FOURTH AMENDMENT — SEARCH AND SEIZURE — WHEN DETERMINING THE CONSTITUTIONAL REASONABLENESS OF A POLICE OFFICER'S DECISION TO STOP AND DETAIN AN AUTOMOBILE, A COURT IS NOT TO CONSIDER THE OFFICER'S SUBJECTIVE MOTIVATIONS — *Whren v. United States,* 116 S. Ct. 1769 (1996).

The Supreme Court of the United States recently held that in determining the constitutional reasonableness of a police officer's automobile stop and detention, neither the ulterior motivations of that officer nor the hypothetical actions of similarly situated officers are relevant considerations. *Whren v. United States,* 116 S. Ct. 1769 (1996). In so holding, the Court reasoned that with regard to traffic stops, the Fourth Amendment reasonableness inquiry ends once it is demonstrated that probable cause existed for executing the challenged stop. *Id.* at 1772. The Court concluded that even if it could be demonstrated that the stop of a vehicle was pretext for an otherwise unlawful search of the vehicle, the stop will be deemed constitutional so long as the police officer had probable cause to believe that the vehicle violated a traffic regulation. *Id.* at 1775. While it is true that the *Whren* decision is license for pretextual traffic stops, the scope of a search and seizure made pursuant to such a stop is subject to other Fourth Amendment protections; therefore, any potential abuse of what otherwise appears to be a troubling precedent will be limited.

On June 10, 1993, petitioner Whren and petitioner Brown were in a vehicle in a "high drug area" stopped at an intersection. *Id.* at 1772. After waiting at the intersection for an unusually long period of time, the petitioner Brown made a left hand turn without signalling and drove off at an unreasonable speed. *Id.* Having observed the petitioner's actions, two out-of-uniform vice-squad police officers in an unmarked car followed the petitioner's vehicle to a red light. *Id.* One of the out-of-uniform officers then exited his vehicle and approached petitioner's vehicle so as to warn petitioner of his having violated traffic regulations. *Id.* As the officer came along side the petitioners' vehicle, he noticed what appeared to be crack cocaine in the hands of the passenger, petitioner Whren. *Id.* A subsequent search of the petitioner's vehicle uncovered various illegal drugs for which the petitioners were charged. *Id.*

At a pretrial suppression hearing, the petitioners argued that the initial traffic stop was not justified. *Id.* Specifically, petitioners claimed that the vice-squad officers did not have probable cause for believing that petitioners were in possession of illegal drugs. *Id.* In addition, petitioners alleged that the traffic stop for the purpose of warning petitioner Brown of his traffic violations was pretextual. *Id.* Based on their assertion that the stop was unjustified, petitioners argued that the evidence seized therefrom was tainted and ought to be suppressed. *Id.*

The District Court for the District of Columbia denied petitioners' motion to suppress the seized drugs. *Id.* The district court first noted that the petitioners raised no factual challenge. *Id.* Examining the uncontroverted facts, the district court held that the officers' traffic stop was within the scope of permissible police conduct. Therefore, the district court admitted the drugs into evidence. *Id.* Subsequently, the petitioners were convicted of the drug charges. *Id.*

On appeal, the Court of Appeals for the District of Columbia affirmed the convictions. *Id.* As to the suppression issue, the appellate court held that in determining the illegality of a traffic stop, the subjective motivations of the officers involved are not to be considered. Rather, the court opined 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." *Id.* (quoting United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995)).

The Supreme Court of the United States granted *certiorari*, *id.* at 1772 (citing Whren v. United States, 116 S. Ct. 690 (1996)), and on June 10, 1996, affirmed the holding of the appeals court. *Id.* at 1777. The Supreme Court concluded, as did the appellate court, that the Fourth Amendment is not concerned with an officer's subjective motivations in making a traffic stop. *Id.* at 1774. Rather, the Court held that a traffic stop based on probable cause is constitutionally reasonable, notwithstanding a showing of pretext. *Id.* at 1772, 1774, 1774.

Writing for a unanimous Court, Justice Scalia began the Court's analysis by noting that the Fourth Amendment prohibits, *inter alia,* unreasonable searches and seizures. *Id.* at 1772. The Justice determined that the temporary detention of an individual during a traffic stop, even for a short period, constitutes a seizure for Fourth Amendment purposes. *Id.* Thus, the Justice found it necessary to determine the reasonableness of the temporary detention of the petitioners. *Id.*

Applying these principles, the Justice announced that when a police officer has probable cause to believe a crime has been perpetrated, the officer's stop of the perpetrator is presumed reasonable. *Id.* Justice Scalia underscored that petitioners did not argue that the vice-squad officers lacked probable cause for their belief that petitioners had violated District of Columbia traffic law; rather, petitioners asserted that probable cause was not enough. *Id.* at 1172-73. The petitioners, the Justice explained, were concerned with the potential abuse of permitting pretextual traffic stops, namely using a lawful traffic stop to investigate criminal activity for which no articulable suspicion exists. *Id.* at 1773. The Justice noted that petitioners, in an effort to prevent this abuse, would have constitutional reasonableness depend on whether a reasonable officer *would* have made the traffic stop to warn petitioner Brown of his traffic violations. *Id.*

Considering what petitioners claimed to be supporting case law, Justice Scalia rejected the notion that the actual motivations of police officers should play a role in determining the constitutional reasonableness of an otherwise lawful traffic stop. *Id.* at 1773. In doing so, Justice Scalia distinguished cases involving inventory searches and administrative inspections in which the subjective motivations of officers have been considered. *Id.* The Justice determined that the focus on an officer's motivations in these types of cases arises because administrative and inventory searches are not supported by probable cause. *Id.* As the vice-squad officer's stop of petitioner's vehicle *was* supported by probable cause, the Justice concluded these cases were without weight. *Id.*

Continuing, Justice Scalia chided the petitioners' suggestion that the Court invalidate the traffic stop because of pretext. *Id.* at 1774. The Justice emphasized that not only is an inquiry into the subjective motivations of an officer not supported by case law, but such a inquiry has been expressly prohibited in Fourth Amendment probable cause analysis. *Id.* Specifically, the Justice cited *United States v. Robinson* for the well established principle that so long as an officer's actions when viewed objectively are justified, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officers action does not invalidate the action." *Id.* (quoting Scott v. United States, 436 U.S. 128, 138 (1978) (citing United States v. Robinson)).

Justice Scalia acknowledged, however, that petitioners' argument was not based on a subjective inquiry into the motivations of the individual officer; rather the petitioners' argument was based on what would have been the actions of a reasonable officer, similarly situated. *Id.* at 1774. Although this standard does embody some objective, empirical analysis, the Justice stressed that it is nevertheless driven by subjective considerations. *Id.* The "reasonable officer" test's purpose, the Justice explained, is still to prevent officers from using traffic stops as pretext for otherwise unlawful searches; instead of inquiring into the individual officer's state of mind, the test inquires into the reasonable officer's state of mind. *Id.*

Justice Scalia admitted that if the Fourth Amendment was concerned with evidentiary difficulties, an analysis of general police practices, in contrast to an analysis of the individual officer's practices, might make sense. *Id* at 1775. The Justice again remarked, however, that the Fourth Amendment's principle concern is with determining the objective reasonableness of the suspect police actions, regardless of subjective intent. *Id.* The Justice posited that even if evidentiary difficulties were a concern, petitioners' "reasonable officer" test would nevertheless be cumbersome; determining the hypothetical actions of a hypothetical reasonable officer may in fact be more difficult than determining the motivations of an individual officer. *Id.*

Moreover, as police enforcement practices differ according to jurisdiction, the actions of the reasonable officer working under these practices would differ. *Id.* at 1775. This situation, the Justice proposed, might require the Court to conclude that a traffic stop in one jurisdiction was constitutionally reasonable, while an identical traffic stop in another jurisdiction was unreasonable. *Id.* For example, District of Columbia police regulations precluded vice-squad officers from making traffic stops except in extreme circumstances (circumstances not present in petitioners' case); therefore, the Justice observed, a reasonable District of Columbia vice squad officer *would not* have made the stop at issue. *Id.* However, the Justice countered, the same stop might be perfectly reasonable in another jurisdiction. *Id.* Fourth Amendment reasonableness determinations, Justice Scalia proclaimed, are not to be so variable and should not turn on such trivialities. *Id.*

Finally, Justice Scalia addressed the petitioners' argument that the Court is required to balance the government's interest in traffic safety against the individual's interest in anxiety-free road travel. *Id.* at 1776. While admitting that the Fourth Amendment's reasonableness inquiry inherently involves a balancing of factors, the Justice explained that once it is established that an officer acted with probable cause, a presumption arises in favor of constitutional reasonableness. *Id.* Justice Scalia also rejected petitioners' reliance on cases applying a balancing test to traffic stops. *Id.* The Justice emphasized that, in contrast to the case at bar, the traffic stops in these cases were not founded on probable cause. *Id.* The Justice did recognize that in extreme circumstances certain searches, even when based on probable cause, demand a balancing of factors, for example searches of an individual's home or body. *Id.* at 1776-77. These considerations notwithstanding, Justice Scalia declared that an out-of-uniform traffic stop "does not remotely qualify as such an extreme practice." *Id.* at 1777.

Having rejected the petitioners' proposed "reasonable officer" test and petitioners' proposed balancing test, Justice Scalia held that an officer who has probable cause to believe that an individual has violated local traffic laws may constitutionally stop and detain that individual. *Id.* Justice Scalia concluded that the District of Columbia vice-squad officers' observations provided them with probable cause to believe that the petitioners had violated District of Columbia traffic laws. Therefore, Justice Scalia affirmed the appellate court's finding that the stop and detention at issue was lawful. *Id.*

Analysis

The *Whren* decision reflects the Court's police friendly interpretation of the Fourth Amendment. The decision gives police officers the opportunity conduct otherwise unlawful searches based on the pretext of a lawful traffic

stop. While *Whren* seems to be a troubling decision on its face, when one considers this decision in light of other Fourth Amendment precedent, it is limited in scope.

Whren merely allows a police officer to stop a vehicle if he has probable cause to believe that the vehicle has been involved in a traffic violation. The *Whren* petitioners found this troublesome. As Justice Scalia explained, petitioners' argument was that probable cause was not enough. *Id.* at 1773. Specifically, petitioners noted that police officers can easily catch a motorist violating traffic laws; as such, establishing probable cause for a traffic violation is not difficult. *Id.* From this, the petitioners concluded that an officer could use a lawful traffic stop "as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists." *Id.* The Court rejected the petitioners' concerns relying on precedent which explicitly rejected an analysis of an officer's subjective motivations when a search or seizure is supported by probable cause. *Id.* at 1774.

Given this explicit precedent it was unnecessary for the Court to offer an additional rationale for the decision, notwithstanding one does exist. In considering the typical traffic stop it is evident that the petitioners' allegations regarding the abuses of pretextual stops are reactionary. While it is true that an officer can use a traffic stop as pretext for what would otherwise be an unlawful search, it is rare that a traffic stop will lead to a subsequent search. The detention authorized by a traffic stop is brief. In most states a traffic stop will, at most, result in the issuance of a citation, after which the driver and his vehicle will be released. In order for the officer to conduct a subsequent search of the vehicle and its occupants, he must have independent reasonable suspicion or probable cause of criminal activity; the probable cause for the traffic violation will not suffice.

In *Whren* the officers' search was incident to the arrest of petitioners. The officers had probable cause for the arrest because petitioners' contraband was in plain view. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). This scenario, however, is not typical of traffic stops. In *Whren* the vice-squad officer approached the petitioner's vehicle at a stop light, without forewarning. Conversely, during a typical traffic stop the vehicle is signaled off the road and the occupants have the opportunity to conceal any plainly obvious contraband. Further, given the diminished expectation of privacy a person has in one's automobile, a driver should be wary about having incriminating evidence in his vehicle at all. In light of these considerations, traffic stops will not usually lead to a plain view arrest and subsequent search. Accordingly, an officer's attempt to use a lawful traffic stop as pretext for a further search often will be fruitless.

It is conceded that even in the absence of a plain view sighting, a vehicle and its occupants may still be subject to a subsequent search;

however, this is the case only in the presence of escalating cause. In other words, before an officer's pretextual motivations bear fruit, he must overcome separate Fourth Amendment protections. For example, following a traffic stop an officer may conduct a *Terry* search of a person in the stopped vehicle if, under the circumstances, he has a reasonable suspicion to believe that his safety is in danger. Terry v. Ohio, 392 US. 1, 25-26 (1968). Ordinarily, however, the circumstances surrounding a traffic stop will not create such a suspicion. Furthermore, assuming dangerous circumstances, it is hardly troubling that an officer is permitted to search the occupants of a vehicle for weapons - to conclude otherwise would hold an officer's safety in low regard.

Probable cause is another Fourth Amendment standard that will limit the success of a pretextual traffic stop. If during a stop an officer has probable cause to believe that the persons in a vehicle are engaged in criminal activity, then the officer may arrest those persons. Thereafter, the officer may conduct a search incident to an arrest. As previously noted, this was the type of search conducted in *Whren*. Such a search will allow the officer to search most of the vehicle and its occupants for weapons or evidence. However, as the probable cause standard is more difficult to overcome than is the reasonable suspicion standard of *Terry*, it is more *un*likely that the circumstances surrounding a typical traffic stop will warrant an arrest and subsequent search; again, pretext will likely prove fruitless. Further, according to the precedent relied on by the *Whren* Court, if probable cause does arise during a traffic stop, then any pretext will be irrelevant.

In sum, what these Fourth Amendment standards make clear and what the *Whren* petitioners failed to recognize is that if a pretextual stop does in fact result in a search, then it will only be pursuant to cause independent from that which authorized the stop in the first place. Because it is unlikely that the circumstances surrounding a typical traffic stop will provide that independent cause, the abuse of pretextual traffic stops is necessarily limited. Further, if circumstances do exist which provide cause or suspicion for a search subsequent to the traffic stop, an officer's initial pretext should be of no concern. As the *Whren* Court poignantly explained, "'[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.'" *Whren*, 116 S. Ct. at 1774 (alteration in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

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