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**Criminal Procedure—Pretext in a State of Confusion—The Arkansas Supreme Court Takes a Stand on Pretextual Arrests. *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526, supplemental op. on denial of reh'g, 340 Ark. 318A, 16 S.W.3d 551 (2000), pet. for cert. filed, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-262).**

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CRIMINAL PROCEDURE—PRETEXT IN A STATE OF CONFUSION—THE ARKANSAS SUPREME COURT TAKES A STAND ON PRETEXTUAL ARRESTS. *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526, *supplemental op. on denial of reh'g*, 340 Ark. 318A, 16 S.W.3d 551 (2000), *pet. for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-262).

*Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.*<sup>1</sup>

## I. INTRODUCTION

Few contemporary Fourth Amendment problems present courts with a dilemma knottier than pretextual seizures.<sup>2</sup> Although courts have imposed a legal compromise to settle the conflicting interests of the individual and law enforcement, these stops and arrests endanger that fragile balance by exposing the complex tangle at its root.<sup>3</sup> Further, the law governing these seizures may encourage an unconstitutional focus on race- and class-based biases.<sup>4</sup> The recent *State v. Sullivan* decision<sup>5</sup> challenged the Arkansas Supreme Court to take a fresh look at pretextual arrests, presenting the first occasion to reconsider the issue after a widespread change in the law prompted by the United States Supreme Court's decision in *Whren v. United States*.<sup>6</sup> The court had the

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1. *Arkansas Judiciary Home Page* (visited Aug. 14, 2000) <<http://courts.state.ar.us/>> (quoting AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDGES (1961)).

2. See *Whren v. United States*, 517 U.S. 806, 814 (1996) (acknowledging the evidentiary difficulty of determining an officer's subjective intent); *Hines v. State*, 289 Ark. 50, 55, 709 S.W.2d 65, 68 (1986) ("Claims of pretextual arrest raise a unique problem in the law."). A pretextual seizure, in this context, is "[an officer's] use of a traffic infraction as a subterfuge to . . . investigate . . . an unrelated matter." See *People v. Robinson*, No. 06632, 2000 WL 893383, at \*2 (N.Y. App. Div. July 6, 2000).

3. See *Whren*, 517 U.S. at 816-17 (discussing the balancing of governmental and societal interests implicated by the Fourth Amendment).

4. See Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597 (1999) (commenting on pretextual stops based on racial biases); JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 17.18, at 917 n.212 (3d ed. 2000) (discussing the frequent, and possibly pretextual, stops of suspected drug couriers).

5. See *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526, *supplemental op. on denial of reh'g*, 340 Ark. 318-A, 16 S.W.3d 551 (2000), *pet. for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-262).

6. See *Whren*, 517 U.S. at 813 (holding that the Fourth Amendment requires an objective analysis of probable cause, thus the officer's subjective motivations are irrelevant); Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1026 (1996) (noting that nearly all state courts to consider the issue have followed the federal standard established by

opportunity to join the vanguard of commentators that—disquieted at the prospect of unchecked law enforcement—have encouraged the states to reject *Whren* under their state constitutions.<sup>7</sup> Rather than explicitly rejecting or adopting *Whren*, however, the Arkansas Supreme Court chose an ambiguous middle ground—one several of its justices have charged will cause “considerable confusion” among those bound to enforce the law in Arkansas.<sup>8</sup>

Keeping the fact-intensive nature of the Fourth Amendment in mind, Part II of this note examines the encounter that set the *Sullivan* case in motion. Next, Part III discusses the recent history of pretextual seizures in Arkansas and the federal courts, focusing on the varying standards each developed to meet the unique challenge of pretext. The note also specifically analyzes the standard in Arkansas, closing with a look at other states’ jurisprudence in the area. Part IV then examines the court’s reasoning in *Sullivan*, followed by Part V’s evaluation of the holding’s significance to Arkansas law. Finally, the note suggests that the extensive implications of the *Sullivan* decision warrant a clarification of its ambiguous standard.

## II. FACTS

While driving his Ford Bronco along Highway 65 in Conway, Arkansas on the afternoon of November 18, 1998, Kenneth Andrew Sullivan, a disabled former roofer, attracted the attention of drug interdiction officer Joe Taylor.<sup>9</sup> Officer Taylor, a ten-year law enforcement veteran, clocked Mr. Sullivan driving 40 miles per hour in a posted 35 miles per hour zone.<sup>10</sup> In addition to the excessive speed, Officer

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*Whren* and its progeny).

7. See, e.g., Leary & Williams, *supra* note 6, at 1008. Currently, the state of Washington stands alone in its rejection of *Whren*. See *State v. Ladson*, 979 P.2d 833, 837 (Wash. 1999). The New York Appellate Division, First Department, also rejected *Whren* under state law, but recently overruled its earlier decision and expressly adopted the *Whren* standard. See *Robinson*, 2000 WL 893383, at \*6 (overruling *People v. Martinez*, 667 N.Y.S.2d 247, 248 (N.Y. App. Div. 1998)); see also *infra* note 105 and accompanying text.

8. See *State v. Sullivan*, 340 Ark. 318-A, 318-G, 16 S.W.3d 551, 555 (2000) (Glaze, J., dissenting) (“*Sullivan II*”).

9. See Abstract of Appellant at A-11 to A-12, A-25, A-31, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (No. CR 99-1140). Officer Taylor was assigned at that time to the narcotics section of the Conway Police Department. See *id.* at A-18. He characterized the primary duty of his position to be “find[ing] dope,” although it entailed other work, such as traffic duty, on a daily basis. See *id.*

10. See *id.* at A-13.

Taylor believed that the front “eyebrow” tint on the windshield appeared to be more than the legal five inches in length.<sup>11</sup> Consequently, Officer Taylor decided to stop Mr. Sullivan’s vehicle.<sup>12</sup>

As was typical in this area,<sup>13</sup> the street was heavily congested with traffic, and Mr. Sullivan pulled into a nearby Conoco C-Stop before Officer Taylor had turned on the cruiser’s “blue lights” to stop him.<sup>14</sup> Officer Taylor pulled in behind Mr. Sullivan, who was then out of his Bronco, and, informing him of the reasons for the stop, asked for his driver’s license.<sup>15</sup> Upon examining the license, Officer Taylor, as a narcotics division officer, admittedly recognized the name as someone allegedly involved in drug activity.<sup>16</sup> Officer Taylor testified that he did not recognize Mr. Sullivan by sight, however, and thus, did not initially know whom he was stopping.<sup>17</sup>

Officer Taylor requested proof of registration and liability insurance from Mr. Sullivan, who returned to his vehicle and opened the door to retrieve the paperwork.<sup>18</sup> Officer Taylor then noticed a foot-long roofing hatchet<sup>19</sup>—which he considered a weapon—resting on the floor between the driver’s seat and the door.<sup>20</sup> The officer maintained that he

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11. See *id.* at A-12; see also ARK. CODE ANN. § 27-37-306(b)(1) (Michie Supp. 1999) (regulating the length of windshield tinting, known in the industry as “eyebrow” tinting).

12. See Abstract of Appellant at A-13, *Sullivan* (No. CR 99-1140).

13. See *id.* at A-18.

14. See *id.* at A-13, A-19.

15. See *id.* at A-13, A-20.

16. See *id.* at A-19; see also *State v. Sullivan*, 340 Ark. 315, 317, 11 S.W.3d 526, 527 (2000) (“*Sullivan I*”). The department maintained an “intell [intelligence] file” on Mr. Sullivan, although Officer Taylor testified that he was not aware of the existence of the file before November 18, 1998. See Abstract of Appellant at A-19, *Sullivan* (No. CR 99-1140). He did not explain how he recognized Mr. Sullivan’s name without prior knowledge of the file. See *id.*

17. See *id.* at A-30.

18. See Abstract of Appellant at A-13, *Sullivan* (No. CR 99-1140).

19. This description of the object, used at the trial level, was adopted in the Arkansas Supreme Court’s opinion. See *id.* at A-1 to A-44; *Sullivan I*, 340 Ark. at 315, 11 S.W.3d at 526. During the appeal, however, Mr. Sullivan re-characterized the object as a “hatched hammer” or “hammer/hatchet.” See Brief for Appellee at 11, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (No. CR 99-1140).

20. See Abstract of Appellant at A-13 to A-14, A-20, *Sullivan* (No. CR 99-1140). Officer Taylor testified that: “I considered the roofing hatchet . . . to be a [knife-type] weapon because [it was] sitting right beside him in between the driver’s seat and the door. [It was] not in [a] tool belt. There [was] no other roofing tool paraphernalia sitting there beside it.” See *id.* at A-25. The statute itself defines a “knife”-type weapon as a “bladed hand instrument that is capable of inflicting serious physical injury or death by cutting or stabbing.” See ARK. CODE ANN. § 5-73-120(b)(2) (Michie Repl. 1997).

did not notice that the roofing hatchet was corroded and rusting into the carpet—a condition the Arkansas Supreme Court found significant<sup>21</sup>—until he picked it up from the floor of the vehicle.<sup>22</sup>

Officer Taylor testified that after Mr. Sullivan was unable to locate the required paperwork, he arrested Mr. Sullivan for speeding, improper tint, no proof of registration or insurance, driving an unsafe vehicle, and possession of a weapon—the roofing hatchet.<sup>23</sup> He placed Mr. Sullivan in the back of another officer's cruiser to transport him to the police station<sup>24</sup> and began an inventory search of the vehicle according to department policy.<sup>25</sup> Officer Taylor testified that, during the course of the search, he discovered a black, zippered tote bag under an armrest.<sup>26</sup> He opened the bag, and allegedly found methamphetamine, marijuana, and assorted drug paraphernalia.<sup>27</sup> Subsequently, the State charged Mr.

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21. See *infra* note 128 and accompanying text.

22. See Abstract of Appellant at A-20, *Sullivan* (No. CR 99-1140). The condition of the hatchet became a point of contention during the hearing, as Mr. Sullivan argued that the rust should have indicated that the item was a tool, not a weapon. See *id.* at A-32. The prosecuting attorney countered that the hatchet would have been unable to rust if regularly used as a tool. See *id.* at A-35.

23. See *id.* at A-14, A-24. According to Officer Taylor, Mr. Sullivan admitted that his speedometer cable was broken during their initial conversation. See *id.* at A-14. Due to the broken speedometer, Officer Taylor considered the vehicle unsafe to drive: "He couldn't tell what speed he was driving there." See *id.* at A-16 to A-17.

24. See *id.* at A-14. The weapons charge was a Class A misdemeanor, which required that Mr. Sullivan be fingerprinted and photographed at the station. See *id.* at A-24; see also ARK. CODE ANN. § 5-73-120(d)(2) (Michie Repl. 1997) (designating this offense a Class A misdemeanor); ARK. CODE ANN. § 12-12-1006(a) (Michie Repl. 1999) (requiring Class A misdemeanor arrestees to be immediately processed). Mr. Sullivan never actually left the scene, however, as the traffic was too congested for the officer to exit the parking lot. See Abstract of Appellant at A-15, *Sullivan* (No. CR 99-1140).

25. See Abstract of Appellant at A-14, *Sullivan* (No. CR 99-1140); see also *id.* at A-43 (reproducing the Conway Police Department's policy on inventory searches: "[W]henever a vehicle is . . . taken into the custody or control of [a department officer] . . . said officer shall inventory the passenger compartment of said vehicle . . ."). An inventory search is the post-arrest search of an impounded vehicle. See *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976). Neither probable cause nor a search warrant is required if the officer conducts the inventory search according to standard departmental regulations. See *Opperman*, 428 U.S. at 369; see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE §§ 16.01(A), at 233, 16.02(B), at 234 (2d ed. 1997).

26. See Abstract of Appellant at A-15, *Sullivan* (No. CR 99-1140).

27. See *id.* at A-15. The bag's alleged contents were: "several bundles of suspected methamphetamine ("meth"), a zip-lock bag with ten individually wrapped suspected bags of meth, 27 corners of plastic bags, a small plastic container with suspected marijuana, a zip-lock bag with bag corners inside of it, a plastic container with two bags of suspected meth, two [additional] bags of suspected meth, a plastic tube with white powdery residue in it, a wood handled knife with white powdery residue on the ends, a red-colored metal plate, and a purpled [sic] colored straw." See *id.*

Sullivan with three drug-related felonies, weapon possession, and speeding;<sup>28</sup> he was never charged for his failure to provide proof of insurance or registration.<sup>29</sup>

On March 4, 1999, Mr. Sullivan filed a motion to suppress the drugs and drug paraphernalia, arguing that he was arrested only as a pretext to search his vehicle for drugs.<sup>30</sup> On August 2, 1999, the trial court held a hearing on the motion, with Officer Taylor as the sole witness, and after overnight deliberation granted Mr. Sullivan's motion to suppress.<sup>31</sup> Although the trial court found that Mr. Sullivan's excessive speed justified the initial stop—and that the roofing hatchet fit the statutory definition of a “knife”-type weapon<sup>32</sup>—it ruled that his subsequent arrest was motivated by Officer Taylor's suspicion of drug activity and was thus pretextual, warranting suppression of the evidence.<sup>33</sup>

On November 12, 1999, the State filed an interlocutory appeal of the ruling; the sole question was whether the trial court erred in suppressing the evidence.<sup>34</sup> On February 10, 2000, the Arkansas Supreme Court unanimously upheld the ruling of the trial court.<sup>35</sup>

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28. See *Sullivan I*, 340 Ark. at 316-17, 11 S.W.3d at 527; Abstract of Appellant at A-1 to A-2, *Sullivan* (No. CR 99-1140).

29. See *Sullivan I*, 340 Ark. at 317, 11 S.W.3d at 527; Abstract of Appellant at A-1 to A-2, *Sullivan* (No. CR 99-1140). The State charged Mr. Sullivan with the felonies of possession of methamphetamine with intent to deliver, attempt to manufacture, and possession of drug paraphernalia. See *Sullivan I*, 340 Ark. at 316-17, 11 S.W.3d at 525.

30. See Abstract of Appellant at A-3, *Sullivan* (No. CR 99-1140). Evidence seized from a defendant in violation of the Fourth Amendment is inadmissible in the subsequent criminal trial. See *DRESSLER*, *supra* note 25, § 5.04(B), at 73; *Mapp v. Ohio*, 367 U.S. 643 (1961).

31. See *Sullivan I*, 340 Ark. at 317, 11 S.W.3d at 527. The hearing was held in the Faulkner County Circuit Court, with the Honorable Charles E. Clawson, Jr. presiding. See Brief for Appellant at cover, *Sullivan* (No. CR 99-1140).

32. See *id.* at A-39, A-41; see also *supra* note 20 and accompanying text.

33. See Abstract of Appellant at A-39, *Sullivan* (No. 99-1140). Although Officer Taylor had testified that he “would of [sic] probably took him down to the station there and had his vehicle towed in,” even if he had not found the hatchet, the court found that the officer chose to physically arrest Mr. Sullivan because of his knowledge of narcotics division intelligence. See *id.* at A-24 to A-25, A-39. In addition, the court found that: “[T]he weapons charge, I think, was just added to that. And I don't believe that in this particular instance that . . . was appropriate . . .” See *id.* at A-39 to A-40.

34. See Brief for Appellant at cover, *Sullivan* (No. CR 99-1140); Brief for Appellee at 4, *Sullivan* (No. CR 99-1140). Originally filed with the Arkansas Court of Appeals, the appeal was subsequently certified to the Arkansas Supreme Court. See Brief for Appellee at 4, *Sullivan* (No. CR 99-1140); see also ARK. R. APP. P. CRIM. 3(a) (designating that interlocutory appeals of trial court orders suppressing evidence, when taken by the State, fall within the Arkansas Supreme Court's jurisdiction).

35. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 528.

One week after the opinion was handed down, the State filed a Petition for Rehearing, arguing that the court had made “a significant error of law” by its failure to analyze the appeal under controlling precedent of the United States Supreme Court.<sup>36</sup> The State grounded this argument on the United States Supreme Court’s decision in *Whren v. United States*,<sup>37</sup> a case neither party had previously argued or cited.<sup>38</sup> The State asserted, for the first time, that *Whren* “expressly eliminated the concept of ‘pretext’ from Fourth Amendment analysis in cases involving vehicle stops.”<sup>39</sup> The State further contended that the Arkansas Supreme Court had relied upon *Whren* in deciding two previous cases, and thus, according to its own precedent, had applied the wrong standard in suppressing the evidence on the basis of pretext.<sup>40</sup>

A sharply-divided court denied rehearing on May 18, 2000.<sup>41</sup> Factually distinguishing *Whren* from the *Sullivan* case, the court reiterated its previous holding, again finding the arrest pretextual under the circumstances.<sup>42</sup> The dissenting Justices countered that Arkansas statutes and established case law, as well as the clear applicability of the *Whren* precedent, would dictate a contrary result.<sup>43</sup>

The following day, May 19, 2000, the State filed a motion to recall the mandate issued to the trial court, explaining that it intended to file a petition for writ of certiorari to the United States Supreme Court.<sup>44</sup> The motion not only asserted that the court had plainly erred in its interpretation of *Whren*,<sup>45</sup> but that it had seriously overstepped its authority over the United States Constitution.<sup>46</sup> Without comment, the

36. See Petition for Rehearing at 1, 4, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (No. CR 99-1140).

37. 517 U.S. 806 (1996). See discussion *infra* Part III.B.

38. See *Sullivan II*, 340 Ark. at 318-D, 16 S.W.3d at 551.

39. Petition for Rehearing at 2, *Sullivan* (No. CR 99-1140).

40. See *id.* at 2-3. The petition cited *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), and *Burriss v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). See *id.*

41. See *Sullivan II*, 340 Ark. at 318-A, 16 S.W.3d at 550. Justices Glaze, Imber, and Smith dissented and would have granted rehearing. See *id.* at 318-D, 16 S.W.3d at 553 (Glaze, J., dissenting).

42. See *id.* at 318-C, 16 S.W.3d at 553.

43. See *id.* at 318-F to 318-G, 16 S.W.3d at 555 (Glaze, J., dissenting). Lamenting the majority’s failure to overturn the trial court, Justice Glaze predicted the decision would “generate considerable confusion among the rank and file of law enforcement, the bench, and the bar alike.” See *id.* at 318-G, 16 S.W.3d at 555 (Glaze, J., dissenting).

44. See Motion to Recall Mandate at 3, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (No. CR 99-1140). The State planned to request a summary reversal of the decision. See *id.*

45. See *id.* at 2 (“The Court misapprehended the scope of *Whren*’s Fourth Amendment holding with respect to pretext, as to either a vehicle stop or an arrest.”).

46. See *id.* at 2-3 (“The Court seems to have mistaken its power to interpret state

Arkansas Supreme Court granted the motion to recall the mandate, and the State filed a petition for writ of certiorari on August, 16, 2000.<sup>47</sup>

### III. BACKGROUND

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>48</sup> For nearly one hundred years, this broadly written amendment remained “largely unexplored territory.”<sup>49</sup> The last fifty years, however, have produced “billions of words of interpretative text” from the United States Supreme Court and lower courts, which make the Fourth Amendment a contradictory—and often confusing—area of constitutional law.<sup>50</sup>

Much of the confusion results from the myriad of exceptions, qualifications, and reversals peppering the landscape of the Fourth Amendment—a consequence of judicial disagreement on the principles that should govern interpretation in this area.<sup>51</sup> The inherent contradictions within the body of search and seizure law have led to a pendulum-like swing between two competing, and equally important, interests: a free society’s need for privacy versus the requirements of effective law enforcement.<sup>52</sup>

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law more broadly than the Supreme Court interprets federal law for a power to do the same when the Court interprets federal law.”). The State also professed its confidence that this error warranted granting of the writ and a summary reversal by the United States Supreme Court, where the “misapplication of *Whren* alone” might not. *See id.* at 2.

47. *See* Order of June 8, 2000, *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (No. CR 99-1140); 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-262). Mr. Sullivan’s brief in opposition to the petition for certiorari contended that: (1) the Arkansas Supreme Court’s decision rested on adequate and independent state grounds; (2) *Whren* was clearly distinguishable and thus, inapplicable; and (3) in the alternative, certiorari should be granted to evaluate the case in light of *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (June 26, 2000) (argued Dec. 4, 2000). *See* Brief in Opposition, *Arkansas v. Sullivan* (No. 00-262) (Nov. 29, 2000) at 10-13, 17.

48. U.S. CONST. amend. IV.

49. *See* JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 49 (1966).

50. *See* DRESSLER, *supra* note 25, § 5.01, at 68.

51. *See* LANDYNSKI, *supra* note 49, at 264.

52. *See* LANDYNSKI, *supra* note 49, at 264-65.



### A. The Problem of Pretext

The headlong collision of the law governing traffic stops with the exceptions to the warrant requirement has created a unique Fourth Amendment dilemma.<sup>53</sup> Once police have probable cause to believe a traffic violation has occurred—no matter how minor—they may stop the vehicle.<sup>54</sup> Once the vehicle is stopped, the circumstances that arise and furnish probable cause to search are incalculable and “often unforeseeable.”<sup>55</sup>

As one commentator has noted: “[i]nnumerable cases involve traffic stops ripening into something more serious.”<sup>56</sup> For example, a driver exiting his vehicle may appear to be armed, thereby justifying a *Terry* frisk.<sup>57</sup> Alternatively, the officer may spot a weapon or drugs in plain view, leading to the seizure of the contraband and the arrest of its owner.<sup>58</sup> In short, many commentators argue, law enforcement has taken advantage of this interplay to target certain groups, subjecting “suspicious” looking individuals to lengthy interrogations and, frequently, arrests.<sup>59</sup> Thus, a pretextual seizure may take the form of a

53. See Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416 (2000) (“Current law effectively permits officers to search the car of any person they observe committing a traffic offense.”). As a general matter, when the police have probable cause to believe that a traffic violation has occurred, the decision to stop a car is reasonable. See *Whren v. United States*, 517 U.S. 806, 810 (1996).

54. See Oliver, *supra* note 53, at 1414 (“The [pretextual stop] provides the first link in the Fourth Amendment chain that the officer hopes will lead to the discovery of contraband.”).

55. See HALL, *supra* note 4, § 17.5, at 897 (quoting *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970)).

56. See *id.* § 17.5, at 897.

57. See HALL, *supra* note 4, § 17.5, at 897 (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)). An officer may perform a limited search, i.e. a pat down, when he has a reasonable suspicion that the suspect may be armed and presently dangerous. See WAYNE LAFAYE ET AL., CRIMINAL PROCEDURE § 3.8(e), at 249 (2d ed. 1999).

58. See *Whren v. United States*, 517 U.S. 806 (1996). The traffic stop is regularly used in connection with a “drug courier profile.” See HALL, *supra* note 4, § 17.18, at 917 n.212. After stopping a vehicle based on a “compilation of characteristics” believed to identify a drug courier, the officer will then look for contraband in plain view and ask questions in an attempt to form reasonable suspicion for a more thorough search. See *id.* § 17.18, at 917-18.

59. See HALL, *supra* note 4, § 22.17, at 17-18. The Tenth Circuit observed: [I]n the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy intensive interrogation when we forget to wear our seat belts, turns on no more than ‘the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress,

pretextual traffic stop, in which the officer stops the car for a minor traffic violation in order to effect an ulterior motive, or if the stop itself was lawful, then the officer may choose to arrest the occupant on a pretext in order to justify a thorough search of the vehicle.<sup>60</sup>

1. *Pre-Whren Precedent: In Search of a Standard*

Responding to the aforementioned problems, courts developed different tests to determine whether evidence seized as a result of an allegedly pretextual stop or arrest was admissible.<sup>61</sup> Some courts employed a “would have” or subjective test, in which the ultimate question is not whether the officer had sufficient probable cause for the stop, but whether a reasonable officer would have made the stop, absent underlying pretext.<sup>62</sup> The majority of courts, however, used an objective “reasonableness” test, which requires only that the officer have sufficient probable cause to make the initial stop.<sup>63</sup> The United States

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the shortness of our hair, or the color of our skin.’

United States v. Guzman, 864 F.2d 1512, 1516 (10th Cir. 1988), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995).

60. *Whren* settled the issue of pretextual stops, yet did not explicitly address the standard for a pretextual arrest. See *Whren*, 517 U.S. at 808. The Eighth Circuit recently declared it settled law that *Whren*’s standard encompasses a pretextual arrest as well, and analyzed the two situations identically. See United States v. Clayton, 210 F.3d 841, 844–45 (8th Cir. 2000); *accord* United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) (holding that the objective standard should apply, based on pre-*Whren* precedent); *Wilson v. State*, 752 A.2d 1250, 1260 (Md. 2000) (finding no difference in the analysis). The Arkansas Supreme Court has not yet squarely addressed the issue, and it is unclear whether it will draw a distinction between stops and arrests.

61. See HALL, *supra* note 4, § 17.21, at 923.

62. See *id.* § 17.21, at 924; See, e.g., United States v. Hernandez, 55 F.3d 443, 446 (9th Cir. 1995); United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995); United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986). The “reasonable officer” test espoused by the *Whren* petitioners—and unanimously rejected by the Court—is essentially identical to the “would have” test. See Leary & Williams, *supra* note 6, at 1016; *Whren*, 517 U.S. at 813.

63. See HALL, *supra* note 4, §§ 22.17, at 17, 17.21, at 924; See, e.g., United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995); United States v. Cummins, 920 F.2d 498, 500–01 (8th Cir. 1990); United States v. Hawkins, 811 F.2d 210, 215 (3d Cir. 1987). The “authorization” test is another name for the objective test. See *People v. Robinson*, No. 06632, 2000 WL 893383, at \*4 (N.Y. App. Div. July 6, 2000).

Supreme Court did not directly address the issue of pretextual traffic stops and arrests until the 1996 decision of *Whren v. United States*.<sup>64</sup>

a. Piecemeal Federal Precedent

As early as 1932, the Supreme Court had expressed concern for the general problem of pretext.<sup>65</sup> However, as the early cases addressed the problem only in dicta,<sup>66</sup> the Court had no established standard for assessing the constitutionality of a pretextual stop.<sup>67</sup> This left only the generally applicable objective test, often used in Fourth Amendment jurisprudence, as a stop-gap measure.<sup>68</sup> Casting about for a standard, some of the lower courts relied on the objective rule,<sup>69</sup> while others found an objective test could not encompass an officer's "bad" motive and suppressed the evidence.<sup>70</sup>

Although some of the lower courts did not correctly predict it, the Supreme Court had signaled its ultimate decision on the issue in several cases—eventually cited by the *Whren* Court in support of its holding.<sup>71</sup>

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64. 517 U.S. 806 (1996). In 1991, Justice White implied that the Court was avoiding the issue, citing five examples in that year alone. See *Enriquez-Nevarez v. United States*, 502 U.S. 962 (1991) (White, J., dissenting from denial of certiorari).

65. See *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence."). The *Lefkowitz* decision involved a general exploratory search of an office, following the arrest of its occupants on a warrant for conspiracy. See *Lefkowitz*, 285 U.S. at 459, 461.

66. See *Florida v. Wells*, 495 U.S. 1, 4 (1990) ("[A]n inventory search must not be a ruse for general rummaging in order to discover incriminating evidence."); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) ("[There has been] no showing that the police . . . acted in bad faith or for the sole purpose of investigation.") (upholding an inventory search); *New York v. Burger*, 482 U.S. 691, 716-17 n.27 (1987) ("[the search did not appear to be] a 'pretext' for obtaining evidence of . . . violation of . . . penal laws.") (upholding an administrative search). The *Whren* Court distinguished each of these cases. See *Whren*, 571 U.S. at 811-12; see also discussion *infra* Part III.B.

67. See *Enriquez-Nevarez*, 502 U.S. at 962 (White, J., dissenting from denial of certiorari).

68. See *Scott v. United States*, 436 U.S. 128 (1978). In *Scott*, a wiretapping case, the Court approved of an "objective assessment of an officer's actions in light of the facts and circumstances then known to him" and "without regard to the underlying intent or motivation of the officers involved." See *id.* at 136. The Court has also applied this rule, "a sound one," in other circumstances. See *LAFAVE ET AL.*, *supra* note 57, § 3.1(d), at 21 n.85 (citing *Horton v. California*, 496 U.S. 128 (1990)).

69. See cases cited *supra* note 63.

70. See *LAFAVE ET AL.*, *supra* note 57, § 3.1(d), at 24-25; see also cases cited *supra* note 62.

71. See *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *Scott v. United States*, 436 U.S. 128, 138 (1978); *United States v. Robinson*, 414 U.S. 218, 221 n.1, 236 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973). *Scott*, *Villamonte-Marquez*, and *Maryland v. Macon*, 472 U.S. 463 (1985), are sometimes known as "the

These cases served to illustrate that the Fourth Amendment's underlying "reasonableness" analysis requires an objective assessment of the totality of the circumstances.<sup>72</sup> The clearest representation of this approach lies in *Scott v. United States*,<sup>73</sup> where the Court approved a standard of objective reasonableness without inquiry into the officers' subjective motivations.<sup>74</sup>

#### b. The Standard in Arkansas: Subjective or Objective?

The Arkansas Supreme Court has consistently held that the Arkansas Constitution's prohibition against unreasonable search and seizure is virtually identical to the Fourth Amendment of the United States Constitution, and thus, it should be construed analogously to federal law in the area.<sup>75</sup> As recently as 1995, the court specifically declined to hold that the Arkansas Constitution provides greater protection for searches and seizures than the United States Constitution.<sup>76</sup>

Prior to the *Whren* decision, the Arkansas Supreme Court had adopted a "but for" test,<sup>77</sup> apparently identical to the more widely used "would have" subjective test, to determine whether an arrest was pretextual.<sup>78</sup> The test considered the circumstances of the arrest itself in order to unearth the officer's underlying intent in effectuating the arrest:

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trilogy," due to their frequent use to support an objective test. *See Leary & Williams, supra* note 6, at 1010.

72. *See Whren*, 514 U.S. at 812-13.

73. 436 U.S. 128 (1978).

74. *See id.* at 138. *See also supra* note 68 and accompanying text.

75. *See, e.g., Rainey v. Hartness*, 339 Ark. 293, 300, 5 S.W.3d 410, 415 (1999); *Mullinax v. State*, 327 Ark. 41, 47, 938 S.W.2d 801, 804-05 (1997); *Stout v. State*, 320 Ark. 552, 557-58, 898 S.W.2d 457, 460 (1995). The applicable constitutional provision, with the exception of minor changes in syntax, is identical to the Fourth Amendment. *See* ARK. CONST. art. II, § 15.

76. *See Stout*, 320 Ark. at 557, 898 S.W.2d at 460. The court attributed its reluctance to the difficulty of balancing competing interests to provide effective rules in automobile searches and seizures. *See id.*, 898 S.W.2d at 460. The court noted, "Of course, we could hold that the Arkansas Constitution provides greater protection . . . but we see no reason to do so . . . [T]hrough the years . . . we have followed the [United States] Supreme Court cases." *See id.*, 898 S.W.2d at 460.

77. *See Hines v. State*, 289 Ark. 50, 55, 709 S.W.2d 65, 68 (1986). "[W]ould the arrest not have occurred but for the other, typically more serious, crime." *See id.*, 709 S.W.2d at 68. If an arrest cannot meet this test, then the court should suppress the evidence pursuant to the exclusionary rule; if the arrest would have occurred despite the ulterior motive, then there is no deterrent value in suppressing it. *See id.*, 709 S.W.2d at 68.

78. *See id.*, 709 S.W.2d at 68.

would the arrest have occurred absent an ulterior motive?<sup>79</sup> Significantly, in each case presenting the issue following the 1986 adoption of the "but for" test, the court refused to find that the seizure was pretextual.<sup>80</sup>

Before 1986, the court had specified that the proper pretext investigation hinged on the "arresting officer's" intent.<sup>81</sup> Upon adopting the "but for" test, the court blurred the subjectiveness of the standard by leaving "intent" unarticulated.<sup>82</sup> Thus, the appropriate standard remained unclear, as the test appeared to contemplate the more objective analysis of a "reasonable officer" in the circumstances, but in application, the court routinely considered the subjective motivations of the officer involved in the case.<sup>83</sup> The *Mings v. State* decision<sup>84</sup> demonstrated the confusion, as the court took a step away from its own precedent by applying an objective test used by the Eighth Circuit.<sup>85</sup> Despite implicitly overruling ten years of precedent, the *Mings* court did not address the earlier cases, nor did it mention the previously-adopted "but

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79. *See id.*, 709 S.W.2d at 68; *Richardson v. State*, 288 Ark. 407, 410, 706 S.W.2d 363, 365 (1986).

80. *See Brenk v. State*, 311 Ark. 579, 587, 847 S.W.2d 1, 5 (1993) (holding arrest was not clearly pretextual in the circumstances); *Weaver v. State*, 305 Ark. 180, 186-87, 806 S.W.2d 615, 619 (1991) (holding that arrest was justified by officers' reasonable suspicion); *Ray v. State*, 304 Ark. 489, 495-98, 803 S.W.2d 894, 897-99 (1991) (holding arrest was not pretextual in the circumstances); *Thomas v. State*, 303 Ark. 210, 213, 795 S.W.2d 917, 918 (1990); *Rodriquez v. State*, 299 Ark. 421, 424, 773 S.W.2d 821, 822 (1989). Out of these decisions, only *Ray* mentioned the *Hines* test. *See Ray*, 304 Ark. at 495, 803 S.W.2d at 897. The court found pretext after applying the *Hines* test only once, in a case presenting a pretextual prosecutor's subpoena. *See State v. Shepherd*, 303 Ark. 447, 455, 798 S.W.2d 45, 49 (1990).

81. *See Richardson*, 288 Ark. at 410, 706 S.W.2d at 365. This phrasing indicates a more subjective test than the "reasonable officer" rejected by the *Whren* Court. *See Whren*, 517 U.S. at 814-15.

82. *See Hines*, 289 Ark. at 55, 709 S.W.2d at 68; *see also supra* note 77 and accompanying text.

83. *See Hines*, 289 Ark. at 55, 709 S.W.2d at 68.

84. 318 Ark. 201, 884 S.W.2d 596 (1994). The *Mings* court apparently found the stop and arrest analyses to be identical and used the terms interchangeably. *See id.* at 210, 884 S.W.2d at 602.

85. *See Mings*, 318 Ark. at 210, 884 S.W.2d at 602 (citing *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990) (holding that an otherwise valid stop cannot be invalidated by the officer's suspicions of criminal activity)). The Arkansas Court of Appeals' decision in *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993), further demonstrates the confusion over the applicable standard. In *Miller*, the court concluded that the Arkansas Supreme Court had established an objective test, which it found in accord with other recent decisions and the United States Supreme Court's decisions. *See id.* at 115, 868 S.W.2d at 512. Further, it explicitly declared the test to be that of a "reasonable officer" in the situation. *See id.* at 116, 868 S.W.2d at 512.

for” test.<sup>86</sup> *Mings* remained the last published word on the subject for the next six years—until *State v. Sullivan*.<sup>87</sup>

### B. The United States Supreme Court Weighs In: *Whren v. United States*

In 1996, the United States Supreme Court resolved the different standards among the lower federal courts with the unanimous *Whren v. United States* decision.<sup>88</sup> In *Whren*, plainclothes vice-squad officers patrolling a “high crime” area passed a Nissan Pathfinder with temporary plates stopped at an intersection; two young black men were inside it.<sup>89</sup> The Nissan’s driver was looking into Whren’s lap as the officers passed them.<sup>90</sup> The officers’ suspicions were aroused when the Nissan remained stopped for an “unusually long time—more than 20 seconds,” and then suddenly drove off at an “unreasonable” speed.<sup>91</sup> The vehicle soon stopped again at a traffic light, and the officers pulled up alongside, immediately observing two large bags of crack cocaine through the window, in Whren’s lap.<sup>92</sup> After arresting the occupants, the officers also found “quantities” of illegal drugs in the vehicle.<sup>93</sup>

The petitioners argued that the stop was pretextual, contending that the “heavily and minutely regulated” traffic laws tempted officers to use a minor traffic violation as means of investigating other suspicions.<sup>94</sup> Further, the petitioners asserted, officers might well use “decidedly impermissible factors,” such as race, to decide which motorists to stop.<sup>95</sup> Thus, they urged the Court to adopt a new test for these situations:

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86. See *Mings*, 318 Ark. at 210, 884 S.W.2d at 602.

87. An unpublished opinion from 1995, *Martinez v. State*, No. CR 94-729, 1995 WL 45848, at \*2 (Ark. Jan. 30, 1995) (per curiam), cited the *Mings* standard approvingly. See *id.* at \*2. The court went on to deny the defendant’s ineffective assistance of counsel claim, reasoning that the defendant’s attorney “could have easily concluded that a motion to suppress based on pretext would not be successful.” See *id.*

88. 517 U.S. 806 (1996). Justice Scalia wrote for the unanimous Court. See *id.*

89. See *id.* at 806, 810.

90. See *id.* at 808.

91. See *id.*

92. See *id.* at 808-09. For the purpose of an automobile stop, an officer standing outside the vehicle may seize, without a warrant, any item both visible and immediately recognizable as subject to seizure under the “plain view” exception to the warrant requirement. See *LAFAYETTE ET AL.*, *supra* note 57, § 3.7(f), at 222.

93. See *id.* at 809.

94. See *Whren*, 517 U.S. at 810.

95. See *id.* at 810.

would a police officer, acting reasonably, have made the stop for the reason given?<sup>96</sup>

The Court declined to adopt the test, noting that it lacked affirmative support in prior law.<sup>97</sup> In addition, the Court found that the petitioners' test flatly contradicted repeated holdings that an officer's motive cannot invalidate "objectively justified behavior under the Fourth Amendment."<sup>98</sup> In support of this assertion, the Court marshaled cases, albeit distinguishable on their facts, that were united in a decidedly objective approach to officer behavior.<sup>99</sup> Concluding that these cases decisively foreclosed the petitioners' argument that the constitutionality of a traffic stop depends on the actual motivations of the officer involved, the Court concluded: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>100</sup>

The petitioners urged that their proposed test was "objective," hinging on material deviations from usual police practices and not the individual officer's subjective good faith.<sup>101</sup> The Court disagreed, finding that the test required "plumb[ing] the collective unconscious of law enforcement" in order to determine what a reasonable officer would have done in the circumstances.<sup>102</sup> Conceding that standard police procedures could sometimes assist in an objective analysis, the Court maintained that the petitioners' test would require "speculat[ion] about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."<sup>103</sup>

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96. *See id.*

97. *See id.* at 811-12. The Court distinguished or dismissed the cases that the petitioners asserted supported their approach. *See id.* The Court discussed *Florida v. Wells*, 495 U.S. 1, 4 (1990), *Colorado v. Bertine*, 479 U.S. 367, 372 (1987), and *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987). *See id.*; *see also supra* note 66 and accompanying text.

98. *See Whren*, 517 U.S. at 812.

99. *See id.* at 812-13 (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *Scott v. United States*, 436 U.S. 128, 138 (1978); *United States v. Robinson*, 414 U.S. 218, 221 n.1, 236 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973)).

100. *See Whren*, 517 U.S. at 813. The Court concluded, "For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common law rule that probable cause justifies a search and seizure." *See id.* at 819. In addition, the Court agreed that the Constitution prohibits selective enforcement of the laws based on race, yet maintained that such claims are appropriately brought under the Equal Protection Clause, not the Fourth Amendment. *See id.* at 813.

101. *See id.* at 813-14.

102. *See id.* at 815.

103. *See id.*

### C. The Reaction to *Whren* in the State Courts

In the aftermath of *Whren*, nearly every state court considering the subject has adopted the objective test as its own standard.<sup>104</sup> Currently,<sup>105</sup> only the Washington Supreme Court has expressly rejected *Whren*, based on established precedent under its state constitution.<sup>106</sup> Several additional state courts have distinguished *Whren* as inapplicable to the facts of the cases at bar, rather than expressly rejecting it.<sup>107</sup> Nevertheless, as one commentator has asserted, “the need for well-reasoned state court rulings to protect citizens from pretext has never been greater.”<sup>108</sup> Much of the “vociferous” recent criticism of *Whren*<sup>109</sup>

104. See Abraham Abramovsky & Jonathan I. Edelman, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 739 (2000). *State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998), has been cited as an Arkansas case approving of the *Whren* standard. See Abramovsky & Edelman, *supra*, at 748 n.98; see also discussion *infra* Part III.D and note 127. One commentator described the states as “infected” by federal court decisions adopting an objective standard. See Leary & Williams, *supra* note 6, at 1026.

105. The New York Appellate Division, First Department, had also expressly rejected *Whren*, based on state constitutional precedent. See *People v. Martinez*, 667 N.Y.S.2d 247, 248 (N.Y. App. Div. 1998). Recently, however, the First Department reconsidered the policy issues and overruled *Martinez*, holding that “we adopt and follow the federal view.” See *People v. Robinson*, No. 06632, 2000 WL 893383, at \*6 (N.Y. App. Div. July 6, 2000). In addition, the New York Court of Appeals, that state’s highest court, has never explicitly addressed the issue and the intermediate Appellate Divisions have reacted to *Whren* in “widely disparate ways.” See Abramovsky & Edelman, *supra* note 104, at 735, 739.

106. See Abramovsky & Edelman, *supra* note 104, at 748 n.98. Washington premised its rejection on “well established” precedent holding that its state constitution provides broader protections against search and seizure than the United States Constitution. See *State v. Ladson*, 979 P.2d 833, 837 (Wash. 1999). In particular, Washington’s constitution prohibits a person to be “disturbed . . . without authority of law”; the courts have construed this prohibition to require them to “look beyond the formal justification for the stop to the actual one.” See *Ladson*, 979 P.2d at 837, 839.

107. See *State v. Varnado*, 582 N.W.2d 886, 893 (Minn. 1998) (distinguishing *Whren*’s facts from a pretextual frisk lacking probable cause); *State v. Holmes*, 569 N.W.2d 181, 185, 187 (Minn. 1997) (distinguishing *Whren*’s facts from a pretextual inventory search following an impermissible *Terry* stop for a parking violation); *State v. Gonzalez-Gutierrez*, 927 P.2d 776, 778-79 (Ariz. 1996) (distinguishing *Whren*’s facts from a non-pretextual stop unrelated to traffic violations). The *Sullivan* court interpreted these cases as a “[refusal] to give total authority to law enforcement.” See *Sullivan II*, 340 Ark. at 318-B, 16 S.W.3d at 552.

108. See Leary & Williams, *supra* note 6, at 1008.

109. See Beck & Daly, *supra* note 4, at 597. In advocating a new standard, one commentator dismissed the *Whren* decision as “a rickety piece of judicial scholarship . . . [b]uilt upon unreasoned distinctions, perversions of precedent, a question-begging unarticulated and unsupported premise, bootstrapping, logical inconsistencies, and a narrow vision of the Fourth Amendment.” See Leary & Williams, *supra* note 6, at 1025.



has abandoned the federal courts to their objective standard,<sup>110</sup> and focused instead on urging state courts to follow Washington in rejecting *Whren* as inconsistent with state constitutions.<sup>111</sup>

Before 2000, the Arkansas Supreme Court considered *Whren* five separate times.<sup>112</sup> In each case, the court approved of *Whren*'s objective approach, most often to affirm that a traffic stop is reasonable when an officer has probable cause to believe that a violation of the law has occurred.<sup>113</sup> None of these cases squarely presented the issue of pretext, however; thus, *Sullivan* represented the court's first opportunity to review its own precedent in light of *Whren*'s objective test.<sup>114</sup>

#### IV. REASONING OF THE COURT

In *State v. Sullivan*,<sup>115</sup> the Arkansas Supreme Court held that Officer Taylor's search of Kenneth Sullivan's vehicle was not justified as either an inventory search or a search incident to arrest, as, under the circumstances, the arrest was a pretext to search the vehicle for illicit drugs and paraphernalia.<sup>116</sup> After reviewing additional case law raised in the State's Petition for Rehearing,<sup>117</sup> a divided court affirmed its previous

110. See Leary & Williams, *supra* note 6, at 1007. The authors observed: "[I]t is now impossible in the federal courts to find a police officer's conduct unconstitutional on the basis of pretext." See *id.*

111. See *id.* at 1026; Beck & Daly, *supra* note 4, at 598; Abramovsky & Edelstein, *supra* note 104, at 728.

112. See *McDaniel v. State*, 337 Ark. 431, 438, 440, 990 S.W.2d 515, 519-20 (1999) (holding that search of vehicle was justified by probable cause); *Muhammad v. State*, 337 Ark. 291, 296, 303, 988 S.W.2d 17, 19, 23 (1999) (holding that consent search of vehicle was reasonable); *State v. Earl*, 333 Ark. 489, 494, 970 S.W.2d 789, 791 (1998) (holding that officers have probable cause to stop and arrest if a violation of the law is committed in their presence); *Burris v. State*, 330 Ark. 66, 71-73, 954 S.W.2d 209, 212 (1998) ("[T]he relevant inquiry is whether [the officer] had probable cause to believe that Burris was committing a traffic offense at the time of the initial stop."); *Travis v. State*, 331 Ark. 7, 9-11, 959 S.W.2d 32, 34 (1998) (following *Burris*).

113. See, e.g., *Burris*, 330 Ark. at 72, 954 S.W.2d at 213.

114. See, e.g., *Travis*, 331 Ark. at 9, 959 S.W.2d at 34 (noting that Travis did not contend that the stop was pretextual).

115. 340 Ark. 315, 11 S.W.3d 526 (2000) ("*Sullivan I*").

116. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 527-28. Chief Justice W.H. "Dub" Arnold wrote for a unanimous court. See *id.* at 316, 11 S.W.3d at 526.

117. See Petition for Rehearing at 2, *Sullivan* (No. CR 99-1140). In its petition, the State argued that the United States Supreme Court's opinion in *Whren v. United States*, 517 U.S. 806 (1996), foreclosed inquiry into the officer's subjective motivations. See Petition for Rehearing at 3, *Sullivan* (No. CR 99-1140); see also discussion *supra* Part II.

holding that the arrest was pretextual and denied rehearing in a 4-3 supplemental opinion.<sup>118</sup>

#### A. The Original Unanimous Opinion

The court began its first opinion by recognizing that the appropriate standard of review required it to make an independent evaluation of the totality of the case's circumstances, reversing only if the trial court's ruling was against the preponderance of the evidence.<sup>119</sup> The court also noted that the State's only point on appeal asserted that the trial court erred in granting Mr. Sullivan's motion to suppress the evidence found in his vehicle.<sup>120</sup>

In that light, the court then reviewed the testimony of Officer Taylor, pointedly observing that he was assigned to the narcotics section of the police department and was admittedly aware of that section's information on Mr. Sullivan.<sup>121</sup> Summarizing Mr. Sullivan's argument that the circumstances of the arrest itself proved that it was pretextual, the court repeated his persistent assertion that Officer Taylor had no reasonable basis to believe that the roofing hatchet was to be used as a weapon.<sup>122</sup>

Turning to its own analysis, the court first acknowledged Arkansas precedent holding that pretext should be determined by the arresting officer's intent as evidenced by the circumstances of the arrest.<sup>123</sup> After briefly noting that the United States Supreme Court specifically forbade pretextual arrests in a 1932 case,<sup>124</sup> the court then reaffirmed the "but

118. See *State v. Sullivan*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) ("*Sullivan I*").

119. See *Sullivan I*, 340 Ark. at 317, 11 S.W.3d at 527.

120. See *id.*, 11 S.W.3d at 527.

121. See *id.*, 11 S.W.3d at 527; see also Abstract of Appellant at A-39, *Sullivan* (No. CR 99-1140) (holding that the arrest was predicated on Officer Taylor's knowledge of the narcotics division).

122. See *Sullivan I*, 340 Ark. at 317, 11 S.W.3d at 527; see also Brief for Appellee at 13, *Sullivan* (No. CR 99-1140). Mr. Sullivan argued that:

The arresting officer had no reasonable basis to believe that the roofing hammer/hatchet was to be used as a weapon; therefore, the . . . 'inventory search' . . . was for controlled substances [and it] absolutely illustrates and proves that the physical arrest was pretextual . . . and certainly not for possessing a roofing hammer/hatchet as a weapon.

Brief for Appellee at 13, *Sullivan* (No. CR 99-1140).

123. See *Sullivan I*, 340 Ark. at 317, 11 S.W.3d at 527. The court referred to its holding in *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), which followed *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986), and implicitly, *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986). See *Brenk*, 311 Ark. at 586, 847 S.W.2d at 5; see also discussion *supra* Part III.A.1.b.

124. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 527 (citing *United States v.*

for” test it had adopted in the 1986 *Hines v. State* decision.<sup>125</sup> The “but for” approach<sup>126</sup> does not prevent all “dual motive” arrests, the court explained, but only those arrests which would not have happened at all but for the officer’s pretextual ulterior motive.<sup>127</sup>

Apparently applying the “but for” test, the court expressed its disbelief that Mr. Sullivan would have been physically arrested for speeding five miles per hour over the limit and having a corroded roofing hatchet in his vehicle.<sup>128</sup> It thereby implied that the arrest failed the test, as the court found that it would not have occurred without Officer Taylor’s ulterior motive of searching for contraband.<sup>129</sup> It bolstered this finding by its observation that the trial court, after assessing the totality of the circumstances and the credibility of Officer Taylor, had ruled the arrest to be pretextual.<sup>130</sup> As the circumstances of each case necessarily determine pretext, the court therefore concluded it could not hold that the ruling of the trial court was against the preponderance of the evidence.<sup>131</sup>

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Lefkowitz, 285 U.S. 452, 467 (1932) (“An arrest may not be used as a pretext to search for evidence.”)).

125. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 527-28 (citing *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986)). The court also noted that the Arkansas Court of Appeals followed the *Hines* test in *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993). See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 527. In *Miller*, however, the court upheld an admittedly pretextual stop, because it found that a “reasonable officer” would have made the stop despite the pretextual motive. See *Miller*, 44 Ark. App. at 116, 868 S.W.2d at 512; see also *supra* note 85 and accompanying text.

126. “[W]ould the arrest not have occurred but for the other, typically, the more serious crime.” *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 528 (quoting *Hines*, 289 Ark. at 55, 709 S.W.2d at 68).

127. See *id.*, 11 S.W.3d at 528. The *Hines* court found this the “correct result,” as described by Professor LaFave in his treatise on criminal procedure. See *Hines*, 289 Ark. at 55, 709 S.W.2d at 68 (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1(d) (1984)).

128. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 528. The court opined: “[T]he question then becomes whether [Sullivan] would have been arrested simply for traveling forty miles per hour in a thirty-five mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time . . . . We find that to be doubtful.” *Id.*, 11 S.W.3d at 528 (emphasis in original).

129. See *id.*, 11 S.W.3d at 528.

130. See *id.*, 11 S.W.3d at 528. The ruling of the trial court made no mention of Officer Taylor’s credibility, or lack thereof. See Abstract of Appellant at A-39 to A-40, *Sullivan* (No. CR 99-1140).

131. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 528.

## B. The 4-3 Supplemental Opinion on Denial of Rehearing

In the wake of the court's decision, the State filed a Petition for Rehearing on February 17, 2000, arguing that the opinion contained a "significant error of law" contrary to recent United States Supreme Court precedent.<sup>132</sup> In response, on May 18, 2000, a divided court handed down a supplemental opinion denying the State's petition.<sup>133</sup>

### 1. *The Majority Opinion*

The court began its supplemental opinion by summarizing the unusual procedural events leading up to it—specifically, the State's argument that the original opinion had contained a "significant error of law."<sup>134</sup> It also observed that the State had not previously presented this particular precedent, *Whren v. United States*.<sup>135</sup> In its subsequent repetition of the State's petition argument,<sup>136</sup> the court arguably recast it, thus shifting the focus of the inquiry.<sup>137</sup>

The court rejected this argument, as its reading of *Whren* would not support it.<sup>138</sup> Synopsizing the facts of *Whren*, the court dismissed them as easily distinguishable from those surrounding Mr. Sullivan's arrest.<sup>139</sup>

132. See Petition for Rehearing at 1-3, *Sullivan* (No. CR 99-1140); see also discussion *supra* Part II. The State's Petition for Rehearing argued that the cases the court's opinion relied upon, *Brenk v. State*, 311 Ark. 570, 847 S.W.2d 1 (1993), *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986), and *Miller v. State*, 44 Ark. App. 112, 868 S.W.2d 510 (1993), were all decided before *Whren v. United States*, 517 U.S. 806 (1996). See Petition for Rehearing at 2, *Sullivan* (No. CR 99-1140). The petition further asserted that *Whren* "expressly eliminated the concept of 'pretext' from Fourth Amendment analysis in cases involving vehicle stops." See *id.* Thus, the State argued, the court had applied the wrong standard in its original decision and should grant rehearing to correct the error. See *id.* at 3.

133. See *Sullivan II*, 340 Ark. 318-A, 16 S.W.3d 551 (2000). Justices Corbin, Brown and Thornton joined Chief Justice Arnold, writing again for the majority, while Justices Imber and Smith joined Justice Glaze's dissent and would have granted rehearing. See *id.* at 318-D, 16 S.W.3d at 553.

134. See *id.* at 318-A, 16 S.W.3d at 551.

135. See *id.*, 16 S.W.3d at 551.

136. The court summarized the State's argument as: "[U]nder *Whren*, a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime." See *id.*, 16 S.W.3d at 551.

137. See *id.*, 16 S.W.3d at 551. But see Petition for Rehearing, *Sullivan* (No. CR 99-1140); cf. *Sullivan II*, 340 Ark. at 318-E, 16 S.W.3d at 554 (Glaze, J., dissenting) (pointing out the incongruity).

138. See *Sullivan II*, 340 Ark. at 318-A, 16 S.W.3d at 551. The court noted: "We do not read *Whren* as going as far as the State would have it." See *id.*, 16 S.W.3d at 551.

139. See *id.* at 318-B, 16 S.W.3d at 551.

The court hinged this dissimilarity on its finding that Mr. Sullivan was "arrested primarily" for the roofing hatchet, as distinct from the fact that the *Whren* petitioner's crack cocaine was in plain view.<sup>140</sup> In addition, it found that Mr. Sullivan was stopped for speeding, in contrast to "acting suspiciously in a high crime area."<sup>141</sup> Finally, the court observed that Officer Taylor conducted a full inventory search following the arrest, unlike the arrest in *Whren*, which resulted from the plain view detection of contraband.<sup>142</sup>

The court then turned to the State's contention that *Whren* forecloses inquiry into the ulterior motives of police officers if there is sufficient probable cause for the initial traffic stop.<sup>143</sup> In doing so, the court admitted that the *Whren* decision is "broadly written," but nevertheless dismissed much of it as dicta, concluding that, in any case, it will not serve as "blanket authority" for pretextual arrests in all cases.<sup>144</sup> Reiterating its previous holding, the court stated that it must evaluate the reasonableness of the arrest and subsequent search in each individual case.<sup>145</sup>

The court briefly catalogued five state court cases that, it averred, rejected or limited *Whren* on either state constitutional grounds or the unreasonable circumstances of the search and seizure.<sup>146</sup> It acknowledged that the Arkansas Supreme Court had previously cited *Whren* in two cases;<sup>147</sup> however, it rejected their applicability here, as neither of

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140. See *id.* at 318-A to 318-B, 16 S.W.3d at 551-52.

141. See *id.*, 16 S.W.3d at 551-52.

142. See *id.*, 16 S.W.3d at 551-52.

143. See *id.* at 318-B, 16 S.W.3d at 552; see also Petition for Rehearing at 3, *Sullivan* (No. CR 99-1140) ("Even if the officer had an ulterior motive, which the State does not admit, it is not to be taken into account by this Court, according to *Whren*, because the stop was unquestionably proper.")

144. See *Sullivan II*, 340 Ark. at 318-B, 16 S.W.3d at 552.

145. See *id.*, 16 S.W.3d at 552. To illustrate this point, the court asserted that *Whren* would not allow an officer to trail a suspicious driver, waiting for a minor traffic violation, and then, when the driver exceeded the speed limit by one mile per hour, to arrest him, thereby validating a full search of the vehicle. See *id.*, 16 S.W.3d at 552. The dissenting justices agreed with this reading of *Whren*, but noted, "those are not the facts before this court." See *id.* at 318-F, 16 S.W.3d at 555 (Glaze, J., dissenting).

146. See *id.* at 318-B to 318-C, 16 S.W.3d at 552 (citing *State v. Gonzalez-Gutierrez*, 927 P.2d 776 (Ariz. 1996); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997); *People v. Dickson*, 690 N.Y.S.2d 390 (N.Y. App. Div. 1998); *State v. Ladson*, 979 P.2d 833 (Wash. 1999)); see also discussion *supra* Part III.C.

147. The court cited *Whren* in *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998), and *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). Interestingly, the court did not acknowledge its overt reliance on *Whren* in three additional cases. See *supra* note 112 and accompanying text.

the two cases had presented the issue of pretext.<sup>148</sup> The court maintained that one of the cases, *Travis v. State*,<sup>149</sup> even noted explicitly that a pretextual arrest argument had not been proffered before them.<sup>150</sup>

Next, the court re-emphasized the trial court's ruling that the arrest had been pretextual and its own belief that *Whren* would not disallow such a finding.<sup>151</sup> Further, even if it gave *Whren* a more expansive reading ("as the State would have it"),<sup>152</sup> the court firmly avowed that it may nevertheless give the United States Constitution a broader interpretation than the United States Supreme Court had given it, effectively providing more rights.<sup>153</sup> In support of this proposition, the court cited an instance where it had "arguably" already done so: the Arkansas requirements on night searches are more stringent than those mandated by the United States Supreme Court.<sup>154</sup>

Drawing to a close, the court announced that it would not give "carte blanche" approval for "all pretextual arrests for traffic violations," particularly in a case it found so factually distinct from *Whren*.<sup>155</sup> Echoing its original holding once more, the court avowed that it would decide the reasonableness of the arrest and search on a case by case basis, as, it concluded, "the *Whren* decision makes clear."<sup>156</sup>

148. See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552.

149. 331 Ark. 7, 959 S.W.2d 32 (1998).

150. See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552.

151. See *id.*, 16 S.W.3d at 552.

152. See *id.* at 318-A, 16 S.W.3d at 551.

153. See *id.* at 318-C, 16 S.W.3d at 552. Notwithstanding that assertion, it is settled law that the United States Supreme Court is the ultimate authority on the meaning of the United States Constitution, and may not be overruled. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Miller v. Johnson*, 515 U.S. 900 (1995); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the [United States] Constitution, and that principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.") (referring to the seminal decision of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

154. See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552. The court cited ARK. R. CRIM. P. 13.2(c) (mandating that night warrants may only be issued when the magistrate has reasonable cause to believe that exceptional circumstances exist) and *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991) (refusing to apply the *Leon* good faith exception to an improperly justified night search). See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552.

155. See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552-53 (emphasis in original). The court summarized: "We draw a clear distinction between arresting a person with crack cocaine in his hands . . . and effecting a pretextual arrest for purposes of a search. . . . Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment." *Id.*, 16 S.W.3d at 552-53.

156. See *id.*, 16 S.W.3d at 553.

## 2. *The Dissenting Opinion*

The dissenting opinion began in agreement with the majority, noting that although the State had not previously presented *Whren* before them, the decision was significant in reaching a correct holding in this case.<sup>157</sup> Justice Glaze then delineated his disagreements with the majority, with an emphasis on aspects of the *Sullivan* arrest that the majority opinion had omitted.<sup>158</sup> In contrast to the majority, Justice Glaze stressed the fact that, in addition to speeding and the roofing hatchet on the floorboard, Mr. Sullivan had no proof of liability insurance or registration, his speedometer was not functional, and his windows were incorrectly tinted.<sup>159</sup> Justice Glaze concluded that, under these circumstances, Officer Taylor clearly had probable cause to stop Mr. Sullivan for a traffic violation, i.e. speeding and improper tint.<sup>160</sup> Accordingly, the dissenters found that the entirely proper stop, resulting in the discovery of other violations of the law, validated the arrest and subsequent inventory search of the vehicle.<sup>161</sup>

Justice Glaze then returned to *Travis v. State*,<sup>162</sup> a case that the majority opinion had mentioned and dismissed as inapplicable.<sup>163</sup> As recounted in the dissenting opinion, the *Travis* court upheld a stop predicated upon an officer's mistaken belief he had probable cause.<sup>164</sup> Explicitly relying on *Whren's* objective standard, the *Travis* court held it to be well-settled law that an officer may stop and detain a motorist

157. *See id.*, 16 S.W.3d at 553 (Glaze, J., dissenting).

158. *See id.*, 16 S.W.3d at 553 (Glaze, J., dissenting). The dissent also noted the undisputed evidence that the original stop, for speeding, was proper. *See id.*, 16 S.W.3d at 553 (Glaze, J., dissenting).

159. *See id.*, 16 S.W.3d at 553 (Glaze, J., dissenting).

160. *See Sullivan II*, 340 Ark. at 318-D, 16 S.W.3d at 553 (Glaze, J., dissenting).

161. *See id.*, 16 S.W.3d at 553 (Glaze, J., dissenting). Rule 4.1(a)(iii) of the Arkansas Rules of Criminal Procedure permits a law enforcement officer to arrest without a warrant if the officer has probable cause to believe that a person has committed any violation of the law in the officer's presence; speeding is a violation of Arkansas law. *See* ARK. R. CRIM. P. 4.1(a)(iii); ARK. CODE ANN. § 27-51-201(c) (Michie Repl. 1994); *see also* *State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998); *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997) (holding that a law enforcement officer is authorized to arrest persons for minor traffic violations, such as speeding, pursuant to ARK. R. CRIM. P. 4.1(a)(iii)). Officer Taylor also followed the Conway Police Department's Vehicle Inventory Policy during the inventory search. *See* Abstract of Appellant at A-16, *Sullivan* (No. CR 99-1140).

162. 331 Ark. 7, 959 S.W.2d 32 (1998).

163. *See Sullivan II*, 340 Ark. at 318-D, 16 S.W.3d at 553 (Glaze, J., dissenting).

164. *See id.* at 318-E, 16 S.W.3d at 553 (Glaze, J., dissenting); *see also supra* note 112 and accompanying text. The officer wrongly assumed that Texas license plates required an expiration sticker. *See Travis*, 331 Ark. at 9, 959 S.W.2d at 34.

so long as there is probable cause to believe that a traffic violation has occurred.<sup>165</sup> Further, the dissenting opinion noted the long-standing rule requiring the court to liberally review probable cause, thereby implying that the *Sullivan* majority had performed an improperly strict review in addition to ignoring its previous reliance on *Whren*.<sup>166</sup> In light of this precedent, Justice Glaze returned to his previous conclusion, maintaining that the arrest and search were proper under Arkansas law.<sup>167</sup>

The dissenting opinion followed this assertion by quarreling with other aspects of the majority opinion.<sup>168</sup> Disagreeing with the majority's representation of the State's argument on rehearing, Justice Glaze quoted from the State's Petition, which contended that "the relevant inquiry, thus, is . . . whether the officer had probable cause to believe that the defendant was committing a traffic offense," and not, as the majority had suggested, whether the officer may have had an ulterior motive.<sup>169</sup> In a similar vein, the dissenting opinion also dismissed the majority's assertion that Mr. Sullivan had been arrested "primarily" due to the roofing hatchet.<sup>170</sup> Justice Glaze firmly reiterated that the appropriate issue was not whether the roofing hatchet alone was cause enough for an arrest, but rather whether Mr. Sullivan had committed violations of the law in the officer's presence; Justice Glaze concluded that, "unquestionably," Mr. Sullivan had done so.<sup>171</sup> Thus, he continued, according to applicable Arkansas law,<sup>172</sup> Mr. Sullivan's arrest was proper, as was the subsequent inventory search of the vehicle.<sup>173</sup>

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165. See *Sullivan II*, 340 Ark. at 318-E, 16 S.W.3d at 553 (Glaze, J., dissenting).

166. See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting).

167. See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting).

168. See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting).

169. See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting) (quoting Petition for Rehearing at 3, *Sullivan* (No. CR 99-1140)).

170. See *id.* at 318-E to 318-F, 16 S.W.3d at 554 (Glaze, J., dissenting).

171. See *Sullivan II*, 340 Ark. at 318-F, 16 S.W.3d at 554 (Glaze, J., dissenting). Justice Glaze also conjectured, "It appears that the [trial] judge got off track by injecting his personal view as to whether a hatchet could be a weapon for which he could be arrested for possession." See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting). The trial judge reflected, "I've got a hammer under the seat of my car today. Am I subject to being arrested and taken physically into custody because I have a hammer?" See *id.*, 16 S.W.3d at 554 (Glaze, J., dissenting) (quoting Abstract of Appellant at A-38 to A-39, *Sullivan* (No. CR 99-1140)).

172. See sources cited *supra* note 161.

173. See *Sullivan II*, 340 Ark. at 318-F, 16 S.W.3d at 554 (Glaze, J., dissenting); see also ARK. R. CRIM. P. 12.6(b) (providing that a vehicle impounded in consequence of any arrest may be searched to such extent as is reasonably necessary for safekeeping of the vehicle and its contents); sources cited *supra* note 25. The dissenters also noted that Mr. Sullivan did not prove, nor did the trial court find, that the search was explicitly pretextual or conducted in bad faith. See *Sullivan II*, 340 Ark. at 318-G, 16



According to the dissenting opinion, the majority had held the initial stop to be proper, finding only the arrest to be pretextual.<sup>174</sup> Justice Glaze repeated his finding that Mr. Sullivan's traffic offenses justified the arrest, and professed himself to be unaware of any law, nor of any indication otherwise in the record, that would have required Officer Taylor to have merely issued a citation in lieu of a physical arrest.<sup>175</sup> He acknowledged that Officer Taylor had recognized Mr. Sullivan, after the stop, as a person involved in drug activities, yet maintained that this fact should not be used to invalidate the arrest, when many other violations served to justify it.<sup>176</sup>

Finally, the dissenters asserted that the United States Supreme Court's search and seizure jurisprudence would dictate a result contrary to the majority's holding.<sup>177</sup> Condensing the *Whren* Court's summary of precedent,<sup>178</sup> Justice Glaze quoted from *Whren's* unanimous rejection of a subjective test,<sup>179</sup> thus intimating that the majority had improperly considered Officer Taylor's possible ulterior motives in arresting Mr. Sullivan.<sup>180</sup>

The dissenters would have held that the trial court erred in suppressing the evidence, and therefore, would overturn its ruling.<sup>181</sup> Justice Glaze asserted the majority's contrary holding to be a clear "departure from search and seizure law," as defined by the United States Supreme Court.<sup>182</sup> He concluded with the speculation that the majority's failure to follow United States Supreme Court precedent "will generate considerable confusion among the rank and file of law enforcement, the bench, and the bar alike."<sup>183</sup>

S.W.3d at 554 (Glaze, J., dissenting).

174. See *id.* at 318-G, 16 S.W.3d at 555 (Glaze, J., dissenting).

175. See *Sullivan II*, 340 Ark. at 318-G, 16 S.W.3d at 555 (Glaze, J., dissenting).

176. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting).

177. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting).

178. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting) (focusing on *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), and *United States v. Robinson*, 414 U.S. 218 (1973)).

179. See *Sullivan II*, 340 Ark. at 318-G, 16 S.W.3d at 555. "We think [among other cases, *Villamonte-Marquez* and *Robinson*] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813.

180. See *Sullivan II*, 340 Ark. at 318-G, 16 S.W.3d at 555 (Glaze, J., dissenting).

181. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting).

182. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting).

183. See *id.*, 16 S.W.3d at 555 (Glaze, J., dissenting).

## V. SIGNIFICANCE

By refusing to allow police officers “carte blanche” authority to use pretextual seizures as a method of investigation, the Arkansas Supreme Court has shaken off the specter of federal authority and sent a clear message to state law enforcement. This accords with the view of many commentators and the State of Washington,<sup>184</sup> who believe that a subjective test for pretextual seizures is the only acceptable way to ensure that officers do not “[patrol] far outside the outer boundaries of the Fourth Amendment.”<sup>185</sup>

Despite its popularity with legal commentators, this is emphatically a minority view among courts considering the issue.<sup>186</sup> Courts adopting the objective test have noted the advantage of allowing officers to “enforce violations of the law—even minor ones—when they actually view” them,<sup>187</sup> and the disadvantage of hinging the validity of traffic stops on “the vagaries of police departments’ policies and procedures.”<sup>188</sup> In addition, the evidentiary difficulty of determining subjective intent disturbed the *Whren* Court, likely contributing to its endorsement of the objective standard.<sup>189</sup>

A. The Significance of the *Sullivan* Standard: Subjective or Objective?

Despite these problems, in choosing the minority path, the Arkansas Supreme Court has made it clear that it will not tolerate pretextual investigatory methods from law enforcement officers. Unfortunately for those officers—and for the other Arkansans bound to uphold the law—the method the court will use to determine the presence of pretext is decidedly less clear. Neither the pre-*Whren* precedent, nor the *Sullivan* decision, effectively delineates the “but for” test. Based on previous applications of the test, it would appear to be a subjective standard—despite the mixed messages about the proper focus.<sup>190</sup>

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184. See *State v. Ladson*, 979 P.2d 833, 837 (Wash. 1999). See also discussion *supra* Part III.D.

185. See *United States v. Botero-Ospina*, 71 F.3d 783, 792 & n.1 (1995) (Seymour, C.J., dissenting).

186. See discussion *supra* Part III.C.

187. See *Robinson*, 2000 WL 893383, at \*5.

188. See *id.*

189. See *Whren*, 517 U.S. at 814.

190. See discussion *supra* Part III.A.1.b. It is unclear whether the focus of the “but for” test should be a “reasonable officer” or the actual arresting officer. See discussion

Yet, the court has not consistently applied a subjective standard in all cases involving pretextual seizures. Based on *Mings v. State*,<sup>191</sup> the court's most recent pre-*Sullivan* decision, the proper standard was an objective one that pre-dated, but paralleled, *Whren*.<sup>192</sup> To compound the problem, application of the "but for" test had never resulted in a finding of pretext until *Sullivan*, which could indicate that the test was in fact an objective one.<sup>193</sup>

The *Sullivan* decision cannot serve to clarify the proper test, as it merely quotes from earlier decisions rather than examining them.<sup>194</sup> Further, the opinion merges the court's authority to interpret the state constitution with a license to interpret the United States Constitution, effectively blurring the basis for its holding.<sup>195</sup> Finally, the court arguably misinterpreted the *Whren* decision by dismissing "much of it" as dicta.<sup>196</sup> The most conspicuous error, however, lies in the court's refusal to clearly delineate whether the Arkansas standard is measured objectively or subjectively. Until this is clarified, application of the law is destined to result in contradiction and confusion.

#### B. The Significance of *Sullivan* as Precedent: *Guthrie* and *Stephens* Muddy the Waters

Such confusion is apparent in the court's recent decision in *State v. Guthrie*,<sup>197</sup> on facts similar to the *Sullivan* case.<sup>198</sup> The only significant difference between the two was that the trial court in *Sullivan* specifically found a pretextual arrest, while in *Guthrie*, the trial court found an "unreasonable stop."<sup>199</sup> In both cases, the State appealed, asserting the actions were proper under *Whren*, and in both, the Arkansas Supreme

*supra* Part II.B.1.b.

191. 318 Ark. 201, 884 S.W.2d 596 (1994).

192. See discussion *supra* Part III.A.1.b. *Mings* applied an objective test adopted from the Eighth Circuit. See *supra* note 185 and accompanying text. The *Sullivan* decision clearly overrules *Mings*, although it neglects even to acknowledge it. See *Sullivan II*, 340 Ark. at 318-A to 318-C, 11 S.W.3d at 551-52.

193. See *supra* p. 36 and note 96.

194. See *Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 527.

195. See *Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552.

196. See *id.* at 318-B, 16 S.W.3d at 552.

197. 341 Ark. 624, 19 S.W.3d 10 (2000).

198. Both presented a stop for a minor traffic offense, whereupon both officers recognized the drivers as involved in criminal activity. See *id.* at 630-31, 19 S.W.3d at 15 (Glaze, J., dissenting). Both cases also involved the subsequent discovery of contraband, which both trial courts suppressed. See *id.*, 19 S.W.3d at 15 (Glaze, J., dissenting).

199. See *id.* at 631-32, 19 S.W.3d at 15 (Glaze, J., dissenting).

Court disagreed.<sup>200</sup> The *Guthrie* court declined to review the merits of the appeal, holding that it presented a “run-of-the-mill” probable cause determination.<sup>201</sup> The three *Sullivan* dissenters dissented again, arguing that the court was “wrong” to deny the review after its decision in the “strikingly similar” *Sullivan* case.<sup>202</sup> Justice Glaze asserted that the court should hear the appeal to clarify the “confusing” state of the law in “these traffic stop-and-arrest situations.”<sup>203</sup>

The court’s refusal to use *Guthrie* as an opportunity to clarify the state of the law is both striking and significant. The five decisions by the Arkansas Supreme Court that relied on *Whren*’s objective standard for traffic stops<sup>204</sup> would seem to indicate that *Guthrie* merited a reversal, simply on the facts and the pre-*Sullivan* law.<sup>205</sup> Yet, the *Sullivan* decision may have signaled an implicit overruling of that standard in stops as well as arrests. The court’s refusal to elucidate either the *Sullivan* holding or the distinction, if any, between stops and arrests is unfortunate, as the *Guthrie* decision can only lead to further confusion over the standard defining pretextual seizures.

The court’s recent decision in *Stephens v. State*<sup>206</sup> further illustrates the confusion over the Arkansas standard.<sup>207</sup> Justice Glaze, the dissenter in *Sullivan I*, *Sullivan II*, and *Guthrie*, wrote for the majority in this case, holding that because the officer had a valid arrest warrant and the authority to approach Mr. Stephens under the Arkansas Rules of Criminal Procedure, the arrest could not be pretextual.<sup>208</sup> In reaching this conclusion, the court relied on *Mings v. State*,<sup>209</sup> the 1994 case in which it had adopted the Eighth Circuit’s objective test for determining

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200. See *id.* at 632, 19 S.W.3d at 15 (Glaze, J., dissenting).

201. See *id.* at 629, 19 S.W.3d at 14. The court found its review was not required, because the correct and uniform administration of the criminal law was not at issue. See *id.*, 19 S.W.3d at 14; see also ARK. R. APP. PROC. Rule 3(c).

202. See *Guthrie*, 341 Ark. at 630, 19 S.W.3d at 15 (Glaze, J., dissenting).

203. See *id.* at 632, 19 S.W.3d at 16 (Glaze, J., dissenting).

204. See *supra* pp. 47-48 and note 112.

205. See *supra* note 127 and accompanying text. The officer in *Guthrie* observed traffic violations, which, under prior Arkansas law, would have justified the stop. See *Guthrie*, 341 Ark. at 632, 19 S.W.3d at 16 (Glaze, J., dissenting).

206. No. CR 98-1073, 2000 WL 1433628 at \*1 (Ark. Sept. 28, 2000).

207. See *id.* at \*1. In *Stephens*, the defendant was in a car with someone “whom the policeman knew to be involved in drugs.” See *id.* at \*1. Upon identifying the defendant as “Mack Stephens,” the officer called in a query to the Arkansas Crime Information Computer, which reported an outstanding warrant for “Mack Stephens.” See *id.* Mr. Stephens was arrested on this warrant, which was later discovered to have been issued for his son of the same name. See *id.*

208. See *id.* at \*2.

209. 318 Ark. 201, 884 Ark. 596 (1994).

pretext.<sup>210</sup> It did not, however, explicitly declare the Arkansas standard to be objective, nor did it mention *Sullivan*. In a concurring opinion, Justice Brown referred to the “objective and reasonableness standard set out in *Mings*,” concluding that *Sullivan* had upheld a “reasonableness standard.”<sup>211</sup>

In sum, *Stephens* purports to rely on *Mings*—and, implicitly, its objective standard—but fails once again to unmistakably identify the proper test. Although within the context of the facts in *Stephens*, the court has undoubtedly applied an objective standard, neither the majority nor the concurring opinion makes that clear. Furthermore, the decision is likely to do more harm than good, as the concurring opinion injects a “reasonable officer” standard—identified with a subjective test, as in *Whren*—into an otherwise objective test.<sup>212</sup> This mixed focus demonstrates the key difficulty in this body of Arkansas law, as it appears that the court has not yet decided what the proper standard should be. Until it chooses to clarify the issue, there can be no predictability in pretext cases.

### C. The Significance on Writ of Certiorari: Can *Sullivan* Stand?

If the United States Supreme Court grants writ of certiorari in *Sullivan*, the decision is clearly in jeopardy. The United States Supreme Court has jurisdiction over state court decisions when the face of the opinion does not demonstrate any possible adequate and independent state ground for the decision.<sup>213</sup> The *Sullivan* opinion does not mention or rely on the Arkansas Constitution.<sup>214</sup> Arguably, not even the precedent it cites has a state law basis.<sup>215</sup> Thus, because *Sullivan* adopted

210. See *id.* at \*2. See also discussion *supra* Part III.A.1.b.

211. See *id.*

212. See *id.* (Brown, J., concurring). Commentators divide the various approaches into an objective reasonableness test and a subjective, reasonable officer, “would have” test. See discussion *supra* Part III.A.1.

213. See *Michigan v. Long*, 463 U.S. 1032, 1040-41(1983). *Long* instituted a rule requiring state courts to make a “plain and clear statement” that any use of federal cases was only for guidance. See *id.* at 1041. Without such a statement, a state court decision appearing to rest on federal grounds falls within the United States Supreme Court’s jurisdiction. See *id.*

214. See *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526, *supplemental op. on denial of reh’g*, 340 Ark. 318-A, 16 S.W.3d 551 (2000), *pet. for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-262).

215. See *id.*; discussion *supra* Part IV.A. The *Sullivan* opinion is analogous to the Appellate Court of Illinois’ decision in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). In *Rodriguez*, a consent search case, the Court reversed the lower court’s holding that the search was reasonable. See *id.* at 189. Because the decision of the Illinois court did not

the subjective standard unanimously rejected by the *Whren* Court, the Court is likely to reverse *Sullivan* on writ of certiorari.<sup>216</sup>

In the final analysis, for Arkansas to maintain its minority path, the court must explicitly ground its standard in the Arkansas Constitution. Arkansas' subjective standard will remain subject to reversal by the United States Supreme Court unless the court can use future cases to base its standard on clearly independent and adequate state grounds.<sup>217</sup> This may be a difficult task in Arkansas, as—unlike the state of Washington—it has historically construed the Arkansas Constitution as analogous to the United States Constitution.<sup>218</sup> Given that the provisions of the Arkansas Constitution are textually nearly identical to the United States Constitution, it will be a “vexing problem” to develop interpretative methods to provide broader rights for Arkansans, while still maintaining consistency with the parallel federal rights.<sup>219</sup>

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contain a “plain statement” that it rested on state law, the Court concluded that it was based on federal law. *See id.* at 182. The Court commented: “The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely on no constitutional provisions other than [the United States Constitution].” *See id.*

216. *See* discussion *supra* Part IV.B.1; *see also* discussion *supra* Part III.B. The only arguable exception to this history is the state's more stringent requirements on night searches, mentioned in the *Sullivan* opinion. *See Sullivan II*, 340 Ark. at 318-C, 16 S.W.3d at 552. In the alternative, it is possible that the Court might choose to address the issues raised by Mr. Sullivan's Brief in Opposition, in particular his contention that *Whren* is inapplicable to this pretextual arrest, and it should instead be analyzed in light of *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (June 26, 2000) (No. 99-1408) (argued Dec. 4, 2000). *See* Brief in Opposition, *Arkansas v. Sullivan* (No. 00-262) (Nov. 29, 2000) at 17. This argument attempts to recast the issues below, distinguishing the stop in *Whren* from Sullivan's arrest and asserting that the Fourth Amendment will not allow an officer “unbridled discretion” to make a custodial arrest for a “non-jailable” traffic violation. *See id.* at 19-20. The recast argument, if accepted, will fall squarely within the question presented in *Atwater*, which has been argued and is awaiting the Court's decision. *See* Brief of Petitioners, *Atwater v. City of Lago Vista*, 2000 WL 1299527 at \*i (Sept. 11, 2000) (No. 99-1408). It is not at all clear, however, that the Court will accept an argument drawing a Fourth Amendment distinction between pretextual stops and pretextual arrests. *See supra* note 60 and accompanying text.

217. *See Long*, 463 U.S. at 1041.

218. *See, e.g., Stout v. State*, 320 Ark. 552, 557-58, 898 S.W.2d 457, 460 (1995); *see also supra* note 74 and accompanying text. *See also State v. Ladson*, 979 P.2d 833, 837 (Wash. 1999); *supra* note 106 and accompanying text.

219. *See Marie L. Garibaldi, The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 67 (1998). State courts engaged in this challenge must have dual concerns: (1) how to prevent the state constitution from becoming a “mere shadow” of the federal constitution; and (2) how to avoid expanding state provisions far beyond those of the parallel federal provisions. *See id.*

Further, in order to develop an independent state jurisprudence, the court must clarify the basis of its holdings. The ambiguity of *Sullivan*, as demonstrated in *Guthrie* and *Stephens*, cannot serve as an adequate basis to diverge from federal law. Likewise, as a more immediate problem, the decision cannot provide a consistent, predictable basis for determining the law in Arkansas. The court's refusal to give "carte blanche" authority to law enforcement for pretextual investigatory methods may well be a precedent decision that will prove its wisdom in time. As a first step towards independence, however, it leaves something to be desired.

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