State v. Donis: The New Jersey Supreme Court Turns Its Back While Police Conduct Random Mobile Data Terminal Searches, 17 J. Marshall J. Computer & Info. L. 1235 (1999)

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CASENOTE

STATE V. DONIS:
THE NEW JERSEY SUPREME COURT TURNS ITS BACK WHILE POLICE CONDUCT RANDOM MOBILE DATA TERMINAL SEARCHES

I. INTRODUCTION

On the night of January 24, 1994, Sergeant Kenneth Hawthorne of the West Windsor Police Department in New Jersey was conducting a routine patrol on U.S. Route 1.[1] While driving northbound on Route 1, Sergeant Hawthorne came upon a 1986 Subaru driven by Mr. Mauro Donis ("Donis").[2] Sergeant Hawthorne testified that, although he did not witness any criminal or traffic violations,[3] he still ran a random mobile data terminal ("MDT")[4] search on Donis' license plate.[5] The sole reason

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1. State v. Donis, 723 A.2d 35 (N.J. 1998) (per curiam).

2. *Id.* at 37.

3. *See* Sam L. Amirante, *People v. Barnes—George Orwell's 1984 Revisited: Unbridled and Impermissible Police Use of Computer Power in the Modern Age*, 28 Loy. U. Chi. L.J. 667, 679 (1997) (discussing the unrestrained discretion of police officers in conducting random MDT license plate checks). *See generally* Editorials, *Supreme Court on Patrol*, 8 N.J. L. Wkly. 6 (1999) (commenting on how prior to installation of MDTs, New Jersey police officers had to witness traffic violations or have suspicion of a criminal act to pull over a motorist—yet with MDTs, police officers may conduct "searches" of license plates without probable cause or even reasonable suspicion). The fact that a police officer does not actually observe a traffic violation, criminal act, or equipment violation makes no difference in determining whether or not the officer has authority to conduct a random MDT search of the vehicle's license plates. *See id.*

4. *See* Darlene Cedres, *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 Rutgers Computer & Tech. L.J. 391, 395 (1997). Mrs. Cedres states that "MDT technology utilizes radio waves to transmit data . . . MDT hardware varies . . . but a terminal is commonly comprised of a large video display, a numeric keypad, an internal wireless mobile data modem, a processor, and a memory." *Id.; see also* Cerulean Technology Inc., *Wireless Technology for Public Safety* (visited Feb. 12, 1999) <http://www.cerulean.com/wireless/index. htm> (discussing recent upgrades in MDT technology that allow police officers to utilize a "Data Mining" feature in order to sift through police databases to find the most relevant

1235

given by Sergeant Hawthorne for conducting the MDT check on Donis' license plate was the "proximity to the vehicle and the opportunity to stop the car if information appeared that would warrant such a stop."[6]

The MDT check displayed that the car was registered to Donis, and that his driver's license had been suspended.[7] In addition to the information pertaining to the status of Donis' driver's license and to whom the car was registered, the MDT displayed a second screen which provided personal information including Donis' home address, social security number, sex, and physical characteristics.[8] Based on his observations of the driver and the personal information obtained from the MDT search, Sergeant Hawthorne deduced that Donis was indeed the owner of the car.[9] Sergeant Hawthorne pulled Donis over, at which time Donis admitted that he owned the car, and that he did not have

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information pertaining to a particular license plate number). Today, the majority of police cars are equipped with MDT technology. *Id.*

5. *Donis*, 723 A.2d at 37.

6. *Id.*

7. *Id.*

8. *Id.* The New Jersey Supreme Court gave this explanation of what happens when a police officer enters a license plate number into the MDT:

> A mobile data terminal (MDT) consists of a screen and keypad that are linked to the computerized databases of the New Jersey Division of Motor Vehicles (DMV) . . . . When an officer enters a vehicle's license plate number, the initial "DMV plate" screen shows the expiration date of the registration for the vehicle; the status of the vehicle, including whether it has reported stolen; the registrant's name, address, date of birth, and driver's license number . . . . When an officer accesses a DMV plate screen, the MDT then automatically runs a search of the registrant's name and displays the results on the "DMV name" screen. The DMV name screen shows the registrant's name and the number of names that match that search name; the registrant's driver's license number and date of birth; a code for the registrant's eye color; a code for whether the license or registration is suspended; whether the license is a photo or non-photo license; the licensee's address, social security number, date of birth, weight, and height; the term of the license; the license expiration date; the number of points accrued against the license . . . . An officer with a driver's license number also can access the "DMV DL" screen . . . . [M]uch of the information retrieved from the "DMV DL" screen is included in the previously accessed screens.

Id. at 36.

9. *Donis*, 723 A.2d at 37; *see* Amirante, *supra* note 3, at 681-82 (arguing that the legal presumption that the driver of the car is also the owner should not be allowed without some evidence of that fact). *But cf.* People v. Barnes, 505 N.E.2d 427 (Ill. App. Ct. 1987) (creating a legal presumption that the driver of the car is the owner for purposes of a traffic stop for suspended license); State v. Kolstad, No. C6-96-972, 1996 Minn. App. LEXIS 1233, at *4-5 (Minn. Ct. App. Oct. 29, 1996) (holding that it is rational for police to infer that the driver is the owner, and that this inference can create reasonable suspicion if the owner's license checks out to be suspended); State v. Stamper, No. 13469, 1993 Ohio LEXIS 743, at *5 (Ohio Ct. App. Feb. 10, 1993) (holding that an officer only needs a reasonable basis to believe that the driver of the vehicle is also the owner, and that this basis may be derived from personal information gleaned from the MDT search).

automobile insurance.[10] Donis was subsequently issued two summonses, one for driving without a license and another for driving without liability insurance.[11]

MDTs are wireless communication terminals that interface with existing radio equipment to provide communication between police officers and particular databases.[12] They are self-contained units with an internal wireless mobile data modem, processor, and built-in memory.[13] MDTs use a wireless public or private radio facility to provide a live connection between the MDT and the database it is accessing.[14] MDTs free up radio voice channels and provide a secure connection for sensitive information.[15]

The MDT supports four major services that include accessing information related to names, vehicles, property addresses, and state and national databases.[16] Data is transmitted at 4800 bits per second over VHF, UHF, or 800 MHF FM channels.[17] The major components of a MDT include a forty-character LCD display, numeric keypad, function keys,[18] and a key tag reader that allows users to individually identify themselves.[19]

Police may conduct random and arbitrary MDT searches on license plates in New Jersey and any other jurisdiction where police depart-

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10. *Donis,* 723 A.2d at 37.

11. *Id.;* N.J. STAT. ANN. § 39:3-40 (West 1990) (driving with a suspended or revoked license); § 39:6(B)-2 (driving without the requisite minimum of auto-liability insurance).

12. *See* Mentor Engineering, *Mobile Data System Information-Digital Dispatch* (visited Mar. 12, 1999) <http://www.mentoreng.ca/system.htm>.

13. *Id.*

14. Versaterm, *Mobile Data Terminal* (visited Mar. 11, 1999) <http://www.versaterm.com/public/p7b.htm>.

15. Ben Saladino, *Public Safety Mobile Data Terminals* (last modified Dec. 10, 1991) <http://www.interplaza.com/scandfw/mdt/htm>.

16. *Id.* MDTs also provide e-mail between users, and are being developed to provide police officers with mug shots of criminals. *Id.*

17. *Id.*

18. *See* Kearney Police/Buffalo County Sheriff's Department, *Mobile Data Terminal* (visited March 13, 1999) <http://lec.kearney.net/mdt.html>. The function keys are as follows: F1) Log On/Off; F2) Dispatch (which allows police officers to receive a call for service from dispatch and make traffic stops); F3) State inquiry (allows police officers to access state crime databases to check for arrest warrants); F4) Messaging (permits police officers to send digitally encrypted messages from one cruiser to another); F5) Paging (similar to messaging); F6) Crimes Lookups (allows police officer to access local databases and obtain access to e-mail); F7-10) Shortcut Keys (F7) provides access to the status of other units, F8) makes the police officer available for a call, F9) puts police officer enroute to a call, and F10) puts the officer at the scene). *Id.*

19. Expertech, *Mobile Data Terminal (MDT)* (visited Mar. 13, 1999) <http://www.expertech.com.au/>.

ments are equipped with the technology.[20] Courts have routinely allowed police wide discretion when conducting these searches, finding that a person cannot have a privacy interest in something that is exposed to the public.[21] Similarly, courts have upheld the constitutionality, both federal and state, of random MDT searches under the plain view doctrine.[22] Whether the justification is a police officer's safety in conducting traffic stops,[23] or the general public's interest in safe highways,[24] it is difficult for a defendant to succeed on a motion to suppress the evidence police gathered from MDT searches.

On December 10, 1998, the New Jersey Supreme Court finally interfered into an area that courts consistently avoided. In *State v. Donis*, the

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20. *See infra* note 74 and accompanying text, for a discussion of the various jurisdictions throughout the United States that are acquiring and using MDT technology. *See generally* Cedres, *supra* note 4, at 392 (discussing the unchecked discretion of the police when conducting MDT searches, and the need for a reasonable suspicion requirement).

21. *See* Katz v. United States, 389 U.S. 347, 350 (1967). The Court declared that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Id.* In cases of MDT searches, what one knowingly exposes to the public is their license plate. *Id.*; *see also* State v. Harding, 670 P.2d 383, 392 (Ariz. 1983) (finding no expectation of privacy in item affixed to exterior of car); State v. Lewis, 671 A.2d 1126, 1127 (N.J. Super. Ct. App. Div. 1996) (holding MDT search did not interfere with privacy interest of individual); State v. Myrick, 659 A.2d 976, 979 (N.J. Super. Ct. Law Div. 1995) (declaring a minimal privacy interest in license plates continuously exposed to the public); State v. Bates, No. 1576, 1987 Ohio App. Lexis 8372 at *3 (Ohio App. Ct. Aug. 12, 1987) (finding no intrusion on privacy rights from random MDT search); State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997) (discussing that there is no expectation of privacy in what is there for the "whole world" to see).

22. *See generally* Cooper v. California, 386 U.S. 58, 62 (1967). State courts have been reluctant to hold MDT searches unconstitutional under their respective state constitutions, which generally provide greater protection from unreasonable searches and seizures by government than does the Fourth Amendment of the United States Constitution. *Id.* The plain view exception to the Fourth Amendment was expressly accepted for the first time by the United States Supreme Court in, Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam) (holding that warrantless searches and seizures of objects in plain view are not unreasonable). *See e.g.*, United States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989) (stating that license plates are in plain view and deserve no privacy rights); United States v. Matthews, 615 F.2d 1279, 1285 (10th Cir. 1980) (holding that the plain view doctrine precludes a right to privacy in license plates); *Bates*, 1987 Ohio App. LEXIS 8372, at *3 (justifying seizure of evidence through reasonable suspicion garnered from computer check of license plate in plain view).

23. *See generally* Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam) (noting that a large percentage of police shootings occur when officers approach a suspect seated in the stopped vehicle).

24. *See* Delaware v. Prouse, 440 U.S. 648, 658 (1979) (holding that the states have a "vital interest" in requiring that vehicles are safe and that drivers have a valid license); *see also Barnes*, 505 N.E.2d at 428 (finding that the inconvenience of a "short roadside stop" is minimal compared to the increased safety in the public highways); Commonwealth v. Blouse, 611 A.2d 1177, 1179 (Pa. 1992) (finding a strong state interest in conducting systematic stops of vehicles for safety reasons).

court placed a judicial check on random MDT searches conducted by police in New Jersey.[25] The Court held it was permissible for police officers to run random MDT searches on license plates to determine if the vehicle was reported stolen or to verify the status of the registered owner's driver's license.[26] However, the Court also held that it was not permissible for police officers to obtain the registered owner's personal information contained in the New Jersey Department of Motor Vehicles ("DMV") database without "reason to suspect wrongdoing."[27]

The New Jersey Supreme Court stated that MDTs should be reprogrammed to provide for a two-step process that would balance the protection of police officers with the privacy interests of individuals.[28] The *Donis* court stated that random MDT searches were a legitimate and necessary law enforcement tool.[29] Further, the *per curiam* opinion held that random spot checking of license plates promotes the public good by "removing unlicensed drivers and unregistered and stolen vehicles from the road."[30] The court's reasoning is flawed, however, making the enforcement of its mandate unrealistic.[31]

This Casenote contends that the New Jersey Supreme Court erred by holding that the use of MDTs by police officers should not be limited to instances where the officers actually witness an apparent equipment or traffic violation.[32] The *Donis* court stated that if police officers had to wait to witness a violation, they would no longer need to use a MDT; in effect they would already have a reasonable and articulable suspicion to stop the vehicle.[33] The New Jersey Supreme Court fails to realize that it is authorizing police officers to use MDTs to artificially create a reason-

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25. *See Donis*, 723 A.2d at 40.

26. *Id.*

27. *Id.*

28. *Id.* The two-step process outlined by the *Donis* court would allow police officers to obtain the "DMV plate screen" by randomly checking license plates, a method which does not deviate from earlier police practice. *Id.* at 36. Then, if that initial search provided a police officer with a "reason to suspect wrongdoing" i.e., the vehicle is reported stolen or the registered owner's license is encumbered in some way, the police officer could proceed to the "DMV name" screen and obtain personal information concerning the vehicle's owner. *Id.*

29. *Id.* at 41.

30. *Donis,* 723 A.2d at 41.

31. In making it's mandate virtually unenforceable the Court stated:
We acknowledge the two-step process would not preclude an officer from using the original inquiry screen to obtain "personal information," that the proper use of MDTs and the information accessed therefrom depends on the *officer's discretion,* and that officers could obtain such personal information from other sources. However, we *assume* that the law enforcement community will use the MDTs properly and will comply with the restrictions imposed by the Court.
Id. (emphasis added) (leaving the police officer to follow its ruling at her own discretion).

32. *See id.* at 40.

33. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that in order for a police officer to perform a traffic stop, he have a reason based upon "specific and articulable facts"). *See*

able basis to pull over a vehicle. The MDTs should be used to expedite an investigation by a police officer allowing the officer to quickly access information from the DMV database,[34] not to create the basis for stopping an otherwise law abiding citizen.[35]

Second, this Casenote argues that the New Jersey Supreme Court further erred by holding that the random use of MDTs does not violate Article I, paragraph 7 of the New Jersey Constitution,[36] or the applicable statute dealing with disclosure of personal information contained in DMV databases.[37] While the *Donis* court was careful to point out that individuals do not have a privacy interest in license plates,[38] it did find a privacy interest in the personal information contained in the DMV

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generally State v. Pike, 551 N.W.2d 919, 921 (Minn. 1996) (holding that an investigatory stop only requires reasonable suspicion).

34. *See* Cedres, *supra* note 4, at 396-97 (stating that a MDT can be tailored exclusively to law enforcement, providing all the necessary functions, including a feature that allows a police officer to input information into her MDT at the scene of the crime instead of filing a report at the station). In addition to the state DMV database, a police officer, if the particular MDT is so equipped, may access the F.B.I.'s National Crime Information Center (NCIC), and the State Crime Information Center (SCIC) databases to see if the suspect is wanted for any arrest warrants. *Id.*

35. Law abiding means that the individual has not committed any traffic, equipment, or criminal violation when the officer subjects them to a MDT search.

36. N.J. CONST. art. I, para. 7 provides:

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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Id.; see also ALASKA CONST. art. I, § 14; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; HAW. CONST. art I, § 6; ILL. CONST. art I, § 6; LA. CONST. art. I, § 7; MASS. CONST. pt. 1, art. 14; MICH. CONST. art. I, § 11; MONT. CONST. art. II, § 10; NEB. CONST. art. I, § 7; N.M. CONST. art II, § 10; N.Y. CONST. art. I, § 12; N.C. CONST. art. I, § 20; P.R. CONST. art. § 10; S.C. CONST. art. I, § 10; VT. CONST. art. 11; VA. CONST. art. I, § 10; WASH. CONST. art. I, § 7; W. VA. CONST. art. II, § 6; WYO. CONST. art. § 4.

37. N.J. STAT. ANN. § 39:2-3.4(c) (1998) states:

Personal information shall be disclosed for use in connection with matters of *motor vehicle or driver safety and theft*; motor vehicle emissions; motor vehicle product alterations, recalls or advisories; performance monitoring of motor vehicles and dealers by motor vehicle manufacturers; and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of the Automobile Information Disclosure Act . . . and may be disclosed as follows: . . . .

Id. (emphasis added). According to the statute, it may be disclosed "[f]or use by any government agency, including any court or *law enforcement in carrying out its functions*, or any private persons or entity acting on behalf of a federal, state or local agency in carrying out its function." *Id.* § 39:2-3.4 (c)(1) (emphasis added). This Casenote argues that when police officers randomly and capriciously use MDTs they are not carrying out law enforcement functions as defined by Section 39:2-3.4(c)(1). *See also Donis*, 723 A.2d at 44 (Stein, J., concurring).

38. *Donis*, 723 A.2d at 40.

database.[39] As such, the court failed to protect this interest by allowing random MDT searches and "general matches"[40] of suspects from information gathered from the "DMV name" screen.[41]

Finally, this Casenote argues that the *Donis* court's ruling will not be followed by police officers. The court placed the protection of privacy rights in the not so willing hands of law enforcement and allows police officers to follow the two-step process at their discretion.[42] The Court relies on faulty assumptions that police officers will not abuse their discretion when conducting random MDT searches.[43] Further, the Court is sanctioning continued violations of constitutional rights by staying its order for a full six months until the MDTs can be reprogrammed.[44] The *Donis* court should have enjoined the use of MDTs indefinitely until the reprogramming could have been satisfactorily accomplished.[45]

II. SUMMARY OF FACTS AND BACKGROUND

At his trial in the Municipal Court,[46] Donis pled guilty to both charges, but conditioned his plea on the outcome of his motion to sup-

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39. *Id.*

40. *See* State v. Parks, 672 A.2d 742, 744 (N.J. Super. Ct. App. Div. 1996) (finding that when the police officer saw that the individual operating the vehicle "generally matched" the personal description obtained from the MDT search, he had legitimate basis to pull the individual over); *Lewis*, 671 A.2d at 1127 (affirming the conviction of a defendant who was identified after the police officer followed him in order to verify that the personal information from the MDT matched his observations). *But cf.* Commonwealth v. Fullard, No. 81786, 1994 Va. Cir. LEXIS 859, at *4 (Va. Cir. Ct. Feb. 4, 1994). In *Fullard,* the court held that a police officer could not have possibly seen the driver's personal characteristics from a car that was traveling at a fast pace at a distance of some twenty-five feet. *Id.* Further the court argued that this stop was too general and could result in others beside the registered owner being unlawfully detained by police. *Id.* at *6. A general match or "match up" is when the police officer takes the personal information obtained from the MDT search and compares it with her visual observations of the driver. *Id.*

41. *Donis*, 723 A.2d at 41.

42. *Id.*

43. *See infra* part V. C. and accompanying text, for a discussion of the dangers of giving police officers unregulated discretion to conduct MDT searches.

44. *Donis*, 723 A.2d at 42. The Donis court stated: "[W]e recognize that time will be required to modify the MDTs used by numerous law enforcement agencies throughout the State to implement the two-step process ordered by this opinion. Such reprogramming, however, should be completed by June 1, 1999." *Id.*

45. *See id.* (Stein, J., concurring) (stating that the court undermines its opinion by allowing police officers to continue random MDT searches until the computers are reprogrammed).

46. The Municipal Court is the trial level court in New Jersey. The Municipal Court's jurisdiction includes probable cause hearings on indictable offenses, traffic, minor criminal, ordinance violations, fish and game, and navigation violations. In this Casenote, the opinions of the Municipal Court and New Jersey Superior Court Law Division in this matter are unreported, therefore any facts relied on are from the slip opinions of The Superior Court of New Jersey Appellate Division, and the opinion of the New Jersey Supreme Court.

press the evidence obtained through the MDT search.[47] The Municipal Court denied the motion to suppress, and Donis appealed to the Law Division of the Superior Court of New Jersey.[48] The Law Division found, as a matter of law, that there is no reasonable expectation of privacy with regard to license plates and, consequently, police officers may conduct MDT searches for "no reason at all."[49] Donis appealed to the Appellate Division of the Superior Court of New Jersey[50] and his case was consolidated with that of Heidi Gordon.[51]

The Appellate Division, in a per curiam opinion, affirmed the lower court's denial of both motions to suppress.[52] Since license plates and DMV records are "openly displayed" the panel held that there was no unlawful intrusion on the defendant's right to privacy.[53] Further, the court stated that the traffic stops were not unreasonable seizures because the police officers believed there was a "general match" between the driver's appearance and personal information obtained from the MDT search.[54] The Supreme Court of New Jersey granted certification and affirmed the decision of the Appellate Division.[55]

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47. *Donis*, 723 A.2d at 37.

48. *Id.*

49. *Id.*

50. State v. Donis, No. A-2064-94T3 (N.J. Super. Ct. App. Div. July 25, 1996).

51. State v. Gordon, No. A-1707-95T3 (N.J. Super. Ct. App. Div. July 25, 1996). The facts of Gordon's case are analogous to that of *Donis*. On December 6, 1994, Hopewell Township Police Officer Joseph Giordano was parked on the side of Route 654 in New Jersey entering the license plates of passing cars into his MDT. *Donis*, 723 A.2d at 37. Officer Giordano testified that he checked somewhere near to two hundred license plates during the day in question. *Id.* When Gordon's car passed Officer Giordano, he entered her license plate into the MDT and it showed that the owner of the car was a forty-eight year old woman whose license was suspended. *Id.* Officer Giordano saw that the driver resembled an "older female" and stopped Gordon's car. *Id.* at 37-38. Once the officer confirmed the identity of Gordon, she was ticketed for driving with a suspended license and for driving without liability insurance. *Id.* at 38.

52. *Donis*, 723 A.2d at 38. In addition to the cases of *Donis* and *Gordon* before the Appellate Division was the appeal of Mr. Nathan Levine. A police officer in Princeton Township New Jersey ran a random MDT search of Mr. Levine's license plate because it appeared "tattered or beaten up". State v. Levine, No. A-6019-95T1, slip op. at 6 (N.J. Super. Ct. App. Div. July 25, 1996). The MDT search revealed that the owner of the car had a suspended license. *Id.* The police officer matched the personal information obtained from the DMV database and found it consistent with his observations of the driver. *Id.* Mr. Levine was subsequently charged with driving with a suspended license. *Id.* The *Donis* court did not decide Mr. Levine's appeal since he chose not to seek certification. *See Donis*, 723 A.2d at 37 n.1.

53. *Donis*, 723 A.2d at 38.

54. *Id.*

55. State v. Donis, 702 A.2d 350 (1997); *Donis*, 723 A.2d at 38; *see supra* text accompanying notes 31 and 32, for New Jersey Supreme Court's reasoning for affirming the ruling of the Appellate Division.

The *Donis* court's reasoning is premised upon the fact that any information contained in the New Jersey DMV database is accessible to the public.[56] This was true until August 1997.[57] In direct response to the federal Driver's Privacy Protection Act ("DPPA"),[58] the New Jersey legislature passed sections 39:2-3.3 and 3.4 of the New Jersey Statutes Annotated[59] ("Section 3.3 and 3.4") designed to protect the personal information contained in the DMV databases.[60] After the enactment of the DPPA, the government was generally concerned about making personal information, such as home addresses and social security numbers, available to the public.[61] However, the federal and New Jersey legislatures created an exception for law enforcement agencies to obtain the personal information contained in DMV databases while carrying out their governmental function.[62]

The courts have interpreted the "governmental function" exception to allow police officers to gather personal information from MDTs, whatever the reason may be.[63] This is entirely too much power to be left to the discretion of police officers. In the past, the United States

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56. *Donis*, 723 A.2d at 39.

57. N.J. ADMIN. CODE tit. 13, § 18-11.3(a) states:

[A]ll records which are required by law to be made, maintained, or kept on file by the Division of Motor Vehicles shall be considered public records. Public records shall be available for examination by the citizens of New Jersey . . . Citizens of New Jersey shall have the right to copy public records . . . Citizens shall have the right to purchase copies of public records by written request.

Id.

58. Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994), which places restrictions on the release of personal information contained in the state DMV databases:

(a) In general. Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record; (b) Permissible uses. Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft . . . and may be disclosed as follows: (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions . . . .

Id.

59. N.J. STAT. ANN. §§ 39:2-3.3, 2-3.4 (West 1997).

60. *Donis*, 723 A.2d at 39.

61. *Id.*

62. *See* 18 U.S.C. § 2721(b)(1); N.J. STAT. ANN.§ 39:2-3.4(c)(1) (creating exceptions for disclosure of driver's personal information to law enforcement).

63. *See generally* People v. McKnight, 555 N.E.2d 1196 (Ill. App. Ct. 1990) (upholding MDT search of vehicle parked legally on side of road); State v. Pike, 551 N.W.2d 919, 921 (Minn. 1996) (finding MDT search on vehicle that officer felt was going too slow legitimate); Woods v. Texas, No. 01-93-00875-CR, 1994 Tex. App. LEXIS 820, (Tex. App. Ct. 1994) (holding officer had reasonable suspicion to stop driver even though MDT information was incorrect); Stroud v. Virginia, 370 S.E.2d 721, 722 (Va. 1988) (upholding MDT search of car parked in the defendant's private driveway).

Supreme Court struck down law enforcement practices that lacked departmental guidelines and left decisions to the discretion of police officers.[64] In considering the growing number of law enforcement agencies acquiring MDT technology, the potential for abuse is great.[65]

III. ISSUES AND CONCLUSIONS

The *Donis* court reviewed whether police officers violated Article I, paragraph 7 of the New Jersey Constitution when they randomly entered driver's license plate numbers into their MDTs and received personal information contained in the DMV database.[66]

The New Jersey Supreme Court affirmed the Appellate Division of the Superior Court, and held that random use of MDTs did not violate the state constitution because there is no expectation of privacy in license plates since they are in plain view.[67] Further, the Court held that the very purpose of a license plate is to identify your car to police officers should they happen to need that information.[68] Additionally, the Court held that "spot checking" license plates by use of MDTs was an essential tool to law enforcement and protects a vital state interest[69] in maintaining safe highways.[70] While the Court authorized random MDT searches

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64. *See generally* Florida v. Wells, 495 U.S. 1, 5 (1990) (holding that warrantless inventory searches of impounded vehicles by police were unconstitutional because they were not sufficiently regulated by departmental procedures and left too many decision to the officers' discretion).

65. *See* Linda Stewart Ball, *The McKinney Police Department Will Soon be Going High-Tech,* THE DALLAS MORNING NEWS, Dec. 28, 1996, at 1H; Howard Goodman, *Computers Are Now Fixtures in Many of Philadelphia's Police Cars,* THE PHILADELPHIA IN- QUIRER, Aug. 15, 1998; Rose Kim, *Super 911 on Call: City Rings in New High-Tech Emergency Phoning Systems,* NEWSDAY, Jan. 31, 1998, at A07; Bill Lundy, *New Equipment to Keep Upperpark Police Officers Prepared,* ALLENTOWN MORNING CALL, Aug. 20, 1998; Paloma McGregor, *Crime Databases May Go On The Road: Police Could Use In-Car Computers,* THE PLAIN DEALER, Mar. 7, 1997, at 1B; Denise Scharding, *Not Quite Robocop, but Computerized,* PITTSBURGH POST-GAZETTE, Sept. 21, 1997, at NW-4; Robert Szkodny, *Harnessing the Power of Wireless Data: Local New Jersey Police Unit Improves Services With Cellular Digital Packet Data,* COMM. NEWS, Jan. 1997, at 28; Holly J. Wagner, *Placentia: Council to Weigh Mobile Data Terminals for Police Cars,* L.A. TIMES, Sept. 20, 1994, at Part B, p. 2.

66. *Donis,* 723 A.2d at 37.

67. *Id.* at 38, 40.

68. *Id.* at 40.

69. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 449 (1990) (balancing state's interest in establishing sobriety checkpoints along highways with the level of intrusion to an individual's privacy by being randomly stopped); Welsh v. Wisconsin, 466 U.S. 740, 762 (1984) (recognizing long and compelling state interest in maintaining safe roads and highways); *Prouse,* 440 U.S. at 658 (agreeing that state had "vital interest" in maintaining safe highways, ensuring that drivers were licensed, and that vehicles that used the state's highways were operating properly).

70. *Donis,* 723 A.2d at 40.

to determine whether a vehicle was stolen or to check the status of the owner's driver's license, it reasoned that the same rational should not apply to personal information.[71] Pursuant to Section 3.4, the Court held that in order to use MDTs to randomly access the personal information stored in the DMV database, police officers need to have "reason to suspect wrongdoing."[72]

As a way to implement its decision, the *Donis* court devised a two-step process that could be used to balance the dual concerns of the state's interest in highway safety with a citizen's right to privacy.[73] The court enlisted the New Jersey Attorney General to establish guidelines and disciplinary procedures that would be imposed if police officers used MDTs to obtain personal information without a suspicion of criminal activity.[74] The *Donis* court conceded, however, that the overall compliance with its decision would depend on each police officer's individual discretion.[75] Thus, the New Jersey Supreme Court held that police officers' random use of MDTs to check non-personal information, such as the status of the driver's license or whether the car had been reported stolen, does not violate Article I, paragraph 7 of the New Jersey Constitution or Section 3.4.[76] Further, the *Donis* court held that under the two-step process, police officers could not obtain personal information from the DMV database without "reason to suspect wrongdoing."[77]

IV. COURT'S ANALYSIS

The New Jersey Supreme Court began its analysis by recognizing the state's interest in "maintaining highway safety by ensuring that only qualified drivers operate motor vehicles and that motor vehicles are in a safe condition."[78] Based on the fact that the State of New Jersey extensively regulates its highways, individuals "'must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy.'"[79] In furtherance of the state's interest in safe highways, the court recognized that the Director of the DMV is authorized by statute to collect any and all data related to the general good of safe high-

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71. *Id.*

72. *Id.*

73. *Id.* at 36, 40.

74. *Donis,* 723 A.2d at 41; *see id.* at 36 (explaining the personal information housed in the New Jersey databases).

75. *Id.*

76. *Id.* at 40. *But see id.* at 45 (Stein, J., concurring). Justice Stein believes that the public interest would be better served if the Court held all random and suspicionless MDT searches used to obtain personal information void. *Id.*

77. *Id.* at 40.

78. *Id.* at 38.

79. *Donis,* 723 A.2d at 38 (quoting New York v. Class, 475 U.S. 106, 113 (1986)).

ways.[80] The court recognized that included in this data is the "name, address, and social security number of a motorist" that would aid police officers in locating the owners of stolen vehicles.[81]

The New Jersey Supreme Court noted that pursuant to the Right to Know Law citizens had a right to inspect public records.[82] Included in these public records is the personal information of every licensed driver in the State of New Jersey.[83] The New Jersey Supreme Court acknowledged that while the DMV database itself was not a public record,[84] "its contents are contained within the public records maintained by the DMV."[85] The *Donis* court further stated that prior to August 1997, citizens of the state had "the unqualified right to access the DMV's public records, provided that the citizen 'demonstrated to the satisfaction of the Director of the [DMV] . . . that he or she had a legitimate beneficial interest in the requested record.'"[86]

The *Donis* court noted that the unqualified right of citizens to access the personal information contained in the DMV public records was restricted by two statutes enacted by the New Jersey legislature.[87] The Court stated that the New Jersey legislature enacted the statutes to protect "'the safety of citizens of this state' and to protect 'victims of sexual assault or domestic violence [who now] are assured that they have greater protection from those who would harm or have harmed them.'"[88]

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80. N.J. STAT. ANN. § 39:2-3 (c) (West 1997) states: "The commissioner shall: Collect such data with respect to the proper restrictions to be placed upon motor vehicles and their use upon the public roads . . . as shall seem for the public good." *Id.*; *Donis*, 723 A.2d at 38.

81. *Id.* at 38-39.

82. N.J. STAT. ANN. § 47: 1A-1 (West 1989) states: "The Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protection of the public interest." *Id.*; *Donis*, 723 A.2d at 39.

83. *See* N.J. ADMIN. CODE. tit. 13, § 18-11.3 (a) (1998).

84. *See id.* § 18:11-3 (c).

> The Division's database and the information contained in it do not constitute public records. In no event shall data or information contained in the database be provided to any person or entity which seeks to use such information for the purpose of commercial solicitation for profit or political canvassing or campaigning or any similar purpose or objective.

Id.

85. *Donis*, 723 A.2d at 39.

86. *Id.* (quoting N.J. ADMIN. CODE tit. 13, § 18-11.3 (d)).

87. *Donis*, 723 A.2d at 39 (referencing N.J. STAT. ANN. §§ 39:2-3.3, 2-3.4). Section 3.3, N.J. STAT. ANN. §§ 39:2-3.3, defines personal information as "information that identifies an individual, including an individual's photograph; social security number; driver identification number; name; address other than the five-digit zip code; telephone number; and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." *Id.*

88. *Id.* (quoting New Jersey Governor Whitman, press release (August 5, 1997)). *See infra* part V. (discussing the dangers of allowing public access to the personal information contained in governmental databases).

The *Donis* court recognized that Section 3.4 was passed to put New Jersey "in compliance with the federal Driver's Privacy Protection Act . . . which prohibits states from disclosing personal information contained in motor vehicle records except under certain, specified circumstances."[89]

The New Jersey legislature acknowledged that restrictions should be placed on access to the personal information contained in the DMV databases,[90] yet the *Donis* court noted that an exception is provided for disclosure to law enforcement agencies.[91] In determining that police officers had the right to access information contained in the DMV databases, the court held that "police officers randomly using MDTs should have the right to determine from a motorist's license plate the status of the vehicle and the driving status of the registered owner . . . ."[92] Further, the New Jersey Supreme Court held that the MDTs should be reprogrammed so that police officers who used the MDTs at random and did not have an objective basis for the search could access only non-private information.[93] Nevertheless, the *Donis* court reasoned that "if the initial MDT inquiry disclosed that the car was unregistered, reported stolen or that the registered owner was not properly licensed, that information would then justify the police officer accessing the 'personal information' from the MDT."[94]

The New Jersey Supreme Court conceded that the two-step process would ultimately depend on police officers' discretion and the cooperation of the law enforcement community in general.[95] The *Donis* court reasoned that it is the individual officer, not the MDTs themselves that pose danger to privacy.[96] As such, the court stated that the New Jersey Attorney General should announce guidelines and establish disciplinary measures to impose on any police officer abusing the MDTs.[97] In considering a letter from the New Jersey Attorney General, the court allowed

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89. *Donis*, 723 A.2d at 39; 18 U.S.C. §§ 2721-2725.

90. *See* Sections 3.3 and 3.4.

91. *Donis*, 723 A.2d at 39-40; N.J. STAT. ANN. § 39:2-3.4 (c)(1) (stating that the personal information contained in the DMV databases may be disclosed "[f]or use by any government agency, including any court or law enforcement agency in carrying out its functions . . . .").

92. *Id.* at 40.

93. *Id.*

94. *Id.*

95. *Id.* at 41.

96. *Donis*, 723 A.2d at 41.

97. *Id.* Further, the *Donis* court held that any officer found to have abused a MDT "should be addressed and punished swiftly." *Id.* In addition, the court held that police departments could come up with stricter regulations than the court imposed in its opinion. *Id.*

until June 1, 1999 to reprogram the MDTs.[98] Until that time, the court authorized police officers to continue to randomly search license plates with MDTs and obtain personal information.[99] Thus, the New Jersey Supreme Court held that random MDT searches of license plates did not violate Article I, paragraph 7 of the New Jersey Constitution, as long as the searches were conducted with MDTs reprogrammed to follow the "two-step" process.[100]

V. AUTHOR'S ANALYSIS

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.[101]

The New Jersey Supreme Court erred in finding that police officers do not have to witness a traffic or equipment violation to conduct a MDT search of a license plate.[102] Further, the *Donis* court erred in holding that random MDT searches did not violate Article I, paragraph 7, of the New Jersey Constitution or Section 3.4. Finally, the *Donis* court erred by assuming that police officers will not abuse their discretion when using MDTs.[103] This Casenote contends that the *Donis* court failed to adequately protect the constitutional rights of citizens and that additional steps are necessary to protect personal information contained in DMV databases.[104] Without further protection of personal information, law enforcement will continue to conduct unreasonable searches and seizures utilizing the MDT search.

A. POLICE OFFICERS NEED AN OBJECTIVE BASIS TO CONDUCT MDT SEARCHES

The *Donis* court held that police officers do not need an objective

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98. *Donis*, 723 A.2d at 42.

99. *Id.* However, as a check against potential abuses the *Donis* court held that "the Attorney General should caution law enforcement agencies against the indiscriminate use of MDTs during the interim period." *Id.*

100. *See Donis*, 723 A.2d at 42.

101. Mincey v. Arizona, 437 U.S. 385, 393 (1978).

102. *Donis*, 723 A.2d at 40.

103. *See id.* at 41.

104. *See* Sandra Byrd Petersen, Note, *Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, 48 FED. COMM. L. J. 163, 164 (1995) (stating that Congress or the State legislatures need to create a right of privacy in information stored in governmental databases and that current laws are inadequate or have little effect on intrusions to individuals' privacy). *But cf.* Bill Loving, *DMV Secrecy: Stalking and Suppression of Speech Rights*, 4 COMM. L. CONSPECTUS 203, 208 (1996) (discussing the importance of allowing access to DMV databases in order to prevent unwanted individuals, i.e. convicted felons or those who have been convicted for driving under the influence, from using public highways and endangering the rest of society).

basis to conduct a MDT search of a license plate.[105] However, the court failed to consider the United States Supreme Court's rulings in the area of random and suspicionless stops of motor vehicles.[106] By ruling that police officers do not need an objective basis to conduct a MDT search, the *Donis* court sanctioned "fishing expeditions" by law enforcement.[107] While MDT searches of license plates may be less intrusive than random stops of vehicles on the highway,[108] they should still be afforded consti-

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105. *Donis*, 723 A.2d at 40. The court felt that if police officers needed an objective basis to conduct a MDT search of the driver's license plate, the MDT itself would no longer be of any use. *Id.* "The use of MDTs by police officers should not be limited only to those instances when they actually witness a violation of motor vehicle laws. By the time an officer observes [a violation], that officer no longer needs to use the MDT." *Id.* (emphasis added).

106. *See* California v. Hodari D., 499 U.S. 621, 626 (1991) (holding that a seizure requires physical force to restrain movement); Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (holding that a seizure occurs through an "intentional acquisition of physical control"); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (finding that any restraint of movement or freedom of an individual by government officials is to be considered a seizure). The United States Supreme Court has held that traffic stops are to be considered seizures in the Fourth Amendment sense. *See also Prouse*, 440 U.S. at 661-62 (holding that random stops of vehicles at a particular officer's discretion are unwarranted and that whatever basis the state has in conducting random stops cannot justify this level of intrusion on drivers); United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975) (holding that random traffic stops, even though they may involve minor inconvenience to the drivers, must be based on an objective basis or else they are unreasonable); *Terry*, 392 U.S. at 21-22 (holding that an officer needs a reason based on "specific and articulable facts" to stop an individual).

107. *See* Almedia-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring) (arguing that random stops of vehicles along the California and Mexico border were nothing more than "fishing expeditions" that trounced the rights of many to find a small number of guilty individuals); Sandoval v. California, 386 U.S. 948, 950 (1967) (Douglas, J., dissenting) (stating that police engage in fishing expeditions when they hunt for potential unlawful activities without an objective basis); Ortega v. O'Connor, 146 F.3d 1149, 1157 (9th Cir. 1998) (holding that a search must be reasonably related to "legitimate concerns" and the court will not authorize general warrants or fishing expeditions for evidence of criminality); *see also* Rise v. Oregon, 59 F.3d 1556, 1564 (9th Cir. 1995) (Nelson, J., dissenting) (arguing that random searches cannot be justified on the mere chance that some incriminating evidence might be discovered). *But cf.* State v. Harlow, 933 P.2d 1076, 1079 (Wash. Ct. App. 1997) (holding that searching of vehicle records by police officers is not a fishing expedition since the records are stored for state use). Law enforcement agencies conduct fishing expeditions when they search for criminality without any objective basis, i.e. probable cause or reasonable suspicion.

108. *See Myrick*, 659 A.2d at 980 (holding that a random check of a license plate has little if any effect on an individual's privacy, and therefore requires no justification by the police officer conducting the procedure); *Stamper*, 1993 Ohio App. LEXIS 743, at *6 (reasoning that a random check of a license plate differs from a random traffic stop, and therefore requires no objective basis on the part of the police officer to conduct the license plate search); *Bates*, 1987 Ohio App. LEXIS 8372, at *3 (holding that a random search of a license plate does not involve the same level of intrusion as does a random traffic stop since an individual is not physically detained).

tutional protections.[109]

The New Jersey Supreme Court erred in finding the state's interest in highway safety greater than any privacy right an individual may have in the personal information contained in the DMV database.[110] The *Donis* court failed to recognize that any marginal benefit to highway safety derived from random MDT searches is not adequate enough to violate constitutional rights of citizens.[111] In addition, the *Donis* court's finding that the state's interest in maintaining highway safety trumps privacy rights fails to meet the requirements of the United States Supreme Court's decision in *Brown v. Texas*.[112] The *Brown* test requires a court to

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109. *See Sitz*, 496 U.S. at 454 (reiterating the Court's holding in *Prouse* and stating that lack of empirical evidence that a random stop actually promotes the state's interest in highway safety is a factor to consider when weighing the validity of the stop); *Brignoni-Ponce*, 422 U.S. at 878 (holding that courts should not sanction random stops by law enforcement officials that lack departmental guidelines and are based on a police officer's discretion); *see also* Amirante, *supra* note 3, at 679 (discussing that police officers should not be allowed to conduct random searches because they violate individuals' right to privacy); Cedres, *supra* note 4, at 392 (stating that the lack of a reasonable suspicion requirement for police officers to conduct MDT searches violates the Supreme Court's holding in *Prouse*).

110. *See Donis*, 723 A.2d at 38; *see also Class*, 475 U.S. at 113 (stating that citizens should expect that the State will intrude into their private sphere in order to regulate highways); United States v. Miller, 608 F.2d 1089, 1093 (5th Cir. 1979) (finding that roadblocks created to check the license and registration of drivers were a valid exercise of the Supreme Court's ruling in *Prouse*); State v. Kadelak, 655 A.2d 461, 467 (N.J. Super. Ct. App. Div. 1995) (finding that MITs (mobile inspection teams) serve an important state interest in maintaining safe highways and safe vehicles, and that the legislature is well within its power to authorize random stops of vehicles).

111. *See Prouse*, 440 U.S. at 659. The Court stated that it was "unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment." *Id.* Moreover, the Court held that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations." *Id.* Additionally, the Court stated that there was a greater chance of finding an unlicensed driver "among those who commit traffic violations" than finding one by committing random stops. *Id.* Finally the Court held that "[t]he contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best." *Id.* at 660; *see also infra* Part V. B. of this Casenote for discussion of violations of Article I, paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the United States Constitution that occur when police officers randomly conduct MDT searches of innocent individuals.

112. Brown v. Texas, 443 U.S. 47 (1979). In *Brown*, the Court used a balancing test to determine if a traffic stop or seizure was in violation of the Fourth Amendment. *Id.* at 50. The Court held that the "constitutionality of such seizures involves a weighing of the gravity of the public concern served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 50-51. Further, the Court declared that the "Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out *pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers*." *Id.* at 51. (emphasis added); *see also* Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (hold-

balance the state's interest with the intrusions to citizens resulting from the state carrying out its goal.[113] As such, MDT searches are an unconstitutional invasions of an individual's privacy when they are used against citizens who have not violated any highway safety laws.[114]

Using the *Brown* test, it is apparent that the New Jersey Supreme Court erred in weighing New Jersey's interest in safe highways, against the citizen's right to privacy. First, the public concern served by the seizure of vehicles, via MDT searches of license plates, is to maintain safe highways by ensuring that only licensed drivers use these highways.[115] The "gravity of the public concern" is not serious enough to subject individuals to random MDT searches.[116] Ensuring that individuals have a valid driver's license is not a compelling reason.[117] Second, the "degree to which the seizure advances" New Jersey's interest in safe highways and guarantees that drivers have a license is minimal at best.[118] This idea is well illustrated by the United States Supreme Court in *Delaware v. Prouse* when it stated "that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers."[119] The public interest would be better served by police officers using MDTs only when they have an objective basis, such as witnessing a moving or apparent equipment violation. The "severity of the interference with individual liberty" is great considering the amount of information contained in DMV databases[120] and the relative ease in which an officer can obtain this information.[121]

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ing the public interest in conducting administrative searches of homes for code violations would not justify a general search of the whole city in hopes of finding evidence of criminality); Edmond v. Goldsmith, No. 98-1400-C-B/S, 1998 U.S. Dist. LEXIS 18899, at *16 (S.D. Ind. Nov. 18, 1998) (using the *Brown* balancing test to determine if highway checkpoints are the least intrusive means to accomplish state's goal of road safety).

113. *See Brown*, 443 U.S. at 49.

114. *Id.*

115. *See Donis*, 723 A.2d at 38.

116. *See Brown*, 443 U.S. at 50-51 (holding that one factor to determine if a seizure is constitutional, is the "gravity of the public concern" served by such a seizure).

117. *See Prouse*, 440 U.S. at 660. In *Prouse* the Court held "that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Id.*

118. *See Brown*, 443 U.S. at 50-51 (stating that the second factor to weigh in determining the constitutionality of a seizure is the degree to which it advances the state's interest).

119. *Prouse*, 440 U.S. at 659.

120. *See Brown*, 443 U.S. at 51 (stating that the last factor to consider when determining the constitutionality of a seizure is the level of interference with an individual's liberty).

121. *See* John Shattuck, *In the Shadow of 1984: National Identification Systems, Computer-Matching, and Privacy in the United States*, 35 HASTINGS L. J. 991, 993 (1984) (discussing how law enforcement is increasingly relying on the data contained in governmental databases and how the laws to protect privacy rights in the personal data are outdated).

B. RANDOM MDT SEARCHES VIOLATE SECTION 3.4 AND THE NEW JERSEY CONSTITUTION

The *Donis* court erred in its holding[122] that random MDT searches did not violate the New Jersey Constitution.[123] While the New Jersey Supreme Court found there was no expectation of privacy in a license plate, it did find a privacy right in the personal information contained in the DMV database.[124] Since the *Donis* court found that the personal information was worth protecting,[125] it incorrectly dismissed any constitutional protection afforded to that information.[126] Furthermore, contrary to the *Donis* court's reading of Section 3.4,[127] when police officers randomly use MDTs they are not "carrying out their governmental func-

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122. *See Donis*, 723 A.2d at 40.

123. *Id.* at 41. The text of Article I, paragraph 7 of the New Jersey Constitution is almost exactly the same as the Fourth Amendment of the United States Constitution. U.S. CONST. amend IV. reads:

> 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.

Id. Compare with N.J. CONST. art. I, para. 7.

124. *Donis*, 723 A.2d at 40 (reasoning that the personal information should not be accessible to police officers who conduct random MDT searches of license plates).

125. *Id.*

126. *Donis*, 723 A.2d at 41. The court stated "that the two-step process would not preclude an officer from using the original inquiry screen to obtain 'personal information' . . . ." *Id.; see* Rodriguez v. City of Passaic, 730 F. Supp. 1314, 1319 (D. N.J. 1990) (holding that Article I, paragraph 7 virtually replicates the Fourth Amendment, and that a decision under Article I would lead to the same outcome under the Fourth Amendment), *aff'd*, 914 F.2d 244 (3rd Cir. 1990); State v. Citarella, 712 A.2d 1096, 1099 (N.J. 1998) (stating that the Fourth Amendment and Article I, paragraph 7 contain identical language and that the focus of both is protection against unreasonable searches and seizures by the government); State v. Davis, 517 A.2d 859, 866 (N.J. 1986) (holding Article I, paragraph 7 strikes balance between privacy interests and the interests of effective law enforcement); *see also* State v. Bruzzese, 463 A.2d 320, 323 (N.J. 1983) (finding that Article I, paragraph 7 provides citizens of New Jersey greater protection than the Fourth Amendment and, therefore, a finding of lawfulness under Article I, paragraph 7 encompasses validity under the Fourth Amendment). *See generally* Cedres, *supra* note 4, at 403-06 (stating that New Jersey Constitution affords greater privacy protection than Fourth Amendment); *cf.* State v. Valentine, 636 A.2d 505, 508 (N.J. 1994) (holding that Article I, paragraph 7 does not require a higher standard than the Fourth Amendment in the context of a frisk after a lawful traffic stop). Article I, paragraph 7 of the New Jersey Constitution is virtually identical to the Fourth Amendment, and thus a violation of Article I would encompass a violation of the Fourth Amendment. *Id.*

127. *Id.* at 40-41. The New Jersey Supreme Court held that Section 3.4 does not require police officers to have an objective basis in order to use MDTs. *Id.* at 41. Additionally, the court held that random "spot checks" of license plates "promotes public safety." *Id.*

tions."[128] By creating Section 3.4, the New Jersey Legislature protects citizens from unwanted disclosures of the personal information contained in the DMV database. The law enforcement exception to Section 3.4 should not allow police officers to randomly access the information without an objective basis.[129] These general searches are not basic functions of law enforcement.[130] Random MDT searches are not conducted pursuant to law enforcement regulations,[131] but are done at a particular officer's discretion.[132] As such, Section 3.4 actually bars random MDT searches by police officers because they are not performed pursuant to law enforcement carrying out its functions.[133]

1. *Constitutional Protection for Personal Information Contained in DMV Databases*

The *Donis* court failed to adequately protect the personal information contained in the New Jersey DMV database.[134] Under its two-step

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128. *See* Section 3.4. Section 3.4 (c)(1) creates an exception to disclosure of personal information contained in the DMV database for "use by any government agency, including any court or law enforcement agency *in carrying out its functions.*" *Id.* (emphasis added); *see also Donis,* 723 A.2d at 44 (Stein, J., concurring) (arguing that Section 3.4 mandates that police officers have an objective basis before using MDTs).

129. Section 3.4 (c)(1) creates an exception to disclosure of drivers' personal information for law enforcement while performing their "governmental functions."

130. *See* Veronia Sch. Dist. 4J v. Acton, 515 U.S. 646, 669-70 (1995) (O'Connor, J., dissenting) (arguing that searches without guidelines lead to general searches and subsequent violations of the Fourth Amendment); Payton v. New York, 445 U.S. 573, 585 (1980) (holding that the Fourth Amendment's purpose is to protect citizens from general searches conducted by the government). A general search is when law enforcement officials conduct a warrantless search without an objective basis and without searching for anything in particular. Basically, a general search is a random search in the hope of finding some evidence of criminality.

131. Interview with Police Officer, Cook County Sheriff's Office, in Chicago, IL (Mar. 11, 1999). In response to the question "Are there any department regulations for randomly checking license plates with the MDT?," the officer answered, "No, basically the officers will check plates with the MDT whenever they are not doing something else." *Id.*

132. *See Donis,* 723 A.2d at 43 (Stein, J., concurring) (discussing how the officer who ran the MDT search of Donis testified that he ran the plate for no other reason but the fact that he happened to be behind his car).

133. *Id.* The officer who ran the MDT search of Donis' license plate testified that the only reason he conducted the search was that "he just happened to be behind" Donis's car and that he normally conducts random MDT searches when he is "not doing anything else." *Id.* Similarly, the officer who conducted the MDT search of Gordon's license plate testified that he had a "habit" of conducting two hundred or more random MDT searches while he was on duty. *Id.* at 44. Surely this unregulated and fortuitous activity was not what the New Jersey legislature had in mind when it created an exception for disclosure to law enforcement while carrying out its law enforcement functions.

134. *Donis,* 723 A.2d at 45 (Stein, J., concurring). Justice Stein stated that the public interest would be better served if the court held that all "random and suspicionless use of MDTs by police officers to obtain 'personal information'" would be prohibited. *Id.*

process,[135] the court still allows police officers to obtain a driver's personal information by way of a random MDT search.[136] Moreover, the *Donis* court held that Article I, paragraph 7 of the New Jersey Constitution creates a "zone of privacy wherein all individuals expect that what they say or do will be protected from unreasonable government intrusion."[137] By declining to extend this zone of privacy to license plates, the *Donis* court held that there is no expectation of privacy in an object exposed to the public.[138] The New Jersey Supreme Court erred by focusing exclusively on the public characteristics of license plates and not on the information that could be derived from them.[139]

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135. *Id.* at 40.

136. *See id.* at 40, where the *Donis* court reasoned that "With the reprogrammed MDTs, police officers who were using MDTs at random and who lacked suspicion could access only non-private information." *Id.* Then if the "MDT plate" screen showed a violation the officer would be justified in accessing the personal information. *Id.* What the *Donis* court fails to realize is that the only way a police officer can find out about a violation is through the initial suspicionless and random MDT search. While the *Donis* court's two-step process provides more protection than there has been in the past, police officers may still get to the personal information contained in the DMV database from an initially suspicionless search of the license plate. This logic is comparable to allowing police officers to randomly stop an individual on the street, search his person for any evidence of criminality, and then justify the initial suspicionless stop and search from any evidence discovered. In a sense the *Donis* court was holding that the ends justify the means, however if the Fourth Amendment stands for anything it must stand for just the opposite.

137. *Donis*, 723 A.2d at 38 (quoting State v. Myrick, 659 A.2d 976, 979 (N.J. Super. Ct. Law Div. 1995)).

138. *See Donis*, 723 A.2d at 40.

139. *See* State v. Hempele, 576 A.2d 793 (N.J. 1990). In *Hempele*, the New Jersey Supreme Court declined to follow the two-prong test developed by Justice Harlan's concurring opinion in *Katz v. United States*. *Id.* at 801. Instead the court held that Article I, paragraph 7 of the New Jersey Constitution requires that an expectation of privacy be reasonable. *Id.* at 802. Further, the court stated that the subjective reasonableness of an expectation of privacy should not be a separate requirement under the New Jersey Constitution. *Id.* The court proceeded to find a reasonable expectation of privacy in curbside garbage. *Id.* at 803. It reasoned that if a container "conceals its contents from plain view" then an individual could have a privacy right in the concealed contents. *Id.* at 804; *see also* Cedres, *supra* note 4, at 408-09 (discussing *State v. Hempele* and the comparisons of database records to garbage). A license plate is analogous to the curbside garbage bag in *Hempele*. Both are exposed to the public view and both contain concealed information. The garbage bag contains items that an individual may want to keep private, such as personal notes or financial documents. Similarly, a license plate provides information, which can lead to a large amount of personal information stored in the DMV database. If the New Jersey Supreme Court can find a reasonable expectation of privacy in garbage, one must be found in the vast amounts of personal information stored in databases. *But cf.* California v. Greenwood, 486 U.S. 35 (1988). In *Greenwood*, the Court found that warrantless searches of garbage bags on the curb would violate the Fourth Amendment only "if the respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *Id.* at 39. Furthermore, the Court held that since the garbage bags were in an area that was "suited for public inspection" the defendant could not have a reasonable expectation of privacy in the garbage. *Id.* at 40.

The *Donis* court not only failed to protect the personal information held by the DMV, but also sanctioned continued violations of individual's constitutional rights.[140] By giving law enforcement over six months to make the necessary changes, the court is allowing police officers unlimited and unrestrained access to a driver's home address, social security number,[141] and even photo.[142] The dangers of allowing unfettered access to this information are obviously great.[143] This unrestrained access will only lead to more intrusions on citizens' right to privacy.[144] The *Do-*

140. *See Donis*, 723 A.2d at 42 (holding that police officers could continue to randomly use MDTs to obtain personal information, until the computers could be reprogrammed).

141. *See generally* Nowlin v. Dep't of Motor Vehicles, 53 Cal. App. 4th 1529, 1537-38 (Cal. Ct. App. 1997) (upholding California DMV's practice of dissimulation of social security numbers to make sure violations of the Vehicle Code are paid).

142. *See generally* NBS Imaging Sys., Inc. v. State Bd. of Control, 60 Cal. App. 4th 328, 330 (Cal. Ct. App. 1997) (discussing the development of an "image database" for the California DMV that law enforcement would be able to use to access photographs and demographic information on all licensed drivers in the state).

143. *See* 138 CONG. REC. H1785 (daily ed. March 26, 1992) (statement of Rep. Moran) (discussing the murder of Rebecca Schaeffer, who was the star of the television show "My Sister Sam," and how her stalker obtained her home address through the California DMV records); *see also* Kallstrom v. City of Columbus, 136 F.3d 1055, 1062 (6th Cir. 1998) (upholding a right to privacy in personal information due to risk of danger to the individual if the information was distributed to the public); Amirante, *supra* note 3, at 681 (stating that the potential for abuse of computerized databases is extremely high and that the citizens of this country are lucky that more police officers do not abuse their access to personal information); Alan R. Kabat, note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy For a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 343 (1998) (discussing that any limitations that existed in searching traditional databases are virtually nonexistent today, since computers and the Internet can handle such arduous tasks in a matter of seconds). *See generally* Paul M. Schwartz, *Symposium: Data Protection Law and the European Union's Directive: The Challenge for the United States: Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 559-60 (1995) (discussing how as computer technology grows, the amount of personal information stored in governmental databases grows, and that the state legislatures should respond by providing laws that protect exposure of this personal information); State Farm Mut. Auto. Ins. Co. v. Dep't of Motor Vehicles, 53 Cal. App. 4th 1076, 1083 (Cal. Ct. App. 1997) (finding that the personal information contained in the California DMV database could be used by attorneys involved in civil litigation); Bombardieri v. Gnazzo, No. 96-6833, 1995 Mass. Super. LEXIS 71, at *2-4 (Mass. Dist. Ct. Dec. 19, 1996) (holding that the D.R.I.V.E. program, which allows car dealerships in Massachusetts access to the database of the Registry of Motor Vehicles was legitimate since it's purpose was to accelerate title and license plate registrations on newly purchased cars).

144. *See Donis*, 723 A.2d at 44 (Stein, J., concurring). Justice Stein notes that Donis tried unsuccessfully to move the Appellate Division to allow discovery concerning the use of MDTs by the West Windsor Police Department. *Id.* Justice Stein discovered that the Donis' defense attorney had found two female witnesses to testify on behalf of the defendant. *Id.* These witnesses alleged that they had thwarted unwanted romantic advances from police officers who had obtained their personal information from MDTs. *Id.; see also* Washington v. Stebbings, No. 40041-0-I, 1998 Wash. App. LEXIS 623, at *2 (Wash. Ct. App. Apr. 20, 1998). In *Stebbings*, a police officer conducted a random MDT search of the defendant's

nis court, however, believes that the two-step process will provide the necessary safeguards to potential abuse by police officers.[145] Considering the potential dangers of random MDT searches, the court's two-step process is incredibly insufficient.

Since the New Jersey Constitution provides a zone of privacy to individuals,[146] the *Donis* court erred by not including the personal information of drivers within that zone.[147] The New Jersey Supreme Court avoided the constitutional question of privacy[148] and by doing so ignored the rights of its citizens.[149] The United States Supreme Court analyzed the parameters of the zone of privacy in *Whalen v. Roe*.[150] In that case, the Court held that an important privacy interest is the right to avoid disclosing personal information.[151] Because the citizens of New Jersey have the right to avoid having their personal information disclosed, the *Donis* court erred by not honoring that right.[152]

2. A Reasonable Expectation of Privacy in Personal Information Contained in DMV Databases

The reasonable expectation of privacy requirement of the Fourth Amendment, and Article I, paragraph 7 of the New Jersey Constitution may discourage most courts when considering whether there is a constitutional violation from disclosure of personal information contained in a

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license plate. *Id.* At that time, the defendant's motorcycle was legally parked in a motel parking lot. *Id.* Pursuant to the MDT search, the officer learned that the defendant was wanted on an outstanding arrest warrant. *Id.* The court denied defendant's motion to suppress, finding that the officer acted reasonable and that randomly checking the license plates of parked cars was normal procedure. *Id.* at *4.

145. *See id.* at 40. Further, the *Donis* court held that the New Jersey Attorney General should establish guidelines and discipline those who abuse the MDTs. *Id.*

146. *See* State v. Myrick, 659 A.2d 976 (N.J. Super Ct. Law Div. 1995).

147. *See Donis*, 723 A.2d at 42 (Stein, J., concurring) (noting that the court fails to address the constitutionality of random MDT searches, and instead focuses on "statutory interpretation").

148. *Id.*

149. *See id.* (stating that it is common practice for state courts to avoid resolving constitutional questions if the legal matter could be resolved by another non-constitutional basis).

150. Whalen v. Roe, 429 U.S. 589 (1977). In *Whalen*, the Court was deciding the constitutionality of a New York statute that authorized inspections of prescription records kept on governmental databases. *Id.* at 599. The Court found that there are two kinds of interests within the zone of privacy that surrounds personal information stored by the government. *Id.* "One is the individual interest in avoiding disclosure of personal information, and the other is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600.

151. *Whalen*, 429 U.S. at 599.

152. *See generally id.* at 605 (stating that with the right to collect and store personal information, comes the added duty to protect citizens from "unwarranted disclosures" of that information).

database.[153] Just because the personal information is contained in computer databases does not mean it is unworthy of constitutional protection.[154] Not only did the *Donis* court fail to devise a method to prevent unauthorized access to personal information, it also misapplied Section 3.4 protections. As such, the danger of "indiscriminate disclosure" of the personal information is great[155] and the New Jersey legislature must act to prevent police officers from randomly accessing the DMV database.[156]

C. UNREGULATED USE OF MDTs BY POLICE OFFICERS

The *Donis* court erred in allowing police officers to randomly conduct MDT searches at their discretion.[157] Instead of prescribing a method

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153. *See* Schwartz, *supra* note 168, at 574. Professor Schwartz claims that the "reasonable expectation" threshold test prevents the Fourth Amendment from being utilized in information privacy matters. *Id.* This is due to the fact that most of the stored data is kept in public records. *Id.* at 572. Likewise, Professor Schwartz states that "[t]he Fourth Amendment provides little protection for personal information already controlled by . . . the government itself." *Id.* at 573.

154. *See* Ryan Reetz, Note, *Warrant Requirement for Searches of Computerized Information*, 67 B.U. L. REV. 179, 197 (1987). The author states that in order to have a reasonable expectation of privacy in computer records, the individual needs to show that they would have the same expectation of privacy if the records were in another form. *Id.* Thus, if the personal information contained in the New Jersey DMV databases were written on paper and stored in a home or discarded in the trash the New Jersey Supreme Court would most certainly recognize a reasonable expectation of privacy. Therefore, the Donis court should apply this same protection to the stored personal information in the DMV databases.

155. *See Whalen*, 429 U.S. at 607 (Brennan, J., concurring). In his concurring opinion, Justice Brennan warns of future abuses that may occur as a result of easily accessible personal information contained in computer databases. *Id.* He reasoned that a state should carefully design a program that "includes numerous safeguards intended to forestall the danger of indiscriminate disclosure." *Id.* Justice Brennan believed that the ultimate duty of the state should be "to prevent abuse and limit access to the personal information . . . ." *Id. See generally* Tuzzio v. Ward, 554 N.Y.S. 227, 228 (N.Y. App. Div. 1990) (finding that the defendant police officer was guilty of misconduct for allowing a computer printout of a license plate of an undercover car get into the hands of a known organized crime figure); City of Houston v. Tippy, No. 01-97-01429-CV, 1999 Tex. App. LEXIS 2652, at *2 (Tex. Ct. App. Apr. 1, 1999). In *Tippy*, the defendant police officer was investigated by the Houston police department's internal affairs division for misuse of his cruiser's MDT. *Id.* Transcripts from MDT e-mail conversations revealed that while on duty the defendant had used ethnic slurs to refer to his superiors and had generally spent much too much time on the MDT and not on police work. *Id.* at *3.

156. *See* Interview with police officer, Cook County Sheriff's Office, in Chicago, IL (Mar. 11, 1999). In Illinois, there were instances where police officers were paid by owners of apartment buildings to obtain the criminal history of prospective renters. *Id.* The landlords would give the police officers the individuals license number and then the officer would run the number through his MDT. *Id.* The MDT would show the criminal history of the owner of the car and the landlords would use this information to accept or reject the future tenant. *Id.*

157. *See Donis*, 723 A.2d at 41.

where police officers would not be able to rely on their discretion, the New Jersey Supreme Court devised an inadequate rule.[158] Additionally, the court delegated its responsibility of establishing guidelines for law enforcement to the New Jersey Attorney General.[159] The *Donis* court knew its ruling would have little effect on the random use of MDTs to obtain personal information, but assumed that the law enforcement community would not abuse their discretion.[160] Instead of assuming that police officers would not abuse their power, the *Donis* court could have ensured that further abuses would not occur.[161]

In leaving the proper use of MDTs to the police officer's discretion, the *Donis* court failed to properly guide the officer's actions.[162] Without rules on the proper use of MDTs, police have to make ad hoc decisions.[163] When police officers are making unregulated ad hoc decisions, it is the privacy rights of citizens that suffer.[164] The New Jersey Supreme Court assumes that a police officer will know when she is going too far with the MDT search. What happens in situations where the initial MDT infor-

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158. *Id.* at 40.

159. *Id.* at 41.

160. *Id.*

161. The *Donis* court could have guarded against misuse of the MDTs by requiring that police have an objective basis to conduct a license plate search and that any random use of MDTs would result in severe penalties. These penalties could range from loss of pay, to criminal or civil charges depending on the degree of the abuse.

162. *Donis*, 723 A.2d at 41.

163. *See* United States v. Huguein, 154 F.3d 547 (6th Cir. 1998). In *Huguein*, the Sixth Circuit was determining the constitutionality of random intoxication checkpoints along the highway. *Id.* at 550. The court recognized that there was no set procedure for police officers to follow when stopping vehicles to check for inebriated drivers. *Id.* Subsequently, the Sixth Circuit found the checkpoints unconstitutional, since there were no limits placed on police officers' discretion while they conducted the stops. *Id.* at 555. The court believed that unregulated searches by the officers could lead to violations of citizens' rights. *Id.*

164. *See Wells*, 495 U.S. at 4. In *Wells*, police impounded the defendant's car after he was arrested for driving under the influence of alcohol. *Id.* at 2. Police proceeded to conduct an inventory search of the impounded car. *Id.* The officers eventually discovered a locked suitcase in the trunk of the car. *Id.* They forced the suitcase open with tools and found a large amount of marijuana. *Id.* In finding a violation of the Fourth Amendment, the Court held that the "search was not sufficiently regulated to satisfy the Fourth Amendment . . . ." *Id.* at 5; *see also* Florida v. Bostick, 501 U.S. 429, 441 (1991) (Marshall, J., dissenting) (arguing that the goal of the Fourth Amendment is to protect citizens from suspicionless searches "notwithstanding the effectiveness" of the particular method of search); Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring) (arguing that by allowing police to conduct searches at their own discretion, the court will be authorizing general searches that the Fourth Amendment strictly forbids). *But cf.* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (upholding inventory searches by police officers since there was no substantial evidence that the searches were a pretext to ulterior motives).

mation is incorrect[165] or when the police officer has reason to believe that the information gathered from the MDT search is not accurate?[166] Without guidance from the courts, officers must use their individual judgment to determine how to respond.[167]

Discrimination is another problem that results from discretionary practices by police officers.[168] Without regulation, police officers may use MDTs to check only the license plates of women or persons of a certain ethnicity. Unregulated and random MDT searches may also result in pretextual stops and searches of personal information.[169] Police officers

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165. *See* Arizona v. Evans, 514 U.S. 1, 16 (1995) (holding that evidence would not be excluded even though it was discovered after the defendant was being arrested based on incorrect information contained in the computer database); *cf.* People v. Santiago, 645 N.Y.S.2d 746, 749 (N.Y. Crim. Ct. 1996) (holding that records from DMV can be excluded as fruits of the poisonous tree if the initial stop is unjustified). *See also* United States v. White, No. 1:98CR332-1, 1999 U.S. Dist. LEXIS 3703, at *3 (M.D. N.C. Jan. 14, 1999). In *White*, the police officer ran the plate of the defendant, which he believed to be from South Carolina. *Id.* The license plate number came back invalid and the officer pulled the defendant over. *Id.* Subsequently, it was discovered by the officer that the license plate was from Georgia, not South Carolina, and that was why it came up invalid. *Id.* However, this error did not render the stop and subsequent discovery of cocaine invalid. *Id.* at *6. *See generally* People v. Williams, 33 Cal. App. 4th 467, 476-77 (Cal. Ct. App. 1995) (justifying arrest based on MDT information that was not updated to reflect the current owner of the vehicle); People v. Sampson, 627 N.E.2d 772, 773 (Ill. App. Ct. 1994) (upholding arrest even thought initial stop was based on information concerning a different license plate); City of Waukesha v. Reidy, No. 98-2022, 1999 Wis. App. LEXIS 173, at *3 (Wis. Ct. App. Feb. 10, 1999) (finding that it was reasonable for the officer to rely on the incorrect information contained in the DOT's records, since there was no way to know that an employee of DOT would erroneously apply defendant's registration payment to another driver's plates); Cedres, *supra* note 4, at 400-03 (discussing the large amounts of errors that exist in the data complied in governmental databases).

166. *See* State v. Britton, No. C9-98-968, 1999 Minn. App. LEXIS 121, at *3-4 (Minn. Ct. App. Feb. 2, 1999) (holding that even though the MDT search of the license plate showed that the car was not reported stolen, officer still had reasonable suspicion to stop the vehicle based on personal experience).

167. *See generally* Gibson v. Texas, No. C14-88-00540-CR, 1989 Tex. App. LEXIS 414, at *2 (Tex. Ct. App. Mar. 3, 1989). Police officers witnessed a Cadillac Eldorado traveling through an intersection in the City of Houston. *Id.* at *1-2. One officer decided to run the plate of the defendant's car through his MDT since Eldorados were frequently stolen in the area. *Id.* at *2. The defendant was eventually pulled over for failure to signal a turn. *Id.* Drugs were found within the defendant's car, and he was arrested for possession of narcotics. *Id.* The court denied the defendant's motion to suppress, finding that the stop was not a pretext arrest nor an illegal detention. *Id.* at *5-6.

168. *See Donis*, 723 A.2d at 43 (Stein, J., concurring) (alluding to the fact that Donis is a Latino, and Gordon is an African-American).

169. *See* Whren v. United States, 517 U.S. 806, 810 (1996) (discussing pretext stops, and rejecting the petitioners argument that traffic stop was pretextual, since there was probable cause to stop the petitioners' vehicle). *See generally* Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 719 (1998) (discussing two approaches to fight pretext arrests outside those that were argued by the petitioners' attorneys in *Whren*).

may, under the *Donis* court's holding, use MDTs to create a pretext to stop an otherwise law-abiding citizen.[170] The *Donis* court erred in not establishing guidelines for police officers to follow in order to eliminate the arbitrariness of random MDT searches.

1. *The Reasonably Related to Law Enforcement Purpose Standard*

Instead of allowing random and suspicionless MDT searches of license plates, the *Donis* court should have created an objective standard to weigh the reasonableness of each particular search. In his concurring opinion, Justice Stein argued for an objective standard less than reasonable suspicion.[171] This standard requires that any use of MDTs by police must be reasonably related to a law enforcement purpose.[172] Justice Stein argued that the randomness of MDT searches "constitutes not only an unproductive application of police resources, but one that reflects only a marginal likelihood of advancing law enforcement objectives."[173] The concurring opinion further argued that when police officers conduct random MDT searches they are "not 'carrying out [the] functions of a law enforcement agency' within the meaning of those statutes."[174]

This standard would protect the privacy of individuals and not place any additional burdens on police work.[175] Police officers could still use the MDT to check the license plates of those who have unsafe equipment or who commit moving violations. The state's interest in safe highways would still be protected as it was before MDTs were utilized. Further-

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170. A police officer may notice an individual of a certain race and possibly believe that there is some evidence of criminality inside the vehicle. Without an objective basis to stop and search the vehicle, the officer would not be allowed to arbitrarily pull the vehicle over. However, with a MDT the officer can punch in the license plate without articulable suspicion and use the information obtained from the random check as the basis to pull over the car. The MDT search is therefore a pretext to stop and search an otherwise law abiding driver.

171. *See Donis*, 723 A.2d at 44 (Stein, J., concurring). Justice Stein noted that "the intrusion occasioned by the use of MDTs is less invasive than that resulting from a suspicionless seizure of a motor vehicle, [therefore] I would find acceptable a standard less restrictive than reasonable suspicion . . . ." *Id.*

172. *See id.* at 45 (Stein, J., concurring).

173. *Id.*

174. *Id.* (quoting 18 U.S.C. § 2721 (b)(1) and Section 3.4 (c)(1)).

175. Under the related to law enforcement purpose standard, police officers could use the MDTs for what their original purpose was—namely expediting investigations and arrests. Further, an additional purpose of MDTs was to cut down on radio traffic, which in turn leads to quicker police work. *See* interview with police officer, Cook County Sheriff's Office, in Chicago, IL (Mar. 11, 1999). In response to the question "To the best of your knowledge, how have MDTs changed the way police perform routine traffic patrols?," the officer interviewed answered, "With more police out on the street it gets hard to get the MDT information over your police radio. The MDT cuts down on radio traffic and allows for faster response time." *Id.*

more, invalidating random MDT searches will not compromise the safety of police officers. The only derivative effects would be greater protection of citizens' privacy and a judicial check on unreasonable searches and seizures conducted by the government.

To implement the "reasonably related to law enforcement purpose" standard, the *Donis* court could have provided for a system of departmental regulations regarding MDT use. These regulations could be as simple as requiring that every time a MDT search is conducted the date, time, and officer's name would be stored in a computer database operated by the police force.[176] At the end of each day the reports could be printed out and stored in the police records at the station. Then, if a problem arose concerning abuse of the MDTs by an officer, there would be a printed record of all the searches and when they took place. Furthermore, the use of the MDT should be directly related to the issuing of a citation or warning.[177] This way there would be further records of the purpose for the MDT search and an additional barrier to random and unregulated use.

Additionally, the *Donis* court should have required that the police officer have an objective basis to run a MDT search of a license plate. The officer would then need to show either from written records,[178] or possibly videotape from the cruiser camera, that there was indeed an objective basis to use the MDT. The defendant could then challenge the basis for the MDT search at a suppression hearing, with the state rebutting the motion to suppress with written or videotaped evidence. By requiring an objective basis for a MDT search and ensuring that police officers have proof of this basis, the *Donis* court could have further guarded against abuse by police officers.

VI. CONCLUSION

In *Donis,* New Jersey Supreme Court failed to provide a rule that would adequately protect unwarranted disclosures of driver's personal

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176. *See* interview with police officer, Cook County Sheriff's Office, in Chicago, IL (Mar. 11, 1999). In response to the question "Do you believe that there may be a potential for abuse with MDTs, like personal information getting into the wrong hands?," the officer answered, "When a police officer gets information from the MDT his last name, department number, time, and date he ran something is connected to all MDT information." *Id.*

177. By requiring that the MDT search should accompany the issuance of a citation or warning, the Donis court could have ensured that police officers were using the MDTs for a law enforcement purpose. This would then put the disclosure of the personal information contained in the DMV in compliance with Section 3.4 (c)(1). The *Donis* court erred by finding that random MDT searches were related to a "law enforcement purpose" and that the subsequent disclosure of the personal information did not violate Article I, paragraph 7 of the New Jersey Constitution.

178. Written records being the citation or ticket issued the driver and any notes taken by the officer during the incident or afterwards when she files her reports.

information stored in the DMV databases. The *Donis* court did provide some level of protection with its two-step process, however, it is not enough. Likewise, the court's ruling will not be carried out by law enforcement because police officers may or may not follow it at their discretion.[179] The state legislatures need to provide laws that will adequately protect driver's personal information. While the *Donis* court interpreted Section 3.4 as not allowing random MDT searches of personal information,[180] the court still found that random checks of non-personal information were a legitimate function of law enforcement.[181] The *Donis* court felt that MDTs reprogrammed under the two-step process would preclude police officers from randomly accessing personal information of motorists.[182] The court itself realized the weakness of its assumptions,[183] yet presumed that the law enforcement community would not abuse MDTs.[184]

The *Donis* court fell in line with the majority of jurisdictions that believe MDT searches of license plates do not need to be supported by an objective basis.[185] Its holding, while somewhat limiting random MDT use, still grants police wide discretion in using the computers. The obstacles that seem to block courts from finding a constitutional intrusion

179. *See Donis*, 723 A.2d at 41; *see also* interview with police officer, Cook County Sheriff's Office, in Chicago, IL (Mar. 11, 1999). In response to the question "Do you believe that the two-step process developed by the New Jersey Supreme Court will be followed by police officers?," the officer answered, "No, after running 20-30 plates a night—if your plates are not suspended and the driver is not wanted, all your personal information becomes a blur." *Id.*

180. *Donis*, 723 A.2d at 40. The court stated that "it does not appear . . . that the Legislature contemplated that Sections 3.3 and 3.4 would permit random use of MDTs to secure 'the personal information' of motorists." *Id.*

181. *Id.* at 41. The court, in arguing against the concurrence, found the legislature did not intend to disallow all random uses of MDTs since it "would render MDTs useless as efficient investigative tools." *Id.*

182. *Id.* at 40. The *Donis* court held that "[w]ith the reprogrammed MDTs, police officers who were using MDTs at random and who lacked suspicion could access only non-private information." *Id.*

183. *Id.* at 41. The court conceded "that the two-step process would not preclude an officer from using the original inquiry screen to obtain 'personal information' . . . ." *Id.*

184. *Id.*

185. *See, e.g.*, Avett v. Arkansas, 928 S.W.2d 326 (Ark. 1996); Village of Lake in the Hills v. Lloyd, 591 N.E.2d 627, 629 (Ill. App. Ct. 1992); State v. Preston, 961 S.W.2d 627, 629 (Mo. Ct. App. 1993); Hafford v. Texas, 828 S.W.2d 275, 276 (Tex. Ct. App. 1992). *But cf.* State v. Willis, No. 91 CA 33, 1992 Ohio App. LEXIS 5764, at *2 (Ohio Ct. App. Nov. 10, 1992). In *Willis*, police randomly entered the defendant's license plate number into their MDT and discovered that his driver's license was suspended. *Id.* In a highly uncommon decision, the court held that "more is needed than a random check of a license plate number to establish probable cause to stop and question the operator . . . ." *Id.* The court further stated that "the Fourth Amendment of our Constitution has all but eroded away, but we at the grass roots must do what we can to salvage what little remains." *Id.*

from random MDT searches is the fact that the driver has no idea that the search is taking place. The courts, therefore, conclude that since the intrusion to the individual is slight, police officers should have nearly unlimited permission to conduct the MDT search.

The New Jersey Supreme Court would have better served its state citizens by holding all random MDT searches invalid. The reasoning of Justice Stein in his concurring opinion better serves the interests of privacy and legitimate police work than the faulty assumptions of the *per curiam* opinion.[186] The *Donis* court could have at least required an objective basis[187] to conduct a MDT search, instead of mandating reprogramming that will be ineffective. As such, it is left to the state legislatures to place restrictions on random MDT searches of license plates.[188] Until that time, citizens' constitutional rights will continue to be violated at the discretion of police officers.

Kevin C. Wille

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186. *Donis*, 723 A.2d at 42 (Stein, J., concurring). Justice Stein argues "that the random use of MDTs by police officers to obtain motorists' personal information is impermissible conduct that violates [Section 3.4]." *Id.* (emphasis added).

187. *Id.* at 45. The concurring opinion argued for a standard "reasonably related to an appropriate law enforcement purpose . . . ." *Id.*

188. *See* 18 U.S.C. §§ 2721-2725. Congress placed restrictions on the state DMV's power to disclose personal information of drivers contained in databases. This federal legislation was adopted by New Jersey Legislature in Section 3.4. However, an exception was created for disclosure to law enforcement while "carrying out its functions." *See also* Section 3.4. The Donis court falsely interpreted random MDT use as a function of law enforcement. Therefore, the New Jersey Legislature should amend Section 3.4 to prohibit random use of MDTs to obtain drivers' personal information.