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STATE V. OCHOA: THE END OF PRETEXTUAL STOPS IN NEW MEXICO?

Michael Sievers*

I. INTRODUCTION

The New Mexico Court of Appeals rejected federal precedent in 2009 when it decided *State v. Ochoa*, holding that the state constitution prohibits pretextual traffic stops.[1] A traffic stop is pretextual if it is made "not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving."[2] With the *Ochoa* decision, New Mexico became one of three states since 1996 whose appellate courts have at some point rejected the practice as a matter of state constitutional law.[3] There is no federal constitutional prohibition of pretextual traffic stops under the Fourth Amendment, as the subjective intentions of police officers play no role in ordinary Fourth Amendment analysis.[4] The New Mexico Constitution does prohibit those stops, but defendants must meet a heavy burden to show pretext under the totality of circumstances. *Ochoa* set out several factors to guide courts in determining whether a stop was pretextual under the totality of the circumstances. The result is a workable test defendants may use to suppress illegally obtained evidence.[5]

This article begins with an explanation of the way New Mexico's appellate courts evaluate questions about the constitutionality of searches and seizures. It then examines the approach the U.S. Supreme Court has taken to the issue of pretextual stops. Following that is a summary of the

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1. 2009-NMCA-002, ¶ 38, 146 N.M. 32, 206 P.3d 143, *cert. granted*, 2008-NMCERT-012, 145 N.M. 572, 203 P.3d 103, *cert. quashed*, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

2. *Id.* ¶ 16, 206 P.3d at 149.

3. *Id.* ¶¶ 27–28, 206 P.3d at 153 (describing court decisions in Washington state and Delaware in which the federal standard was rejected).

4. Whren v. United States, 517 U.S. 806, 813 (1996).

5. *See Ochoa*, 2009-NMCA-002, ¶¶ 39–41, 206 P.3d at 155-56.

New Mexico case law that led up to the *Ochoa* decision, providing some context for the Court of Appeals' decision. Next is a statement of the facts in *Ochoa*, as well as the reasoning used and holding reached by the court of appeals. After providing that background information, I analyze the decision by warning that the issue may not be settled, detailing the reasons such a holding is necessary, examining how several other states have treated the issue, and critiquing the U.S. Supreme Court's reasoning regarding pretextual stops. I conclude that the New Mexico Court of Appeals made the right decision.

II. NEW MEXICO'S EXPANSIVE CONCEPT OF LIBERTY SETS THE STAGE FOR THE *OCHOA* DECISION

A. New Mexico's Warrant Requirement and the Interstitial Approach to Search and Seizure Analysis

In the federalist system, states have the ability to provide a greater degree of liberty under their individual constitutions than is available under the U.S. Constitution.[6] Textual differences between the state and federal constitutions, alone, do not provide an obvious explanation of the different approaches taken by the U.S. Supreme Court and the New Mexico Court of Appeals on the issue of pretextual stops; the language of New Mexico's article II, section 10, closely resembles the language of the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states:

> 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.

In comparison, New Mexico's article II, section 10, states:

> 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

6. *Id.* ¶ 6, 206 P.3d at 147; *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977) (encouraging state appellate courts to provide greater liberty under their state constitutions than the federal courts apply under the federal constitution, even when the phrasing of the provisions is similar or identical).

> be seized, nor without a written showing of probable cause, supported by oath or affirmation.

Although the two provisions use similar wording, they have different meanings under state and federal law because of New Mexico's expansive concept of liberty and case-by-case approach to determining the reasonableness of particular searches and seizures.[7] The U.S. Constitution provides officers greater latitude to conduct searches and seizures without warrants when there is an objectively reasonable basis for the search or seizure. In contrast, the New Mexico Constitution, in the interest of protecting privacy rights, requires officers to obtain a warrant to search a private citizen, absent a specific delineated exception.[8] New Mexico's exceptions to the warrant requirement include (1) exigent circumstances, (2) consent to search, (3) searches incident to arrest, (4) the plain view doctrine, (5) open field, and (6) hot pursuit.[9] Unlike federal courts, New Mexico's courts have not recognized a bright-line automobile exception to the warrant requirement and instead require a showing of exigent circumstances that render obtaining a warrant impracticable.[10]

New Mexico courts use an interstitial approach in determining whether the state Constitution protects a right that is not protected by the U.S. Constitution.[11] An interstitial approach means that the court begins its analysis of constitutional questions by asking whether the U.S. Constitution protects the asserted right; if it does, the inquiry ends.[12] If it does not, the court examines the New Mexico Constitution and may break from federal precedent because of flawed federal analysis, structural differences in the state and federal governments, or distinct characteristics of the state.[13] The New Mexico Court of Appeals used that approach in diverging from federal law in *Ochoa*, implicitly finding that both flawed

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7. *See generally Ochoa*, 2009-NMCA-002, 206 P.3d 143.

8. State v. Rivera, 2010-NMSC-046, ¶ 2, 148 N.M. 659, 241 P.3d 1099.

9. *Id.* ¶ 25, 241 P.3d at 1106 (quoting State v. Duffy, 1998-NMSC-014, ¶ 61, 126 N.M. 132, 967 P.2d 807).

10. *See* State v. Gomez, 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1.

11. *Id.* ¶ 19, 932 P.2d at 7 (abandoning the "lock-step" model under which the state followed federal precedent in interpreting state constitutional provisions that are parallel to federal constitutional provisions). The *Gomez* court held that a departure from federal law was appropriate because it was not persuaded by federal precedent and found that New Mexico law is distinctively protective in the realm of searches and seizures of automobiles. *Id.* ¶ 12, 932 P.2d at 5; *see also* Michael B. Browde, *Fortieth Anniversary Article:* Gomez *Redux: Procedural and Substantive Developments Twelve Years On*, 40 N.M. L. REV. 179 (2010) (describing applications of the interstitial analysis by the New Mexico courts).

12. *Gomez*, 1997-NMSC-006, ¶ 11, 932 P.2d at 5.

13. *Id.*

federal analysis and distinct state characteristics justified a departure from the federal rule.[14]

B. Federal Precedent: Creating a Bright-Line Rule of Reasonableness

Since the U.S. Supreme Court's decision in *Terry v. Ohio*, police officers have worked with the idea that they may stop a suspect if they can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a stop and possibly a frisk of the suspect.[15] In the case of traffic stops, it is the observed violation of traffic laws that the U.S. Supreme Court held to reasonably warrant a stop of a motorist in *Whren v. United States,* regardless of underlying reasons for the stop.[16]

Whren created a bright-line rule that shut the door to arguments by defendants in federal courts alleging pretext in traffic stops; as long as a police officer has probable cause to believe a traffic violation has occurred, a stop will not be found unreasonable for purposes of the Fourth Amendment.[17] The *Whren* case arose when the defendant moved to suppress as evidence crack cocaine that police officers seized during a traffic stop.[18] The district court denied the motion to suppress, and the defendant was convicted.[19]

In affirming Whren's conviction, the D.C. Circuit Court of Appeals adopted the majority view that a stop is reasonable if an officer could have stopped the driver because there was probable cause to believe a traffic violation had occurred.[20] In their appeal on certiorari, the petitioners argued that traffic violations are so common and easy to spot that police officers are tempted to use them to investigate crimes for which they have no reasonable suspicion or probable cause.[21] They also argued that under a bright-line rule allowing pretext, officers would be permitted to consider factors like race in deciding whether to stop a vehicle.[22] In the interest of preventing that practice, the petitioners urged the U.S. Supreme Court to adopt a new standard for assessing whether a search was

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14. *Ochoa*, 2009-NMCA-002, ¶ 12, 206 P.3d at 148.

15. 392 U.S. 1, 21 (1968); *see also* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 428 (1997) (discussing *Terry v. Ohio* in the context of pretextual stops).

16. *Whren*, 517 U.S. at 819.

17. *Id.* (holding that the existence of probable cause "rendered the stop reasonable under the Fourth Amendment . . . .").

18. *Id.*

19. *Id.* at 809.

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

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

22. *Id.*

unreasonable: "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[23] The petitioners described the standard as objective.[24] To the contrary, a unanimous Supreme Court wrote that any inquiry into whether a traffic stop was pretextual would necessarily be subjective.[25] The court rejected the petitioners' proposed test, writing, "[w]hile police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[26]

According to *Whren*, the Fourth Amendment's use of the term "unreasonable" means that objectively reasonable actions by police officers are constitutionally permissible, regardless of an officer's subjective intentions.[27] The court agreed that the U.S. Constitution prohibits officers from targeting drivers for traffic stops based on factors like race.[28] However, the court asserted that it is the Equal Protection Clause of the Fourteenth Amendment that prohibits the intentional discriminatory application of laws, not the Fourth Amendment.[29] The U.S. Supreme Court affirmed the conviction.[30]

C. *The Buildup to* Ochoa

In the years leading up to *Ochoa*, New Mexico's appellate courts had established two principles important to the analysis regarding pretextual stops: (1) New Mexico courts strongly prefer warrants; and (2) New Mexico courts prefer case-by-case analyses over bright-line rules in search and seizure cases.[31] However, *Ochoa* was the first case squarely to address whether pretextual stops are valid under the New Mexico Consti-

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23. *Id.* at 814.
24. *Id.*
25. *See id.* (arguing that "although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons.").
26. *Whren*, 517 U.S. at 815.
27. *Id.* at 814 (stating that "the Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.") (citing United States v. Robinson, 414 U.S. 218 (1973)) (emphasis in original) (internal quotation marks omitted).
28. *Id.* at 813.
29. *Id.*
30. *Id.* at 819.
31. *See Ochoa*, 2009-NMCA-002, ¶¶ 20, 24, 206 P.3d at 151, 152.

tution.[32] In analyzing the issue, the *Ochoa* court criticized the reasoning used in *Whren*, considered academic criticism of *Whren*, sifted through New Mexico precedent, glanced at the law in several other states, and concluded that New Mexico's distinctively expansive concept of liberty precluded it from following the U.S. Supreme Court's lead in *Whren*.[33] *Ochoa*'s examination of New Mexico precedent revealed a strong preference for examining the reasonableness of an officer's actions under the circumstances of each case, rather than adhering to bright-line rules that render certain police conduct *per se* reasonable.[34] The ultimate question in every search and seizure case in New Mexico is whether the officers' actions were reasonable under the particular circumstances of a case. Common law search and seizure rules are based on that premise.[35] As a result, the state's appellate courts have seized the opportunity to branch off from federal law on multiple occasions in the years following the state's abandonment of a "lock-step" approach of search and seizure analysis.[36] That is, in the years since, the state stopped interpreting article II, section 10, as if it were identical to the Fourth Amendment.[37]

The *Ochoa* court stood on solid ground in deciding that pretextual stops are prohibited, with ample precedent demonstrating that article II, section 10 provides greater liberty than the Fourth Amendment provides.[38] For one, *Ochoa* is consistent with New Mexico's rejection of the

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32. *Id.* ¶ 9, 206 P.3d at 148.

33. *See id.* ¶¶ 13–38, 206 P.3d at 148-55.

34. *Id.* ¶ 24, 206 P.3d at 152. One example of a bright-line or *per se* rule rejected by New Mexico courts was a federal rule that "all warrantless arrests of felons based on probable cause are constitutionally permissible in public places." Campos v. State, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994). The court rejected the rule in favor of a case-by-case analysis of reasonableness. *Id.*

35. *See* State v. Attaway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (stating that "[t]he myriad rules, exceptions, and exceptions to exceptions that flourish in the jurisprudence of search and seizure are often no more than factual manifestations of the constitutional requirement that searches and seizures be reasonable.").

36. *See, e.g.*, *infra* note 38 (listing cases in which the courts broke off from federal law by holding that the state constitution provides greater liberty than the U.S. Constitution).

37. *See Ochoa*, 2009-NMCA-002, ¶ 24, 206 P.3d at 152 (citing State v. Granville, 2006-NMCA-098, ¶ 14, 140 N.M. 345, 142 P.3d 933) (listing nine cases from the previous fifteen years in which New Mexico's appellate courts held article II, section 10 provides more protection of liberty than the Fourth Amendment).

38. *See Attaway*, 117 N.M. at 149, 870 P.2d at 111; *Campos*, 117 N.M. at 159, 870 P.2d at 121; *Gomez*, 1997-NMSC-006, ¶ 39, 932 P.2d at 12; *Granville*, 2006-NMCA-098, ¶ 14, 142 P.3d at 937-38; State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225; State v. Gutierrez, 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993); State v. Cordova, 109 N.M. 211, 214, 784 P.2d 30, 33 (1989); State v. Madalena,

federal principle that a person's reasonable expectation of privacy is diminished when occupying an automobile.[39] The New Mexico Supreme Court rejected such a bright-line automobile exception to the warrant requirement in the first case that addressed the issue after the state abandoned the "lock-step" approach.[40] *State v. Gomez* held that both probable cause and exigent circumstances are required for an officer to search an automobile without a warrant.[41] New Mexico's strong preference for warrants weighed heavily in the court's decision in *Gomez*. When an independent magistrate evaluates the facts and makes a finding of probable cause, there is a reduced risk that a competitive interest in "ferreting out crime" will compromise an officer's judgment.[42]

The *Ochoa* court cited other examples of New Mexico courts interpreting the state constitution to provide expanded liberty.[43] In one of those cases, the New Mexico Court of Appeals held article II, section 10, prohibited the warrantless search of garbage bags left in containers in an alley behind a house,[44] while the U.S. Supreme Court has held that such searches are not prohibited by the Fourth Amendment.[45] Likewise, the New Mexico Supreme Court has given constitutional status to the rule that officers must knock, announce their presence, and be refused admittance before entering a dwelling to execute an arrest warrant, while the U.S. Supreme Court has not decided whether the Fourth Amendment requires the knock and announce procedure.[46] In another example, federal courts have approved of border inspection agents' routine practice of inquiring into matters beyond citizenship and immigration, even in the absence of reasonable suspicion of criminal activity.[47] To the contrary, the

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121 N.M. 63, 69–70, 908 P.2d 756, 762–63 (Ct. App. 1995); State v. Rodarte, 2005-NMCA-141, ¶ 1, 138 N.M. 668, 125 P.3d 647.

39. *See Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 25 P.3d at 231.

40. *Gomez*, 1997-NMSC-006, ¶ 39, 932 P.3d at 12.

41. *Id.* ¶¶ 37–44, 932 P.3d at 11-13; *contra* California v. Acevedo, 500 U.S. 565, 575–76 (1991) (holding that officers may search closed containers within a lawfully stopped vehicle without exigent circumstances).

42. *See Gomez*, 1997-NMSC-006, ¶¶ 36–38, 932 P.3d at 11-12.

43. *See Ochoa*, 2009-NMCA-002, ¶ 24, 206 P.3d at 152.

44. *Granville*, 2006-NMCA-098, ¶ 1, 142 P.3d at 935.

45. *Id.* ¶ 11, 142 P.3d at 937 (citing California v. Greenwood, 486 U.S. 35, 37 and United States v. Long, 176 F.3d 1304, 1308 (10th Cir.1999)).

46. *See Attaway*, 117 N.M. at 149, 870 P.2d at 111 *modified on other grounds by State v. Lopez*, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80, (holding that officers' knowledge that the subject of a search is an armed drug dealer may constitute exigency under the totality of the circumstances).

47. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 545 (holding the stop of a vehicle "at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens" does not violate

New Mexico Supreme Court held that reasonable suspicion is required to make a prolonged border-inspection stop.[48]

Similarly, federal courts have held that police officers may arrest a suspect in public without a warrant as long as they have probable cause to believe a crime has occurred,[49] while the New Mexico Supreme Court held there must be both probable cause and exigent circumstances for officers to make an arrest in public without a warrant.[50] New Mexico courts also have rejected the federal courts' bright-line "good faith" exception to the exclusionary rule—allowing evidence to be introduced at trial despite being illegally obtained, as long as police were acting with a good faith belief that their actions were not illegal—describing the exception as incompatible with the article II, section 10, probable cause requirement for the issuance of warrants.[51]

The trend has continued in other contexts. New Mexico courts continue to use the two-prong *Aguilar-Spinelli* test in assessing the existence of probable cause for a warrant,[52] while the U.S. Supreme Court has replaced *Aguilar-Spinelli* with a more flexible totality of the circumstances

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the Fourth Amendment); United States v. Ludlow, 992 F.2d 260, 263 (10th Cir. 1993) (stating that since the *Martinez-Fuerte* decision, "our cases have recognized that no individualized suspicion is necessary to stop, question, and then selectively refer motorists to a secondary inspection checkpoint.").

48. *See Cardenas-Alvarez*, 2001-NMSC-017, ¶ 16, 25 P.3d at 231 (citing State v. Estrada, 111 N.M. 798, 800, 810 P.2d 817, 819 (Ct. App. 1991)) (stating that "we continue to proscribe the prolongation of a border checkpoint stop once questions regarding citizenship and immigration status have been answered, unless the officer conducting the stop reasonably suspects the defendant of criminal activity. Traffic congestion may require the referral of a motorist from primary to secondary without offending this rule . . . however, no such congestion was present in this case. We now consider whether our state search and seizure jurisprudence applies to the case at bar.").

49. United States v. Watson, 423 U.S. 411, 423 (1976).

50. *Campos*, 117 N.M. at 159, 870 P.2d at 121 (holding that there must be probable cause to believe the suspect is committing or is about to commit a felony and that there is an exigency that would prevent the officer from obtaining a warrant for officers to make a warrantless arrest in public).

51. *Gutierrez*, 116 N.M. at 432, 863 P.2d at 1053; *contra* United States v. Leon, 468 U.S. 897 (1984) (adopting a cost-benefit balancing test analyzing the deterrent effects of exclusion versus the societal cost involved in excluding the evidence in each set of circumstances).

52. *See* Aguilar v. Texas, 378 U.S. 108, 114 (1964) (articulating a two-prong test under which courts analyze the underlying facts making it probable that evidence of a crime was at the scene to be searched, as well as the underlying facts establishing credibility of the informant), *overruled by* Illinois v. Gates 462 U.S. 213, 238 (1983); *see also* Spinelli v. United States, 393 U.S. 410, 413 (1969), *overruled by Gates*, 462 U.S. at 238.

test.[53] Also unlike federal law, New Mexico law prohibits officers from arresting a person, without a warrant, for non-jailable offenses if an officer is acting solely on the basis of probable cause.[54] Finally, in determining whether a specific sobriety roadblock is constitutionally reasonable, New Mexico courts follow stricter guidelines than are required by the Fourth Amendment.[55]

After considering those precedent cases, the *Ochoa* court stated that the reason for requiring reasonable suspicion to justify a traffic stop is to prevent officers from acting on hunches, and it concluded that such a purpose "is not furthered when our courts refuse to examine the unconstitutional hunch motivating the stop."[56]

III. *STATE V. OCHOA*: POLICE OFFICERS' PRETEXTUAL STOP RESULTS IN SUPPRESSION OF EVIDENCE

A. The Arrest

It all began February 12, 2003, in Artesia, a southeast New Mexico town of about 11,000 people.[57] Agent David Edmondson had encountered an unfamiliar scene: a new, black GMC Yukon with an out-of-state

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53. *See Cordova*, 109 N.M. at 214, 784 P.2d at 33 (holding that Rule 5-211(E) NMRA incorporates the two prongs of the *Aguilar-Spinelli* test, which the U.S. Supreme Court rejected and replaced in *Gates*, 462 U.S. 213, with a totality of the circumstances test). Rule 5-211(E) NMRA states that a finding of probable cause must

> be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

54. *See Rodarte*, 2005-NMCA-141, ¶ 1, 125 P.3d at 647 (noting that these searches are reasonable under the Fourth Amendment pursuant to *Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 354 (2001), which held that a warrantless arrest for a misdemeanor seatbelt violation was not unreasonable under the Fourth Amendment).

55. *Madalena*, 121 N.M. at 69–70, 908 P.2d at 762–63 (listing eight factors for determining whether a roadblock is reasonable and noting that they are more cumbersome than the balancing test used to determine reasonableness under the Fourth Amendment).

56. *Ochoa*, 2009-NMCA-002, ¶ 26, 206 P.3d at 153.

57. State v. Ochoa, No. CR-2003-148-GLC (Dist. Ct. N.M. Jan. 14, 2004) (Order of Judgment and Sentence); U.S. Census Bureau, *State & County QuickFacts, Artesia (City), New Mexico*, http://quickfacts.census.gov/qfd/states/35/3505220.html (last visited July 10, 2012).

license plate,[58] parked outside a residence police were monitoring.[59] Edmondson was working undercover with the Pecos Valley Drug Task Force and suspected a resident of that home was trafficking drugs.[60] He wanted to identify the driver of the Yukon, so he drove past the residence several times to check on it.[61] When the Yukon pulled away from the home, Edmondson radioed Officer Ramiro Martinez of the Artesia Police Department and asked Martinez to stop the vehicle on the basis that, Edmondson later testified, the driver was not wearing a seatbelt.[62] Martinez followed the Yukon for thirteen blocks but was unable to determine whether the driver was wearing a seatbelt because the vehicle's windows were tinted.[63] Acting on the basis of the radio call, Martinez nevertheless stopped the vehicle.[64] The alleged seatbelt violation became a non-issue[65] when the officer recognized the driver—Julian Ochoa—as someone he believed to have outstanding arrest warrants.[66]

Officer Martinez arrested Ochoa after confirming the warrants.[67] Agent Edmondson arrived at the scene and continued the drug investigation, questioning Ochoa about the residence he had just left.[68] Ochoa turned out to be a "very cooperative" suspect.[69] He consented to a search of the Yukon and admitted a drug pipe was inside the vehicle, as well as a baggie containing methamphetamine.[70] The officers were unable to locate the drugs until they took Ochoa out of the handcuffs and allowed him to point out the location in the console where the baggie was stashed.[71] They also discovered a .38-caliber handgun in the vehicle.[72] Charges ensued.[73]

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58. Appellant's BIC, State v. Ochoa, 2006-NMCA-131, 140 N.M. 573, 144 P.3d 132 (No. 30016), 2005 WL 6122972, at *2.

59. *Ochoa*, 2009-NMCA-002, ¶ 3, 206 P.3d at 147.

60. Appellant's BIC, State v. Ochoa, 2006-NMCA-131, at *2.

61. *Ochoa*, 2009-NMCA-002, ¶ 2, 206 P.3d at 147.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.* (Officer Martinez testified that he did not remember whether Ochoa was wearing a seatbelt when he rolled down the window to speak to the officer).

66. *Ochoa*, 2009-NMCA-002, ¶ 2, 206 P.3d at 147.

67. *Id.* ¶ 3, 206 P.3d at 147.

68. *Id.*

69. Appellant's BIC, State v. Ochoa, 2006-NMCA-131, at *5.

70. *Ochoa*, 2009-NMCA-002, ¶ 3, 206 P.3d at 147.

71. Appellant's BIC, State v. Ochoa, 2006-NMCA-131, at *5.

72. Criminal Information, State v. Ochoa, No. CR-2003-148-GLC (Dist. Ct. N.M. May 27, 2003), 2003 WL 25754474.

73. *Id.*

B. A Trial Court's Denial of a Motion to Suppress Leads to Big Change

Ochoa filed a motion to suppress the evidence that was seized during the traffic stop, arguing the stop was prohibited by article II, section 10, of the New Mexico Constitution.[74] The state argued the stop was reasonable because the officer had probable cause to believe Ochoa had violated the traffic code.[75] The district court found that Agent Edmondson wanted the car stopped so he could identify the driver and investigate the suspected drug trafficking.[76] However, the court also found that Officer Martinez reasonably relied on Agent Edmondson's statement that a traffic violation had occurred.[77] The court thus denied Ochoa's motion to suppress, and Ochoa pleaded guilty.[78]

The New Mexico Court of Appeals reversed Ochoa's conviction on the basis of the misdemeanor arrest rule,[79] but it declined to reach the question of whether pretextual stops are reasonable under the state constitution.[80] The New Mexico Supreme Court granted certiorari and held that the misdemeanor arrest rule does not apply to investigatory traffic stops.[81] The court remanded the case to the court of appeals to decide whether pretextual traffic stops are reasonable under article II, section 10, of the New Mexico Constitution.[82] The court of appeals answered in the negative and reversed the district court's decision to deny Ochoa's motion to suppress.[83] Ochoa's case stood in limbo for nearly a year as the New Mexico Supreme Court again granted a writ of certiorari December 30, 2008, but quashed the writ November 19, 2009, thus ending Ochoa's case and leaving the law of pretextual stops as it had been set out by the court of appeals.[84]

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74. *Ochoa*, 2009-NMCA-002, ¶ 4, 206 P.3d at 147.

75. *Id.*

76. *Id.* at ¶ 5, 206 P.3d at 147.

77. *Id.*

78. State v. Ochoa, 2006-NMCA-131, ¶ 3, 140 N.M. 573, 144 P.3d 132.

79. *Id.* ¶ 8, 144 P.3d at 135. The court explained: "Since a seatbelt violation is a misdemeanor, our misdemeanor arrest rule requires that the offense be committed in the officer's presence to justify a warrantless arrest for its violation." *Id.*

80. *Id.* ¶ 15, 144 P.3d at 137.

81. *See* State v. Ochoa, 2008-NMSC-023, ¶ 15, 143 N.M. 749, 182 P.3d 130 (holding that "the Court of Appeals improperly applied New Mexico's misdemeanor arrest rule to this case, because the 'arrest' at issue was an investigatory stop for a seatbelt violation.").

82. *Id.* ¶ 22, 182 P.3d at 136.

83. *Ochoa*, 2009-NMCA-002, ¶ 38, 206 P.3d at 155.

84. State v. Ochoa, 2008-NMCERT-012, 145 N.M. 572, 203 P.3d 103; State v. Ochoa, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

C. *Rationale of* Ochoa

The court of appeals, applying the interstitial analysis of search and seizure law, first noted that the U.S. Constitution does not prohibit pretextual stops.[85] The court acknowledged Ochoa had preserved his claim that the state constitution provides an "extra layer" of protection against unreasonable searches and seizures of automobiles.[86] *Ochoa* described the federal analysis as unpersuasive and out of step with New Mexico's "distinctively protective standards for searches and seizures of automobiles" and thus concluded the interstitial analysis by deciding that a break from federal law was justified.[87]

In reaching that holding, the court began with a critique of what it viewed as the flawed reasoning of the U.S. Supreme Court's decision in *Whren*.[88] The *Ochoa* court reviewed some of the existing criticism of the *Whren* decision before turning to its own analysis, attacking what it characterized as a conclusory argument by the U.S. Supreme Court.[89] *Whren* treated the conclusion as inevitable, even though the U.S. Supreme Court had not previously decided the issue; meanwhile, state and federal courts had applied differing analyses under the Fourth Amendment.[90] The Supreme Court previously had questioned the constitutionality of pretextual searches.[91] But *Whren* held that in those cases the court was referring only to inventory and administrative searches.[92] Those searches were distinguishable because they do not require probable cause or reasonable suspicion as a precondition, unlike cases in which an officer "seizes" a person by conducting a traffic stop.[93] *Whren* assumed, and wrongly so,

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85. *See Ochoa*, 2009-NMCA-002, ¶¶ 7–8, 206 P.3d at 147-48.

86. *Id.* ¶ 10, 206 P.3d at 148.

87. *Id.* ¶ 12, 206 P.3d at 148.

88. 517 U.S. 806.

89. *See Ochoa*, 2009-NMCA-002, ¶ 14, 206 P.3d at 149.

See id. (stating that *Whren* "uses objectivity as the ultimate constitutional measure for reasonable traffic stops without offering an affirmative reason for this conclusion.").

90. *Id.*

91. *See Whren*, 517 U.S. at 811–12 (citing four cases in which the U.S. Supreme Court had mentioned, in what it termed "dicta," disapproval of pretextual stops).

92. *See id.*

93. *See id.* (arguing those cases "simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes."). An administrative inspection or search is "the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme—for example, unannounced inspection of a mine for compliance with health and safety standards." *Id.* at 811 n.2 (citing Donovan v. Dewey, 452 U.S. 594, 599–605 (1981)). An inventory search is "the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as

that requiring probable cause or reasonable suspicion is enough to prevent officers from making pretextual stops.[94] For the *Ochoa* court, the distinction between administrative searches and searches requiring probable cause was unhelpful in the context of pretextual stops.[95] In pretext cases, the actual reason for the stop is not justified, so the exception to the warrant requirement being relied upon does not actually justify an intrusion into the person's private affairs.[96]

The court in *Ochoa* wrote that regulation of traffic is so extensive that police officers do not have difficulty finding a reason to make a stop, opening the door to the type of arbitrary police conduct that the Fourth Amendment is meant to prohibit.[97] *Ochoa* described pretextual stops as being so commonplace as to be "established and persistent patterns of law enforcement conduct" and therefore rejected the idea that the requirement of reasonable suspicion or probable cause would be enough to prevent those stops from occurring.[98] *Whren* had pointed to the Equal Protection Clause of the Fourteenth Amendment as the source of relief when pretextual stops are based on certain impermissible factors such as race.[99] The *Ochoa* court argued that lawsuits brought against police officers under the Fourteenth Amendment are ineffective in deterring police misconduct, and the remedies available through those suits are inadequate.[100] In contrast, a defendant asserting a violation of the Fourth Amendment has a valuable remedy through the exclusionary rule, which serves to deter police misconduct by prohibiting the government from using illegally obtained evidence in criminal prosecutions.[101]

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might be kept in a towed car), and to protect against false claims of loss or damage." *Id.* at 811 n. 1 (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1976)).

94. *See Ochoa*, 2009-NMCA-002, ¶ 14, 206 P.3d at 149.

95. *See id.* ¶ 16, 206 P.3d at 149.

96. *See id.* (writing that, "by definition, a pretextual stop raises the identical constitutional concerns which our Supreme Court recognized under the emergency assistance doctrine . . . that police officers will abuse what is otherwise valid presence as a subterfuge to conduct an invalid investigation.") (citing *Ryon*, 2005-NMSC-005).

97. *See Ochoa*, 2009-NMCA-002, ¶ 17, 206 P.3d at 150 (stating "virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.") (quoting State v. Ladson, 979 P.2d 833, 842 n. 10 (1999) (internal quotation marks omitted)).

98. *Ochoa*, 2009-NMCA-002, ¶ 18, 206 P.3d at 150 (quoting David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 299 (1999)).

99. *Ochoa*, 2009-NMCA-002, ¶ 19, 206 P.3d at 150-51.

100. *Id.*

101. *See id.* (arguing that by holding that pretextual stops do not render a stop unreasonable under the Fourth Amendment, the *Whren* court "not only refuses to condemn this bad police conduct, it rewards pretextual stops by permitting prosecu-

The court turned to New Mexico precedent and found that article II, section 10 of the state constitution guarantees a greater amount of liberty for people in automobiles than the Fourth Amendment provides.[102] Unlike the federal courts, New Mexico courts have "rejected the notion that an individual lowers his expectation of privacy when he enters an automobile."[103] Thus, unlike federal law, a warrantless search of an automobile must be reasonable and justified by a "true exigency," meaning the delay in obtaining a search warrant would put legitimate law enforcement interests in jeopardy.[104] New Mexico courts also have refused to justify warrantless searches of automobiles when the defendant no longer has access to the vehicle; federal courts may have once characterized these searches as being searches "incident to arrest."[105] The court of appeals had previously expressed disapproval of the use of pretext by police, and it reaffirmed that disapproval in *Ochoa*.[106] When the government argued that diverging from federal law was unnecessary because of the reasonable suspicion requirement for making a traffic stop, the court responded that the whole purpose of the reasonable suspicion requirement is to prevent officers from making stops based solely on hunches.[107] It should not therefore be used to defeat its own purpose.[108] Allowing police officers to use pretextual tactics simply sidesteps the reasonable suspicion requirement, because a hunch can quickly lead to a stop when a police officer

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tion with the evidentiary fruits of the stop.") (citing Illinois v. Krull, 480 U.S. 340, 347 (1987)).

102. *See id.* ¶ 20, 206 P.3d at 151.

103. *See id.* (quoting Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 25 P.3d at 231) (internal quotation marks omitted).

104. *Ochoa*, 2009-NMCA-002, ¶ 22, 206 P.3d at 151-52.

105. *Id.* ¶ 23, 206 P.3d at 152 (citing *State v. Roswell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 374, 188 P.3d 95, 98). *Roswell* rejected the rule that a warrantless search of a vehicle is justified when an arrestee was a "recent occupant" of the vehicle as held in the cases of *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004)). *Roswell*, 2008-NMSC-041, ¶ 10, 188 P.3d at 98. *But see* Arizona v. Gant, 556 U.S. 332, 351 (2009) (narrowing *Belton* and stating that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the *time of the search* or it is reasonable to believe the vehicle contains evidence of the offense of arrest.") (emphasis added).

106. *See Ochoa*, 2009-NMCA-002, ¶ 34, 206 P.3d at 154 (citing State v. Lowe, 2004-NMCA-054, ¶ 22, 135 N.M. 520, 90 P.3d 539; *Ryon*, 2005-NMSC-005, ¶¶ 33–36, 108 P.3d at 1045-46; State v. Prince, 2004-NMCA-127, ¶ 19, 136 N.M. 521, 101 P.3d 332; State v. Montoya, 116 N.M. 297, 303, 861 P.2d 978, 984 (Ct. App. 1993)).

107. *See Ochoa*, 2009-NMCA-002, ¶¶ 35–37, 206 P.3d at 155.

108. *See id.*

looks for a traffic violation to legitimize the process.[109] Thus, the use of pretext is "a triumph of form over substance; a triumph of expediency at the expense of reason."[110] The court further wrote that adoption of the *Whren* bright-line rule would result in the courts abdicating their responsibilities to uphold defendants' constitutional rights, and it therefore held that New Mexico law prohibits pretextual stops.[111]

Ochoa set out a two-part test for courts to follow in deciding whether a stop is pretextual and thus unreasonable. First, courts must decide whether there was an objectively reasonable basis for the stop.[112] If there was, then the inquiry turns to whether the officer's subjective motivation for the stop was unrelated to the basis for the stop.[113] The burden is on the defendant to prove that a stop was pretextual under the totality of the circumstances.[114] Once the defendant shows sufficient facts creating a presumption of pretext, the state has a burden to show that the officer would have stopped the defendant regardless of the pretextual motive.[115] Applying the analysis to the circumstances in *Ochoa*, the court held the stop was pretextual because Agent Edmondson wanted to stop Ochoa not for the seatbelt violation, but to question him about drugs, an investigation that had no constitutionally valid basis.[116] The court therefore reversed the district court's denial of Ochoa's motion to suppress.[117]

IV. ANALYSIS: NEW MEXICO SETS A GOOD EXAMPLE FOR THE COUNTRY

The New Mexico Supreme Court left *Ochoa* as the law of the land by quashing certiorari in the case, and it should not overturn the court of appeals' decision if the issue arises in another case.[118] New Mexico has the opportunity to set an example for state courts across the country, preventing police conduct only where it is unreasonable, but also preventing it where federal law does not.[119] The *Ochoa* decision was necessary,

109. *See id.* ¶ 18, 206 P.3d at 150 ("The extensive regulation of all manner of driving subjects virtually all drivers to the whim of officers who choose to selectively enforce the traffic code for improper purposes.").
110. *See id.* ¶ 37, 206 P.3d at 155.
111. *See id.* ¶ 38, 206 P.3d at 155.
112. *Ochoa*, 2009-NMCA-002, ¶ 40, 206 P.3d at 155-56.
113. *Id.*
114. *Id.*
115. *Id.*; *see also* Brennan, *supra* note 6, at 500.
116. *Ochoa*, 2009-NMCA-002, ¶ 46, 206 P.3d at 157.
117. *Id.*
118. *See* State v. Ochoa, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.
119. *See Whren*, 517 U.S. 806.

and the burden it places on defendants to prove pretext through a set of objective factors dispels the *Whren* court's notion that pretext cases would necessarily turn on a subjective inquiry.[120]

A. The Issue May Not be Settled

Ochoa may not have settled the issue of pretextual stops for all time, and subsequent decisions by the New Mexico Supreme Court have suggested the opinion applies narrowly to traffic stops, rather than to *Terry* stops in general.[121] Justice Bosson has stated that *Ochoa* should be overturned.[122] Granting certiorari requires two votes, and Justice Bosson noted that he was a dissenting vote in the decision to quash certiorari in *Ochoa*.[123] Justice Bosson wrote as part of a short special concurrence in *State v. Gonzales* that *Ochoa* was wrongly decided and that the state analysis should be the same as that used in *Whren*.[124] Justice Bosson did not elaborate in the concurrence. Although the New Mexico Supreme Court may not be done with the issue, the court of appeals has treated the *Ochoa* rule as controlling and the state supreme court has directed trial courts to apply *Ochoa* as the "law of the land within our state borders" until the court has an opportunity to analyze the subject itself.[125] The New Mexico Supreme Court had one other opportunity to discuss *Ochoa* in the 2012 decision of *Schuster v. State of NM Tax. & Rev. Dep't*,[126] but there were no separate opinions, and the supreme court applied *Ochoa* and unanimously affirmed the Motor Vehicle Division's decision to revoke a DWI defendant's driver's license.[127]

B. The Need to Prohibit Pretextual Traffic Stops

The New Mexico Legislature took it upon itself to prohibit the use of specific types of profiling by police officers in conducting an investigation by passing the Prohibition of Profiling Practices Act ("PPPA"), but

120. *See Ochoa*, 2009-NMCA-002, ¶ 41, 206 P.3d at 156.

121. *See* State v. Jenkins, No. 29,026, 2011 WL 2041835, at *11 (Ct. App. March 23, 2011) (indicating that *Ochoa* was not necessarily applicable in a case where a police officer stopped a pedestrian but holding that the defendant did not prove the officer had a pretextual motive).

122. State v. Gonzales, 2011-NMSC-012, ¶ 19, 150 N.M. 74, 257 P.3d 894 (Bosson, J., concurring).

123. *Id.*

124. *Id.*

125. *Id.*

126. No. 32,942 (N.M. July 26, 2012).

127. *See infra* note 204.

the constitutional rule of *Ochoa* is necessary nonetheless.[128] The PPPA requires police departments, as part of their administrative complaint procedures, to discipline officers who have violated the statute.[129] That, however, does not vindicate a defendant's right to be free from unreasonable searches and seizures or a defendant's right to exclude evidence obtained as a result of an unreasonable search.[130] Moreover, the PPPA, while protecting the equal protection rights of certain classes of people, does not prohibit the use of profiling based on factors like a defendant's presence in a low-income or "high crime" neighborhood.[131] A constitutional rule prohibiting the use of pretext on a broader level is necessary to prevent searches based on unreasonable factors that go beyond race or the other categories covered by the PPPA or similar statutes.[132] *Ochoa*, which was decided the same year the PPPA became effective, implemented such a constitutional rule and in doing so, strengthened the rights of people to be free from unreasonable searches and seizures.[133]

Police officers have authority to stop drivers for a wide variety of traffic offenses in New Mexico, affording them plenty of opportunities to use those violations as pretext to conduct more intrusive searches and seizures.[134] Between the state traffic code and municipal traffic codes, police in a given jurisdiction can stop a driver for driving too fast, not fast

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128. NMSA 1978, § 29-21-2(A) (2009) ("In conducting a routine or spontaneous investigatory activity, including . . . a traffic stop . . . or in determining the scope, substance or duration of the routine or spontaneous investigatory activity, a law enforcement agency or a law enforcement officer shall not rely on race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability or serious medical condition, except in a specific suspect description related to a criminal incident or suspected criminal activity, to select a person for or subject a person to the routine or spontaneous investigatory activity."); NMSA 1978, § 29-21-2(B) (2009) ("In conducting an investigatory activity in connection with an investigation, a law enforcement agency or a law enforcement officer shall not rely on race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability or serious medical condition, except to the extent that credible information, relevant to the locality or time frame, links a person with those identifying characteristics to an identified criminal incident or criminal activity.").

129. NMSA 1978, § 29-21-3(B)(2) (2009).

130. *See* NMSA 1978, § 29-21-3 (2009). The statute does not provide a mechanism for a defendant to enforce it in a suppression hearing in a criminal case.

131. *See* NMSA 1978, § 29-21-2(A) (2009).

132. *See Ochoa*, 2009-NMCA-002, ¶ 17, 206 P.3d at 150 (stating that the court's concern with pretextual stops is based on a desire to prevent unbridled police discretion that places the liberty of every person in the hands of an arbitrary authority).

133. *See id.*

134. *See generally* NMSA 1978, §§ 66-7-301 to -373 (2002).

enough, or for decreasing speed too quickly.[135] A police officer may, in some circumstances, pull over a driver for passing another vehicle on the right, or stop the car being passed for speeding up before the other car has completely passed.[136] These are just a few examples of the many violations that exist under the extensive traffic regulations that apply to New Mexico drivers.[137] With so many potential violations occurring at any given time, it is inevitable that a traffic stop will involve some degree of discretion.[138] If the deciding factor in that exercise of discretion is the driver's race, the stop may violate a defendant's equal protection rights, but it is nonetheless a "reasonable" seizure under the Fourth Amendment—an absurd result.[139]

Consider a Texas case, decided three years before *Whren*, in which a police officer over a five-year span had arrested 250 people for drug offenses, all of the arrests happening after traffic stops, with 246 of those arrests occurring without a warrant.[140] The Fifth Circuit Court of Appeals noted it was familiar with the officer's "propensity for patrolling the Fourth Amendment's outer frontier" but upheld the search on a rationale similar to that of *Whren*.[141] *Ochoa*'s rule is necessary to keep officers well

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135. *See, e.g.*, New Mexico Motor Vehicle Code, NMSA 1978, §§ 66-7-301, -305, -306 (2002); LAS CRUCES, N.M., Code §§ 27-12-6-1.1, -1.2, -1.5 (2006); ALBUQUERQUE, N.M., Code §§ 8-2-4-3, -7 (1974); BAYARD, N.M., Code § 38-1 (2010) (adopting by reference the New Mexico Uniform Traffic Ordinance); LOS ALAMOS COUNTY, N.M., Code §§ 38-241, -242, -244 (1995); HOBBS, N.M., Code § 10.04.010 (adopting the New Mexico Motor Vehicle Code).

136. *See* NMSA 1978, § 66-7-310 (1978).

137. *See generally* NMSA 1978, §§ 66-7-301 to -373 (2011). Additionally, the municipal codes provide more reasons to stop drivers. A municipal police officer in Portales can stop a driver for failing to signal continuously during the last 100 feet before turning. *See* PORTALES, N.M., Code § 25-1 (2009) (adopting NMSA 1978, §§ 66-7-325 (2011)). An officer in Farmington can stop a driver for entering an intersection that is blocked on the other side by a backup of traffic. *See* FARMINGTON, N.M., Code § 25-3-6 (2010). An Albuquerque police officer may stop a driver for following the car in front too closely or for having an arm around another person in the vehicle. *See* ALBUQUERQUE, N.M., Code § 8-2-1-21 (1974); ALBUQUERQUE, N.M., Code § 8-2-1-24(B) (1974).

138. *See Ochoa*, 2009-NMCA-002, ¶ 18, 206 P.3d at 150 ("The extensive regulation of all manner of driving subjects virtually all drivers to the whim of officers who choose to selectively enforce the traffic code for improper purposes.").

139. *See Whren*, 517 U.S. at 813.

140. United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993).

141. *See id.* ("Hence, while we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring for more serious violations, we may look no further than the court's finding that Trooper Washington had a legitimate basis for stopping the van. We thus must conclude that the stop did not violate the fourth amendment.").

within that frontier.[142] Given that the traffic code is so extensive, under *Whren*, police officers may act arbitrarily and without justification for an investigation that is the actual motivation for a traffic stop.[143] There is therefore little difference between the use of pretext and a writ of assistance, which the drafters of the Fourth Amendment aimed to prohibit.[144]

C. The Law in Other States

Whren has been followed or adopted as state law in nearly every state.[145] However, the state of Washington has taken an approach similar

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142. *See id.* (finding that a stop was reasonable under the Fourth Amendment because of *Whren* despite being less than enthused about the officer's conduct).

143. *See* Janet Koven Levit, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L.J. 145, 168 (1996) (arguing that using a solely objective test circumvents the requirement of reasonable suspicion and thereby undermines the purpose of the Fourth Amendment).

144. *See id.* (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19–44 (Ohio State University Press, 1st Ed. 1969); JACOB. W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20, 31, 33–36 (The John Hopkins University Press, 1966); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 412 (1974); Payton v. New York, 445 U.S. 573, 583–84 (1980); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 254–56 (1989)).

145. *See* Jones v. Sterling, 110 P.3d 1271 (Ariz. 2005); State v. Harmon, 113 S.W.3d 75 (Ark. 2003); People v. Letner, 235 P.3d 62 (Cal. 2010); People v. Rodriguez, 945 P.2d 1351 (Colo. 1997); State v. Jones, 966 A.2d 277 (Conn. App. Ct. 2009); Russell v. United States, 687 A.2d 213 (D.C. 1997); Hilton v. State, 961 So. 2d 284 (Fla. 2007); Gonzalez v. State, 683 S.E.2d 878 (Ga. Ct. App. 2009); State v. Torres, 222 P.3d 409 (Haw. Ct. App. 2009); Anderson v. Spalding, 50 P.3d 1004 (Idaho 2002); People v. Bartelt, 948 N.E.2d 52 (Ill. 2011); Row v. Holt, 864 N.E.2d 1011 (Ind. 2007); State v. Canaan, 964 P.2d 681 (Kan. 1998); Commonwealth v. Kelly, 180 S.W.3d 474, 479 (Ky. 2005); State v. Hunter, 46,194 (La. App. 2 Cir. 4/13/11) 62 So.3d 340, 344; State v. Bolduc, 1998 ME 255, 722 A.2d 44; State v. Williams, 934 A.2d 38, 44 (Md. 2007); Commonwealth v. Lora, 886 N.E.2d 688, 696–697 (Mass. 2008); People v. LaBelle, 732 N.W.2d 114, (Mich. 2007); State v. Krenik, 774 N.W.2d 178, 183 (Minn. 2009); Jones v. City of Ridgeland, 48 So.3d 530, 539 (Miss. 2010); State v. Lane, 937 S.W.2d 721, 723 (Mo. 1997); State v. $129,970.00 in U.S. Currency 2007 MT 148, 161 P.3d 816; State v. Draganescu, 755 N.W.2d 57, 73 (Neb. 2008); Doyle v. State, 995 P.2d 465, 469 (Nev. 2000); State v. McBreairty, 697 A.2d 495, 497 (N.H. 1997); State v. Segars, 799 A.2d 541, 548 (N.J. 2002); People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001); State v. McClendon, 517 S.E.2d 128, 131 (N.C. 1999); State v. Franzen, 2010 ND 244, 792 N.W.2d 533, 536; State v. Mays, 2008-Ohio-4539, ¶ 23, 894 N.E.2d 1204; Dufries v. State, 2006 OK 13, ¶ 8, 133 P.3d 887, 889; Commonwealth v. Chase, 960 A.2d 108, 113 (Pa. 2005); State v. Quinlan, 921 A.2d 96, 106 (R.I. 2007); State v. Wright, 706 S.E.2d 324, 328 (S.C. 2011); State v. Wright, 2010 SD 91, ¶ 12, 791 N.W.2d 791, 795; State v. Saine, 297 S.W.3d 199, 208 (Tenn. 2009); Walter v. State, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000); State v. Applegate, 2008 UT 63, ¶ 17, 194 P.3d 925; State v. Beaure-

to New Mexico, while a Delaware court experimented with rejecting *Whren* but later reverted back to the *Whren* analysis because the state's high court had not ruled on the issue.[146]

1. Delaware Court Rejects *Whren*, but Not for Long

The government in *State v. Heath* urged the Superior Court of Delaware, a trial court, to follow *Whren* and argued that the Delaware Constitution, "like the federal constitution, finds nothing inherently suspect" with pretextual stops.[147] Delaware courts, like New Mexico courts, had abandoned a lock-step approach to interpreting the state constitution's search and seizure provision.[148] The *Heath* court wrote that giving police officers permission to conduct pretextual stops would effectively create a general warrant with which police officers could search and seize almost anyone on the road at any time.[149] General warrants are prohibited by the particularity requirement of article I, section 6, of the Delaware Constitution, so stops that are "purely pretextual" were unconstitutional.[150] *Heath* set out a two-part analysis for courts to determine whether a stop is valid. First is the objective inquiry, or "could have" test: courts decide whether there was probable cause or reasonable suspicion to make the stop.[151] If not, the stop is invalid; if police did have probable cause or reasonable suspicion, courts then turn to the subjective inquiry, or "would have" test: whether there was an unrelated motive for the stop and whether, under the totality of the circumstances, a reasonable officer would have made

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gard, 2003 VT 3, ¶ 8, 820 A.2d 183; Jones v. Commonwealth, 690 S.E.2d 95, 100 (Va. 2010); State v. Sigler, 687 S.E.2d 391, 399 (W. Va. 2009); State v. Popke, 2009 WI 37, ¶ 11, 765 N.W.2d 569; Nava v. State, 2010 WY 46, ¶ 11, 228 P.3d 1311, 1315 (Wyo. 2010).

146. *See* State v. Heath, 929 A.2d 390, (Del. Super. Ct. 2006); State v. Day, 168 P.3d 1265, 1269 (Wash. 2007).

147. *Heath*, 929 A.2d at 397. Article I, section 6 of the Delaware Constitution states that "[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation." DEL. CONST. art. I, § 6.

148. *See* Dorsey v. State, 761 A.2d 807, 814 (Del. 2000) (stating that "The Declaration of Rights in the Delaware Constitution is not a mirror image of the federal Bill of Rights. Consequently, Delaware judges cannot faithfully discharge the responsibilities of their office by simply holding that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in 'lock step' with the United States Supreme Court's construction of the federal Bill of Rights.").

149. *Heath*, 929 A.2d at 402.

150. *Id.*

151. *Heath*, 929 A.2d at 403.

the stop without the unrelated motive.[152] The court applied the two-part analysis to the facts of *Heath* and granted the defendant's motion to suppress.[153]

The *Heath* decision stood alone, however, as the same court decided one year later that the Delaware Supreme Court was better suited to determine whether the Delaware Constitution requires an analysis that differs from federal precedent.[154] In 2011, the court again declined to apply *Heath*; since the Delaware Supreme Court had not held that the state constitution prohibits pretextual stops, the rule from *Whren* controlled.[155]

2. Washington State Rejects *Whren*

The Supreme Court of Washington rejected *Whren* because of a constitutional provision that directly provides a right of privacy and creates a warrant requirement similar to the one New Mexico's courts have found to exist. The Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[156] The use of the term "authority of law" has been taken by the Washington courts to mean that police generally must have a warrant before conducting any search or seizure, with certain narrow exceptions.[157] The Supreme Court of Washington had already taken the principle as far as to hold that sobriety roadblocks are prohibited because the articulable suspicion of criminal activity that would justify a limited seizure of drivers, pursuant to *Terry v. Ohio*,[158] is lacking.[159] The court in *Ladson* stated that the state constitution requires an inquiry into officers' subjective state of mind to determine whether the actual reason for a stop

152. *Id.*

153. *Id.* at 411–12.

154. State v. Darling, 2007 Del. Super. LEXIS 170, *3–4, n. 43, Witham, J. (Del. Super. June 8, 2007).

155. *See* Cohan v. Simmons, 2011 Del. Super. LEXIS 46 (Del. Super. Ct. Jan. 28, 2011).

156. WASH. CONST. art. I, § 7.

157. *See Ladson*, 979 P.2d at 838.

158. 392 U.S. at 30 (approving of what would become known as a "*Terry* stop," holding that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

159. *Ladson*, 979 P.2d at 839.

is justified.[160] In the case of a pretextual stop, the actual reason for the stop is necessarily unreasonable—hence the need for the officer to use a pretextual justification for the stop—so the result is an impermissible "triumph of form over substance."[161] Washington's high court directed lower courts to consider the totality of the circumstances, including an officer's subjective intent and the objective reasonableness of the officer's actions, to determine whether a given stop is pretextual.[162] Officers in the *Ladson* case admitted they had used a traffic violation as merely an excuse to stop the defendant. The underlying reason for the stop was a rumor that the defendant was involved in drug trafficking.[163] Washington's court of appeals had reversed the trial court in light of the U.S. Supreme Court's decision in *Whren*. The Washington Supreme Court reversed and held the evidence seized in the stop should have been suppressed on state constitutional grounds.[164]

D. New Mexico's Reasons for the Exclusionary Rule Support Ochoa

The Fourth Amendment exclusionary rule serves to deter misconduct by police and preserve judicial integrity.[165] In each case, the rule is subject to a cost-benefit analysis that weighs the public interest in finding truth against the "incremental benefit of applying the rule."[166] In contrast, the New Mexico Supreme Court in *State v. Gutierrez* explained that the purpose of the article II, section 10 exclusionary rule is to vindicate an individual's constitutional right, in a particular case, to be free from unreasonable searches and seizures.[167] *Gutierrez* went on to hold that the good-faith exception to the exclusionary rule does not apply in New Mexico.[168] "Surely, the framers of the Bill of Rights of the New Mexico Con-

160. *Id.*

161. *Id.* at 838–39.

162. *Id.* at 843.

163. *See id.* at 836 (summarizing the trial court's finding that "[a]lthough the officers had never seen [defendant] Ladson before, they recognized [defendant] Fogle from an unsubstantiated street rumor that Fogle was involved with drugs."). The trial court found that the officers selectively enforced the traffic laws while on "proactive gang patrol" depending on whether there was potential for gathering of intelligence about other criminal activity. *Id.*

164. *Ladson*, 979 P.2d at 843 (applying the exclusionary rule, noting that "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

165. *Gutierrez*, 116 N.M. at 440, 863 P.2d at 1061 (citing State v. Snedeker, 99 N.M. 286, 657 P.2d 613 (1982)).

166. *Gutierrez*, 116 N.M. at 440, 863 P.2d at 1061.

167. *Id.* at 446, 863 P.2d at 1067.

168. *Id.* at 447, 863 P.2d at 1068.

stitution meant to create more than a code of ethics under an honor system."[169] If the probable cause requirement of article II, section 10 is to be taken seriously, the courts should not allow police to subvert it by complying only in a superficial manner.[170]

E. The Federal Approach Leaves Much to be Desired

Whren's proposed remedy to race-based pretextual stops—equal protection lawsuits—ineffectively deters that type of police misconduct.[171] While under *Ochoa* a defendant could argue pretext during an article II, section 10 suppression hearing, the defendant would likely have to hire a new attorney to pursue an equal protection claim, which could be prohibitively expensive for many defendants.[172] The purpose of raising an argument of pretext is to suppress evidence through the exclusionary rule, the goal of which is, according to federal courts, general deterrence of unreasonable police conduct.[173] The courts should enforce the rule in pretext cases in part because the use of pretext is unreasonable police conduct that should be deterred.[174] It is bizarre to say that intentionally discriminatory traffic stops are reasonable under the Fourth Amendment as long as there is some excuse for the stop, but that a citizen may sue the officer for the very same conduct as a violation of the Equal Protection Clause.[175]

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169. *Id.* at 446, 863 P.2d at 1067 (internal quotation marks and citation omitted).

170. *See* N.M. CONST. art. II, § 10.

171. *See Whren*, 517 U.S. at 813 (stating that the Equal Protection Clause of the Fourteenth Amendment is the appropriate vehicle for deterring racial profiling by police officers).

172. *See* Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000) (arguing for a rule that would exclude at trial evidence obtained in violation of equal protection rights).

173. *See Leon*, 468 U.S. at 906 (stating that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.") (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)); *contra Gutierrez*, 116 N.M. at 446, 863 P.2d at 1067 ("The approach we adopt today focuses not on deterrence or judicial integrity, nor do we propose a judicial remedy; instead, our focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.").

174. *See, e.g.*, *Ochoa*, 2009-NMCA-002, 206 P.3d 143; State v. Albarez, No. 29,468, 2009 WL 6567159 (Ct. App. June 30, 2009) (affirming suppression of evidence based on the defendant's claim of pretext where an officer stopped a vehicle after police received citizen complaints that included an "unspecified allegation that a white Mustang might be involved in drug trafficking," but the officer stopped the vehicle for having a crack in the windshield).

175. *See Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the

As traffic stops are "among the most common encounters regular citizens have with police," it follows that traffic offenses present some of the greatest opportunities for racial profiling and other types of unreasonable and arbitrary police conduct.[176] The use of pretext should be aggressively discouraged. The most effective way to deter the practice is by way of ordinary suppression hearings, not separate lawsuits alone.[177]

F. Ochoa *Created a Tough, Reasonable Test*

The *Ochoa* decision avoids the problems that the U.S. Supreme Court in *Whren* insisted would arise with a prohibition on pretextual stops by shifting the burden to the defendant to prove the use of pretext.[178] A defendant who claims evidence was seized as the result of a pretextual stop has the burden to show that the officer's motive for conducting the stop was a "hunch" and not supported by probable cause or reasonable suspicion under the totality of the circumstances.[179] *Ochoa* set out a non-exhaustive list of factors for courts to consider in determining whether a stop is pretextual.[180] Courts may consider whether a defendant was stopped before being arrested and charged with a separate offense, as with the drug and weapon possession charges filed against Julian Ochoa.[181] Whether the officer complied with standard police practices also is relevant to the analysis. If the officer was in an unmarked car and not in uniform, the stop may be more likely to have been pretextual.[182] The fact that an officer does not typically enforce traffic laws would weigh toward a finding of pretext, as well as whether an officer had some information about a separate offense but did not have reasonable suspicion or probable cause to believe the underlying offense had occurred.[183] Courts also may consider

> the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged

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Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

176. Harris, *supra* note 98, at 289.

177. *See* Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 751 (2004) (describing the difficulties of prevailing in a claim brought under the Equal Protection Clause of the Fourteenth Amendment).

178. *Ochoa*, 2009-NMCA-002, ¶ 40, 206 P.3d at 155-56.

179. *Id.*

180. *Id.* ¶ 41, 206 P.3d at 156.

181. *Id.*

182. *Id.*

183. *Ochoa*, 2009-NMCA-002, ¶ 41, 206 P.3d at 156.

> suspicion arose or violation was committed the stop was made, how many officers were present for the stop; the conduct, demeanor, and statements of the officer during the stop . . . .[184]

Also part of the totality of the circumstances determination are certain characteristics of the driver, testimony by officers about the reason for the stop, and whether the stop was needed for traffic safety.[185] If the defendant can point to facts that add up to show a pretextual motive, then the state assumes a burden to show the stop would have occurred even without the unrelated motive.[186] These totality factors illustrate that the U.S. Supreme Court may have been wrong to assume that determining pretext would require speculation about hypothetical officers, as those factors are mostly objective.[187]

The Fifth Judicial District Court followed *Ochoa* in *State v. Dominguez* by granting a defendant's motion to suppress drugs and drug paraphernalia where a Roswell police detective had stopped the defendant for a seatbelt violation.[188] The officer was the only member of a special investigatory unit aimed at combating violent crimes, and he worked closely with a narcotics unit. He testified that generally, his narcotics investigations arose from consensual encounters or traffic stops.[189] The district court based its finding of pretext on the following circumstances:

> (1) neither Defendant nor his passenger were cited for the seatbelt violation; (2) Detective Mahone was in an unmarked car and not in uniform; (3) enforcement of the traffic code was not "clearly" among the detective's typical duties, nor was he a patrol officer; and (4) although the detective had probable cause to stop the vehicle for the passenger's failure to wear a seatbelt, it was not the real reason for the stop.[190]

The New Mexico Court of Appeals affirmed, declining the state's invitation to "reweigh, rejudge, or reevaluate the detective's subjective motivations for making the stop, or to conclude that an officer's affiliation with a

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184. *Id.*

185. *Id.*

186. *Id.* ¶ 40, 206 P.3d at 155-56.

187. *See Whren*, 517 U.S. at 815 ("While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.").

188. State v. Dominguez, 2010 N.M. App. Unpub. LEXIS 420, at *1 (October 20, 2010).

189. *Id.* at *2–3.

190. *Id.* at *7.

zero tolerance police unit shields an officer's pretexual motives from an inquiry and examination . . . ."[191] *Dominguez* demonstrates that *Ochoa*'s totality of the circumstances test provides a workable way for defendants to suppress evidence obtained as the result of truly pretextual stops.[192]

The *Ochoa* rule, however, does not prevent police officers from conducting reasonable drug investigations. If officers follow the proper procedures, evidence they seize will normally not be suppressed.[193] Consider *State v. Perea*, in which the court of appeals affirmed the conviction of a defendant who claimed the use of pretext when police arrested him for possession of drugs and paraphernalia during a traffic stop.[194] The stop was the result of a drug investigation.[195] Officers arranged a drug buy with the assistance of another suspect who, in exchange for not being arrested, agreed to call the defendant to set up the sale.[196] The informant described the vehicle that the defendant would be driving to the sale. When an officer saw the vehicle, he confirmed that it was the one the informant described—thereby corroborating the informant's tip—and stopped the vehicle.[197] Although the officer witnessed the defendant commit several traffic violations, the court of appeals held the stop was not pretextual because the officer already had reasonable suspicion to investigate further into the drug operation and had stopped the vehicle for that reason.[198]

Similarly, officers looking to investigate suspected drunk drivers are not prohibited from making stops based on observations of traffic violations that themselves add up to reasonable suspicion.[199] For example, in *State v. Flores*, the court of appeals affirmed the aggravated DWI conviction of a defendant who was stopped after an officer saw the defendant's vehicle make a wide left turn, drive above the speed limit, and generally demonstrate a diminished amount of control over the vehicle.[200] The officer had been waiting in a parking lot near a Roswell bar, looking for

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191. *Id.* at *8.

192. *See id.*

193. *See* State v. Perea, No. 30,071, 2010 WL 4161011, at * 1 (Ct. App. May 19, 2010) (affirming the conviction of a defendant who raised the pretext argument pursuant to *Ochoa*).

194. *Id.*

195. *See id.*

196. *Id.* at * 1.

197. *Id.* at * 1.

198. *See Perea*, No. 30,071, 2010 WL 4161011, at * 2.

199. *See, e.g.*, State v. Flores, No. 30,024, 2010 WL 4162294 (Ct. App. May 11, 2010).

200. *See id.* at * 1.

drivers who showed signs of intoxication.[201] Unlike the cases with which *Ochoa* was concerned—where officers use a technical traffic violation to pursue an investigation not based on reasonable suspicion—the erratic driving itself provided reasonable suspicion in *Flores* for police officers to believe the driver was impaired.[202] The court thus characterized the stop as the "opposite of a pretextual stop," as the reason for the stop was also the reason for the citation. The court affirmed the conviction.[203] *Ochoa* thus leaves officers with the discretion to investigate suspected crimes occurring within vehicles while giving real value to the right of the people to be free from arbitrary police conduct.[204]

V. CONCLUSION

State courts are right to follow the advice of former U.S. Supreme Court Justice Brennan by providing a more expansive concept of liberty under their respective constitutions than the U.S. Constitution requires.[205] An increasingly conservative U.S. Supreme Court has advanced an ever-

201. *See id.*

202. *See id.* at * 3.

203. *See id.*

204. *See generally Flores*, No. 30,024, 2010 WL 4162294; *Perea*, No. 30,071, 2010 WL 4161011 (applying *Ochoa* but affirming convictions stemming from traffic stops where police officers followed the proper procedures); *see also Schuster*, No. 32,942 (N.M. July 26, 2012). In *Schuster*, the New Mexico Supreme Court rejected the defendant's argument that the traffic stop leading to his arrest was pretextual and upheld the Motor Vehicle Division's decision to revoke the defendant's driver's license. Police officers had seen the defendant pull into the parking lot of a bar on a motorcycle, which then fell on its side. *Id.* ¶ 3. The officer who then approached the defendant said his purpose in approaching was a "welfare check," which led the supreme court to conclude that the officer was acting as a community caretaker and thus had a proper purpose for the initial *Terry* stop. *Id.* ¶ 35. The defendant, taking on his burden under the second prong of *Ochoa*, argued that the totality of the circumstances indicated pretext: the officer was patrolling primarily as a DWI enforcement officer that night; the officer had taken note of multiple other drunk driving incidents around the same bar; and the defendant argued that the officer never actually saw the defendant driving the motorcycle. *Id.* ¶ 36. The court deferred to the MVD's findings under a substantial evidence standard of review, concluding the defendant had not met his burden to show the officer's underlying motive was unrelated to the community caretaking purpose. *Id.* The court further noted that even if Schuster had met his burden under the second prong of *Ochoa*, the state had met its burden to show an absence of pretext, stating that "[o]bserving Schuster with his motorcycle on the ground certainly gave Karst a motive for approaching Schuster regardless of any pretextual intent—to simply ensure that Schuster was not injured from the fall." *Id.* ¶ 37. The court thus unanimously upheld the license revocation. *Id.*

205. *See* Brennan, *supra* note 6, at 500.

more restrictive view of defendants' rights under the Fourth Amendment.[206] Whether or not the modern federal search and seizure jurisprudence is in fact faithful to the text and intent of the federal constitution, state appellate courts should not simply recite federal reasoning in interpreting their state analogs to the Fourth Amendment.[207] The purposes of the Bill of Rights are different from those of each state constitutional provision, just as the purposes and roles of the federal government and the state governments are different.[208] States have a responsibility to step into the void left by the U.S. Supreme Court both in its minimized judicial reach and limited application of the Fourth Amendment. New Mexico has taken that step in the realm of pretextual traffic stops, at least for now.[209]

206. *See id.* at 495–98 (detailing the U.S. Supreme Court's development of a more restrictive view of Fourth Amendment, Sixth Amendment, equal protection and due process rights starting in the early 1970s).

207. *See generally id.*

208. *Compare* U.S. CONST. art. I–V, with N.M. CONST. art. I–XXIV; *compare also* U.S. CONST. amend. 1–27 with N.M. CONST. art. II.

209. *See Ochoa*, 2009-NMCA-002, 206 P.3d 143.