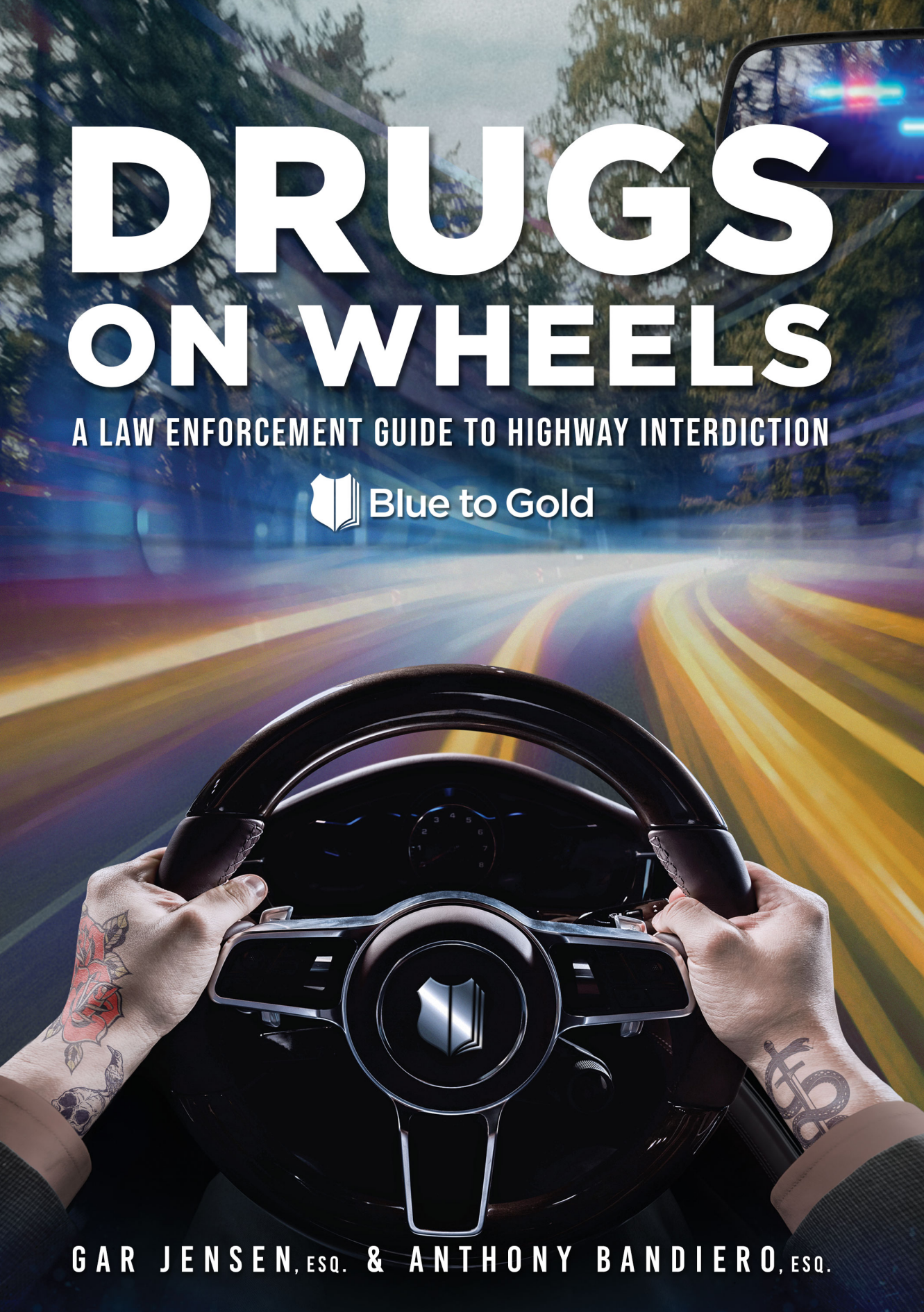
DRUGS
ON WHEELS
A LAW ENFORCEMENT GUIDE TO HIGHWAY INTERDICTION
Blue to Gold
GAR JENSEN, ESQ. & ANTHONY BANDIERO, ESQ.

Drugs on Wheels

A LAW ENFORCEMENT GUIDE TO HIGHWAY INTERDICTION

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Note: This is a general overview of the classical and current United States court decisions related to search and seizure, liability, and confessions. As an overview, it should be used for a basic analysis of the general principles but not as a comprehensive presentation of the entire body of law. It is not to be used as a substitute for the opinion or advice of the appropriate legal counsel from the reader’s department. To the extent possible, the information is current. However, very recent statutory and case law developments may not be covered.

Additionally, readers should be aware that all citations in this book are meant to give the reader the necessary information to find the relevant case. Case citations do not comply with court requirements and intentionally omit additional information such as pin cites, internal citations, and subsequent case developments. The citations are intended for police officers. Lawyers must conduct due diligence and read the case completely and cite appropriately

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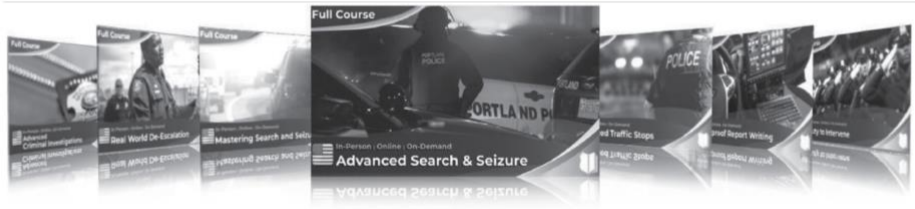

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Table of Contents

Chapter One: Police-Citizen Encounter

Overview

There are three levels of police-citizen encounters, a *consensual encounter*, an *investigative detention*, and an *arrest*. A routine traffic stop, which then develops into a drug seizure, will often contain all three types of the police-citizen encounters (i.e., consent to search). Each encounter, as it interacts with the Fourth Amendment, is viewed differently by the courts. Furthermore, the degree of suspected criminal activity varies with each encounter. Therefore, it is important for peace officers engaged in the detection of drug trafficking to understand how the courts classify and view each of the three types of police-citizen encounters.

In *Wilson v. Superior Court*, the California Supreme Court aptly described these three encounters and stated, "For purposes of Fourth Amendment analysis, there are three levels of police interactions with individuals. First are 'consensual encounters,' which result in no restraint of an individual's liberty and can be initiated by police even if they lack any 'objective justification.' Second are 'detentions,' limited in duration, scope, and purpose, and allowed if the police have an articulable suspicion of a crime. Third are seizures that exceed a detention, including formal arrest, which are only permissible if the police have probable cause to arrest the individual for a crime."[1]

In *United States v. Werking*, the Tenth Circuit further elaborated on these encounters between police and civilians. The first encounter, *"a consensual encounter*, involves a citizen's voluntary cooperation with an official's non-coercive questioning. A consensual encounter is not a seizure within the meaning of the fourth amendment."[2]

" The second, *an investigative detention* or '*Terry* stop,' is a seizure within the scope of the fourth amendment that is justified when specific and articulable facts and rational inferences drawn from those facts give rise to a reasonable suspicion a person has or is committing a crime." [3]

"The third category, *an arrest*, is also a fourth amendment seizure that is characterized by a highly intrusive or lengthy detention and requires probable cause the arrestee has or is committing crime."[4]

This book will help explain how to legally navigate each encounter.

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[1] *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784 (Emphasis added) (internal citations omitted)
[2] *United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir. 1990) (Emphasis added)
[3] *Id.* at p. 1407 (Emphasis added)
[4] *Id.* at p. 1407 (Emphasis added)

Level One: Consensual Encounter

A consensual encounter is not a seizure within the meaning of the fourth amendment. The degree of criminal conduct to justify a consensual encounter between a peace officer and a citizen is "zero".[5]

In *United States v. Vera*, the Eighth Circuit discussed a case where a deputy sheriff pulled his patrol car next to a vehicle, which was parked at a rest stop. A person in the driver's seat of the parked car suddenly sat up and looked at the deputy. According to the deputy, he walked over to the vehicle "to make sure everything was all right and just to talk to him."[6] As he exited his patrol car, he noticed that another male was reclining in the passenger seat of the parked vehicle.

The driver of the car spoke only Spanish, however, but the passenger spoke English, and the deputy began to address him. The deputy then asked the passenger whether he "wouldn't mind stepping out so I can talk to him for a few minutes." The passenger responded, "yeah," exited the car, and walked to the front of the vehicle. The asked the asked if the passenger had a driver's license, and he produced it.

The deputy asked the passenger if he would mind having a seat in the patrol car while he looked at the license, that the passenger responded "yeah," and that the passenger then sat in the front passenger seat of the patrol car while the deputy sat in the driver's seat. The deputy inquired about the nature of the passenger's travels. The passenger indicated that he had been in Omaha visiting with an uncle, and that he and his father (the driver) were returning to California. The deputy asked why they were parked on the eastbound side of Interstate 80 if they were driving to California. The passenger replied that after an exit from the highway to purchase fuel and switch drivers, his father had mistakenly entered the highway on the wrong ramp. He said that rather than turn around, he and his father decided to sleep at the rest area. The deputy asked who owned the parked car, and after the passenger replied that he owned it. The deputy then returned the passenger's driver's license.

After talking to the passenger, the deputy felt that the "vagueness" and "inconsistencies" in the passenger's statements were consistent with what he might hear from drug smugglers, and he asked the passenger whether there were drugs, weapons, or large amounts of currency in the car. The passenger said that he had two or three hundred dollars, and no drugs or weapons.

Immediately after the deputy returned passenger's license, the passenger handed his car keys to the deputy, without being asked. The passenger then said, "You can look if you want to." The deputy then asked the passenger if he was giving permission to search the vehicle. The passenger said, "Yeah."

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[5] *United States v. Williams*, 945 F.2d 192, 195 (7th. Cir. 1991)

[6] *United States v. Vera*, 457 F.3d 831 (8th Cir. 2006), cert. denied 549 U.S. 1230

The deputy then approached the vehicle and told the driver to get out of the car and stand nearby. The deputy then searched the vehicle and found ten kilo-sized packages of cocaine hidden within a false compartment in the back seat. At one point during the search, the passenger attempted to get out of the patrol car; however, the deputy told him to get back inside the car.

The Eight Circuit Court of Appeals focuses the appeal "on whether Vera was "seized" within the meaning of the Fourth Amendment before he consented to the search of his vehicle. The parties agree that if the encounter between Deputy Maddux and Vera was consensual, then the search of Vera's vehicle based on his consent was reasonable." [7]

Concerning the encounter between the deputy sheriff and the passenger and the passenger's father, the Court of Appeals stated, "An authoritative order or command to exit a vehicle effects a seizure, while a request -- with its implication that the request may be refused -- gives "no indication" that consent is required." [8] The court when on to state that "Once it is recognized that there is a constitutionally significant distinction between an official command and a request that may be refused, the record demonstrates that Vera was not seized before he gave consent to search." [9]

The court found that there were no indicia of coercion. "Although Maddux had a holstered firearm, the officer did not brandish a weapon, and because the fact that "most law enforcement officers are armed is well known to the public," a holstered firearm is "unlikely to contribute to the coerciveness" of an encounter with police. The district court made much of the fact that Vera was not informed of his right to discontinue the questioning, but the absence of such advice does not create a presumption against consent, particularly when the citizen is presented with a request that he may decline. The district court also noted that Vera was asked "standard drug interdiction questions clearly designed to lead to a request or command to search" his vehicle, but even where officers openly announce in a confined area that they are conducting a narcotics interdiction effort, citizens have "no reason to believe that they [are] required to answer the officers' questions." The district court did not find that there was any application of force or physical contact, or that Maddux made any other intimidating movements. The facts found by the district court do not support the conclusion that a reasonable person would have believed that assent to Deputy Maddux's requests was required..." [10]

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[7] *Id.* at p. 834
[8] *Id.* at pp. 835-836 (internal citations omitted)
[9] *Id.* at pp. 835-836 (internal citations omitted)
[10] *Id.* at pp. 835-836 (internal citations omitted)

Here, the officer did a great job. The lesson here is to avoid saying or doing anything that may convey to an occupant that they are compelled to comply. Instead, the effective criminal interdiction officer is low-key and inquisitive.

Legal Checklist

A consensual encounter is lawful when:

- ☐ A reasonable person would believe he was free to leave or otherwise terminate the encounter. In other words, a reasonable person would have believed he was not detained or restrained.

Level Two: Investigative Detentions

An *investigative detention*, on the other hand, is a seizure within the scope of the fourth amendment. To justify an investigative detention, a peace officer must have specific and articulable facts from which the peace officer has a reasonable suspicion that a person has or is committing a crime.

As the United States Supreme Court held In *Alabama v. White,* the standard for reasonable suspicion is no particularly high. As the Court framed it, "*Reasonable suspicion is a less demanding standard than probable cause* not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that *reasonable suspicion can arise from information that is less reliable than that required to show probable cause*." [11]

In *United States v. Sokolow,* the United States Supreme Court further discussed the concept of "reasonable suspicion" and stated, "The Fourth Amendment requires 'some minimal level of objective justification' for making the stop. *That level* of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence."[12]

In *United States v. Arvizu*, the United States Supreme Court re-emphasized that reasonable suspicion to stop and detain an individual is to be governed by the totality of the circumstances. The Court also reminded reviewing courts that it was improper to engage in piece-meal, "divide-and-conquer analysis" of the factors relied upon by the officer in making his decision to stop and detain an individual. Additionally, the Court reminded reviewing courts that they must give proper weight to "factual inferences drawn by resident judges and local law enforcement officers" "in light of the District Courts' superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom."[13] The *Arvizu* Court reminded lower courts "they must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable

[11] *Alabama v. White*, 496 U.S. 325, 331 (1990) (emphasis added)
[12] *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (emphasis added) (internal citation removed)
[13] *United States v. Arvizu,* 534 U.S. 266, 277 (2002)

cause, and it falls considerably short of satisfying a preponderance of the evidence standard."[14]

While the Court re-emphasized the totality of the circumstances test, it also simultaneously chastised the Ninth Circuit Court of Appeals for sharply departing from the principles set forth by its prior decisions. The Supreme Court described it this way. "Respondent Ralph Arvizu was stopped by a border patrol agent while driving on an unpaved road in a remote area of southeastern Arizona. A search of his vehicle turned up more than 100 pounds of marijuana. The District Court for the District of Arizona denied respondents motion to suppress, but the Court of Appeals for the Ninth Circuit reversed. In the course of its opinion, it categorized certain factors relied upon by the District Court as simply out of bounds in deciding whether there was reasonable suspicion for the stop. We hold that the Court of Appeals' methodology was contrary to our prior decisions and that it reached the wrong result in this case."[15] Another loss for the notoriously wrong Ninth Circuit.

And the Court was not finished. Concerning the Ninth Circuit's divide-and-conquer analysis of each of the factors that the border agent considered, the Court stated, "We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The courts evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the totality of the circumstances, as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to no weight. Terry, however, precludes this sort of divide-and-conquer analysis. The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was perhaps innocent in itself, we held that, taken together, they warranted further investigation."[16]

In *United States v. Bell*, the Tenth Circuit discussed "reasonable suspicion" and reminded readers that this burden of proof "cannot be reduced to a neat set of legal rules, but rather, depends on the 'totality of the circumstances -- the whole picture.' ... *'That level of suspicion is considerably less than proof of wrongdoing by a preponderance of evidence."*[17] Therefore, "[t]emporary detentions for questioning may be justified if 'there is articulable suspicion that a person has committed or is about to commit a crime" and the purpose here is the public interest "*involved in the suppression of illegal transactions in drugs* or of any other serious crime.'" [18]

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[14] *Id.* at p. 267 (internal citations omitted)
[15] *Id.* at p. 275 (internal citations omitted)
[16] *Id*.
[17] *United States v. Bell*, 892 F.2d 959, 967 (10th Cir. 1989) (*cert. denied*, 496 U.S. 925) (Emphasis added) (internal citations omitted)
[18] *Id*. (Emphasis added) (internal citations omitted)

Additionally, in *United States v. Hooper*, the Second Circuit held that reasonable suspicion is not able to be precisely defined but is certainly more than a hunch. "To justify a *Terry* type detention, a law enforcement officer must have 'reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'....' The term 'reasonable suspicion' is not capable of a precise definition. It is clear, however, that 'an 'inchoate and unparticularized suspicion or hunch'' on the part of a law enforcement officer will not suffice to establish reasonable suspicion. Rather, *the officer must provide 'specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience*.' In making this determination, we consider the totality of the circumstances. Acts that considered in isolation are consistent with innocent travel, nevertheless, *when considered together*, may establish cause for further investigation.*"* [19]

In *United States v. Hawthorne*, the Eight Circuit held that the defendant was lawfully detained under reasonable suspicion. A police officer believed that the defendant matched indicia of a "drug courier profile". The court therefore sought to determine whether the investigative, Terry- type stop of Hawthorne and his bag was supported by a reasonable suspicion. The court focused on the totality of the circumstances, "In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. '[T]he totality of the circumstances -- *the whole picture* -- must be taken into account.'... We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating mode of criminals. It is not necessary that the behavior on which reasonable suspicion is grounded be suspectable only to an interpretation of guilt, however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a 'hunch' or on circumstances which 'describe a very broad category of predominantly innocent travelers.'" [20]

Courts around the country should be hesitant before discounting an officer's training and experience. In *United States v. Mendez*, the Tenth Circuit said, "We make our determination [as to whether the officer had reasonable suspicion to detain the defendant] with deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances, *id*., remembering that reasonable suspicion represents a 'minimum level of objective justification' which is 'considerably less than proof of wrongdoing by a preponderance of the evidence." [21]

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[19] *United States v. Hooper*, 935 F.2d 484, 493 (2nd Cir. 1991) (*cert. denied*, 502 U.S. 1015) (Emphasis added) (internal citations omitted)

[20] *United States v. Hawthorne*, 982 F.2d 1186, 1189 (8th Cir. 1992) (Emphasis added) (internal citations omitted)

[21] *United States v. Mendez*, 118 F.3d 1426, 1429 (10th Cir. 1997) (internal citations omitted)

In *People v. Glick,* the California Court of Appeals stated that officers don't need to be certain, just reasonable. "The touchstone inquiry in all Fourth Amendment cases is the reasonableness -- not certainty -- of the official's conduct."[22] The court continued to state that "The Fourth Amendment proscribes only '*unreasonable*' searches and seizures, and that proscription applies to investigative stops of vehicles as occurred here."[23] Finally, court reminded readers that "It is well established that circumstances short of probable cause may justify an investigative detention reasonably related in duration and scope to the circumstances which justified the intrusion in the first place."[24]

Legal Checklist

A suspect may be detained when:

- ☐ You can articulate facts and circumstances that would lead a reasonable officer to believe that the suspect has, is, or is about to be, involved in criminal activity;
- ☐ You use the minimal amount of force necessary to detain a cooperative suspect;
- ☐ Once the stop is made, you must diligently pursue a means of investigation that will confirm or dispel your suspicions;
- ☐ If your suspicions are dispelled, the person must be immediately released or the stop converted into a consensual encounter.

[22] *People v. Glick,* 203 Cal.App.3d 796, 800 (1988) (internal citations omitted)
[23] *Id.* at p. 801
[24] *Id.* at pp. 802-803

Level Three: Arrest

An *arrest* is a seizure within the scope of the fourth amendment. To justify an arrest, a peace officer must have probable cause that a person has committed or is committing a crime.

Probable cause exists when, at the moment an officer makes an arrest or conducts a search, "the facts and circumstances within [his] knowledge and of which [he has] reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant has] committed or was committing an offense."[25]

Probable cause is a practical, nontechnical concept to be determined upon the facts and circumstances of each case. It has also been defined as "having more evidence for than against ... evidence which inclines the mind to believe but leaves some room for doubt."[26]

The United Supreme Court described probable cause and explained, "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens' demands. ... In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal conduct."[27]

Probable cause is an objective, rather than a subjective standard. Therefore, it is immaterial whether an officer entertained a belief that probable cause existed (though they should). Instead, probable must exist when viewed objectively the officer's actions were reasonable under the Fourth Amendment.[28] As the United States Supreme Court held, "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."[29]

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[25] *Beck v. Ohio,* 379 U.S. 89, 91 (1964), quoted in *People v. Triggs* (1973) 8 Cal.3d 884, 894-895.)
[26] *People v. Ingle,* 53 Cal.2d 407, 412-413 (1960)
[27] *Illinois v. Gates*, 462 U.S. 213, 243, n. 13 (1983); *People v. Brown* (1990) 216 Cal.App.3d 1442, 1449-1450.) (Emphasis added)
[28] See *People v. Gonzales,* 216 Cal.App.3d 1185, 1190 (1989)
[29] *Scott v. United States,* 436 U.S. 128, 138, (1978)

Thus, the challenged action of an officer is to be measured "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[30]

Legal Checklist

A lawful arrest has three elements:

- ☐ You must have probable cause that a crime has been committed;
- ☐ You need legal authority to make the arrest; and
- ☐ You must have lawful access to the suspect.

There are two ways to effectuate an arrest:

- ☐ You may use any physical force with the intent to arrest; or
- ☐ You may make a show of authority sufficient to make a reasonable person believe he was under arrest.

[30] *Scott v. United States*, *supra*, *People v. Gonzales*, *supra.*

Chapter Two: Checkpoints

Overview

Police checkpoints have been a controversial topic for many years. Some people believe that they are an invasion of privacy and that they violate constitutional rights. Others believe that they are necessary to keep our roads safe and to prevent accidents. In this book, we will explore the legal history of police checkpoints, their legal status, and how to effectively utilize them.

For example, border checkpoints are an important tool for law enforcement agencies to prevent illegal immigration and drug trafficking. In this chapter, we will explore what border checkpoints are, how they work, and their effectiveness in reducing illegal immigration and drug trafficking. We will also examine the legal requirements for border checkpoints and your rights when you are stopped at one. Whether you are a law enforcement officer, a prosecutor, or simply someone who is interested in learning more about this important issue, this chapter is for you.

Driver's License and Vehicle Registration Checkpoints

In *Delaware v. Prouse*, the United States Supreme Court acknowledged the lawfulness of checkpoints for the enforcement of driver's license and vehicle registration laws. The Supreme Court stated, "[W]e hold that except in situations where there is reasonable suspicion that a motorist is unlicensed or an automobile is not registered, stopping and detaining the driver to check his driver's license and registration are unreasonable under the Fourth Amendment. This holding does not preclude states from developing methods for spot checks that involve less intrusion."[31]

In *City of Indianapolis v. Edmond*, the Supreme Court reiterated its holding in *Prouse* by stating,"It goes without saying that our holding today does nothing to alter the constitutional status ... of the type of traffic checkpoint that we suggested would be lawful in *Prouse*."[32]

In *United States v. Obregon*, the Tenth Circuit discussed a case where a vehicle was stopped at a roadblock established on the Interstate to conduct routine driver's license and vehicle registration checks. During the checkpoint the officer requested and obtained the defendant's consent to search the car. The search of the car revealed cocaine in a garment bag. The defendant contended that his detention was unlawful. The court disagreed and held "that Obregon's initial stop at the roadblock and subsequent detention were proper and lawful. It is uncontested that Obregon was stopped at the roadblock by Officer Faison for the routine purpose of checking Obregon's driver's license and car registration."[33]

Legal Checklist

A driver's license and vehicle registration checkpoint should consider the following:

- ☐ The decision to establish a checkpoint, the selection of the site, and the procedures for the operation of the checkpoint, are made and established by supervisory law enforcement personnel;

[31] *Delaware v. Prouse* 440 U.S. 648 (1979)
[32] *City of Indianapolis v. Edmond* 531 U.S. 32 (2000)
[33] *United States v. Obregon*, 748 F.2d 1371, 1376 (10th Cir. 1984)

- ☐ Motorists are stopped according to a neutral formula, such as every third, fifth or tenth driver;
- ☐ Adequate safety precautions are taken, such as proper lighting, warning signs, and signals, and clearly identifiable official vehicles and personnel;
- ☐ The location of the checkpoint was determined by a policy-making official, and was reasonable, i.e., on a road having a high incidence of unlicensed drivers;
- ☐ The time the checkpoint was conducted was reasonable and its duration reflect "good judgment" on the part of law enforcement officials;
- ☐ The checkpoint exhibits indicia of its official nature (to reassure the public of the authorized nature of the stop);
- ☐ The average length and nature of the detention is minimized; and finally,
- ☐ The checkpoint is preceded by publicity.

Narcotic Enforcement Checkpoint

In *City of Indianapolis v. Edmond*, the United States Supreme Court ruled on the constitutionality of a highway checkpoint program whose primary purpose was the discovery and interdiction of illegal narcotics. The Court noted that, "As petitioners concede, the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics." The Court held that, "[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."[34]

However, the Court was careful to note that it still approved of the use of various other checkpoints. The Court stated, "Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control."[35] For example, The United States Supreme Court stated "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."[36]

The Court also defended its prior holding in *Sitz,* where the DUI checkpoints were upheld. As the Court framed it, "It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety and border checkpoints that we approved in *Sitz.*[37]

Additionally, the Court appeared to take great pains in limiting its decision to prohibited "general crime" control-style checkpoints, not other narrowly tailored checkpoints with more compelling interests. As the Court stated, "Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control. Our holding also does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose. Finally, we caution that the purpose inquiry in this context is to be

[34] *City of Indianapolis v. Edmond* 531 U.S. 32, 40-42 (2000)
[35] *Id.* at p. 44
[36] *Id.* at p. 44
[37] *Id.* at pp. 47-48

conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."[38]

In *United States v. Yousif*, the Eighth Circuit held that a narcotic checkpoint, decided two years after *Edmonds*, was unlawful. In *Yousif*, the Missouri Highway Patrol (MHP) and the Phelps County Sheriff's Department set up a drug interdiction checkpoint, which was located at the end of an exit ramp leading uphill from eastbound Interstate Highway 44 ("I-44") to Sugar Tree Road. The Sugar Tree Road exit was chosen as a site for the checkpoint because law enforcement officers believed that I-44 was a commonly used route for transporting drugs, there was little use of the Sugar Tree Road exit for commercial or local traffic, and the end of the ramp was not visible from the highway. The checkpoint was governed by a set of standard procedures set forth in a memorandum issued by the MHP (hereinafter "the MHP memorandum"). Pursuant to the MHP memorandum, the following procedures were implemented. Approximately one-quarter mile west of the Sugar Tree Road exit, signs were placed on each shoulder of the road, stating: "Drug Enforcement Checkpoint 1/4 Mile Ahead." Further down the road, approximately 100 yards west of the Sugar Tree Road exit, more signs were placed alongside of the road, stating: "Drug Dogs in Use Ahead." The checkpoint was set up at the end of the Sugar Tree Road exit ramp, out of view from I-44. At least two fully marked MHP patrol cars were located at the checkpoint. When a vehicle would arrive at the checkpoint, at least one uniformed officer would approach the driver and ask for his or her driver's license, registration, and--if required by the state of registration--proof of insurance. The officer would also record the license plate number of the vehicle and ask the driver if he or she saw the signs and why he or she exited the highway. Upon perceiving any indication of illegal activity, the officer would question the driver further. If there were any reason to believe that the vehicle contained illegal drugs or other contraband, the officer would ask for consent to search the vehicle. If consent were denied, but the officer still had a reasonable suspicion of unlawful activity, the officer would ask the occupants to step out of the vehicle. The officer would then turn off the ignition and have a drug dog walk around the exterior of the vehicle. If the dog failed to alert, and the officer had no other reason to hold the vehicle and its occupants, they would be allowed to leave.

Shortly before 3:00 p.m., a MHP patrolman observed the defendant's SUV, with Oklahoma license plates, turn from I-44 onto the Sugar Tree Road exit ramp. The highway patrol officer was dressed in uniform and standing with other officers at the top of the ramp. A sign indicating the presence of a police checkpoint, as well as two MHP patrol cars, were clearly visible to the vehicle as it approached the end of the Sugar Tree Road exit ramp. The SUV slowed, coming nearly to a stop halfway up the ramp. The MHP patrolman waved his arm directing the defendant to proceed

[38] *Id.* at pp. 47-48

forward. After the SUV stopped at the checkpoint, the patrolman and two other officers approached the vehicle.[39]

In deciding the legality of this checkpoint, the court held, "The Sugar Tree Road checkpoint program, as it was operated in the present case, similarly violated the Fourth Amendment insofar as its primary purpose was the interdiction of drug trafficking (which the government concedes) and the officers operating the Sugar Tree Road checkpoint were under instructions to stop *every* vehicle that took the Sugar Tree Road exit." [40] Readers should note that this checkpoint was not a lawful "ruse" checkpoint that will be discussed later. Instead, this checkpoint was more akin to *Edmonds*. As the court described it, "While the checkpoint at issue in the present case differs from the checkpoint at issue in *Edmond* in that the MHP used signs to suggest to drivers that taking the Sugar Tree Road exit was a way to *avoid* a police checkpoint, the mere fact that some vehicles took the exit under such circumstances does not, in our opinion, create individualized reasonable suspicion of illegal activity as to every one of them."[41]

In *United States v. William*, the First Circuit held that a New Hampshire driver, who was arrested at a sobriety checkpoint after he rolled down his window and the officer smelled marijuana and noticed the defendant's eyes were glassy and blood shot. The court noted that the key issue "rests solely on the lawfulness of the stop. ... [T]he Supreme Court has permitted vehicle checkpoints and very brief inquiries of all drivers for certain purposes and with certain safeguards: one of the allowed uses is for sobriety checkpoints." [42]

As the court explained, "The threshold requirement under *Sitz* and *Edmond*--that sobriety concerns be the primary purpose of the checkpoint--is met in this case. New Hampshire has a general procedure for authorizing sobriety checkpoints; and in this case a plan was submitted and approved by a state judge, and the directions to the officers were consistent with operating a sobriety checkpoint. The police were aware that other crimes might come to light; thus, a drug-sniffing dog was kept in reserve but brought forward to William's car only after drugs had been initially found due to William's appearance and the odor of marijuana."[43] The court concluded that the driver did not prove that "checkpoint was part of some task force or program aimed at some purpose other than sobriety."[44]

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[39] *United States v. Yousif*, 308 F.3d 820 (8th Cir. 2002)
[40] *Id.* at p. 827
[41] *Id.* at p. 827
[42] *Id.* at p. 68
[43] *Id.* at p. 68 (internal citations omitted)
[44] *Id.* at p. 69

Legal Checklist

A checkpoint that is conducted for “general crime control” is prohibited. This includes a checkpoint to investigate narcotics violations.

Information Gathering Checkpoint

In *Illinois v. Lidster*, *supra*. just after midnight, an unknown motorist traveling eastbound on a highway struck and killed a 70-year-old bicyclist. The motorist drove off without identifying himself. About one week later at about the same time of night and at about the same place, local police set up a highway checkpoint designed to obtain more information about the accident from the motoring public.

Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer. The flyer said "ALERT ... FATAL HIT & RUN ACCIDENT" and requested "ASSISTANCE IN IDENTIFYING THE VEHICLE AND DRIVER INVOLVED IN THIS ACCIDENT WHICH KILLED A 70 YEAR OLD BICYCLIST."

The defendant drove a minivan toward the checkpoint. As he approached the checkpoint, his van swerved, nearly hitting one of the officers. The officer smelled alcohol on defendant's breath. He directed the defendant to a side street where another officer administered a sobriety test and then arrested the defendant. The defendant challenged the lawfulness of his arrest and conviction on the ground that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment.

Based on these facts, United States Supreme Court held that "[t]his Fourth Amendment case focuses upon a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident. We hold that the police stops were reasonable, hence, constitutional."[45]

The United States Supreme Court also noted that the information-gathering checkpoint was not governed by its decision in *Indianapolis v. Edmonds.*[46]*,* where it held that checkpoints for general crime control were prohibited. As the Court noted, "The checkpoint stop here differs significantly from that in *Edmonds.* The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals. *Edmond's* language, as well as its context, makes

[45] *Illinois v. Lidster,* 540 U.S. 419, 421 (2004)
[46] *Indianapolis v. Edmonds,* 531 U.S. 32 (2000)

clear that the constitutionality of this latter, information-seeking kind of stop was not then before the Court."[47]

The Court also refused to lump information-gathering checkpoints into the same category as narcotics checkpoints and said, "unlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." [48] Additionally, the court held that the information seeking checkpoint "are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as "responsible citizen[s]" to "give whatever information they may have to aid in law enforcement." [49]

In some respects, the Court appears to view these checkpoints as quasi-consensual encounters. "Further, the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." [50]

After the Court rejected an *Edmond*-type presumptive rule of unconstitutionality, it examined the reasonableness of the actual checkpoint that occurred *Lidster* and that the stop was constitutional. In particular, the Court held that the "*The relevant public concern was grave.* Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort." [51] Also in favor was the timing of the checkpoint and well as its location because the checkpoint "took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred. [52]

Finally, the level of intrusion "*only minimally with liberty of the sort the Fourth Amendment seeks to protect.* Viewed objectively, each stop required only a brief wait

[47] *Id.* 540 U.S. at pp. 423- 424
[48] *Id.*
[49] *Id.* 540 U.S. at pp. 423- 424 (internal citations omitted)
[50] *Id.* 540 U.S. at pp. 426-427 (internal citations omitted)
[51] *Id.* 540 U.S. at pp. 427-428 (emphasis added) (internal citations omitted)
[52] *Id.*

in line-a very few minutes at most. Contact with the police lasted only a few seconds." There was also "no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops." [53]"For these reasons the Court concluded that the checkpoint stop was constitutional."

Legal Checklist

An information seeking checkpoint should consider the following:

- ☐ The decision to establish a checkpoint, the selection of the site, and the procedures for the operation of the checkpoint, are made and established by supervisory law enforcement personnel;
- ☐ Motorists are stopped according to a neutral formula, such as every car, third, fifth or tenth driver;
- ☐ Adequate safety precautions are taken, such as proper lighting, warning signs, and signals, and clearly identifiable official vehicles and personnel;
- ☐ The location of the checkpoint has a nexus to the crime committed;
- ☐ The time the checkpoint was conducted was soon after the crime;
- ☐ The checkpoint exhibits indicia of its official nature (to reassure the public of the authorized nature of the stop);
- ☐ The average length and nature of the detention is minimized.

[53] *Id.*

"Narcotic Checkpoint Ahead" Ruse

The courts have held that a "Narcotic Checkpoint Ahead" Ruse is lawful.

In *United States v. Wendt*, the Seventh Circuit decided a case involving the Drug Enforcement Administration. With the help of local law enforcement agencies, the DEA established a drug checkpoint near the intersection of two interstates. Before an exit, the DEA posted signs indicating that a drug checkpoint lay ahead. Further down the interstate, beyond the exit, officers stationed two unoccupied squad cars as decoys. Thus, the exit appeared to be the last and only chance to avoid the checkpoint. However, the actual checkpoint was at the end of the exit's ramp.

A police officer was positioned on an overpass of the interstates near the exit. From his vehicle he used binoculars to observe the eastbound lanes of the interstate. From this vantage point, he saw a white Ford Expedition operated by the defendant cross two lanes of traffic to exit at the exit without using a turn signal. This constituted two traffic offenses in violation of the state's vehicle code, to wit, crossing two lanes of traffic without using a turn signal and entering the exit ramp without using a turn signal.

The officer reported his observations to police officers, who were positioned at the top of the exit ramp. The defendant's vehicle was ultimately stopped by officers at that location. The only vehicles which were stopped at the exit were ones that had committed traffic violations.

After the defendant was stopped, he gave his consent to search his car. The officers searched the car and discovered a hidden compartment with 19.6 kilograms of cocaine. The defendant was arrested.

The Court of Appeals examined and sustained the lawfulness of the "ruse checkpoint" and the traffic stop of the defendant's vehicle. The defendant argued that "based on *City of Indianapolis v. Edmond*,[54] the traffic stop was unreasonable because the officers lacked individualized suspicion. Moreover, [the defendant asserted] that the DEA established a "programmatic regiment" to stop and search cars with out-of-state license plates for drugs."[55] The court disagreed and held that "[t]he decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred. [The defendant's] reliance on *Edmond* is misplaced. In *Edmond*, the police established various drug checkpoints, where officers stopped and

[54] *See City of Indianapolis v. Edmond,* 531 U.S. 32 (2000)
[55] *United States v. Wendt*, 465 F.3d 814 (7th Cir. 2006)

questioned the driver of every car that passed through. The Supreme Court found that officers seized motorists without any particularized suspicion, a violation of the Fourth Amendment. In contrast, here, the traffic stop was conducted based on the officers' reasonable belief that traffic violations had occurred."[56] Therefore, since the traffic stop was objectively reasonable the consent to search was not tainted.

In *United States v. Martinez*,[57] the Eighth Circuit evaluated a case where deputy sheriffs participated in a drug interdiction program. As part of the program, the officers placed signs reading "Drug Enforcement Checkpoint Ahead, One Fourth Mile" and "Drug Dogs In Use" along the eastbound lanes of an Interstate. The signs, written in English and Spanish, were located just west of an exit. The exit was located in a remote area that has no shops or restaurants. There was little reason for motorists to take the exit unless they are local residents. In reality, there was no drug enforcement checkpoint on the interstate. Instead, the signs placed along the interstate 44 were a ruse to induce motorists engaged in drug-related activity to take the exit. Deputy sheriffs were stationed at the top of the exit but did not stop every vehicle taking the exit. Only motorists who were observed committing a traffic violation were stopped.

The defendant was traveling eastbound on the interstate. Deputies, who were stationed in separate vehicles at the top of the exit, observed the defendant's tractor trailer come up the exit ramp, roll through the stop sign at the top of the exit ramp, turn left across the overpass, and then turn left again onto the entrance ramp to the westbound interstate. Upon observing the traffic violation, the deputies stopped the defendant on the shoulder of westbound interstate.

The court framed the issue and stated, "All of Martinez's arguments on this issue more or less hinge on his assertion that the officers were operating an illegal checkpoint, which rendered the seizure of his truck and subsequent search of the vehicle unconstitutional under the rationale of *City of Indianapolis v. Edmond*. The problem with Martinez's arguments is that the officers in this case were not operating a checkpoint like those in *Edmond* and *Yousif.*"[58]

The court held "a critical distinction remains: *Edmond…*involved the use of actual checkpoints at which motorists were stopped regardless of whether they had committed a traffic violation. Here, there was no checkpoint on the Sugar Tree Road exit, and motorists who took the exit were not stopped unless they were observed committing a traffic violation. Given this distinction, *Edmond* and *Yousif* are not controlling. ... Furthermore, the officers' use of the deceptive signs does not make the stop illegal, as it is well-established that officers may use deception to uncover criminal behavior. Thus, we find no error in the district court's finding that Martinez

[56] *Id.* at pp. 816-817 (internal citations omitted)
[57] *United States v. Martinez*, 358 F.3d 1005 (8th Cir. 2004)
[58] *Id.* at p. 1008

was lawfully stopped after committing a traffic violation."[59] Thus, the driver's rights were not violated.

In *United States v. Williams*, [60] The Eighth Circuit analyzed a case where the defendant was driving a tractor-trailer eastbound on interstate, when he encountered signs warning that a drug checkpoint was ahead. The signs were placed just before an exit. The drug checkpoint alluded to by the signs on did not exist. It was a ruse. The ruse was set up to detect drug traffickers on the highway. There are no services, fuel, lodging, or food facilities, accessible from the exit.

The defendant took the exit, failed to stop at the stop sign at the end of the exit ramp, rolled through the intersection and stopped on the edge of the adjacent on-ramp. A deputy sheriff, who was observing the exit from a concealed vantage point, observed the stop-sign violation and approached the defendant's vehicle.

The court stated that "The Sugar Tree exit on I-44 has been the subject of a prior opinion of this court--*United States v. Yousif*.[61] In that case, we held that drugs discovered at the exit should have been suppressed because a drug checkpoint set up at the end of the off-ramp was conducted in violation of the Fourth Amendment under *City of Indianapolis v. Edmond*.[62] Williams contends the Sugar Tree ruse involved here is also unconstitutional because it is, in substance, the same checkpoint deemed unconstitutional in *Yousif.* The court was not persuaded. "In *Yousif,* all motorists who exited the interstate were stopped at the checkpoint, including Yousif. This, we held, did not pass constitutional muster. Although some of the drivers exiting I-44 may have been seeking to avoid detection, this did not give rise to the requisite individualized suspicion because many 'took the exit for wholly innocent reasons.' 'General profiles that fit large numbers of innocent people do not establish reasonable suspicion.' Therefore, the checkpoint set up on the exit ramp, which resulted in the encounter with Yousif, was unjustified. [63]

That was not the type of stop that occurred here. As the court framed it, "Here, there was no checkpoint, so there was no police- citizen encounter that had as its primary purpose "'the general interest in crime control.'" To the contrary, individualized suspicion--indeed, probable cause--arose when the deputy observed Williams run the stop sign.[64]

In *United States v. Carpenter*, a deputy sheriff was operating a ruse drug checkpoint on the interstate highway. He placed a sign reading "Drug Enforcement Checkpoint Ahead 1/4 Mile," on each side of the eastbound lanes of the interstate, approximately 200-300 yards before an exit ramp. A short distance further east, but still before the

[59] *Id.* at pp. 1008-1009
[60] *United States v. Williams*, 359 F.3d 1019 (8th Cir. 2004)
[61] See *United States v. Yousif* 308 F.3d 820 (8th Cir.2002)
[62] See *City of Indianapolis v. Edmond* 531 U.S. 32 (2000)
[63] *United States v. Williams*, 359 F.3d 1019, 1020-2021 (8th Cir. 2004) (internal citations omitted)
[64] *Id.* at p. 1020-2021 (internal citations omitted)

exit, he placed two more signs labeled "Drug Dogs In Use." The deputy sheriff parked his marked police car so he could observe eastbound vehicles exiting the interstate. Although there was no actual checkpoint, the deputy sheriff was "watching for any nonlocal traffic that would exit the interstate" and trying "to get reason to stop them."[65] He explained that "if they were nonlocals, why, we would try to find out what they were doing up there." The deputy sheriff considered "nonlocal" traffic to be cars he didn't recognize, or those with out-of-state license plates.[66]

The defendant, who was driving a Blazer, was driving eastbound on the interstate traveling from Texas to New York, and carrying a quantity of cocaine. After seeing the signs, the defendant exited the interstate at the exist and drove south on a county road. The deputy sheriff observed the Blazer exit the interstate and turn onto the county road. Because the vehicle "just didn't look right for the area," he decided to follow it.

As the defendant drove down the road, he realized there were no services at the exit, and when he looked in his rear-view mirror, he saw that a police car was following him. Concerned that he had "driven into a trap," he decided to make a U-turn and pulled onto the side of the road. The deputy sheriff rounded a curve and saw the defendant's Blazer parked on the side of the road. The deputy sheriff pulled off the road behind the Blazer, activating the emergency flashing lights on top of his police car as he did so.

The deputy sheriff approached the Blazer and asked the defendant if he was lost, to which he responded in the negative. The defendant then stated the that he had exited the highway looking for a gas station, but said that when he realized there were none in the area, he had intended to turn around and get back onto the highway. The deputy sheriff thought this was suspicious, as there are no gas stations at the exit; however, such services are available at other nearby exits. From the highway, there are blue signs indicating the presence of a motel and a campground at the exit, but otherwise the area is mostly rural.

The deputy sheriff asked the defendant's destination, and he replied that he was traveling from Austin, Texas, to New York. The deputy sheriff then asked to see the defendant’s license and registration, and the defendant provided his Texas driver's license, along with paperwork indicating that the car was a rental vehicle. At some point in the conversation, the deputy sheriff leaned into the Blazer and saw that the gasoline gauge indicated the vehicle had a quarter of a tank of gas. He also noticed that the defendant appeared nervous, as he could see an artery in his neck pulsing.

The deputy sheriff took the defendant’s license and the rental papers back to his patrol car, where he remained for four or five minutes. As he examined the papers, he noticed that the rental agreement indicated that the vehicle had been rented in El

[65] *United States v. Carpenter*, 462 F.3d 981, 983 (8th Cir. 2006)
[66] *Id.*

Paso, rather than Austin. The deputy sheriff again walked over to the defendant's vehicle and asked him what was in the cargo area of the Blazer. The defendant replied that there were boxes of tile in the vehicle. When the deputy sheriff asked to look in the boxes; however, the defendant asked if there was a problem with his license and told the deputy sheriff that "the boxes were all packaged up and he didn't see why the deputy needed to look inside them." At this point, the deputy sheriff told the defendant that he had exited the highway at a drug interdiction area, that he believed the defendant had exited to avoid the drug checkpoint, that he thought the defendant had drugs in the car, and that, if the defendant would not consent to a search, he would call a nearby officer with a drug dog. The defendant refused to consent to a search, and the deputy asked him to step out of the vehicle and patted down the defendant's shirt and pants pockets in a search for weapons.

Another deputy sheriff, who had been parked nearby on the north side of the highway with a trained drug detection dog in his vehicle, arrived and walked the dog around the outside of the Blazer. The dog alerted, and the first deputy sheriff searched the Blazer. When he opened the boxes in the rear cargo area, he discovered bundles wrapped in plastic. Using his pocketknife, the deputy sheriff slit open one of the bundles and found it to contain a white powder that he believed was cocaine. The defendant was arrested.

The district court granted the defendant's motion to suppress, relying on *United States v. Yousif*; however, the Court of Appeals reversed the district court and held that motion to suppress should have been denied.[67]

Concerning the initial encounter between the deputy sheriff and the defendant, the appeals court held that "The district court concluded that Carpenter was seized either when Deputy Rightnowar took the defendant's driver's license and car rental documents to his patrol car or when the officer told the defendant that he suspected him of carrying drugs and asked him to get out of his vehicle. Carpenter's principal contention is that he was seized at the earlier point, when Rightnowar took the driver's license and documents to his patrol car for four to five minutes. *We conclude, however, that Rightnowar's request for the identification and registration, and his brief retention of those documents, did not constitute a seizure.*[68]

The court went on to say that "[a] request to see identification is not a seizure," as long as the police do not convey a message that compliance with their request is required." The district court found that Rightnowar "asked" to see Carpenter's license and registration, not that he ordered their production, so absent some other "message" of compulsion not present on this record, the deputy's request did not constitute a seizure. Rightnowar retained Carpenter's documents for four to five minutes while he examined them, and the record is unclear whether Rightnowar ran

[67] *United States v. Carpenter*, 462 F.3d 981 (8th Cir. 2006) (internal citations omitted)
[68] *Id*. at p. 985

a computerized check, but we see no constitutionally significant distinction between this fact pattern and the situation in *Slater* [where we previously held that officers do not violate the Fourth Amendment when they ask to view a person's identification].[69] Rightnowar reasonably could interpret Carpenter's act of providing the documents as consent to retain them for brief examination or check, and the deputy's carrying of the license and rental papers to his vehicle did not effect a seizure."[70]

The Court of Appeals agreed with the district court that the defendant was seized when the deputy sheriff asked the defendant to exit his vehicle, conducted a patdown search for weapons and told the defendant that if he did not consent to a search, the deputy sheriff would call for nearby deputy sheriff with a drug dog. "The government does not dispute that this interaction constituted a seizure, but we conclude that Rightnowar at that point had *reasonable suspicion of illegal activity* sufficient to justify an investigative detention." [71]

As the court said, "This case, of course, does not involve an illegal checkpoint at which all vehicles exiting the highway were stopped. Since *Yousif*, moreover, we have clarified that exiting a highway immediately after observing signs for a checkpoint "is indeed suspicious, even though the suspicion engendered is insufficient for Fourth Amendment purposes." In other words, Carpenter's act of exiting just after the checkpoint signs may be considered as one factor in the totality of circumstances, although it is not a sufficient basis standing alone to justify a seizure.

"In this case, Carpenter drove a car with Texas license plates, exited just beyond the ruse checkpoint signs, and then parked off the road for no apparent reason. These factors at least begin to raise a reasonable inference that the driver may have departed the highway without a destination in mind because he was carrying drugs and wanted to avoid the purported checkpoint. The level of suspicion in this case was reasonably heightened when Carpenter claimed to be looking for a gas station, even though he had a quarter of a tank of gas and had taken an exit with no available services, despite signs on the highway indicating services at previous exits. An officer reasonably could infer that Carpenter provided a false explanation to disguise his effort to avoid the checkpoint. When questioned about his travel plans, Carpenter appeared nervous to the deputy, and then explained that he was traveling from Austin, Texas, to New York, despite providing a rental agreement indicating his car had been rented in El Paso. This sort of discrepancy between documents and a driver's explanation is a legitimate basis for suspicion, particularly where a reasonable officer could infer that Carpenter's explanation was an effort to distance himself from a known source city for drugs.

Some innocent travelers with a quarter tank of gas may leave a highway after drug checkpoint signs looking for fuel at an exit with no signs for services. And perhaps

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[69] See *United States v. Slater* 411 F.3d 1003, 1006 (8th Cir. 2005)
[70] *Carpenter*, 462 F.3d at 985-986
[71] *Id.* at pp. 986-987 (emphasis added)

some of those innocent travelers will also be nervous when approached by police and even drive a vehicle rented in a drug-source city that is almost 600 miles from their stated point of departure. These circumstances, however, are sufficiently unusual and suspicious that they eliminate a substantial portion of innocent travelers, and provide reasonable suspicion to justify the brief detention of Carpenter for the purpose of conducting a dog sniff of the vehicle."[72]

One note of caution about the *Carpenter* case. The court seemed to gloss over the fact that the deputy activated his lights and got behind Carpenter. At this point, most reasonable people would not feel free to leave. However, when the deputy initially asked if Carpenter was lost, he gave the appearance that he was not being detained, and therefore the community caretaking doctrine would likely save this initial encounter. In the end, officers should avoid turning on emergency lights during consensual encounters if possible. If not, then inform the occupants they are not being detained.

In *United States v. Wright*,[73] the Eighth Circuit analyzed a case where the defendant was driving a pickup eastbound on an interstate when he noticed signs indicating that a state patrol checkpoint with a drug dog was located past the next freeway exit. The signs were placed approximately 600 feet west of an interchange which has an eastbound exit ramp. The exit ramp accesses a county road, which turns into a gravel road approximately 200 yards south of the interstate just past a KOA campground. Other than at the campground there are no services or signs for services at the interchange.

The state patrol had set up the checkpoint as a ruse designed to induce drug traffickers to avoid it by leaving the highway. Troopers had arranged the checkpoint and had placed an unoccupied patrol car with activated overhead lights at the underpass of the interchange. The troopers waited in another patrol vehicle off the highway, near an abandoned gas station south of the interstate and on the east side of the country road. The spot at which they were parked was approximately seventy-five yards from the stop sign at the top of the eastbound exit ramp. From their location the troopers watched for vehicles with out of state license plates leaving the freeway and then contacted those motorists who committed traffic violations.

The defendant exited the freeway and the troopers observed that he failed to make a complete stop at the sign at the top of the exit ramp before turning south onto the county road and continuing past the KOA campground. One of the trooper, who was using binoculars, noticed that the defendant had Nevada license plates, and the troopers found it unusual that an out of state vehicle would exit at that location and not enter the campground. They stopped the defendant's vehicle, and initiated a conversation with him. The troopers attempted to record their encounter with the

[72] *Id.* at pp. 986-987 (internal citation omitted)
[73] *United States v. Wright*, 512 F.3d 466 (8th Cir. 2008)

defendant; however, conversation was inaudible on the recording because of background noise from the defendant's diesel engine and radio.

One of the troopers noticed that the defendant's hands were trembling "extremely bad [sic]" while he searched for his vehicle registration and that his voice was quivering. The trooper asked why the defendant had exited the interstate, and he responded that he was tired and looking for a place to rest. When asked why he had not pulled into the KOA campground, the defendant said that he did not have camping gear and did not see any buildings. The defendant was not able to find the vehicle registration.

At this point, the trooper asked the defendant to go to the patrol vehicle with him so that he could issue a warning ticket for not stopping at the stop sign. While walking back to the patrol vehicle, the troopers observed equipment in the bed of the pickup. The defendant told them he was hauling stage equipment from Las Vegas to the Twin Cities. While the defendant sat in the front of the patrol car, a trooper checked his driver's license, criminal history, and vehicle registration. He asked the defendant again about the equipment he was transporting, and the defendant replied that he was driving to Minneapolis to set up a stage for a show. When asked again why he had taken this exit, the defendant stated that he had hoped to make it to Omaha but decided that he needed to rest.

Because the trooper became suspicious that the defendant was carrying drugs, he told the other trooper to call for a drug dog. While the trooper wrote the warning ticket, he asked the defendant if there was any contraband in his vehicle. The defendant denied having any drugs or drug paraphernalia. When the trooper commented that law enforcement often uses ruse checkpoints to detect criminal activities, the defendant claimed that he had not seen the drug checkpoint signs on the interstate.

The trooper completed the warning ticket and returned the defendant's driver's license. As the defendant was walking back to his pickup, he asked him the defendant if he (the trooper) could ask a few questions. The defendant agreed. The trooper again asked if there were drugs in the pickup, and the defendant again denied having any. The trooper then requested permission to search his vehicle, and the defendant consented. However, as soon as it was clear that the trooper intended to search the pickup on the spot, the defendant withdrew his consent. The trooper then told the defendant that he would have to stay at the scene until the drug dog arrived.

While they waited for the drug dog, the trooper commented that motorists who exit the freeway after a drug checkpoint sign are usually doing something illegal. He commented that if the defendant had a marijuana pipe or small amount of marijuana in the pickup, it would be an infraction under the state's law similar to a speeding ticket. The defendant looked down, and the trooper repeated that an infraction was basically like a speeding ticket. He said that if the defendant had anything, it would be better to tell the officers. The defendant responded that he had just done a couple

lines of cocaine with a rolled up dollar bill that was between his seat and the console. The trooper found a dollar bill with white residue in the pickup cab at the spot the defendant told him to look. The defendant then informed the troopers that there was a white bindle in the cooler, and the trooper retrieved it.

The trooper put the defendant in the patrol car and began to write a citation for possession of drug paraphernalia. In the meanwhile, the other trooper contacted the dog handler to tell him he was not needed because the defendant had admitted to possession of drug paraphernalia. The canine officer arrived anyway and deployed the drug dog, who alerted on the rear passenger side of the defendant's pickup. The trooper searched the vehicle and found a brick of cocaine. The defendant was placed under arrest at this point but not advised of his *Miranda* rights. While he and the trooper were waiting in the patrol car, the other troopers found a suitcase in the rear seat of his pickup. The defendant told the trooper, "They found the rest of it. That thing's full of cocaine."[74]

The Eighth Court of Appeals upheld the “ruse checkpoint” and said “In two of our subsequent cases which had similar facts as those before us now, no Fourth Amendment violation was found. In both cases signs on the freeway indicated a checkpoint ahead even though none actually existed, and not every exiting motorist was stopped. [The two cases were *United States v. Williams*;[75] *United States v. Martinez*[76]]. In both of those cases a ruse drug checkpoint was set up by placing signs warning of a drug checkpoint ahead to induce motorists to exit the freeway before reaching the checkpoint. Officers would then stop only those exiting vehicles which committed a traffic violation. In holding that this practice did not violate the Fourth Amendment we distinguished [prior cases where we found a violation because unlawful ruse checkpoints] involved the use of actual checkpoints at which motorists were stopped regardless of whether they had committed a traffic violation. Here, there was no checkpoint on the . . . exit, and motorists who took the exit were not stopped unless they were observed committing a traffic violation.[77]

In *United States v. Klinginsmith*, the highway patrol conducted a “Narcotic Checkpoint Ahead” ruse, an investigative technique for detecting drug couriers using the interstate. Just before an exit, they placed a large sign, visible to all driving on the interstate, which read as follows: "NARCOTIC CHECK LANE AHEAD." This sign was but a ruse, as there was no NARCOTIC CHECK LANE AHEAD. The exit indicates that a small town is to the north, and that a frontage road is to the south. The reason for the sign reading NARCOTIC CHECK LANE AHEAD was the belief of the highway patrol that if after reading the sign a driver, particularly an out-of-state driver, turned off at the

[74] *Id*. at p. 469
[75] See *United States v. Williams* 359 F.3d 1019 (8th Cir. 2004)
[76] See *United States v. Martinez* 358 F.3d 1005 (8th Cir. 2004)
[77] *Id*. at p. 471

exit, such would possibly indicate that the driver did not want to go through a narcotics check, and would therefore suggest that he or she might be carrying drugs.

In any event, traffic turning off at the exit was monitored by the highway patrol. Two state troopers, who were driving separate cars, were advised that a blue vehicle bearing an out of state license plates had left the interstate at the exit and was proceeding south on a gravel frontage road at a high rate of speed. Both troopers began pursuing the car. After traveling some three and one-half miles, one of the troopers spotted the vehicle. The car was just coming to a stop at a stop sign where the gravel frontage road meets "old" highway. The trooper observed the car turn left, travel a short distance and then pull into a gas station where the driver stopped near the diesel pumps.

At this point, the trooper drove his car into the gas station and stopped several feet behind the car. The driver of the car left his vehicle and began walking toward the trooper's car. The passenger remained in the car. The trooper left his patrol vehicle and asked the driver of the car if he could ask some questions. He agreed. He said he had exited to look for a gas station, and that he was traveling from Oklahoma City, Oklahoma to Lincoln, Nebraska. Upon request, the driver produced a driver's license. He indicated that the vehicle had been rented by the passenger. The conversation between the trooper and the driver lasted some 30 seconds.

By this time, the second trooper had arrived at the scene and parked behind the first trooper's car. The second trooper's car had a video camera mounted on the dashboard and a wireless microphone, which he used when operating the video camera. He activated the video camera and the microphone, and the events that thereafter occurred at the gas station within view of the camera were tape recorded. The district judge viewed, and heard, the tape at the suppression hearing.

The first trooper then proceeded to the passenger's side of the car and asked the passenger he would mind answering a few questions. The passenger consented and said they were coming from Mississippi and that he didn't know just where they were going. He produced a driver's license and the rental papers for the car. In the meantime, the driver, told the second trooper that though they were coming from Oklahoma City, the trip had originated in Mississippi, where they had been building parking lots.

The second trooper asked the passenger if there were any weapons or drugs in the car, and he said there were not. And in response to an inquiry as to whether the car could be searched, the passenger said he had no objection. The driver also said he had no objection to a search of the car.

By this time, a dog had been brought to the scene and it "alerted" to the car. The troopers handcuffed the driver and the passenger. The "alerting" and handcuffing occurred about 15 minutes after the first trooper had pulled in behind the car at the gas station. The key for the trunk was not immediately forthcoming, but eventually

the passenger showed the troopers where the key to the trunk had been hidden. The trunk was then opened and a number of packages of marijuana were discovered under a green tarp. About 38 minutes after the dialogue started between the first trooper and the driver, the defendants were arrested and both given a Miranda warning.

The district court denied the defendant's motion to suppress evidence. The district court first held that the troopers did not stop the car. The district court also held that what followed was a consensual encounter between the troopers and the occupants of the car. The district court also noted that if there were an investigative detention, it was supported by reasonable suspicion.[78]

The district court justified it's reasoning by stating that, "The district identified several factors which, considering the totality of the circumstances, justified the investigative detention of Magee and Klinginsmith: (1) I-35 is a known avenue for drug transportation; (2) the defendants took an exit which was the first exit after a narcotics check lane sign, and an exit that was seldom used; (3) the defendants traveled down an unmarked gravel road; (4) the driver of the car indicated that they were looking for a gas station, when they had just passed several gas stations on the highway; (5) the defendants appeared very nervous; and (6) they gave conflicting stories about the details of their trip.[79]

The Court of Appeals concurred with the district court and held, "We agree completely with the district court's analysis of this matter. The fact that Troopers Simone and Heady "followed" Magee and Klinginsmith down the frontage road does not constitute a "seizure." The troopers did not stop the Buick. Magee did. The questioning of each regarding license, car registration, and the like is permitted by *Terry v. Ohio*[80] and its progeny, where there is, as in the instant case, reasonable suspicion of criminal activity. Both Magee and Klinginsmith consented to a search of the car, which would have justified the police in searching the Buick without the intervening fact that a dog "alerted" to the vehicle. And when the dog "alerted," there was probable cause to arrest Magee and Klinginsmith and to search the vehicle without a warrant under the automobile exception even had there been no prior consent. We think the district court correctly analyzed the course of events, on a step-by-step basis."[81]

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[78] *United States v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994)
[79] *Id.* footnote 1 (internal citations omitted)
[80] See *Terry v. Ohio* 392 U.S. 1 (1968)
[81] *Id.* at p. 1510 (internal citations omitted)

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Anthony Bandiero is the Senior Legal Instructor for Blue to Gold Law Enforcement Training. He is also a Nationally Certified Instructor, and many consider him to be one of the best legal instructors in the nation. He has studied constitutional law for over twenty years and has taught search and seizure to over 50,000 officers around the country.

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The late Gar Elliott Jensen received a Bachelor of Arts Degree from Brigham Young University in 1971. He received a Bachelor of Science in Law in 1973 and a Juris Doctor with Cum Laude honors in 1976. He was admitted to the California State Bar in 1976. Since June of 1980, he has been a Deputy District Attorney for San Bernardino County, California. In 1988, when the San Bernardino District Attorney's office organized its Narcotic Enforcement Division he was assigned to that division. In 1988, when the Major Narcotic Prosecution Unit was funded by the State of California, he was chosen as one of two Major Narcotic Vendor Prosecutors for San Bernardino County. He is currently the Intercept (Wiretap) Coordinator for San Bernardino County. As a deputy district attorney, he has prosecuted in excess of 200 cases involving the manufacturing of drugs and the smuggling of narcotics. He has instructed various law enforcement agencies, including but not limited to the United States Department of Justice, United States El Paso Intelligence Center (EPIC) - “Operation Pipeline,” United States Drug Enforcement Administration, United States Department of Transportation - Drug Interdiction Assistance Program, California Department of Justice, Bureau of Narcotic Enforcement, California Highway Patrol, Arizona Department of Public Safety, Royal Canadian Mounted Police and California Narcotic Officer's Association, on the subjects of highway drug interdiction, canine searches, drug courier profiles, search warrants, evidence collection and search and seizures issues. In 1996 and 1997, he was a nominee for "Prosecutor of the Year" by Region V of the California Narcotic Officer's Association. In 1997, he was named "Prosecutor of the Year" by the California Narcotic Officer's Association statewide organization. In 2005, he was presented the Director’s Award by the El Paso Intelligence Center (EPIC). The inscription on the award stated, “In special recognition for your professionalism, dedication, and support of Drug Law Enforcement and Operation Pipeline.”

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