of pretext, and by affording too much deference to the magical words "officer safety," the court in *Vandenberg* avoided this important question.

## VI. CONCLUSION

Although the New Mexico Supreme Court struggled to hold a tight rein on *Vandenberg*, after close analysis, it is clear that the court was unable to keep its holding from seeping past the constitutional boundaries of the Fourth Amendment to the U.S. Constitution. The result is that New Mexico citizens may now be subjected to entirely arbitrary traffic stops and frisks. Moreover, although the court intimated that it would allow officers very broad discretion under the New Mexico Constitution, the court failed to clarify whether article II, section 10 prohibits pretextual police conduct. By not directly addressing this issue, the court has given a green light to questionable police conduct and, at the same time, deflected responsibility for allowing this to happen.