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## Article

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## TRAFFIC STOP FEDERALISM: PROTECTING NORTH CAROLINA BLACK DRIVERS FROM THE UNITED STATES SUPREME COURT

### ABSTRACT

*Black drivers face a different constitutional reality than whites the moment they step behind the wheel in North Carolina. Although black drivers represent only about twenty-two percent of the North Carolina population, thirty-two percent of all traffic stops involve black drivers. This racial disparity may raise suspicion of either implicit or explicit racial profiling on the part of police departments, but the reality is that North Carolina law does not expressly prohibit racial profiling. Instead, so long as the police officers have an objective basis to stop a driver--and they may choose from any of the hundreds of misdemeanor traffic regulations--their implicit or explicit racism is largely irrelevant.*

*Once stopped, the power dynamic only increases in favor of the police. Police officers may request a drug dog to “sniff” around a driver’s vehicle with no suspicion, knowing that should the dog alert to the presence of drugs, there would then be probable cause to search the entirety of the vehicle without a search warrant. If the drug dog does not arrive prior to completing the objective of the traffic stop, the police officers may continue to hold the driver if there is reasonable suspicion of wrongdoing. The police officers may develop this reasonable suspicion through seemingly innocent behavior on the part of the driver, including nervousness or disrespectfulness towards the police officers. The police officers may also expand the scope of the stop by asking for consent to search the vehicle. Minimal consideration is given to whether a black driver, shaped by prior personal and historical experiences with law enforcement, can refuse consent or to terminate the encounter with the police.*

*\*324 This article argues that the racial disparities for traffic stops and searches are the fault of two supreme courts: first, the United States Supreme Court for creating a traffic stop framework built on a number of supposed objective standards that give excess deference to police officers’ subjective beliefs and expectations while ignoring the realities and experiences of black drivers; second, the North Carolina Supreme Court for its blind acquiescence to the framework established by the U.S. Supreme Court. This Article proceeds to argue that North Carolina may protect its own drivers by exercising traffic stop federalism and interpreting its own constitution to consider the experience of its black drivers. Lastly, the Article concludes by arguing that North Carolina may serve as an example to other states who seek to protect their own black drivers from the U.S. Supreme Court.*

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**\*325** “Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”<sup>1</sup>

- Justice William Brennan

*Interviewer: “Do you remember what you pulled 'em over for?”*

*Officer Jeronimo Yanez: “Um, I wanted to pay attention to that because we had a strong armed robbery last week uh which involved two African American males um, one having a firearm and pointing it at the clerk and then the other uh the victim told me that he also had a firearm but I wasn't able to see it when the video was reviewed. Um, so I was sitting at the intersection and I see a white vehicle. I can't remember what kind of vehicle it was. Um but I see two occupants. What I believed was two occupants inside the car. And I couldn't make out the passenger. But I knew the passenger had a hat on. And I couldn't make out if it was a guy or girl I just knew that they were both African American and the driver uh appeared to me that he appeared to match the uh physical description of the one of our suspects from the strong arm robbery, gunpoint.”*

*Interviewer: “What is that description?”*

*Officer Yanez: “Um it was a (sigh) I can't remember the height, weight but I remember that it was, the male had dreadlocks around shoulder length.”*

*Interviewer: “Um-hm”*

*Officer Yanez: “Or longer hair around shoulder length. And, um it wasn't specified if it was corn rows or dreadlocks or straight hair. Um and then just kind of distinct facial features with like a kind of like a wide set nose and uh I saw that in the driver of the vehicle.”<sup>2</sup>*

### **\*326 INTRODUCTION**

At 9:05 p.m. on July 6, 2016, Officer Jeronimo Yanez with the St. Anthony, Minnesota, police department activated his squad lights to pull over a vehicle driven by Philando Castile.<sup>3</sup> Officer Yanez stopped the vehicle because he believed that Castile matched the description of a suspect from an armed robbery about a week prior.<sup>4</sup> Officer Yanez later explained his suspicion was based on the facts that Castile was African American, appeared to have dreadlocks, and had a “kind of a wide set nose.”<sup>5</sup> After stopping Castile's vehicle, Officer Yanez approached and smelled what he believed to be burnt marijuana.<sup>6</sup> He also noticed that the passenger was a female and that a young child was in the back.<sup>7</sup> Officer Yanez informed Castile that he was stopped due to a broken taillight and asked for his license and registration.<sup>8</sup> Castile informed Officer Yanez that he had a gun and reached between his right leg and the center console.<sup>9</sup> Officer Yanez suspected Castile was reaching for his gun, in part because of the burnt marijuana smell, and informed Castile to stop reaching several times.<sup>10</sup> Both Castile and his passenger

responded several times that he was not reaching for his gun.<sup>11</sup> Officer Yanez then fired seven shots at Castile.<sup>12</sup> Castile died about twenty minutes after the shooting.<sup>13</sup> The entire traffic stop lasted less than one minute.<sup>14</sup>

Prior to his fatal traffic stop, police officers had stopped the thirty-two-year-old Castile forty-six times, all pursuant to traffic stops.<sup>15</sup> According to an analysis performed by National Public Radio, only **\*327** six of these traffic stops stemmed from suspicions that could have been observed from outside of the vehicle.<sup>16</sup> Castile's history with law enforcement and his subsequent death at the hands of the police highlight the issue of racial bias in traffic stops. This article asks what allows police officers like Officer Yanez to make traffic stops based on their suspicion that drivers like Philando Castile share a hair style and a broad nose with an armed robbery suspect? What consideration, if any, is given or should be given to the personal experiences of the driver in how the police officers conduct traffic stops? If the United States Supreme Court sanctions such racial bias in traffic stops, could and should states abandon the Supreme Court's framework and protect their own drivers from such racial bias?

These issues of race and police activity are especially relevant in North Carolina where the racial disparity in traffic stops and subsequent searches is dramatic.<sup>17</sup> After a series of racially charged traffic stops in the 1990s, the North Carolina legislature mandated that police departments report racial data involving each effectuated traffic stop.<sup>18</sup> Social scientists recently aggregated this data and found that over a twenty-year period in North Carolina, blacks constituted about 22% of the population but accounted for 32% of all traffic stops.<sup>19</sup> In 2010 alone, the odds of a given white person being stopped by police were 13.4% whereas blacks' 21.9% chances of being stopped were much higher.<sup>20</sup> Once stopped, blacks then faced a much higher likelihood than whites of being searched.<sup>21</sup> Over the twenty-year timeframe, North Carolina police conducted 700,000 searches pursuant to a traffic stop.<sup>22</sup> White drivers were searched 2.35% of the time they were stopped.<sup>23</sup> Black drivers were searched 5.05% of the time.<sup>24</sup> The disparity becomes even greater when the traffic stop was made for investigatory purposes as opposed to safety **\*328** purposes. For investigatory stops, black drivers faced a 170% increased chance of being searched compared to whites.<sup>25</sup>

These studies reflect that the social phenomenon of "driving while black" is a reality for North Carolina black drivers.<sup>26</sup> Black drivers are disproportionately stopped and searched as compared to white drivers.<sup>27</sup> Acknowledging that there are cultural, sociological, and structural issues that account for the problem and the solution, this article instead focuses on the legal frameworks in place to govern traffic stops and the normative legal alternatives available to address it.<sup>28</sup> Specifically, the racial disparity found in the amount of traffic stops and searches in North Carolina is largely the result of a conflicted traffic stop framework established by the U.S. Supreme Court and that a solution may be for North Carolina to abandon that framework and establish its own.<sup>29</sup>

On one end of the framework, the U.S. Supreme Court created a seemingly objective-based standard throughout the traffic stop process that gives deference to the subjective beliefs and experiences of an individual police officer.<sup>30</sup> On the other end of the framework, the U.S. Supreme Court minimally considers the historical and personal experiences of the driver.<sup>31</sup> Here, the U.S. Supreme Court **\*329** fails to make a simple recognition: the black experience with police is different and unique from the white experience.<sup>32</sup> It is impacted and formed by the historical legacy of slavery,<sup>33</sup> Jim Crow,<sup>34</sup> and the era of mass incarceration.<sup>35</sup> It is defined by the constant and repeated traffic stops incurred by today's black drivers.<sup>36</sup> The traffic stop framework must reflect that difference in experience, but it does not. Instead, it treats drivers as colorless non-entities, all sharing the same life experiences and expectations of encounters with police officers.<sup>37</sup> When the two ends of the framework intersect, behavior on the part of black drivers that reflects historical and personal experiences with police officers then provides a reasonable basis for a police officer to stop the driver and to escalate the stop to a search of the vehicle.<sup>38</sup>

Traffic stop federalism presents a practical and feasible normative legal alternative to the U.S. Supreme Court's framework.<sup>39</sup> Traffic **\*330** stop federalism recognizes that the U.S. Supreme Court interprets the federal constitution to set a "floor" to the amount of rights a state must afford its citizens.<sup>40</sup> States are then free to interpret their own constitutions to afford its citizens broader and more extensive constitutional rights and protections.<sup>41</sup> In the traffic stop context, state courts are free to conclude that the U.S. Supreme Court's interpretation of the Fourth Amendment fails to adequately safeguard black drivers, and to instead interpret their own state constitution to establish a new framework more representative of the black experience.<sup>42</sup>

North Carolina serves as an example of both the potential successes and downfalls of traffic stop federalism as a normative solution to the U.S. Supreme Court's conflicted framework.<sup>43</sup> As the ninth most populous state,<sup>44</sup> North Carolina has a growing minority population,<sup>45</sup> **\*331** and a history that encompasses the black experience in America.<sup>46</sup> Its courts have recognized that it has the authority to interpret its own constitution independently and more broadly than the U.S. Supreme Court's interpretation of the Fourth Amendment.<sup>47</sup>

The circumstances are ripe for the North Carolina courts to address the racial disparity in traffic stops and searches by interpreting the state constitution to protect its black drivers.<sup>48</sup> And yet, North Carolina has also exhibited the biggest weakness of traffic stop federalism--its courts have rejected it in the context of traffic stops and instead have blindly acquiesced to the U.S. Supreme Court's framework.<sup>49</sup>

While this article focuses on North Carolina to address the legal frameworks in place to govern traffic stops and the normative legal alternatives available to address the racial disparities in stops and searches, the lessons learned from North Carolina are applicable nationwide. The driving while black phenomenon is not limited to North Carolina.<sup>50</sup> A study focusing on Kansas City traffic stops found that police officers stopped 24% of all black drivers per year compared to 12% for whites,<sup>51</sup> while a Missouri investigation revealed that blacks were 85% more likely to be stopped by police.<sup>52</sup> Additionally, social scientists surveyed 2,324 drivers and found that black men are "by far the most likely to be stopped for investigatory reasons."<sup>53</sup> Their study concluded that over the course of a year, an **\*332** African American man who is less than 40 years old and is driving an older luxury car has a 44% likelihood of an investigative stop. A similar white man driving any other vehicle has an 8% chance of such a stop, and a white woman has only a 4% chance.<sup>54</sup>

Nationwide, black drivers are also more likely to be searched than white drivers.<sup>55</sup> The survey of 2,324 drivers revealed that black drivers were five times more likely than white drivers to have their vehicle searched during the traffic stop.<sup>56</sup> A recent Stanford study found that, across several states, white drivers were searched in 2% of all traffic stops while 3.5% of black drivers were searched.<sup>57</sup> The study concluded that black drivers had "approximately twice the odds of being searched relative to white drivers."<sup>58</sup>

This nationwide problem devolves to the majority of states with traffic stops being a predominately state function.<sup>59</sup> Equipped with their own constitutions, cultures, and experiences, states are then presented with the opportunity to exercise traffic stop federalism to protect their own black drivers.<sup>60</sup> North Carolina's consideration and rejection of such a normative approach can guide these state Supreme Courts in their own consideration of adopting a broader traffic stop framework that better protects their black drivers. Perhaps, too, an increase in states exercising traffic stop federalism may trigger the U.S. Supreme Court to reconsider its own framework.<sup>61</sup>

This article proceeds along the progression of a traffic stop. Part I discusses the U.S. Supreme Court's framework for the initiation of the stop,<sup>62</sup> North Carolina's interpretation of this framework,<sup>63</sup> and how this framework intersects with the black experience to legitimize racially based traffic stops.<sup>64</sup> Part II transitions from the initiation of the stop to the police conducting

an investigation of the driver and the vehicle.<sup>65</sup> This part focuses on the U.S. Supreme Court's \*333 framework for using drug dogs to establish probable cause to search a vehicle,<sup>66</sup> and the use of reasonable suspicion to continue holding a driver past the purpose of the traffic stop.<sup>67</sup> After discussing North Carolina's interpretation of this framework, this part next analyzes how the framework affords deference to the subjective beliefs of law enforcement and no such deference to the black experience.<sup>68</sup> Part III concentrates on consent-based searches and the framework established by the U.S. Supreme Court and North Carolina Supreme Court to assess whether consent is voluntarily given.<sup>69</sup> This part concludes by examining how these tests fail to consider black experiences with police in determining the voluntariness of consent.<sup>70</sup>

## I. MAKING THE STOP--A QUASI-OBJECTIVE STANDARD

Traffic stops are governed by the Fourth Amendment, which guarantees, “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”<sup>71</sup> Because a traffic stop is considered a “seizure” under the Fourth Amendment,<sup>72</sup> it must not be “unreasonable” under the circumstances.<sup>73</sup> What is unclear is what role does race play, if any, in the determination of whether a traffic stop is unreasonable.

In *Whren v. United States*, the U.S. Supreme Court first considered the role that race may play in a police officer's decision to stop a vehicle.<sup>74</sup> Writing for the unanimous court, Justice Antonin Scalia \*334 noted that traffic stops at best “interfere with freedom of movement, are inconvenient, and consume time and at worst may create substantial anxiety.”<sup>75</sup> Justice Scalia in agreement with the rest of the Supreme Court reflected the dominantly elite and white viewpoint of traffic stops: they are not life changing events, but rather anxiety ridden inconveniences that keep someone from getting where they are going on time.<sup>76</sup> For many drivers, especially white drivers, this may be the case for most traffic stops.<sup>77</sup> However, for black drivers, traffic stops mean much more than a time-consuming inconvenience.<sup>78</sup> The stop itself is angst-ridden and filled with uncertainty.<sup>79</sup> Rather than ending at a citation or a warning, the stop \*335 may be extended to justify a search of the vehicle.<sup>80</sup> Those who feel unnecessarily stopped may feel alienated and delegitimized from society.<sup>81</sup> In turn, this alienation may impact how they behave during the next traffic stop.<sup>82</sup>

This part examines the legal framework for when police officers may stop a vehicle.<sup>83</sup> Section B addresses the suspicion needed for police to stop a vehicle.<sup>84</sup> The next section then moves to the proposed normative legal solution--traffic stop federalism--by examining North Carolina's consideration and implementation of the U.S. Supreme Court framework.<sup>85</sup> Lastly, the last section in this part examines the impact of these court decisions on black drivers.<sup>86</sup>

### A. *Whren and the Pretext Possible Probable Cause*

On June 10, 1993, Michael Whren and James Brown, two young black men, stopped their vehicle at a stop sign in Southeast Washington, D.C.<sup>87</sup> The Nissan Pathfinder they were driving had \*336 temporary tags.<sup>88</sup> While stopped at the stop sign, several plainclothes vice officers patrolling the area for drug violations in an unmarked vehicle observed Whren and Brown.<sup>89</sup> The plainclothes officers believed that the driver was stopped too long, approximately twenty seconds, at the stop sign.<sup>90</sup> They also observed the driver looking down into the lap of the passenger while stopped at the stop sign.<sup>91</sup> The officers made a U-turn to follow the vehicle, at which point, the vehicle “turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.”<sup>92</sup> At this point, the officers stopped the vehicle and observed two large plastic bags of crack cocaine in Whren's hands.<sup>93</sup>

During the suppression hearing, the primary vice officer, Officer Ephraim Soto, testified that he and the other vice officers were patrolling a high drug area and that their objective was to find narcotic activity occurring, not to conduct traffic patrols.<sup>94</sup> Soto provided he was “out there almost strictly to do drug investigations” and that he stopped vehicles for traffic violations “[n]ot very often at all.”<sup>95</sup> But Soto did acknowledge that he made the stop to investigate two potential traffic violations: being stopped at the stop sign for an excessive amount of time and speeding.<sup>96</sup>

Soto's testimony differed slightly from his partner, Officer Homer Littlejohn.<sup>97</sup> Littlejohn did not attempt to justify the stop based on a traffic violation.<sup>98</sup> Instead, Littlejohn testified that the officers made the stop because they had reasonable suspicion that the drivers were engaged in some sort of drug activity.<sup>99</sup> Littlejohn emphasized that “[w]e did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long.”<sup>100</sup>

Soto and Littlejohn offered two competing justifications for stopping the vehicle: violations of the traffic code and reasonable \*337 suspicion for drug activity.<sup>101</sup> Whren and Brown, however, challenged the stop based solely on Soto's justification--the traffic violation.<sup>102</sup> They acknowledged that while Soto likely had probable cause that Whren had committed two traffic violations--not giving full time and attention to the operation of the vehicle and driving at an unreasonable speed--this probable cause of traffic code violations was not enough to stop a vehicle.<sup>103</sup> Whren and Brown argued that “the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation.”<sup>104</sup> To Whren and Brown, this rule would have dire consequences because “the ease with which officers can identify civil traffic infractions creates the phenomenon of the pretextual traffic stop--the use of traffic laws to evade constitutional restraints.”<sup>105</sup> This possibility was especially dangerous in the context of race because “[i]f police are not required to exercise their discretion within the confines of standard police procedure,” Whren and Brown argued in their brief, “the decision whether to stop a particular citizen for a particular minor traffic infraction will turn on no more than ‘the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.’”<sup>106</sup> To Whren and Brown, the officers observed them, followed them, and stopped them not because of the traffic violations, but because they were black.<sup>107</sup> The traffic violations were then just a pretext to make the stop.<sup>108</sup>

As such, Whren and Brown argued that the Fourth Amendment test for traffic stops should not be whether the police officer had probable cause of the traffic violation, “but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.”<sup>109</sup> The argument was fine, but distinct--rather than asking whether a reasonable police officer could have made the traffic stop based upon probable cause of a traffic violation the question should be whether a \*338 reasonable police officer would have made the traffic stop.<sup>110</sup> By asking whether a reasonable police officer would have made the traffic stop based upon probable cause of a traffic violation, Whren and Brown argued that courts should protect drivers against the officers using traffic code violations as a pretext for racially based stops.<sup>111</sup> To Whren and Brown, reasonable plainclothes vice officers patrolling for drug-related offenses would not have stopped a driver for speeding and not paying attention while at a stop sign, rendering their stop unconstitutional.<sup>112</sup>

The Supreme Court roundly rejected this argument in a unanimous decision.<sup>113</sup> Justice Scalia first considered whether police officers' “ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause ....”<sup>114</sup> To Justice Scalia, the Court had never held “outside the context of inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment ...,”<sup>115</sup> Instead, he highlighted that when law enforcement was acting within their constitutional authority, especially when acting with probable cause, the Court had “flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification.”<sup>116</sup> Justice Scalia further relied on prior cases that “[s]ubjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional.”<sup>117</sup>

He concluded that “these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”<sup>118</sup> Acknowledging that the Constitution does prohibit the selective enforcement of law based on race, he noted that the Equal Protection Clause is the appropriate forum for complaint and that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>119</sup>

\*339 Justice Scalia then considered the test proposed by *Whren* and *Brown*-- whether a reasonable police officer would have made the probable cause based traffic stop as opposed to whether a reasonable police officer could have made the stop.<sup>120</sup> He again rejected this argument, but this time on the basis that the proposed approach was too subjective in nature.<sup>121</sup> Justice Scalia argued that to apply the test proposed by *Whren* and *Brown*, the analysis would rest upon whether the “conduct deviated materially from usual police practices, so that a reasonable police officer in the same circumstances would not have made the stop for the reasons given[.]” and that this test is too subjective in nature.<sup>122</sup> In practice, he posits that “ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable--an exercise that might be called virtual subjectivity.”<sup>123</sup>

The Court's holding in *Whren* is substantial. It ultimately holds that police officers may make a traffic stop whenever they have probable cause of a traffic code violation.<sup>124</sup> Behind that holding, however, the Court rejects any consideration of the officer's potential racial bias or whether the traffic violation is pretext for other unfounded suspicions.<sup>125</sup> By refusing to consider whether a reasonable police officer would have exercised his or her discretion in making the stop, the Court sanctioned police officers to be able to target black drivers, absent any suspicion, and follow those drivers until he or she commits a traffic code violation.<sup>126</sup>

### ***B. Expanding Whren--Reasonable Suspicion Based Stops***

While *Whren's* holding is substantial, it did leave two questions left unanswered. First, what about Littlejohn's justification for making the traffic stop: was reasonable suspicion of drug activity enough to stop the vehicle? And, second, what if police only have reasonable suspicion of a traffic code violation, not probable cause? The holding in *Whren* was that police may stop a vehicle if they had \*340 probable cause of a traffic violation.<sup>127</sup> Probable cause exists when there is a fair probability or substantial chance a crime has been committed and that the suspect committed it.<sup>128</sup> In contrast, reasonable suspicion is a “less demanding standard” and “requires a showing considerably less than preponderance of the evidence.”<sup>129</sup> A finding of reasonable suspicion is satisfied by “some minimal level of objective justification.”<sup>130</sup> Generally, a reasonable suspicion standard merely requires that a police officer have a “reasonable, articulable suspicion that criminal activity is afoot.”<sup>131</sup>

In 2002, the Supreme Court considered whether law enforcement may stop a vehicle based on reasonable suspicion of criminal activity alone. In *United States v. Arvizu*, a federal border control agent received a notification that a border checkpoint sensor had been triggered.<sup>132</sup> This was problematic to the agent because it indicated to him that the checkpoint was likely unmanned and when that occurred previously, drug smugglers usually attempted to cross the unmanned checkpoint.<sup>133</sup> The agent began monitoring the area for the vehicle that triggered the sensor and after he located a minivan--which he knew was the vehicle used by drug smugglers--driving in that direction he began to follow it.<sup>134</sup> While following the minivan, he made several observations that he believed were suspicious based on his experience: the minivan slowed down, the driver appeared to be stiff and rigid, the driver did not wave or acknowledge the agent, the children waved in a way that he felt was compelled, and lastly the vehicle turned into an area not generally frequented by minivans.<sup>135</sup> Ultimately, the agent performed a registration check that revealed that the minivan was registered to an address in an “area notorious \*341 for alien and narcotics smuggling.”<sup>136</sup> At this point, the agent stopped the vehicle.<sup>137</sup>

The Supreme Court found this to be a lawful stop, not based on whether the agent had probable cause of a traffic violation, but rather on the agent's reasonable suspicion that the vehicle was engaged in drug smuggling.<sup>138</sup> The Court noted “the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity ‘may be afoot[.]’”<sup>139</sup> Here, the Court found that the agent was able to draw on his “own experience and specialized training to make inferences from and deductions about the cumulative information available to” him that “might well elude an untrained person” in making the stop.<sup>140</sup> Tellingly, all the factors the agent relied upon were innocent in nature--the driving of a minivan, not waving to the agent, a turn into an area not frequented by minivans, and what appeared to be compelled waving--but were perceived as suspicious by the agent's subjective beliefs formed by his experiences and training.<sup>141</sup>

The Supreme Court's holding in *Whren* also left unanswered the question of whether an officer's reasonable suspicion of a traffic code violation constituted a sufficient basis to stop a vehicle. While the Supreme Court has not directly clarified whether *Whren* requires probable cause as opposed to reasonable suspicion of a traffic code violation,<sup>142</sup> the majority of circuits interpreted the probable cause \*342 portion of *Whren* to be dicta.<sup>143</sup> Specifically, “the Second, [Third,] Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits” have all ‘construed *Whren* to require only that the police have “reasonable suspicion” to believe that a traffic law has been broken.’”<sup>144</sup> To support this interpretation of *Whren*, the circuits noted that the reasonable suspicion “standard was for many years accepted as the standard governing run of the mill traffic stops.”<sup>145</sup> They further noted there was “little in *Whren* to suggest that the Court meant to create a new probable cause standard in the context of investigatory traffic stops. Instead, the Court in *Whren* was responding to the situation before it--one in which the officer obviously possessed probable cause.”<sup>146</sup>

Thus, post-*Whren*, the Court and federal circuits expanded the scope of what constitutes a permissible traffic stop.<sup>147</sup> The result is the current Supreme Court framework for making a traffic stop: a police officer may follow a vehicle based on a hunch, even if that hunch is solely based on racial bias, until that officer has either reasonable suspicion or probable cause that the driver committed a traffic code violation or that criminal activity is afoot.<sup>148</sup>

### C. The North Carolina Approach

North Carolina has a clear problem with police officers stopping black drivers at a disproportionate rate.<sup>149</sup> But, if the disproportionate stopping of black drivers is partially the result of the \*343 Supreme Court's traffic stop framework, then is North Carolina--and its black drivers--stuck with the problem? The answer is a resounding no.<sup>150</sup> A firmly held principle of federalism and state constitutional law is “that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.”<sup>151</sup> While federal law “sets minimum requirements that States must meet but may exceed,” states must do so “by enacting appropriate legislation or by judicial interpretation of its own Constitution ...,”<sup>152</sup> North Carolina is free to exercise traffic stop federalism and to interpret its own constitution to broaden the Supreme Court's framework.<sup>153</sup>

The ability to allow states to interpret their own constitutions to provide extra rights to those provided by the federal constitution has several benefits.<sup>154</sup> As noted by Judge Jeffrey Sutton, “State courts also have a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee.”<sup>155</sup> Under this approach, states with more sizeable black populations, especially ones with a history of racial discrimination and abuse by law enforcement, may be able to protect these drivers better by interpreting their constitutions to afford these drivers more constitutional protections.<sup>156</sup> States are different and \*344 state “constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.”<sup>157</sup> Further, as Justice Brennan noted, “one of the strengths

of our federal system is that it provides a double source of protection for the rights of our citizens.”<sup>158</sup> When the federal courts fail to provide sufficient protection of individual rights, federalism then allows the states to provide this greater protection.<sup>159</sup>

North Carolina provides a near-perfect example of the potential merits of traffic stop federalism.<sup>160</sup> It is currently the ninth most-populated state and has a rapidly growing minority population.<sup>161</sup> The history of North Carolina mirrors the struggle of black Americans, stretching from slavery to Jim Crow to the War on Drugs and finally to the disproportionate rate of black traffic stops.<sup>162</sup> The state constitution's prohibition against unreasonable searches and seizures stands apart from the Fourth Amendment.<sup>163</sup> Finally, the Supreme Court of North Carolina has repeatedly held that it is “not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.”<sup>164</sup> Thus, the most realistic normative legal solution for North Carolina to address the disparity in traffic stops is to reject the Supreme Court's framework and to adopt its own, consistent with the experiences of its citizens and its more expansive state constitution.

Prior to *Whren*, the North Carolina courts appeared willing to do just that.<sup>165</sup> In 1990, six years prior to *Whren*, the North Carolina Court of Appeals considered the case of *State v. Morocco*.<sup>166</sup> At approximately 7:40 am, a police officer observed Larry Fremont \*345 Morocco driving a vehicle without wearing a seatbelt.<sup>167</sup> The officer stopped Morocco based on this violation and subsequently discovered cocaine in the vehicle.<sup>168</sup> In challenging the stop, Morocco claimed that the initial basis for the stop--driving without a seatbelt--was a pretext.<sup>169</sup> To determine whether the stated reason for the stop was a pretext, the court stated that “the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do.”<sup>170</sup> Although the court held that a reasonable officer would have stopped Morocco for not wearing his seatbelt, this test the U.S. Supreme Court eventually rejected in *Whren*.<sup>171</sup> As established by the North Carolina Court of Appeals--regarding whether a reasonable police officer would have made the stop--the court acknowledged the possibility that pretextual stops, even supported by some objective basis, would still fall outside of constitutional protection if a reasonable police officer in that situation would not have made the stop.<sup>172</sup>

In 1999, however, the North Carolina Supreme Court directly considered *Whren*.<sup>173</sup> Police officers stopped Paul McClendon after they observed two cars travelling approximately seven miles per hour over the speed limit and the rear car, driven by McClendon, following too closely to the first car.<sup>174</sup> The officer who made the stop testified that he used the speeding violation as an opportunity to advance a drug investigation, believing that the front car was a decoy vehicle to the second car.<sup>175</sup> He testified that based on his extensive \*346 experience in drug investigations, it was common for drug traffickers to use a decoy vehicle to effectuate their offense.<sup>176</sup> In challenging the validity of this stop, McClendon argued that the speeding violation was a pretext for the stop.<sup>177</sup> He argued that the standard set forth in *Morocco* should apply--that a reasonable police officer would not have stopped his vehicle for only going seven miles per hour over the speed limit.<sup>178</sup>

McClendon also anticipated that *Whren* may influence the North Carolina Supreme Court's decision.<sup>179</sup> Consequently, in his petition, he argued that the North Carolina Supreme Court should refuse to apply *Whren*, consistent with its earlier determinations that it was free to interpret its own constitution to afford extra protections.<sup>180</sup> He also argued that if the court followed *Whren*, “there will be little practical means of preventing, or even discouraging, law enforcement officers from using discriminatory pretextual motives against law abiding Black and Hispanic motorists in the State of North Carolina.”<sup>181</sup>

The North Carolina Supreme Court rejected McClendon's argument and adopted the *Whren* decision.<sup>182</sup> Recognizing that it is free to interpret its own constitution independently from the federal constitution, the court determined the “reasoning of the Supreme Court in *Whren* to be compelling.”<sup>183</sup> Making no reference of the test set-forth in *Morocco*, the North Carolina

Supreme Court determined that “for situations arising under our state Constitution, we hold that an objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause.”<sup>184</sup>

After *McClendon*, North Carolina drivers were not protected from the U.S. Supreme Court framework allowing for pretextual traffic stops so long as there was probable cause of a traffic violation.<sup>185</sup> But much like *Whren*, *McClendon* left open the possibility that police officers may not make pretextual stops based on reasonable suspicion \*347 of a traffic violation.<sup>186</sup> The North Carolina Supreme Court appeared to take a more restrictive view on this issue than the federal circuits.<sup>187</sup> In *State v. Ivey*, a police officer stopped Ivey after he observed Ivey make a right hand turn without using a turn signal; however, the traffic code in question only prohibited right hand turns without a signal when “any other vehicle may be affected by such movement ...,”<sup>188</sup> The Supreme Court of North Carolina concluded that the police officer lacked sufficient probable cause to stop Ivey's vehicle because there was no indication that another vehicle would have been affected by the turn.<sup>189</sup>

In its decision, the North Carolina Supreme Court recognized that *Whren* was binding upon it, but also acknowledged Ivey's race may have played a role in the stop.<sup>190</sup> The court never contemplated that the stop could have been based on the officer's reasonable suspicion that the turn could have impacted another driver, but instead focused on whether there was probable cause to believe Ivey's actions violated the traffic code.<sup>191</sup> In determining whether probable cause existed, the court considered whether a “reasonable [police] officer would have believed, under the circumstances of the stop,” that Ivey's actions affected another driver.<sup>192</sup> Finding that no such evidence existed, the court found there was not probable cause to make the stop.<sup>193</sup> By not analyzing whether the police officer had a reasonable suspicion of the turn impacting another driver, the court implicitly rejected the idea that under *Whren*, a police officer may make a pretextual traffic stop so long as he or she had reasonable suspicion of a traffic code violation. Instead, the court held the police officers to a probable cause standard focusing on whether a reasonable police officer *would* have had sufficient probable cause to \*348 make the stop, somewhat returning to the standard set forth in *Morocco*.<sup>194</sup>

Only two-years later, however, the North Carolina Supreme Court appeared to overturn itself and instead adopted the U.S. Supreme Court traffic stop framework in its entirety.<sup>195</sup> In *State v. Styles*, the North Carolina Supreme Court considered a traffic stop based on an officer's reasonable suspicion of a traffic code violation.<sup>196</sup> Here, an officer observed Styles change lanes without signaling.<sup>197</sup> The applicable North Carolina traffic code only prohibits changing lanes without signaling if it will impact the safety of another vehicle.<sup>198</sup> These facts were similar to *Ivey* where under a probable cause standard, the stop was deemed unlawful as there was no evidence to suggest a reasonable police officer would have determined the lane change affected another driver.<sup>199</sup> However, the court reconsidered its ruling in *Ivey*.<sup>200</sup> Relying on the federal circuit court cases following *Whren*, the court held that “reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.”<sup>201</sup>

Additionally, the court in *Styles* examined whether reasonable suspicion of criminal activity alone is enough to warrant a traffic \*349 stop.<sup>202</sup> After citing several U.S. Supreme Court cases to support traffic stops based solely on reasonable suspicion that criminal activity is afoot, the North Carolina Supreme Court affirmed that “[t]his Court requires that ‘[t]he stop ... be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.’”<sup>203</sup>

Thus, while North Carolina had the constitutional means and a historical need to interpret its constitution to protect black drivers, it failed to do so.<sup>204</sup> As a result, North Carolina black drivers are subject to the U.S. Supreme Court's framework that allows police officers to follow vehicles based on racial bias until there is probable cause or reasonable suspicion of a traffic code violation or reasonable suspicion of criminal activity sufficient to justify the traffic stop.<sup>205</sup>

**\*350 D. Making the Stop and the Black Experience**

The U.S. Supreme Court and the North Carolina courts share a common framework governing when police officers may make a stop.<sup>206</sup> To these courts, the framework is seemingly objective--so long as an officer has reasonable suspicion or probable cause of either a traffic code violation or criminal activity, he or she may make the stop.<sup>207</sup> The objective basis for the stop--probable cause or reasonable suspicion--should then render the subjective intent of the police officer irrelevant.<sup>208</sup> At no point in this framework do the courts consider the driver; rather, the drivers' actions are viewed completely through the lens of the police officer's perceptions.<sup>209</sup> Although the courts perpetuate that this framework is objective in nature, it in fact relies heavily on the subjective beliefs and experiences of the individual police officer.<sup>210</sup> The consequence of this subjectivity is severe on black drivers as the framework renders their subjective beliefs to be irrelevant, but these subjective beliefs may result in behavior that police officers find to support probable cause or reasonable suspicion.<sup>211</sup> This conflict then results in increased traffic stops for black drivers.<sup>212</sup>

The underlying premise of *Whren* allows for the police officer's subjective beliefs and biases to initiate the traffic stop.<sup>213</sup> An officer on patrol who sees a black driver and believes for whatever reason that the driver may be engaged in criminal activity--even if this hunch is based on explicit racism--may then follow the driver until that driver commits a traffic code violation.<sup>214</sup> The officer is free to then use that traffic code violation as a pretext for his or her racial **\*351** bias in making the stop.<sup>215</sup> This standard was quickly viewed as a victory for law enforcement.<sup>216</sup> Police Chief magazine covered *Whren* immediately and declared that it "preserve[s] officers' ability to use traffic stops to uncover other criminal activities,"<sup>217</sup> and a highway patrol training officer declared, "After *Whren* the game was over. We won."<sup>218</sup>

If law enforcement "won" as a result of *Whren*, then black drivers lost. This framework legitimized the random targeting of black drivers by law enforcement.<sup>219</sup> Black drivers now had to live with the constant threat of being targeted by law enforcement.<sup>220</sup> While *Whren* also allowed such conduct with white drivers, black drivers carry the burden and stigma of pretext stops.<sup>221</sup> It is reasonable to expect that the constant scrutiny by police officers would lead to mistrust, fear, and nervousness by those who are consistently followed.<sup>222</sup> In turn, it is also reasonable to believe that this nervousness may impact how drivers operate their vehicles once they observe a police vehicle following them.<sup>223</sup>

The framework's supposed check on this initial subjective intent of the police officer is that the officer must still have probable cause or reasonable suspicion to make the stop.<sup>224</sup> However, both probable **\*352** cause and reasonable suspicion are on-site determinations made by the police officer based on his or her personal experience and perceptions.<sup>225</sup> Consider probable cause. The Supreme Court has held and the North Carolina courts have adopted, that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."<sup>226</sup> Further, it "does not deal with hard certainties, but with probabilities."<sup>227</sup> And these probabilities "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."<sup>228</sup> This standard allows for law enforcement officers to formulate "certain common-sense conclusions about human behavior" and "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."<sup>229</sup> Thus, the probable cause standard, which supports the objective-nature of the traffic stop framework, rests heavily upon the common sense conclusions made by the police officer.<sup>230</sup>

Reasonable suspicion affords a similar amount of discretion to police officers' subjective interpretations of human behavior.<sup>231</sup> The U.S. Supreme Court and North Carolina Supreme Court have both found that a stop predicated upon reasonable suspicion

must be **\*353** supported by “some minimal level of objective justification ...,”<sup>232</sup> To meet this standard, both courts require that “[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.”<sup>233</sup> Again, this standard does not consider the subjective beliefs of the person stopped, but rather focuses on inferences made by the police officer on his or her personal experience.<sup>234</sup> It allows police officers to take innocent behavior, potentially spurred by subjective fears, and render it suspicious based on their own personal experiences and training.<sup>235</sup> Consequently, behaviors such as dramatically lowering one's speed,<sup>236</sup> nervousness,<sup>237</sup> presence in a known high crime area,<sup>238</sup> unprovoked flight,<sup>239</sup> and evasive **\*354** behavior<sup>240</sup> may all contribute to police officers' reasonable suspicion determinations.

The result of this framework is that black drivers are much more likely to be stopped than white drivers.<sup>241</sup> For example, imagine a black driver who has been repeatedly and lawfully followed by police officers. On any given night, the driver may see the police behind her and become either nervous or fearful about the repeated following. The police officer may very well be targeting her just because she is black. Her fear and nervousness may lead the driver to lower her speed, maybe make a quick turn to try to “lose the police officer,” or somewhat increase her speed in accordance with the speed limit. Assume too that the driver may not live in the best part of town or may be commuting through a high crime area on the way home. The police officer following her may consider all these innocent factors that are mostly a response to the driver's nervousness or anger at being followed to believe there is reasonable suspicion to stop the vehicle. Or, perhaps the same driver became nervous or fearful at the sight of the police officer following her and this impacted her driving. She nervously changed lanes without signaling or drifted slightly over the yellow line. Such conduct would then afford the police officer either probable cause or reasonable suspicion that she committed a traffic violation and to stop the vehicle.<sup>242</sup>

When stopped by the police officer, the framework established by the U.S. Supreme Court and accepted by the North Carolina Supreme Court precludes her from arguing the stop was a pretext for the officer's racial bias, that a reasonable police officer would not have stopped her based on those facts, or that her personal experiences with police officers impacted her driving. Instead, so long as the **\*355** police officer's subjective observations support a seemingly objective basis for the stop, the stop was permissible.<sup>243</sup>

## II. FROM TRAFFIC STOP TO VEHICLE SEARCH--BRINGING IN THE DRUG-SNIFFING DOG

Black drivers are not only stopped by police officers at a disproportional rate but their vehicles are searched pursuant to these stops at a disproportional rate.<sup>244</sup> In North Carolina alone, over a twenty-year period, black drivers were searched nearly twice as often as white drivers.<sup>245</sup> This section discusses how police officers transition from a traffic based stop to conducting an investigatory search of the vehicle. Such a transition is meaningful, as in North Carolina, when the stop becomes investigatory in nature, black drivers face a 115% increased chance of a search, compared to whites.<sup>246</sup>

While police officers have broad discretion in making the stop, they are somewhat more limited in how they conduct the stop.<sup>247</sup> The U.S. Supreme Court has held that “[a] seizure for a traffic violation justifies a police investigation of that violation.”<sup>248</sup> As traffic stops are “more analogous to a so-called ‘Terry stop’ ... than to a formal arrest [,]”<sup>249</sup> the “tolerable duration of police inquiries in the traffic-stop [sic] context is determined by the seizure's ‘mission’--to address the traffic violation that warranted the stop.”<sup>250</sup> Under these restrictions, when police officers stop a vehicle, they are limited in scope and time to investigating the reason for the stop.<sup>251</sup> For example, if they stop a driver for speeding, they are limited to investigating the driver for speeding, not for whether the driver possesses illegal drugs.<sup>252</sup>

Nonetheless, traffic stops made by police officers based upon either probable cause or reasonable suspicion of only a traffic code violation may still result in a search of the vehicle--if the police **\*356** officers can establish probable cause of additional

wrongdoing.<sup>253</sup> The Supreme Court has long held that the Fourth Amendment does not require a search warrant when law enforcement has probable cause to believe evidence of wrongdoing is present in a vehicle.<sup>254</sup> This approach extends to anywhere in the vehicle where the evidence of criminal activity may be.<sup>255</sup> Consequently, police officers may transition from a traffic stop to an investigatory stop in order to conduct a search of the vehicle by developing probable cause of criminal activity.<sup>256</sup>

One way that police officers may develop probable cause of criminal activity is through a drug-sniffing dog.<sup>257</sup> The U.S. Supreme Court has held that a well-trained police dog's "alert" as to the presence of contraband is sufficient to establish probable cause to search a vehicle.<sup>258</sup> The availability of a drug-sniffing dog to transition a traffic stop into an investigatory stop has led police officers to refer to drug-sniffing dogs as "probable cause on four legs[.]"<sup>259</sup> with officers only needing an alert from a drug-sniffing dog to justify a search of the entire vehicle.<sup>260</sup>

**\*357** But when may officers use the drug-sniffing dog during the course of a routine traffic stop? What level of suspicion is required, if any? This section focuses on the U.S. Supreme Court's framework regarding the use of drug dogs to develop sufficient probable cause to support a search of a vehicle stopped for a traffic code violation.<sup>261</sup> It focuses on the initial decision to call in the drug dog and the police officers' ability to extend the traffic stop beyond its initial purpose to await the drug dog's arrival.<sup>262</sup> After examining U.S. Supreme Court's framework and North Carolina's approach, this section analyzes how this framework conflicts with the black experience and how this conflict results in black drivers being disproportionately searched as part of their traffic stop.<sup>263</sup>

#### ***A. Calling in the Drug Dog and the U.S. Supreme Court--No Suspicion Required***

An Illinois state trooper stopped Roy Caballes for driving seventy-one miles per hour on a portion of the interstate where the speed limit was sixty-five miles per hour.<sup>264</sup> The trooper called-in the stop and asked for a check of Caballes' license plates.<sup>265</sup> A different trooper heard the call and immediately went to the stop equipped with his drug-sniffing dog.<sup>266</sup> Prior to the drug dog arriving, the on-site trooper indicated to Caballes that he was going to give him a warning ticket.<sup>267</sup> Before the trooper completed the warning ticket, the other trooper and the drug-sniffing dog arrived.<sup>268</sup> The trooper walked the dog around Caballes' vehicle, and the dog alerted at the trunk.<sup>269</sup> A subsequent probable cause search of the trunk found marijuana.<sup>270</sup>

Caballes challenged the lawfulness of the search, and the Illinois Supreme Court seemed to agree.<sup>271</sup> The Illinois Supreme Court determined that "there were no specific and articulable facts to support the use of a canine sniff"<sup>272</sup> and that the use of the dog sniff **\*358** "impermissibly broadened the scope of the traffic stop."<sup>273</sup> After Illinois petitioned on writ of certiorari to the U.S. Supreme Court, Caballes argued that "[t]he fact that the police had probable cause to stop [him] for speeding did not authorize them to undertake an investigatory dog sniff, designed solely to prospect for possible evidence of an unrelated offense."<sup>274</sup> The Illinois Supreme Court<sup>275</sup> and Caballes<sup>276</sup> were willing to concede that reasonable suspicion was sufficient to use a drug dog as part of a routine traffic stop, but Illinois argued no level of suspicion was required.<sup>277</sup>

The U.S. Supreme Court agreed with Illinois. The Court framed its analysis around the principle that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy."<sup>278</sup> Looking to prior cases involving drug dogs, the Court determined that allowing a dog to sniff around the outside of a vehicle does not implicate legitimate privacy interests and hence is not a search for Fourth Amendment purposes.<sup>279</sup> Consequently, the Court held that no suspicion was required to justify using a drug detection dog to sniff a vehicle during a stop for a traffic code violation.<sup>280</sup>

### ***B. Calling in the Drug Dog and North Carolina--No Suspicion Required***

In *Caballes*, the Illinois Supreme Court found that reasonable suspicion was necessary to use a drug-sniffing dog as part of a routine traffic stop, but the U.S. Supreme Court overturned that decision.<sup>281</sup> The U.S. Supreme Court was able to do so, however, \*359 because the Illinois Supreme Court based its holding on its reading of the U.S. Constitution, not on Illinois' constitution.<sup>282</sup> Thus, the possibility of traffic stop federalism remains in place for requiring some level of suspicion for using a drug-sniffing dog.<sup>283</sup>

Once again, though, North Carolina has elected to proceed in lockstep agreement with the U.S. Supreme Court. Prior to *Caballes*, the North Carolina courts also required reasonable suspicion to utilize a drug dog as part of a routine traffic stop.<sup>284</sup> In *North Carolina v. Branch I*, Branch was stopped at a license and registration checkpoint.<sup>285</sup> While she was stopped, a police officer walked a drug-sniffing dog around Branch's vehicle.<sup>286</sup> The dog alerted and a probable cause search of Branch's vehicle found marijuana stems and butts in the vehicle's ashtray and a small amount of marijuana in her purse located in the vehicle.<sup>287</sup>

Branch challenged the use of the drug dog and the North Carolina Court of Appeals agreed with her. The Court of Appeals held that “a \*360 reasonable and articulable suspicion is required before a dog sniff, even though it is not a search ...,”<sup>288</sup> After the North Carolina Supreme Court denied review of this holding,<sup>289</sup> the state submitted a petition for writ of certiorari to the U.S. Supreme Court, which was granted.<sup>290</sup> The U.S. Supreme Court vacated the Court of Appeals' decision and remanded it back to the court for consideration in light of *Caballes*.<sup>291</sup>

On remand, the North Carolina Court of Appeals did not have to follow the U.S. Supreme Court's ruling in *Caballes*. While the Court of Appeals was bound by the U.S. Supreme Court's interpretation of the Fourth Amendment, the Court of Appeals in *Branch II* could have interpreted the North Carolina constitution's prohibition against unreasonable searches and seizures as requiring reasonable suspicion to justify the use of a drug-sniffing dog--just as it had earlier.<sup>292</sup> Instead, the Court of Appeals made no reference to the North Carolina constitution and applied the U.S. Supreme Court's ruling in *Caballes* to Branch.<sup>293</sup> As such, the Court of Appeals held that “officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle.”<sup>294</sup> Once again, the North Carolina courts had an opportunity to expand the rights of its citizens through a broader interpretation of its constitution--consistent with their prior holdings--but refused to do so in light of contrary U.S. Supreme Court decisions.

### ***C. Waiting for the Drug Dog and Reasonable Suspicion***

The U.S. Supreme Court's framework allows for police officers to request and use a drug dog to sniff around a vehicle stopped pursuant to a routine traffic stop without any suspicion of additional wrongdoing.<sup>295</sup> But what if the drug-sniffing dog is late to arrive? Can police officers prolong the traffic stop beyond its completion to conduct a dog drug-sniff? As stated earlier, the U.S. Supreme Court considers traffic stops to be relatively brief encounters that may “last \*361 no longer than is necessary to effectuate th[at] purpose.”<sup>296</sup> The authority for the stop “thus ends when tasks tied to the traffic infraction are--or reasonably should have been--completed.”<sup>297</sup> While officers may engage in unrelated investigations during the course of the traffic stop, such as a utilizing a drug-sniffing dog, these investigations may not “lengthen the roadside detention.”<sup>298</sup>

In *Rodriguez v. Florida*, the U.S. Supreme Court considered whether extending a traffic stop for a reasonable amount of time to use the drug-sniffing dog unduly lengthened the “roadside detention.”<sup>299</sup> The state advocated a *de minimis* exception to the general prohibition against extending a traffic stop beyond its initial purpose.<sup>300</sup> It argued that the government's “strong

interest in interdicting the flow of illegal drugs along the nation's highways," outweighed the *de minimis* additional instruction of requiring a driver, already stopped, to remain pulled over while awaiting the drug-sniffing dog.<sup>301</sup> To further this argument, the government set forth that the police officer "may 'incremental[ly]' prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable ...."<sup>302</sup>

The U.S. Supreme Court declined to establish the *de minimis* exception, proposed by the state in the case, of prolonging traffic stops to use a drug-sniffing dog.<sup>303</sup> Instead, the Court found that the government did not have a general safety interest in the case of drug trafficking that would outweigh the additional intrusion and that police officers should always conduct traffic stops diligently.<sup>304</sup> As such, the Court held that police officers could only extend traffic stops beyond their initial purpose if they have reasonable suspicion to do so.<sup>305</sup> Thus, under the U.S. Supreme Court's framework, no suspicion is required to use a drug-sniffing dog during a routine \*362 traffic stop, but reasonable suspicion is required if the sniff will prolong the stop beyond its initial purpose.<sup>306</sup>

#### ***D. Waiting for the Drug Dog and Reasonable Suspicion in North Carolina***

In terms of requiring reasonable suspicion for extending a stop in anticipation of a drug dog sniff, North Carolina has had a somewhat scattered approach. At first, North Carolina courts adhered somewhat strictly to a requirement of reasonable suspicion in prolonging the stop to use a drug-sniffing dog.<sup>307</sup> However, in 2012 the North Carolina Court of Appeals in *State v. Brimmer* established a *de minimis* exception similar to the one advocated for by the government in *Rodriguez*.<sup>308</sup> Only two years following *Brimmer*, the North Carolina Court of Appeals again considered the issue.<sup>309</sup> In *State v. Cottrell*, the North Carolina Court of Appeals limited the *de minimis* exception to the facts of *Brimmer*, specifically to instances "in which a drug-sniffing dog is available at the scene of the traffic stop prior to completion of the purpose of the stop."<sup>310</sup> The Court of Appeals noted that it refused to extend the *de minimis* exception to situations where a drug dog has not "already been called to the scene prior to completion of the lawful stop."<sup>311</sup> Instead, the Court of Appeals committed itself to requiring reasonable suspicion in those situations.<sup>312</sup> Once the U.S. Supreme Court decided *Rodriguez*, however, the North Carolina courts again returned to requiring reasonable suspicion for all situations where police officers prolonged the stop for a drug sniff.<sup>313</sup>

\*363 After the U.S. Supreme Court's ruling, the North Carolina courts were somewhat limited in exercising traffic stop federalism.<sup>314</sup> As *Rodriguez* directly rejected the *de minimis* exception allowed by the North Carolina courts in limited instances, the U.S. Supreme Court arguably provided drivers with more constitutional rights--requiring some level of individualized suspicion before police officers could prolong the stop. Consequently, the North Carolina courts were limited in maintaining their *de minimis* exception and the North Carolina Court of Appeals correctly identified this limitation when it held that "the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*."<sup>315</sup>

Although the North Carolina courts were bound by the U.S. Supreme Court to require some level of suspicion to prolong a traffic stop to wait for a drug dog, the North Carolina court did have a choice--what level of suspicion to require. The U.S. Supreme Court held that reasonable suspicion was required,<sup>316</sup> but the North Carolina courts could have required the higher level of suspicion--probable cause. Instead, the North Carolina courts affirmed its earlier commitment to reasonable suspicion and emphasized that "reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required."<sup>317</sup> They again committed the initial determination of reasonable suspicion to the on-sight police officer, requiring that courts "must examine both the facts known to the officer at the time he decided to approach the defendant and the rational inferences that may be drawn from those facts"<sup>318</sup> and courts must "take into account an officer's training and experience."<sup>319</sup>

Therefore, the U.S. Supreme Court's traffic stop framework, adopted by the North Carolina courts, allows for police officers to transition from a routine traffic stop to an investigatory stop involving a search of the vehicle through the use of a drug-sniffing dog.<sup>320</sup> With absolutely no suspicion of any criminal wrongdoing, the police officers may utilize the drug-sniffing dog to potentially **\*364** provide probable cause for a search of the vehicle.<sup>321</sup> The one check imposed by the Court on this practice is that police officers may not prolong the stop beyond its initial objective to use the drug dog,<sup>322</sup> however, they may still prolong the stop to use the drug-sniffing dog if they develop reasonable suspicion, which again gives deference to the police officer's experience and personal knowledge.

### *E. The Drug-Sniffing Dog and the Black Experience*

The framework created by the U.S. Supreme Court and adopted by the North Carolina courts again appears on its face to be objective in nature. Police may utilize a drug dog for anyone--white or black--without any suspicion so long as the drug dog does not prolong the stop beyond its initial justification.<sup>323</sup> If the police develop reasonable suspicion--again a supposedly objective standard--they may then prolong the stop beyond its initial justification to wait for the arrival of the drug dog.<sup>324</sup> Much like the initial stop framework, this framework also refuses to consider the driver. A driver is helpless when it comes to the decision of whether a drug dog will be used and whether one is available. The officer has complete as to whether to use a drug dog during the initial stop and it may be a matter of luck as to whether a dog is available or arrives in the time it takes the police officer to complete the initial justification of the stop.<sup>325</sup> Further, this framework once again fails to contemplate the inherent coerciveness of a traffic stop, especially for a black driver.<sup>326</sup> A black driver, impacted by the entirety of the black American experience, may likely become extremely nervous when face-to-face with a police officer while stopped on the side of the road.<sup>327</sup> And it **\*365** is this nervousness, often coupled with other innocent behavior, which then gives the police officer--based on his or her own personal experiences and training--reasonable suspicion to prolong the stop and potentially search the vehicle.<sup>328</sup>

The initial decision of whether to utilize a drug dog may provide for the most subjectivity on the part of the police officer. By requiring no suspicion, police officers need not justify why they request a drug dog for some drivers but not for others.<sup>329</sup> **\*366** Consequently, a police officer who has a subjective belief that black drivers are more likely to carry drugs in their vehicles than white drivers may follow a black driver until the driver commits a traffic code violation and then immediately request a drug-sniffing dog to confirm the officer's subjective hunch.<sup>330</sup> The same police officer may then never request the drug-sniffing dog when he stops a white driver.<sup>331</sup> At no point does the U.S. Supreme Court framework provide protection to the driver, who sits at the mercy of the police officer's discretion and the availability of a drug-sniffing dog.<sup>332</sup>

The one protection afforded to drivers under the drug dog framework is that police may not prolong the stop for the drug dog absent reasonable suspicion.<sup>333</sup> Again though, the determination of reasonable suspicion is predicated in large part by the individual police officer's subjective beliefs and experiences without any consideration of the driver.<sup>334</sup> This reliance on reasonable suspicion is especially problematic in the context of a traffic stop when the vehicle is pulled over. Prior to being pulled over, a black driver may become increasingly nervous when she sees a police vehicle following her and her driving may be affected, but the encounter becomes more coercive when the driver and police officer are face-to-face.<sup>335</sup> The normal reaction for any driver is to become **\*367** apprehensive when stopped by the police.<sup>336</sup> However, for a black driver, potentially possessing a deep distrust and skepticism of police officers, this nervousness is likely to be much greater than that of a white driver.<sup>337</sup>

The nervousness of a black driver becomes especially relevant in the determination of what exactly constitutes reasonable suspicion. North Carolina courts have repeatedly held that innocent conduct,<sup>338</sup> such as nervousness is a significant factor

in determining whether an officer could form a reasonable suspicion that criminal activity was afoot.<sup>339</sup> As a result, North Carolina courts frequently couple nervousness along with other seemingly innocent factors, such as the \*368 strong smell of an air freshener,<sup>340</sup> to find sufficient reasonable suspicion to prolong a stop pending the arrival of a drug-sniffing dog. It is again a situation where innocent conduct becomes suspicion because of the subjective beliefs of the police officer.<sup>341</sup>

This framework, built upon the subjective whims of a police officer and a reasonable suspicion standard built on excessive nervousness, conflicts with the black experience and results in black drivers being disproportionately searched as part of their traffic stop.<sup>342</sup> Consider the hypothetical black driver from the earlier discussion on when police officers may initiate a traffic stop.<sup>343</sup> A police officer started following a black driver based on his belief that black drivers are generally engaged in drug use. The driver observed the police officer following her and this made her nervous, which resulted in her committing a traffic code violation. The police officer then had this objective basis to make a stop. Believing that black drivers were likely to engage in drug activity, he immediately called in the driver's license plates and requested a drug-sniffing dog. He approached the vehicle and began the process of giving the driver a citation for the traffic violation. The dog had still not arrived by the time he finished writing the citation.

As the stop continued, the driver, who had been followed and stopped by the police repeatedly before and was significantly impacted by the Black Lives Matter movement,<sup>344</sup> became increasingly nervous about the interaction. She began sweating profusely. When the officer asked her questions, she either mumbled a response or gave short answers, hoping to end the stop. When the officer asked her where she was coming from, she could not \*369 remember due to her nervousness. The officer believed the totality of these factors, especially her nervousness, were enough for reasonable suspicion and kept her pulled over until a police dog arrived. The police dog then sniffed around her car, alerted, and allowed the police to search the vehicle.

When searched by the police officer, the framework established by the U.S. Supreme Court and accepted by the North Carolina Supreme Court precludes her from arguing that the only reason the officer called for the police dog was because she was black or that he failed to follow standard operating procedures. It also precludes her from arguing that her nervousness should not be considered as a basis for reasonable suspicion because she was not nervous because of the contents of her car, but rather because of her fear or distrust of police officers predicated upon historical and personal experiences with law enforcement. Rather, a court will refuse to look at why the officer requested the drug-sniffing dog and will give deference to the police officer's determination that her nervousness contributed to his reasonable suspicion determination based on current standards.<sup>345</sup>

### III. CONSENT-BASED SEARCHES

A North Carolina police officer stopped a vehicle in which Marlon Bartlett, a black man, was a back seat passenger after the officer suspected Bartlett had just participated in a drug transaction in a fast food parking lot.<sup>346</sup> After stopping the vehicle, five uniformed police officers approached Bartlett, ordered him to show his hands, and instructed him to exit the vehicle.<sup>347</sup> Once outside the vehicle, one of the officers asked Bartlett whether he would consent to a search of his person.<sup>348</sup> According to the officer, Bartlett responded, “[g]o ahead,” at which point the officer conducted a search and discovered a bag of heroin in Bartlett's underwear.<sup>349</sup>

It seems absurd and counterintuitive that an individual who knows he is in possession of heroin would then voluntarily consent to a search of his person.<sup>350</sup> A more reasonable explanation would \*370 perhaps be that a black male, stopped on the side of the road by five uniformed police officers, having been ordered to show his hands and to exit the vehicle, would feel that he has no choice but to consent to a search.<sup>351</sup> Despite such apparent inherent coerciveness, consent-based searches “are part of the standard investigatory techniques of law enforcement agencies.”<sup>352</sup> These searches occur “on the highway, or in a person's home or office, and under informal and unstructured conditions.”<sup>353</sup> When performed on a highway, consent-based searches

often involve both a search of a driver's person and their vehicle.<sup>354</sup> Police officers asking for consent to search during a routine traffic stop has become commonplace<sup>355</sup> and are “now a wholesale activity accompanying a great many traffic stops ....”<sup>356</sup>

In North Carolina, consent-based searches are the most common type of search performed during a traffic stop.<sup>357</sup> Of the nearly 700,000 vehicle searches performed by North Carolina law enforcement officers over the past twenty years, over 304,678 of those searches were based upon consent;<sup>358</sup> amongst these vehicle searches, consent was given by 141,190 black drivers as compared to only 127,954 white drivers.<sup>359</sup> If consent-based searches are the most prevalent type of search, and if North Carolina black drivers provide \*371 consent more often than white drivers, then how does North Carolina law ensure that consent is voluntarily given?

North Carolina largely follows the framework established by the U.S. Supreme Court.<sup>360</sup> This section explores the framework established by the U.S. Supreme Court—a framework that began as subjective in nature, considering the suspect's perception of the circumstances, that gradually shifted towards a seemingly objective standard focused instead on the individual police officer's perception of the circumstances.<sup>361</sup> It subsequently examines North Carolina's acceptance of the approach and how this framework then clashes with the black experience to result in more searches of black drivers.<sup>362</sup>

#### *A. From Subjective to Objective—the U.S. Supreme Court and Consent-Based Searches*

The U.S. Supreme Court first considered the permissibility of a consent-based search in *Schneckloth v. Bustamonte*.<sup>363</sup> A California police officer stopped Bustamonte while on routine patrol at approximately 2:40 a.m.<sup>364</sup> He based the stop on the fact that one headlight and the license plate light were out on the vehicle.<sup>365</sup> Bustamonte was not the driver, but was rather located in the front seat with one other individual and the driver.<sup>366</sup> The police officer asked the third individual in the front seat if he could search the vehicle and he responded, “Sure, go ahead.”<sup>367</sup> A subsequent search of the vehicle found three stolen checks.<sup>368</sup>

At trial, Bustamonte challenged the validity of the consent given to search, but the trial court found it was a valid search.<sup>369</sup> The California Court of Appeals found the consent to be valid based on an earlier California Supreme Court standard: “[w]hether in a particular case an apparent consent was in fact voluntarily given or \*372 was in submission to an express or implied assertion of authority, is a question of fact to be determined in light of all the circumstances.”<sup>370</sup>

Subsequently, Bustamonte successfully brought the case into federal court, with the Ninth Circuit Court of Appeals ruling in his favor by holding that “consent was a waiver of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demonstrate, not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withhold [sic].”<sup>371</sup> Thus, on appeal to the U.S. Supreme Court, the Court was presented with two interpretations of the validity of consent: one based on the totality of the circumstances, and the other solely based on the subjective understanding of the individual being questioned that consent could be denied.<sup>372</sup>

The Court focused its decision by balancing the need and legitimacy of consent-based searches for law enforcement purposes and the requirement “that they be free from any aspect of official coercion.”<sup>373</sup> Based in part on this balancing, the Court rejected any requirement that the suspect must be aware of his or her ability to refuse consent.<sup>374</sup> The Court highlighted that such a standard is too subjective in nature, stating that “[a]ny defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction ... of the fruits of that search by simply failing to testify that he in fact knew he could refuse consent.”<sup>375</sup> Further, such a standard would feasibly require law enforcement to notify the suspect of his

or her right to refuse consent, which would be “thoroughly impractical to impose” because the “circumstances that prompt the initial request to search may develop quickly or be a logical extension of ... police questioning.”<sup>376</sup>

Although the Court rejected a purely subjective test--whether the suspect knew of his or her right to refuse consent--the Court was sympathetic to the potential coerciveness of a police encounter.<sup>377</sup> The Court noted that the “possibility of unfair and even brutal police \*373 tactics poses a real and serious threat to civilized notions of justice.”<sup>378</sup> To balance these concerns, the Court held that consent to search is valid when “the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.”<sup>379</sup> This voluntariness is “to be determined from all the circumstances.”<sup>380</sup> The Court attempted to reconcile the subjective with the objective by directing that “[i]n examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.”<sup>381</sup>

Therefore, in assessing the validity of consent to search, the Court implemented a “vague” totality of the circumstances test that considered the objective<sup>382</sup>--whether there was explicit or implicit coercion applied by law enforcement and the subjective--considering “the defendant's level of schooling, intelligence, and presence or absence of any warnings were relevant in considerations in determining whether a statement [of consent] was voluntary.”<sup>383</sup>

*Schneckloth* remains the governing standard for when consent is voluntarily given.<sup>384</sup> However, as several critics have noted, the standard has evolved away from one considering the subjective beliefs of the suspects to one that is “wholly objective and focuses solely on the behavior of the law enforcement official[s].”<sup>385</sup> Professor Mary Strauss conducted a review of cases involving consent-based searches post-*Schneckloth* and found that while defendants could conceivably “try to invalidate the consent to search based on numerous subjective factors relating to the suspect's mental state or character, it is a rare case in which the court actually analyzes any of these factors.”<sup>386</sup> She points to a number of cases to show that \*374 “[e]ven more rare is the case where the court finds them [subjective factors] determinative and excludes the evidence.”<sup>387</sup>

Professor Ric Simmons notes that it “is an open secret that the subjectivity requirement of *Schneckloth* is dead,” and that “recent cases at every level have considered only objective criteria, such as the location of the search, the language used in making the request, and the behavior of the police officer.”<sup>388</sup> The Court has been able to shift the focus away from the subjective and solely towards the objective by merging the consent analysis with the Fourth Amendment analysis for when a seizure occurs.<sup>389</sup>

In *United States v. Drayton*, three police officers boarded a Greyhound bus traveling from Fort Lauderdale to Detroit as part of a routine drugs and weapons interdiction effort.<sup>390</sup> The officers were in plain clothes but carried concealed weapons and visible badges.<sup>391</sup> One officer positioned himself on the driver's seat, facing the rear of the bus, while one officer positioned himself in the rear of the bus, with the remaining officer approaching passengers as he moved from the rear to the front of the bus.<sup>392</sup> This officer approached Drayton and Brown who were seated next to one another.<sup>393</sup> After receiving consent to search a bag and Brown, the officer then asked Drayton for consent to search his person.<sup>394</sup> Drayton responded by lifting his hand “about eight inches from his legs,” at which point the officer patted him down and detected “hard objects.”<sup>395</sup> A further search revealed that these hard objects were duct-taped plastic bundles of cocaine.<sup>396</sup>

Drayton challenged the search on the validity of his consent.<sup>397</sup> In assessing the validity of the consent, the Court did not consider \*375 Drayton's subjective perceptions of the request under *Schneckloth*, but instead focused solely on the behavior of the officers to determine whether Drayton was “seized” for Fourth Amendment purposes.<sup>398</sup> The Court concluded that

[T]he police did not seize the respondents when they boarded the bus and began asking questions. The officers gave the passengers no reason to believe that they were required to answer the officers' questions .... [H]e did not brandish a weapon or make any intimidating movements .... Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.”<sup>399</sup>

Thus, to the Court, the relevant inquiry was whether a reasonable person, subject to the behavior of the police officers, would have felt free to terminate the encounter and leave.<sup>400</sup> In *Drayton*, they found as such and the consent was found to be valid.<sup>401</sup>

The merging together of consent and a lawful seizure has created a “fiction that treats coercion and voluntary consent as either/or conditions in a false binary: consent that is not coerced by improper state conduct is treated as if it is happily and freely given.”<sup>402</sup> Quite simply, after *Drayton*, if a reasonable person would have felt free to terminate the encounter with police, then any subsequent consent given is presumed to be valid--regardless of any subjective factors that may have compelled the granting of consent.<sup>403</sup>

### ***B. From Subjective to Objective--North Carolina Follows the Road***

The North Carolina courts were again presented with choices after both *Schneckloth* and *Drayton*--do they follow suit and interpret the validity of consent-based on the Supreme Court's interpretation of the Fourth Amendment or do they stray and interpret the validity of consent-based on their own independent interpretation of the North Carolina constitution?

\*376 Other state courts have directly rejected the U.S. Supreme Court's framework.<sup>404</sup> Ohio's Supreme Court attempted to do so in the early 1990s by requiring police officers to notify drivers of their right to refuse consent.<sup>405</sup> However, the Ohio Supreme Court did so under an interpretation of the Fourth Amendment, not their own constitution, which allowed the U.S. Supreme Court to invalidate that requirement.<sup>406</sup> Consequently, “many state courts have abandoned any reliance on the Fourth Amendment and have looked instead to their own state law to provide greater restrictions on police activity during traffic stops.”<sup>407</sup> This has led to some states interpreting their “state constitutions to flatly forbid the police from posing any question or request that is unrelated to the underlying reason(s) for the traffic stop,”<sup>408</sup> unless supported by reasonable suspicion.<sup>409</sup> Other states have interpreted their own constitutions to allow officers to engage in some degree of unrelated questions, to include asking for consent, without reasonable suspicion so long the questions or requests do not change the fundamental nature of the stop.<sup>410</sup>

North Carolina, though, has again failed to afford its drivers more rights and has instead elected to proceed in lockstep agreement with \*377 the U.S. Supreme Court.<sup>411</sup> Several years prior to *Schneckloth*, the North Carolina Supreme Court considered the voluntariness of a consent to search. In *Little*, the Court found that “implicit in the very nature of the term ‘consent’ is the requirement of voluntariness.”<sup>412</sup> Requiring the consent to be “unequivocal and specific” and “freely and intelligently given.”<sup>413</sup> Providing that “[t]o be voluntary, it must be shown that the waiver was free from coercion, duress or fraud, and not given merely to avoid resistance.”<sup>414</sup> The North Carolina Supreme Court implemented a totality of the circumstances test that was similar in scope and language to the one later adopted by the U.S. Supreme Court.<sup>415</sup> In fact, the North Carolina Supreme Court predicated its decision on such a standard being consistent with the protections afforded by the Fourth Amendment of the U.S. Constitution and the Constitution of the State of North Carolina.<sup>416</sup>

After *Schneekloth* effectively confirmed North Carolina's framework, North Carolina courts accepted *Schneekloth* as the governing standard, absent any reference to the North Carolina constitution.<sup>417</sup> Much like under the federal framework, North Carolina soon began diminishing the consideration of any subjective factors.<sup>418</sup> In *Fincher*, Michael Fincher was found guilty of first degree murder on the theory of felony murder, first degree rape, and \*378 first degree burglary.<sup>419</sup> He was seventeen years old at the time of the alleged crimes and during the police investigation.<sup>420</sup> During the trial, he presented expert testimony that he was "mentally retarded" and suffered from a schizophreniform disorder.<sup>421</sup> According to the expert, Fincher's mental condition caused him a disturbance of his mood and behavior along with auditory hallucinations.<sup>422</sup> The expert also provided that Fincher was more susceptible to "fear in a given situation than an average individual ... and that his ability to deal with stress [was] limited."<sup>423</sup> However, the expert did provide that Fincher could express himself to police officers.<sup>424</sup> Lastly, the expert testified that Fincher's I.Q. was around 50, well below average.<sup>425</sup>

As part of the investigation, ten uniformed police officers arrived at an apartment where Fincher lived.<sup>426</sup> An officer prepared a consent form to search Fincher's bedroom and presented it to Fincher.<sup>427</sup> Fincher signed the form, granting permission to the police officers to search his room.<sup>428</sup> During trial, he challenged his ability to voluntarily give consent-based on subjective considerations--the fear caused by the presence of ten police officers, his low IQ, and his mental illness.<sup>429</sup> The trial court found his consent to be voluntary and thus valid.<sup>430</sup>

The North Carolina Supreme Court recognized that *Schneekloth* controlled its analysis as to whether Fincher's consent was voluntarily given.<sup>431</sup> However, the court summarily dismissed the subjective factors arguing against voluntary consent, equating Fincher's age and mental condition with the voluntariness of a confession.<sup>432</sup> The court found that a "defendant's subnormal mental capacity is a factor to be considered ... [s]uch lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and \*379 understandingly made."<sup>433</sup> Similarly, the court found that "the fact that the defendant is youthful will not preclude the admission of his inculpatory statement absent mistreatment or coercion by police officers."<sup>434</sup> The court gave no consideration to the fact that the presence of ten police officers may have created a subjective fear in Fincher that implicitly coerced his consent.<sup>435</sup>

Instead, the court focused on objective factors to determine Fincher's consent was voluntary.<sup>436</sup> Mainly, the Court relied on the fact that Fincher appeared to be "alert, coherent, [was] not under the influence of alcohol or narcotic drugs; that ... [he] was [not] threatened, nor ... promised or offered any reward ... That no threats or suggested violence or show of violence to law enforcement officers to persuade or induce the defendant[] to waive [his] rights."<sup>437</sup> To the Court, so long as the "defendant understood the form and that no force or coercion was used against him[,]"<sup>438</sup> Fincher "voluntarily, willingly, and understandingly consented to the search of his bedroom."<sup>439</sup>

Fincher established a baseline for voluntariness of consent to search-- establishing that subjective components, such as mental illness, age, and the presence of many police officers, would not render consent invalid so long as there was no evidence of direct coercion.<sup>440</sup> Beyond limiting the subjective prong of *Schneekloth*, North Carolina courts also followed the trend of conflating the voluntariness of consent with the lawfulness of a seizure standard. Following *Drayton*, the North Carolina courts considered the appropriateness of consent in several different contexts not by applying *Schneekloth*'s totality of the circumstances test, but by asking whether a reasonable person would have felt free to terminate \*380 the encounter with the police and leave.<sup>441</sup> While North Carolina's adoption of this approach resulted in some consent-based searches being deemed invalid, it still resulted in the subjective being ignored in favor of the objective.<sup>442</sup> Consents to search were deemed invalid for objective reasons, such as a driver's license not being returned, but not based on any subjective concern held by the driver.<sup>443</sup>

Recently, North Carolina courts hinted a return to the *Schneckloth* voluntariness test, but again indicated that the objective prong will far outweigh subjective prong.<sup>444</sup> In *State v. Bartlett*, referenced at the beginning of this section, Bartlett consented to a search of his person after several police officers stopped his vehicle and ordered him out of the vehicle.<sup>445</sup> Bartlett challenged his consent in part on subjective factors, mainly that “he consented only in acquiescence ‘to the coercive environment fostered by the police.’”<sup>446</sup> His argument was based on his race, noting that “there is strong evidence that people of color will view a ‘request’ to search by the police as an inherently coercive command.”<sup>447</sup> Bartlett argued that his race “gives pause to whether [his] consent” was “genuinely voluntary.”<sup>448</sup>

The North Carolina Court of Appeals decided Bartlett's case not on whether a reasonable person would have felt free to deny the police officer's request on leave, but rather on the totality of the circumstances test, acknowledging that “race may be a relevant factor in considering whether his consent was voluntary.”<sup>449</sup> Nonetheless, \*381 the Court then gave much greater consideration to the objective factors presented in support of the consent being voluntarily given.<sup>450</sup> Specifically, the court pointed out that only one officer interacted with Bartlett and that the “overall circumstances presented at the suppression hearing tended to show that [Bartlett] consented ‘freely and intelligently[,]’ and not to merely avoid resistance.”<sup>451</sup>

The Court of Appeals' decision in *Bartlett* is significant for several reasons. Potentially, it marked a return to *Schneckloth* and the totality of the circumstances test, and a possible turn away from *Drayton*'s consideration as to whether a reasonable person would feel free to leave.<sup>452</sup> It also reflected the possibility that North Carolina courts could find someone's race and his or her subjective fears predicated upon that race's prior history with police officers as a consideration in whether consent is validly given.<sup>453</sup> Nonetheless, *Bartlett* is also significant in that it shows the North Carolina courts' rejection of traffic stop federalism regarding consent-based searches; mainly, that North Carolina courts could interpret their own constitution to require some sort of suspicion before asking for consent and they fail to do so.<sup>454</sup> Finally, *Bartlett* reflects that even when North Carolina courts consider race, the subjective fears that come along with it will be subservient to objective considerations that support a finding that consent was voluntarily given.<sup>455</sup>

### C. Consent and the Black Driver

The framework established by the U.S. Supreme Court, and followed by the North Carolina, is in direct conflict with the black experience in the United States.<sup>456</sup> Regardless of whether courts will apply the totality of the circumstances test from *Schneckloth* or the “would a reasonable person feel free to leave” test from *Drayton*, little consideration, if any, will be given to the subjective beliefs of the driver.<sup>457</sup> This conflict is especially relevant in the case of the black driver, whose subjective fear of police officers may incentivize \*382 coerced obedience to the request for consent, resulting in more consent-based searches.<sup>458</sup> By not considering the subjective beliefs of the black driver, courts allow for police officers to ask for consent to search throughout the traffic stop process without any suspicion or consideration as to whether a black driver ever can truly deny the request from police officers.<sup>459</sup>

Professor Strauss explored the inherent tension in consent-based searches and the black experience in the United States.<sup>460</sup> She noted that “[e]ven in the ‘best’ of circumstances--a polite officer, without gun drawn, familiar circumstances for the consenter--people consent in situations where they have only something to lose.”<sup>461</sup> She referenced psychology studies that supported “the general idea that obedience to authority is deeply ingrained, that people will obey authority even when it is not in their own best interest to do so, and that obedience increases with when the authority figure has visible trappings of authority, such as a uniform.”<sup>462</sup> While noting the limitations of the studies, Strauss concluded that “people follow or obey a ‘request’ made by police officers in authority positions in situations where there is not only no ostensible benefit to do so, there is likely harm.”<sup>463</sup>

To Professor Strauss, the concern that most individuals, regardless of race, will view the authority of police as inherently coercive is especially problematic, as “certain segments of society will see even the politest ‘request’ by an officer that way.”<sup>464</sup> Specifically, she argues that many blacks know that “refusing to accede to the authority of the police, and even seemingly polite requests-can have deadly consequences.”<sup>465</sup> She concludes that “[g]iven this sad history [of police abuse], it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.”<sup>466</sup>

**\*383** So, what does this mean for black drivers in North Carolina? Consider the hypothetical black driver from the earlier sections.<sup>467</sup> She may be stopped for several innocent factors that the police officer subjectively believes to be suspicious--such as slowing down, appearing evasive, or not making eye contact with the police officer. Or, she may be stopped for probable cause or reasonable suspicion of a traffic code violation--such as going seven miles per hour over the speed limit, changing lanes without signaling, or having an object hanging from her review view mirror. Regardless of the basis for the stop, the police may then ask for her consent to search without any suspicion of additional wrongdoing beyond the purpose of the stop. Appearing at her driver's side window while stopped at the side of the road, a police officer may then, in a polite voice and without any show of force, ask for consent to search. The driver, made nervous and fearful of police officers by a history of abuse by police officers towards blacks, feels she has no choice to consent. The officer then searches the vehicle to support his subjective hunch based on racial bias that led him to follow the vehicle initially.

Much like the basis for the stop and the use of a drug-sniffing dog, the hypothetical driver has little recourse to challenge the validity of her consent. Like *Bartlett*, she may claim that her subjective fears of police officers coerced her consent, but as in *Bartlett*, North Carolina courts are likely to give more credence to the objective factors supporting consent--the police officer not presenting any show of force and his use of a polite voice.<sup>468</sup> And consequently, courts will likely find the consent to be valid and sanction the entirety of the police officer's actions, starting the encounter based on his racial bias, following the vehicle awaiting for some objective reason to stop, and then obtaining consent to search the vehicle, without ever considering the black driver's subjective fears of police encounters.

## CONCLUSION

Black drivers are disproportionately stopped and searched by police officers.<sup>469</sup> While this is a nationwide problem, the racial disparity is especially prevalent in North Carolina where black drivers are stopped disproportionate to their population and are **\*384** subsequently searched more than twice as often as white drivers.<sup>470</sup> The legal cause of this racial disparity is the conflicted traffic stop framework established by the U.S. Supreme Court.<sup>471</sup> Throughout the traffic stop framework, the U.S. Supreme Court endorses the subjective beliefs of a police officer by allowing the police officer to follow a vehicle based on a “hunch.”<sup>472</sup> An officer's history and background turn innocent factors into suspicion, which support the initial stop, prolong the stop for a drug dog, and leave it to the individual police officer to determine whether to use a drug-sniffing dog.<sup>473</sup> Meanwhile, this framework does not consider the subjective beliefs, formed by the black experience in the United States, of the black driver.<sup>474</sup> It fails to consider a black driver's inherent nervousness and fear of police officers and how it may impact their driving, their behavior during the stop, and his or her willingness to consent to a search.<sup>475</sup> When these ends of the framework intersect, it results in the behavior of the black driver who is impacted by his or her subjective beliefs and fears of police officers forming the basis for additional police interference.<sup>476</sup>

The appropriate normative legal solution to fix this problem is traffic stop federalism. North Carolina courts could interpret its state constitution and ask the following questions to protect its black drivers: Whether a reasonable police officer would have made the stop? Whether the conduct deemed suspicious by the police officer was instead innocent conduct reflecting the subjective fears of the black driver, only made suspicious by the officer's implicit racial bias? Whether reasonable suspicion supported the use of a drug dog? Whether there was probable cause to prolong a stop to wait for the drug dog? And, whether

some suspicion must be required to ask for consent or even whether a black driver could ever truly consent to a police officer's request?

North Carolina courts repeatedly refused to ask any of these questions and instead blindly acquiesced to the conflicted framework established by the U.S. Supreme Court.<sup>477</sup> The result is that black drivers will continue to be stopped and searched and that cycle of negative police encounters with black drivers will continue. Blacks \*385 will continue to be fearful and distrustful of the police in North Carolina, and the outward manifestation of these subjective beliefs will subsequently provide more objective support for police officers to continue with the constant stopping and searching of black drivers.<sup>478</sup>

Although North Carolina courts appear to reject traffic stop federalism, its experience is relevant to its legislature, other states, and the federal judiciary.<sup>479</sup> The U.S. Supreme Court framework is failing black drivers and perpetuating distrust between law enforcement and the black community. Through seeing the failure of its court system, the North Carolina legislature can abandon the U.S. Supreme Court's framework through legislative reform. Other states can heed North Carolina's warning call and implement traffic stop federalism when their constitutions make it appropriate. Lastly, the federal judiciary should look at the North Carolina experience to see the failure of its framework and to instead endorse the rights of black drivers, which they should have been protecting all along.

#### Footnotes

- a1 Assistant Professor of Law, Campbell University School of Law. J.D. 2005, Emory University School of Law; B.A. 2001, University of Illinois. I thank my colleagues Bobbi Jo Boyd and Daniel Tilly for their encouragement and support. I also thank Callie Davis and Sarah Sponaule for their research assistance.
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- 16 *Id.*
- 17 See FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 69 (2018).
- 18 See *id.* at 36-39; see also N.C. GEN. STAT. ANN. § 143B-903 (West 2014).
- 19 BAUMGARTNER ET AL., *supra* note 17, at 69.
- 20 *Id.*
- 21 *Id.* at 85.
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *Id.* at 86 (distinguishing between a “safety” stop and an “investigatory” stop). The authors “argue that stops for ‘investigatory’ purposes are more likely to relate to minor offenses that may serve as pretext for pulling a driver over.” *Id.* at 53.
- 26 See generally David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997) (“[D]ata reveals several patterns, which African-Americans and Hispanics understand quite well already: police use traffic regulations to investigate many innocent citizens ... and African-Americans and Hispanics are the targets of choice ....”); David A. Harris, *The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters*, 84 MINN. L. REV. 265, 266 (1999) (“[W]hat many African-American drivers say they go through every day: police using traffic offenses as an excuse to stop and conduct roadside investigations of black drivers and their cars ....”); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 26 (2011) (“There is strong evidence that racial minorities believe law enforcement officers engage in racial profiling. African-Americans have long argued that police officers scrutinize their behavior more closely ....”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 130-37 (2011); Frank R. Baumgartner, Derek A. Epp & Kelsey Shoub, *The Fears of Driving While Black in NC Are True. The Data Prove It.*, NEWS & OBSERVER (July 30, 2018, 8:48 AM), <https://www.newsobserver.com/opinion/article215562040.html>.
- 27 BAUMGARTNER ET AL., *supra* note 17, at 69, 85.
- 28 See *infra* Part I.
- 29 See *infra* Sections I.C-D.
- 30 See *infra* Section I.A.
- 31 See *infra* Section I.D.
- 32 See, e.g., Tracey Maclin, “*Black and Blue Encounters*” *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 256 (1991) (“[W]hen whites are stopped by the police, they too feel uneasy and often experience fear .... But I wonder whether the average white person worries that an otherwise routine police encounter may lead to a violent confrontation.”); Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1199 (2008) (“Over time, whites and blacks come to view police and policing ‘in strikingly different terms.’ Blacks especially are more likely than others to believe that the police are unaccountable, abusing citizens and treating minorities harshly.” (internal citations omitted)).
- 33 See generally ALEXANDER, *supra* note 26, at 22-26.

- 34 *See generally* JENNIFER RITTERHOUSE, *GROWING UP JIM CROW: HOW BLACK AND WHITE SOUTHERN CHILDREN LEARNED RACE* (2006); Steven A. Berrey, *Resistance Begins at Home: The Black Family and Lessons in Survival and Subversion in Jim Crow Mississippi*, 3 *BLACK WOMEN, GENDER & FAM.* 65, 65-90 (2009).
- 35 *See generally* ALEXANDER, *supra* note 26, at 185-220.
- 36 *See, e.g.*, Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 *J. MARSHALL L. REV.* 439, 451 (2004) (“The use of racial profiling in the selective enforcement of public laws is most evident in traffic stops by law enforcement officers. It can also be a most humiliating and frightening experience for anyone, especially African-American males who may fear imminent harm from police officers.”).
- 37 *See* *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that subjective intentions are not a factor in determining whether an officer has probable cause, and legally allowing for the treatment of drivers as colorless non-entities).
- 38 *See, e.g.*, Maclin, *supra* note 32, at 253 (“Black men know they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent.”).
- 39 *See generally* John Paul Stevens, *The Other Constitutions*, *N.Y. REV.*, Dec. 6, 2018, at 33 (reviewing JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018)). Justice Stevens agrees with the author that “state judiciaries can set an example for the federal judiciary and ultimately persuade it to endorse rights that they have recognized and that should have prevailed as a matter of federal law for decades.” *Id.*
- 40 *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).
- 41 Brennan, *supra* note 1, at 500-01; *see also* JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 16-21 (2018); EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 20-32 (2013).
- 42 *See, e.g.*, Timothy P. O'Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 *LOY. U. CHI. L.J.* 745, 761-62 (2009); Margaret M. Lawton, *State Responses to the Whren Decision*, 66 *CASE W. RES. L. REV.* 1039, 1044-45 (2016); *Brown v. State*, 182 P.3d 624, 633 (Alaska Ct. App. 2008) (“[W]e were convinced that the United States Supreme Court's interpretation of the Fourth Amendment ‘fails to adequately safeguard our citizens' right to privacy, ... fails to adequately protect citizens from unwarranted government intrusion, and ... unjustifiably reduces the incentive of police officers to honor citizen's constitutional rights.’” (quoting *Joseph v. State*, 145 P.3d 595, 605 (Alaska Ct. App. 2006))).
- 43 *See infra* Section I.C.
- 44 Benjamin Elisha Sawe, *The 50 US States Ranked by Population*, *WORLDDATLAS*, <https://www.worldatlas.com/articles/us-states-by-population.html> (last updated Sept. 14, 2018).
- 45 Jessica Stanford, *NC in Focus: Black Population in North Carolina, 2016*, *UNC CAROLINA DEMOGRAPHY* (Feb. 8, 2018), <https://demography.cpc.unc.edu/2018/02/08/nc-in-focus-black-population-in-north-carolina-2016/> (projecting that although the Black population in North Carolina is expected to grow, it will grow at the same rate as the state's overall population, leaving similar overall percentages); *see generally* Caroline Metzler & Gavin Off, *Hispanic Population Continues to Rise in NC as White Population Trails*, *CHARLOTTE OBSERVER* (June 25, 2018, 3:53 PM), <https://www.charlotteobserver.com/latest-news/article213539719.html> (focusing on North Carolina's Hispanic population while also showing statistics about the growth in the black population).
- 46 *See generally* JEFFERY J. CROW ET AL., *A HISTORY OF AFRICAN AMERICANS IN NORTH CAROLINA* (N.C. Office of Archives and History ed., 2d rev. ed. 2011).
- 47 *State v. Arlington*, 319 S.E.2d 254, 260 (N.C. 1984); *see State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999) (“[T]his Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.”).
- 48 *See infra* Part III.
- 49 *See infra* Sections I.C, II.B, II.D, III.B.

- 50 ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEPT OF JUSTICE, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1, 4 (2018), <https://www.bjs.gov/content/pub/pdf/cpl15.pdf> (noting that traffic stops were the most common form of police-initiated contact for Americans and when comparing driving population traffic stop percentages analyzed by race, blacks were more likely than whites to be the driver in a traffic stop, as 9.6% of all black drivers were stopped whereas only 8.6% of all white drivers were stopped).
- 51 CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 20, 52 (2014).
- 52 Jim Salter, *Missouri Report: Blacks 85 Percent More Likely to Be Stopped*, ASSOCIATED PRESS NEWS (June 1, 2018), <https://www.apnews.com/58d9ad846ef14b93915ee26d3cf4663e>.
- 53 EPP ET AL., *supra* note 51, at 20, 66.
- 54 *Id.* at 69-70 (“Investigatory stops target black men, and, especially, lower income black men.”).
- 55 *See id.* at 2.
- 56 *Id.* at 20, 105.
- 57 Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* 6 (June 18, 2017) (unpublished working paper) (on file with the Stanford Open Policing Project).
- 58 *Id.* at 6.
- 59 *Id.* at 1.
- 60 *See generally* SUTTON, *supra* note 41, at 17.
- 61 *See* Stevens, *supra* note 39.
- 62 *See infra* Sections I.A-B.
- 63 *See infra* Section I.C.
- 64 *See infra* Section I.D.
- 65 *See infra* Part II.
- 66 *See infra* Sections II.A-B.
- 67 *See infra* Section II.C.
- 68 *See infra* Sections II.D-E.
- 69 *See infra* Sections III.A-B.
- 70 *See infra* Section III.C.
- 71 U.S. CONST. amend. IV; *see also* Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).
- 72 Whren v. United States, 517 U.S. 806, 809-10 (1996).
- 73 *Id.* at 810.
- 74 *See id.* Much has been written about *Whren* and pretext stops. *See, e.g.*, Lewis R. Katz, “*Lonesome Road*”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1421 (2013) (“The Court’s holding in *Whren* merely solidified a trend in United States jurisprudence toward ignoring police officers’ racial biases, admitted or otherwise.”); Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 930 (2008) (“[S]uch a high level of discretion provides the police with the ability to use traffic stops based upon legitimate traffic infractions as pretexts to investigate other, possibly criminal

activity for which the police have no probable cause or even reasonable suspicion.”); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1859 (2004) (“The totality of the Court’s analysis in *Whren* is, to put it mildly, quite disappointing.”); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN’S L. REV. 535, 557 (2002) (“[T]he Court seemed either oblivious to, or unconcerned with, its implicit sanctioning of unbridled arbitrariness or racial profiling ...”); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 821 (2002) (“By unequivocally and categorically rejecting the notion that a traffic stop could ever be unconstitutional so long as the officer could identify any traffic or equipment violation, ... *Whren* sent a clear and unmistakable message to the police: You may, in your complete discretion, stop almost any car at any time.”); Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation’s Roads*, 90 KY. L.J. 75, 79 (2001-2002) (“[T]he Supreme Court’s decision in *Whren v. United States* effectively blunted any efforts to challenge racial profiling under the Fourth Amendment.”); Hon. Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 605-06 (1999) (examining the application of *Whren* in Pennsylvania); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 91 (1998); 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, 1025 (1996) (“*Whren* is a rickety piece of judicial scholarship. It is built upon unreasoned distinctions, perversions of precedent, a question-begging unarticulated and unsupported premise, bootstrapping, logical inconsistencies, and a narrow vision of the Fourth Amendment.”).

75 *Whren*, 517 U.S. at 817 (quoting *Prouse*, 440 U.S. at 657).

76 *Id.* at 807.

77 See Nsikan Akpan, *Police Respect Whites More than Blacks During Traffic Stops, Language Analysis Finds*, PBS (June 5, 2017, 4:26 PM), <https://www.pbs.org/newshour/science/police-respect-whites-blacks-traffic-stops-language-analysis-finds>.

78 See EPP ET AL., *supra* note 51, at 8 (“This racial difference in police practices and people’s lived experience and shared knowledge of these practices is why black people commonly rate stops that they have experienced as unfair, while whites are generally more sanguine about the stops that they have experienced.”).

79 See Michael A. Fletcher, *For Black Motorists, a Never-Ending Fear of Being Stopped*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/magazine/2018/04/the-stop-race-police-traffic/> (last visited Apr. 5, 2019). Across the country, law-abiding black and Hispanic drivers are left frightened and humiliated by the inordinate attention they receive from police, who often see them as criminals. *Id.* Such treatment leaves minorities feeling violated, angry, and wary of police and their motives. *Id.*

80 See *id.*; see also *supra* notes 51-52 and accompanying text.

81 BAUMGARTNER ET AL., *supra* note 17, at 32.

82 See Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, CITIZEN-TIMES (Aug. 27, 2016, 2:34 PM), <https://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/>. Billy Robertson, a black 67-year-old pastor in Asheville, North Carolina, discussed a traffic stop that occurred two years prior after being pulled over by an officer who said he had crossed the yellow line. *Id.*

I don’t want to be no accident. I’m serious. These are my hands .... [Black people] got to be talking about ‘I am reaching into my pocket for my license. Cause I don’t want to be no accident.’ ... When I was a kid in the black neighborhood - I’m talking about Asheville - the community would tell us, they would say, ‘When you go to town, keep your head down.’ ... They were fearful of young black men being abused .... This is something that was engrained in black males in the African-American community, way back, years ago. That same thing is taking place now, there’s such a fear.

*Id.*

83 See *infra* Section I.A.

84 See *infra* Section I.B.

85 See *infra* Section I.C.

86 See *infra* Section I.D.

- 87 Brief for the Petitioners at 2-4, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758.
- 88 *Id.* at 2.
- 89 *Id.* at 2-3.
- 90 *Whren*, 517 U.S. at 808.
- 91 *Id.*
- 92 *Id.*
- 93 *Id.* at 808-09.
- 94 Brief for the Petitioners, *supra* note 87, at 3-4.
- 95 *Id.* at 7.
- 96 *Id.* at 8.
- 97 *See id.* at 4-5.
- 98 *Id.* at 31a n.7.
- 99 *Id.*
- 100 Brief for the Petitioners, *supra* note 87, at 6 n.7.
- 101 *See Whren v. U.S.*, 517 U.S. 806, 819 (1996).
- 102 Brief for the Petitioners, *supra* note 87, at 41-49.
- 103 *Id.* at 13; *see also Whren*, 517 U.S. at 810.
- 104 *Whren*, 517 U.S. at 810.
- 105 Brief for the Petitioners, *supra* note 87, at 22.
- 106 *Id.* (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974)).
- 107 *Id.* at 13-15; *see also Whren*, 517 U.S. at 810.
- 108 *Whren*, 517 U.S. at 811.
- 109 *Id.* at 810.
- 110 Brief for the Petitioners, *supra* note 87, at 13-37; *see also Whren*, 517 U.S. at 810.
- 111 Brief for the Petitioners, *supra* note 87, at 22-23.
- 112 *Id.* at 41.
- 113 *See generally Whren*, 517 U.S. at 813 (finding that while enforcement of the law based on a race is unconstitutional, subjective intentions of race do not play a role in a Fourth Amendment probable cause analysis).
- 114 *Id.* at 811.
- 115 *Id.* at 812.
- 116 *Id.* at 812-13 (citing *United States v. Robinson*, 414 U.S. 218, 221 (1973) (“[A] traffic-violation arrest ... would not be rendered invalid by the fact that it was a ‘mere pretext for a narcotics search ....’”)).

- 117 *Id.* at 813 (citing *Gustafson v. Florida*, 414 U.S. 260, 266 (1973); *Scott v. United States*, 436 U.S. 128, 138 (1978)).
- 118 *Id.*
- 119 *Id.*
- 120 *Id.* at 813-14.
- 121 *Id.* at 814.
- 122 *Id.*
- 123 *Id.* at 815.
- 124 *Id.* at 819.
- 125 *Id.* at 812-13.
- 126 *See, e.g., Harris, supra* note 26, at 546 (“Police will *not* subject *all* drivers to traffic stops in the way *Whren* allows. Rather ... they will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics.”).
- 127 *Whren*, 517 U.S. at 808.
- 128 *See Illinois v. Gates*, 462 U.S. 213, 244-46 (1983).
- 129 *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968).
- 130 *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 217 (1984)).
- 131 *Wardlow*, 528 U.S. at 123; *see also United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (“[T]he totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”).
- 132 *United States v. Arvizu*, 534 U.S. 266, 268-69 (2002).
- 133 *Id.*
- 134 *Id.* at 270.
- 135 *Id.* at 270-71.
- 136 *Id.* at 271.
- 137 *Id.* at 271-72 (emphasizing the fact that ultimately, the van was found to contain 128.85 pounds of marijuana).
- 138 *Id.* at 277.
- 139 *Id.* at 273 (relying on *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).
- 140 *Id.*; *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that a reviewing court must give due weight to factual inferences drawn by resident judges and local law enforcement officers).
- 141 *See Arvizu*, 534 U.S. at 274-75 (“The court appeared to believe that each observation by [the agent] that was by itself readily susceptible to an innocent explanation was entitled to ‘no weight.’ *Terry*, however, precludes this sort of divide-and-conquer analysis.” (citation omitted)); *see also Sokolow*, 490 U.S. at 7-8 (rejecting a distinction between “evidence of ‘ongoing criminal behavior,’” and “probabilistic” evidence because it “creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment”); *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (holding that while each act in a series was perhaps innocent in and of itself, the Court held that taken together they amounted to reasonable suspicion).

- 142 *But see* *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (“[T]he usual traffic stop is more analogous to a so-called ‘Terry stop[]’ ... than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose ‘observations lead him reasonably to suspect’ that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly ....”); *Illinois v. Caballes*, 543 U.S. 405, 415 (2005) (Souter, J., dissenting) (“[W]e held that the analogue of the common traffic stop was the limited detention for investigation authorized by *Terry v. Ohio* ....”).
- 143 *See infra* note 144 and accompanying text.
- 144 *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006) (quoting *United States v. Willis*, 431 F.3d 709, 723 (9th Cir. 2005) (Fletcher, J., dissenting)); *see also* *Holeman v. City of New London*, 425 F.3d 184, 189-90 (2d Cir. 2005); *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999); *Johnson v. Crooks*, 326 F.3d 995, 998 (8th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d 1101, 1104 (9th Cir. 2000); *United States v. Ozbirn*, 189 F.3d 1194, 1197 (10th Cir. 1999); *United States v. Chanthasouvat*, 342 F.3d 1271, 1275 (11th Cir. 2003).
- 145 *Delfin-Colina*, 464 F.3d at 396 (citing *United States v. Velasquez*, 885 F.2d 1076, 1081 n.3 (3d Cir. 1989)).
- 146 *Id.* at 397 (citing *Lopez-Soto*, 205 F.3d at 1104).
- 147 *See supra* notes 142-46 and accompanying text.
- 148 *See* Lawton, *supra* note 42, at 1044.
- 149 *See supra* notes 17-24 and accompanying text; *see also* BAUMGARTNER ET AL., *supra* note 17, at 85 (“Driving while black exposes a driver to approximately twice the odds of being pulled over, and once pulled over, to about twice the odds of being searched.”).
- 150 While a majority of states now interpret their state constitutions to allow pretextual stops, like *Whren*, both Washington and New Mexico interpreted their constitutions to reject *Whren's* holding, with both states instead applying the totality of the circumstances test. *See* Lawton, *supra* note 42, at 1044, 1048-51, 1054-55; *see also* *Schuster v. State Dep't of Tax'n & Revenue, Motor Vehicle Div.*, 283 P.3d 288, 297 (N.M. 2012) (“New Mexico has departed from United States Supreme Court precedent in *Whren* ... by holding that pretextual traffic stops are constitutionally unreasonable.”); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999) (“[P]olice may enforce the traffic code .... They may not, however, use that authority as a pretext or justification ....”); *State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (“[A] mixed-motive traffic stop [is one that is] based on both legitimate and illegitimate grounds ....”).
- 151 *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).
- 152 *Id.* at 288.
- 153 *See* *State v. McDowell*, 310 S.E.2d 301, 310 (N.C. 1984) (“State courts are no less obligated to protect and no less capable of protecting a defendant’s federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment ....”).
- 154 *See infra* notes 155-59 and accompanying text.
- 155 SUTTON, *supra* note 41, at 17.
- 156 *Cf.* O'Neill, *supra* note 42, at 762 (“Vermont and North Dakota may not have a ‘driving while black’ problem for the simple reason that they have very few blacks. Thus, the ‘limited lockstep’ doctrine is the Illinois Supreme Court’s excuse for not fine-tuning constitutional law to fit the realities of life in Illinois.”).
- 157 SUTTON, *supra* note 41, at 17.
- 158 Brennan, *supra* note 1, at 503.
- 159 *See id.*
- 160 *See supra* notes 43-48 and accompanying text.
- 161 *See supra* notes 44-45 and accompanying text.

- 162 *See supra* note 46 and accompanying text.
- 163 *See* *Arlington v. State*, 319 S.E.2d 254, 260 (N.C. 1984); *State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999).
- 164 *Arrington*, 319 S.E.2d at 260; *see also* *State v. Carter*, 370 S.E.2d 553, 555 (N.C. 1988) (“[T]he authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.”).
- 165 *See infra* notes 166-72 and accompanying text.
- 166 *State v. Morocco*, 393 S.E.2d 545, 546 (N.C. Ct. App. 1990).
- 167 *Id.* The Court noted that the trial court made the finding of fact that “[t]he defendant appeared not to be wearing a properly fastened seatbelt. In North Carolina, this is an offense for which an officer may issue a citation.” *Id.*
- 168 *Id.* at 547.
- 169 *Id.* at 548.
- 170 *Id.* (adding that “police may not make *Terry-stops* merely on the pretext of a minor traffic violation” (citing *United States v. Smith*, 799 F.2d 704, 710-11 (11th Cir. 1986))).
- 171 *Id.* at 549. *But see* *Whren v. United States*, 517 U.S. 806, 813-14 (1996) (rejecting the proposed ‘would have test,’ stating “[b]ut although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations”).
- 172 *See Morocco*, 393 S.E.2d at 548; *see also* *State v. Hunter*, 420 S.E.2d 700, 703 (N.C. Ct. App. 1992) (providing that “[a] stop is invalid if it seeks to use a ‘pretext concealing an investigatory motive’ on part of the police” and “the question is whether a reasonable officer would have stopped the defendant for being illegally parked in a rest area, not whether an officer could have done so” (quoting *State v. Phifer*, 254 S.E.2d 586, 589 (N.C. 1979))).
- 173 *See* *State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999).
- 174 *Id.* at 130.
- 175 *Id.*
- 176 *See* Defendant-Appellant's New Brief at 28, *State v. McClendon*, 517 S.E.2d 128 (N.C. 1999) (No. 392A98).
- 177 *McClendon*, 517 S.E.2d at 132.
- 178 *See* Defendant-Appellant's New Brief, *supra* note 176, at 34-35.
- 179 *See id.* at 22.
- 180 *Id.* at 26-27; *McClendon*, 517 S.E.2d at 132.
- 181 Defendant-Appellant's New Brief, *supra* note 176, at 33.
- 182 *McClendon*, 517 S.E.2d at 132.
- 183 *Id.*
- 184 *Id.*
- 185 *See id.* at 131-32.
- 186 *See id.* at 132 (holding that “an objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause” with no mention of police action related to reasonable suspicion).

- 187 *Compare supra* notes 143-44, and accompanying text (discussing the federal circuit courts' holdings on this issue), with *State v. Ivey*, 633 S.E.2d 459, 461-62 (N.C. 2006), *abrogated by* *State v. Styles*, 665 S.E.2d 438, 440 n.1 (N.C. 2008).
- 188 *Ivey*, 633 S.E.2d. at 460-61 (quoting N.C. GEN. STAT. ANN. § 20-154(a) (West 2016)).
- 189 *See id.* at 461-62.
- 190 *Id.* at 461.
- 191 *See id.* at 460-61.
- 192 *Id.* at 461.
- 193 *Id.* at 461-62.
- 194 *Id.*; *see also* *State v. Morocco*, 393 S.E.2d 545, 548 (N.C. Ct. App. 1990) (“In determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do.”).
- 195 *See* *State v. Styles*, 665 S.E.2d 438, 440 & n.1 (N.C. 2008).
- 196 *Id.* at 441.
- 197 *Id.* at 439.
- 198 *Id.* at 441 (quoting N.C. GEN. STAT. ANN. § 20-154(a) (West 2016)).
- 199 *See Ivey*, 633 S.E.2d at 461 (“The record in the case *sub judice* simply does not support a finding of probable cause. The record does not indicate that any other vehicle or any pedestrian was, or might have been, affected by the turn.”). *But c.f. Styles*, 665 S.E.2d at 441 (“[I]t is clear that changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle. Officer Jones' observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle.”).
- 200 *Styles*, 665 S.E.2d at 440, 440 n.1. *But see id.* at 446-47 (Brady, J., dissenting) (“Rather than rely upon the controlling authority of this Court's prior decisions, the majority has sought out non-authoritative opinions of federal circuit courts with which to justify its departure from our case law .... We have no need to resort to decisions of lower federal courts when this Court's precedent speaks directly and clearly on the issue .... [T]he majority's analysis stands upon cases that perpetuate a faulty reading of a Supreme Court of the United States opinion. The better course of action would have been to simply follow this Court's precedent in *Ivey*.” (footnote omitted)).
- 201 *Id.* at 440.
- 202 *Id.* at 439. *See also id.* at 447 (Brady, J., dissenting) (“The State is correct that in many situations all that would be required to seize a vehicle and its occupants would be a reasonable, articulable suspicion that criminal activity is afoot.”).
- 203 *Id.* at 439 (second and third alterations in original) (quoting *State v. Watkins*, 446 S.E.2d 67, 70 (N.C. 1994)) (citing *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989); *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 212 (1984); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).
- 204 *See id.* at 445-46 (Brady, J., dissenting).
- 205 *See, e.g., State v. Foreman*, 527 S.E.2d 921, 923 (N.C. 2000) (holding that an officer had reasonable suspicion to stop a vehicle based on the officer observing a “quick left turn” away from a DWI checkpoint at the “precise point where the driver” would become aware of its presence); *State v. McRae*, 691 S.E.2d 56, 59 (N.C. Ct. App. 2010) (holding that an unsignaled lane change on a road with “medium” traffic and executed a short distance in front of police constituted sufficient reasonable suspicion for a traffic stop); *State v. Blackwell*, No. COA10-132, 2010 WL 5135877, at \*6 (N.C. Ct. App. Dec. 7, 2010) (holding that making two lane changes without signaling and then positioning the vehicle between two vehicles already in close proximity supported reasonable suspicion to make the stop); *State v. Watkins*, 725 S.E.2d 400, 403-04 (N.C. Ct. App. 2012) (holding that changing lanes in heavy traffic was sufficient reasonable suspicion to make a stop); *State v. Jones*, 813 S.E.2d 668, 672 (N.C. Ct. App. 2018) (holding that a police officer's observation of a single instance of a vehicle crossing the double yellow centerline constituted reasonable suspicion to make

the traffic stop); *State v. Johnson*, 803 S.E.2d 137, 140-41 (N.C. 2017) (holding that an officer's stop of a driver for driving at an unsafe speed given the weather and conditions was permissible even if the officer did not actually observe the speeding); *State v. Sutton*, 817 S.E.2d 211, 212, 214 (N.C. Ct. App. 2018) (holding that a police officer's observation of a truck crossing about one inch over the double yellow lines on a curvy road is sufficient reasonable suspicion to make a traffic stop).

206 *See Styles*, 665 S.E.2d at 440.

207 *See supra* Sections I.A-C.

208 *See Styles*, 665 S.E.2d at 444 (Brady, J., dissenting) (citing *Whren v. United States*, 517 U.S. 806, 811-19 (1996)).

209 *See id.* at 439.

210 *See id.*

211 *See* ALEXANDER, *supra* note 26, at 107-08.

212 *See id.*

213 *See Whren*, 517 U.S. at 812 (“Not only have we never held, outside the context of inventory search or administrative inspection ... that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”); *see also* Katz, *supra* note 74, at 1421 (“The Court's holding in *Whren* merely solidified a trend in United States jurisprudence toward ignoring police officers' racial biases, admitted or otherwise.”).

214 *See Driving While Black*, *supra* note 26, at 560 (“African-Americans and Hispanics are the targets of choice for law enforcement.”).

215 *See* Katz, *supra* note 74, at 1420 (“The Court's holding in *Whren* institutionalizes pretextual stops and arrests.”).

216 *See* EPP ET AL., *supra* note 51, at 35.

217 *Id.* (alteration in original) (quoting Roy Caldwell Kime, *U.S. Supreme Court Rules on Asset Forfeiture and Traffic Stop Evidence*, POLICE CHIEF, Aug. 1996, at 10, 10).

218 *Id.* (quoting Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 128).

219 *See Driving While Black*, *supra* note 26, at 560 (“[W]hatever their motivation, viewed as a whole, pretextual stops will be used against African-Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population.”); Katz, *supra* note 74, at 1416 (“The Supreme Court has turned its back on this [black] population and has eliminated meaningful Fourth Amendment review of what happens on the streets and highways ....”).

220 *See generally* ALEXANDER, *supra* note 26, at 108-09.

221 *See generally* EPP ET AL., *supra* note 51, at 150 (“Police stops are a great unifier and divider in American society .... On the one side are people for whom police stops are the signal form of surveillance and legalized racial subordination. This group is populated largely by African Americans and other racial minorities.”).

222 *See* BAUMGARTNER ET AL., *supra* note 17, at 12-13; EPP ET AL., *supra* note 51, at 77-78; Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1017-19 (2005) (revealing that personal experiences with police officers significantly increases perceptions of biased policing for blacks and that vicarious experiences with police officers with regards to prejudice and profiling also increases perceptions of biased policing for blacks).

223 *See generally* EPP ET AL., *supra* note 51, at 47, 53-54.

224 *See supra* Sections I.A-C.

225 *See* Katz, *supra* note 74, at 1413, 1416, 1443-44 (describing the probable cause and reasonable suspicion requirements for traffic stops).

- 226 Illinois v. Gates, 462 U.S. 213, 244 n.13 (1983) (citations omitted). “Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” State v. Zuniga, 322 S.E.2d 140, 146 (N.C. 1984) (alterations in original) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). See also State v. Altaian, 794 S.E.2d 301, 303 (N.C. 2016) (“[T]he probable cause analysis under the federal and state constitutions is identical.”); State v. Earhart, 516 S.E.2d 883, 886 (N.C. Ct. App. 1999).
- 227 Gates, 462 U.S. at 231 (citation omitted).
- 228 Id. (quoting Brinegar, 338 U.S. at 175).
- 229 Id at 231-32 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). See also Allman, 794 S.E.2d at 303 (“To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw ‘[r]easonable inferences from the available observations.’” (alteration in original) (quoting State v. Riggs, 400 S.E.2d 429, 434 (N.C. 1991))).
- 230 See generally District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (“Probable cause ‘is not a high bar.’” (quoting Kaley v. United States, 571 U.S. 320, 338 (2014))); State v. Williams, 333 S.E.2d 708, 713 (N.C. 1985) (defining probable cause as “those facts and circumstances within an officer’s knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense”).
- 231 See United States v. Sokolow, 490 U.S. 1, 7 (1989).
- 232 Id. (quoting Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 217 (1984)); see also Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000) (“The officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or ‘hunch’” of criminal activity” (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968))); State v. McClendon, 517 S.E.2d 128, 132 (N.C. 1999) (“In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.”).
- 233 State v. Watkins, 446 S.E.2d 67, 70 (N.C. 1994) (citing Terry, 392 U.S. at 21-22); see also State v. Otto, 726 S.E.2d 824, 827-28 (N.C. 2012) (“Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures.”). This same standard-- reasonable suspicion--applies under the North Carolina constitution. Otto, 726 S.E.2d at 827-28.
- 234 See supra notes 207-11 and accompanying text.
- 235 See generally Sokolow, 490 U.S. at 9 (providing that “there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot.” (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980))). See, e.g., Watkins, 446 S.E.2d at 69-70.
- 236 See, e.g., United States v. Arvizu, 534 U.S. 266, 270 (2002) (finding that an individual lowering his speed from about 50-55 to 25-30 miles per hour after seeing law enforcement could be considered as part of the reasonable suspicion analysis).
- 237 See, e.g., McClendon, 517 S.E.2d at 134 (“[N]ervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists.”); State v. Jackson, 681 S.E.2d 492, 494-95 (N.C. Ct. App. 2009) (finding that observing a vehicle braking on the highway, the passengers tensing up when the police officer drove by, and one of the passengers putting on a hood, possibly to obstruct his identity, all contributed to sufficient reasonable suspicion for law enforcement to stop the vehicle).
- 238 Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (“[T]he fact that the stop occurred in a ‘high crime area’ [is] among the relevant contextual considerations in a Terry analysis.” (citing Adams v. Williams, 407 U.S. 143, 147-48 (1972))). See, e.g., State v. Jackson, 772 S.E.2d 847, 850 (N.C. 2015) (finding that it is relevant when determining reasonable suspicion whether the defendant was walking in a high crime area when stopped).
- 239 Wardlow, 528 U.S. at 124 (“[I]t was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officer’s suspicion, but his unprovoked flight upon noticing the police.”); see also, e.g., State v. Griffin, 749 S.E.2d 444, 446-47 (N.C. 2013) (finding that a legal turn made to avoid a law enforcement checkpoint is comparable to unprovoked flight and may be considered as part of the reasonable suspicion analysis).

- 240 *See, e.g., Wardlow*, 528 U.S. at 124 (“Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam); *Sokolow*, 490 U.S. at 8-9)); *State v. Foreman*, 527 S.E.2d 921, 922-23 (N.C. 2000) (finding that a driver's evasive maneuvers in approaching a DUI checkpoint was sufficient reasonable suspicion to make a stop).
- 241 *See supra* notes 206-21 and accompanying text.
- 242 *See supra* notes 226-35 and accompanying text.
- 243 *See supra* notes 225-35 and accompanying text.
- 244 *See supra* notes 20-25 and accompanying text.
- 245 *See* BAUMGARTNER ET AL., *supra* note 17, at 85.
- 246 *Id.*
- 247 *See* *Rodriguez v. United States*, 135 S. Ct. 1609, 1614-15 (2015).
- 248 *Id.* at 1614.
- 249 *Id.* (quoting *Knowles v. Iowa*, 525 U.S. 113, 117 (1998)).
- 250 *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).
- 251 *Id.*
- 252 *See id.*
- 253 *State v. Kincaid*, 555 S.E.2d 294, 299-300 (N.C. Ct. App. 2001) (“A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search.” (quoting *State v. Earhart*, 516 S.E.2d 883, 886 (N.C. Ct. App. 1999))).
- 254 *See* *Carroll v. United States*, 267 U.S. 132, 151-53 (1925) (establishing an exception to the warrant requirement for moving vehicles, “where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought”); *see also* *Boyd v. United States*, 116 U.S. 616, 623-24 (1886) (discussing historical interpretations of permissible searches and seizures under the Fourth Amendment).
- 255 *See* *California v. Acevedo*, 500 U.S. 565, 580 (1991) (“The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”); *State v. McDaniels*, 405 S.E.2d 358, 366 (N.C. Ct. App. 1991) (“[A] police officer may now search a closed container found in a vehicle, where the officer has the suspect's general consent to search and the officer might reasonably believe the container holds the object of the search.”).
- 256 *See Kincaid*, 555 S.E.2d at 297-98.
- 257 *See* *Florida v. Harris*, 568 U.S. 237, 246-47 (2013).
- 258 *Id.* at 247-48 (“If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause.”). North Carolina has also accepted this proposition. *See* *State v. Washburn*, 685 S.E.2d 555, 560 (N.C. Ct. App. 2009) (“[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts.”).
- 259 Martin Kaste, *Eliminating Police Bias When Handling Drug-Sniffing Dogs*, NAT'L PUB. RADIO (Nov. 20, 2017, 5:01 AM), <https://www.npr.org/2017/11/20/563889510/preventing-police-bias-when-handling-dogs-that-bite>.
- 260 *Id.*
- 261 *See infra* Section II.A.

- 262 *See infra* Sections II.C-D.
- 263 *See infra* Section II.E.
- 264 Brief for the Respondent at 7, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923).
- 265 *Id.* at 2.
- 266 *Caballes*, 543 U.S. at 406.
- 267 Brief for the Respondent, *supra* note 264, at 2.
- 268 *Caballes*, 543 U.S. at 406.
- 269 Brief for the Respondent, *supra* note 264, at 3.
- 270 *See id.*
- 271 *See* *People v. Caballes*, 802 N.E.2d 202, 202 (Ill. 2003), *vacated*, 543 U.S. 405.
- 272 *Id.* at 204 (citing *People v. Cox*, 782 N.E.2d 275, 279-80 (Ill. 2002)).
- 273 *Id.*
- 274 Brief for the Respondent, *supra* note 264, at 6.
- 275 *See Caballes*, 802 N.E.2d at 202.
- 276 *See* Brief for the Respondent, *supra* note 264, at 21.
- 277 *See Caballes*, 543 U.S. at 407.
- 278 *Id.* at 408.
- 279 *See id.* at 408-09 (first citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); then citing *United States v. Jacobsen*, 466 U.S. 109, 123-24 (1984); and then citing *United States v. Place*, 462 U.S. 696, 707 (1983)). In *United States v. Place*, the Court stated that it will treat a canine sniff by a well-trained drug dog as “*sui generis*” because it “discloses only the presence or absence of narcotics, a contraband item” and “does not expose noncontraband items that otherwise would remain hidden ....” *Place*, 462 U.S. at 707.
- 280 *See Caballes*, 543 U.S. at 409.
- 281 *See* *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003), *vacated*, 543 U.S. 405 (“[A] canine sniff was performed without ‘specific and articulable facts’ to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation.”). *But see Caballes*, 543 U.S. at 410 (“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”).
- 282 The Illinois Supreme Court’s decision did not explicitly provide whether the drug dog sniff triggered the Fourth Amendment or the Illinois constitution; instead, the Illinois Supreme Court based its decision on *People v. Cox*, which had previously required ‘specific and articulable facts’ to justify the calling of a police dog. *See* *People v. Cox*, 782 N.E.2d 275, 278, 281 (Ill. 2002), *overruled by* *People v. Bew*, 886 N.E.2d 1002 (Ill. 2008). In *Cox*, the Illinois Supreme Court based its holding on the Fourth Amendment to the U.S. Constitution with no reference made to the Illinois constitution. *Id.* at 278. *See also* O’NEILL, *supra* note 42, at 761 (“In our federal system, the state’s highest court has every right to find that the Illinois Constitution offers more protection to Illinois citizens than does the Fourth Amendment of the Federal Constitution .... Instead, the court could have found that Article I, Section 6 of the Illinois Constitution provides increased protection to Illinois drivers and passengers.”).
- 283 *See, e.g.,* *People v. Devone*, 931 N.E.2d 70, 74 (N.Y. 2010) (holding that a canine drug sniff of the exterior of a vehicle constitutes a search under the New York constitution, and law enforcement may only utilize a drug sniff of a vehicle if supported by “founded suspicion,” which is a lesser standard than reasonable suspicion).

- 284 State v. Falana, 501 S.E.2d 358, 360 (N.C. Ct. App. 1998) (holding that a drug sniff of a vehicle is not a search, but a reasonable and articulable suspicion is required before law enforcement can use a drug sniff).
- 285 State v. Branch (*Branch I*), 591 S.E.2d 923, 924 (N.C. Ct. App. 2004), *vacated*, 546 U.S. 931.
- 286 *Id.*
- 287 *Id.*
- 288 *Id.* at 926.
- 289 State v. Branch, 595 S.E.2d 437 (N.C. 2004) (mem.).
- 290 North Carolina v. Branch, 546 U.S. 931 (2005) (mem.).
- 291 *Id.*
- 292 *See, e.g.*, State v. Falana, 501 S.E.2d 358, 360 (N.C. Ct. App. 1998); *Branch I*, 591 S.E.2d at 927.
- 293 *See* State v. Branch (*Branch II*), 627 S.E.2d 506, 508-09 (N.C. Ct. App. 2006).
- 294 *Id.* at 509.
- 295 *See* Illinois v. Caballes, 543 U.S. 405, 409-10 (2005).
- 296 Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) (alteration in original).
- 297 *Id.* at 1614 (citing United States v. Sharpe, 470 U.S. 675, 686 (1985)).
- 298 *Id.* (citing Arizona v. Johnson, 555 U.S. 323, 327-28 (2009); *Caballes*, 543 U.S. at 408).
- 299 *Id.* at 1612, 1614.
- 300 *Id.* at 1616.
- 301 *Id.* at 1615 (quoting United States v. \$404,905.00 in U.S. Currency, 182 F.3d 643, 649 (1999)).
- 302 *Id.* at 1616 (alteration in original).
- 303 *See id.*
- 304 *See id.*
- 305 *See id.* at 1615.
- 306 *See id.* at 1616.
- 307 *See, e.g.*, State v. Euceda-Valle, 641 S.E.2d 858, 863 (N.C. Ct. App. 2007) (“[I]n order to further detain a suspect from the time the warning ticket is issued until the time the canine unit arrives, there must be ‘reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.’” (quoting State v. McClendon, 517 S.E.2d 128, 132 (N.C. 1999))); State v. Fisher, 725 S.E.2d 40, 44 (N.C. Ct. App. 2012) (“[Reasonable suspicion must exist at the moment the officer decides to detain the defendant beyond the issuing of the citation ....”); State v. Bell, 576 S.E.2d 695, 698 (N.C. Ct. App. 2003) (holding that reasonable suspicion must be presented once the officer decides to hold the driver past the issuing of the citation).
- 308 State v. Brimmer, 653 S.E.2d 196, 199-200 (N.C. Ct. App. 2007) (adopting rule that if the traffic stop is prolonged for a short period of time in order to complete a drug sniff, the intrusion is considered *de minimis*); *see also supra* notes 299-302 and accompanying text.
- 309 *See* State v. Cottrell, 760 S.E.2d 274, 275-76 (N.C. Ct. App. 2014).
- 310 *Id.* at 283.

- 311 *Id.*
- 312 *Id.* at 285.
- 313 State v. Warren, 775 S.E.2d 362, 365 (N.C. Ct. App. 2015).
- 314 *Id.*
- 315 *Id.*
- 316 Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015).
- 317 Warren, 775 S.E.2d at 365 (quoting State v. Barnard, 658 S.E.2d 643, 645 (N.C. 2008)).
- 318 *Id.* at 365-66 (citing State v. Thompson, 252 S.E.2d 776, 779 (N.C. 1979)).
- 319 *Id.* (quoting State v. Willis, 481 S.E.2d 407, 410 (N.C. Ct. App. 1997)).
- 320 See *supra* notes 295-98 and accompanying text.
- 321 See *supra* notes 274-80 and accompanying text.
- 322 See *supra* notes 298-315 and accompanying text.
- 323 Illinois v. Caballes, 543 U.S. 405, 407-08 (2005).
- 324 See Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015).
- 325 Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 315 (2005) (“The scope of the *Caballes* decision is unreasonably broad and thus threatening to civil liberties, because it opens the way for the police to conduct suspicionless drugs searches with drug-sniffing dogs in any lawful traffic stop ....”).
- 326 See *infra* notes 327-32 and accompanying text.
- 327 See Eugene Scott, *Only One-third of African Americans Say They Have Confidence in the Police. Killings Like Alton Sterling's Are Part of the Reason.*, WASH. POST: THE FIX (Mar. 27, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/03/27/only-one-third-of-african-americans-say-they-have-confidence-in-the-police-killings-like-alton-sterlings-are-part-of-the-reason/> (quoting Rep. Cedric Richmond, “We must all continue to work to bridge the divide between law enforcement and community. Until this is done, many young black men and women will be forced to fear any nonthreatening action they take could be met with certain death.”); see also Kevin Hardy, *Local Activist Group Says Video Shows Des Moines Officer Racially Profiling 2 Black Men*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/crime-and-courts/2018/08/15/iowa-cci-traffic-stop-videos-show-evidence-racially-biased-policing-des-moines-kyle-thies/1001324002/> (last updated Aug. 16, 2018, 7:10 PM).
- 328 See, e.g., State v. Sutton, 817 S.E.2d 211, 218 (N.C. Ct. App. 2018) (finding that a driver's confusion, quick talking, stuttering and mumbling, lack of eye contact, extreme nervousness, and bloodshot and glassy eyes were, based on the training and experience of the officer, sufficient indicia of reasonable suspicion to prolong the stop); State v. Johnson, 783 S.E.2d 753, 763-64 (N.C. Ct. App. 2016) (finding that the driver's inability to answer basic questions, his changing of his story, the presence of a vehicle's computer system on the floorboard, and the driver appearing ‘very’ nervous-- breathing heavily, neck veins pulsing--were sufficient grounds to prolong the stop); State v. Warren, 775 S.E.2d 362, 366 (N.C. Ct. App. 2015) (finding that reasonable suspicion is sufficient to prolong a stop based on the driver's presence in a high crime, high drug area, the driver had something in his mouth he wasn't chewing, and the driver denied being involved in drug activity “any longer,” when viewed through the lens of the officer's “six years of experience” and “specific training in narcotics detection”); State v. Fisher, 725 S.E.2d 40, 44-45 (N.C. Ct. App. 2012) (finding that an overwhelming odor of air freshener and a driver's nervousness contributed to sufficient reasonable suspicion to prolong the stop); State v. Blackwell, No. COA10-132, slip op. at 8-9 (N.C. Ct. App. Dec. 7, 2010) (finding that a driver's nervousness and a can of air freshener in the car contributed to sufficient reasonable suspicion “[w]hen ... viewed in their totality and through the eyes of a reasonable, cautious officer, guided by his experience and training”); State v. Euceda-Valle, 641 S.E.2d 858, 863-64 (N.C. Ct. App. 2007) (finding that the driver's extreme nervousness, the smell of air freshener, and the driver's refusal to make eye contact was sufficient reasonable suspicion to prolong the stop); State v. Hernandez, 612 S.E.2d 420, 426-27 (N.C. Ct. App. 2005) (holding that reasonable suspicion

is sufficient to prolong stop based on driver's extreme nervousness, refusal to make eye contact, smell of air freshener, and conflicting stories from passengers and driver).

- 329 See generally Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 748-49 (2011) (“*Caballes* and *Whren* operate in tandem, allowing police to stop virtually any motorist and, by the use of a drug dog, check the motorist's car for drugs at the whim of a police officer, even if a reasonable police officer would not have stopped the car for such a trivial offense, or even if the real reason for the stop is not the traffic violation but the race of the motorist.”).
- 330 See, e.g., Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-01-06-ct-met-canine-officers-20110105-story.html> (quoting Virginia Martinez, an attorney from the Mexican American Legal Defense and Educational Fund, “We know that there is a level of racial profiling going on .... People of color are just targets.”).
- 331 See, e.g., *Racial Disparity in Consent Searches and Dog Sniff Searches*, AM. C.L. UNION ILL. (Aug. 13, 2014), <https://www.aclu-il.org/en/publications/racial-disparity-consent-searches-and-dog-sniff-searches> (“Black motorists were 55% more likely than white motorists to be subjected to a dog sniff. Yet white motorists were 14% more likely than black motorists to be found with contraband during officer searches performed in response to a dog alert.”).
- 332 The Court justified its ruling in *Caballes* on the premise that the drug dog sniffing the outside of the vehicle on a public roadway was not a “search” for Fourth Amendment purposes. 543 U.S. 405, 408-10 (2005). In prior situations where the Court allowed for Fourth Amendment searches without any individualized suspicions, such as inventory searches, the Court did require that the search be performed consistent with standardized police procedures to protect against pretextual searches. See *Florida v. Wells*, 495 U.S. 1, 4 (1990); see also *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).
- 333 See discussion *supra* Section II.D.
- 334 See, e.g., *supra* note 327 and accompanying text.
- 335 See *Florida v. Bostick*, 501 U.S. 429, 448-49 (1991) (Marshall, J., dissenting) (“The vulnerability that an intrastate or interstate traveler experiences when confronted by the police outside of his ‘own familiar territory’ surely aggravates the coercive quality of such an encounter.”).
- 336 See *State v. Pearson*, 498 S.E.2d 599, 601 (N.C. 1998) (stating that “[m]any people become nervous when stopped by a state trooper”).
- 337 Several studies explore the difference in how whites and blacks perceive police officers with the statistically significant common thread being that whites tend to see and respond to police officers in a more favorable way than blacks. See generally Patricia Y. Warren, *The Continuing Significance of Race: An Analysis Across Two Levels of Policing*, 91 Soc. Sci. Q. 1026, 1039 (2010) (providing that vicarious police experiences--stories about police that people hear about from their friends and family--reduce police legitimacy for black respondents and that perceptions of racial profiling by black respondents significantly reduced trust in law enforcement); Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 307 (2004) (“Contacts with the police tend to have stronger and longer-lasting effects on the views of African Americans than whites. Blacks are more likely to leave an encounter with police upset or angry, and they are also more likely to feel that they have not received procedural justice from the officer, which lowers their overall opinion of the police.” (citations omitted)); Weitzer & Tuch, *supra* note 222, at 1017-18 (“[A] majority of blacks ... believe that police in their city treat blacks worse than whites .... A majority of blacks ... believe[] that police provide ‘worse’ service to black neighborhoods .... [S]ignificant numbers of Hispanics and blacks, but almost no whites report being ‘treated unfairly’ by police in their city specifically because of their race.”).
- 338 See *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (“Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”); *State v. Johnson*, 783 S.E.2d 753, 762 (N.C. Ct. App. 2016) (holding that “context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances” (quoting *United States v. Branch*, 537 F.3d 328, 336-37 (4th Cir. 2008))); *State v. Fisher*, 725 S.E.2d 40, 45 (N.C. Ct. App. 2012) (“We recognize that several of the factors listed by the State in this case can easily be construed as innocent behavior, but ‘[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation.” (quoting *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979))).

- 339 *See Fisher*, 725 S.E.2d at 501, 504.
- 340 *See State v. Euceda-Valle*, 641 S.E.2d 858, 863 (N.C. Ct. App. 2007) (holding “that the trial court’s findings of fact support its legal conclusion that law enforcement had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle. Defendant was extremely nervous and refused to make eye contact with the officer. In addition, there was smell of air freshener coming from the vehicle, and the vehicle was not registered to the occupants.”); *see also State v. Hernandez*, 612 S.E.2d 420, 426-27 (N.C. Ct. App. 2005) (holding that reasonable suspicion was supported by nervousness, lack of eye contact, conflicting statements, and strong odor of air freshener in the vehicle).
- 341 *See supra* note 234 and accompanying text.
- 342 *See supra* notes 50-53 and accompanying text.
- 343 *See supra* text accompanying note 334.
- 344 *See Clare Foran, A Year of Black Lives Matter: As the Protest Movement Evolves, Activists Face Pushback and Growing Pains*, ATLANTIC (Dec. 31, 2015), <https://www.theatlantic.com/politics/archive/2015/12/black-lives-matter/421839/>; *see also What We Believe*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/what-we-believe/> (last visited Apr. 5, 2019).
- 345 *See supra* notes 322-40 and accompanying text.
- 346 *State v. Bartlett*, 818 S.E.2d 710, 712-13 (N.C. Ct. App. 2018) (noting that the officer pulled the vehicle’s driver over for reckless driving and speeding).
- 347 *Id.* at 713.
- 348 *Id.*
- 349 *Id.* (noting that Bartlett testified he never gave the officer consent to conduct a search).
- 350 *See Ric Simmons, Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (arguing that two individuals who consented to a search “is at once absurd, meaningless, and irrelevant .... It is absurd because no outsider viewing the interaction would conclude that the defendants voluntarily consented to a search when surrounded by police at close quarters ....”).
- 351 *See Ohio v. Robinette*, 519 U.S. 33, 47 (1996) (Stevens, J., dissenting) (“The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away while the officer continues to address them.”).
- 352 *State v. Smith*, 488 S.E.2d 210, 213 (N.C. 1997) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-32 (1973)).
- 353 *Schneckloth*, 412 U.S. at 231-32.
- 354 *See, e.g., id.* at 220 (stating that when the driver of the vehicle was pulled over, the officer searched both his person and the vehicle).
- 355 *See, e.g., State v. Ready*, 565 N.W.2d 728, 731 (Neb. 1997) (quoting *State v. Ready*, 556 N.W.2d 264, 270 (Neb. Ct. App. 1996)) (acknowledging that an officer provided that he routinely asked for consent to search when he made a traffic stop); *United States v. Lattimore*, 87 F.3d 647, 649 (4th Cir. 1996) (explaining that an officer testified that he searches “97 percent of the cars [he] stop[s]”); *State v. Retherford*, 639 N.E.2d 498, 502 (Ohio Ct. App. 1994) (stating that an officer testified that he requested to search 786 vehicles involved in traffic stops in a single year).
- 356 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(e) 539 (5th ed. 2012).
- 357 BAUMGARTNER ET AL., *supra* note 17, at 112-13.
- 358 *Id.* at 113.
- 359 *Id.*

- 360 *See supra* Section I.C.
- 361 *See infra* Section III.A.
- 362 *See infra* Sections III.B-C.
- 363 412 U.S. 218, 219 (1973).
- 364 *Id.* at 220.
- 365 *Id.*
- 366 *Id.*
- 367 *Id.*
- 368 *Id.*
- 369 *Id.* at 219-20.
- 370 *Id.* at 221 (quoting *People v. Michael*, 290 P.2d 852, 854 (Cal. 1955)); *see also* *People v. Bustamonte*, 270 Cal. App. 2d 648, 652 (1969).
- 371 *Bustamonte*, 412 U.S. at 221-22 (discussing *Bustamonte v. Schneckloth*, 448 F.2d 699, 700 (9th Cir. 1971)).
- 372 *Id.*
- 373 *Id.* at 229.
- 374 *Id.*
- 375 *Id.* at 230.
- 376 *Id.* at 231-32.
- 377 *Id.* at 232.
- 378 *Id.* at 225.
- 379 *Id.* at 248.
- 380 *Id.* at 248-49.
- 381 *Id.* at 229.
- 382 Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 220-21 (2001).
- 383 Simmons, *supra* note 350, at 778 (alteration added).
- 384 Strauss, *supra* note 382, at 221.
- 385 Simmons, *supra* note 350, at 775-76. “Although the legal test that courts have been applying in evaluating consent searches has a subjective and an objective prong, in fact the subjective prong has been virtually ignored for the past thirty years.” *Id.* at 777 (alteration added); *see also* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 520-21 (2015).
- 386 Strauss, *supra* note 382, at 221-22 (citing DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32 (1999) (“In most of the cases, the courts did not even discuss the subjective factors that the Supreme Court in *Schneckloth* said would be relevant in determining voluntariness.”). When the Court mentioned these subjective factors at all, it minimized them. *See* Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory*

*into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 232-33 (1997) (reiterating the Court's ignoring of subjective factors).

387 Strauss, *supra* note 382, at 222 (alteration added).

388 Simmons, *supra* note 350, at 779.

389 *Id.* at 779-81.

390 536 U.S. 194, 197 (2002).

391 *Id.*

392 *Id.* at 197-98.

393 *Id.* at 198.

394 *Id.* at 199.

395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.* at 200-01 (relying on *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)) (stating that “[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage-- provided they do not induce cooperation by coercive means”).

399 *Id.* at 203-04.

400 *Id.* 201.

401 *Id.* at 206-07.

402 *Burke*, *supra* note 385, at 525 (citing *Simmons*, *supra* note 350, at 785).

403 *See id.*

404 *See infra* notes 405-10 and accompanying text.

405 *State v. Robinette*, 653 N.E.2d 695, 697 (Ohio 1995).

406 *Ohio v. Robinette*, 591 U.S. 33, 37 (1996) (“Although the opinion below mentions Art. I, § 14, of the Ohio Constitution in passing ... the opinion clearly relies on federal law nevertheless. Indeed, the only cases it discusses or even cites are federal cases ....”).

407 *Brown v. State*, 182 P.3d 624, 630, 636 (Alaska Ct. App. 2008) (“These [consent] searches result in substantial interruption of motorists' travels .... In all but exceptional cases, these consent searches are held to be valid under the Fourth Amendment. The federal law in this area is premised on the assumption that, all things being equal, a motorist who does not wish to be subjected to a search will refuse consent when the officer seeks permission to conduct a search. But experience has shown that assumption is wrong.”).

408 *Id.* at 633.

409 *See State v. Washington*, 898 N.E.2d 1200, 1206 (Ind. 2007); *State v. Brikenmeier*, 888 A.2d 1283, 1290-91 (N.J. 2006) (holding that consent searches following the stop of a vehicle are improper unless the authorities have reasonable suspicion that the accused is engaged in criminal activity); *State v. Fort*, 660 N.W.2d 415, 418-19 (Minn. 2003) (holding that the Minnesota constitution does not permit the search of a passenger of a vehicle during a routine traffic stop if the officer does not have reasonable suspicion to seek consent to search); *State v. Carty*, 790 A.2d 903, 908-09 (N.J. 2002).

- 410 *See* State v. McKinnon-Andrews, 846 A.2d 1198, 1203-04 (N.H. 2004) (holding that a police officer's asking for consent may be valid if there is "reasonable articulable suspicion"); State v. Gonzalez, 789 N.E.2d 260, 270 (Ill. 2003).
- 411 *Cf. Brown*, 182 P.3d at 633-34 ("Both the Alaska Supreme Court and this Court have repeatedly interpreted Article I, Section 14 to provide greater protection to the citizens of this State than they would otherwise have under the Fourth Amendment. We have exercised this authority when we were convinced that the United States Supreme Court's interpretation of the Fourth Amendment "fails to adequately safeguard our citizens' right to privacy, ... fails to adequately protect citizens from unwarranted government intrusion, and ... unjustifiably reduces the incentive of police officers to honor citizen's constitutional rights.") (quoting Joseph v. State, 145 P.3d 595, 605 (Alaska Ct. App. 2006)).
- 412 State v. Little, 154 S.E.2d 61, 65 (N.C. 1967).
- 413 *Id.* (citing Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951)).
- 414 *Id.*
- 415 *See Little*, 154 S.E.2d at 65-66; *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).
- 416 *Little*, 154 S.E.2d at 65-66 ("By such a waiver and consent a defendant relinquishes the protection of the Fourth Amendment to the United States Constitution ... and also relinquishes the protection given by Article I, section 15 of the North Carolina Constitution.").
- 417 *See, e.g., State v. Brown*, 293 S.E.2d 569, 582 (N.C. 1982) ("Taking into account all of the factors enunciated in *Schneckloth*, we hold that defendant's consent to the search was voluntarily given free from coercion of any form.").
- 418 *See infra* notes 431-43 and accompanying text.
- 419 North Carolina v. Fincher, 305 S.E.2d 685, 687 (N.C. 1983).
- 420 *Id.* at 691.
- 421 *Id.* at 690.
- 422 *Id.*
- 423 *Id.*
- 424 *Id.*
- 425 *Id.* A different expert did estimate Fincher's verbal IQ to be 65. *Id.*
- 426 *Id.* at 689.
- 427 *Id.*
- 428 *Id.* at 690.
- 429 *See id.*
- 430 *See id.* at 691.
- 431 *Id.* at 689 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).
- 432 *See id.* at 690-91.
- 433 *Id.* at 690. The Court conflates the voluntariness of consent with the voluntariness of a confession, stating, "[s]uch lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made." *Id.* (quoting State v. Jenkins, 268 S.E.2d 458, 463 (N.C. 1980)).

- 434 *Id.* The Court again turns to the analysis of when a confession is voluntarily given, “[a]lthough age is also to be considered by the trial judge in ruling upon the admissibility of a defendant’s confession ....” *Id.*
- 435 *See supra* notes 431-33 and accompanying text.
- 436 *Fincher*, 305 S.E.2d at 691.
- 437 *Id.*
- 438 *Id.*
- 439 *Id.*
- 440 *Id.* at 690-91.
- 441 *See, e.g.*, *State v. Campbell*, 617 S.E.2d 1, 13 (N.C. 2005) (“Seizure of a person within the meaning of the Fourth Amendment occurs ‘only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.’ ... Thus, ‘[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search.’” (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *United States v. Drayton*, 536 U.S. 194, 201 (2002))); *State v. Kincaid*, 555 S.E.2d 294, 299 (N.C. Ct. App. 2001) (“A reasonable person, under the circumstances, would have felt free to leave when the documents were returned .... Sergeant Splain was neither prohibited from simply asking if defendant would consent to additional questioning, nor was the officer prohibited from questioning defendant after receiving his consent.”).
- 442 *See, e.g.*, *State v. Jackson*, 681 S.E.2d 492, 497 (N.C. Ct. App. 2009).
- 443 *See, e.g., id.* (holding that “a reasonable person under the circumstances would certainly not believe he was free to leave without his driver’s license and registration”); *cf. supra* note 292 and accompanying text.
- 444 *See infra* notes 445-55 and accompanying text.
- 445 *State v. Bartlett*, 818 S.E.2d 710, 715 (N.C. Ct. App. 2018).
- 446 *Id.* at 714.
- 447 *Id.* at 715.
- 448 *Id.*
- 449 *Id.*
- 450 *Id.*
- 451 *Id.*
- 452 *See U.S. v. Drayton*, 536 U.S. 194, 205 (2002); *Bartlett*, 818 S.E.2d at 714 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).
- 453 *See Bartlett*, 818 S.E.2d at 715.
- 454 *See id.* at 715-16.
- 455 *See id.* at 715.
- 456 *See* discussion *supra* Sections III.A-B.
- 457 *See supra* note 454 and accompanying text; *see also Schneckloth*, 412 U.S. at 227; *Drayton*, 536 U.S. at 201.
- 458 *See supra* notes 357-58 and accompanying text.

- 459 *See supra* note 453 and accompanying text.
- 460 *See* Strauss, *supra* note 382, at 221.
- 461 *Id.* at 236.
- 462 *Id.* (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 13-26 (1974); Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 47-49 (1974)).
- 463 *Id.* at 239-40.
- 464 *Id.* at 242.
- 465 *Id.* at 242-43.
- 466 *Id.* at 243.
- 467 *See supra* text accompanying notes 241-43 and 343-45.
- 468 *See* discussion *supra* Part III.
- 469 *See supra* notes 17-28 and accompanying text.
- 470 *See supra* notes 50-61 and accompanying text.
- 471 *See supra* Part I.
- 472 *See supra* Part I.
- 473 *See supra* Part I.
- 474 *See supra* Section I.D.
- 475 *See supra* Section I.D.
- 476 *See supra* Sections I.D, II.E.
- 477 *See supra* Sections I.C, II.B, II.D, III.B.
- 478 *See supra* Sections I.D, III.B.
- 479 *See supra* Sections I.C, II.B, II.D, III.B.

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