State of New York

Court of Appeals

The People of the State of New York,
v.
Jerry Glenn
—»«—
The People of the State of New York,
v.
Patrick Reynolds
—»«—
The People of the State of New York,
v.
Frank Robinson

Brief of the
New York State Defenders Association, *Amicus Curiae*

NEW YORK STATE DEFENDERS ASSOCIATION
194 Washington Ave, Suite 500
Albany, NY 12210
(518) 465-3524
(518) 465-3249 *facsimile*

HARRINGTON & MAHONEY
1620 Statler Towers
Buffalo, New York 14202
(716) 853-3700
(716) 853-3710 *facsimile*
(Mark J. Mahoney, *Counsel,*
Attorneys for *Amicus* New York
State Defenders Association)

September 7, 2001

Contents

Table of Authorities

Cases

Other Authorities

Interest of *Amicus*

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1300 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems.

New York State contractually obligates NYSDA, through its Public Defense Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, the Association has issued numerous reports identifying problems in the state's public defense system.

The Court of Appeals has granted NYSDA amicus curiae status in a number of important cases dealing with the rights of criminal defendants. Some of the cases in which NYSDA has filed amicus briefs include: *People v. Young*, 94 N.Y.2d 171 (1999); *People v. Garcia*, 92 N.Y.2d 726 (1999); *People v. Romero,* 91 N.Y.2d 750 (1998); *People v. Grant*, 91 N.Y.2d 989 (1998); *People v. Burdo,* 91 N.Y.2d 146 (1997); *People v. Knowles*, 88 N.Y.2d 763

(1996); *People v. Ford*, 86 N.Y.2d 397 (1995); *People v. McKiernan*, 84 N.Y.2d 397 (1994); *Matter of King v. N.Y.S. Div. of Parole*, 83 N.Y.2d 788 (1994); *People v. Van Pelt*, 76 N.Y.2d 156 (1990); *People v. Alzarez, et al.*, 70 N.Y.2d 375 (1987); *People v. Seaberg*, 74 N.Y.2d 1 (1989); *People v. Pollenz*, 67 N.Y.2d 264 (1986) and *People v. Bigelow*, 66 N.Y.2d 417 (1985); *People v. Hartley*, 65 N.Y.2d 703 (1985); *People v. Smith*, 63 N.Y.2d 41 (1984).

This case raises important questions about the scope of police powers and the rights of our citizens to privacy. This case also raises important questions about the role of the courts of New York State in determining such questions in the context of our federal system. The New York State Defenders Association has a long history of interest and advocacy concerning these questions, in this Court and others, as do its members. Since the disposition of the cases now before the Court depends, in our view, on principles beyond the focus of the parties to this case, and since a decision in this case based on the analysis of the several district attorneys would have consequences far beyond this case, we have sought permission to appear as *Amicus Curiae* on behalf of the position of the defendants in each appeal.

Summary of the Argument

This case involves the setting of boundaries between the police and citizen: Where do the police powers end and the rights of citizens to privacy begin? The pretext search cases present fundamental choices about where that boundary should lie. Thus, the parties before the court properly focus upon the relative "scope of protection" from police seizures resulting under the New York decisions to this point that have barred evidentiary use of the fruits of "pretext" vehicle stops, and that resulting under the approach of the United States Supreme Court in *Whren v. United States.* Our focus, as *amicus*, is less on the relative "scope of protection" of each approach *per se*, and more on other jurisprudential concerns that should also weigh in the Court's state constitutional determinations under Article I § 12.

These "pretext" cases illustrate the need for constitutional search and seizure rules which reserve for the citizen a zone of privacy that comports with "reasonable expectations of privacy." The danger is that the police can comply with objective rules relating to "reasonable suspicion" for traffic stops, and yet selectively and invidiously exercise their powers in myriad ways. This can do extensive damage the social fabric, especially because "pretext stops" affect the innocent far more often than they affect people actually committing offenses in addition to a

traffic violation.

This case is not just about the boundaries set for the police, but about the manner in which our courts adjudicate these boundaries. After all, even the Supreme Court, in *Whren v. United States*, did not condone police searches and seizures conducted on a pretext basis. It expressly *disapproved* of searches motivated by perceptions about race. But, without any real analysis of the problem, the Court held that such arbitrary actions by the police could not be addressed under the Fourth Amendment. The holding in *Whren* was instead dictated by the Court's previous decisions that had precluded consideration of the subjective motivations of the police in determining the admissibility of seized evidence in a variety of contexts. Thus, while pretext searches are not *condoned* in the federal courts, *Whren* effectively tolerates and even encourages them by confining judicial inquiry to the objective circumstances of the disputed traffic stop. In contrast, in a longer history of correlative cases, New York has consistently permitted courts to inquire into the subjective motivations of the police. Therefore, in reality, the arguments by the People, in the cases now before the Court, are necessarily calling into question this *entire line of New York cases*. As much as the Supreme Court, in *Whren*, found itself constrained by its line of cases taking an opposite stance, this Court should be guided by its prior decisions.

This case is also about the function actually served by pronouncements of the Court of Appeals on these constitutional questions: is the function of constitutional

rule-making, in the area of criminal law, to protect citizens by guiding the police in their actual compliance with these boundaries, or is it to facilitate *post hoc* adjudication of constitutional claims by those actually arrested? We believe that much of the divergence between this Court and the Supreme Court in the past decades can be accounted for by this Court's preference for the former approach in the adjudication of state constitutional claims. On the other hand, as it has in so many decisions announcing rules inconsistent with our state constitution, the Supreme Court in *Whren v. United States* squarely takes the latter approach.

Point I

New York precedent and the need to preserve the rights of all persons in New York require that police motivations be considered relevant to the constitutionality of searches and seizures

The problem presented by the "pretext search" cases is that legitimate and important privacy interests, and other important social freedoms, cannot be ignored by courts when crafting rules governing police-citizen encounters *especially* in the context of motor vehicle stops. The Supreme Court in *Whren v. United States*, 517 U.S. 806 (1996), acknowledged that its rules for Fourth Amendment enforcement would not protect citizens form intrusions based on race, or other constitutionally impermissible classifications.

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal

Protection Clause, not the Fourth Amendment.

517 U.S. 806, 813. What is the "constitutional basis" for saying that the subjective motivations of police are not the concern of the Fourth Amendment? The Supreme Court never had a better justification for this statement than what it said in *Horton v. California*, 496 U.S. 128, 138 (1990):

> [E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.

The reality is, without lawful motivations, arbitrary (the opposite of "evenhanded") enforcement of the law is guaranteed. Like every component of the criminal justice process, the ulterior motivation of the police officer must be open to meaningful review, and this is a principle that New York courts have consistently adhered to.

New York does better, and must continue to do better, than to write off concerns about arbitrary police intrusions in the context of traffic stops.

A. Precedent dictates the result in these cases

In this case the Court would naturally focus at first on the strong New York precedents disallowing "pretext stops" as the beginning point in its analysis of these cases. But when we begin to compare the New York precedents with the decision in *Whren v. United States*, we find in the latter decision no analysis of the propriety of "pretext stops" in a legal, social, or constitutional sense, and no analysis of the costs and benefits of this law enforcement device, which

would compare with the issues debated in New York cases before and after *Whren*. Instead, we see that, while actually expressing disapproval of "pretext stops," the decision by the Supreme Court was not the product of weighing of competing arguments—whether social, moral, legal or constitutional—about how these police–citizen encounters ought to be regulated.

Instead the decision in *Whren* was simply dictated by the fact that, in numerous cases, dealing with different search and seizure issues over a long period of time, the Supreme Court, with minor exceptions, has decided that it was not going to consider the ulterior motivations of police officers. It was this line of authority, which was not derived from any interpretation of the text or history or "original intent" of the Fourth Amendment, that determined the result in *Whren*. As opposed to a determination of the scope of the Fourth Amendment's protection, *per se*, *Whren* reflects a long-standing choice about the *manner in which* the federal courts would adjudicate Fourth Amendment claims.

And so it is, although conversely, that this Court's decision in these cases should be governed by a longer line of its own precedent, also dealing with different search and seizure issues, in which New York has consistently decided that the motivations of police officers *are relevant* to the reasonableness of the seizure or search, and to the legal remedy of suppression in appropriate cases.

B. New York has a history of inquiring into the ulterior motivations of a police officer who undertakes a search or seizure

Whether in the context of the execution of a warrant, or during a variety of warrantless intrusions, New York has a

history of inquiring into the subjective intent of police officers, quite apart from the many "pretext stop" cases cited by the parties.

1. The "emergency" doctrine

People v. Mitchell, 39 N.Y.2d 173 (1976), involved the "emergency doctrine," which affords law enforcement officials limited privilege to make a warrantless search of a protected area. The Court of Appeals laid out three criteria that must be met in order for the search to be lawful under this doctrine, the second of which is that "the search must not be primarily motivated by intent to arrest and seize evidence." The Court said

> The second requirement is related to the first in that the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding.

People v. Mitchell, 39 N.Y.2d 173, 178.

2. Plain view

In *People v. Love*, 84 N.Y.2d 917 (1994), the drugs and drug paraphernalia found in plain view, was held admissible only after an inquiry was made into the motivation of the officers in entering the room without a warrant, relying on earlier Court of Appeals cases. That is, New York maintains an "inadvertence" requirement for the "plain view" exception to the warrant requirement to apply. This rule itself is expressly designed to prevent the use of otherwise lawful intrusions as a pretext for further unjustified

searching.[1] The law is otherwise in federal courts. See *Horton v. California*, 496 U.S. 128 (1990))(*Horton* is one of those cases that led to the decision in *Whren*, rejecting consideration of "the subjective state of mind of the officer").

3. Stop and Frisk

In *People v. Prochilo*, 41 N.Y.2d 759 (1977), this Court addressed the issue of street searches for weapons. In laying out three factors that must be present in order to justify the search, the Court made an inquiry into the subjective intent of the officer, i.e., "Was there evidence of probative worth that there had been a pretext stop and frisk or that the police were otherwise motivated by improper or irrelevant purpose?" *People v. Prochilo*, 41 N.Y.2d 759, 761-762.

4. Stop to Inquire

In *People v. Hollman*, 79 N.Y.2d 181 (1992), this Court addressed the differences between street encounters labeled as requests for information, in which an officer only needs an articulable reason to briefly ask a person routine questions, and encounters labeled as common-law inquiries, in which an officer needs a suspicion that criminality is afoot. A defining difference between these two encounters

---

[1] Though the "inadvertence" or "non-pretext" requirement has been overlooked, at least once, when the Court made reference to the "plain view" doctrine, *People v. Diaz*, 81 N.Y.2d 106 (1993) (refusing to adopt a "plain touch" exception to the warrant requirement), in neither that case, or the Appellate Division cases in two Departments which have inexplicably repeated the omission, *e.g. People v. Spencer*, 272 A.D.2d 682 (3d Dept.2000); *People v. Batista*, 26 A.D.2d 218 (1st Dept. 1999) was the "inadvertence" issue raised or relevant.

is the motivation of the officer in making the stop. Once the officer's motivation in asking the questions is to investigate some sort of criminal activity, the encounter becomes a common-law inquiry. *People v. Hollman*, 79 N.Y.2d 181,191. (Compare, *Florida v. Bostick*, 501 U.S. 429 (1991))

5. Inventory Search

The officer's motivation is also examined when deciding whether a search of a vehicle or container is truly an "inventory search." *People v. Gonzalez*, 62 N.Y.2d 386, 391 (1984). ("There is nothing in the record to suggest that this [inventory] search was a pretext investigative search rather than routine police procedure."); *People v. D'Abate*, 37 N.Y.2d 922, 923 (1975).

6. Right to counsel

Just to give some perspective, consideration of the subjective state of mind of the police also arises in another area well-defined as one in which this Court has chosen its course in defining textually similar constitutional provisions differently than the federal courts. In *People v. Ermo*, 47 N.Y.2d 863 (1979), police arrested the defendant on an assault charge, then elicited a confession to an unrelated felony murder. This Court upheld the suppression of the confession because it was demonstrated that the motivation of the officers in arresting the defendant was to gain information on the murder, in violation of the New York right to counsel.

o

From this perspective, the challenge to the People in each of the cases before the Court is to demonstrate that this entire line of cases is wrong, or that there exist compelling

reasons, in the case of "pretext stops" alone, to depart from this heavy precedent concerning the adjudication of search and seizure cases in New York under our Constitution.

C. Rules regulating searches and seizures must protect the innocent

The prime fallacy of the arguments we perceive by the People in these cases is to assume that the focus should be on the hypothesis of two offending motorists, each guilty of additional crimes not fully evident to the police, but suspected in the case of one. How can we allow the evidence of contraband found in "plain view" in the case of the arrest by the officer who had no ulterior motive or suspicions, and yet suppress the evidence obtained by the "savvy" officer who suspected that more was going on than bad driving?

The problem with this argument is its beginning point. It starts from the popular misconception that constitutional restrictions on the police are to protect criminals, and that the debate is about the "scope of protection" for criminals. But the restrictions on the state's investigatory powers are, like the restrictions in the prosecutorial function, primarily for the protection of the innocent. These rules simply have to be developed in the cases where criminal charges happened to be founded. As this Court noted in *People v. Elwell*, 50 N.Y.2d 231, 234 (1980) quoting from Justice Douglas' dissenting opinion in *Draper v. United States*, 358 U.S.307, 314 (1959), "A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals."

Instead, the primary test of the validity of the procedural rules regarding searches and seizures must be the

extent to which these rules protect innocent persons from mistaken searches and seizures based on arbitrary or insufficiently founded police action.

To our *amicus* brief to this Court in *People v. Bigelow* we attached a study of search warrants issued by Buffalo City Court city court judges over a ten-year period. It was therein demonstrated that warrants issued solely on the strength of uncorroborated informant information were "completely mistaken" (resulting in the discovery of nothing claimed to be contraband) 22% of the time and "facially mistaken"(seizure of something not described in the warrant, being actual or suspected contraband, *e.g.* "pills") 35% of the time. This error rate was significantly higher than the same measures of mistaken warrants overall (which were 15% to 25.5 % respectively) of mistaken searches over all.

Based on this we argued to the Court that, in ascertaining probable cause based on informers, the more structured inquiry under *Elwell* had to be maintained to protect innocent persons who were being subjected to police intrusions into their homes, often at night. We take the Court's reaffirmance of the *Elwell* standards, in *People v. Johnson*, 66 N.Y.2d 398 (1985) (warrantless searches), the case decided with *Bigelow* and later in *People v. Grimminger*, 71 N.Y.2d 635(1988) (search warrants), as confirmation of the importance, under Art. I § 12, of setting standards that meaningfully protect the innocent from intrusion. As Justice Jackson once wrote:

The "error rate" in police "hunches" is extraordinarily high.

> There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1948) (Jackson, J.,dissenting). In a famous dissenting opinion decrying the subjectivity of "profile" stops by drug agents at airports, one federal judge commented on how this highly criticized practice affects completely innocent people:

> During the suppression hearing, agents Gerace and Allman testified that they spend their days approaching potential drug suspects at the Greater Buffalo International Airport. According to their own testimony, they detained 600 suspects in 1989, yet their hunches that year resulted in only ten arrests. It appears that they have sacrificed the fourth amendment by detaining 590 innocent people in order to arrest ten who are not--all in the name of the "war on drugs". When, pray tell, will it end? Where are we going?

United States v. Hooper, 935 F.2d 484, 500 (1991) (George C. Pratt, Circuit Judge, dissenting).[2]

---

[2] *Accord.:*

> We have no reliable statistical numbers telling us how many innocent people are stopped, questioned, and sometimes searched by law enforcement officers proceeding on little more than intuition. Testimony from drug agents in some airport stop cases, however, shows that only a small percentage of travelers stopped are ever arrested. Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas, 65 B.U.L.REV. 843, 876 & n. 135 (1985). In one case, the district court calculated that the DEA agent involved had arrested only three to five percent of the airport suspects he stopped. *United States v. Moya*, 561 F.Supp. 1, 4

In the New York State Attorney General's report, entitled "The New York City Police Department's 'Stop and Frisk' Practices, A Report to the People of New York from the Office of the Attorney General," (1999), it is reported that 175,000 New Yorkers were interdicted pursuant to a police "stop and frisk" program and nearly 90% of these persons were involved in no criminal activity justifying seizures or arrest.

The "pretext stop" of motorists implicates this very concern, but to a greater degree. "Vehicle stops for traffic violations occur countless times each day . . . ," *New York v. Class*, 475 U.S. 106, 113 (1986) (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 (1979), and "police officers in some jurisdictions have a rule of thumb: The average driver cannot go three blocks without violating some traffic regulation." 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). The result is, as Justice Kennedy later recognized in *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting),

> the practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with [*Maryland v. Wilson*, permitting police to order passengers in a stopped vehicle to exit the vehicle], the Court puts tens of millions of passengers at risk of

---

(N.D.Ill.1981), aff'd, 704 F.2d 337 (7th Cir.1983).

United States v. McKines, 933 F.2d 1412, 1430 (8th Cir. 1991) (Lay, Chief Judge, dissenting)

arbitrary control by the police.

Indeed, every effort to study this situation confirms the high "error" rate in police "hunches" about motorists. We can be certain that reporting of "pretext" vehicle and traffic stops that yield no evidence of criminality is low. And yet based on anecdotal and statistical data and studies, there is every indication that the "pretext" stop of motorists is the least productive of all police interventions, and the tactic most likely to result in the largest number, and the largest percentage, of innocent (except for the traffic offense of the driver) persons.

The report by the New Jersey Attorney General concerning the profile stops on the New Jersey Turnpike revealed that less than 20% of those motorists who were stopped and who were then targeted for "consensual searches" (the overwhelmingly majority of whom were non-white) were found to have contraband. While some might view this as a good success rate, these searches were purportedly based on "reasonable suspicion" after the officers had spoken to the motorist, removed them and passengers from the vehicle and then viewed the interior of the vehicle. *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (April 20, 1999) p. 28 (www.state.nj.us/lps/intm_419.pdf).[3] The data in the

[3] Although repeatedly referring to the evidence developed during the lengthy litigation resulting in the decision in *State v. Soto*, 734 A.2d 350 (N.J. 1996), the Interim Report does not specifically summarize it. In the *Soto* case, Judge Francis found that "the defendants have established a prima facie case of selective enforcement which the State has failed to rebut requiring suppression of all contraband and evidence seized." The data showed that "a black was 4.85 times as likely as a white to be stopped between exits 1 and 3." Unfortunately, the judge did not reach the question of the extent

report is incomplete, and it is limited by the fact that it is based on self-reporting by the police, after proven instances of disappearing records. The report acknowledges that the arrest or seizure rate is low, and typically involved low level offenses. The report also concluded that the arrest and seizure ratio was not reflective of in most cases of effective law enforcement.

In recent testimony before the New Jersey Senate Judiciary Investigation Hearings relating to racial profiling by the State Police, on April 3, 2001,[4] Attorney General John J. Farmer, Jr. revealed revised data indicating that the consent searches were successful only 25% of the time for Whites, only 13% for African Americans, and even less frequently, about 5%, for Hispanic individuals. He found these results to roughly compare with national data from the Bureau of Justice Statistics ("Contacts Between Police and the Public - 1999 National Survey" (BJS March 2001). The hearing produced this telling exchange between Farmer and a New Jersey state senator:

---

to which the police were erroneous in their "hunches" behind these stops.

[4] Accessible on the Internet at http://www.njleg.state.nj.us/nj/Sen Judiciary Committee Hearing on Racial Profiling 4-03-01.pdf

Senator Lynch: So we have a risk of trampling on people's rights with Latinos at 95 percent?

Attorney General Farmer: Ninety-five percent, yes.

Senator Lynch: Blacks at . . . ?

Attorney General Farmer: Eighty-seven percent.

Senator Lynch: -- 87 percent. And whites at?

Attorney General Farmer: Seventy-five percent.

(p. 80)

Most clearly, the New Jersey reports and investigations confirm that the *degree of intrusion* by police officers once a motorist is stopped is affected by the subjective motivations which lead to a pretext stop to begin with.

Thus, for us, the comparison that is most relevant to those stopped pretextually is between the hugely disproportionate numbers of otherwise innocent persons who are subjected to more intense police scrutiny, usually for arbitrary and invidious reasons, compared to those who are stopped and who coincidentally happen to be involved in detectable criminal behavior.

The "cost" of restricting "pretext stops" can be overstated, especially since any valid V&T charge survives (and could possibly be summonsed by mail), and any *suppressed* contraband or illegal weapons seized will not be *returned*, and because there are always alternative means to continue investigating a suspect who is in a motor vehicle. But, based on how little we know about the extent of "pretext stops" in New York that come up "blank," it would be difficult to overstate the individual and social harm arising from the stops and detention of hundreds of thousands of motorists annually based on the mistaken and arbitrary hunches of police officers.

When the reasonable expectation of privacy of these

citizens, including the reasonable expectation that they will not be pulled over for a traffic charge that would ordinarily be overlooked, merely because of the whim of a police officer, is factored into it, it is clear that mere compliance with objective rules for traffic arrests fails to establish every vehicle stop as "reasonable" under Art. I § 12 of the New York Constitution.

D. The reasonableness of the expectation of privacy on the highway

Dismissing evidence of impermissible motivations of police officers from "Fourth Amendment" adjudication, on the grounds that such motivations are relevant to Equal Protection, but not Fourth Amendment rights, is doubly flawed.

First, equal protection principles establish as reasonable the expectation of a member of an ethnic or racial minority, or one gender, or those of a certain age range (or other "cognizable group") that she will not be stopped for a traffic violation of the type under circumstances where a member of the general population would not ordinarily be stopped. The fact that a person enjoys the right to "equal protection" of the laws can only validate for that person the reasonableness of their expectation of equal privacy on the highway.

Second, the problems associated with "pretext" stops are not limited to stops of members of "cognizable groups." *All citizens* have equivalent expectations that the whim or *animus* of a police officer, or an unfounded hunch or stereotype will not give rise to a traffic stop that would not have occurred otherwise. While not damaging in the same way as "racial profiling," the social interest in respect for

law enforcement personnel, and for the law in general, and our fundamental aversion to arbitrary enforcement of the law, render "pretext" stops in this class as pernicious, and as unreasonable, if less susceptible to statistical analysis, as those involving "cognizable groups."

E. The validity of considering the motivations of the police officers

The ulterior motivation of the police officer to take advantage of an objectively or legally valid intrusion for constitutionally unjustified reasons may not only be determinative of whether intrusion actually occurs– especially in the context of motor vehicle "pretext stops"– but also has a significant effect on the intensity and duration of the intrusion. Even the *official* New Jersey reports on the "profile" stops on the New Jersey Turnpike make this point clear.

In other words, the motives of police officers make a tremendous difference in how the traffic laws are enforced against citizens, and in the nature of the encounter when citizens are confronted with law enforcement officers on the highway. It therefore makes a difference whether police officers know that improper motives, however difficult they may be to prove, can be the subject of later judicial inquiry.

The cases cited above illustrate the fact that New York, in its constitutional adjudications, has never foregone review of the motivations of police officers in search and seizure cases. The arguments presented by the state, in the cases now before the Court, fail to demonstrate that there is

any constitutional imperative to reversing this stance. They even fail to establish that this consistent openness to evidence of police motivation is *unwise*.

F. There is no reason to be less receptive to evidence of police motivation in the case of "pretext stops."

Defendants will only infrequently succeed in proving that the stop of the motor vehicle was a "pretext." Indeed, the obvious difficulty in proving pretext will deter most defendants from trying to do so. However, that is hardly a reason to shut the courtroom door to such claims. By keeping those doors open, in fact, we believe that respect for, and the fair administration of, the law will be encouraged. That is to say, the "pretext search" presents just as appropriate an opportunity to inquire into the motivations of the police as any other type of search and seizure.

The state, here, in our view, would have an even more difficult task to somehow distinguish the "pretext stop" from other searches and seizures with respect to the constitutional appropriateness or even simple wisdom of conducting the inquiry into the motivations of the police officer. Because of the huge number of citizens who are exposed daily to such intrusions, and the practically countless objective grounds that might arise "justify" to them, there is perhaps greater reason to inquire into the ulterior motivations of the police in alleged pretext cases than in any other.

Point II

This Court has always strived to protect New York's citizens from arbitrary intrusion by giving clear guidance to police and magistrates about the constitutional boundaries in criminal investigation

If there is one common thread throughout the modern decisions of this Court in the area of criminal law in general, and constitutional criminal procedure in particular, it is that articulated by Judge Wachtler in his concurring opinion in *People v. Fitzpatrick*, 32 N.Y.2d 499, 514-15 (1973) (J. Wachtler, concurring):

> [T]he *application* of standards is so inherently difficult in search and seizure cases (really in the entire criminal area) that we must be certain that the standard at least is clear and unambiguous.

It has been commonplace to discuss the differences between the constitutional pronouncements of this Court and the Supreme Court, in interpreting and applying similarly worded provisions of our respective constitutions, as disagreements about the "scope of protection" afforded by these provisions. Of course, this makes sense as there will be a tremendously different impact on our citizens' lives if this Court were to reject New York precedent in favor of the federal "approach" to many cases, the present

one included. However, this does not mean that the decisions themselves had primarily to do with the relative "scope of protection" of the New York constitutional rule.

The Court has alternately been chastised for "result-oriented" decision-making in these cases perceived as having created greater "scope of protection," or encouraged to provide some coherent framework with which to justify the different results purely as a matter of constitutional doctrine. *See*, *e.g.* Robert M. Pitler, Independent State Search and Seizure Constitutionalism: the New York State Court of Appeals' Quest for Principled Decision Making, 62 BROOKLYN. L. REV. 1 (Spring 1996). Of course this analysis, whether critical or friendly, or both, and the public debate within the Court about its methodology in independent state constitutional adjudication, raise important questions and challenges.

But we believe now, as we did when appearing as *amicus* in *People v. Bigelow*, earlier in the evolution of the "New Federalism," that the validity of this Court's independent pronouncements in the area of criminal procedure have significance, and structure, in dimensions beyond the "results" of individual cases. We believe that these other dimensions also validate, if they did not in fact determine, this Court's adherence, as a matter of state constitutional law, to rules abandoned by the Supreme Court as its membership changed, and this Court's rejection, also as a matter of state constitutional interpretation, of various pronouncements in new areas by the Supreme Court.

One of these dimensions, discussed above, is in the *manner of adjudicating* constitutional claims. New York has long since determined that it would keep its doors open

to arguments, and evidence, concerning the ulterior motivations of police officers. The federal courts have long held otherwise. While this difference is not directly one of "constitutional" doctrine, it has a very broad effect.

But apart from the *manner of adjudicating* constitutional claims, another fundamental dimension to pronouncements in the area of criminal procedure is to establish rules that are of use to those who must apply them where they count. In the area of search and seizure, this is where warrants are issued and warrantless intrusions are undertaken. Significant decisions by this Court in the past decades illustrate that it is an important aspect in New York independent constitutional determinations, and yet it has been overlooked completely by those who have attempted to critique the Court's record in this area.

A. Prior cases show a preference for rules which guide the police, or magistrates issuing warrants

We believe that much of the divergence between this Court and the Supreme Court in the past decades can be accounted for by this Court's preference for rules that protect citizens from arbitrary interference from police and, *at the same time*, actually guide the police and magistrates in their compliance with constitutional boundaries. Conversely, in so many decisions announcing rules inconsistent with its earlier pronouncements and our state constitution, the Supreme Court has merely adopted rules that facilitate the *post hoc* adjudication of constitutional claims, without giving meaningful guidance to police officers.

1. Informer based hearsay

In *Illinois v. Gates*, 462 US. 213 (1983), the Supreme Court abandoned the long-established "two-prong" test for determining probable cause based upon the allegations of an informer, established in *Spinelli v. United States*, 393 U.S. 410 (1969). The majority replaced the familiar "basis of knowledge" and "veracity or reliability" requirements with a vague "totality of the circumstances" approach, asserting that the two-pronged test had become technical, inflexible and rigidly applied.

This left a vague federal standard of review in place of a structured analysis useful to guide police officers acting without warrants and magistrates issuing them. In *People v. Johnson,* 66 N.Y.2d 398 (1985)(warrantless arrest), and later in *People v. Grimminger*, 71 N.Y.2d 635 (1988), this Court reaffirmed the “two-prong” analysis of informer-based probable cause that had been used and developed since *People v. Hendricks*, 25 N.Y.2d 129 (1969), and refined in *People v. Elwell*, 50 N.Y.2d 231 (1980), because the “two-prong” analysis lent a structure to probable cause determinations, guiding magistrates and police officers, yet allowing room to apply common sense to the particular facts of the case. This Court recognized that elimination of a requirement of independent demonstration of these "two prongs" would invite more mistaken intrusions into protected areas than already experienced.

In the abstract, neither case departed from a constitutional requirement of probable cause for a search, but New York preserved a structured inquiry that would assist officers and magistrates in insuring that the factual predicate actually conformed to this standard.

2. "Good faith" and "substantial basis" review

In *People v. Bigelow*, of course, the Court reaffirmed its earlier rejection of the the "good faith exception" to the warrant requirement, rejecting the rule stated by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). The rejection of a "good faith exception" is another example of this Court's emphasis on careful compliance by officers, at the outset, with requirements of probable cause, rather than inviting *post hoc* rationalizations for upholding warrants that fail to meet that standard. While not a "rule" for police officers in itself, the *Bigelow* holding is another example of this Court's refusal to erode incentives for the police to comply with the actual requirements of probable cause.

3. Eyewitness identification

In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court replaced, for federal courts, the due process/independent source analysis, and the *per se* rule of exclusion from *Gilbert v. California*, 388 U.S. 263 (1967) with a test concerned with the "reliability of the identification as a whole" based upon the "totality of the circumstances." In *People v. Adams*, 53 N.Y.2d 241 (1981), this Court rejected the new federal approach and adhered to the previous structure of analysis.

As a result, the message to police remained clear in New York: suggestiveness in identification confrontations would not be tolerated. Under a *post hoc* "totality of circumstances" review, however, federal investigators are free to use suggestive procedures and hope that they can later show that the identification was nevertheless

"reliable," even based on then-unknowable facts.

4. Inevitable discovery

The federal courts adopted an "inevitable discovery" exception that would admit into evidence property intentionally sought through exploitation of illegality, *Nix v. Williams,* 467 U.S. 431 (1984). This encourages the police to take constitutional shortcuts in the obtaining of the evidence, directing their energy and creativity toward hypothesizing alternate means by which the discovery of the same object was "inevitable." This rule is much criticized by commentators because it allows the intentional circumvention of lawful procedures, turning what was initially supposed to be an exception to the exclusionary rule into an exception to the warrant requirement. *Cf.* LaFave, Search and Seizure, § 11.4.

This Court accordingly has determined that evidence derived from an unlawful intrusion may only be admitted where leads to its discovery were found inadvertently and the unlawful intrusion was not the result of the police having intentionally forgone lawful means to obtain the same property. *People v. Knapp*, 52 N.Y.2d 689 (1981); *People v. Payton*, 45 N.Y.2d 300 (1978); *People v. Fitzpatrick*, 32 N.Y.2d 499 (1973); *People v. Stith*, 69 N.Y.2d 313 (1987). The Court found this rule necessary to guide the police and reinforce the need to use constitutional means to obtain evidence.

5. Street encounters

Perhaps no cases better illustrate this Court's historical determination that constitutional rules actually serve to regulate the police-citizen encounter than *People v. Hollman*, 79 N.Y.2d 181 (1992), discussed above at p. 8,

and *People v. DeBour*, 40 N.Y.2d 210 (1976). In these cases the Court has struggled to make clear rules for the police, based on a realistic and sober assessment of the difficulty of their task as well as the privacy interests of our citizens in street encounters.

6. Search of vehicle incident to arrest

In *People v. Belton*, 55 N.Y.2d 49 (1982), this Court limited the search of a vehicle, incident to the arrest of an occupant, to a search of the passenger compartment of the vehicle for evidence related to the crime for which the arrest occurred. By contrast, by virtue of the arrest alone, the Supreme Court would have allowed a "search incident to arrest" of the passenger compartment, without regard to the nature of the offense. *New York v. Belton*, 452 U S. 454 (1981). The latter case removed any restrictions on the police, and exposes what Judge Fuchsberg described as the "illusory expedient of" the "bright line rule" which substitutes "omnibus declaration for particularized analysis of individual cases."

7. Search incident to traffic arrest

Sometimes the choice is whether to provide any limitations at all on the police. New York has maintained restrictions on the police in the scope of the search of a person, and the vehicle incident to a traffic arrest. *People v. Troiano*, 35 N.Y.2d 476 (1974); *People v. Torres*, 74 N.Y.2d 224 (1989). The federal courts, on the other hand, enforce no limitations on the scope of these searches, another "illusory expedient" of a "bright line." *See, United States v. Robinson*, 414 US. 218 (1973); *Michigan v. Long*, 463 U.S. 1032 (1983).

8. Search incident to arrest

In searches incident to arrest unrelated to automobiles, this Court has also declined to interpret the State Constitution's protection against unreasonable searches and seizures as narrowly as the Fourth Amendment is interpreted by the United States Supreme Court. *People v. Smith,* 59 N.Y.2d 454 (1983); *People v. Gokey*, 60 N.Y.2d 309 (1983); *People v. Caldwell*, 53 N.Y.2d 933 (1981). In these areas the Court also strove for clarity of reasons for its rulings allowing searches incident to arrest where the police have reason to fear for the safety of themselves or the public or the loss of evidence of the crime. Although these principles may not be easier to apply than the federal rule, *People v. Smith*, 59 N.Y.2d 454, 460 (Jasen, J., concurring), this Court was unwilling to concede authority to conduct unreasonable warrantless searches by adopting a "bright line" rule simply for reasons of efficiency, a fair characterization by this Court of the federal approach. *Id.* at 457.

B. This court should not deregulate the arbitrary stop of motor vehicles on the pretext of a traffic offense

What the state seeks in these cases is to deregulate the discretion of police officers in New York, to permit them to stop citizens on the highway for invidious, arbitrary, or ulterior purposes, using the existence of a traffic offense as a pretext. While the current rules in New York prohibiting "pretext stops" are not simple to apply (and certainly violations are not easily proven), they remain, if enforced, as a meaningful guide and deterrent to police officers, and an indispensable protection for the hundreds of thousands of

our citizens whose right to privacy in their automobiles is at stake.

By contrast, the choice of the federal courts is to have *no rule* to circumscribe the police discretion to make a traffic stop, and therefore no rule to actively protect the citizen from arbitrary and invidious exercise of this power. This is the same type of "bright line" "rule" which New York has rejected in the past as being illusory— no rule at all, just an open invitation.

The observation we make of New York's precedents in this area is not that our rules aim to make *it easier for the police*, for that would do nothing to accomplish the real mission of a constitutional court. The object is to pronounce rules that the police can understand and reasonably follow, and that also protect the privacy and liberty rights of our citizens.

Conclusion

This court will never be able to set any threshold for approval of police intrusions low enough to satisfy those who recklessly blame the judiciary for perceived failures of law enforcement. The focus of this Court's Article I § 12 jurisprudence has always been clear: to promote the twin goals of effective law enforcement and the protection of New York's citizens from standardless interference by the police.

From our perspective, adherence to New York's precedent in disallowance of "pretext stops" of citizens in motor vehicles is not merely a question of the scope of Art. I § 12 compared to the scope of the Fourth Amendment. It

is also about adherence to deliberate and longstanding jurisprudential choices about how constitutional claims are adjudicated in New York and the usefulness of this Court's pronouncements in implementing the constitutional protections guaranteed to our citizens.

Those "pretext stops" of motor vehicles that actually come to the attention of the courts are but the tip of an iceberg of arbitrary police action which can never be completely eliminated, but which can be regulated. The doors of our courts must remain open to evidence that a police intrusion was impelled by an ulterior motive to achieve by pretext what the constitution would not otherwise allow. And the constitutional pronouncements by this Court should continue to articulate rules that actually guide the police in their encounters with the citizens, not just for the benefit of those who happen to be guilty, but the vast majority who are innocent of any wrongdoing besides a traffic violation that would ordinarily be overlooked.

Respectfully submitted,

Mark J. Mahoney
HARRINGTON & MAHONEY
1620 Statler Towers
Buffalo, NY 14202-3093
(716) 853-3710 (*facsimile)*
(716) 853-3700 (*voice*)
(Attorneys for *Amicus* New York State Defenders Association)

September 7, 2001