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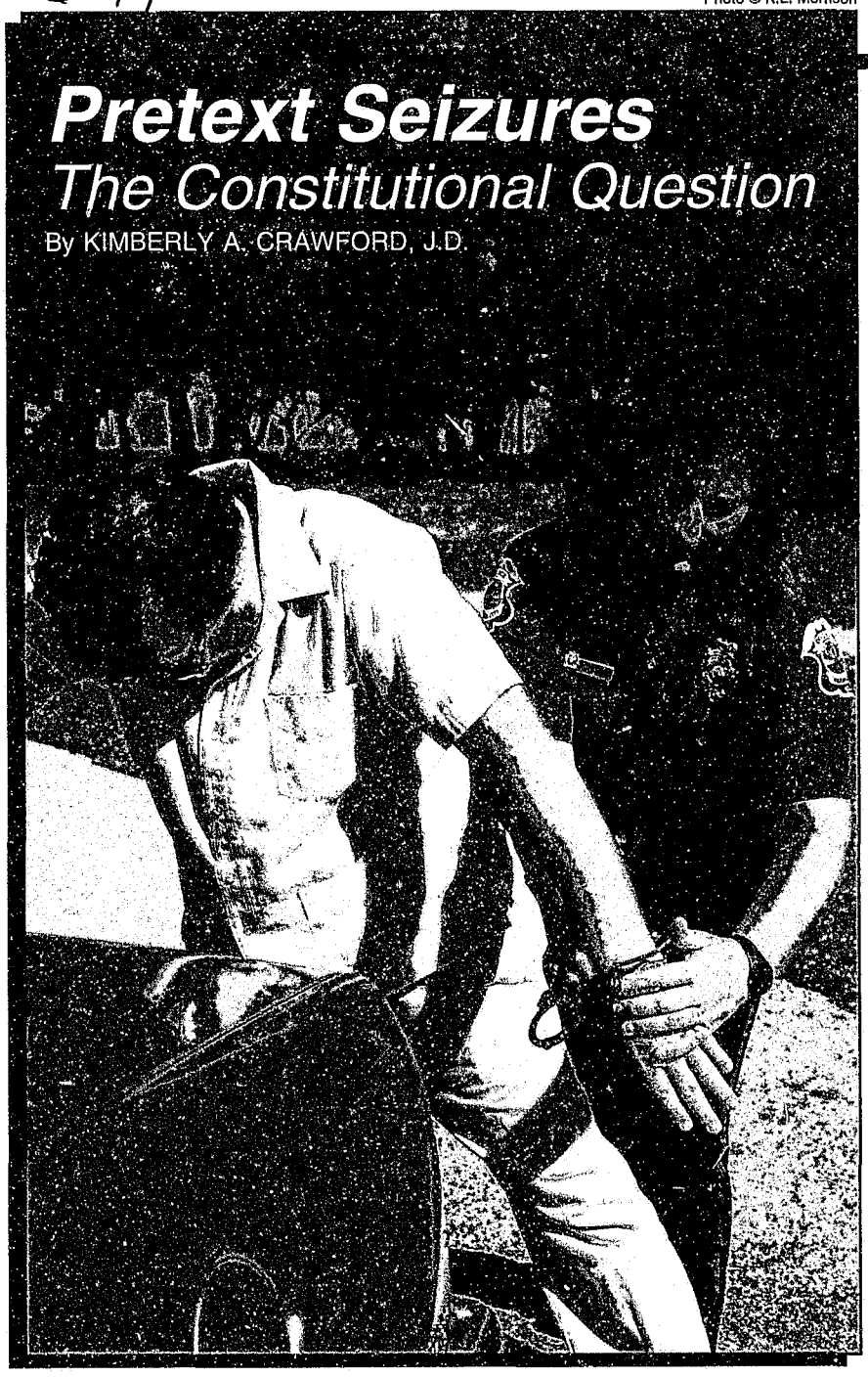

Pretext Seizures
The Constitutional Question

By KIMBERLY A. CRAWFORD, J.D.

The fourth amendment to the U.S. Constitution prohibits unreasonable searches and seizures.[1] *Searches* are presumed unreasonable if conducted without search warrants and the burden of proof is on the government to establish that a warrantless search was justified under an exception to the warrant requirement.[2]

With respect to *seizures*, there is no presumption that the government needs a warrant. To be reasonable under the fourth amendment, seizures need only be based on governmental interests that outweigh the intrusions upon an individual's privacy rights.[3]

In theory, the formula for determining the reasonableness of a seizure is relatively simple: The greater the intrusion on an individual's privacy interests, the more facts and circumstances the government must have to support its claim of an overriding interest. Thus, an arrest, which is the most significant form of seizure, requires the government to establish its interests to the level of probable cause.[4] In contrast, an investigative detention, which is a much reduced intrusion, requires only a showing of reasonable suspicion.[5]

In reality, however, determining the reasonableness of a seizure can be an extremely difficult task. No mathematical or scientific formula exists for predicting when facts and circumstances rise to the level of reasonable suspicion or probable cause; yet, law enforcement officers are required to make such judgments on a daily basis and act on them. Once acted upon, those judgments are subject to seemingly endless defense challenges.

Traditionally, defense challenges to seizures have centered around the facts and circumstances used to justify the action or the amount of force used to accomplish it. However, one defense challenge to seizures goes beyond the traditional arguments and focuses on the law enforcement officer's state of mind. This challenge alleges that a seizure is unconstitutional if the seizing officer has an ulterior motive and uses

the seizure merely as a pretext to allow further investigation.

This article discusses the nature of pretext seizures and reviews the courts' methods for determining their legality. Additionally, it suggests a law enforcement practice to combat defense challenges alleging unlawful pretext seizures.

> ***"...one defense challenge...alleges that a seizure is unconstitutional if the seizing officer...uses the seizure merely as a pretext to allow further investigation."***

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HISTORICAL BACKGROUND

One of the first cases of note to address the issue of pretext seizures was *State* v. *Blair*.[6] In *Blair*, police officers investigating a murder had as their primary evidence a palm print on the door of the victim's van. An anonymous tip indicated that a member of the Blair family was involved in the crime.

Finding that three of four members of the local Blair family had major case prints on file and that none of the prints matched the one on the victim's van, the police focused their attention on Zola Blair, the fourth member of the family. Although Zola had no prints on file, the police discovered that there was an outstanding traffic warrant for her arrest. After executing that warrant, the police obtained finger and palm prints from Zola and questioned her about the murder before booking her on the traffic warrant and allowing her to make bond.

When fingerprint experts made a match on the prints, the officers arrested Zola on a murder warrant. She then made incriminating statements during interrogation. Prior to trial, however, the defense moved to suppress both the fingerprint evidence and the incriminating statements as being the products of an unlawful pretext arrest. The prosecution, on the other hand, argued that the original arrest of Zola Blair was pursuant to a lawful traffic warrant and that any ulterior motive on the part of the law enforcement officers was irrelevant.

Finding that the defendant had been treated as a murder suspect when arrested and not as a minor traffic offender,[7] the trial court concluded without precedent that the arrest was unlawful because it was pretextual and that the evidence obtained as a result of that arrest were fruits of the poisonous tree. Following an appeal in which the State supreme court upheld the trial court's order of suppression,[8] the U.S. Supreme Court granted certiorari.[9] However, the Supreme Court subsequently dismissed the writ of certiorari as being improvidently granted.[10]

Because the lawfulness of the arrest in *Blair* was the predominant issue in dispute, a Supreme Court decision in the case undoubtedly would have determined the legality of pretext seizures. Unfortunately, the Supreme Court's refusal to hear the case left the legality of pretext seizures unresolved and allowed State and lower Federal courts to reach their own conclusions regarding the lawfulness of such seizures. As a result, the courts' approach to pretext seizures has been inconsistent.

SUBJECTIVE APPROACH

The subjective approach, which apparently was used by the State court in *Blair*, focuses exclusively on the law enforcement officer's state of mind at the time of the seizure. If a seizure on a relatively minor offense is motivated by a law enforcement officer's desire to investigate a more serious offense, the initial seizure is deemed to be a pretext and considered unlawful.

Following *Blair*, the Circuit Court of Appeals for the Ninth Circuit was the only court to adopt temporarily the subjective approach. In *United States* v. *Smith*,[11] the appellate court warned that "an arrest may not be used as a pretext to search for evidence. Whether an arrest is a mere pretext to search

turns on the motivation or primary purpose of the arresting officers."[12] Thus, the court cautioned that an arrest for a minor traffic offense that was motivated by the desire to search the vehicle for evidence of some other unrelated offense for which the police lacked probable cause would be unconstitutional.

Despite this admonition, the Ninth Circuit Court of Appeals subsequently upheld a stop based on probable cause to believe that a driver was operating a vehicle without a license, despite the fact that the police admittedly had an ulterior motive to search the car for drugs. The court's decision in *United States* v. *Cannon*[13] marks a clear departure from its earlier subjective approach to pretext seizures.

The Ninth Circuit's digression from the subjective approach virtually was mandated by a number of Supreme Court decisions.[14] Although repeatedly refusing to address the issue of pretextual seizures specifically,[15] the fourth amendment interpretation espoused by the Supreme Court over the past decade unquestionably demands an objective approach to search and seizure issues.

In *Maryland* v. *Macon*,[16] for example, the Supreme Court emphasized that "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' and not on the officer's actual state of mind at the time the challenged action was taken."[17] In light of such unequivocal language endorsing an objective standard for review of fourth amendment issues, the subjective approach to pretext seizures is clearly baseless.

OBJECTIVE APPROACH

With the demise of the subjective approach to pretext seizures, it would seem that State and Federal courts would be consistent in adopting an objective standard. To some extent, this is true. Currently, all appellate courts confronted with defense claims of improper pretext seizures purportedly evaluate the government's actions on the basis of objective reasonableness. If the seizure is objectively reasonable, then it is lawful, despite any ulterior motive on the part of the government.

Unfortunately, courts do not always agree on what makes a seizure objectively reasonable. Some courts use a "could have" test, while others use a "would have" test.

"Could Have" Test

When determining the lawfulness of an alleged pretext seizure, courts that apply the "could have" test simply require the government to establish that the seizure was authorized.[18] Any law enforcement officer "could have" made the seizure because there were sufficient facts, amounting to either probable cause or reasonable suspicion, to justify the intrusion.

In *United States* v. *Scopo*,[19] the Court of Appeals for the Second Circuit used the "could have" test to uphold a motor vehicle stop that subsequently led to the seizure of an altered weapon and the prosecution of an organized crime figure for the possession of that weapon. The vehicle in question was being driven by defendant Ralph Scopo, a known member of an organized crime family engaged in an internal "war."

Surveillance teams first observed the vehicle double parked on the wrong side of the road and later make two unsignaled lane changes. After following the vehicle for approximately 2 miles, officers seized the vehicle as it paused for a red light. As the officers approached the vehicle with weapons drawn, they observed the defendant throw something into the back seat. After ordering the defendant out of the vehicle, officers looked into the back seat and found a fully loaded revolver in plain view.

After being charged with the possession of an illegal weapon, defendant successfully moved to have the evidence suppressed on the grounds that the stop of his vehicle for traffic violations was a mere pretext to search his car for weapons. The district court found that the pretext nature of the seizure was evidenced by officers' testimony that traffic stops often were used to confiscate weapons from organized crime figures and that the stop was

made more than 2 miles from the traffic violation.

On review, the Court of Appeals for the Second Circuit reversed the dismissal order. In doing so, the court refused to look beyond whether the officers had probable cause to arrest the defendant for the traffic violation. Instead, the court held that "when an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle."[20] Reviewing the facts before it, the court noted that the officers had directly observed the defendant violating the traffic laws and, consequently, had probable cause to arrest him.

The "could have" test for determining the legality of a seizure is straightforward and effectively thwarts any defense claim of pretext. Because courts that use the "could have" test focus their attention exclusively on factual justifications, seizures based on probable cause or reasonable suspicion are lawful, regardless of any alleged pretextual motivation.

"Would Have" Test

When confronted with a pretext challenge, courts that apply the "would have" test go beyond the factual justifications for a seizure and determine whether a reasonable law enforcement officer "would have" made the seizure absent an ulterior motive. Accordingly, a seizure based on probable cause or reasonable suspicion may be deemed unconstitutional if a reviewing court determines that under the same circumstances, a reasonable officer would not have made the seizure.

In *United States* v. *Smith*,[21] the Court of Appeals for the 11th Circuit used the "would have" test to conclude that the stop of a weaving vehicle was pretextual. The subsequent search of the vehicle, although based on probable cause, was considered tainted by the unlawful seizure.

> ***...courts that use the 'could have' test focus their attention exclusively on factual justifications....***

A Florida Highway Patrol officer assigned to a special drug squad observed the vehicle in *Smith* traveling north on Interstate 95 at 3:00 a.m. The officer testified that he followed the vehicle because he suspected it might be carrying drugs but did not stop it until he observed it weaving and crossing into the emergency lane. After stopping the vehicle, the officer used a drug detection dog to locate 1 kilogram of cocaine in the trunk. The driver was later charged with possession with intent to distribute.

Following his conviction, defendant contested the admissibility of the cocaine on the grounds that it was discovered as a result of a pretext seizure. The government, on the other hand, argued that the weaving of the vehicle gave the officer the reasonable suspicion necessary to investigate the possibility of drunk driving and that any officer under the circumstances could have made the seizure.

Vacating defendant's conviction, the Court of Appeals for the 11th Circuit rejected the "could have" analysis championed by the government and opted to apply the "would have" test. In doing so, the court considered whether a reasonable officer would have stopped a vehicle weaving slightly and crossing the line into the emergency lane without an ulterior motive. Concluding that a reasonable officer would not have made such a stop, the court gave the following explanation:

> That an officer theoretically *could* validly have stopped the car for a possible traffic infraction was not determinative. Similarly immaterial was the actual subjective intent of the [officer]. The stop was unreasonable not because the officer secretly hoped to find evidence of a greater offense, but because it was clear that an officer would have been uninterested in pursuing the lesser offense absent that hope.[22]

Although courts that apply the "would have" test profess to be using a purely objective approach, subjectivity inevitably creeps into the analysis. Courts will not employ the "would have" test unless they believe an officer had a subjective ulterior motive for making the seizure. The ulterior motive does not necessarily invalidate the seizure, but it will cause the courts using the "would have" test to consider what a reasonable officer would have done under the circumstances absent an ulterior motive.

The "would have" test has a substantial disadvantage in that it

requires courts confronted with a pretext challenge to go beyond the particular facts of a case and consider what has been done under similar circumstances in other cases. Courts using this test cannot review the facts of the case before them and simply decide whether the officer had probable cause or reasonable suspicion to make the seizure. Rather, these courts must consider whether and under what circumstances officers made similar stops in the past.

For example, when confronted with a defense challenge that a traffic stop for making an illegal turn was pretextual, a court using the "would have" test cannot simply determine that the officer making the stop had reason to believe the traffic laws were violated. Instead, if the court believes the officer had an ulterior motive when making the stop, it must consider how frequently officers stop drivers for illegal turns when no ulterior motive exists.

COUNTERING THE "WOULD HAVE" TEST

Because a number of State and Federal courts[23] use the "would have" test, law enforcement agencies should be prepared to meet the pretext challenge. They can do so by keeping accurate, detailed records regarding the number and types of seizures made.

For instance, when confronted with the challenge that a traffic stop for an illegal U-turn or an unsignaled lane change was pretextual, a law enforcement agency could refute that challenge by establishing the consistency with which its officers make such stops. In essence, the records serve as testimony that established procedures, not ulterior motives, govern the actions of the officers.

CONCLUSION

Defense claims of pretext have found favor in some State and lower Federal courts. Agencies can prepare to rebut such claims by maintaining detailed records regarding all seizures, especially traffic stops. Unless the Supreme Court resolves the issue of pretext seizures by adopting the "could have" test, these accurate, detailed records may be the governemnt's best defense to claims of pretext.✦

> ***"Courts will not employ the 'would have' test unless they believe an officer had a subjective ulterior motive for making the seizure."***

Endnotes

[1] U.S. CONST. amend. IV.

[2] *Katz* v. *United States*, 389 U.S. 347 (1967).

[3] *Graham* v. *Conner*, 490 U.S. 386, at 395 (1989).

[4] *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

[5] *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[6] 691 S.W. 2d 259 (Mo. 1985)(en banc).

[7] When they arrested her, officers read Blair her constitutional rights before taking her to the homicide unit, where they booked her on homicide charges. They then took major case prints. She was detained overnight before being released. *Id.* at 262.

[8] *Id.* The case resulted in a 4-3 decision with a very cogent dissent filed by Judge Blackmar.

[9] 106 S.Ct. 787 (1986).

[10] 107 S.Ct. 1596 (1987).

[11] 802 F.2d 1119 (9th Cir. 1986).

[12] *Id.* at 1124 (citations omitted).

[13] 29 F.3d 472 (9th Cir. 1994).

[14] The Ninth Circuit cited *Maryland* v. *Macon*, 472 U.S. 463 (1985), and *Scott* v. *United States*, 436 U.S. 128 (1978).

[15] In one term, the Supreme Court denied certiorari in five cases involving pretext seizures. *See, United States* v. *Trigg, United States* v. *Cummins*, and *United States* v. *Enriquez-Navarez*, 112 S.Ct. 428 (1991); *Anderson* v. *Illinois*, 112 S.Ct. 89 (1991); and *Hope* v. *United States*, 111 S.Ct. 1640 (1991).

[16] 472 U.S. 463 (1985).

[17] *Id.* at 470-71 (quoting *Scott* v. *United States*, 436 U.S. 128 (1978).

[18] *See, United States* v. *Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc); *United States* v. *Hassan El*, 5 F.3d 726 (4th Cir. 1993) (petition for cert. filed); *United State* v. *Cummins*, 920 F.2d 498 (8th Cir. 1990) *cert. denied*, 112 S.Ct. 428 (1991); *United States* v. *Trigg*, 878 F.2d 1037 (7th Cir. 1989), *appeal after remand*, 925 F.2d 1064, *cert. denied*, 112 S.Ct. 428 (1991); *United States* v. *Causey*, 834 F.2d 1179 (5th Cir. 1987)(en banc); *United States* v. *Scopo*, 19 F.3d 777 (2d Cir. 1994); *United States* v. *Hawkins*, 811 F.2d 210, *cert. denied*, 108 S.Ct. 110 (1987); *People* v. *King*, 36 Cal. Rptr. 2d 365 (Cal. App. 1995); *State* v. *Lopez*, 873 P.2d 1127 (Utah 1994); *Randle* v. *State*, (unpublished) 1994 WL75807 (Tex. App. 1st Dist.); *State* v. *Bea*, 864 P.2d 854 (Or. 1993); *State* v. *Swanson*, 838 P.2d 1340 (Ariz. 1992); *People* v. *Haney*, 480 NW2d 322 (Mich. App. 1992); and *State* v. *Law*, 769 P.2d 1141 (Idaho Ct. App. 1989).

[19] 19 F.3d 777 (2d Cir. 1994).

[20] *Id.* at 782 (quoting *United States* v. *Cummins*, 920 F.2d 498 (8th Cir. 1992)).

[21] 799 F.2d 704 (11th Cir. 1986).

[22] *Id.* at 710 discussing *United States* v. *Cruz*, 581 F.2d 535 (5th Cir. 1978)(en banc).

[23] *See, United States* v. *Guzman*, 864 F.2d 1512 (10th Cir. 1988); *United States* v. *Smith*, 799 F.2d 704 (11th Cir. 1986); *United States* v. *Cannon*, 29 F.3d 472 (9th Cir. 1994); *People* v. *Owens*, ___ NYS 2d ___ (NY 1995); *State* v. *Chapin*, 879 P.2d 300 (Wash. App. 1994); *State* v. *Turner*, (unpublished) 1994 WL313053 (Ohio App. 2d Dist); *State* v. *Izzo*, 623 A.2d 1277 (Me. 1993); *Robinson* v. *State*, 617 So. 412 (Fla. Ct. App. 1993); *Townsel* v. *State*, 763 P.2d 1353 (Alaska Ct. App. 1988).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.