

12-2584-cr
United States v. Bernacet

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term, 2012

5 (Argued: May 1, 2013 Decided: August 1, 2013)

6
7 Docket No. 12-2584-cr
8

9 UNITED STATES OF AMERICA,
10

11
12
13 *Appellee,*

14
15
16 -v.-

17 RONNIE BERNACET,
18

19
20 *Defendant-Appellant.*
21

22
23
24 Before:

25 SACK, WESLEY, AND CARNEY, *Circuit Judges.*
26
27
28
29
30

31 Appellant Ronnie Bernacet appeals from a judgment of
32 conviction, entered by the United States District Court for
33 the Southern District of New York (Laura Taylor Swain,
34 *Judge*), of possessing a handgun after a felony conviction in
35 violation of 18 U.S.C. § 922(g)(1). Bernacet asserts that
36 (1) the search of law enforcement databases at a traffic
37 checkpoint rendered that stop an unreasonable seizure of his
38 person in violation of the Fourth Amendment; (2) officers
39 lacked probable cause to believe that he was violating his
40 parole; and (3) because a parole violation does not provide
41 a lawful basis for a warrantless arrest in New York, his

1 arrest for a parole violation was unconstitutional. We hold
2 that (1) the *de minimis* additional time taken to search a
3 database did not render the traffic checkpoint an
4 unreasonable seizure; (2) officers had sufficient probable
5 cause to believe that Bernacet was violating his curfew; and
6 (3) the New York law prohibiting warrantless arrests for
7 parole violations that are not themselves crimes or offenses
8 is a state "arrest rule" subject to *Virginia v. Moore*, 553
9 U.S. 164 (2008), and Bernacet's arrest was not
10 unconstitutional. We therefore AFFIRM the district court's
11 judgment.

12
13 AFFIRMED.

14
15
16
17
18 DARRELL B. FIELDS, Appeals Bureau, Federal
19 Defenders of New York, Inc., New York, NY, *for*
20 *Appellant Ronnie Bernacet.*

21
22 MATTHEW L. SCHWARTZ, Assistant United States
23 Attorney (Iris Lan, Assistant United States
24 Attorney, *on the brief*), *for* Preet Bharara,
25 United States Attorney for the Southern
26 District of New York, New York, NY, *for*
27 *Appellee United States of America.*

28
29
30
31 WESLEY, *Circuit Judge:*

32
33 Ronnie Bernacet appeals from a judgment of conviction
34 entered against him in the United States District Court for
35 the Southern District of New York (Laura Taylor Swain,
36 *Judge*) following a one-day bench trial on October 25, 2011.
37 Bernacet was convicted of one count of possessing a firearm
38 following a conviction for a felony, in violation of 18

1 U.S.C. § 922(g)(1). The district court sentenced Bernacet
2 to 57 months' imprisonment and three years' supervised
3 release.

4 Bernacet asserts that (1) the use of a criminal history
5 database search at a routine traffic checkpoint rendered the
6 stop an unconstitutional seizure of his person; (2) the
7 police lacked probable cause to believe that he was
8 violating his parole; and (3) warrantless arrests for parole
9 violations are unconstitutional in New York. We disagree
10 and find that: (1) the criminal history database search was
11 a *de minimis* extension of the constitutional traffic
12 checkpoint; (2) the police had probable cause to believe
13 that Bernacet was violating his parole; and (3) Bernacet's
14 arrest was constitutional, notwithstanding state laws
15 prohibiting officers from arresting parole violators without
16 a warrant in the absence of a crime or offense. We
17 therefore affirm the judgment of the district court.

18 19 **Background**

20 On October 5, 2010, New York Police Department ("NYPD")
21 officers conducting a two-hour scheduled traffic-safety
22 vehicle checkpoint in the Bronx stopped motorists to check

1 their driver's licenses and vehicle registrations. They
2 collected licenses from only the drivers and ran each
3 driver's license through NYPD's "FINEST" system using a
4 mobile device terminal ("MDT") in the squad car. This
5 "generate[d] a report from the New York Statewide Police
6 Information Network ('NYSPIN'), which includes data from
7 multiple sources, including" Federal Bureau of Investigation
8 ("FBI") databases, New York State law enforcement records,
9 and New York Department of Motor Vehicle ("DMV") records.
10 Callahan Dec. "An officer cannot . . . elect to run a
11 FINEST search from an MDT through some but not all of these
12 databases." *Id.* It typically took less than one minute to
13 run each of the license checks conducted at the stop. *Id.*
14 Officer Patrick Callahan, who had conducted "approximately
15 100 vehicle safety checkpoints at that location" during his
16 22 years with the NYPD, ran licenses through the FINEST
17 system. *Id.* The checkpoint resulted in two felony arrests,
18 including Bernacet's.

19 Bernacet pulled up to the checkpoint at approximately
20 11:45 p.m. He gave his driver's license to Officer Ramon
21 Garcia, who passed it to Callahan. When he ran Bernacet's
22 license, Callahan noticed that Bernacet was on parole.

1 Knowing that parolees in New York customarily have 9:00 p.m.
2 curfews, he instructed Garcia to "check it out." *Id.*
3 Garcia confronted Bernacet about his suspected parole
4 violation. Garcia contends that Bernacet replied that "he
5 forgot and was sorry." Garcia Dec. Bernacet "has claimed
6 variously that he replied, 'What, I'm on violation of
7 parole?' and 'I don't have a curfew my parole officer know I
8 am here [sic].'" *United States v. Bernacet*, No. 11-cr-
9 00107-LTS, 2011 U.S. Dist. LEXIS 101258, at *3 (S.D.N.Y.
10 Sept. 7, 2011) (citations omitted).

11 Garcia asked Bernacet to step out of the car. Garcia
12 maintains that he then saw a handgun protruding from
13 Bernacet's pocket; Bernacet alleges that the firearm was not
14 discovered until Garcia frisked him. *Id.* Garcia then
15 arrested Bernacet. A frisk incident to the arrest revealed
16 a gravity knife in addition to the loaded, .25-caliber Armi-
17 Galesi-Brescia semi-automatic pistol. After receiving his
18 *Miranda* warnings, Bernacet made several incriminating
19 statements. *Id.*

20

21

Discussion

22 Bernacet contends that the officers (1) should not have
23 searched law enforcement databases at a traffic safety

1 checkpoint, (2) did not have probable cause to believe that
2 he was violating his parole, and (3) were not authorized
3 under state law to arrest him for a parole violation, and
4 that therefore his arrest was unconstitutional. Success on
5 any of these claims would require suppression of the handgun
6 and incriminating statements Bernacet made pursuant to his
7 arrest. We hold that the NYSPIN search was reasonable; the
8 officers had probable cause to believe that Bernacet was
9 violating his parole; and his warrantless arrest was not
10 unconstitutional. The district court's decision to admit
11 the handgun and Bernacet's incriminating statements was
12 therefore proper. Accordingly, we affirm Bernacet's
13 conviction.

14 **I. Use of Drivers' Licenses to Search Law Enforcement**
15 **Databases at the Traffic Stop Was Reasonable**
16

17 Bernacet does not challenge the legality of the traffic
18 stop itself, and he does not argue that the search of law
19 enforcement databases unconstitutionally infringed his
20 privacy interests.¹ Rather, he contends that the NYPD's

¹ We construe Bernacet's challenge as related to the constitutionality of the law enforcement database search during an otherwise constitutional traffic stop, which "effectuate[d] a seizure within the meaning of the Fourth Amendment." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). Insofar as he intends to challenge the use of the NYSPIN database as a search, and not because it prolonged the seizure, this claim is devoid of merit. "[T]he government's matching of a lawfully obtained identification record against other records in its lawful

1 search of law enforcement databases at a traffic stop was
2 constitutionally unreasonable because it was not closely
3 related to the purpose of the checkpoint. In light of the
4 *de minimis* intrusion on motorists that was imposed by the
5 law enforcement database search, the traffic stop as
6 conducted was constitutional.

7 **A. The Government's Interests Outweighed the Drivers'**
8 **Interests in This Fixed, Traffic-Safety Checkpoint**

9 The Supreme Court has endorsed the government's
10 interest in conducting a fixed checkpoint to monitor traffic
11 safety as a benefit that outweighs drivers' privacy
12 interests. In *Delaware v. Prouse*, 440 U.S. 648, 663 (1979),
13 the Court struck down roving stops of automobiles without
14 any particularized suspicion. However, the Court suggested
15 that "[q]uestioning of all oncoming traffic at roadblock-
16 type stops" was a lawful alternative method to provide for
17 traffic safety. *Id.* In *City of Indianapolis v. Edmond*, 531
18 U.S. 32, 47 (2000), the Court struck down drug interdiction
19 checkpoints while noting that its holding "d[id] nothing to
20 alter the constitutional status of . . . the type of traffic

possession does not infringe on an individual's legitimate
expectation of privacy." *Boroian v. Mueller*, 616 F.3d 60, 67
(1st Cir. 2010) (collecting cases). Police officers are
permitted to look up anyone's parole status at any time; the only
intrusion into privacy interests here was the requirement that
motorists wait while the police did so.

1 [safety] checkpoint that we suggested would be lawful in
2 *Prouse*."

3 In this case, the traffic safety checkpoint was
4 conducted at an "accident prone location in the impact
5 zone," and officers processed 49 cars in two hours. Vehicle
6 Checkpoint Form.² The waiting times that each car
7 experienced are fairly characterized as "brief" and "no more
8 onerous than [delays] that typically accompany normal
9 traffic congestion." *Illinois v. Lidster*, 540 U.S. 419, 426
10 (2004); see also *Mich. Dep't of State Police v. Sitz*, 496
11 U.S. 444, 452 (1990)(stating that the "'objective'
12 intrusion" on motorists subjected to checkpoint stops is
13 "measured by the duration of the seizure and the intensity
14 of the investigation"). This traffic safety checkpoint was
15 thus lawful, and is not on its own challenged by Bernacet.

16 **B. Gathering Additional Information Did Not Make the**
17 **Stop Unconstitutional**

18 Bernacet argues, however, that the addition of law
19 enforcement database searches renders unconstitutional the
20 otherwise lawful traffic checkpoint. The search of the
21

² We note that the record on appeal seems to indicate that 65 NYSPIN checks took place (from 10:22 p.m. to 11:59 p.m.), 49 vehicles were pulled over, and no passengers' records were searched.

1 NYSPIIN databases took approximately one minute per motorist;
2 of that one minute, some portion was consumed by the search
3 of DMV records.³ Dist. Ct. Doc. 20-4. The fact that
4 "ordinary criminal wrongdoing," *Edmond*, 531 U.S. at 38, was
5 uncovered in the course of an otherwise lawful checkpoint
6 designed for a permissible purpose does not invalidate the
7 checkpoint or the arrest. *Lidster*, 540 U.S. at 423. The
8 police encountered information suggesting that a parole
9 violation was ongoing; the Fourth Amendment did not require
10 them to ignore this information merely because the officers'
11 primary focus was on traffic safety. "The law does not
12 require the police to ignore evidence of other crimes in
13 conducting legitimate roadblocks." *United States v. Lopez*,
14 777 F.2d 543, 547 (10th Cir. 1985); see also *United States*
15 *v. Morales*, 788 F.2d 883, 886 (2d Cir. 1986).

16 The duration of the stop was not significantly
17 increased by the fact that the MDTs search multiple
18 databases, including law enforcement databases. Although
19 our decision in *United States v. Harrison*, 606 F.3d 42 (2d
20 Cir. 2010), related to traffic stops instead of checkpoints,

³ Although it is difficult to discern the duration of each search, the record reflects, for example, that from 11:23 p.m. to 11:29 p.m. Callahan ran eleven separate license checks through the MDT. Dist. Ct. Doc. 20-4.

1 it applies with equal force in this context, where the
2 initial stop is not challenged. In *Harrison*, we wrote that
3 "an officer's inquiries into matters unrelated to the
4 justification for the traffic stop . . . do not convert the
5 encounter into something other than a lawful seizure, so
6 long as those inquiries do not measurably extend the
7 duration of the stop." *Id.* at 45 (internal quotation marks
8 and alteration omitted); see also *Lidster*, 540 U.S. at 427-
9 28.

10 Finally, we note that Bernacet does not argue that the
11 checkpoint was illegal in itself or that the stated purpose
12 of protecting traffic safety in an accident prone location
13 was pretextual. He argues, instead, that it was improper
14 for the police, at a lawfully conducted traffic safety
15 checkpoint, to search for parole status in addition to DMV
16 records. If he were able to establish that the checkpoint
17 was actually conducted for basic crime control purposes and
18 not for vehicle safety reasons, then we would likely find
19 the checkpoint unconstitutional. *Edmond*, 531 U.S. at 41.

20 **II. Officers Had Probable Cause to Believe that**
21 **Bernacet Was Violating His Parole**

22
23 Bernacet contends that the officers lacked probable
24 cause to believe that he was violating his parole because

1 they had no evidence that he had a curfew as a condition of
2 his parole. Bernacet points out that, although he did have
3 a 9:00 p.m. curfew, curfews are not a mandatory condition of
4 parole in New York State. N.Y. State Parole Handbook 2010
5 at 21-22. He avers that it was unreasonable for the police
6 to assume that he had a 9:00 curfew as a condition of his
7 parole. We disagree.

8 Callahan had probable cause if "the facts and
9 circumstances within [his] knowledge and of which he had
10 reasonably trustworthy information were sufficient to
11 warrant a prudent man in believing that" Bernacet was
12 committing a parole violation.⁴ *Amore v. Novarro*, 624 F.3d
13 522, 536 (2d Cir. 2010) (alterations omitted) (quoting *Beck*

⁴ Insofar as Callahan had probable cause, it transferred to Garcia when Callahan told him that Bernacet was violating his curfew. We do not rely on Bernacet's response when Garcia confronted him regarding his parole violation, though it may have contributed to Garcia's probable cause calculation. Garcia reported that Bernacet apologized for the violation; Bernacet has provided different and inconsistent versions of his reply. *United States v. Bernacet*, No. 11-cr-107-LTS, 2011 U.S. Dist. LEXIS 101258, at *3 (S.D.N.Y. Sept. 7, 2011). We are puzzled as to why the district court declined to make a factual finding as to Bernacet's response. *Id.* at *2-3.

Similarly, the district court declined to credit either Garcia's "claims that a gun was visibly protruding from [Bernacet's] back pocket" or Bernacet's assertion "that his back pockets were deep enough that the gun was not visible" until he was frisked. *Id.* at *3. We assume for purposes of this appeal that Garcia could not rely on the visibility of the handgun to establish probable cause.

1 v. *Ohio*, 379 U.S. 89, 91 (1964)). The district court
2 appears to have based its holding on the facts that Callahan
3 "knew that [Bernacet] was on parole. He knew that parolees
4 are customarily subject to 9:00 p.m. curfew as a condition
5 of their parole. He also knew that, when [Bernacet] was
6 stopped at the checkpoint, the time was approximately 11:30
7 p.m." *Bernacet*, 2011 U.S. Dist. LEXIS 101258, at *7.

8 Bernacet argues that there was no probable cause
9 because (1) curfew is not a mandatory condition of parole
10 and (2) the NYSPIN search result screenshot submitted to the
11 court did not contain information related to the terms of
12 Bernacet's parole. Otherwise, Bernacet "has not challenged
13 the reasonableness of Officer Callahan's belief, established
14 over the course of 20 [sic] years of experience, that a 9:00
15 p.m. curfew is customarily imposed on parolees." *Id.*
16 Although he had the opportunity, Bernacet declined to cross-
17 examine Callahan about his affidavit. Callahan's affidavit
18 is the only evidence on the record regarding the likelihood
19 that a New York parolee had a 9:00 p.m. curfew.

20 We read Callahan's affidavit to suggest that a high
21 percentage of New York parolees have 9:00 p.m. curfews. No
22 evidence adduced at the suppression hearing suggests

1 otherwise. Callahan's 22-year NYPD experience that "New
2 York parolees customarily have a curfew [of] 9:00 p.m.,"
3 Callahan Dec., which Bernacet declined to challenge given
4 the opportunity, constitutes "reasonably trustworthy
5 information . . . sufficient to warrant a prudent man in
6 believing" that such a curfew existed in this case. *Amore*,
7 624 F.3d at 536. The report from the NYSPIN database firmly
8 established Bernacet's parole status and his presence on the
9 road shortly before midnight established that he was
10 breaking a 9:00 p.m. curfew if he had one. Taken together,
11 this evidence was sufficient to provide Callahan with
12 probable cause to believe that Bernacet was violating his
13 parole.

14 **III. Illegal Warrantless Arrests for Parole Violations**
15 **Are not Unconstitutional Seizures**

16
17 Bernacet contends that the fruits of a search incident
18 to a warrantless arrest for a parole violation are
19 inadmissible because New York has forbidden warrantless
20 arrests for parole violations that are not independently
21 crimes or offenses. We agree that Bernacet's arrest was
22 illegal under New York law but conclude that it was
23 constitutionally permissible. The exclusionary rule
24 therefore does not apply.

1 **A. New York Law Prohibited Bernacet's Warrantless**
2 **Arrest for Violating His Curfew**

3
4 The district court determined that Bernacet's arrest
5 was permissible under New York law. Bernacet, citing *People*
6 *v. Bratton*, 8 N.Y.3d 637 (2007), contends that the district
7 court erred. We agree that *Bratton* extends to arrests by
8 police officers and that Bernacet's arrest was therefore
9 unlawful under New York law.

10 In *Bratton*, the New York Court of Appeals held that
11 warrantless arrests by parole officers for parole violations
12 committed in their presence violate New York law if the
13 parole violation does not otherwise constitute a crime or
14 offense. *Id.* at 641. Bratton, an Ithaca-based parolee,
15 refused to permit two parole officers to enter his apartment
16 to obtain a sample for a urinalysis test. *Id.* at 639.
17 Bratton attempted to leave; the parole officers arrested
18 him. *Id.* at 639-40. Relying heavily on the legislative
19 history of the New York statutes permitting parole officers
20 to make arrests, the Court of Appeals held that there was "a
21 considered legislative choice" constricting the warrantless
22 arrest authority of parole officers in New York. *Id.* at
23 640-643. The Court of Appeals held that refusal of
24 urinalysis was "not an offense within the meaning of section

1 10.00(1) of the [N.Y.] Penal Law . . . that would
2 independently justify a peace officer in making a
3 warrantless arrest if committed in his presence." *Id.* at
4 643. Bratton's custody was therefore unlawful and his
5 charge of resisting arrest was dismissed. *Id.* at 641.

6 Seeking to distinguish *Bratton*, the district court
7 relied on its view that the statute authorizing parole
8 officers to make warrantless arrests differs from that
9 authorizing police officers to make warrantless arrests.
10 *Bernacet*, 2011 U.S. Dist. LEXIS 101258, at *9. However,
11 "[t]he rules governing the manner in which a peace officer
12 may make an arrest, pursuant to section 140.25, are the same
13 as those governing arrests by police officers, as prescribed
14 in section[s] 140.15 [and 140.10]." CPL N.Y. 140.27(1).
15 The statutes conferring warrantless arrest authority on
16 parole and police officers are identically worded:⁵ a police
17 officer or a parole officer "may arrest a person for [a]ny
18 offense when he has [probable] cause to believe that such
19 person has committed such offense in his presence." CPL
20 N.Y. 140.25(1)(a), 140.10(1)(a).

⁵ The only textual difference between the statutes is that CPL N.Y. 140.10(1)(a) permits a police officer to make an arrest when "he **or she**" has probable cause.

1 The authority to make a warrantless arrest for parole
2 and police officers alike relies on New York's definition of
3 an "offense." See *Bratton*, 8 N.Y.3d at 643 (reading
4 "offense" in CPL N.Y. 140.25(1)(a) to refer to N.Y. Penal L.
5 § 10.00(1)). The *Bratton* Court held that the only parole
6 violations that are "offenses" for the purpose of this
7 statute are those that "would independently justify" a
8 warrantless arrest even if they were not a violation of
9 parole. *Id.* Staying out later than 9:00 p.m. does not
10 qualify. Bernacet's arrest for his curfew violation was not
11 authorized by New York law.

12 **B. Bernacet's Arrest Was Constitutionally Permissible**

13 But, not every arrest that is illegal under state law
14 violates the United States Constitution. See, e.g., *United*
15 *States v. Wilson*, 699 F.3d 235, 244 (2d Cir. 2012). In
16 *Whren v. United States*, 517 U.S. 806, 815 (1996), the
17 Supreme Court held that plainclothes police officers were
18 constitutionally authorized to seize a vehicle and its
19 occupants based on probable cause that the driver had
20 committed a relatively minor traffic infraction,
21 notwithstanding state regulations that permitted such
22 officers to enforce traffic laws "only in the case of a

1 violation that is so grave as to pose an *immediate threat* to
2 the safety of others." *Id.* (internal quotation marks
3 omitted, emphasis retained). The Court wrote, "[P]olice
4 enforcement practices, even if they could be practicably
5 assessed by a judge, vary from place to place and from time
6 to time. We cannot accept that the search and seizure
7 protections of the Fourth Amendment are so variable, and can
8 be made to turn on such trivialities." *Id.* (internal
9 citation omitted).

10 Based in part on this reasoning, in *Virginia v. Moore*,
11 553 U.S. 164, 167 (2008), the Supreme Court upheld the
12 arrest of a driver for driving on a suspended driver's
13 license, despite Virginia laws requiring the officers to
14 issue a summons instead of making an arrest when handling
15 such an infraction. The Court held that "an arrest based on
16 probable cause but prohibited by state law" is
17 constitutional. *Id.* at 166. Bernacet maintains that *Moore*
18 does not apply to parole violations because not all such
19 violations are defined as "crimes" or "offenses" under New
20 York law, and further that parole violations should be
21 treated differently, as a constitutional matter, from other
22 types of infractions. Neither argument is persuasive.

1 **1. Moore Applies to Arrests for Parole Violations**

2 Bernacete asks us to hold that *Moore* applies to
3 "crimes," "offenses," and "violations," but not to parole
4 violations, which he asserts, are not all "offenses" or
5 "crimes" under state law. He points to several cases that
6 use various terms to categorize the types of infractions
7 that support a constitutionally valid arrest.⁶ Aside from
8 semantics, however, he does not identify a basis to
9 distinguish parole violations from other relatively minor
10 infractions that the Supreme Court has held can
11 constitutionally support an arrest. These include minor
12 misdemeanors and traffic offenses. For example, in *Atwater*
13 *v. City of Lago Vista*, 532 U.S. 318, 323 (2001), the Court
14 held that the Fourth Amendment does not forbid "a
15 warrantless arrest for a minor criminal offense, such as a
16 misdemeanor seatbelt violation punishable only by a fine."
17 *See also Moore*, 553 U.S. at 167 (for driving on a suspended
18 license).

⁶ Bernacete directs us to, *inter alia*, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (permitting warrantless arrests "where there is probable cause to believe that a **criminal offense** has been or is being committed") (emphasis added); *Marcavage v. City of New York*, 689 F.3d 98, 109 (2d Cir. 2012)(same for an "**offense**") (emphasis added); *United States v. Delossantos*, 536 F.3d 155, 158 (2d Cir. 2008) (same for "a **crime**") (emphasis added).

1 It is true that state *substantive* criminal law can
2 render an arrest unconstitutional by altering the legal
3 status of the underlying conduct. For example, in New York
4 police may constitutionally arrest a 21-year-old man based
5 on probable cause to believe he has had sexual intercourse
6 with a 16-year-old. See N.Y. Penal Law § 130.25. However,
7 police could not constitutionally arrest the same 21-year-
8 old man based on the same suspicions in Connecticut (where
9 the age of consent is 16. Conn. Gen. Stat. § 53a-71(a)(1)).

10 However, the Fourth Amendment does not incorporate
11 state *procedural* criminal law. “[W]hile States are free to
12 regulate [warrantless] arrests however they desire, state
13 restrictions do not alter the Fourth Amendment’s
14 protections.” *Moore*, 553 U.S. at 176. The legality of
15 warrantless arrests for parole violations “var[ies] from
16 place to place and from time to time,” *id.* at 172 (internal
17 quotation marks omitted). In fact, even New York permitted
18 such arrests before 1977. See *Bratton*, 8 N.Y.3d at 642-43.
19 “Fourth Amendment protections are not ‘so variable.’”
20 *Moore*, 553 U.S. at 172 (quoting *Whren*, 517 U.S. at 815).

21 Under New York law, parole violations are not
22 “offenses” or “crimes” for the purpose of determining

1 whether officers are authorized to make a warrantless arrest
2 of a person violating his parole. But this limitation on
3 the power to arrest does not mean that violating parole does
4 not implicate New York substantive law. The legality of
5 Bernacet's arrest at New York law therefore does not end, or
6 even inform, the constitutional inquiry. "Read together,
7 *Moore* and *Whren* stand for the proposition that the Fourth
8 Amendment does not generally incorporate local statutory or
9 regulatory restrictions on seizures and that the violation
10 of such restrictions will not generally affect the
11 constitutionality of a seizure supported by probable cause."
12 *Wilson*, 699 F.3d at 243. Bernacet's claim is of a
13 constitutional dimension; it cannot be measured with a state
14 law ruler.

15 **2. Bernacet's Parole Violation Provided a**
16 **Reasonable Ground for Arrest**

17
18 Bernacet further contends that parole violations have a
19 special status that takes them outside the ambit of *Moore*.
20 We disagree.

21 First, even New York courts do not interpret *Bratton* as
22 speaking to the constitutional validity of a warrantless
23 arrest of a parole violator. For example, custody that is
24 illegal solely because it is premised on an improper

1 warrantless arrest does not necessarily provide grounds for
2 habeas relief: that custody may violate state law, but it is
3 not unconstitutional. *People ex rel. Rouse v. N.Y. State*
4 *Div. of Parole*, 864 N.Y.S.2d 230, 235-36 (Sup. Ct. Bronx
5 Cnty. July 25, 2008). Furthermore, before *Bratton*, the New
6 York Appellate Division "focus[ed] . . . on the narrow
7 question of whether a violation of the statute requiring the
8 issuance of a parole violation warrant . . . require[d]
9 suppression . . . [and] conclude[d] that it does not."⁷
10 *People v. Dyla*, 142 A.D.2d 423, 439 (2d Dep't 1988).
11 "[N]either the Federal nor the State Constitutions,
12 according to their language and history, require the
13 suppression of evidence gathered as a result of a 'seizure'
14 which is not 'unreasonable' and hence not unconstitutional,
15 solely on the grounds that the seizure may be considered
16 violative of some State statute, ordinance or regulation."⁸

⁷ *Dyla* is compatible with and survives *Bratton*; the Appellate Division expressly "d[id] not decide[] whether a violation of parole constitutes an 'offense' (see[] Penal Law § 10.00[1]) so that the warrantless arrest may be validated on this basis." *People v. Dyla*, 142 A.D.2d 423, 434 n.3 (2d Dep't 1988).

⁸ Other state courts have similarly resolved the question at issue in *Dyla*. In *People v. Weathers*, the Appellate Court of Illinois upheld the warrantless arrest of a parolee for a curfew violation, finding such arrests lawful in Illinois (and presumptively constitutional); the court rejected her claim that

1 *Id.* at 434 (citations omitted).

2 Second, New York has previously permitted warrantless
3 arrests for all parole violations, suggesting that such
4 arrests pose no inherent constitutional dilemma. Before
5 1978, “[i]n any case where a parole officer ha[d] [probable]
6 cause to believe that [a] parolee ha[d] violated the
7 conditions of his parole in an important respect, such
8 parole officer [could] retake such parolee and cause him to
9 be temporarily detained without a warrant.” Former N.Y.
10 Correct. L. §§ 216, 829(3) (both repealed 1978).⁹ *Bratton*
11 acknowledges that “an exception to the warrant requirement
12 for those violations taking place in a parole officer’s
13 presence [might] make sense,” 8 N.Y.3d at 641, but notes
14 that there was “a considered legislative choice” to forbid
15 this authority. *Id.* at 642. The legislation has changed
16 since 1978, but the constitutional analysis has not.

the fruits of the search incident to her arrest should be excluded. 40 Ill. App. 3d 211, 213-14 (1976). In *Medlock v. State*, the Court of Appeals of Arkansas held that a warrantless arrest of a parolee, though illegal, was supported by probable cause and denied a motion to suppress. 79 Ark. App. 447, 461-62 (Div. IV 2002), *aff’d* by No. CR-03-839, 2004 WL 2191165 (Ark. Sept. 30, 2004) (*per curiam*). Neither court found a Fourth Amendment problem with arrests supported by probable cause that a parole violation occurred. The constitutionality of warrantless arrests for parole violations does not vary by state. *Moore*, 553 U.S. at 176.

⁹ A similar rule still exists for probationers. See CPL N.Y. 410.50(4).

1 Third, parole violations are not inherently less
2 serious than other minor offenses for which the Fourth
3 Amendment permits warrantless arrests. The Supreme Court
4 has held that warrantless arrests are lawful, for example,
5 in the case of a mother arrested in front of her children
6 for driving without a seatbelt (among other minor
7 infractions), *Atwater*, 532 U.S. at 323-24; for impersonating
8 a police officer when helping a motorist change a tire,
9 *Devenpeck v. Alford*, 543 U.S. 146, 148-49 (2004); for
10 driving with a suspended license, *Moore*, 553 U.S. at 166;
11 and for speeding, *Arkansas v. Sullivan*, 532 U.S. 769, 769
12 (2001) (*per curiam*).

13 While violating a curfew imposed as a condition of
14 parole is not the gravest of offenses, it is no less
15 reasonable a ground for detention. Indeed, although an
16 offense need not lawfully result in a custodial sentence for
17 it to serve as a basis for a constitutional arrest,
18 *Sullivan*, 532 U.S. at 771; *Atwater*, 532 U.S. at 348-50,
19 under New York law, a parole violation is a lawful ground
20 for a parolee's arrest and incarceration, reflecting the
21 gravity that the State accords the offense. See N.Y. Exec.
22 L. § 259-i(3). Without defining the limits of *Moore*, we

1 conclude that probable cause regarding a violation that, if
2 proven, could result in the loss of liberty provides
3 sufficient grounds for a constitutional warrantless arrest.

4 Bernacety's arrest was constitutionally permissible; the
5 fruits of the search incident to his arrest were therefore
6 properly admitted. *Sullivan*, 532 U.S. at 771.¹⁰

8 **Conclusion**

9 Bernacety's checkpoint stop was legal and the NYPD had
10 probable cause to believe that he was violating his parole.
11 His arrest by the police staffing the checkpoint, while
12 contrary to New York law, was constitutionally reasonable.
13 The search incident to his arrest uncovered a handgun;
14 because the arrest was constitutionally proper, this weapon
15 was properly admitted at Bernacety's trial.

¹⁰ We note, of course, that nothing restricts the authority of the States to "accord protection against arrest beyond what the Fourth Amendment requires." *Virginia v. Moore*, 553 U.S. 164, 180 (2008) (Ginsburg, J., concurring). The Supreme Court has expressed a preference for statutory, rather than constitutional, limitations on the arrest power. "It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001). States are free to develop their own remedies for illegal arrests as well; however, suppression under the Fourth Amendment is available only for constitutional violations.

1 For the foregoing reasons, the opinion and order of the
2 district court is **AFFIRMED.**