

YOUR PAPERS, PLEASE: POLICE AUTHORITY TO REQUEST IDENTIFICATION FROM A PASSENGER DURING A TRAFFIC STOP IN ALASKA

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INTRODUCTION

Alaska's Constitution explicitly recognizes a right to privacy.¹ This Article examines Alaska's right to privacy in the context of a police officer's authority to request identification from a passenger during a routine traffic stop.

Take, for example, this potential scenario: a police officer stops a vehicle for a routine traffic offense, such as a non-functioning license plate light. There is no doubt that the officer has authority to stop a vehicle in such circumstances; the officer has personally observed an infraction of the traffic code. Nothing about the observed infraction, however, implicates a passenger of the vehicle in any unlawful activity. During the stop, the officer requests identification from all passengers because of a standard investigative practice to make a blanket request in all traffic stops. Once the officer obtains the passenger's identification, the officer runs her name and information through the state law enforcement database system, checking for outstanding warrants and any parole or probationary status. Occasionally, the request yields information that permits the officer to arrest an individual who otherwise has done nothing indicative of criminal activity and merely had the misfortune to be sitting next to someone who failed to

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1. ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

illuminate their license plate light.

The United States Supreme Court has gradually expanded the authority of police officers over both drivers and passengers during routine traffic stops. During a traffic stop, police officers may inquire into matters unrelated to the stop, order drivers and passengers to exit the vehicle,² and conduct a pat down search of both the driver and any passenger if the officer reasonably concludes that the individual is armed and dangerous.³ Although the issue of requesting a passenger's identification has never been squarely presented to the Supreme Court, many jurisdictions that have addressed the issue have ruled that police may also request identification and run a criminal background check on passengers as a routine matter in every traffic stop.⁴

However, the Alaska Constitution, unlike the Federal Constitution, explicitly guarantees the right to privacy.⁵ This constitutional provision establishes a limit to police authority not found at the federal level or in most other states. With that in mind, this Article examines whether the Alaska Constitution permits a police officer to request identification from a passenger during a routine traffic stop when the request is not related to the justification for the stop, when the officer has no reasonable suspicion of criminality, and when no other circumstances indicate a legitimate need to obtain identification. Part I begins by examining the law in other jurisdictions, including the federal courts and the courts of other states that have addressed the issue. Part II then examines whether the additional privacy protections found in the Alaska Constitution, as applied and interpreted by Alaska courts, impose a limit on police authority to ask for a passenger's identification. Ultimately, this Article concludes that the Alaska Constitution does not allow law enforcement officers to request identification from passengers in a vehicle during a routine traffic stop without reasonable suspicion of criminality or other circumstantial justification for the request.

I. OVERVIEW OF LAW FROM OTHER JURISDICTIONS

The United States Supreme Court has never addressed whether a police officer may request identification from, or conduct a criminal background check on, passengers in a vehicle during a routine traffic stop absent reasonable suspicion of criminality. Every United States

2. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam); *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

3. *Mimms*, 434 U.S. at 111-12; *Arizona v. Johnson*, 555 U.S. 323, 327 (2009).

4. See *infra* note 81 and accompanying text.

5. ALASKA CONST. art. I, § 22.

Circuit Court to address the issue has found that the Fourth Amendment to the United States Constitution allows both the request for identification and the criminal check, as long as the underlying traffic stop is not unreasonably extended.⁶ State courts that have addressed the issue have approved various outcomes under their own constitutions, from allowing requests for identification and criminal checks as a matter of course,⁷ to allowing officers to request identification but not run criminal checks,⁸ to forbidding any questions about a passenger's identity.⁹ The Alaska Supreme Court has not decided the issue under the Alaska Constitution.

A. Routine Traffic Stops and *Terry v. Ohio*

Both Article I, Section 14 of the Alaska Constitution and the Fourth Amendment of the United States Constitution protect against unreasonable searches and seizures.¹⁰ The United States Supreme Court recently confirmed that a traffic stop qualifies as a seizure, reasoning that the driver and passengers are effectively seized for the duration of the stop.¹¹

An officer who personally observes a traffic infraction has probable cause for a traffic stop.¹² Routine traffic stops, even those supported by

6. See *infra* note 81 and accompanying text (noting that every circuit to address the issue has found no Fourth Amendment violation when an officer requests passenger identification and conducts a criminal check).

7. See *infra* notes 82-85 and accompanying text (discussing the reasoning behind allowing routine requests for passenger identification and accompanying criminal checks).

8. See *infra* notes 86-87 and accompanying text (discussing states that allow requests for passenger identification but either have not addressed or do not allow criminal checks).

9. See *infra* notes 88-89 and accompanying text (discussing states that forbid routine requests for passenger identification).

10. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); ALASKA CONST. art. I, § 14 ("The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

11. *Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (quoting *Brendlin v. California*, 551 U.S. 249, 255 (2007)).

12. See, e.g., *Bessette v. State*, 145 P.3d 592, 594 (Alaska Ct. App. 2006) (ruling that officer had probable cause to stop defendant who was trying to start a stalled snow machine on the sidewalk in violation of the traffic code); *Williams v. State*, 853 P.2d 537, 538 (Alaska Ct. App. 1993) (ruling that trooper had probable cause to stop defendant since evidence established that the driver was

probable cause, are considered “a species of investigative stop rather than a formal arrest.”¹³ The principles of *Terry v. Ohio*,¹⁴ a seminal case that limited the scope and duration of investigative stops, therefore mandate that “a traffic stop ‘must be temporary and [must] last no longer than is necessary to effectuate the purpose of the stop’.”¹⁵ If a police officer’s investigation exceeds these boundaries, either in duration, manner, or scope, the stop becomes unreasonable and constitutionally invalid.¹⁶

In the course of a traffic stop, it is not considered an unreasonable search and seizure for a police officer to ask the driver to “produce routine driving documents.”¹⁷ Several state courts have identified a driver’s license, proof of insurance, and the vehicle’s registration as routine driving documents.¹⁸ A computer check to verify the validity of routine driving documents does not unreasonably expand the scope or duration of a valid traffic stop.¹⁹

Prior case law confirms the Supreme Court’s recent holding that a traffic stop is a seizure that must comport with the principles of *Terry v. Ohio*.²⁰ Accordingly, the scope and duration of the stop must not be prolonged by police conduct unrelated to the stop.²¹ However, federal and state courts have reached different conclusions regarding how these principles apply when an officer conducts a check for outstanding

violating taillight regulations).

13. *Brown v. State*, 182 P.3d 624, 625 (Alaska Ct. App. 2008) (citing *Berkemer v. McCarty*, 468 U.S. 420, 440–41 (1984)).

14. 392 U.S. 1 (1968).

15. *Brown*, 182 P.3d at 625 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion)).

16. *Id.* at 625.

17. *Clark v. Municipality of Anchorage*, 112 P.3d 676, 678 (Alaska Ct. App. 2005) (internal quotation marks omitted) (quoting *United States v. Maldonado*, 356 F.3d 130, 134 (1st Cir. 2001)). The United States Supreme Court, in dicta, has approved the practice of requesting identification from drivers during a routine traffic stop. See *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (noting that during routine traffic stops, “licenses and registration papers are subject to inspection”).

18. *Clark*, 112 P.3d at 678–79 (citing *Chang v. State*, 608 S.E.2d 283, 285 (Ga. Ct. App. 2004)); *State v. Prince*, 101 P.3d 332, 334 (N.M. Ct. App. 2004); *Maysonet v. State*, 91 S.W.3d 365, 373 (Tex. Crim. App. 2002); *State v. Hoang*, 6 P.3d 602, 606 (Wash. Ct. App. 2000); *Campbell v. State*, 97 P.3d 781, 785 (Wyo. 2004).

19. See *Fallon v. State*, 221 P.3d 1016, 1019 (Alaska Ct. App. 2010) (“By calling dispatch to check on the status of the license, [the officer] did not unreasonably expand the scope or duration of the stop.”) (internal citations omitted).

20. See, e.g., *Brendlin v. California*, 551 U.S. 249, 255 (2007) (internal citations omitted) (“The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver even though the purpose of the stop is limited and the resulting detention quite brief.”).

21. *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968).

warrants on the *passenger's* identification during a traffic stop.

B. Rights of Passengers Under Federal Law

The United States Supreme Court's recent holding that a traffic stop constitutes a seizure applies to both the driver as well as all passengers.²² Because a traffic stop impacts a passenger's constitutional right to be free from unreasonable seizures, a passenger has standing to challenge an illegal stop or the unreasonable expansion of an initially lawful stop.²³

The Court has found that routine traffic stops "resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*."²⁴ However, given the potential dangers of traffic stops, the Court determined that officers can minimize the risk of harm to police and the occupants of a vehicle if they take unquestioned control of the situation.²⁵ Because of the inherent dangers present in routine traffic stops, the Court has allowed officers to take additional protective measures.²⁶

Four Supreme Court decisions cumulatively apply and clarify *Terry* in a traffic-stop setting: *Pennsylvania v. Mimms*,²⁷ *Maryland v. Wilson*,²⁸ *Brendlin v. California*,²⁹ and *Arizona v. Johnson*.³⁰

In *Pennsylvania v. Mimms*, the Court addressed the question of whether ordering the driver to get out of the car after a lawful stop "was reasonable and thus permissible under the Fourth Amendment."³¹ When an officer stopped Mimms for an expired license plate, the officer noticed a bulge under Mimms' jacket.³² Fearful for his safety, the officer frisked Mimms and discovered a loaded revolver.³³ Mimms was immediately arrested.³⁴ In assessing the constitutionality of the officer's actions, the Court addressed the reasonableness of the officer's actions,

22. *Arizona v. Johnson*, 555 U.S. 323, 326 (2009).

23. *Id.*

24. *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984).

25. *Maryland v. Wilson*, 519 U.S. 408, 414 (1997) (quoting *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981)).

26. *See, e.g., Johnson*, 555 U.S. at 330-32 (discussing Supreme Court precedents authorizing officer safety measures during traffic stops).

27. 434 U.S. 106 (1977) (per curiam).

28. 519 U.S. 408 (1997).

29. 551 U.S. 249 (2007).

30. 555 U.S. 323 (2009).

31. *Mimms*, 434 U.S. at 109.

32. *Id.* at 107.

33. *Id.*

34. *Id.*

weighing the need to protect an officer's safety with an individual's right to "personal security free from arbitrary interference by law officers."³⁵ Because of the potential risks and dangers an officer faces approaching a person seated in an automobile, the Court found it reasonable to allow officers to avoid unnecessary risks in the course of duty.³⁶ The Court reasoned that the public interest in officer safety outweighed such a "de minimis" intrusion into the driver's personal liberty.³⁷ The Court held that it is constitutional for police officers to order a driver out of his vehicle. Furthermore, the Court held that an officer may conduct a pat down search of the driver if the officer reasonably concludes that the driver "might be armed and presently dangerous."³⁸

Maryland v. Wilson extended the *Mimms* rule to apply to passengers as well as drivers.³⁹ Wilson was a passenger in a vehicle being pursued for speeding and tag violations.⁴⁰ During the pursuit, the officer noticed that Wilson kept nervously looking out the window, then ducking down and disappearing before popping his head back up.⁴¹ Upon stopping the vehicle, the officer noticed that Wilson was nervous and sweaty.⁴² When Wilson exited the car, a quantity of crack cocaine fell to the ground.⁴³ In extending the *Mimms* rule to allow officers to order passengers to exit the vehicle during a traffic stop, the Court again emphasized concerns for officers' safety during traffic stops.⁴⁴ The Court noted that while both drivers and passengers can pose dangers to police officers, there is an increased intrusion on passengers' personal liberty, since there is less probable cause or reason to stop or detain a passenger, who, unlike the

35. *Id.* at 109.

36. *Id.* at 110 (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968)). The Court cited a study showing that "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile." *Id.* (citing Allen P. Bristow, *Police Officer Shootings - A Tactical Evaluation*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 93, 93 (1963)). The Court acknowledged "that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations." *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 234 (1973)). "Indeed, it appears 'that a significant percentage of murders of police officers occurs when the officers are making traffic stops.'" *Id.* (quoting *Robinson*, 414 U.S. at 234 n.5).

37. *Id.* at 111.

38. *Id.* at 112.

39. *Maryland v. Wilson*, 519 U.S. 408, 410 (1997).

40. *Id.*

41. *Id.*

42. *Id.* at 410-11.

43. *Id.* at 411.

44. *Id.* at 413.

driver, has not committed a vehicular offense.⁴⁵ Nevertheless, the only change in the passenger's circumstance occurs in ordering the passenger to step outside the vehicle because the passenger was already detained by the traffic stop.⁴⁶ The Court posited that ordering passengers to get out of a stopped car may prevent them from accessing concealed weapons inside the vehicle.⁴⁷ Furthermore, the Court recognized that any threat to officer safety during a traffic stop arises not out of the driver's fear of receiving a traffic ticket, but from the possibility of a more serious crime being uncovered during the stop.⁴⁸ Passengers and drivers alike may be motivated to inflict violence on an officer under those circumstances.⁴⁹ Taking into account these considerations, the Court held that an officer may order passengers to exit a car during a traffic stop.⁵⁰

Recently, *Brendlin v. California* held that passengers are seized to the same extent as a driver during a routine traffic stop, and therefore they have standing to "challenge the constitutionality of a stop."⁵¹ *Brendlin* was a passenger in a vehicle during a traffic stop.⁵² Suspecting that *Brendlin* had dropped out of parole supervision, the police officers asked him to identify himself.⁵³ When reinforcements arrived, the officers ordered *Brendlin* out of the car and placed him under arrest.⁵⁴ *Brendlin*, the driver, and the car all possessed items used for the production of methamphetamine.⁵⁵ In its reasoning, the Court acknowledged that drivers and passengers alike are curtailed by a traffic stop and the intrusion on privacy does not distinguish between drivers and passengers.⁵⁶ Accordingly, passengers have equal standing to challenge a traffic stop under the Fourth Amendment. A reasonable passenger in a car that has just been stopped by police would understand that the police officer's control of the situation prevented them from exiting the car without police permission.⁵⁷ He would not "have believed himself free to 'terminate the encounter' between the

45. *Id.* The Court cited statistics to prove that "traffic stops may be dangerous encounters." *Id.* (internal citations omitted).

46. *Id.* at 413-14.

47. *Id.* at 414.

48. *Id.*

49. *Id.*

50. *Id.* at 415.

51. *Brendlin v. California*, 551 U.S. 249, 251 (2007).

52. *Id.* at 252.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 257.

police and himself;" consequently, a passenger is seized within the meaning of the Fourth Amendment during a traffic stop.⁵⁸

Finally, in *Arizona v. Johnson*, the Supreme Court applied *Terry* to pat downs during traffic stops.⁵⁹ Johnson was a passenger in an automobile pulled over for an expired registration.⁶⁰ During the traffic stop, an officer noticed Johnson was nervous and observed several signs that Johnson might have been involved in criminal activity.⁶¹ For his safety, the officer conducted a pat down, during which he discovered a gun.⁶² Applying the holding in *Terry* that to move from a stop to a frisk the officer must have reasonable suspicion that the stopped person is armed and dangerous, the Court ruled the pat down during the traffic stop lawful.⁶³

In summary, without offending the Fourth Amendment, a lawful traffic stop allows police officers to: inquire "into matters unrelated to the justification for the traffic stop";⁶⁴ "order the driver to get out of the vehicle";⁶⁵ "order passengers to get out of the car";⁶⁶ conduct a pat down search of the driver if the officer reasonably concludes that the driver is armed and dangerous;⁶⁷ and conduct a pat down search of a passenger if the officer reasonably concludes that the passenger is armed and dangerous.⁶⁸

The Supreme Court has also upheld the constitutionality of "stop and identify" statutes.⁶⁹ State laws requiring suspects to state their name during a valid *Terry* stop have been upheld as consistent with the Fourth Amendment's prohibition against unreasonable search and seizures.⁷⁰ The request for a suspect's name is directly related "to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a

58. *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

59. *Arizona v. Johnson*, 555 U.S. 324, 331 (2009).

60. *Id.* at 327.

61. *See id.* at 328 (observing clothing and behavior consistent with gang or criminal activity and weapon possession).

62. *Id.*

63. *Id.* at 327, 329.

64. *Id.* at 333.

65. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (per curiam).

66. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

67. *Mimms*, 434 U.S. at 112.

68. *Johnson*, 555 U.S. at 327.

69. *See Hiibel v. Sixth Judicial Dist. Court of Nev., Humbolt Cnty.*, 542 U.S. 177, 187-88 (2004) (quoting NEV. REV. STAT. § 171.123(3) (2003)) (upholding a 2003 Nevada statute that required any person lawfully detained to "identify himself, but [the person] may not be compelled to answer any other inquiry of any peace officer").

70. *Id.* at 187-88.

legal nullity.”⁷¹ Further, the request does not directly change the stop itself in terms of duration or location.⁷² The Court noted that *Terry* imposed certain limitations on an investigative stop, requiring that the stop be “justified at its inception and ‘reasonably related in scope to the circumstances which justified’ the initial stop.”⁷³ Under these principles, an officer cannot arrest a suspect for failing to produce identification if the officer’s purpose in asking for identification does not bear a reasonable relation to the purpose of the stop.⁷⁴

In response to the argument that a statute requiring disclosure of one’s identity to a police officer violates the Fifth Amendment’s protection against self-incrimination, the Court declined to address whether the privilege applies when “furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.”⁷⁵ The Court instead held more narrowly that the Fifth Amendment did not apply where “petitioner’s refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it ‘would furnish a link in the chain of evidence needed to prosecute’ him.”⁷⁶ The petitioner refused to reveal his identity simply because he felt the officer was not entitled to know his name, not because he saw any possibility or reason that his name would be used against him in a criminal case.⁷⁷ Although the court acknowledged “petitioner’s strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature’s judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him.”⁷⁸ Nevada is one of many

71. *Id.* at 188. (internal citations omitted).

72. *Id.*

73. *Id.*

74. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

75. *Id.* at 191.

76. *Id.* at 190 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

77. *Id.* at 190–91.

78. *Id.* (rejecting the defendant’s argument that disclosing his name would be the key link in the chain of evidence that would lead to his prosecution, thus implicating the Fifth Amendment) (quoting *Hoffman*, 341 U.S. at 486). Nevada is not the only state with a “stop and identify” statute. At least twenty-three other states have similar statutes: ALA. CODE § 15-5-30 (West 2011); ARIZ. REV. STAT. ANN. § 13-2412 (2012); ARK. CODE ANN. § 5-71-213(a)(1) (2012); COLO. REV. STAT § 16-3-103(1) (2012); DEL. CODE ANN., tit. 11, §§ 1902(a), 1321(6) (2012); FLA. STAT. § 856.021(2) (2012); GA. CODE ANN. § 16-11-36(b) (2012); 725 ILL. COMP. STAT. § 5/107-14 (2012); IND. CODE § 34-28-5-3.5 (2012); KAN. STAT. ANN. § 22-2402(1) (2012); LA. CODE CRIM. PROC. ANN. § 215.1(A) (West 2011); MO. REV. STAT. § 84.710(2) (2012); MONT. CODE ANN. § 46-5-401(2)(a) (2011); NEB. REV. STAT. § 29-829 (2012); N.H. REV. STAT. ANN. §§ 594:2, 644:6 (Lexis 2012); N.M. STAT. § 30-22-3

states with stop and identify statutes.⁷⁹

Although the United States Supreme Court has not yet addressed whether a police officer can request identification from passengers and run a criminal background check without any reasonable suspicion of criminality, every United States Circuit Court to address the issue has answered in the affirmative.⁸⁰

C. State Split: Passengers' Rights

Alaska's appellate courts have not yet addressed whether the request for identification from a passenger in a vehicle during a routine traffic stop is permitted under the state constitution. Other state courts around the country are split on the question.

The majority of states that have decided this issue have concluded that the police may request identification from a passenger and may run a criminal background check in a traffic stop without violating any Fourth Amendment rights, but the requests and background checks must not unreasonably prolong the stop.⁸¹ State courts that allow

(2012); N.Y. CRIM. PROC. LAW § 140.50(1) (West 2012); N.D. CENT. CODE § 29-29-21 (2011); OHIO REV. CODE ANN. § 2921.29 (West 2011); R.I. GEN. LAWS § 12-7-1 (2012); UTAH CODE ANN. § 77-7-15 (West 2012); VT. STAT. ANN., tit. 24, § 1983 (Supp. 2012); WIS. STAT. § 968.24 (2012). Some municipalities also have "stop and identify" statutes. *See, e.g.,* Arlington Cnty, Va. Code § 17-13(c) (1957). For background on "stop and identify" statutes and their impact on Fourth Amendment jurisprudence, *see generally* Peter Koclanes, *Unreasonable Seizure: "Stop and Identify" Statutes Create an Illusion of Safety by Sacrificing Real Privacy*, 57 FLA. L. REV. 431 (2005); James G. Warner, *Dudley Do Wrong: An Analysis of a "Stop in Identify" Statute in Hiibel v. Sixth Judicial District Court of Nevada*, 39 AKRON L. REV. 245 (2006); William H. Weisman, *Where Everybody Knows Your Name: Compulsory Identification and the Fallacy of the Hiibel Majority*, 71 BROOK. L. REV. 1421 (2006); James L. Stulin, Comment, *Does Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification*, 54 AM. U. L. REV. 1449 (2005); Note, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J. 585 (1981); Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057 (1984).

79. NEV. REV. STAT. § 171.123(3) (2011).

80. *See, e.g.,* United States v. Alexander, 2012 WL 48214, at *5 (6th Cir. Jan. 10, 2012); United States v. Pack, 612 F.3d 341, 351 (5th Cir. 2010); United States v. Chaney, 584 F.3d 20, 27 (1st Cir. 2009); Stufflebeam v. Harris, 521 F.3d 884, 888 (8th Cir. 2008); United States v. Diaz-Castaneda, 494 F.3d 1146, 1152-53 (9th Cir. 2007); United States v. Kirksey, 485 F.3d 955, 958 (7th Cir. 2007); United States v. Rice, 483 F.3d 1079, 1085-86 (10th Cir. 2007); United States v. Soriano-Jarquín, 492 F.3d 495, 500 (4th Cir. 2007); United States v. Purcell, 236 F.3d 1274, 1278-79 (11th Cir. 2001).

81. *See, e.g.,* State v. Ybarra, 751 P.2d 591, 592 (Ariz. Ct. App. 1987) (citing State v. Curiel, 634 P.2d 988, 992 (Ariz. Ct. App. 1981)) (holding that a request for identification and warrant check on a passenger is "incidental to the authorized

officers to request identification from a passenger during a traffic stop justify the request in a variety of ways, including: (1) that a request for passenger identification is not a “search” or “seizure” under the Fourth Amendment or comparable state constitutions;⁸² (2) that the request is justified by legitimate concerns for officer safety;⁸³ (3) that the request is

investigatory stop”); *People v. Vibanco*, 60 Cal. Rptr. 3d 1, 14–15 (Cal. Ct. App. 2007) (holding that a request for a passenger’s identification and a criminal background check is permissible as long as they do not prolong the stop); *People v. Bowles*, 226 P.3d 1125, 1129–30 (Colo. App. 2009) (holding that a request for a passenger’s identification and a criminal check is permissible as long as the passenger produces the identification voluntarily); *Loper v. State*, 8 A.3d 1169, 1172–73 (Del. 2010) (holding that, as part of a routine traffic stop, police officers may request a passenger’s identification and run a criminal background check as long as detention is not unreasonably prolonged); *State v. Williams*, 590 S.E.2d 151, 154 (Ga. Ct. App. 2003) (holding that a request for a passenger’s identification is part of a routine traffic stop); *People v. Harris*, 886 N.E.2d 947, 957–58, 963 (Ill. 2008) (holding that a warrant check on passengers is permissible so long as check does not unnecessarily prolong the stop and the stop is conducted reasonably); *Cade v. State*, 872 N.E.2d 186, 188–89 (Ind. Ct. App. 2007) (holding that a request for identification from a passenger is a minimal intrusion if the traffic stop was valid); *see also State v. Smith*, 683 N.W.2d 542, 546–47 (Iowa 2004); *State v. Hoskins*, No. 07-5-1843-1845, 2008 WL 1926727, at *3 (N.H. Super. Ct. Mar. 7, 2008); *State v. Sloane*, 939 A.2d 796, 804 (N.J. 2008); *People v. Jones*, 779 N.Y.S.2d 274, 275 (N.Y. App. Div. 2004); *State v. Morgan*, 2002 WL 63196, at *1 (Ohio Ct. App. Jan. 18, 2002); *Commonwealth v. Campbell*, 862 A.2d 659, 665 (Pa. Super. Ct. 2004); *Roberson v. State*, 311 S.W.3d 642, 646 (Tex. Crim. App. 2010); *State v. Higgins*, 884 P.2d 1242, 1245 (Utah 1994); *State v. Collins*, No. CRF 2010 13041, at *9–21 (Idaho Dist. Ct. Oct. 5, 2010) (discussing numerous reasons why a request for a passenger’s identification is permissible, including officer safety, the minimal nature of the intrusion, necessity in completing a seatbelt citation, and the consensual nature of the encounter).

82. *See, e.g., State v. Gonzalez*, 919 So. 2d 702, 704 (Fla. Dist. Ct. App. 2006) (“A police officer’s request to a defendant for his identification does not constitute detention or seizure” (citing *Holden v. State*, 877 So. 2d 800, 802 (Fla. Dist. Ct. App. 2004))); *State v. Smith*, 683 N.W.2d 542, 547 (Iowa 2004) (holding that a passenger questioned by police was not “seized” under the Fourth Amendment because “a reasonable person would have felt free to decline the deputy’s request for his ID”); *State v. Sloane*, 939 A.2d 796, 803 (N.J. 2008) (holding that a criminal records check “is not a search under the federal or state constitutions”); *State v. Morgan*, 2002 WL 63196, at *2 (Ohio Ct. App. Jan. 18, 2002) (“[a] request for identification . . . is ordinarily characterized as a consensual encounter, not a custodial search”) (citing *State v. Osborne*, 1995 WL 737913, at *3 (Ohio Ct. App. Dec. 13, 1995)).

83. *See, e.g., State v. Williams*, 590 S.E.2d 151, 154 (Ga. Ct. App. 2003) (“The presence of passengers in a stopped vehicle increases the officers’ risks. . . . These risks create a strong interest in officer safety that justifies reasonable safety measures that minimally intrude upon the Fourth Amendment privacy expectations of motorists.” (citing *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997))). *Cade v. State*, 872 N.E.2d 186, 189 (Ind. Ct. App. 2007) (“[W]hen police officers have been requested as part of their duties to interact with an individual, they should be free to verify that that person does not have known or suspected dangerous propensities. This goal can be accomplished by checking the person’s

part of the investigation into the traffic violation;⁸⁴ and (4) that the request stems from the officer's need to collect information about witnesses to a traffic stop.⁸⁵

Some state courts allow officers to request identification from passengers where circumstances warrant it, but deny performing blanket criminal checks because such checks are inappropriate without reasonable suspicion.⁸⁶ However, some state courts do not permit criminal checks of passengers because they measurably extend the stop which would convert the stop into an unlawful seizure.⁸⁷

name against law enforcement records." (quoting *Cochran v. State*, 843 N.E.2d 980, 985 (Ind. Ct. App. 2006)).

84. See, e.g., *State v. Ybarra*, 751 P.2d 591, 592 (Ariz. Ct. App. 1987) (holding that a request for identification and warrant check on a passenger is "incidental to the authorized investigatory stop" (citing *State v. Curiel*, 634 P.2d 988, 992 (Ariz. Ct. App. 1981)); *Loper v. State*, 8 A.3d 1169, 1173 (Del. 2010) (holding that an officer did "not exceed the permissible scope of a routine traffic stop by asking [a] passenger for identification and then running a background check"); *State v. Gutierrez*, 611 N.W.2d 853, 858 (Neb. Ct. App. 2000) ("A reasonable investigation of a traffic stop may include asking for a driver's license and registration, requesting a driver to sit in the patrol car, and asking the driver about his or her destination and purpose. An officer may engage in similar routine questioning of the vehicle's passengers." (citing *U.S. v. Johnson*, 58 F.3d 356, 357 (8th Cir. 1995)); *St. George v. State*, 197 S.W.3d 806, 819, 822-23 (Tex. Crim. App. 2006) ("merely asking for a passenger's identity or identification during a routine traffic stop does not require separate reasonable suspicion as to the passenger," but warrant checks on passengers, as opposed to drivers, are not such a routine component of traffic stops as to justify prolonging the stop).

85. See *State v. Hoskins*, 2008 WL 1926727, at *4 (N.H. Super. Ct. Mar. 7, 2008) ("Since passengers in the vehicle are witnesses to the behavior of both the officer and the driver, it is only prudent for the officer to ask for their identities so that their presence can be documented and they can be contacted later should the need arise.") (citing *State v. Brunelle*, 766 A.2d 272, 274 (2000)); *State v. Griffith*, 613 N.W.2d 72, 81 (Wis. 2000) ("[T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters.")

86. See, e.g., *State v. Johnson*, 645 N.W.2d 505, 510-11 (Minn. Ct. App. 2002) (rejecting the idea that obtaining contact information of witnesses justifies a warrant check); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(c) (4th ed. 2004) (opining that all passenger criminal checks are inappropriate except when (i) the police has reasonable, articulable suspicions that a passenger has committed a crime, (ii) the passenger has violated a traffic law, or (iii) when the passenger must drive the vehicle following the detention of the original driver).

87. See, e.g., *In re M.K.W.*, 2010 WL 4977141, at *2-3 (Kan. Ct. App. Nov. 12, 2010) (finding warrant checks on a passenger unconstitutional when they measurably extended the length of the stop); see also *Piggott v. Commonwealth*, 537 S.E.2d 618, 619-20 (Va. Ct. App. 2000) (finding that although the request for identification was not a search or seizure, retaining the identification while running a warrant check constituted a seizure and was not valid absent reasonable suspicion), *abrogated by McCain v. Commonwealth*, 545 S.E.2d 541, 546 (Va. 2001).

Several courts have held that their own state law does not permit police to request identification from passengers absent reasonable suspicion or other circumstantial justification.⁸⁸ For instance, the Washington Supreme Court held that its state constitution's privacy clause "prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request."⁸⁹

II. ALASKA'S LEGACY OF PRIVACY

Although the United States Constitution establishes minimum required protections of individual rights, the Alaska Constitution often provides greater protections for liberty and privacy interests.⁹⁰ Article I, Section 14 of the Alaska Constitution, like the Fourth Amendment of the United States Constitution, protects against unreasonable searches and seizures.⁹¹ But unlike the United States Constitution, the Alaska

88. *See, e.g.,* *State v. Thompkin*, 143 P.3d 530, 534–36 (Ore. 2006) (holding that the "defendant was unlawfully seized under Article I, section 9" of the Oregon Constitution); *State v. Johnson*, 645 N.W.2d 505, 510 (Minn. Ct. App. 2002) ("Once [the police] determined that appellant did not have a driver's license and was not taking any responsibility for the vehicle, requesting appellant's identification, with no suspicion of criminal activity, and then taking that identification to run a warrants check was a fishing expedition, thus, unreasonable."); *Commonwealth v. Alvarez*, 692 N.E.2d 106, 109 (Mass. App. Ct. 1998) (finding that a request for identification from a passenger "without an objective basis for suspicion that the passenger is involved in criminal activity, slips into the dragnet category of questioning that the Massachusetts Constitution] prohibits" (citing *Commonwealth v. Torres*, 674 N.E.2d 638, 641–43 (Mass. 1996))); *People v. Spicer*, 157 Cal. App. 3d 213, 617–19 (Cal. Ct. App. 1984) (recognizing that "the fact [that] the restraint on [the passenger's] liberty was minimal does not make the restraint a reasonable one," and holding that "[i]n circumstances pregnant with coercion" where the passenger "was confronted by a uniformed officer almost immediately after the car in which she was riding was stopped" and the officer requested her identification "[w]ithout any explanation or prefatory remarks," the officer's "direct request [that] the defendant search for and produce a document . . . amounts to an unlawful seizure").

89. *State v. Rankin*, 92 P.3d 202, 207 (Wash. 2004) (holding that "officers [may] engage passengers in conversation . . . [but when the] interaction develops into an investigation, it runs afoul of [the] state constitution unless there is justification for the intrusion").

90. *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245 (Alaska 2006) (stating that the "[court has] specifically recognized that Alaska's guarantee of privacy is broader than the federal constitution's").

91. "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated." ALASKA CONST. art. I, § 14. The Fourth Amendment of the United States Constitution is virtually identical, although the Alaska provision adds the words "and other property."

Constitution also contains an explicit right to privacy.⁹² Article I, Section 22 of the Alaska Constitution states: “The right of the people to privacy is recognized and shall not be infringed.”⁹³ The effect of Article I, Section 22 is to make privacy a specifically enumerated right in Alaska.⁹⁴ The Alaska Constitution’s express protection of privacy has been interpreted by Alaska courts to protect citizens against “unwanted intrusions by the State” in a manner that is more expansive than the privacy right protected under the federal constitution.⁹⁵

The Alaska Supreme Court has held that the right to privacy granted by Article I, Section 22 can be used as a justification for giving the search protections of § 14 a “liberal interpretation.”⁹⁶ The Alaska Supreme Court has also warned that “[f]ederal decisions dealing with the [F]ourth [A]mendment to the United States Constitution . . . should not be regarded as determinative of the scope of Alaska’s right to privacy amendment, since no such express right is contained in the United States Constitution.”⁹⁷ However, the Alaska Supreme Court has at least considered the Supreme Court’s rulings on the Fourth Amendment in addressing the constitutionality of investigative stops.⁹⁸ Although federal Fourth Amendment jurisprudence on the

92. See, e.g., *Woods & Rohde, Inc. v. State, Dep’t of Labor*, 565 P.2d 138, 148 (Alaska 1977) (emphasizing the Alaska Constitution’s explicit guarantee of privacy).

93. ALASKA CONST. art. I, § 22.

94. *Ravin v. State*, 537 P.2d 494, 501 (Alaska 1975) (noting that this enumeration “does not, in and of itself, yield answers concerning what scope should be accorded this right to privacy”); see also Jeffrey M. Kaban, Note, *Alaska, the Last Frontier of Privacy: Using the State Constitution to Eliminate Pretextual Traffic Stops*, 55 HASTINGS L.J. 1309, 1318 (2004) (noting the importance of the right to privacy in finding broader rights under the state constitution).

95. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1129 (Alaska 1989)); *Woods & Rhode*, 565 P.2d at 149 (quoting *Ravin*, 537 P.2d at 514–15).

96. *Wortham v. State*, 641 P.2d 223, 224–25 n.2 (Alaska Ct. App. 1982), *aff’d*, 666 P.2d 1042 (Alaska 1983); see also Shardul Desai, Note, *Pretextual Searches and Seizures: Alaska’s Failure to Adopt a Standard*, 23 ALASKA L. REV. 235, 246 (2006) (discussing the additional search and seizure protections present in Alaska due to the express constitutional guarantee of privacy (citing *Anchorage Police Dep’t Emps. Ass’n v. Municipality of Anchorage*, 23 P.3d 547, 550 (Alaska 2001))).

97. *State v. Glass*, 583 P.2d 872, 874–75 (Alaska 1978).

98. For example, in *Anchorage v. Cook*, the court relied on the Supreme Court’s reasoning in *Pennsylvania v. Mimms*, holding that “minimal intrusion was justified under the emergency exception to the warrant requirement and, therefore, not violative of either the fourth amendment [or the Alaska Constitution].” 598 P.2d 939, 942 (Alaska 1979). In *Erickson v. State*, the court declined to follow the holding in *Maryland v. Wilson* that a police officer can order the driver and the passengers out of a car that the officer has stopped for a routine traffic violation, without need of any further justification, and narrowly ruled on case-specific grounds. 141 P.3d 356, 359 (Alaska Ct. App. 2006).

interpretation of the Alaska's constitutional privacy right is persuasive, it is not controlling; it is likely that in Alaska, as in Washington state, law enforcement officers are prohibited from requesting identification from passengers unless there is an independent reason that justifies the request.

However, Alaska's right to privacy is not absolute,⁹⁹ and the request for a passenger's identification could be justified after balancing the detainee's privacy interest with the countervailing state interests. Alaska has found such requests reasonable where the officer has reasonable suspicion of criminality,¹⁰⁰ the passenger has committed a traffic infraction,¹⁰¹ or the passenger intends to take possession of the vehicle after the driver's arrest.¹⁰² But the right to privacy does protect against indiscriminate requests for passenger identification where the request cannot be justified as anything other than routine police procedure.

A. A Request for Identification from a Passenger Is a Seizure in Alaska

When analyzing the constitutionality of a request for identification from a passenger during a routine traffic stop under the Alaska Constitution, courts must first determine whether the passenger was seized when the police officer requested identification. If a search or

99. See *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (stating that privacy may sometimes be held subordinate to the constitutional power to protect health and welfare).

100. See, e.g., *Hartman v. State*, Dep't of Admin., 152 P.3d 1118, 1122 (Alaska 2007) (finding that the police may make a stop if they have "a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred" (quoting *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976))).

101. See, e.g., *Marker v. State*, 2006 WL 1720079, at *4 (Alaska Ct. App. June 21, 2006) (finding that officers had authority to stop a vehicle and request identification from both the driver and the passenger where both parties had committed a traffic infraction by failing to wear a seatbelt); *Larson v. State*, 669 P.2d 1334, 1335-36 (Alaska Ct. App. 1983) (finding that an officer was justified in conducting an investigatory stop and demanding identification from a passenger where the officer first observed the passenger driving the car erratically, and then switching seats with another occupant of the car).

102. According to section 13.02.345(c) of the Alaska Administrative Code (2012), police are authorized to release a vehicle to a person of the driver's choice in lieu of impoundment upon the driver's arrest, so long as the proposed driver is a legally licensed driver. ALASKA ADMIN. CODE, tit. 13, § 13.02.345(c) (2012); see also *McBath v. State*, 108 P.3d 241, 250 (Alaska Ct. App. 2005) (finding that officers were authorized to request identification from a passenger who sought to remove the driver's property from a vehicle before the vehicle was impounded).

seizure did occur, the next step is to determine whether the request for identification is within an exception to the warrant requirement.

As discussed above, the United States Supreme Court has held that passengers are seized to the same extent as a driver during a routine traffic stop.¹⁰³ In the majority opinion of *Brendlin v. California*, Justice Souter noted that a passenger in a car that has just been stopped by police would understand “the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”¹⁰⁴ Since a reasonable person would not “have believed himself free to ‘terminate the encounter’ between the police and himself,” a passenger is seized within the meaning of the Fourth Amendment during a traffic stop.¹⁰⁵

Thus a passenger is seized when the car in which he or she is riding is stopped for a traffic violation. A reasonable person would not “believe he or she was free to go”¹⁰⁶ when the police officer approaches the vehicle, informs the occupants that the driver has committed a traffic infraction, and asks for identification from the driver and all passengers. Although the officer may be able to make the same request of a person on the street without conducting a seizure,¹⁰⁷ there are significant distinctions between pedestrians and automobile passengers. There is “a greater sense of security and privacy in traveling in an automobile than . . . by pedestrian or other modes of travel.”¹⁰⁸ A passenger in an automobile does not have the realistic option of simply walking away when confronted by undesired police contact.¹⁰⁹ Because a reasonable person who is a passenger in a vehicle stopped for a traffic violation would not believe he or she is free to go when a police officer requests identification, the passenger is seized by virtue of the stop. The request for identification is not necessarily an additional seizure.

103. See *Brendlin v. California*, 551 U.S. 249, 258 (2007).

104. *Id.*

105. *Id.* at 257–58 (quoting *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991)).

106. *Waring v. State*, 670 P.2d 357, 364 (Alaska 1983).

107. See *Pooley v. State*, 705 P.2d 1293, 1306 (Alaska Ct. App. 1985) (“mere request for identification does not automatically render the stop a seizure, where it does not appear that the identification was retained for an unnecessarily long time”). The key factor in determining whether a seizure has occurred is “whether or not a reasonable person would believe he or she was free to go.” *Waring*, 670 P.2d at 364. Because the average person would feel obligated to respond to a police officer’s questions, an encounter amounts to a seizure only if the police officer adds to those inherent pressures with conduct that a reasonable person would view as threatening or offensive even if coming from another private citizen. *Id.*

108. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

109. See *State v. Rankin*, 92 P.3d 202, 206 (Wash. 2004) (elaborating on the rationale suggested in *Prouse*).

But when there are greater privacy protections by virtue of a state constitution's privacy clause, greater expectations of privacy may make the request for identification a search or seizure. In *State v. Rankin*,¹¹⁰ the Washington Supreme Court held that because of the Washington Constitution's privacy clause, "passengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [the] passengers.'" ¹¹¹ Because of the added protections of Washington's privacy clause, a police officer's request for a passenger's identification violated the right of privacy unless the officer had an independent basis for the request.¹¹²

As the *Rankin* court recognized, a state constitution's privacy clause may grant greater rights and create greater expectations of privacy. Those higher expectations of privacy are present in Alaska.¹¹³ Although some states have held that a request for identification is not a search or seizure,¹¹⁴ the additional privacy protections afforded by the Alaska Constitution make such a finding inapposite in Alaska.

Because under the Alaska Constitution a request for identification from a passenger during a traffic stop is a search and seizure, and because the request is made without a warrant, the request must meet an exception to the warrant requirement if it is to be constitutionally permissible.

B. Exceptions to the Warrant Requirement

Warrantless searches and seizures are considered per se unreasonable, and courts will uphold a warrantless search or seizure only if it satisfies "one of the well-established and specifically defined

110. *Id.*

111. *Id.* at 205 (quoting *State v. Larson*, 611 P.2d 771, 774 (Wash. 1980)).

112. *Id.* at 203. "[T]he freedom from disturbance in 'private affairs' afforded to passengers in Washington by article I, section 7 [of the Washington Constitution] prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request." *Id.* at 207.

113. *See, e.g., State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (discussing the more robust right to privacy guaranteed by the Alaska Constitution as opposed to any federal right to privacy).

114. *See, e.g., Commonwealth v. Campbell*, 862 A.2d 659, 665 (Pa. Super. Ct. 2004) (finding no reasonable expectation of privacy in one's identity, and therefore no unreasonable intrusion when an officer asks for a passenger's identification); *State v. Gonzalez*, 919 So.2d 702, 704 (Fla. Dist. Ct. App. 2006) ("A police officer's request to a defendant for his identification does not constitute detention or seizure.").

exceptions to the warrant requirement.”¹¹⁵ The Alaska Supreme Court has warned that “[i]nherent in the concept of ‘narrowly defined exceptions’ is the requirement that a search conducted pursuant to such an exception must be no broader or more intrusive than necessary to fairly effect the governmental purpose which serves as its justification.”¹¹⁶ The Alaska Supreme Court has recognized the following well-established exceptions to the warrant requirement:

- A search of abandoned property¹¹⁷
- A search in hot pursuit of a fleeing felon¹¹⁸
- A search to prevent the destruction of evidence¹¹⁹
- A search of a movable vehicle¹²⁰
- A pre-incarceration inventory search¹²¹
- A search pursuant to voluntary consent¹²²
- A search conducted for the purpose of rendering emergency aid¹²³
- A stop and frisk¹²⁴

115. *Gallmeyer v. State*, 640 P.2d 837, 841 (Alaska Ct. App. 1982).

116. *Reeves v. State*, 599 P.2d 727, 735 (Alaska 1979) (internal citation omitted) (finding the correctional officer’s “pat-down” was constitutional, but the officer’s search of the balloon found on the individual exceeded the scope of the search).

117. *Schraff v. State*, 544 P.2d 834, 840 (Alaska 1975) (citing *Abel v. United States*, 362 U.S. 217, 240 (1960)) (remanding to find whether the search of an intoxicated man’s wallet in a public tavern was incident to a lawful arrest).

118. *Id.* at 840 (citing *Warden v. Hayden*, 387 U.S. 294, 312 (1967)).

119. *Finch v. State*, 592 P.2d 1196, 1198 (Alaska 1979) (“There must be probable cause to believe that evidence is present, and the officers must reasonably conclude, from the surrounding circumstances and the information at hand, that the evidence will be destroyed or removed before a search warrant can be obtained.”).

120. *Clark v. State*, 574 P.2d 1261, 1262–63 (Alaska 1978) (finding that the movable vehicle exception is essentially a subcategory of the destructible evidence exception because vehicles may escape before a warrant is obtained).

121. *Reeves*, 599 P.2d at 735. (finding that inventory searches are appropriate because the state wants (1) to prevent the entry of prohibited or dangerous items into the jail, and (2) to secure the property of the arrestee for safe-keeping).

122. *Frink v. State*, 597 P.2d 154, 167 (Alaska 1979) (finding defendant voluntarily consented to search of his car). *See Clark v. State*, 231 P.3d 366, 367 (Alaska Ct. App. 2010) (internal citation omitted) (“The police may conduct a warrantless search based on the voluntary consent of a person who has valid control of the place to be searched.”).

123. *Schraff*, 544 P.2d at 841.

124. *Free v. State*, 614 P.2d 1374, 1378 (Alaska 1980) (finding pat-down search for weapons was valid during an investigatory stop after receiving a reliable tip about a potential armed robbery). *See also State v. Moran*, 667 P.2d 734, 735 (Alaska Ct. App. 1983) (internal citations omitted) (“[A]n investigatory stop is differentiated from an arrest on the basis of (1) its purpose, (2) the magnitude of the intrusion, and (3) the quantum of information necessary to justify the

- A search incident to arrest¹²⁵
- A seizure of items in plain view¹²⁶
- A search of probationers or parolees authorized by the conditions of probation or parole and conducted at the direction of a probation or parole officer¹²⁷
- A protective search¹²⁸

Most of these exceptions do not logically apply when a law enforcement official requests identification from a passenger. A passenger's identification is not abandoned property; the passenger is not a fleeing felon; there is no danger of destruction of evidence; the request is not part of an inventory search; there is no need for emergency aid; the search is not conducted incident to arrest; the identification is not in plain view; the officer would not know prior to the request that the passenger was on probation; and the request was not part of a protective search for dangerous persons. If any of the exceptions did apply to the particular facts of a case, the request for identification could be justified on a case-by-case basis rather than as part of a general policy to make a blanket request for identification from all passengers in all traffic stops.

Only the movable vehicle exception, voluntary consent, or a search incident to a lawful investigative stop could justify a general policy of

intrusion, i.e., reasonable suspicion rather than probable cause."); *State v. Wagar*, 79 P.3d 644, 647 n.4 (Alaska 2003) (internal citation omitted) ("Not every legitimate stop can be accompanied by a frisk. What is needed is a reasonable belief at the time of the initiation of the frisk that the suspect may be armed and dangerous.").

125. *Crawford v. State*, 138 P.3d 254, 258 (Alaska 2006) ("Search incident to lawful arrest allows the warrantless search of the area 'within [the arrestee's] immediate control' at the time of the arrest to ensure officer safety and to preserve evidence related to the crime.") (quoting *McCoy v. State*, 491 P.2d 127, 133 (Alaska 1971)).

126. *Daygee v. State*, 514 P.2d 1159, 1162 (Alaska 1973) ("An officer may seize evidence which is legitimately in his plain sight.").

127. *Roman v. State*, 570 P.2d 1235, 1239-44 (Alaska 1977) (finding that search of defendant under authority of parole officer was valid). *See also* *Milton v. State*, 879 P.2d 1031, 1034 (Alaska Ct. App. 1994) ("A search by a probation officer of a probationer's residence is a recognized exception to the warrant requirement as long as the search has been authorized by the conditions of probation or release, the search is conducted by or at the direction of probation authorities, and the search bears a direct relationship to the nature of the crime for which the probationer was convicted.").

128. *Earley v. State*, 789 P.2d 374, 376 (Alaska Ct. App. 1990) ("To satisfy the protective search doctrine, the state must prove that: '(a) the officers must have reasonable cause to believe that their safety is in danger before engaging in such a search, and (b) the search must be narrowly limited to areas where they could find dangerous persons.'") (quoting *Murdock v. State*, 664 P.2d 589, 596 (Alaska Ct. App. 1983)).

making a warrantless request for identification from all passengers during a traffic stop. Each is considered below.

1. *Movable Vehicle Exception*

Movable vehicle search cases are justified by the notion that “warrantless searches must be tolerated because vehicles and evidence contained in them might be removed before it is possible to obtain a search warrant. Thus, the movable vehicle exception . . . may properly be considered to be a subcategory of the destructible evidence exception.”¹²⁹ To qualify for the destructible evidence exemption, “(1) [t]here must be probable cause to believe that the vehicle contains evidence or contraband and (2) there must be exigent circumstances justifying conduct of the search without a warrant.”¹³⁰

Neither requirement of the movable vehicle exception is met when an officer requests identification from a passenger without circumstantial justification. At the outset of a routine traffic stop, an officer would have no suspicion, let alone probable cause, that anyone in the vehicle other than the driver was engaged in unlawful activity. Likewise, there would be no probable cause to believe that a vehicle stopped for a traffic infraction contained evidence or contraband that would be discovered by requesting a passenger’s identification. And at the outset of such a routine traffic stop, there are no exigent circumstances that would justify an immediate search without a warrant. Because the movable vehicle exception does not justify blanket searches of all cars and all passengers in all stops, it cannot justify a blanket request for passenger identification in all stops.

2. *Voluntary Consent*

A warrantless search may be conducted pursuant to the voluntary consent of an individual “who has valid control of the place to be searched.”¹³¹ To prove voluntary consent, the State has the burden of showing that consent was “unequivocal, specific and intelligently given, uncontaminated by any duress or coercion.”¹³² A person may voluntarily consent to a search or seizure that would not otherwise satisfy constitutional requirements.¹³³

129. Clark v. State, 574 P.2d 1261, 1262-63 (Alaska 1978).

130. *Id.* at 1263.

131. Clark v. State, 231 P.3d 366, 367 (Alaska Ct. App. 2010); Nason v. State, 102 P.3d 966, 970-71 (Alaska Ct. App. 2004).

132. Frink v. State, 597 P.2d 154, 167 (Alaska 1979) (quoting Erickson v. State, 507 P.2d 508, 515 (Alaska 1973)); accord Phillips v. State, 625 P.2d 816, 817 (Alaska 1988).

133. Schaffer v. State, 988 P.2d 610, 613 (Alaska Ct. App. 1999).

When the State relies upon the consent exception, two main issues must be determined: (1) whether the defendant actually consented, and (2) whether the defendant did so with the requisite voluntariness.¹³⁴ To assess these issues, courts examine the totality of the circumstances.¹³⁵ Mere “acquiescence to apparent lawful authority” does not constitute voluntary, uncoerced consent to a warrantless search.¹³⁶

In *Brown v. State*,¹³⁷ the Alaska Court of Appeals held that under the specific circumstances of that case, “the officer conducting the traffic stop was prohibited from requesting [the defendant’s] permission to conduct a search that was (1) unrelated to the basis for the stop and (2) not otherwise supported by a reasonable suspicion of criminality.”¹³⁸ The court refrained from deciding “whether Article I, Section 14 [of the Alaska Constitution] should be interpreted to completely preclude requests for searches during a routine traffic stop unless the search is related to the ground for the stop or is otherwise supported by a reasonable suspicion of criminality,” opting instead for a narrower holding based on the “particularly egregious example” presented by Brown’s case.¹³⁹

Brown was stopped for an equipment violation, but she was never informed of the reason for the stop.¹⁴⁰ Brown did not know if she was suspected of a minor traffic infraction or a more serious crime.¹⁴¹ Without explanation, the trooper demanded Brown’s driver’s license, and then he went back to his patrol vehicle.¹⁴² For all that Brown knew, the trooper might have been verifying her identity in preparation for arresting her.

When the trooper returned to Brown’s car, he still refrained from telling Brown the reason for the stop.¹⁴³ Moreover, even though the trooper had decided to release Brown with a warning, the trooper gave her no indication that she was free to go (or would shortly be free to go).¹⁴⁴ Instead, the trooper asked Brown to consent to a search of her

134. *Id.* at 613–14.

135. *Id.* at 614; *Nason*, 102 P.3d at 971.

136. *Schaffer*, 988 P.2d at 616; *see also* *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (finding that when consent justifies search, consent will be determined by voluntariness through the totality of the circumstances).

137. 182 P.3d 624 (Alaska Ct. App. 2008).

138. *Id.* at 626.

139. *Id.* at 634.

140. *Id.* at 625.

141. *Id.*

142. *Id.* at 627.

143. *Id.*

144. *Id.*

person and her vehicle for drugs.¹⁴⁵

Because Brown remained ignorant of the reason for the stop, she did not know the basis for the trooper's assertion of authority over her.¹⁴⁶ Consequently, even if Brown had been familiar with search and seizure law, Brown had no way of knowing if she had the right to refuse the trooper's request—indeed she had no way of knowing if the trooper's request to conduct a search was indeed a request or was, instead, simply a polite phrasing of a command. Despite the promptness of the trooper's request, Article I, Section 14 of the Alaska Constitution prohibited him from asking for permission to search the car.¹⁴⁷

The court distinguished the circumstances in *Brown* from U. S. Supreme Court cases holding that “absent specific coercive circumstances beyond those that normally attend a traffic stop, the motorist's ensuing consent to search will be deemed voluntary.”¹⁴⁸ The court noted that numerous commentators have criticized the Supreme Court's holdings.¹⁴⁹ Because the motorist in *Brown* remained ignorant of the reason for the stop and of the officer's authority over her, and because the request for consent to search was nothing more than a fishing expedition unsupported by any individualized suspicion, the court recognized that these coercive circumstances precluded a finding of voluntary consent.¹⁵⁰

The same coercive circumstances recognized in *Brown* apply to requests for identification from passengers. Although the passengers may be aware of the reason for the traffic stop, they remain ignorant of the basis for the officer's authority over them. It is not a crime, nor is it suspicious, to be a passenger in a car that is stopped for a traffic violation.¹⁵¹ The request for passenger identification serves no logical purpose related to the traffic offense; however, a passenger might assume that the passengers are required by law to comply with the request, especially where the officer makes the request of the driver and the passengers simultaneously. Like the driver in *Brown*, a passenger would have “no way of knowing if the trooper's request . . . was indeed

145. *Id.*

146. *Id.*

147. *Id.* at 634.

148. *Id.* at 625.

149. *Id.* at 632.

150. *Id.* at 634.

151. *State v. Affsprung*, 87 P.3d 1088, 1095 (N.M. Ct. App. 2004) (“Defendant was present solely by virtue of the coincidence [that] he was a passenger in the vehicle stopped for a malfunctioning license plate light, and under the circumstances, giving the officer no suspicion whatsoever of criminal activity or danger of harm from weapons.”).

a request or was, instead, simply a polite way of phrasing a command.”¹⁵²

Although a passenger may freely provide identification to an officer, his or her compliance with the officer’s request is mere “acquiescence to apparent lawful authority,” not a voluntary, uncoerced consent to a warrantless search. Like the driver in *Brown*,¹⁵³ the passenger has no way of knowing the officer’s purpose behind requesting identification, and no way of knowing if he or she has a lawful right to refuse. When law enforcement temporarily detains a vehicle they seize the passenger. “In circumstances pregnant with coercion,” an officer’s “direct request [that] the defendant search for and produce a document”¹⁵⁴ vitiates any consent implied by a passenger’s voluntary relinquishment of his or her identification.

3. *Investigative Stop*

Upon personally observing a traffic infraction, a police officer has probable cause for a traffic stop.¹⁵⁵ The principles of *Terry v. Ohio*¹⁵⁶ require that “a traffic stop ‘must be temporary and [must] last no longer than is necessary to effectuate the purpose of the stop.’”¹⁵⁷ A police officer’s conduct during the stop must be “‘reasonably related in scope’ to the circumstances that justified the stop in the first place. The stop becomes unreasonable—and thus constitutionally invalid—if the duration, manner, or scope of the investigation exceeds these boundaries.”¹⁵⁸

Alaska has not followed the example of federal courts in giving law enforcement officers carte blanche investigatory powers during a routine traffic stop. The Alaska Court of Appeals has not adopted the holding of *Maryland v. Wilson*¹⁵⁹ that a police officer may order passengers out of a car during a traffic stop without any additional justification.¹⁶⁰ The Alaska Supreme Court has held that “a licensing

152. *Brown*, 182 P.3d at 634. Some courts have found that an officer may ask for identification as long as the circumstances do not suggest that a reasonable person would feel obligated to comply. *See, e.g., State v. Gonzalez*, 919 So.2d 702, 704 (Fla. Dist. Ct. App. 2006).

153. *Brown*, 182 P.3d at 627.

154. *People v. Spicer*, 203 Cal. Rptr. 599, 604 (Cal. Ct. App. 1984).

155. *Bessette v. State*, 145 P.3d 592, 594 (Alaska Ct. App. 2006); *Williams v. State*, 853 P.2d 537, 538 (Alaska Ct. App. 1993).

156. 392 U.S. 1 (1968).

157. *Brown*, 182 P.3d at 625 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion)).

158. *Id.*

159. 519 U.S. 408, 414–415 (1997).

160. *See Erickson v. State*, 141 P.3d 356, 359 (Alaska Ct. App. 2006) (declining to decide whether the Alaska Constitution grants greater protection on this issue

statute cannot be used as a means for obtaining information or evidence not related to the licensing requirement.”¹⁶¹ And the Alaska Court of Appeals has held that a lawful investigatory stop may not be extended without reasonable suspicion solely “in the hope that something might turn up.”¹⁶²

During a traffic stop, an officer may ask the motorist to produce “routine driving documents” without unreasonably expanding the scope or duration of the traffic stop.¹⁶³ Routine driving documents include a driver’s license, proof of insurance, and the vehicle’s registration.¹⁶⁴ A computer check to verify the validity of routine driving documents does not unreasonably expand the scope or duration of a valid traffic stop.¹⁶⁵

However, the request for identification and criminal background check on a passenger’s license unreasonably expands the scope, and therefore the duration, of the traffic stop. Any unconstitutional search or seizure, even one lasting only a matter of seconds,¹⁶⁶ is a violation of an individual’s rights.¹⁶⁷ Although the total length of the stop may not be per se excessive, any time spent on matters outside the scope of the stop is unreasonable. Thus, even when a request for the passenger’s identification may have been made within minutes of the initial stop and the criminal check could have been completed within minutes, any time spent on actions not reasonably related to the initial stop would extend

in light of case-specific reasons that justified ordering the passenger out of the car).

161. Schraff v. State, 544 P.2d 834, 839 (Alaska 1975).

162. Cousins v. State, 2006 WL 1897112, at *3 (Alaska Ct. App. July 12, 2006); see also Kaban, *supra* note 94, at 1320–24.

163. Clark v. Municipality of Anchorage, 112 P.3d 676, 678 (Alaska Ct. App. 2005) (quoting United States v. Maldonado, 356 F.3d 130, 134 (1st Cir. 2001)).

164. *Id.*

165. Fallon v. State, 221 P.3d 1016, 1019 (Alaska Ct. App. 2010) (citing Brown v. State, 182 P.3d 624, 629 (Alaska Ct. App. 2008)); see also Clark, 112 P.3d at 678 (“[I]t does not unreasonably expand the scope or duration of a valid traffic stop for an officer to prolong the stop to immediately investigate and determine if the driver is entitled to continue to operate the vehicle by checking the status of the driver’s license, insurance, and vehicle registration[.]”) (emphasis in original).

166. See, e.g., State v. Sloane, 939 A.2d 796, 805 (N.J. 2008) (“An NCIC query can produce a response in approximately .05 seconds.”) (citing Press Release, The Federal Bureau of Investigation, 40 Years of NCIC (Jan. 24, 2007), available at <http://www.fbi.gov/news/pressrel/press-releases/40-years-of-ncic>).

167. Cf. People v. Spicer, 203 CAL. RPTR. 599, 601–03 (Cal. Ct. App. 1984) (citation omitted); see also THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 6.4.3.1 (2008) (noting that investigative techniques and computer checks in particular “prolong the length of a stop until the results have been obtained, allowing the police – if the officer so chooses – to exploit that period of time to engage in conversation with the detainee . . . and otherwise obtain incriminating evidence”).

the stop unnecessarily in violation of an individual's rights.

A blanket request for passengers' identification is not "reasonably related in scope to the circumstances that justified the stop in the first place."¹⁶⁸ The traffic stop is justified by the officer's direct observation of a traffic violation. No evidence of the infraction could be gleaned from a passenger's identification. Although an officer could conceivably collect witness information in anticipation that witnesses must later be summonsed to traffic court or another legal proceeding arising out of the police-citizen contact,¹⁶⁹ the officer could obtain that information merely by asking the passengers for their names and contact information, and perhaps even by a request for identification for these purposes. But seizing the identification card and then conducting a warrant check on the passenger goes beyond the scope of witness identification. Moreover, this justification is particularly thin where the officer does not issue a citation to the driver for the original traffic violation, and there are to be no hearings or further proceedings necessitating witness participation. The passengers, as a practical matter, have no witness value and are almost never subpoenaed to traffic court.¹⁷⁰

C. No Generalized Concern for Officer Safety Outweighs Individual Privacy Rights

Some other jurisdictions allow the request for passenger identification on the theory that officer safety concerns justify asking all passengers for identification during a traffic stop. Although there are significant threats to officer safety that could potentially arise during a traffic stop, a generalized concern for "officer safety" may not be used as a means of nullifying a constitutional right. As the New Mexico court in

168. *Brown*, 182 P.3d at 625 (internal citation omitted).

169. *See State v. Griffith*, 613 N.W.2d 72, 81-82 (Wis. 2000) ("[T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters. If witnesses are willing to identify themselves, they may later be able to assist police in locating the person who violated the law. If questions later arise about police conduct during the stop, passengers may be able to provide information about what occurred during the stop."); *State v. Hoskins*, 2008 N.H. Super. LEXIS 7, at *13-15 (N.H. Super. Ct. Mar. 7, 2008). *But see State v. Johnson*, 645 N.W.2d 505, 510-11 (Minn. Ct. App. 2002) (rejecting the idea that obtaining contact information of witnesses justifies a warrant check; "[t]he officers could have taken the information they needed from appellant's identification and returned it to him. They did not have to run a warrants check to get his name and address.").

170. *See Castle v. State*, 999 P.2d 169, 173-74 (Alaska Ct. App. 2000) (noting that the police are justified in stopping witnesses only where exigent circumstances are present).

Affsprung held:

Defendant's mere presence in a vehicle with a faulty license plate light adds nothing of significance that causes this even minimal intrusion to tip the balance in favor of public or officer safety over individual [Article I, Section 22] privacy. To permit law enforcement officers to ask for and to check out passenger identification under these circumstances opens a door to the type of indiscriminate, oppressive, fearsome authoritarian practices and tactics of those in power that the [search and seizure clause] was designed to prohibit.¹⁷¹

An officer's request for a passenger's identification and a subsequent criminal check of the passenger expands the scope of the stop, changes the target of the stop, and prolongs the stop.¹⁷² A policy that allows officers to indiscriminately obtain identification from passengers during a traffic stop encourages the systematic infringement of privacy rights. Officers have every incentive to perpetuate this systematic infringement because their fishing expedition may yield an occasional warrant or probationer. The officer loses nothing if the criminal check reveals nothing of interest, but in such an exchange the privacy rights of individuals are violated.

CONCLUSION

The Alaska Constitution, in addition to its explicit guarantee of privacy, provides more protection against unreasonable searches and seizures than exists in some other jurisdictions. These provisions secure a broader right to privacy than that of the Federal Constitution.

Because the right to privacy is not absolute, a police officer would have authority to request a passenger's identification where the officer has reasonable suspicion of criminality, the passenger has personally committed a traffic infraction, or the passenger intends to take possession of the vehicle after the driver's arrest. But an officer has no authority under the Alaska Constitution to request a passenger's identification during a routine traffic stop without reasonable suspicion of criminality or other circumstantial justification. The request cannot be justified by the traffic stop, by a generalized concern for officer safety, or

171. *State v. Affsprung*, 87 P.3d 1088, 1094-95 (N.M. Ct. App. 2004).

172. *See United States v. Henderson*, 463 F.3d 27, 46 (1st Cir. 2006) (finding the scope and duration of a traffic stop must be reasonably related to the circumstances that led to the stop in the first place).

by a vague argument about collecting witness contact information. And although the passenger may in theory have a right to refuse the “request,” the inherent imbalance of power present in a traffic stop renders the passenger’s seemingly voluntary consent the product of coercion.

The Alaska Constitution does not permit law enforcement officers to request identification from vehicle passengers during a routine traffic stop without reasonable suspicion of criminality or other circumstantial justification. For routine traffic stops in which there is no independent justification, a request for passenger identification is constitutionally invalid. Although such a request may be valid under the United States Constitution and under the law of other states, the Alaska Constitution provides privacy and search and seizure protections for passengers that prohibit such a request without independent justification.