

\*488 THE LAW OF PRETEXT STOPS SINCE *WHREN* v. UNITED STATES

Celia Guzaldo Gamrath [FN1]  
Iain D. Johnston [FNaa1]

Copyright (c) 1997 by the Illinois State Bar Association; Celia Guzaldo Gamrath, Iain D. Johnston

The United States Supreme Court's decision in *Whren v. United States* effectively abolished the Fourth Amendment argument against pretext stops, i.e., traffic stops based on genuine infractions but conducted for an "improper" police motive. This article explores the impact of *Whren* on federal and state courts and argues that Illinois should take the *Whren* approach.

### I. Introduction

Consider this: A motorist leaves a known drug area and enters the highway, obeying all vehicle laws. A police officer follows the vehicle for 20 miles and then observes the driver change lanes without signaling. The officer stops the motorist for the minor traffic offense and uncovers a bag of narcotics in the driver's lap.

In fact, the officer originally suspected the driver of narcotics possession, but did not have probable cause to arrest until after the stop. The motorist moves to suppress the evidence because of improper police motives. The critical issue is whether the traffic stop was a mere pretext to obtain other evidence without probable cause, and if so, whether such pretext results in an invalid stop and/or subsequent search.

Both federal and state courts have struggled with arguments concerning pretextual traffic stops under the Fourth Amendment to the United States Constitution and its parallel provisions in state constitutions. But recently, in *Whren v. United States*, [FN1] the United States Supreme Court put an end to the confusion under the Fourth Amendment with a holding that rejects the pretext argument and deems irrelevant any inquiry into the officer's subjective motive for making the stop.

This article first defines a pretext stop in the context of constitutional protections afforded by the search and seizure provisions of the federal and Illinois Constitutions. It then describes *Whren* and analyzes the disjointed application of the pretext doctrine among state and federal courts both before and after *Whren*.

Although *Whren* now forecloses challenges based on pretext stops under federal law, the various states, including Illinois, will need to examine the impact of *Whren* on state law decisions. This

article recommends that Illinois courts follow the Whren decision in “lockstep” for challenges of pretext stops under the Illinois Constitution. Finally, the article concludes that the General Assembly need not pass legislation prohibiting pretext stops.

## II. Pretext Stops

A pretext stop or arrest is an objectively valid stop for an improper reason. It occurs where the police employ a stop based on probable cause or reasonable suspicion [FN2] as a device to search for evidence of an unrelated offense for which probable cause is lacking. [FN3] Pretext stops commonly involve citizens traveling in a motor vehicle who are stopped by police for a minor traffic violation just so the officers can investigate drug trafficking or other more serious crimes. [FN4]

Under the pretext doctrine, evidence discovered and seized from a pretext stop or arrest is inadmissible. [FN5] The evidence is excluded to deter police misconduct\*489 and prevent officers from being rewarded for their pretext. [FN6] In 1932, the United States Supreme Court first held that an arrest may not be used as a pretext to search for evidence. [FN7] While supporters of the pretext approach adhere to this view, dissenters contend it is inconsistent with Fourth Amendment objectives to inquire into the underlying subjective intentions of arresting officers.

The Fourth Amendment and its parallel provision, Article I, section 6 of the Illinois Constitution, protect against searches and seizures that are unreasonable. [FN8] “Whether a Fourth Amendment violation has occurred ‘turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time’ and not on the officer's actual state of mind at the time the challenged action was taken.” [FN9] So long as the objective facts and circumstances justify the action taken by police, even an improper state of mind does not invalidate that action. [FN10]

There are three schools of thought governing pretext stops, and each employs its own test. First, there is the subjective test, which examines the actual motive of the officer making the traffic stop. Under this test, if the officer has an improper pretextual motive, such that his or her real intent in stopping the vehicle is to conduct a search, then the stop is unreasonable and invalid from its inception, regardless of any traffic violation. The subjective test clearly supports the pretext doctrine and, in our hypothetical described above, would result in suppression of the evidence.

In contrast, there is the objective test, which looks only to the validity of the stop based on the traffic violation and conducts no inquiry of the officer's motive in making the stop. [FN11] In our hypothetical, so long as the traffic stop was objectively based on a traffic infraction, it is not invalidated even though the officer acted out of a dual motivation. [FN12] The objective test is referred to below as the “could” test because it asks whether the officer could have legally made the stop, notwithstanding any pretext.

The third test is commonly referred to as the “would” test. It provides that the validity of a traffic stop turns on whether a reasonable officer would have stopped the vehicle for the minor traffic violation. Despite reference to the “reasonable officer,” this standard is subjective because it requires the court to consider usual police practices and the officer's actual motive for making the stop. In our hypothetical, the “would” test may or may not result in suppression of the evidence, depending upon the officer's subjective state of mind. Regrettably, many state courts, including Illinois, have interfused the “would” test with the purely objective test and have created a line of cases that confuses the constitutional analysis of pretext stops.

### III. Whren v United States

In a June 1996 decision, the United States Supreme Court addressed the validity of pretext stops under the Fourth Amendment. In *Whren v United States*, [FN13] the Supreme Court unanimously held that where police have probable cause to stop traffic offenders, a pretextual motive cannot invalidate the stop.

On June 10, 1993, plainclothes police officers patrolling a “high drug area” observed a truck with temporary license plates and youthful occupants waiting at a stop sign for more than 20 seconds. When the police headed toward the truck, it turned without signaling at an “unreasonable” speed. The police followed the truck and pulled up alongside it. The officer who approached the vehicle immediately observed two large plastic bags of what appeared to be crack cocaine in Whren's hands. The officer arrested Whren and the other occupants of the truck.

The defendants challenged the legality of the stop and resulting seizure of the evidence on the grounds that the traffic violations were so minor that no reasonable police officer would have made the stop without a pretextual motive. The defendants argued that because the police might use commonly occurring traffic violations as a means of investigating violations of other laws, the Fourth Amendment test for traffic stops should be whether a reasonable officer “would” have stopped the car for the purpose of enforcing the traffic violation.

The Supreme Court rejected the “would” test in favor of the “could” test, which asks whether the officer could have validly made the stop despite a pretextual motive. The Supreme Court reasoned that prior precedent have foreclosed the idea that ulterior motives can invalidate police conduct that is justified by probable cause. The Supreme Court further declared that subjective intentions and actual motivations play no role in a probable cause analysis under the Fourth Amendment.

### \*490 IV. State Case Law Approach to Pretext Stops

#### A. Illinois

Despite the common complaint by defendants of pretext stops, Illinois courts have published only a few cases on the issue and only one has been decided since *Whren*. [FN14] Prior to that,

however, Illinois courts had unartfully combined the “would” test with the purely objective test articulated in *Whren*.

For example, in *People v Alvarez*, [FN15] the court rejected the pretext argument by stating that “the clear trend in Illinois Appellate Court decisions is to determine whether the stop is objectively reasonable.” [FN16] In support, the court cited five appellate court decisions, which purportedly used the objective test. A review of those cases, however, shows that at least two of them used the “would” test, which is indicative of a subjective test or, at best, is a modified objective approach. [FN17]

In *People v Perez*, [FN18] the court first cited the “would” test as a basis for determining whether the stop was invalid as pretextual, but then went on to state that an objectively reasonable stop is not invalid because of the officer's improper motive. The court noted that “[s]o long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional.” [FN19]

Despite the hybrid use of would-and could-type language in Illinois decisions, courts have tended to ignore the subjective component of the “would” test and focus solely on the objective validity of the stop. Almost without exception, courts have concluded that a traffic stop is valid so long as probable cause or reasonable suspicion to stop exists.

In *People v Smith*, [FN20] the court specifically held where a police officer has probable cause to stop a motorist for a traffic infraction, the officer's actions are not to be questioned on the basis of any pretextual intent with which he or she may have acted. The proper focus is on whether there is an objective legal basis to stop the motorist, rather than on the officer's “real intent.”

Similarly, in *People v Assenato*, [FN21] the court held that so long as police lawfully stop a motorist for a traffic violation, pretext is not an issue and should not be considered. [FN22] The test remains the same even where police do not charge the motorist with a minor traffic violation when a more serious offense is discovered. [FN23]

Recently, in *People v Evans*, [FN24] the appellate court departed from this analysis, applying the pretext doctrine in the context of a search incident to arrest. In *Evans*, police stopped the defendant for a routine traffic stop. During the stop, the officer removed a wooden box from inside the defendant's pocket, which the officer suspected contained controlled substances.

The court found that despite the officer's suspicion that the box contained contraband, in the absence of other incriminating evidence, the officer did not have probable cause to take control of the container and search it. The court held that mere suspicion or curiosity is not enough to justify a search, and an officer's authority to investigate a traffic violation may not serve as a pretext to obtain other evidence.

Five months after *Evans* was decided, the Illinois Supreme Court in *People v Bailey* [FN25] implicitly rejected the pretext doctrine in the context of a *Belton* [FN26] automobile search incident to arrest. In *Bailey*, the defendant was charged with a narcotics offense after he was stopped for a license violation. The defendant argued that the search was not incident to his

arrest for the license violation because, prior to the stop, the officer only suspected the defendant of committing a minor traffic violation. The supreme court rejected the defendant's argument, noting that “‘Belton...justifies a search of a vehicle incident to arrest without regard to the nature of the offense supporting the arrest.’” [FN27]

Had Bailey couched his argument in terms of a pretext stop, the court would have rejected his contention on a similar basis; namely, that where the traffic stop is lawful, the officer's actual motive for the stop is not relevant. Logic dictates that if the Evans court had the benefit of the Bailey decision, a different outcome would have resulted.

As stated earlier, only one Illinois case involving pretext stops has been published since Whren. In *People v Thompson*, [FN28] the fifth district appellate court declared that the “would” standard for testing the reasonableness of traffic stops is no longer viable. The court repudiated prior precedents and adopted the purely objective test as defined in Whren. It further held that the subjective intent of police during a traffic stop cannot invalidate an otherwise lawful stop.

The Thompson opinion did not end there, but went on to state that while the validity of a traffic stop is independent of the officer's actual motivations, those motivations are still relevant to issues raised by a pretext stop. The court noted that pretext stops harbor an underlying intent to exceed their original scope. Therefore, once a stop is deemed pretextual, the true mission is to find a legal excuse to justify a warrantless search. The Thompson court concluded that although a pretextual setting does not automatically warrant suppression of the evidence, the pretext itself can be weighed in determining the reasonableness of the search.

## B. Other States

Before Whren, other states had employed the “would” test or even the \*491 purely subjective test. [FN29] However, after Whren, most of those states adopted the Whren analysis and abandoned prior case law that supported the pretext stop argument. Florida, for example, abandoned the “would” test and turned its focus to the purely objective test articulated in Whren. [FN30] This is unsurprising in view of a 1982 amendment to the Florida Constitution requiring that Florida's interpretation of the Fourth Amendment be consistent with the rulings of the United States Supreme Court. [FN31]

After Whren, the states that had already been applying the objective test simply reaffirmed their position that a pretextual motive does not invalidate a traffic stop supported by probable cause or reasonable suspicion. [FN32]

## V. Federal Case Law Approach to Pretext Stops

Until Whren, the federal circuit courts were also divided over the standard to apply when defendants claimed they were stopped based on pretext. [FN33] The eleventh and ninth circuits, for example, used the “would” test or the so-called “usual police practices” test. [FN34] For several years, the tenth circuit also used the “would” test. However, after years of trying to apply

this test and finding it unworkable, the court overruled prior precedent and adopted the purely objective test. [FN35]

The majority of federal circuits [FN36] use the purely objective test. The seventh circuit announced its use of the purely objective test in *United States v Trigg*. [FN37] In *Trigg*, at the time the defendant was initially arrested, the officer discovered he had a suspended driver's license. About six weeks later, the officer saw the defendant exit a known crack house and drive away in a vehicle. The officer ran another check on the defendant's driver's license and discovered it was still suspended. The defendant was stopped for driving on a suspended license.

Prior to the stop, there was insufficient probable cause to arrest the defendant for drug trafficking. However, a search incident to lawful arrest was conducted, and cocaine was found in the defendant's coat pocket. The defendant was indicted on federal drug charges and moved to suppress the evidence.

The seventh circuit court, without the benefit of *Whren*, held that when a defendant claims his or her arrest was based on pretext, the court must use a purely objective inquiry. [FN38] So long as police are doing no more than they are legally permitted and objectively authorized to do, then the arrest meets Fourth Amendment standards and is not unreasonable. [FN39] In *Trigg*, the defendant's arrest was not unreasonable because the officer had probable cause to arrest him for driving on a suspended license. [FN40]

After *Trigg* and before the Supreme Court's *Whren* decision, the seventh circuit repeatedly affirmed its purely objective analysis of pretext stops and arrests. [FN41] Also during this time, several federal and state courts adopted the seventh circuit's reasoning and sound analysis. [FN42] Now that the Supreme Court has spoken on the issue of pretext stops, the question is whether all state courts, including Illinois', are required to follow this approach.

## VI. The Lockstep Approach

The lockstep doctrine provides that state courts, when construing their own constitutions, are bound to follow United States Supreme Court precedent concerning similarly phrased federal constitutional provisions. [FN43] Although Illinois courts are not required to follow the Supreme Court in lockstep, they often do, absent some legitimate, objective reason to interpret similar provisions differently. [FN44]

In *People v Tisler* [FN45] the Illinois Supreme Court affirmed a lockstep approach to search and seizure provisions in the Illinois and federal Constitutions. The court rejected the defendant's contention that Article I, section 6 of the Illinois Constitution provided more expansive protection than the Fourth Amendment. In addressing whether Article I, section 6 should be interpreted more broadly, the court stated:

We must find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our

constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned. [FN46]

Tisler generated strife from various members of the court who opined that state courts need not follow the Supreme Court in lockstep, even in the absence of an expressed intent that parallel constitutional provisions be construed differently. In separate opinions, four justices expressed concern that the majority's adherence to the lockstep \*492 approach needlessly limits the court's power to interpret the Illinois Constitution more expansively than the federal Constitution. [FN47]

Since Tisler, other Illinois courts have wavered on whether to follow the Supreme Court in lockstep when construing comparable constitutional provisions. The only clear line of cases favoring a lockstep approach involves searches and seizures. [FN48] However, in cases concerning free speech, [FN49] jury trials, [FN50] self-incrimination, [FN51] and due process, [FN52] the supreme court has engaged in independent analyses of our constitution, often concluding that state provisions offer broader protection than that enjoyed under comparable federal constitutional provisions.

Most recently, in *People v Washington*, [FN53] the supreme court summarily held it was not bound to follow federal precedents in lockstep in defining due process, despite identical language in the Illinois and federal due process clauses. [FN54] In support, the court relied on *People v McCauley* [FN55] for the blanket proposition that the court is not required to construe our constitution in lockstep with the federal Constitution.

Justice Miller dissented in *Washington*, remarking that his fellow justices erroneously invoked the “flawed decision” in *McCauley*. [FN56] In Justice Miller's view, before distinguishing the language of a state constitutional provision from its corresponding federal provision, the court should first find some concrete basis or expressed intent of the drafters for doing so. Absent some legitimate, objective basis supported by the language of the constitution, the debates, or the convention committee reports, it is unsound not to follow Supreme Court precedent in lockstep. [FN57]

Justice Miller's view is especially poignant in search and seizure cases. After all, the Fourth Amendment to the federal Constitution was the prototype for Article I, section 6 of the Illinois Constitution governing unreasonable searches and seizures. [FN58] Accordingly, there is no sound reason why the two provisions should not receive the same interpretation. Indeed, the courts have done so almost without exception in this area. [FN59]

## VII. A Legislative Response to Whren?

Although the Fourth Amendment analysis is not controlling as to Article I, section 6 of the Illinois Constitution, the Supreme Court's recent decision in *Whren* effectively puts an end to the pretext stop argument in Illinois. To hold otherwise would require the Illinois Supreme Court to abandon prior precedent and analyses that have construed our search and seizure clause in lockstep with the Fourth Amendment.

Realistically, the General Assembly is the only remaining source of authority to expand the protections afforded against pretext stops. [FN60] However, in Illinois, any arguments favoring legislation to prevent pretext stops seem futile given the legal, practical, and policy considerations against such legislation.

The primary argument espoused by supporters of legislation to prohibit pretext stops is that it is necessary to prevent police from acting based on improper motives, including race-based motives. [FN61] However, both the federal and Illinois Constitutions already provide protection against race-based enforcement actions. [FN62] Thus, additional legislation is not required.

The argument that the pretext doctrine promotes the spirit of equal protection and consistent enforcement of the laws is unpersuasive. Advocates for legislation contend that the abolition of the pretext doctrine by the courts would allow police to use any minor traffic infraction as a pretext to search. The argument follows that allowing pretext stops encourages selective enforcement of the laws against minorities or other suspicious classes of motorists. [FN63]

This reasoning is flawed. The pretext doctrine does not immunize any citizen, innocent or suspicious, from the traffic laws. It allows both to be stopped and cited for traffic violations. However, legislation intended to prevent police from conducting pretext stops would actually give more protection against unreasonable searches and seizures to drug traffickers than to inadvertent speeders. This would offend equal protection.

Numerous practical considerations also weigh against adopting legislation prohibiting pretext stops. First, citizens have the ability to avoid pretext stops altogether by simply not violating traffic\*506 laws. Traffic violations, even if common or minor, are still against the law and, therefore, provide police with the requisite probable cause to conduct an investigatory stop.

Second, legislating against pretext stops would increase the difficulties of the job of police by preventing them from apprehending serious crime offenders during lawful traffic stops. Third, legislation that allows inquiry into police motives would be unworkable in practice. On what basis, if not an objective basis, could a court possibly determine the “true” intent of officers when enforcing the law? Applying a subjective test would unquestionably lead to inconsistent results that, at times, would punish police accused of improper motives despite a valid arrest. [FN64]

Finally, even if Illinois passed legislation prohibiting pretext stops, it is still unlikely that drug offenders would receive the protection they seek. Under the dual sovereign doctrine, drug offenders may be prosecuted in federal and state courts without violating double jeopardy. [FN65] Thus, offenders could still be tried in the federal system, where the pretext stop argument has been eliminated. Ironically, these offenders could receive even stiffer sentences under the federal sentencing guidelines, which are more stringent and draconian than the Illinois sentencing scheme.

## VIII. Conclusion

Illinois courts have sometimes used and other times rejected the lockstep approach when analyzing parallel constitutional provisions. However, in the context of unreasonable searches and seizures, the courts have not wavered. The Fourth Amendment proscription against unreasonable searches and seizures is coextensive with the scope of Article I, section 6 of the Illinois Constitution. Accordingly, Illinois courts have consistently applied federal interpretations to our constitutional provision governing searches and seizures.

Moreover, Illinois courts have foreclosed on the idea that our search and seizure clause provides any greater protection than that afforded under the Fourth Amendment. Given this history, there is no reason for the Illinois Supreme Court to depart from the Whren analysis for challenges of pretext stops under the Illinois Constitution.

Still, courts should be particularly cautious in their wording of the proper test in resolving pretext claims. As Whren and Thompson made apparent, there is a distinction between the “would” test and the purely objective test. Fusing the two tests causes an illogical departure from the lockstep approach.

[FN1]. Celia Guzaldo Gamrath is a judicial law clerk to the Honorable Thomas R. Rakowski of the first district appellate court. She received her J.D. cum laude from The John Marshall Law School, where she was a law journal executive editor, and her B.S. in 1991 from Indiana University. She is an adjunct professor at The John Marshall Law School.

[FNaa1]. Iain D. Johnston, a former judicial law clerk to the Honorable Philip G. Reinhard of the United States District Court for the Northern District of Illinois, is currently an assistant Illinois Attorney General. He graduated from Rockford College cum laude in 1987 and from The John Marshall Law School cum laude in 1990.

[FN1]. 517 US 806, 135 L Ed 2d 89, 116 S Ct 1769 (1996).

[FN2]. Stopping a vehicle is justified where an officer has probable cause or reasonable suspicion to believe the driver has committed or is committing a traffic offense. *Terry v Ohio*, 392 US 1, 9, 20 L Ed 2d 889, 88 S Ct 1868, 1874 (1968). See also Ralph Ruebner, *Illinois Criminal Procedure* §1.37 at 1-77 (2d ed 1994).

[FN3]. *United States v Trigg*, 878 F2d 1037, 1039 (7th Cir 1989).

[FN4]. *United States v Guzman*, 864 F2d 1512, 1515 (10th Cir 1988) (drug trafficking); Honorable Daniel T. Gillespie, *Pretextual Stops*, ISBA Traffic Laws & Courts newsletter (January 1996) (drunk driving).

[FN5]. *People v Alvarez*, 243 Ill App 3d 933, 937, 613 NE2d 290, 293 (3d D 1993).

[FN6]. *People v Anderson*, 169 Ill App 3d 289, 294, 523 NE2d 1034, 1037-38 (3d D 1988).

[FN7]. *United States v Lefkowitz*, 285 US 452, 467, 76 L Ed 877, 884, 52 S Ct 420, 424 (1932).

[FN8]. *Scott v United States*, 436 US 128, 137, 56 L Ed 2d 168, 177, 98 S Ct 1717, 1723 (1978); *People v Reynolds*, 350 Ill 11, 182 NE 754 (1932).

[FN9]. *Maryland v Macon*, 472 US 463, 470-71, 86 L Ed 2d 370, 378, 105 S Ct 2778, 2783 (1985), quoting *Scott*, 436 US at 136 (citation omitted).

[FN10]. *Scott*, 436 US at 138.

[FN11]. *Whren*, 116 S Ct at 1774.

[FN12]. *Id.*

[FN13]. 517 US 806, 135 L Ed 2d 89, 116 S Ct 1769 (1996). The Supreme Court reaffirmed its decision in *Whren* in *Ohio v Robinette*, 519 US 33, 136 L Ed 2d 347, 117 S Ct 417 (1996).

[FN14]. *People v Thompson*, 283 Ill App 3d 796, 970 NE2d 1129 (5th D 1996). See also *People v Perez*, Ill App 3d, 681 NE2d 173 (3d D 1997); *People v Orsby*, 286 Ill App 3d 142, 675 NE2d 237 (2d D 1996); *People v Brownlee*, 285 Ill App 3d 432, 674 NE2d 503 (4th D 1996).

[FN15]. 243 Ill App 3d 933, 613 NE2d 290 (3d D 1993).

[FN16]. *Id.*, 613 NE2d at 294.

[FN17]. *People v Guerrieri*, 194 Ill App 3d 497, 551 NE2d 767, 770 (5th D 1990); *People v Mendoza*, 234 Ill App 3d 826, 599 NE2d 1375, 1383 (5th D 1992).

[FN18]. 258 Ill App 3d 465, 631 NE2d 240 (5th D 1994).

[FN19]. *Id.*, 631 NE2d at 245.

[FN20]. 269 Ill App 3d 962, 647 NE2d 310 (4th D 1995).

[FN21]. 186 Ill App 3d 331, 542 NE2d 457 (2d D 1989).

[FN22]. See also *People v Perry*, 204 Ill App 3d 782, 562 NE2d 618 (2d D 1990).

[FN23]. See also *People v Hood*, 265 Ill App 3d 232, 638 NE2d 264 (4th D 1994); *People v Shepherd*, 242 Ill App 3d 24, 610 NE2d 163 (4th D 1993).

[FN24]. 259 Ill App 3d 650, 631 NE2d 872 (2d D 1994).

[FN25]. 159 Ill 2d 498, 639 NE2d 1278 (1994).

[FN26]. *New York v Belton*, 453 US 454, 69 L Ed 2d 768, 101 S Ct 2860 (1981).

[FN27]. Bailey, 639 NE2d at 1281, quoting United States v Arango, 879 F2d 1501, 1506 (7th Cir 1989).

[FN28]. 283 Ill App 3d 796, 670 NE2d 1129 (5th D 1996).

[FN29]. For cases employing the “would” test, see Kehoe v Florida, 521 So2d 1094, 1097 (Fla 1988); State v Tate, 430 SE2d 9, 10-12 (Ga App 1993); Maine v Izzo, 623 A2d 1277, 1280-81 (Me 1993); North Carolina v Morocco, 393 SE2d 545, 547 (NC App 1990); Ohio v Spencer, 600 NE2d 335, 337 (Ohio App 1991); Limonja v Virginia, 375 SE2d 12, 13 (Va App 1988); Minnesota v Everett, 472 NW2d 864, 867-68 (Minn 1991). Cf Miller v State, 868 SW2d 510, 511 (Ark App 1993) (cites objective test cases, but uses “would” test); State v Bolosan, 890 P2d 673, 681 (Hi 1995) (unique hybrid test); Cf New York v Camarre, 569 NYS2d 223, 224 (NYAD 1991) (uses pure subjective test).

[FN30]. Compare State v Daniel, 665 So2d 1040 (Fla 1995), with Petrel v State, 675 So2d 1049 (Fla App 1996), State v Corvin, 677 So2d 947 (Fla App 1996). See also Gama v Nevada, 920 P2d 1010, 1013 (Nev 1996) (court followed objective test detailed in Whren).

[FN31]. Fla Const Art I, Sec 12; but see State v Holland, 680 So2d 1041 (Fla App 1996) (hesitant to use objective test without word from Florida Supreme Court).

[FN32]. State v Finowski, No 17481, 1996 WL 366006 (Ohio App July 3, 1996); State v Scott, 926 SW2d 864 (Mo App 1996); State v McCall, 929 SW2d 601 (Tex App 1996); State v Storbakken, 552 NW2d 78 (ND 1996); State v Predka, 555 NW2d 202 (Iowa 1996); State v Vineyard, Nos 03C01-9502-CR-00052, 00053, 1996 WL 400518 (Tenn Crim App July 18, 1996).

[FN33]. Cummins v United States, 502 US 962, 116 L Ed 2d 448, 112 S Ct 428 (1991) (White, J., dissenting from denial of writ of certiorari).

[FN34]. United States v Smith, 799 F2d 704, 709 (11th Cir 1986); United States v Cannon, 29 F3d 472, 474-76 (9th Cir 1994).

[FN35]. United States v Botero-Ospina, 71 F3d 783, 787 (10th Cir 1995) (en banc), overruling United States v Guzman, 864 F2d 1512, 1517 (10th Cir 1988).

[FN36]. United States v Johnson, 63 F3d 242, 245-47 (3d Cir 1995); United States v Jeffus, 22 F3d 554, 557 (4th Cir 1994); United States v Causey, 834 F2d 1179, 1184 (5th Cir 1987); United States v Ferguson, 8 F3d 385, 391 (6th Cir 1993); United States v Cummins, 920 F2d 498, 500-01 (8th Cir 1990); United States v Mitchell, 951 F2d 1291, 1295 (DC Cir 1991).

[FN37]. United States v Trigg, 878 F2d 1037 (7th Cir 1989).

[FN38]. Id at 1040-41.

[FN39]. *Id.* at 1041.

[FN40]. *United States v Trigg*, 925 F2d 1064, 1065 (7th Cir 1991).

[FN41]. *United States v Willis*, 61 F3d 526, 530 (7th Cir 1995); *United States v Woody*, 55 F3d 1257, 1268 (7th Cir 1995); *United States v Fiala*, 929 F2d 285, 287-88 (7th Cir 1991); *United States v Rivera*, 906 F2d 319, 321-22 (7th Cir 1990); *United States v Hope*, 906 F2d 254, 258 (7th Cir 1990).

[FN42]. *Ferguson*, 8 F3d at 391; *People v Haney*, 480 NW2d 322, 324 (Mich App 1991); *Scarborough v State*, 621 So2d 996, 1005 (Ala Crim App 1992).

[FN43]. *People v Levin*, 157 Ill 2d 138, 159, 623 NE2d 317, 327 (1993). For an in-depth analysis of the Illinois lockstep approach, see Thomas B. McAfee, *The Illinois Bill of Rights And Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 SIU L J 1 (Fall 1987).

[FN44]. *People v Mitchell*, 165 Ill 2d 211, 650 NE2d 1014, 1017-18 (1995); *People v Washington*, 171 Ill 2d 475, 665 NE2d 1330 (1996).

[FN45]. 103 Ill 2d 226, 469 NE2d 147 (1984).

[FN46]. *Id.*, 469 NE2d at 157.

[FN47]. In *Tisler*, Justice Ward concurred in a separate opinion, Justice Clark specially concurred, and Justice Goldenhersh dissented. He was joined by Justice Simon. For a more complete discussion of the separate opinions filed in *Tisler*, see *People v Williams*, 182 Ill App 3d 598, 538 NE2d 564, 602 (1st D 1989) (Pincham, J., dissenting).

[FN48]. *Tisler*, 469 NE2d at 157; but see Note, *United States v Leon & Illinois v Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U Ill L Rev 311.

[FN49]. *People v DiGuida*, 152 Ill 2d 104, 604 NE2d 336, 338 (1992).

[FN50]. *People v Duncan*, 124 Ill 2d 400, 530 NE2d 423, 427 (1988).

[FN51]. *People v Smith*, 93 Ill 2d 179, 442 NE2d 1325, 1329 (1982).

[FN52]. *People v McCauley*, 163 Ill 2d 414, 645 NE2d 923, 937 (1994); *People ex rel. Burris v Ryan*, 147 Ill 2d 270, 588 NE2d 1023, 1027 (1991); *Rollins v Ellwood*, 141 Ill 2d 244, 565 NE2d 1302, 1316 (1990).

[FN53]. 171 Ill 2d 475, 665 NE2d 1330 (1996).

[FN54]. *Id.*, 665 NE2d at 1335.

[FN55]. 163 Ill 2d 414, 645 NE2d 923 (1994).

[FN56]. Washington, 665 NE2d at 1341-42 (Miller, J., dissenting).

[FN57]. Id.

[FN58]. People v Reynolds, 350 Ill 11, 182 NE 754 (1932); People v Long, 208 Ill App 3d 627, 567 NE2d 514 (1st D 1990), cert. denied, 137 Ill 2d 669, 571 NE2d 153 (1991).

[FN59]. People v Beasley, 206 Ill App 3d 112, 563 NE2d 1113 (1st D 1990); People v Reincke, 84 Ill App 3d 222, 405 NE2d 430 (5th D 1980); People v Estrada, 68 Ill App 3d 272, 386 NE2d 128 (2d D 1979).

[FN60]. The Nevada Supreme Court has deferred this issue to its legislature. See Gama v Nevada, 920 P2d 1010, 1013, n3 (Nev 1996).

[FN61]. See Whren, 116 S Ct at 1773; Vineyard, 1996 WL 400518, at \*3.

[FN62]. US Const Amend XIV; Ill Const Art I, Sec 2.

[FN63]. See State of Utah v Lopez, 873 P2d 1127, 1139-40 (Utah 1994).

[FN64]. People v Anderson, 169 Ill App 3d 289, 295, 523 NE2d 1034, 1038 (3d D 1988), citing 2 W. LaFave, Search & Seizure §5.2(e) at 459 (2d ed 1987) (questioning whether it is within the ability of judges to accurately determine the subjective intentions of police).

[FN65]. Heath v Alabama, 474 US 82, 88, 88 L Ed 2d 387, 106 S Ct 433, 437 (1985).

85 ILBJ 488

END OF DOCUMENT