PRETEXTUAL SEARCHES AND SEIZURES: ALASKA'S FAILURE TO ADOPT A STANDARD

SHARDUL DESAI

A decade has passed since the United States Supreme Court set an objective standard for testing the legality of pretextual searches and seizures under the Fourth Amendment. Due to the greater protection of privacy under the Alaska Constitution, it is possible that a stricter standard would prevail in Alaska. However, Alaska courts have yet to address whether and under what circumstances such searches are valid under the state constitution. In recent cases involving pretextual searches and seizures the Alaska courts have avoided the state constitutional question entirely and have even applied the wrong standard under the Fourth Amendment. This Note highlights the need for the courts to resolve definitively whether the Alaska Constitution imposes a stricter standard beyond that set by the Fourth Amendment; author argues that it ultimately does not.

I. INTRODUCTION

"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."[1] *– William Pitt*

Freedom from government intrusion lies at the very foundation of Western law and culture, and is one of our nation's most cherished freedoms. As the Alaska Supreme Court has stated, "[c]ertainly the . . . guarantee against unreasonable searches and seizures is at the very core of the protections needed to preserve democracy against the excesses of government."[2]

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1. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49–50 (1937).

2. McCoy v. State, 491 P.2d 127, 138 (Alaska 1971).

To deter unreasonable searches and seizures, evidence collected by illegal means is generally inadmissible at trial.[3] However, there is a good-faith exception to this rule: evidence collected in an illegal search and seizure may nevertheless be admissible if the officer reasonably believed, in good faith, that the search was legal.[4] This good-faith exception raises the issue of whether a bad faith exclusionary principle may also exist. That is, whether evidence obtained in an otherwise valid search can be suppressed when an officer acted in bad faith. So-called pretextual searches and seizures, or pretexts, fall into this category.[5]

Pretexts occur when the police use a legal justification to make a stop and conduct a search for an unrelated crime for which they do not have the probable cause or the reasonable suspicion necessary to support a stop.[6] A common example, and the kind most frequently litigated, is a vehicle stop for a minor traffic violation when an officer subjectively desires to investigate another, non-traffic-related crime.[7] Because pervasive regulations tend to preclude total compliance with traffic and safety laws, allowing pretexts would seem to subject drivers to "unfettered police discretion."[8] Such discretion would permit traffic stops based on arbitrary or discriminatory characteristics.[9] The New York Court of Appeals indicated the reality of this situation: "We are not unmindful of studies . . . which show that certain racial and ethnic groups are disproportionately stopped by police officers, and that those stops do not end in the discovery of a higher proportion of contraband than in the cars of other groups."[10]

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3. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 391–93 (1914).

4. United States v. Leon, 468 U.S. 897, 922 (1983); *see also* Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984) (extending the *Leon* rule); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3 (4th ed. 2004) (providing an extended analysis on the *Leon* good-faith exception).

5. LAFAVE, *supra* note 4, § 1.4.

6. Many courts and commentators have defined the meaning of "pretext." The definition used here is a synthesis of some of the more common definitions. *See* United States v. Cannon, 29 F.3d 472, 474 (9th Cir. 1994) (citing United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988)); People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001); Jeffery M. Kaban, Note, *Alaska, the Last Frontier of Privacy: Using the State Constitution to Eliminate Pretextual Traffic Stops*, 55 HASTINGS L.J. 1309, 1309 (2004); BLACK'S LAW DICTIONARY 117 (8th ed. 2004) (pretextual arrest).

7. *See* Kaban, *supra* note 6, at 1309.

8. *Cannon*, 29 F.3d at 475 (quoting *Guzman*, 864 F.2d at 1516).

9. *Id.*

10. *Robinson*, 767 N.E.2d at 644.

In *Whren v. United States*,[11] the Supreme Court determined that pretexts are legal under the Fourth Amendment of the U.S. Constitution.[12] The issue has never been addressed under the Alaska Constitution. Since *Whren*, six cases in the Alaska Court of Appeals have questioned the legality of pretexts under article I, section 14 of the Alaska Constitution. In both *Hamilton v. State*[13] and *Way v. State*,[14] the court of appeals avoided the issue by narrowly defining pretexts. In *Nease v. State*,[15] the court declined to address the pretext question under the state constitution.[16] Indeed, the *Nease* court implicitly applied an obsolete standard—the reasonable officer standard—to pretexts under the Fourth Amendment, relying on a treatise published *before* the *Whren* opinion.[17] Finally, *Olson v. State*,[18] *Grohs v. State*,[19] and *Marley v. State*[20] all served to reaffirm the law established in *Nease*.

This Note argues that the Alaska Court of Appeals erred in avoiding the pretext question under the Alaska Constitution and implicitly and erroneously adopted the reasonable officer standard. Further, a thorough analysis of pretexts under the Alaska Constitution demonstrates that Alaska should adopt an objective standard. Part II of this Note will discuss the adoption of, and the rationale behind, the three approaches to pretexts: the objective standard, the reasonable officer standard, and the subjective standard. To accomplish this task, this section will provide a general overview of the Fourth Amendment jurisprudence and the adoption in federal courts of the objective standard and the reasonable officer standard. Finally, this section will discuss the illegality of pretexts under the State of Washington's constitution and that state's adoption of the subjective standard. Part III will discuss pretextual search-and-seizure case law in Alaska. First, a general overview of Alaska's search-and-seizure law will provide the framework within which pretexts can be discussed. This overview will illustrate that the Alaska Constitution provides broader privacy protection than the Federal Constitution. Next, the section will discuss relevant case law related to pretexts as well

11. 517 U.S. 806 (1996).
12. *Id.* at 820.
13. 59 P.3d 760, 766 (Alaska Ct. App. 2002).
14. 100 P.3d 902, 904 (Alaska Ct. App. 2004).
15. 105 P.3d 1145 (Alaska Ct. App. 2005).
16. *Id.* at 1148.
17. *Id.* at 1148–50.
18. No. A-8595, 2005 Alas. App. LEXIS 69 (Alaska Ct. App. July 20, 2005).
19. 118 P.3d 1080 (Alaska Ct. App. 2005).
20. No. A-9285, 2006 Alas. App. LEXIS 80 (Alaska Ct. App. May 3, 2006).

as the recent six cases that raised the pretext question under the Alaska Constitution. Finally, Part IV will illustrate that the court of appeals reached erroneous conclusions in *Hamilton*, *Way*, and *Nease*. Furthermore, the discussion will reveal that regardless of greater privacy protections of the Alaska Constitution, the relevant Alaska case law supports the adoption of the objective standard.

II. FOURTH AMENDMENT AND THE PRETEXT STANDARDS

A. Overview of Fourth Amendment Search-and-Seizure Law

The Fourth Amendment is the Constitution's guarantor of personal security. It 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.[21]

The Supreme Court has stated that "the Fourth Amendment protects people, not places."[22] An individual shall be free from unreasonable governmental intrusion wherever he may harbor a reasonable "expectation of privacy."[23] A "seizure" under the Fourth Amendment occurs whenever an officer accosts an individual and restrains his freedom to leave.[24] Therefore, a traffic stop, even for a brief period of time, constitutes a "seizure."[25]

Warrantless searches and seizures are "per se unreasonable" unless they fall under one of the narrowly recognized exceptions to the warrant requirement.[26] Under these exceptions, there are three categories of permissible warrantless automobile stops: (1) a search

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21. U.S. CONST. amend. IV.

22. Katz v. United States, 389 U.S. 347, 351 (1967).

23. Terry v. Ohio, 392 U.S. 1, 9 (1968) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

24. *Id*. at 16.

25. Whren v. United States, 517 U.S. 806, 809–10 (1996); Delaware v. Prouse, 440 U.S. 648, 653 (1979).

26. *Katz*, 389 U.S. at 357. The exceptions are: (1) searches of abandoned property; (2) searches in hot pursuit of a fleeing felon; (3) searches, with probable cause, to avoid destruction of a known seizable item; (4) searches, with probable cause, of a movable vehicle; (5) inventory searches; (6) searches pursuant to voluntary consent; (7) searches in the rendition of "emergency aid"; (8) *Terry* 'reasonable suspicion' investigatory stops; and (9) searches incident to an arrest. Schraff v. State, 544 P.2d 834, 840–41 (Alaska 1975).

of a motor vehicle based on probable cause;[27] (2) an inventory search;[28] and (3) a *Terry* "reasonable suspicion" investigatory stop.[29]

Because the expectation of privacy regarding one's automobile is significantly less than that relating to one's home or place of business, a less rigorous application of the Fourth Amendment governs.[30] As a result, warrantless searches and seizures of automobiles have been upheld in circumstances where they would be illegal in a home or office.[31] However, unfettered governmental intrusion into an automobile is impermissible.[32] To protect against arbitrary stops, the Supreme Court requires that the reasonableness of a warrantless automobile stop be evaluated under an objective standard.[33] Thus, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[34]

Warrantless automobile stops without probable cause are unconstitutional[35] unless they are routine inventory searches or *Terry* investigatory stops. In *South Dakota v. Opperman*,[36] a vehicle illegally parked was towed to an impound lot.[37] At the lot, the officers conducted a routine inventory of the contents within the car and found marijuana in the glove compartment.[38] When the owner came by to reclaim his car, he was arrested for possession of illegal narcotics.[39] Because of the less rigorous application of the Fourth Amendment to automobiles, the Court found that a routine inventory search to ensure safekeeping of the belongings within the car was reasonable.[40] The Court held that since the inventory search of impounded vehicles was standard practice, the search was not a "pretext concealing an investigatory police motive."[41]

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27. *See Prouse*, 440 U.S. at 654, 662–63.
28. South Dakota v. Opperman, 428 U.S. 364, 370–74 (1976).
29. Adams v. Williams, 407 U.S. 143, 148 (1972).
30. *Opperman*, 428 U.S. at 367.
31. *Id*.
32. *Prouse*, 440 U.S. at 663.
33. *Id.* at 654.
34. Whren v. United States, 517 U.S. 806, 810 (1996) (internal citations omitted).
35. *See Prouse*, 440 U.S. at 662–63.
36. 428 U.S. 364 (1976).
37. *Id.* at 365–66.
38. *Id.* at 366.
39. *Id.*
40. *Id.* at 368, 375.
41. *Id.* at 376.

The final category of permissible automobile stops is the *Terry* "reasonable suspicion" investigatory stop. In *Terry v. Ohio*,[42] the Supreme Court upheld an officer's investigatory search and seizure of an individual based on his "reasonable suspicion" that criminal conduct was likely to occur.[43] Two men had caught the eye of the officer as they took turns walking down a street and peering into a store window roughly a dozen times.[44] Suspecting the two were planning to rob the store, the officer stopped and questioned them.[45] When asked their names the individuals "mumbled something," at which point the officer decided to frisk them.[46] The frisk revealed that the two individuals were carrying guns, and they were subsequently arrested for carrying concealed weapons.[47]

The defendants challenged the admissibility of the evidence under the Fourth Amendment because the officer lacked probable cause for the warrantless search and seizure.[48] To determine whether the officer's intrusion was reasonable under the Fourth Amendment, the Court applied an objective standard: "[W]ould 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?"[49] An officer's subjective good faith or "inarticulate hunches" were insufficient for an investigatory stop:[50] "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[51] Thus, investigatory stops based on reasonable suspicion and not on probable cause are permissible.[52] In *Adams v. Williams*,[53] the *Terry* investigatory stop doctrine was extended to automobile stops.[54]

42. 392 U.S. 1 (1968).
43. *Id.* at 30.
44. *Id.* at 6.
45. *Id.* at 6–7.
46. *Id.* at 7.
47. *Id.*
48. *Id.* at 7–8.
49. *Id.* at 21–22 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).
50. *See id.* at 22.
51. *Id.* at 21.
52. *Id.* at 22.
53. 407 U.S. 143 (1972).
54. *Id.* at 148.

B. The Federal Pre-*Whren* Standard

The only relevant Supreme Court case to mention pretexts before *Whren* was *Abel v. United States*.[55] There, the FBI was interested in connecting Abel with espionage.[56] Lacking sufficient evidence for such an arrest or search, the FBI notified the Immigration and Naturalization Service (INS) that Abel was an alien residing illegally in the United States.[57] INS officers served the defendant with a warrant for his arrest.[58] After the arrest, INS officers conducted a limited search of the premises.[59] The FBI conducted a more thorough search later in the day, during which critical evidence of espionage was discovered.[60] The defendant challenged the evidence gathered regarding espionage, claiming that the government used an administrative warrant as a pretext to search for evidence of espionage.[61]

The Court acknowledged that it would not permit pretextual searches: "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers."[62] The Court further stated that "[t]he test [for a pretext] is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime."[63] Because the INS officials acted in good faith in the deportation arrest, the Court did not find a pretext.[64] Furthermore, the proper communications, coordination, and procedures occurred between the FBI and the INS.[65] Hence, *Abel* stood for the proposition that searches by law enforcement officers following standard procedures should not be considered pretexts.[66]

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55. 362 U.S. 217 (1960). Although the Supreme Court first mentioned pretexts in *United States v. Lefkowitz,* 285 U.S. 452 (1932), that case is no longer relevant since *Chimel v. California*, 395 U.S. 752 (1969) held that full warrantless searches of an arrestee's premises are no longer permissible. *See* LAFAVE, *supra* note 4, § 1.4(e).

56. *Abel*, 362 U.S. at 221.

57. *Id.*

58. *Id.* at 223.

59. *Id.* at 223–24.

60. *Id.* at 224–25.

61. *Id.* at 225.

62. *Id.* at 226.

63. *Id.* at 230.

64. *Id.* at 228.

65. *Id.* at 229.

66. Whren v. United States, 517 U.S. 806, 815–16 (1996); *see also* LAFAVE, *supra* note 4, § 1.4(e).

Abel left little guidance to the lower courts.[67] As a result, lower courts looked to four other Fourth Amendment cases that addressed the subjective intent of law enforcement agents:[68] *Terry v. Ohio*[69] (discussed above), *United States v. Robinson*,[70] *Scott v. United States*,[71] and *United States v. Villamonte-Marquez*.[72]

In *Robinson*, an officer knew that the defendant was driving without a license because the defendant was the subject of a previous investigation that took place four days earlier.[73] The officer stopped and arrested the defendant.[74] A search incident to the arrest revealed the defendant's possession of heroin.[75] Discussing the defendant's challenge to the stop, the Court stated in dicta that the officer's subjective motive was not relevant because the arrest was lawful and the search was not a departure of established police practice.[76]

Federal wiretapping laws require that federal agents minimize the interception of communications.[77] In *Scott*, the defendant challenged the legality of a search because the government officials failed to make any effort to comply with the minimization requirements.[78] The Court claimed that Fourth Amendment analysis first undertakes "an objective assessment of an officer's actions in light of the facts and circumstances then known to him."[79] In this case, the government agents' actions were reasonable because they could not discriminate which phone calls to monitor until hearing the calls.[80]

Finally, in *Villamonte-Marquez*, a congressional statute with historical roots to the First Congress was challenged for violating the reasonableness requirement of the Fourth Amendment.[81] The statute permits customs officials to board any vessel in the United

67. *See* Kaban, *supra* note 6, at 1311.

68. *See Whren*, 517 U.S. at 812–13; United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986); *see also* Kaban, *supra* note 6, at 1312.

69. 392 U.S. 1 (1968).

70. 414 U.S. 218 (1973).

71. 436 U.S. 128 (1978).

72. 462 U.S. 579 (1983).

73. 414 U.S. at 220.

74. *Id.* at 220–21.

75. *Id.* at 223.

76. *Id.* at 221 n.1.

77. Scott v. United States, 436 U.S. 128, 130 (1978).

78. *Id.* at 131–33.

79. *Id.* at 137.

80. *Id.* at 140.

81. United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983).

States at any time, without any suspicion of wrongdoing, for inspection of documents.[82] Officers boarded a sailboat to inspect its documentation and soon smelled burning marijuana.[83] A later search revealed 5800 pounds of marijuana.[84] In response to the defendants' challenge of the search and seizure, the Court stated in dicta that ulterior motives, like being tipped regarding narcotics trafficking, did not deprive agents of their legal justification of boarding the vessel for document inspection.[85]

Based on these cases, ten circuits adopted an objective standard: if an officer *could* have legally made the stop, then it was not pretextual.[86] The Ninth and Eleventh Circuits adopted a reasonable officer standard: whether a reasonable officer following normal police practice would have made the seizure in the absence of illegitimate motivation.[87] The Tenth Circuit had also adopted the reasonable officer standard but later overruled it because "its application has been inconsistent and sporadic."[88] The court recognized that the reasonable officer standard deprived state legislators of "the task of determining what the traffic laws ought to be and how those laws ought to be enforced."[89] Holding the reasonable officer standard "unworkable," the Tenth Circuit adopted the objective test.[90]

C. The Objective Standard: *Whren v. United States*

Two police officers in Washington, D.C., were patrolling a "high drug area" when they spotted a suspicious vehicle that they believed was carrying drugs.[91] Although the officers lacked probable cause regarding narcotics transportation, they observed the truck turn without signaling and speed off.[92] When the car stopped at a light, one of the officers approached it and

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82. *Id.* at 580.
83. *Id.* at 583.
84. *Id.*
85. *Id.* at 584 n.3; *see also* Whren v. United States, 517 U.S. 806, 812 (1996).
86. Kaban, *supra* note 6, at 1312.
87. United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986); United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994). The Eleventh Circuit did not answer whether the reasonable officer standard would apply to probable-cause traffic stops or only to investigatory stops. *Smith*, 799 F.2d at 708–09.
88. United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995).
89. *Id.* at 788.
90. *Id.* at 787.
91. Whren v. United States, 517 U.S. 806, 808 (1996).
92. *Id.*

immediately spotted narcotics in the car.[93] He arrested the two occupants.[94] The defendants challenged the admissibility of the evidence because the officers had neither probable cause nor reasonable suspicion of illegal drug-dealing activity to make the stop.[95]

Justice Scalia, writing for the unanimous court, claimed that "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."[96] Subjective motivations do not factor into the probable cause Fourth Amendment reasonableness analysis.[97] Thus, pretextual searches and seizures are valid where there is probable cause to make the initial stop.[98] The Court recognized the concern that pretexts may generate selective law enforcement but claimed that selective law enforcement is illegal under the Equal Protection Clause and not the Fourth Amendment.[99]

In *Whren*, the Court finally addressed the issue of pretextual searches and seizures for probable-cause automobile stops. However, the Court has yet to address the pretext issue as it relates to investigatory stops.[100]

D. The Subjective Standard: *State v. Ladson*[101]

Most states incorporate some sort of search-and-seizure protection within their state constitutions.[102] In many cases these provisions are similar, if not identical, to the Fourth Amendment.[103] In a few cases, the language is different.[104] Although states can interpret provisions in their constitutions more broadly than similar

93. *Id.* at 809–10.
94. *Id.* at 809.
95. *Id.*
96. *Id.* at 812.
97. *Id.* at 813.
98. *Id.*
99. *Id.*
100. *See* LAFAVE, *supra* note 4, § 1.4(f).
101. 979 P.2d 833 (Wash. 1999).
102. *See, e.g.*, FLA. CONST. art. I, § 12; NEV. CONST. art. I, § 18; N.H. CONST. art. I, § 19; N.Y. CONST. art. I, § 12; N.C. CONST. art. I, § 20; R.I. CONST. art. I, § 6; WASH. CONST. art. I, § 7; W. VA. CONST. art. III, § 6.
103. *See, e.g.*, N.Y. CONST. art. I, § 12; W. VA. CONST. art. III, § 6; FLA. CONST. art. I, § 12.
104. *See, e.g.*, WASH. CONST. art. I, § 7; N.C. CONST. art. I, § 20.

provisions under the Federal Constitution,[105] almost all the states have adopted the *Whren* objective standard for pretexts.[106] The State of Washington is a notable exception.[107]

The Washington Supreme Court adopted the subjective intent standard in *State v. Ladson*.[108] In *Ladson*, two police officers tailed Richard Fogle's car because Fogle was rumored to be involved in drug dealing.[109] The officers stopped Fogle for recently expired license plate tags and later found that his driver's license was suspended.[110] After arresting Fogle, the officers turned their attention to Thomas Ladson, the passenger.[111] The police searched Ladson and his jacket, which was left inside the car, and they discovered a concealed weapon.[112] The police arrested the defendant and conducted a more thorough search, which revealed marijuana.[113] The defendant challenged the legality of the search and seizure because the stop was pretextual, a characterization the police did not deny at trial.[114]

The search-and-seizure provision in the Washington Constitution places a greater emphasis on privacy than does the U.S. Constitution.[115] The *Ladson* court held that all searches require a warrant unless they fall within a narrow category of exceptions.[116] The court explained that "the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation."[117] The court held that the actual reason for the stop must function as something more than a mere formal justification for the search.[118] Therefore, a

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105. *See, e.g.*, Roberts v. State, 458 P.2d 340, 342 (Alaska 1969); State v. Gunwall, 720 P.2d 808 (Wash. 1986). *But see* Holland v. State, 696 So. 2d 757, 759 (Fla. 1997) (holding that a conformity clause within the Florida Constitution requires that search-and-seizure laws be identical to U.S. Supreme Court holdings).

106. *See* People v. Robinson, 767 N.E.2d 638 (N.Y. 2001) (providing a thorough review of pretexts in the fifty states).

107. *See id.* at 642 n.1.

108. State v. Ladson, 979 P.2d 833, 842–43 (Wash. 1999).

109. *Id.* at 836.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 837.

116. *Id.* at 838.

117. *Id.* at 837–38.

118. *See id.* at 838–39.

search or seizure may not expand beyond the rationale for the exception,[119] and thus pretextual searches and seizures violate the Washington Constitution.[120]

III. SEARCH-AND-SEIZURE IN ALASKA

A. General Search-and-Seizure Laws

The Alaska Constitution provides protection from unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[121]

In *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*,[122] the Supreme Court of Alaska held that protection under this state constitutional provision "is stronger than the federal protection because article I, section 14 [of the Alaska Constitution] is textually broader than the Fourth Amendment and the clause draws added strength from Alaska's express guarantee of privacy."[123] This broader protection encompases protections provided under the Privacy Provision of article I, section 22.[124] The *Anchorage Police* court held that constitutional concerns regarding unwarranted intrusion should be addressed by solely focusing on section 14's search-and-seizure protections and stated that "in cases involving allegedly invalid searches, we have recognized that the standard for determining compliance with Alaska's search-and-seizure clause is 'inexorably entwined' with the standard of privacy established in article I, section 22."[125] Nonetheless, the greater privacy protection under article I, section 14 has been used to challenge legal principles held valid under the Fourth Amendment. For example, Alaska affords

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119. *Id.* at 842.

120. *Id.* at 836.

121. ALASKA CONST. art. I, § 14.

122. 24 P.3d 547 (Alaska 2001) (citations omitted).

123. *Id.* at 550. The only textual difference between the Fourth Amendment and article I, section 14 of the Alaska Constitution is the phrase "and other property." *See id.*

124. ALASKA CONST. art. I, § 22.

125. *Anchorage Police Dep't Employees Ass'n*, 24 P.3d at 550–51.

greater search-and-seizure protection for automobiles under its state constitution.[126]

Alaska also recognizes the federal exceptions to the warrant requirement[127] but places greater restrictions on the warrant exceptions. Hence, Alaska recognizes, with significant restrictions, the three categories of warrantless automobile stops: (1) a search of a motor vehicle based on probable cause; (2) an investigatory stop; and (3) an inventory search.

A warrantless search or seizure is lawful where the police have "probable cause to believe that a felony has been committed and probable cause to believe that the person committed it."[128] Alaska courts have explained that "[p]robable cause exists where 'the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[129]

Investigatory stops of automobiles based on suspicious circumstances are also permissible.[130] The principal justification for such stops is that police officers have a duty to make prompt investigations of practical necessity.[131] However, since these stops lack probable cause, they are only permissible within a narrow range of circumstances: (1) where the police officer has reasonable suspicion that imminent public danger exists;[132] (2) where serious harm to person or property has recently occurred;[133] or (3) where an officer stops a potential witness near the scene of a recently reported serious crime.[134] In addition, an officer must point to specific and articulable facts that, taken together with rational inferences, reasonably warrant the investigatory stop.[135]

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126. *See* State v. Daniel, 589 P.2d 408, 416 (Alaska 1979). *Contra* South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

127. *See* Schraff v. State, 544 P.3d 834, 840–41, 844–45 (Alaska 1975) (holding that an officer's search of a suspect's car and wallet was not one of nine recognized exceptions to the warrant requirement).

128. McCoy v. State, 491 P.2d 127, 129 (Alaska 1971).

129. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 175–176 (1949) (alteration and parenthesis in original).

130. Coleman v. State, 553 P.2d 40, 46–47 (Alaska 1976)

131. Goss v. State, 390 P.2d 220, 224 (Alaska 1964); Metzker v. State, 797 P.2d 1219, 1221 (Alaska Ct. App. 1990).

132. *Coleman*, 553 P.2d at 46; *Metzker*, 797 P.2d at 1220.

133. *Coleman*, 553 P.2d at 46; *Metzker*, 797 P.2d at 1220.

134. *Metzker*, 797 P.2d at 1221; Beauvois v. State, 837 P.2d 1118, 1121 (Alaska Ct. App. 1992).

135. *Coleman*, 553 P.2d at 45 (adopting the test in *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)).

Finally, inventory searches are permissible, but Alaska law substantially restricts these searches and seizures.[136] The only case to address inventory searches of automobiles was *State v. Daniel*.[137] In *Daniel*, an officer conducted an inventory of an impounded car and opened a briefcase that was left in the backseat.[138] Inside the briefcase, the officer found marijuana and an automatic pistol and charged the defendant accordingly.[139] The court held that purely routine, non-investigatory inventory searches for the purpose of protecting property located within an impounded vehicle are permissible; however opening closed, sealed, or locked containers during such a search violates the protections of the Alaska Constitution.[140]

The Alaska courts have been equally restrictive in the context of other inventory searches. In *Zehrung v. State*,[141] an inventory search during a booking revealed that the defendant carried in his wallet two stolen credits cards belonging to rape victims.[142] Since the defendant had already posted bail and was not going to be incarcerated, the court held that the jailhouse inventory search was, absent probable cause, an unreasonable governmental intrusion into the defendant's personal freedom.[143] In *Reeves v. State*,[144] police performing a routine booking inventory search at a state jail annex discovered a balloon containing an unknown substance.[145] The officers unwrapped the balloon, and one of the officers took its contents to a police station where field testing revealed the presence of heroin.[146] The court found that, even after an individual's arrest, privacy interests extend even to items within closed or sealed containers, which cannot be opened for inventory searches without a warrant, consent, or prior probable cause.[147]

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136. *See* Reeves v. State, 599 P.2d 727, 737 (Alaska 1979) (holding that a pre-incarceration inventory search "should be no more intensive than reasonably necessary . . . .").

137. 589 P.2d 408 (Alaska 1979).

138. *Id.* at 410.

139. *Id.*

140. *Id.* at 417–18.

141. 569 P.2d 189 (Alaska 1977).

142. *Id.* at 191–92.

143. *Id.* at 193.

144. 599 P.2d 727 (Alaska 1979).

145. *Id.* at 730.

146. *Id.*

147. *Id*. at 737–38.

B. Relevant Pretext Case Law

Before *Whren*, the Alaska Supreme Court addressed pretexts only in the context of the Fourth Amendment. The first pretextual search-and-seizure case was *McCoy v. State*.[148] In *McCoy*, a ticket on Western Airlines had been purchased with a stolen credit card.[149] The defendant presented this ticket to the airlines at the Anchorage airport and was arrested.[150] At the police station, the police searched the defendant without a warrant, and the search discovered a package of cocaine.[151] The defendant moved to suppress the narcotics evidence on the ground that the seach and seizure was unlawful.[152] In its Fourth Amendment analysis, the court stated that, although an arrest cannot serve as a mere pretext for a search, a warrant is not required for a search wholly incident to a vaild arrest.[153] The court went on to hold that the Alaska Constitution did not require broader search-and-seizure protection than the Fourth Amendment already required.[154] The court stated that "[w]here there is probable cause to arrest for a particular crime of a type which can be evidenced by items concealed on the person there is little danger of a pretext arrest."[155] Further, the court relied on policy in determining that "to require a warrant in the circumstances of this case would be a futile gesture which could hamstring legitimate police action without offering meaningful protection to the arrestee."[156]

Justice Rabinowitz strongly dissented from the majority opinion, arguing for greater protection under the Alaska Constitution.[157] He contended that warrantless searches are limited by the reason for the exception: "I read Alaska's Constitution as requiring that the intensity of all warrantless searches of the person be limited by the necessity, or exigency, which provides the basis for the exception."[158] Thus searches should not be permissible when the "rationale for the warrantless intrusion no longer exists."[159] He encouraged his colleagues to establish "a rule that the

148. 491 P.2d 127 (Alaska 1971).
149. *Id.* at 128.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id*. at 138.
154. *Id*. at 139.
155. *Id*.
156. *Id.* at 138.
157. *Id.* at 142–43 (Rabinowitz, J., dissenting).
158. *Id.* at 142.
159. *Id.*

intensity of a warrantless search should be limited to the purpose which justifies its exception."[160] However, the court refused to adopt Justice Rabinowitz's position.[161]

Four years later, in *Schraff v. State*,[162] the Alaska Supreme Court again warned against pretextual searches under the Fourth Amendment.[163] Yet, the court refused to accept Justice Rabinowitz's legal opinion that the warrant exceptions' rationale "provide[s] the theoretical and practical justification for departure from the constitutional requirement [of a warrant] . . . [and therefore] these same justifications provide relevant criteria for delineation of the permissible degree of intensity of a warrantless search of the person incident to a lawful arrest."[164]

In two cases in 1978, the Alaska Supreme Court rejected arguments that searches were impermissible pretexts where the facts supported a valid basis for the search.[165] In one of those cases, *Brown v. State*, an officer responding to an armed robbery witnessed a speeding vehicle traveling in the opposite direction.[166] The vehicle failed to signal when making a left turn and did not stop at a stop sign.[167] The officer stopped the vehicle for traffic violations, and the defendant, who matched the suspect's description, bolted from his car and was apprehended by the officer.[168] The defendant moved to suppress the evidence found within his car because he claimed the traffic stop was a pretext, although the facts never mentioned anything regarding the officer's subjective intent.[169] Nevertheless, the court found that "there was substantial evidence to support the trial court's determination that Brown's vehicle was stopped for a violation of traffic regulations, and that this was not a pretext stop."[170]

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160. *Id.* at 143.

161. *Id*. at 133, 139 (majority opinion expressing disagreement with their dissenting justices and refusing to apply a broader protection under the Alaska Constitution).

162. 544 P.2d 834 (Alaska 1975).

163. *See id*. at 842.

164. *Id*. at 849 (Rabinowitz, J., dissenting).

165. Clark v. State, 574 P.2d 1261, 1265 (Alaska 1978); Brown v. State, 580 P.2d 1174, 1176 (Alaska 1978) (per curiam).

166. *Brown*, 580 P.2d at 1175.

167. *Id*.

168. *Id*.

169. *Id*. at 1176.

170. *Id*.

The Alaska Court of Appeals addressed the pretext issue in *Townsel v. State*.[171] In *Townsel*, an officer responding to an armed robbery witnessed a vehicle traveling in the opposite direction and in violation of numerous traffic regulations: the driver was speeding and the vehicle had a broken headlight, a broken taillight, an obscured driver's window, and an obscured license plate.[172] The officer stopped the car and asked the defendant to exit the vehicle.[173] When the defendant reached for his rifle in the backseat, the officer drew his own weapon, and the defendant fled on foot.[174] Since the officer was unable to catch the defendant, the police searched the contents of the car, found a driver's license, obtained a search warrant for the defendant's residence, and arrested the defendant.[175] At trial, the defendant claimed that the stop was an invalid pretextual stop.[176] The court found that because the officer indicated that he would have made the traffic stop regardless of his investigation of the robbery, the stop was not a pretext.[177]

The last case before *Whren* to address the subjective intent of a police officer was *Beauvois v. State*.[178] In *Beauvois*, the defendant robbed a 7-Eleven and fled on foot towards a campground.[179] Once there, the defendant entered his friend's car, and they started driving out of the campground.[180] Because there was only one road out and it was 3:00 a.m., an officer responding to the robbery, believing that anyone awake in the area could reasonably be a potential witness, decided to stop all moving vehicles he encountered.[181] After the officer stopped the car carrying the defendant, one of the passengers jumped out.[182] The officer soon learned that the car was stolen and detained the driver.[183] Finally, the officer noticed someone hiding under a blanket in the backseat.[184] He removed the blanket and discovered the defendant,

171. 763 P.2d 1353 (Alaska Ct. App. 1988).
172. *Id.* at 1354.
173. *Id.* at 1355.
174. *Id.*
175. *Id.*
176. *Id.* at 1354.
177. *Id.* at 1355.
178. 837 P.2d 1118 (Alaska Ct. App. 1992).
179. *Id*. at 1119–20.
180. *Id*. at 1120.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*.

who matched the robber's description.[185] The 7-Eleven clerk arrived at the scene and identified the defendant as the robber.[186] Charged with robbery, the defendant argued at trial that the stop was an illegal seizure, but he did not specifically argue that it was an illegal pretext.[187]

The court found that the stop was a legal investigatory stop since officers are permitted to reasonably stop potential witnesses near the scene of a recently reported crime.[188] In dicta, the court stated that "[the officer's] subjective intent when he stopped the car is irrelevant. The test is whether, under the facts known to the police officer, the stop of the car was objectively justified. . . . 'This test . . . is *purely objective* and thus there is no requirement that an actual suspicion by the officer be shown.'"[189] However, this holding does not demonstrate adoption of the objective test for *pretexts*, but rather only for *Terry* investigatory stops.[190] The latter objective test was meant to protect individuals from detention based solely on an officer's "inarticulate hunches,"[191] thereby precluding the good-faith exception rule for investigatory stops. Thus, in *Beauvois*, the court was neither addressing the pretext issue nor establishing the irrelevance of an officer's "bad faith" subjective intent for an investigatory stop.

C. Six Recent Cases: *Hamilton*, *Way*, *Nease*, and Others

Since *Whren* was decided, six cases have addressed the constitutionality of pretextual searches and seizures under the Alaska Constitution. However, in all six cases, the Alaska Court of Appeals has avoided addressing the pretext issue under the state constitution. In addition, in *Hamilton v. State* and *Way v. State* the court applied the *Whren* objective standard.[192] A year later, however, in *Nease v. State,* the court applied the reasonable officer standard.[193] Although the reasonable officer standard seems to have prevailed, the court still has failed to conduct a thorough analysis of the pretext issue under the Alaska Constitution.

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185. *Id*.

186. *Id*.

187. *Id*.

188. *Id*. at 1121.

189. *Id*., n.1 (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(a) (2d ed. 1987)) (emphasis in original).

190. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

191. *See id*.

192. Hamilton v. State, 59 P.3d 760, 764–65 (Alaska Ct. App. 2002); Way v. State, 100 P.3d 902, 904 (Alaska Ct. App. 2004).

193. Nease v. State, 105 P.3d 1145, 1149 (Alaska Ct. App. 2005).

In *Hamilton*, the defendant entered a victim's home in the middle of the night and stabbed him twenty-eight times.[194] An officer arriving at the scene of the crime witnessed two cars traveling away.[195] Since it was approximately 2:30 a.m., the officer wanted to record the license plate number of one of the cars for later questioning to determine if the driver was a potential witness to the crime.[196] The officer radioed for a police car behind him to record the license plate number of the sedan.[197] However, the license plate was obscured by snow in violation of Alaska traffic law.[198] The officer stopped the car to talk to the driver.[199] Upon reaching the driver's window, the officer noticed that the driver's hands were covered in blood.[200] The officer then arrested him and a subsequent search of the car revealed evidence linking the defendant to the murder.[201] The defendant challenged the legality of the stop.[202]

In the first part of its analysis, the court found that the officer had probable cause to stop Hamilton because of his traffic violation.[203] The court then relied on *Beauvois* in its analysis of the legality of the stop, stating that an investigatory stop "hinges on an objective test . . . . The officers' subjective theories as to why the stop was proper are irrelevant."[204] The court expanded upon this rule by stating that "the legality of the traffic stop [not just an investigatory stop] is determined by an objective assessment of the facts known to the officers at the time they conducted the stop."[205] Finally, the court concluded that it did not need to accept or reject *Whren* as a matter of Alaska constitutional law because "the police were justified in stopping Hamilton's car as part of their investigation."[206] In the second part of the analysis, the court found that the stop was a permissible investigatory stop for the purpose of

194. *Hamilton*, 59 P.3d at 762–63.
195. *Id.* at 763.
196. *Id*.
197. *Id*.
198. *Id*. at 764.
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*. at 762.
203. *Id*. at 765.
204. *Id*.
205. *Id.*
206. *Id.* at 766.

questioning potential witnesses near the scene of a recently committed serious crime.[207]

In *Way v. State*, an informant had tipped officers that the defendant's van contained a methamphetamine lab.[208] Upon seeing a similar van drive by, an officer tried to see the van's license plate, but the plate was obscured.[209] The officer radioed for another trooper to stop the van for the license plate violation and to determine if the van belonged to Way.[210] Upon approaching the van, the police smelled iodine and saw a small bag of white powder.[211] After getting a search warrant, the officers searched the vehicle.[212] The defendant claimed that the stop was illegal because it was a pretext to determine whether the van had a methamphetamine lab.[213]

The court determined that it need not adopt either *Whren* or *Ladson* as a matter of Alaska constitutional law because the stop was not pretextual.[214] It held that the officers had probable cause to stop the vehicle for illegal license plates.[215] Furthermore, in defining the pretext standard, the court provided a very narrow example of a pretextual search, describing a scenario in which police follow a suspect and wait until the suspect commits a traffic violation.[216]

Recently, the court addressed pretextual stops in *Nease v. State*. In *Nease*, a police officer saw a red pickup truck speeding at seventy-five miles per hour in snowy conditions.[217] When the officer caught up to the truck, the truck was parked, and its owner, Nease, who could barely walk due to intoxication, claimed that he had not been driving.[218] The officer then warned Nease that the next time Nease drove drunk, the officer was going to catch him.[219]

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207. *Id.* at 767.
208. Way v. State, 100 P.3d 902, 903 (Alaska Ct. App. 2004).
209. *Id*.
210. *Id*.
211. *Id*.
212. *Id*.
213. *Id*.
214. *Id*. at 904.
215. *Id*. at 904–05.
216. *Id*. at 905 ("[T]he classic pretext search is one where the police follow a suspect based on the theory . . . that the suspect will certainly commit a traffic violation within a short period of time which will give the police the opportunity to stop the suspect for the traffic violation and then search the suspect and the vehicle.").
217. Nease v. State, 105 P.3d 1145, 1146 (Alaska Ct. App. 2005).
218. *Id*.
219. *Id*.

Some days later, the officer noticed the truck parked at a local bar.[220] An hour later, the officer noticed the truck again at a local restaurant.[221] When Nease pulled out of the parking lot, the officer followed, suspecting that Nease was driving while intoxicated.[222] The officer at first noticed no problems with Nease's driving, but when he noticed that one of Nease's brake lights did not work, he pulled Nease over.[223] The officer then determined that Nease was intoxicated and arrested him.[224] The defendant challenged the validity of the traffic stop, arguing that it was used as a pretext to determine if he had been driving while intoxicated.[225] The district court agreed.[226]

The Alaska Court of Appeals, however, held that the stop was legal.[227] It found that the officer had probable cause to stop Nease for violation of a minor traffic regulation.[228] The court further determined that it need not address if the *Whren* or *Ladson* standards applied under the Alaska Constitution because the stop did not fall within the pretext doctrine, as defined under the Fourth Amendment.[229] In reaching its conclusion, the court cited LaFave's *Search and Seizure*, stating that "the fact that a police officer may have an ulterior motive for enforcing the law is irrelevant for Fourth Amendment purposes—even under the doctrine of pretext searches—unless the defendant proves that this ulterior motive prompted the officer to depart from *reasonable police practices*."[230] Furthermore, "[e]ven if [the court] were to subscribe to the doctrine of 'pretext stops,' the question would be whether Nease proved that Officer Torok departed from reasonable police practice when he decided to stop Nease because of the non-functioning brake light."[231] The court concluded that the officer had probable cause for the stop and that the stop was not a departure from reasonable police practice; therefore, the stop was legal.[232]

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220. *Id*.
221. *Id*.
222. *Id*.
223. *Id*. at 1147.
224. *Id*.
225. *Id*.
226. *Id*.
227. *Id*. at 1150.
228. *Id*. at 1148.
229. *Id*.
230. *Id*. (emphasis added) (citation omitted).
231. *Id*. at 1149.
232. *Id*. at 1150.

Since *Nease*, the court of appeals has addressed three cases that raised pretext claims under the Alaska Constitution: *Olson v. State*,[233] *Grohs v. State*,[234] and *Marley v. State*.[235] Each of these cases only further supported and substantiated the *Nease* decision. The court ruled that to have a valid pretext claim under the Fourth Amendment, the defendants must show both that an ulterior motive existed and that departure from reasonable police practice was prompted by that motive.[236]

IV. DISCUSSION

A. The Alaska Court of Appeals' Failure to Address the Issue of Pretexts Under the Alaska Constitution

Before *Whren*, Alaska courts had inoccuously avoided addressing the pretext issue in both *Brown* and *Townsel* in that, in those cases, the evidence presented at trial was sufficient to establish that the officer did not act with improper motivation.[237] Thus, the courts' refusal to overturn the lower courts' findings was not erroneous.[238] Likewise, *Hamilton* provided a poor opportunity to address the pretext question because the officer had no improper motive[239]—the stop was a valid investigatory stop.[240] The subjective motivation of the officer was to make a stop for the purpose of questioning potential witnesses about a serious crime recently committed nearby.[241] Thus, the officer had no illegal motivation.

However, starting with *Way*, the court of appeals has erroneously avoided the pretext question under the Alaska Constitution. In *Way*, the court narrowly redefined pretexts to include only those cases where the police follow a suspect and wait until he commits a traffic violation.[242] No prior decisions have defined pretexts so narrowly. As defined earlier, a pretextual search or seizure occurs when the police use a legal justification to

233. No. A-8595, 2005 Alas. App. LEXIS 69 (Alaska Ct. App. July 20, 2005).

234. 118 P.3d 1080 (Alaska Ct. App. 2005).

235. No. A-9285, 2006 Alas. App. LEXIS 80 (Alaska Ct. App. May 3, 2006).

236. *Olson,* 2005 Alas. App. LEXIS 69, at *7–8; *Grohs*, 118 P.3d at 1082; *Marley,* 2006 Alas. App. LEXIS 80, at *11.

237. *See* Brown v. State, 580 P.2d 1174, 1176 (Alaska 1978); Townsel v. State, 763 P.2d 1353, 1355 (Alaska Ct. App. 1988).

238. *See Brown*, 580 P.2d at 1176; *Townsel*, 763 P.2d at 1355.

239. *See* Hamilton v. State, 59 P.3d 760, 766 (Alaska Ct. App. 2002).

240. *Id.* at 767.

241. *See id.* at 766.

242. *See* Way v. State, 100 P.3d 902, 905 (Alaska Ct. App. 2004).

make a stop in order to conduct a search for an unrelated crime for which they do not have the probable cause or the reasonable suspicion necessary to support a stop.[243] Rather than focusing on: (1) whether the officer had probable cause to stop Way for an investigation of a possible methamphetamine lab or (2) whether the officer's subjective intent was to search Way's van for a lab, the court redefined pretexts to avoid addressing the question.[244]

In *Nease*, the court of appeals committed an even greater error in finding that the case did not factually fall within the doctrine of pretextual stops.[245] The facts of the case fell squarely within the definition of pretexts that the court developed a year earlier in *Way*. Nonetheless, the court provided no justification for why the pretext definition in *Way* was not applicable. In addition, the court failed to provide adequate justification for its dismissal of the pretext question under state law.[246] The court claimed that the facts failed to fall within the pretext doctrine, as defined under federal law, and did not address the question under the Alaska Constitution.[247]

In conclusion, the Alaska Court of Appeals should no longer avoid the pretext issue under the state's constitution. The focus should be whether an officer had an ulterior motive for the stop. If an ulterior motive exists, the court should do a thorough analysis of the pretext doctrine under the Alaska Constitution.

B. The Implicit Adoption of the Reasonable Officer Standard by the Alaska Court of Appeals

The current Alaska law regarding pretexts is based on improper analyses. In *Beauvois*, the court, in dicta, misinterpreted *Terry* and stated that an objective standard prevails in investigatory stops.[248] In *Terry*, the Supreme Court adopted an objective test solely as a means to protect individuals from police harassment by requiring some objective rationale for the stop.[249] The Court indicated that an officer's subjective "good faith" alone would not warrant these intrusions, thereby excluding *Terry* stops from the good-faith exception to illegal searches and seizures.[250] In fact, the

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243. *See supra* note 6 and accompanying text.

244. *See Way*, 100 P.3d at 905.

245. Nease v. State, 105 P.3d 1145, 1148–49 (Alaska Ct. App. 2005).

246. *Id*. at 1148.

247. *Id.* at 1148–50.

248. Beauvois v. State, 837 P.2d 1118, 1121–22 n.1 (Alaska Ct. App. 1992); *see also supra* notes 188–91 and accompanying text.

249. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

250. *See id*.

U.S. Supreme Court has never addressed whether "bad faith" subjective motivation is permissible for investigatory stops.[251] Although the *Beauvois* court was neither addressing the issue of pretext nor establishing precedent, this misinterpretation has been relied upon in later cases.

For example, in *Hamilton* and *Way*, the Alaska Court of Appeals appears to have adopted the objectective standard by default and without applying the appropriate analysis under the Alaska Constiutiton. In *Hamilton*, the court of appeals directly relied on *Beauvois*.[252] The court held that *Beauvois* announced the position that the legality of an investigatory stop relies on an objective test and that the subjective intent of the officer plays no role.[253] The court then applied the objective test to probable-cause stops.[254] Although investigatory stops and probable-cause stops have been considered separate categories of warrantless exceptions, the *Hamilton* court conflated these constitutionally protected categories without providing any justification.[255] As such, the *Hamilton* court implicitly applied the *Whren* standard when it held that the officer's subjective intent plays no role in probable-cause traffic stops.[256] In *Way*, the court reconfirmed, implicitly, the adoption of the *Whren* standard.[257]

In *Nease*, the court of appeals erroneously adopted the reasonable officer standard through an improper analysis of federal law. Although the pretext issue was dismissed, the court investigated which standard would be appropriate had the pretext issue been addressed.[258] In determining which standard would prevail for pretextual stops, the court did not rely on either *Whren* or *Ladson*, but turned to LaFave's *Search and Seizure* treatise.[259] However, instead of using the 2004 version of that treatise, the court used the 1996 version, which was published before the *Whren* decision.[260] The court cited the sections of LaFave that refer to the

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251. LAFAVE, *supra* note 4, § 1.4(f).
252. Hamilton v. State, 59 P.3d 760, 765 (Alaska Ct. App. 2002).
253. *Id.*
254. *See id*.
255. *See id.*
256. *See id.*
257. *See* Way v. State, 100 P.3d 902, 904–05 (Alaska Ct. App. 2004).
258. *See* Nease v. State, 105 P.3d 1145, 1148–49 (Alaska Ct. App. 2005).
259. *Id*.
260. *See id.* at 1148 n.16; *compare* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e) (3d ed. 1996) (predating *Whren*), *with* LAFAVE, *supra* note 4, § 1.4(f) (reflecting the *Whren* standard.)

United States Supreme Court opinions of *Abel*, *Scott*, and other pre-*Whren* cases.[261] In fact, the *Nease* court relied on LaFave's discussion of *Abel* to determine that pretextual searches and seizures do not occur where there is no departure from reasonable police practice.[262] Since *Whren* has definitively addressed this issue and rejected the reasonable officer standard,[263] the focus on *Abel*'s potential application is misplaced. Nonetheless, like the Ninth, Tenth, and Eleventh Circuits have in the past, the court of appeals implicitly adopted the reasonable officer standard.[264] Unfortunately, *Olson*,[265] *Grohs*,[266] and *Marley*[267] served only to reconfirm the *Nease* decision.

In conclusion, the current applicable law on the pretext doctrine in Alaska has been developed by improper legal analysis. In the post-*Whren* era, the court indirectly adopted the objective standard, but, during the last two years, it has established a reasonable officer standard. The courts should discard this improper standard and finally address the pretext doctrine with a thorough and proper analysis under the Alaska Constitution.

C. Pretext Analysis Under the Alaska Constitution

Alaska courts have investigated the pretext question under the Fourth Amendment but have not determined whether Alaska's *state constitution* requires a different standard.[268] Because this issue has been raised and is of great significance, the Alaska courts should determine the validity of pretexts under article I, section 14 of the Alaska Constitution.

When the Alaska courts do address this issue, they should conduct their own thorough analysis under the Alaska Constitution and not simply adopt the federal standard as there are significant differences between Alaska's search-and-seizure laws and those of the federal government. First, article I, section 14 provides broader

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261. *See Nease*, 105 P.3d at 1148–49; LAFAVE, *supra* note 260, § 1.4(e).

262. *Nease*, 105 P.3d at 1148–49; *see also* LAFAVE, *supra* note 260, § 1.4(e).

263. *See* Whren v. United States, 517 U.S. 806, 814 (1996).

264. *See Nease*, 105 P.3d at 1149.

265. *See* Olson v. State, No. A-8595, 2005 Alas. App. LEXIS 69, at *7–8 (Alaska Ct. App. July 20, 2005).

266. *See* Grohs v. State, 118 P.3d 1080, 1081–82 (Alaska Ct. App. 2005).

267. *See* Marley v. State, No. A-9285, 2006 Alas. App. LEXIS 80, at *11 (Alaska Ct. App. May 3, 2006).

268. *See* Brown v. State, 580 P.2d 1174, 1176 (Alaska 1978); Clark v. State, 574 P.2d 1261, 1265 (Alaska 1978); McCoy v. State, 491 P.2d 127, 138 (Alaska 1971); Townsel v. State, 763 P.2d 1353, 1355 (Alaska Ct. App. 1988).

protection than do the guarantees of the Fourth Amendment.[269] Second, article I, section 14 specifically provides a higher degree of privacy protection within one's car.[270] For example, in *South Dakota v. Opperman*, the Supreme Court held that the lower expectation of privacy within one's vehicle permits broad inventory searches.[271] The Alaska Supreme Court came to a different conclusion, allowing only minimal inventory searches of vehicles.[272] Finally, the warrant exceptions in Alaska are more restrictive.[273] Thus, the Alaska courts should do a thorough analysis of pretextual search-and-seizure law under the Alaska Constitution.

In *Whren*, the Supreme Court recognized the prevalence of objective factors in a Fourth Amendment analysis.[274] The adoption of the objective standard for pretexts was a natural extension of its prior holdings.[275] Likewise, any analysis of pretexts under the Alaska Constitution should rely on anaolgous authority from other search-and-seizure contexts.

Although the Alaska Constitution provides broader privacy protection than does the Fourth Amendment,[276] it does not necessitate the illegality of pretext stops. The broader privacy protection under the Alaska Constitution is not unlimited: "In such circumstances [where there is little danger of a pretext] the individual's right of privacy must give way to the public need to investigate the crime."[277] As a result, in warrantless search-and-seizure cases, the broader privacy protection has applied greater

269. Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage, 24 P.3d 547, 550 (Alaska 2001).

270. *See* State v. Daniel, 589 P.2d 408, 416 (Alaska 1979) (holding that search of closed containers within a car is not permitted in an inventory search due to the individual's privacy expectation). *But see* United States v. Chadwick, 433 U.S. 1 (1977) (prohibiting searches of closed containers in a car during a search after arrest, but not an inventory search), *overruled by* California v. Acevedo, 500 U.S. 565 (1991). *Contra* New York v. Belton, 453 U.S. 454 (1981) (permitting searches of closed containers in an immediate post-arrest search).

271. 428 U.S. 364, 367–68 (1976).

272. *See Daniel*, 589 P.2d at 416–17.

273. *See supra* Part III.A.

274. Whren v. United States, 517 U.S. 806, 812–13 (1996).

275. *Id.*

276. Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage, 24 P.3d 547, 550 (Alaska 2001).

277. McCoy v. State, 491 P.2d 127, 139 (Alaska 1971).

restrictions in two circumstances: in limiting the scope of a search or seizure and in narrowly construing warrant exceptions.[278]

Pretexts deal with neither category. First, a pretext is defined in terms of the subjective motivation for the search and not the *scope* of that search. For example, an officer acting on an impermissible subjective motivation for a search must still conform to the standard scope of that search unless probable cause arises that permits a broader scope.[279] Second, pretexts do not implicate any warrant exception other than that which justified the initial stop. The objective validity of a pretext under the initial warrant exception is not at issue, rather the *subjective* motivation is what makes pretexts problematic.

Alaska courts have, however, interpreted the Alaska Constitution as it applies in other seach-and-seizure contexts, and have tended to shy away from subjective standards. Warrant exceptions, for example, under both Alaska and federal law, are based on generally-applicable, objective policy rationales. For example, as discussed earlier, a *Terry* investigatory stop is permissible, without a warrant, in order to ensure public safety. It is established federal law under *Whren* that when the factual predicates for a warrant exception exist, a search or seizure is valid without further inquiry into whether the motivation for the search is aligned with the policy underlying the exception.[280] Disregard for the subjective motivation of a search or seizure is, indeed, the *sine qua non* of the objective standard.

The Alaska Supreme Court followed the objective standard in *McCoy* and *Schraff*, cases concerning the permissible scope of warrantless searches and seizures. The court twice declined to adopt the reasoning of Justice Rabinowitz, who advocated a subjective approach in his dissents to both cases.[281] As Justice Rabinowitz articulated his position in *Schraff*: "[The warrant exceptions' rationale] provide[s] the theoretical and practical justification for departure from the constitutional requirement [of a

278. Prior discussion of the inventory exception illustrates greater restrictions on the scope of searches, whereas discussion of probable-cause and investigatory stops illustrates greater restrictions on the attainment of a warrant exception.

279. *See* New York v. Belton, 453 U.S. 454, 460–63 (1981) (examining the scope of vehicle searches after arrest). This case illustrates that the scope of a search of an automobile is limited.

280. The Washington Supreme Court held the opposite in *Ladson*, requiring that the motivation of the search align with the underlying policy. *See* State v. Ladson, 979 P.2d 833, 842–43 (Wash. 1999). The *Ladson* case is described *supra* at Part II.D.

281. *See supra* notes 157–64 and accompanying text.

warrant] . . . [and further] these same justifications provide relevant criteria for delineation of the permissible degree of intensity of a warrantless search of the person incident to a lawful arrest."[282] Indeed, focus on alignment of the motivation for a search and the policy underlying the exception validating that search was the touchstone of Justice Rabinowitz's analysis. Given the court's reluctance to adopt subjective considerations in *McCoy* and *Schraff* with respect to the valid *scope* of warrantless searches, it follows that subjective considerations would be similarly irrelevant in the context of pretextual searches.

Nor does an analysis of the privacy-rights implications of searches and seizures support adoption of a subjective standard. Indeed, the court in *McCoy* declined to adopt a subjective standard, stating that "to require a warrant in the circumstances of this case would be a futile gesture which could hamstring legitimate police action without offering meaningful protection to the arrestee."[283] Thus, an issue of great concern for the court should be whether the subjective test offers meaningful protection to a detainee potentially subjected to a pretextual search. It does not. As discussed, it is beyond dispute that probable-cause traffic stops are valid. A subjective test would do little to increase privacy because it is unworkable—police, aware of the test, could simply misrepresent their subjective motivation. Indeed, an attempt to neutralize misrepresentation, such as through a policy that *all* traffic law violators be stopped, would invade the privacy of even more Alaskans. Nor would a subjective test provide additional privacy protections to vulnerable groups because the Equal Protection Clause already protects them from discriminatory police behavior.[284]

Furthermore, the subjective test would hamstring legitimate police action. Not only would officers be required to indicate their subjective motives for all stops, but police officers would be deterred from addressing criminal behavior that is uncovered when they make a routine traffic stop, thereby facilitating criminal activity. Even if officers were acting properly to prevent or impede

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282. Schraff v. State, 544 P.2d 834, 849 (Alaska 1975) (Rabinowitz, C.J., concurring and dissenting).

283. McCoy v. State, 491 P.2d 127, 138 (Alaska 1971).

284. The Alaska Constitution confirms this result, as its equal protection language is even broader than that of the U.S. Constitution. *Compare* ALASKA CONST. art I, § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law"), *with* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

criminal activity, a subjective standard would invite substantial *post hoc* litigation. Finally, the subjective standard would produce a chilling effect by discouraging police officers from following good police intuition. Consequently, following the policy rationale from *McCoy*, the subjective test is not preferable.

Neither the reasonable officer standard nor a modified version of it should be adopted under the Alaska Constitution. No state follows the reasonable officer standard, and only two circuits have found the standard to be valid.[285] Even then, the Eleventh Circuit questioned the standard's application to probable-cause stops.[286] In fact, the Tenth Circuit had found its application entirely untenable.[287] In addition, it is difficult to establish who the reasonable officer is or how reasonable police practice is defined,[288] whether the reasonable officer or practice is reasonable for the entire State of Alaska, reasonable for the local community, or reasonable for that particular officer based on his or her history.

Another problem with the reasonable officer standard is its potential to violate separation of powers within the Alaska Constitution. The reasonable officer standard allows the courts to definitively determine which traffic laws an officer should or should not enforce under the circumstances. This judicial determination trenches on the executive branch's power to determine when and how to enforce the law. Finally, like the subjective standard, the reasonable officer standard does not afford the individual any greater level of protection.

In conclusion, the proper and thorough analysis of the Alaska Constitution supports an interpretation that pretextual searches and seizures should follow the objective standard.

V. CONCLUSION

Although most of the court systems in the nation have definitively addressed the issue of pretextual searches and seizures, the Alaska courts have actively avoided addressing the issue. Other than Washington, all the court systems that have addressed the issue of pretexts have adopted the objective standard.[289] However, Alaska has indirectly and through improper legal analysis adopted a reasonable officer standard. In the interest of justice, it is imperative that Alaska finally address the pretext issue

285. *See supra* notes 87–88 and accompanying text.
286. United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).
287. United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995).
288. *See id.*
289. *See supra* text accompanying notes 106–08.

under a thorough, proper legal analysis. Such an analysis would reveal that the Alaska Constitution supports the objective standard and that neither the reasonable officer standard nor the subjective standard is supported under the constitution's greater protection for privacy.