Saint Louis University Law Journal

Volume 48
Number 2 *(Winter 2004)*

Article 10

3-9-2004

The Missouri Supreme Court Approves a Controversial Police Drug Enforcement Tactic Used on Missouri Highways Code Name: "Gotcha!" A Case Note on State v. Mack

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THE MISSOURI SUPREME COURT APPROVES A CONTROVERSIAL POLICE DRUG ENFORCEMENT TACTIC USED ON MISSOURI HIGHWAYS CODE NAME: "GOTCHA!" A CASE NOTE ON *STATE v. MACK*

The scenario is simple. Any ordinary citizen operating a car could walk, or more precisely drive, right into it. "It" is what courts and police alike have termed a "ruse checkpoint." Although several states have tweaked the checkpoint procedure to fit their state's individual goals, the basic premise remains constant. The story goes something like this: a motorist sees a sign posted on a highway alerting him that there is a narcotics checkpoint at an exit farther down the road. The motorist now has a decision to make. The driver can, for either legitimate or perhaps illegitimate reasons, decide to exit the highway and avoid the upcoming checkpoint. Once the motorist exits the highway, however, he is surprised to find that he has driven right into the checkpoint he sought to avoid by exiting in the first place. The motorist has just succumbed to the premise behind the program, or put another way, "Gotcha!"

The so-called "ruse checkpoint" described previously is a tactic used by police in an effort to assist in America's War on Drugs.[1] Few individuals would deny that drug use is both a prevalent and an increasing problem in the United States. Police departments across the country, including those in the state of Missouri, hold the belief that this relatively new brand of police tactic will significantly disrupt drug flow in the country. Ideally, although not practically, the threat of these checkpoints causes "people carrying narcotics [to] become erratic, exit off the interstate, throw the narcotics out . . . cross the median and go back in the opposite direction."[2] Once a driver exhibits such erratic behavior, the police can pounce. The problem with such a scenario, however, is that few drivers display such obviously suspicious conduct. Many unsuspecting drivers do not realize they are in the trap until they are speaking with a police officer. A further problem with these checkpoints is that police are usually working with a preconceived bias that any individual exiting the highway is hiding something. Such a prejudice obliterates an individual's Fourth Amendment protection where seizures are generally unreasonable without a requisite amount of individualized suspicion.[3] To further muddy the

1. State v. Mack, 66 S.W.3d 706, 712 (Mo. 2002) (en banc).
2. United States v. Brugal, 209 F.3d 353, 355 (4th Cir. 2000).
3. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

waters, police have also used "mixed-motive" checkpoints,[4] which may have a constitutional purpose, such as a driver's license stop, but they also have an unconstitutional purpose, such as intercepting illegal narcotics. With police enforcement utilizing various types of ruse checkpoints, a motorist is left to guess as to the extent of protection he is afforded under the Constitution.

Although the use of ruse checkpoints is more of a recent phenomenon, roadblock jurisprudence has received substantial treatment in American courtrooms. After various decisions, some upholding certain types of checkpoints and roadblocks while disapproving of others, the United States Supreme Court attempted to clarify the issue in the November 2000 case of *City of Indianapolis v. Edmond*.[5] The Court there held that checkpoints designed with the primary purpose of general crime prevention, as is the case with most "ruse checkpoints," are a violation of an individual's Fourth Amendment rights.[6]

Although those in the legal community with an interest in roadblock jurisprudence hoped *Edmond* had answered the difficult issues left surrounding roadblock cases, the Missouri Supreme Court demonstrated that *Edmond* left some wiggle room when it handed down a 4-3 decision approving suspicionless "ruse checkpoints" on Missouri roadways.[7] The majority in *Mack* found distinguishing characteristics between the case before it and *Edmond* that justified a contrary ruling.[8] This case note intends to take a closer look at the rationale driving the decision in *Mack* and suggests that a blanket rule prohibiting all deceptive checkpoints, such as the one in *Mack*, is the best way to halt even further erosion of an individual's Fourth Amendment rights when vehicle checkpoints are involved. This case note will begin by examining some basic Fourth Amendment tenets in Part I and then proceed to examine some of the principal cases that created the area of law referred to as "roadblock jurisprudence" in Part II. Parts III and IV will conclude with an in-depth look at *Mack* and analyze why "ruse checkpoints" should be abolished as a form of police tactic altogether.

4. *See* Merrett v. Moore, 58 F.3d 1547, 1550-51 (11th Cir. 1995).

5. 531 U.S. 32, 35 (2000). (The checkpoint in *Edmond*, unlike the one to be discussed in *Mack*, was not a ruse checkpoint.).

6. *Id.* at 41-42. The Court held the checkpoint program violated the Fourth Amendment because the primary purpose of the checkpoint program was ultimately indistinguishable from the general interest in crime control. *Id.*

7. *Mack*, 66 S.W.3d at 710-11. Justice Limbaugh wrote the majority opinion and Justices Benton, Holstein, and Price concurred. Justice Stith dissented in a separate opinion in which Justices White and Wolff joined.

8. *See id.* at 710.

I. BASIC CONSTITUTIONAL TENETS OF THE FOURTH AMENDMENT

One of the wonderful aspects of living in America is that citizens are afforded the highest degree of protection of their individual liberties and rights of privacy. The Fourth Amendment was designed to protect such rights. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[9]

The various types of checkpoints discussed throughout this note share the common bond of having Fourth Amendment implications. Courts determined long ago that roadblocks and checkpoints constituted a "seizure" within the meaning of the Fourth Amendment.[10] The principal Fourth Amendment issue most courts are left to face in roadblock and checkpoint cases is whether or not the checkpoint system in place is "reasonable" according to the language of the Fourth Amendment. The Fourth Amendment requires all searches and seizures to be reasonable.[11] This note focuses primarily on roadblocks and vehicle checkpoints; the lion's share of the analysis will examine the reasonableness of initial stops or "seizures."

Most judicial interpretations have classified searches and seizures as reasonable so long as some quantum of individualized suspicion was present.[12] Thus, an officer may constitutionally conduct a brief, investigatory stop when he has a reasonable, articulable suspicion that criminal activity is afoot.[13] However, because courts began to relax the once-stringent standards of reasonable suspicion and probable cause, the checkpoint decisions have become harder to decide in a consistent manner.[14] Courts have overlooked the

9. U.S. CONST. amend. IV.

10. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976). The *Brugal* court added, "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitute[d] a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000).

11. U.S. CONST. amend. IV.

12. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

13. Terry v. Ohio, 392 U.S. 1, 30 (1968).

14. The Court notably carved its exceptions to the probable cause and suspicionless search analysis in three similar cases. *See generally* Frank v. Maryland, 359 U.S. 360 (1959); Camara v. Mun. Court of City and County of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). These three cases discussed the possibility of an "administrative" need to enforce government building code regulations that would justify the relaxation of the individualized suspicion and warrant standards. Elaborating further on the "administrative exception" were the cases of *New York v. Burger*, 482 U.S. 691, 703 (1987), which discussed administrative inspection of "closely regulated businesses," and *Michigan v. Tyler*, 436 U.S. 499, 501 (1978), which discussed the fire department's warrantless re-entry to investigate the burning

absence of warrants and individualized suspicion requirements in various settings. Justice Scalia in *California v. Acevedo*, commented that the warrant requirement had become "so riddled with exceptions that it [is] basically unrecognizable."[15] Even though the Court has developed certain exceptions to the warrant and individualized suspicion requirements, including "special needs" exceptions,[16] administrative policy exceptions,[17] and certain roadblock or checkpoint exceptions for border-patrol[18] and sobriety[19] enforcement, they are still the primary defenses citizens of this country have against invasions against their privacy rights, and it is still held in the highest regard.[20]

Police ruse checkpoints present an intriguing problem that courts now must face. The ruse checkpoints do attempt to combat a societal ill in much the same way as the checkpoints in *United States v. Martinez-Fuerte*[21] and *Michigan Department of State Police v. Sitz*[22] did. The courts have the option of creating yet another exception for these drug interdiction ruse checkpoints, but this begs the question of how far the courts can go before all Fourth Amendment safeguards are gone. A recent article by Craig Bradley highlights the difficulties that courts, especially the United States Supreme Court, have had with this topic.[23] Bradley identified a theme that developed on the Supreme Court after the arrival of Justice Stephen Breyer, where the Court "consistently resist[ed] attempts by police to increase their power to interfere

of a furniture store. Another exception developed subsequent to those decisions, and is now known as the "special needs" exception. The cases of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), which involved searches in a school setting, and *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989), which involved mandatory urinalyses testing in an employment setting, further chipped away at the individualized suspicion rule and the warrant requirement. For a more in-depth look at both the administrative exception and the special needs exception, see Leslie P. Butler, Note, *City of Indianapolis v. Edmond: An Unprecedented Use of "Primary" Purpose Leaves Wide Open the Door for "Secondary" Problems*, 46 ST. LOUIS U. L.J. 175, 178 n. 13-14 (2002); Jennifer Y. Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 536 (1997).

15. California v. Acevedo, 500 U.S. 565, 582 (1991); Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U. L. REV. 331, 331 (September 2001/August 2002).

16. *See T.L.O.*, 469 U.S. 325; *Acton*, 515 U.S. 646; *Skinner*, 489 U.S. 602.

17. *See Frank*, 369 U.S. 360; *Camara*, 387 U.S. 523; *See*, 387 U.S. 541; *Burger*, 482 U.S. 691; *Tyler*, 436 U.S. 499.

18. United States v. Marinez-Fuerte, 428 U.S. 543, 563 (1976).

19. *See generally* Brown v. Texas, 443 U.S. 47 (1979).

20. *See* Chotvacs, *supra* note 15, at 331.

21. 428 U.S. 543 (1976).

22. 496 US 444 (1990).

23. Craig M. Bradley, *The Court's New Approach to the Fourth Amendment*, 38 TRIAL 82, 82 (2002).

with (legally) innocent civilians, but it refuse[d] to intervene in how police deal with suspects when there is probable cause to arrest or search."[24]

As this note will illustrate, the Missouri Supreme Court's decision in *State v. Mack* does not entirely support Bradley's proposition. In an effort to produce a more definitive answer to the constitutional validity of the checkpoint question, the United States Supreme Court decided *Edmond*, providing courts with a "primary purpose" inquiry[25] and the established "*Brown* Balancing Test,"[26] both of which will be discussed. The Missouri Supreme Court could have applied these principles to determine the reasonableness of the "ruse checkpoint" scheme it reviewed in *Mack*, but it used other means to arrive at its decision. Therefore, roadblock jurisprudence in the state of Missouri is still unsettled in many ways.

II. THE HISTORY OF ROADBLOCK AND CHECKPOINT JURISPRUDENCE— THE SUPREME COURT RULES CERTAIN CHECKPOINTS CONSTITUTIONAL, OTHERS NOT

A. The Beginning: United States v. Martinez-Fuerte

In 1976, the United States Supreme Court, in *United States v. Martinez-Fuerte* heard consolidated appeals from both the United States Court of Appeals for the Ninth Circuit and the Fifth Circuit.[27] The respondents were appealing criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens across the border.[28] The respondents involved in the consolidated appeals from the Ninth Circuit were arrested at a permanent checkpoint operated by the Border Patrol near the Mexican border.[29] The

24. *Id.*

25. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40-41 (2000).

26. *See* Brown v. Texas, 443 U.S. 47, 50-51 (1979).

27. 428 U.S. 543 (1976).

28. *Id*. at 545. All of the checkpoint programs operated in a similar manner and were in a fixed location near the Mexico-United States border. *Id.* Motorists were made aware of the checkpoints by large flashing signs hanging over the highways. *Id*. at 545-46. All vehicles were forced to stop at these checkpoints. *Id*. If, after the initial brief detention, the Border Patrol Agent believed suspicious behavior was afoot, the motorist proceeded to a secondary inspection area for further questioning. *Id.* at 546. The whole process generally took only a few minutes. *Id.* at 546-47.

29. *Id.* at 545. Respondent Amado Martinez-Fuerte was convicted after a jury trial on two counts of illegally transporting aliens in violation of 8 U.S.C. § 1324 (a)(2). *Id*. at 548. Respondent Jose Jiminez-Garcia was also charged with two counts of illegally transporting an alien and conspiring to commit that offense in violation of 18 U.S.C. § 371; however, unlike Martinez-Fuerte, his motion to suppress the evidence obtained by the stop was granted. *Id.* at 548-549. Respondents Raymond Guillen and Fernando Medrano-Barragan were both charged with four counts of illegally transporting aliens, four counts of inducing the illegal entry of aliens in violation of 8 U.S.C. § 1324 (a)(4), and one conspiracy count. *Id*. at 549. Like it did with

Ninth Circuit held that without reasonable suspicion, these stops and interrogations violated an individual's Fourth Amendment rights. It reversed respondent Martinez-Fuerte's conviction and affirmed the decisions in the other cases.[30] In a similar case involving the transportation of illegal aliens, the Fifth Circuit decided differently than the Ninth Circuit and held that the permanent checkpoints did not violate the Constitution.[31] In an attempt to end this circuit split, the United States Supreme Court granted certiorari to determine the legality and constitutionality of the use of permanent checkpoint stops to enforce Border Patrol.[32]

In an opinion written by Justice Powell, the Supreme Court held consistently with the opinions set forth by the Fifth Circuit and found checkpoint stops of a fixed and permanent nature that detain motorists for brief questioning did not violate the Fourth Amendment and furthermore, that these types of fixed checkpoints did not require a judicial warrant.[33] The Court arrived at this decision knowing that the checkpoint program authorized enforcement officials to stop particular vehicles where no individual suspicion of illegal aliens existed. However, the Court did make clear that the holding in *Martinez-Fuerte* was narrow in scope and was limited only to the types of permanent checkpoints designed with the sole purpose of enforcing Border Patrol.[34] The Court in *Martinez-Fuerte* justified its decision primarily on the strong national sentiment favoring a limited flow of illegal aliens into the country, and the Court recognized the accepted practice of limiting this flow by way of permanent, temporary, and roving checkpoints set up by the Border Patrol.[35] The Court also found that the obvious and visible nature of the

Jiminez-Garcia, the District Court granted Guillen's and Medrano-Barragan's motion to suppress. *Id.* Martinez-Fuerte appealed his conviction, and the Government appealed the granting of the motions to suppress in the decisions of Jiminez-Garcia and of Guillen and Medrano-Barragan. *Id.*

30. *Id.* at 549.

31. *Id.* at 550. Petitioner Rodolfo Sifuentes was arrested at a permanent checkpoint near Sarita, Texas for transporting illegal aliens. *Id.* at 549. His motion to suppress the evidence derived from the stop was denied and he, like Martinez-Fuerte, was convicted after a jury trial. *Id.* at 550. On appeal, the Fifth Circuit affirmed the conviction and found that these stops were consistent with the Fourth Amendment. *Id.*

32. *Martinez-Fuerte*, 428 U.S. at 550 n.6. The conflict between the circuits centered on whether or not these checkpoints were in violation of an individual's Fourth Amendment rights. *Id.* at 551. The Ninth Circuit found that they were, and the Fifth Circuit found that they were not. *Id.* at 549, 550.

33. *See id.* at 549-50.

34. *Id.* at 567. The Court concluded, "[A]ny further detention . . . must be based on consent or probable cause." *Id.* (citing United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (alteration in original)).

35. *Id.* at 552. "It has been national policy for many years to limit immigration into the United States." *Id.* at 551. The Court found that enforcing this limited flow into the country poses difficult law enforcement problems. *Id.* at 552. At the time this decision was handed down, despite Border Patrol's efforts, the Court found illegal alien entry into the United States to

checkpoints[36] combined with the minimal intrusion on time provided drivers with a warning and lessened the element of surprise for innocent travelers.[37] The Court reasoned the minimal interference, the absence of surprise, and the substantial government interest in retarding the influx of illegal immigration substantiated its decision to allow the permanent Border Patrol checkpoints to continue.[38] The Court summarized:

> [T]he purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.[39]

One reason *Martinez-Fuerte* made such an impact is that, although it had limited application, it still established an exception to the rule that individualized suspicion was a prerequisite for a seizure.[40] The Court left no doubt in its opinion that the checkpoint did constitute a seizure within the meaning of the Fourth Amendment, yet it still found that the governmental goals of the program and the negligible intrusion on the driver's rights outweighed the individual's Constitutional concerns.[41] The *Martinez-Fuerte* decision paved the way for courts to carve out further exceptions to the general rule of individualized suspicion in cases involving vehicle checkpoints.

B. The Supreme Court Elaborates Further in Delaware v. Prouse and Brown v. Texas

The Supreme Court decided two important intervening cases between the time after the decision in *Martinez-Fuerte* and before the Court heard another fundamental roadblock case, *Michigan Department of State Police v. Sitz*.[42] The Court in *Delaware v. Prouse* recognized that states do have a substantial

be a relatively easy task. *Id.* The Court thus reviewed techniques such as the permanent checkpoint, the temporary checkpoint, and even the roving patrol as necessary in policing this national dilemma. *Id.*

36. *Id.* at 565. The Court also used the visible manifestations of the checkpoint in comparison with a judicial warrant to reach the conclusion that a warrant was not required to operate these checkpoints. *Id.*

37. *Martinez-Fuerte*, 428 U.S. at 558-560. The Court explained: "Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature." *Id.* at 560.

38. *Id.* at 558-561.

39. *Id.* at 562.

40. *Id.* at 561. The checkpoints in *Martinez-Fuerte* only constituted a seizure. No search of the vehicle was involved.

41. *Id.* The Court explained that an individual's expectation of privacy in a vehicle is not as great as it is in the individual's dwelling where the standards of the Fourth Amendment are at a heightened level. *Id.*

42. 496 U.S. 444 (1990).

interest in protecting licensing and registration laws,[43] however, it found that interest was not substantial enough to justify roving patrol stops as an enforcement technique.[44] The Court concluded that stopping a car to check for a license and registration when there was no reasonable suspicion to believe that the driver was violating any specific law constituted an unreasonable seizure.[45] The Court found that "an individual operating or traveling in an automobile [should] not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation[s]" and laws.[46] The Fourth Amendment protection that an individual is afforded in a dwelling does not terminate when he leaves and enters a vehicle.[47]

The *Prouse* decision reiterated the notion that police officers must have a reason based on objective facts before a stop is justified.[48] According to the Court, an individual motorist has a reasonable expectation of privacy not to be subjected to arbitrary stops based on the unfettered "discretion of the [officers] in the field."[49] The Court further concluded:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[50]

However, the Court did leave open the possibility that a state could create "spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion."[51] Hence, the use of checkpoints to check every motorist's license and registration according to a predetermined, objective plan would be constitutionally valid.

43. 440 U.S. 648, 658 (1979). In *Prouse*, the police stopped the respondent to check for a valid driver's license and registration. *Id.* at 650. When respondent's car was stopped, the police officer noticed marijuana in plain view on the car floor. *Id.* At the hearing for the respondent's motion to suppress the evidence, the patrolman who pulled the car over testified that he did not observe any suspicious or unusual conduct by the driver beforehand. *Id.*

44. *Id.* at 658-659.

45. *Id.* at 663.

46. *Id.* at 662.

47. *Id.* at 662-63.

48. *Prouse*, 440 U.S. at 663. The Court recognized that the most effective method of enforcing traffic violations was "acting upon observed violations." *Id.* at 659.

49. *Id.* at 655.

50. *Id.* at 663. Relying on the absence of empirical data in the case, the Court found that the "contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best." *Id.* at 660.

51. *Id.* at 663.

Brown v. Texas contributed to the roadblock analysis by providing a three-part balancing test that determined the reasonableness of seizures.[52] In *Brown*, the defendant was convicted of violating a Texas statute that made it a crime to refuse to identify one's self to a police officer who had requested such information.[53] When the officers detained Brown and asked for identification, they performed "a seizure of his person," and were thus governed by the same Fourth Amendment principles as the roadblock cases.[54] The Supreme Court found that the Texas statute violated the Fourth Amendment because there was no reasonable suspicion to believe that the defendant had been doing anything criminal.[55] In arriving at this conclusion, the Court used what is now known as the "*Brown* Balancing Test," where the constitutionality of a seizure turns upon "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[56] The "*Brown* Balancing Test" enforced the notion that seizures must be based on specific facts "indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[57] The *Brown* Court found no circumstances that should have led the police officer to reasonably suspect the defendant was about to participate in criminal activity.[58] Without objective facts and reasonable suspicion, an individual's right to privacy must take precedence over the goal of general crime prevention.[59]

C. A Variation on the Roadblock Cases: *Michigan Department of State Police v. Sitz*

The status of roadblock jurisprudence remained fairly constant after the *Prouse* decision until numerous motorists brought an action in 1990 challenging the constitutionality of a Michigan highway sobriety checkpoint

52. Brown v. Texas, 443 U.S. 47, 50-51 (1979).

53. *Id.* at 49-50. In *Brown*, two police officers observed the defendant and another man walking away from one another in an alley in an area that was known for high drug activity. *Id.* at 48. The officers stopped the defendant and asked him to identify himself and tell the officers what he was doing. *Id.* at 48-49. One officer testified that "the situation 'looked suspicious and we had never seen that subject in that area before.'" *Id.*

54. *Id.* at 50.

55. *Id.* at 52.

56. *Id.* at 50-51.

57. *Brown*, 443 U.S. at 51.

58. *Id.* at 51-52. The Court reasoned that there was no indication that it was unusual for people to be in the alley where defendant was found. *Id.* at 52. Also, the mere fact that the defendant was in an area of high crime does not automatically vilify him. *Id.*

59. *Id.* at 52.

program.[60] The District Court engaged in the balancing test created by *Brown v. Texas* to make its original determination that this program violated the Fourth Amendment.[61] Using the balancing test, the Court of Appeals affirmed the District Court's findings that Michigan did have a serious interest in curbing drinking and driving, that sobriety checkpoint programs are generally ineffective, and that the intrusion on an individual's privacy rights was substantial.[62] The legal issue that the Supreme Court faced in *Sitz* involved the constitutionality of sobriety checkpoints generally.[63] In the majority opinion written by Chief Justice Rehnquist, the Supreme Court ultimately held that the Constitution does not prohibit a state's use of highway sobriety checkpoints.[64] The Court made this decision even though these sobriety checkpoints functioned without the traditionally mandated individualized suspicion.

In reaching its conclusion, the Court decided that the lower courts had misapplied the "*Brown* Balancing Test" in analyzing the reasonableness of the sobriety checkpoints.[65] Both courts found that the first prong of the test was easily satisfied. Similar to the line of reasoning used in *Martinez-Fuerte*, the Court relied heavily on the public policy justification for legalizing the Michigan checkpoints. Chief Justice Rehnquist wrote, "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it . . . . Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight."[66] The Court did not agree with the lower court's interpretation of the "effectiveness" prong. The Supreme Court looked to the empirical data to justify the program, but also determined that this prong "was not meant to transfer from politically accountable officials to the courts the decision as to

60. Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990). According to the Michigan guidelines, these sobriety checkpoints were set up at selected locations along various state roads. *Id.* at 447. All vehicles passing through a checkpoint would then be stopped and the drivers would be examined for signs of intoxication. *Id.* If an officer suspected a motorist was intoxicated, he was directed out of the traffic flow for further questioning and further sobriety tests. *Id.*

61. *Id.* at 448-49. "[T]he test involved 'balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints.'" *Id.* (citing Sitz v. Mich. Dep't of State Police, 170 Mich. App. 433, 439 (1988). The Court of Appeals agreed with the District Court that "the *Brown* three-prong balancing test was the correct test to be used to determine the constitutionality of the sobriety checkpoint plan." *Id.* (citing *Sitz*, 170 Mich. App. at 439).

62. *Id.* at 449.

63. *Id.* at 450. The Court noted, "We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." *Id.* at 450-51.

64. *Id.* at 447.

65. *Sitz*, 496 U.S. at 455.

66. *Id.* at 451.

which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."[67] Another point of disagreement was the third and final prong of the "*Brown* Balancing Test." The Court agreed that the objective intrusion of the stops (only a few seconds) was minimal, but it also held that the sobriety checkpoints were not unduly burdensome on the "subjective intrusion" element of the test[68] and did not rise to the level of being a Fourth Amendment violation as the lower courts contended.[69] The Court reasoned that the motorist's level of surprise or fear should have been reduced by some degree after witnessing the visible manifestations of the approaching checkpoint.[70] Hence, the Court arrived at its decision reversing the lower courts and concluding that the benefit to be gained from these sobriety checkpoints in combating the state's drunk-driving problem outweighed the slight "subjective intrusion" on the motorist and did not violate the motorists' Fourth Amendment rights.[71]

D. The Missouri Supreme Court Offers a Pre-Edmond Opinion in State v. Damask

The case of *State v. Damask* is especially notable because in it, the Missouri Supreme Court created yet another exception to the Fourth Amendment individualized suspicion rule by upholding the use of roadblocks designed for the sole purpose of intercepting drug trafficking.[72] The operation of the *Damask* checkpoint was simplistic, yet extremely deceptive in

67. *Id.* at 453. The language from *Brown v. Texas* refers to the "effectiveness" aspect as "the degree to which the seizure advances the public interest." *Brown*, 443 U.S. at 51. In examining the second prong of the "*Brown* Balancing Test," the *Sitz* Court analyzed and compared the 1.5% "hit rate" of the Michigan checkpoints to the 0.5% "hit rate" that was approved in *Martinez-Fuerte*. *Sitz*, 496 U.S. at 454-55.

68. *Sitz*, 496 U.S. at 452. The subjective intrusion element in *Sitz* referenced the fear and surprise element of "law-abiding motorists" not "the natural fear of one who has been drinking." *Id.*

69. *Id.* at 455. The Supreme Court found that the Court of Appeals, which had found the level of "subjective intrusion" to be substantial, had misinterpreted previous cases concerning the "degree of 'subjective intrusion' and the potential for generating fear and surprise." *Id*. at 452. The Court held in *Martinez-Fuerte* that unlike roving patrols, which operated at night and on seldom-used roads, permanent checkpoints are less frightening to motorists. "At traffic checkpoints the motorist can see that other vehicles are being stopped . . . can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id*. at 452-53 (citing United States v. Martinez-Fuerte, 428 U.S. at 558). The Supreme Court in *Sitz* found the level of intrusion resulting from the brief stop at the sobriety checkpoint indistinguishable from the checkpoint stops upheld in *Martinez-Fuerte. Id*. at 453.

70. *Id.* at 453.

71. *Id*. at 455.

72. 936 S.W.2d 565, 567 (Mo. 1996) (en banc). *See also* Scott A. White, *The Constitutionality of Drug Enforcement Checkpoints in Missouri*, 63 MO. L. REV. 263 (1998).

practice.[73] The law enforcement technique used in *Damask* was a classic illustration of a "ruse checkpoint." Defendant Richard Damask fell victim to this ruse checkpoint and was arrested after a drug-sniffing dog smelled marijuana in Damask's trunk.[74] After the trial court sustained Damask's motion to suppress the evidence, the state then brought an interlocutory appeal, and the Court of Appeals affirmed, finding the checkpoint operation violated Damask's Fourth Amendment rights.[75]

Much like the *Sitz* case, the critical legal issue facing the Missouri Supreme Court in *Damask* was the constitutionality of the initial vehicle seizure at the checkpoint.[76] All parties conceded that the checkpoint stop was a seizure and therefore, it must have operated according to the requirements of the Fourth Amendment.[77] As the Supreme Court did in the *Sitz* case,[78] the *Damask* majority relied heavily on the "*Brown* Balancing Test."[79] In applying the first factor of the "*Brown* Balancing Test," the Missouri Supreme Court concluded that the prevention of drug trafficking was certainly a legitimate governmental interest and that the severity of that interest could hardly be

73. *Damask*, 936 S.W.2d at 568. The Franklin County Sheriff's Department "placed two signs that read 'DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD' approximately one-quarter mile west of exit 242, on both sides of the eastbound lanes of I-44." *Id.* These checkpoints attempted to put an end to drug trafficking along I-44, a popular drug transportation route. *Id.* Exit 242 was a remote area and according to the State, there were few valid reasons for non-local residents to take the exit. *Id.* "Contrary to the [highway's postings,] the sheriff's [department] set up the checkpoint at the top of the eastbound exit 242 ramp." *Id*. Eastbound cars taking the 242 exit climbed the ramp, "came to [a] stop sign, and found a uniformed officer waiting." *Id.* The officer then approached the car, asked for a license and registration, and inquired as to the reason for why the motorist exited the highway. *Id.* If the motorist's answer was reasonable, he was allowed to proceed. *Id.* If the answer was unreasonable, or if there was reason to suspect drug trafficking, the officer then asked for permission to search the vehicle. *Id*. If consent was not granted, a drug-sniffing dog circled the vehicle. *Id*.

74. *Id.* At about 4:20 a.m. on November 22, 1996, Damask's Mercury Marquis bearing Nevada license plates passed through the checkpoint. Upon being asked why he exited, Damask answered that he was turning around to go back and get something to eat. However, officers noticed fast food bags in the car and a warm cup of coffee. Damask did not grant the officers consent to search the car, so the police dog performed an exterior "sniff" of the car. Inside Damask's trunk, officers found a bag containing marijuana. *Id.*

75. *Id.* at 568-69.

76. *Id.* at 570.

77. *Id.* at 570. The Fourth Amendment protects individuals from unreasonable searches and seizures. "Generally, seizures that are not based upon a particularized suspicion of criminal activity are [presumed to be] unreasonable." *Id.* at 570-71.

78. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

79. Brown v. Texas, 443 U.S. 47, 50-51 (1979). "The reasonableness of a seizure that is less intrusive than a traditional arrest depends on the balance between the public interest in preventing criminal activity and the individual's right to be free from arbitrary interference by law officers." *Damask*, 936 S.W.2d at 571.

questioned.[80] The Missouri Supreme Court looked to a prior Washington D.C. case, *Galberth v. United States*,[81] for assistance in applying the second prong of the test. The *Damask* court ultimately rejected the *Galbreth* notion that checkpoints such as the one in *Martinez-Fuerte* to control illegal immigration are any different than the checkpoints set up to halt drug trafficking.[82] The court decided that the checkpoint in *Damask* passed the second prong of the *Brown* test so long as the checkpoint was "substantially similar to prior successful checkpoints."[83] Finally, the court also ruled that both the objective and subjective intrusion on an individual's rights was minimal and therefore passed the third prong of the *Brown* balancing test.[84] The objective test was passed because the duration of the stops lasted for an average of two minutes.[85] The checkpoint also survived the subjective test because the program was governed by a clear, strict plan that removed all discretion from the officers who ran it.[86] Following the *Brown* analysis, the Missouri Supreme Court held that the *Damask* checkpoints were not unreasonable and thus did not violate the Fourth Amendment rights of Mr. Damask.[87]

E. The United States Supreme Court Attempts to End the Roadblock Ambiguity with City of Indianapolis v. Edmond

The operation of the vehicle checkpoint program in *Indianapolis v. Edmond*, like most other of the roadblock programs, was relatively straightforward. At each checkpoint location, approximately thirty Indianapolis police officers were present to stop a predetermined number of

80. *Damask*, 936 S.W.2d at 571. The *Damask* court stated, "Drug trafficking has created a 'veritable national crisis in law enforcement' and is 'one of the greatest problems affecting the health and welfare of our population.'" *Id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); Nat'l Treasury Employees Union v. VonRaab, 489 U.S. 656, 668 (1989)).

81. 590 A.2d 990 (D.C. Cir. 1991). The defendant in *Damask* relied on *Galbreth* for the proposition that a checkpoint set up for the primary purpose of drug interdiction, unlike sobriety and immigration control, fails the second prong of the *Brown* test and is not considered a sufficient public interest because it fails to "promote a government interest separate from that of general law enforcement." *Damask*, 936 S.W.2d at 572.

82. *Damask*, 936 S.W.2d at 572-73.

83. *Id.* at 573. The court held:

> [I]f the State can show generally that similar checkpoint operations effectively advanced the State's interests, and that the particular checkpoint in question was substantially similar to prior successful checkpoints, this is sufficient evidence from which a reviewing court can determine the effectiveness of checkpoint operations under *Brown.* Thus, if similar checkpoints discover 'problems [illegal drug trafficking] predictably associated with persons stopped at roadblocks,' *Brown's* second prong is satisfied.

Id. at 573 (alteration in original).

84. *Id.* at 573-74.

85. *Id.* at 574.

86. *Id.* at 574-75.

87. *Damask*, 936 S.W.2d at 575.

vehicles.[88] At least one officer approached each car after the driver was stopped and advised the driver as to the purpose of the checkpoint.[89] The officers conducted each of these searches in the "same manner until particularized suspicion develop[ed]."[90] The individual police officers had no discretion to vary the procedure or the sequence of the vehicles they stopped.[91]

In August 1998, the city of Indianapolis began to operate these checkpoints on Indianapolis roadways with the primary purpose of reducing the amount of unlawful drugs transported in motor vehicles.[92] The city conducted six such roadblocks between the months of August and November of that year, stopping a total of 1,161 vehicles and arresting one hundred and four motorists.[93] The resulting figures totaled an overall "hit rate" of approximately nine percent.[94]

According to the affidavit of Indianapolis Police Sergeant Marshall DePew, the locations of these checkpoints were selected weeks in advance and took into account such factors as local area crime statistics and traffic volume.[95] The Indianapolis checkpoints were usually conducted in the daylight hours and were identified with bold signs that stated, "NARCOTICS CHECKPOINT MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP."[96]

88. City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000).

89. *Id.* The officer then proceeded to ask the driver for his or her driver's license and vehicle registration. *Id.* The officer was also on the lookout for any suspicious "signs of impairment," while conducting an "open-view examination of the vehicle from the outside." *Id.* While the officer was doing this, a drug-sniffing dog circled the outside of the vehicle. *Id*. Particularized suspicion was established when the officers noticed any suspicious behavior or received any hints from the trained drug-sniffing dog. *Id.*

90. *Id*. at 35.

91. *Id.* The city mandated that each seizure was to be conducted according to a standard procedure and each search was to be performed either by consent or by the requisite amount of suspicion. *Id.* The city agreed that absent reasonable suspicion or probable cause, each stop would last less than five minutes. *Id*.

92. *See* Edmond v. Goldsmith, 183 F.3d 659, 661 (7th Cir. 1999).

93. *Id*. Of these one hundred and four arrests, fifty-five of them were for drug-related crimes, and forty-nine of the arrests were for non-drug-related crimes. *Id.*

94. *Id.* Subsequent to the *Edmond* decision, the Missouri Supreme Court in *Mack* found this nine percent "hit rate" inadequate to create the necessary level of individualized suspicion that makes a seizure reasonable. "Whatever the average hit rate may be in Missouri ruse checkpoints, it is clear that it is not sufficient to make them more than just another police technique; it is not enough to elevate ruse checkpoints to the next level, so that the ruse itself creates the kind of individualized suspicion required by *Edmond*." State v. Mack, 66 S.W.3d 706, 716 (Mo. 2002) (en banc).

95. *Edmond*, 531 U.S. at 35.

96. *Id.* at 35-36. Unlike *Mack*, the Indianapolis checkpoint was not a ruse and did not try to trick motorists. The actual checkpoint was located exactly where the posted sign said it was. *See Mack*, 66 S.W.3d at 709.

Respondents James Edmond and Joell Palmer were both stopped at the Indianapolis narcotics checkpoint in late September 1998.[97] Respondents contended that such checkpoints violated their Fourth Amendment rights.[98] The petitioners conceded that the primary purpose of the Indianapolis checkpoint program was to disrupt the flow of illegal narcotics in the city.[99] Using the primary purpose of the checkpoint as a decisive factor in its decision, the Supreme Court stated that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion."[100] The State attempted to persuade the Court that the Indianapolis checkpoint had a valid secondary purpose of checking licenses and registrations, yet the Court quickly dismissed the State's argument, recognizing the dangers that would accompany justifying checkpoints based on so-called "secondary purposes."[101]

Each of the previous checkpoint cases that had been approved by the Court dealt primarily with issues such as policing the national border or ensuring roadway safety, not general crime prevention.[102] After the State's attempt to highlight the similarities between its facts and those found in *Martinez-Fuerte* and *Sitz*, the Court found:

> If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. . . . [T]he Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.[103]

97. *Edmond*, 531 U.S. at 36. Both "[r]espondents then filed a lawsuit on behalf of themselves and the class of [] motorists who had been stopped or were subject to being stopped . . . at the Indianapolis drug checkpoints." *Id.*

98. *Id.* Respondents also contended that these checkpoints violated "the search and seizure provision of the Indiana Constitution." *Id*.

99. *Id*. at 40-41. "In their stipulation of facts, the parties repeatedly refer to the checkpoints as 'drug checkpoints' and describe them as 'being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis.'" *Id.*

100. *Id*. at 41.

101. *Id.* at 46. This is known as the "mixed-motive" argument. If the Court had given credence to this argument, the door would be left open for any conceivable type of checkpoint so long as there was a legitimate purpose attached. *Id.*

102. Of course, the State in *Edmond* put forth arguments attempting to compare its facts with those in both *Martinez-Fuerte* and *Sitz*. The State argued that all three cases had designs to "arrest[] those suspected of committing crimes." *Edmond*, 531 U.S. at 42. The State also compared the severity of the drug problem to that of drunken-driving in *Sitz* and to that of illegal immigration in *Martinez-Fuerte*. The Court ultimately disposed of all of the State's contentions. *Id.*

103. *Id.* at 42.

The Court continued that, "when law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion."[104] The Court further provided that it would not "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."[105]

After a detailed tour of the historical checkpoint jurisprudence, the Supreme Court ultimately ruled that the Indianapolis checkpoints, unlike those approved of in the past, violated the Fourth Amendment because their purpose was "indistinguishable from the general interest in crime control."[106] The Court was clear, however, that its decision did not change the *Martinez-Fuerte* or *Sitz* holdings in any way, but that any checkpoints with general crime control goals must still operate under the governing principles of the Fourth Amendment's required amounts of individualized suspicion.[107]

F. The Eighth Circuit Court of Appeals Affirms the U.S. Supreme Court with a Slight Variation on Edmond

In a case filed on October 7, 2002,[108] the Eigth Circuit Court of Appeals entered its own decision on the ruse checkpoint issue in *United States v. Yousif.*[109] The facts of the *Yousif* case were almost identical to those of both *Damask* and *State v. Mack.*[110] The location of the *Yousif* checkpoint was chosen because of police suspicion that Interstate 44 was being used to transport large volumes of narcotics. The "Sugar Tree" checkpoint location was also selected because it was a little-used route for commercial or local traffic.[111] The operation of the Sugar Tree checkpoint ran according to standards issued by the Missouri Highway Patrol.[112] The checkpoint system, except for its deceptive nature, operated almost identically to the checkpoint in

104. *Id.* at 47.

105. *Id.* at 44.

106. *Id*. at 48.

107. *Edmond*, 531 U.S. at 47.

108. Note that this decision came out after *Mack*. This case is offered here to provide support to the thesis that ruse checkpoints should be abolished altogether.

109. 308 F.3d 820 (8th Cir. 2002)

110. In *Yousif*, the Phelps County Sheriff's Department set up a ruse checkpoint at the end of the exit ramp leading uphill from eastbound Interstate 44 to Sugar Tree Road in Phelps County, Missouri. *Yousif*, 308 F.3d at 823. The checkpoint was classified as a ruse checkpoint because signs were visible along the highway, alerting motorists to an approaching drug checkpoint, whereas in reality, the checkpoint was located on the ramp that exited the highway a short distance past the warning signs. *Id.* at 823.

111. *Yousif*, 308 F.3d at 823. The location of the ruse checkpoint was chosen for almost the exact same reasons. *Mack*, 66 S.W.3d at 707.

112. *Yousif*, 308 F.3d at 823.

Indianapolis v. Edmond.[113] On April 13, 2000, Salwan Yousif drove his rented Ford Explorer into the Sugar Tree Road checkpoint.[114] After a Missouri Highway Patrolman picked up on a very strong berry-like odor, he asked Yousif and his wife for consent to search the Ford Explorer.[115] The search produced large amounts of marijuana.[116]

The district court denied Yousif's motion to suppress the evidence and adopted the magistrate judge's decision, which concluded that the Sugar Tree Road checkpoint did not violate Yousif's Fourth Amendment rights, and that Yousif's consent to the search was voluntary.[117] However, shortly after the district court made its decision, the United States Supreme Court handed down its landmark decision in *Edmond*, which held that similar drug interdiction roadside checkpoints were violative of an individual's Fourth Amendment rights because they allowed seizures without the requisite amount of individualized suspicion.[118]

Even after learning of the *Edmond* decision, the magistrate judge again denied Yousif's motion to suppress.[119] Though the magistrate judge believed there was enough individualized suspicion to distinguish the case from *Edmond*, the district court disagreed, and held the Sugar Tree Road checkpoint to be "'clearly illegal' under *Edmond*."[120] The district court continued, "[a]ll of these indicators . . . Defendant's initial hesitation . . . nervousness and shaking . . . and the overwhelming berry-scented air freshener, would not exist

113. "When a vehicle would arrive at the [Sugar Tree Road] 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" and would inquire as to why the motorist exited the highway. *Id*. at 823-24. If the officer had suspicions about the driver, the officer would ask for consent to search the vehicle. *Id*. at 824. If consent was denied and reasonable suspicion continued, the officer would ask the driver and any other occupants to get out of the vehicle while a drug dog circled the vehicle. *Id*.

114. *Id.* at 824.

115. *Id.* The Ford Explorer had Oklahoma plates, and when questioned by the police, Yousif produced an Arizona driver's license and a rental agreement for the vehicle. *Id*.

116. *Id.*

117. *Yousif*, 308 F.3d at 825.

118. *Id. See also Edmond*, 531 U.S. at 47.

119. *Yousif*, 308 F.3d at 825. The magistrate judge held this case to be distinguishable from *Edmond*, finding that the police did have the requisite degree of individualized suspicion to make the search. *Id.* The magistrate judge pointed to Yousif's conduct in approaching the checkpoint to illustrate the basis for the suspicion. *Id.* According to the judge, factors such as exiting the highway in the first place, stopping his vehicle half-way up the ramp, and driving a vehicle with out-of-town plates all indicated that Yousif might have been attempting to avoid this checkpoint. *Id*. at 825-26.

120. *Id.* at 826. The district court held that "the Supreme Court's holding in *Edmond* could not be 'avoided' simply by relying on 'factual indicators' which purportedly established individualized reasonable suspicion that Yousif was transporting drugs." *Id.*

but for the illegal checkpoint."[121] The district court agreed with the magistrate's opinion that Yousif's voluntary consent was an independent basis for denying the motion to suppress.[122]

On appeal, Yousif argued that the district court erred in denying his motion to suppress by contending:

> [T]he apparent consent he gave . . . and his apparent waiver of *Miranda* rights . . . were not sufficiently attenuated from the unlawful seizure to purge the taint of the constitutional violation. Therefore . . . the marijuana discovered . . . [was] fruit[] of the poisonous tree and subject to exclusion.[123]

For the same reasons that the Supreme Court found the Indianapolis checkpoints unconstitutional, the Court of Appeals for the Eighth Circuit found the Sugar Tree Road ruse checkpoint unconstitutional. Like the checkpoint in *Edmond*, the primary purpose of the Sugar Tree Road checkpoint was the interdiction of drug trafficking.[124] Using the same reasoning that was used by the dissent in *Mack*, the Court of Appeals stated, "while some drivers may have wanted to avoid being caught for drug trafficking, many more took the exit for wholly innocent reasons—such as wanting to avoid the inconvenience and delay."[125] Borrowing from the majority's logic in *Edmond*, the Court of Appeals continued, "a quantum of individualized suspicion only *after* a stop occurs cannot justify the stop itself."[126] The Court of Appeals reversed the decision of the district court, declared that the Sugar Tree checkpoint unconstitutional, and remanded the case for further proceedings.[127]

III. WHAT ALL THE FUSS IS ABOUT: THE MISSOURI SUPREME COURT THROWS A CURVEBALL IN *STATE V. MACK*

On February 13, 2002, the Supreme Court of Missouri reached what many would consider a surprising decision when it reversed the trial court's decision to suppress evidence confiscated by police while operating a ruse checkpoint. The court faced essentially the same Fourth Amendment issues that the United States Supreme Court faced in *Edmond*.[128] The underlying facts of *Mack* are the same as those that courts have seen numerous times before in the so-called "ruse checkpoint" cases.[129]

121. *Id*.
122. *Id.* at 826-27.
123. *Id.* at 827.
124. *Yousif*, 308 F.3d at 827.
125. *Id.* at 827-28.
126. *Id.* at 828 (emphasis in original).
127. *Id.* at 832.
128. State v. Mack, 66 S.W.3d 706 (Mo. 2002) (en banc).
129. *See Yousif*, 308 F.3d at 824; United States v. Brugal, 209 F.3d 353 (4th Cir. 2000); Bass v. Commonwealth, 525 S.E.2d 921 (Va. 2000); State v. Damask, 936 S.W.2d 565 (Mo. 1997).

On June 24, 1999, the City of Troy Police Department established a drug checkpoint on northbound Highway 61 at the Old Cap Au Gris exit in Lincoln County, Missouri.[130] The Old Cap Au Gris exit had no gas stations or restaurants, and the police believed that the only conceivable reasons for a traveler to take this exit "would be to go to a local high school, a local Catholic church, or one of several residences in the area."[131] The drug checkpoint consisted of a sign posted on the highway approximately one quarter of a mile from the Old Cap Au Gris exit, which read "DRUG ENFORCEMENT CHECKPOINT ONE MILE AHEAD" and "POLICE DRUG DOGS WORKING."[132] This checkpoint was a ploy because it led drivers to believe that the drug checkpoint was located at the Highway 47 exit further down the road, when in reality the checkpoint was located at the Old Cap Au Gris exit. Believing the checkpoint was at the Highway 47 exit, unsuspecting motorists would exit at Old Cap Au Gris and drive right into the police trap.[133]

The Troy police conducted their checkpoints according to guidelines that were similar to those established by the Indianapolis Police Department in *Edmond*.[134] The police were instructed that motorists had no valid reason to take the Old Cap Au Gris exit on the night in question. If police questioning revealed no circumstances that warranted reasonable suspicion of drug trafficking, the motorist was released.[135] If the officers did have reasonable suspicion that the motorists possessed narcotics, they directed the vehicle to the entrance side of the ramp, where one of the officers sought permission to search the car.[136]

Respondent Mack took the Old Cap Au Gris exit at approximately 11:00 p.m. on June 24 and was stopped by the Troy police officers.[137] At the suppression hearing, one of the officers described his first contact with Mack as "the most obvious veering off of 61 all night. The vehicle . . . almost missed the turn. He was going northbound on 61 and all of a suddenly [sic] veered off

130. *Mack*, 66 S.W.3d at 707. The Missouri Supreme Court noted that the police chose this particular exit because they believed there was no legitimate reason for a motorist to take that particular exit on that particular night. *Id.*

131. *Id.* The police determined that there were no activities that Thursday night at the high school or the church, and therefore, believed the exit to be an ideal location to set up their checkpoint. *Id.*

132. *Id.*

133. *Id.*

134. The Troy police were stationed at the top of the ramp and were instructed to stop all exiting vehicles, record the driver's license number and registration, and ascertain the motorists' reason for exiting. *Id.*

135. *Mack*, 66 S.W.3d at 707.

136. *Id.* If the driver did not grant the officers permission, a drug dog was used to detect the presence of any narcotics. *Id.*

137. *Id.*

onto the off ramp."[138] The officer continued in more detail by testifying, "I remember seeing a vehicle coming toward me which would have been northbound 61. It appeared it was going to continue past the off ramp. And suddenly it shot over and almost missing it came up the off ramp. And he was moving at a pretty good pace too."[139]

Mack told officers that he had exited at Old Cap Au Gris to get to a bar in Troy.[140] Once at the checkpoint, the officers observed that Mack was "very nervous, had glazed and bloodshot eyes, and smelled of alcohol."[141] Mack allowed the police to search his car, and they discovered various illegal narcotics under the driver's seat. Mack was charged with possession of methamphetamine, cocaine, and methylphenidate.[142]

A. The Missouri Supreme Court distinguishes Mack from Edmond

The Respondent in *Mack* presented the obvious argument that *Edmond* controlled the case, and that his motion to suppress should have been granted accordingly.[143] The State of Missouri, on the other hand, contended that the checkpoints involved were "fundamentally different" than those set up in Indianapolis.[144] The State argued that the requisite level of "individualized suspicion" necessary to allow a checkpoint to pass constitutional muster was present.[145] The Missouri Supreme Court agreed with the State, found that *Mack* was distinguishable from *Edmond*, and concluded that the checkpoints were reasonable under the Fourth Amendment.[146] The decision in *Mack* thus turned on the same legal issue as *Edmond*— whether or not the checkpoints in question generated the "necessary quantum of individualized suspicion" to make them reasonable and thus, constitutional.[147] The *Mack* majority recognized that a police officer normally must observe some type of unusual

138. *Id.*

139. *Id.* at 707.

140. *Mack*, 665.W.3d at 707. The dissent determined that a motorist could have used this exit to get to the bar to which Mack was headed. *Id.* at 718 (Stith, J., dissenting).

141. *Id*. at 708.

142. *Id.*

143. *Id.*

144. *Id.* at 709.

145. *Mack*, 66 S.W.3d. at 709.

146. *Id.* at 709-10. The court in *Mack* recounted the facts in *Edmond*. There, a predetermined number of cars at each checkpoint were stopped at random and there was no attempt to aquire individualized suspicion before making any of the stops. *Id.* at 709. The majority in *Mack* reasoned that, unlike in *Edmond*, the entire purpose of the *Mack* checkpoint was to "generate the suspicious conduct necessary to constitute 'individualized suspicion,' and this was done by deceiving drivers who were engaged in criminal activity into exiting the highway so as to avoid the checkpoint they expected to encounter at the next exit." *Id.*

147. *Id*. at 709.

conduct, "which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," before justifying this type of seizure.[148]

The majority opinion in *Mack* found it was logical that drivers with something to hide, such as drugs in the car, would avoid the drug checkpoint at all costs and exit at the nearest available off-ramp.[149] The majority also relied on the fact that there was allegedly no other legitimate reason for motorists to take the Old Cap Au Gris exit on the night police operated the checkpoints.[150] The court also accepted the State's contention that these types of ruse checkpoints have a lofty success rate because most drivers with drugs in their cars usually "take the bait."[151] Without explicitly applying the "*Brown* Balancing Test," the majority also analyzed the second effectiveness prong of the test by recognizing that these checkpoints were set up in an identical manner to those that have been found to be successful in the past.[152]

The final, and possibly the most convincing, reason behind the majority's ruling was Mack's conduct in taking the Old Cap Au Gris exit.[153] According to one officer's testimony, Mack "suddenly veered off onto the off ramp" and "almost missed the turn," leading the officer little choice but to infer that Mack had made a last-ditch effort to avoid the drug checkpoint.[154] The majority held that this particular conduct, coupled with the totality of the circumstances surrounding the checkpoint's premise, certainly constituted the requisite amount of "individualized suspicion" necessary to be classified as "reasonable."[155] This particularized conduct formed the basis of the majority's refutation of the dissent's argument that this case is indistinguishable from *United States v. Green*,[156] where that court held that checkpoints similar to the ones in *Mack* constituted an unreasonable seizure.[157]

148. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).

149. *Id.* at 709. The nearest available off-ramp in *Mack* was the Old Cap Au Gris exit, and hence an effective trap was laid. *Id.* at 707.

150. *Mack*, 66 S.W.3d at 707. The majority wrote, "the checkpoint was set up in an isolated and sparsely populated area offering no services to motorists and was conducted on an evening that would otherwise have little traffic." *Id.* The court also added that the defendant took the exit at 11:00 p.m., a time when there is normally even less traffic on the local roads. *Id.*

151. *Id.* at 709.

152. *Id.* (citing State v. Damask, 936 S.W.2d 565, 573 (Mo. 1997)). *Damask* referenced the success rate of this police tactic as part of the rationale for its legitimacy. *Id.*

153. *Id*. at 709-10. *See also* United States v. Arvizu, 534 U.S. 266, 275-77 (2002). The *Mack* majority relied on the reasoning in *Arvizu* when it took into consideration Mack's conduct in exiting the highway. *Mack*, 66 S.W.3d at 709-10. The Court in *Arvizu* found that courts must look to the "the totality of the circumstances." *Arvizu*, 534 U.S. at 273.

154. *Mack*, 66 S.W.3d at 710.

155. *Id.* at 710.

156. 275 F.3d 649 (8th Cir. 2001).

157. *Mack*, 66 S.W.3d at 710 (citing United States v. Green, 275 F.3d 694 (8th Cir. 2001)). The majority in *Mack* found the case to be distinguishable from *Green* because in *Green*, there

B. The Mack Dissent Stays True to Edmond

The Court in *Edmond* realized and appreciated the danger and severity of drugs and drug-related activity in this country; however, it went on to find that, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[158] The *Mack* dissent agreed and cited numerous cases decided both before and after *Edmond* declaring these ruse checkpoints unconstitutional.[159]

The dissent began by comparing the facts in *Mack* with those in some of the pre-*Edmond* decisions. Two cases in particular, *State v. Damask* and *Galberth v. United States*, factored largely in the dissent's reasoning. The dissent stressed that the Missouri Supreme Court's decision in *Damask*, which approved the use of checkpoints such as the one in *Mack* for the purpose of preventing drug-related crimes, was in direct conflict with *Edmond*.[160] In *Damask*, the Missouri Supreme Court rejected the *Galberth* reasoning and equated the approval of border checkpoints with an approval of roadway checkpoints for the principal purpose of deterring general criminal activity.[161] However, the dissent urged that the *Galberth* outcome should be the rule because it was consistent with *Edmond*, holding ruse checkpoints to be unreasonable under the Fourth Amendment.[162] The Missouri Supreme Court in *Damask* even held, "[b]ut for the illegal immigration cases, one might agree that *Galberth* correctly states the law."[163]

The dissent referenced the recent Eighth Circuit decision in *United States v. Green*, which explicitly held that a ruse checkpoint similar to the one used in *Mack* violated the Fourth Amendment guidelines stressed in *Edmond*.[164] The

was no additional evidence of the requisite individualized suspicion, whereas in *Mack*, Mack almost missed the turn and veered suddenly off the highway. *Id.* at 710.

158. City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

159. *Mack*, 66 S.W.3d at 711-12 (Stith, J., dissenting). The dissent cited cases invalidating general criminal checkpoints, such as *People v. Lidster*, 747 N.E.2d 419 (Ill. App. Ct. 2001), and pre-*Edmond* cases with similar holdings, *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992); *Galberth v. United States*, 590 A.2d 990 (D.C. Cir. 1991)).

160. *Mack*, 66 S.W. 3d at 712 (Stith, J., dissenting). The dissent noted that "in *Damask* this Court considered the reasoning of *Galberth*, . . . that police may not use a checkpoint to seek evidence of drug-related crimes, but rejected that reasoning because it believed . . . that the United States Supreme Court's approval of border patrol checkpoints in *United States v. Martinez-Fuerte* constituted approval of roadway checkpoints for the purpose of deterring criminal activity." *Id.*

161. *Id.* The Missouri Supreme Court did not rule according to the *Galberth* decision, which held that police could not use such suspicionless checkpoints. *Id.*

162. *Id.*

163. State v. Damask, 936 S.W.2d 565, 572 (Mo. 1997).

164. *Mack*, 66 S.W.3d at 712-13 (Stith, J., dissenting) (citing United States v. Green, 275 F.3d 694, 697-700 (8th Cir. 2001)). The checkpoint program in *Green* operated under the same ruse premise as the one in *Mack*. *Id.* at 712. In *Green*, one defendant consented to a search of his car

Green court ruled in conformity with the *Edmond* holding and found that checkpoints used for general crime prevention were not constitutional.[165] The *Mack* dissent also relied on an earlier case, which actually foreshadowed some of the reasoning that the Supreme Court would later apply in *Edmond*. *United States v. Huguenin* also involved a checkpoint warning similar to the one found in *Mack*, which notified drivers of a drug/DUI checkpoint at an approaching exit.[166] The *Huguenin* court reasoned,

> [The police] did not attempt to minimize the fear and surprise potentially experienced by motorists, but specifically attempted to increase surprise. An ordinary law-abiding citizen, who perhaps took the exit simply to avoid the unusual process of being stopped on an Interstate highway, could fear that he would be under greater suspicion and subject to more intrusive questions and a thorough search of his car simply because he had chosen to take the exit.[167]

The *Mack* dissent suggested that the ruse checkpoint used in *Huguenin* "caused greater Fourth Amendment concern because its surreptitious nature resulted in unreasonable and unnecessary surprise on the part of law-abiding motorists."[168] After discussing both the constitutionality of the mixed-motive purpose of the checkpoint [169] and its excessive level of subjective intrusion, the

at a drug enforcement checkpoint. Drugs were found in the car. Defendants brought a Fourth Amendment challenge to the admission of evidence resulting from the stop and subsequent search of the car at the drug checkpoint. *Green*, 275 F.3d at 697-98.

165. *Green*, 275 F.3d at 699-700.

166. United States v. Huguenin, 154 F.3d 547, 549 (6th Cir. 1998). The Tennessee Sheriff's Department had established this checkpoint as a ruse to stop motorists who chose to exit off the highway after viewing the warning signs. Although the two signs posted on eastbound I-40 read "DRUG-DUI ENFORCEMENT CHECK POINT 1/2 MILE AHEAD," the officers had no checkpoint in place on the highway at that location. *Id.* Rather, the police set up a checkpoint at the end of the Airport Road exit ramp, which was the first exit available to motorists after the posted signs. *Id.* The Airport Road exit was not frequently used because no services were offered at the exit. *Id.* Motorists were unaware of the roadblock at the end of the ramp until they came around a curve approximately 50 to 100 yards into exit ramp. *Id.* After a motorist exited, there was no way to avoid the checkpoint because it was illegal to back down the ramp. *Id.*

167. *Id.* at 561.

168. *Mack*, 66 S.W.3d at 711 (Stith, J., dissenting).

169. *Huguenin*, 154 F.3d at 556-59. There was a dispute about whether the checkpoint's primary purpose was to prevent drunken driving or to intercept narcotics. After analyzing the *Whren* and *Merrett* decisions as well as other mixed-motive cases, the court ultimately held that the primary purpose of the program was to detect narcotics and that the checkpoint could not be ruled constitutional simply because another purpose was to detect drunken driving. *Id.* at 559. The court found that "[t]he problem with mixed-motive checkpoints is that they allow law enforcement officers the opportunity to use a pretext to question and search for contraband without probable cause, conduct the Supreme Court consistently has frowned upon." *Id.* at 557. For a discussion on mixed-motive purposes and pretextual stops, see *Whren v. United States*, 517 U.S. 806, 816 (1996) and *Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir. 1995).

Huguenin court concluded that the ruse checkpoints were not reasonable and thus not constitutional.[170]

Another area of disagreement between the majority and the dissent in *Mack* surrounded the police officers' subjective good faith.[171] The dissent again pointed to *Edmond*, in which the Court found that setting up a trap so as to avoid inconvenience was irrelevant and could "play no role in ordinary, probable-cause Fourth Amendment analysis."[172] Not withstanding the previously Court-approved exceptions, a checkpoint must always create the requisite amount of individualized suspicion, to be determined by objective means, rather than by the police officers' subjective explanations.[173] The dissent continued, "our inquiry is not whether the police *subjectively tried* to create a basis for individualized suspicion . . . [r]ather, the inquiry is whether the way the drug checkpoint was in fact set up, *considered objectively*, created the kind of individualized suspicion required by *Edmond*."[174] The dissent found it paradoxical that a checkpoint scheme such as the one in *Mack* could create individualized suspicion when every vehicle that took the Old Cap Au Gris exit was stopped.[175] The record revealed that between sixty and one hundred and fifty vehicles exited during the life span of this checkpoint.[176] According to the majority's reasoning, every one of these vehicles met the required "individualized suspicion" standard simply because they exited the highway.[177] The dissent suggested that this was "group suspicion" disguised as individualized suspicion, and was unconstitutional.[178]

The dissent also refuted the majority's conclusion that the effectiveness of the ruse checkpoint somehow led to its "propriety."[179] The dissent cited *Sitz*, where that Court held that the effectiveness of a certain law enforcement tactic was not entirely determinative of a checkpoint's constitutionality.[180] The *Sitz*

170. *Huguenin*, 154 F.3d at 563.

171. *Mack*, 66 S.W.3d at 714 (Stith, J., dissenting). The majority adopted the idea that the police tried to set up the checkpoint in a manner that would cause the least amount of inconvenience for local residents and those who might have had a non-criminal reason for exiting the highway. *Id.*

172. *Id.* (citing City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000)).

173. *Id.*

174. *Id.* (emphasis in original).

175. *Id.*

176. *Mack*, 66 S.W.3d at 714 (Stith, J., dissenting).

177. *Id.* The dissent further noted, "[t]his type of suspicion is hardly 'individualized.' If the Court approves this procedure today, it, in effect, will have approved 'group suspicion' as a basis for stopping each individual in the group." *Id.*

178. *Id.* at 714-15.

179. *Id.* at 715.

180. *Id.* (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453-54 (1990)). In *Mack*, the dissent stated "that courts must not consider the relative effectiveness of a chosen path of law enforcement activity in determining its constitutional propriety. So long as the technique

Court did analyze the statistics of the Michigan checkpoint program as part of the "*Brown* Balancing Test," but it did not conclude that the statistics were so overwhelming so as to elevate the checkpoint into a higher level of police enforcement tactic that the *Mack* majority suggested.[181] The *Mack* majority suggested that ruse checkpoints are so effective that they belong to a heightened category of police tactic because the checkpoints themselves created the required individualized suspicion.[182] The dissent looked to the record in *Mack* to show that this proposition was not true.[183] Although the record was inconclusive regarding the exact numbers (the dissent found that the inexactness of the record-keeping was yet another problem with these checkpoints), the police testified that approximately five of the sixty to one hundred and fifty cars that took the Old Cap Au Gris exit lead to a drug-related arrest.[184] In the cases of *Edmond* and *Damask*, which used similar types of checkpoints,[185] the "hit rate" was approximately nine percent and 1.5% respectively.[186] These relatively low percentages discredit the State's contention that these checkpoints, especially ruse checkpoints, are so much more effective than regular, everyday police techniques.[187]

Perhaps the most practical and common sense-based arguments the dissent presented were the various, non-criminal reasons why motorists might have taken the "rigged" exit. Contrary to what the majority accepted, the dissent found legitimate reasons why motorists might have taken the Old Cap Au Gris exit. The dissent suggested reasons such as the following: a law-abiding motorist could have wanted to get home or to another place of destination without the hassle of a drug check, motorists might not have wanted to change travel plans, or motorists might have had a general fear of the police.[188] A motorist not from the area, which was a small community, or a motorist of a

employed is reasonable, the decision whether to use it or some other approach, whether more or less effective, is left in the hands of law enforcement officials." *Id.*

181. *Sitz*, 496 U.S. at 455.

182. *Mack*, 66 S.W.3d at 715 (Stith, J., dissenting).

183. *Id.* The dissent refuted this notion when it found, "[n]either the record, nor common human experience . . . supports the principal opinion's assumption that only those engaged in criminal activity would 'take the bait' and exit the highway at Old Cap Au Gris in response to the subterfuge the police employed here." *Id.* at 715.

184. *Id.* at 715 n.3.

185. The *Edmond* checkpoint, however, was not a ruse.

186. In *Edmond*, 1,161 vehicles were stopped and one hundred and four arrests were made, fifty-five of which were drug-related. In *Damask*, approximately sixty-six cars drove into the checkpoint, ten of which were searched. Only one arrest was made in that case, and that was of the defendant. *Mack*, 66 S.W.3d at 716 (Stith, J., dissenting) (citing City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000)); State v. Damask, 936 S.W.2d 565 (Mo. 1996).

187. *Mack*, 66 S.W.3d at 716. The dissent noted that the Supreme Court held in *Edmond* that a nine percent overall success rate was not enough to create individualized suspicion. *Id.*

188. *Id.*

minority ethnic background might have been afraid of becoming a target of harassment in such a system.[189] The record went on to show that there were numerous residences near the exit, and that the road to which the exit led could have been used to get to downtown Troy.[190] The dissent determined that the road near the exit might not have been the most direct route to Troy, but depending on traffic, it might have been just as timely as the other routes.[191]

Defendant Mack was not the only individual who might have had non-criminal reasons for taking this exit.[192] On a few past occasions, the Old Cap Au Gris exit became so backlogged because of the checkpoint program that cars began to back up into the travel lanes of the highway.[193] To remedy the jam, police would waive many vehicles through without even so much as taking "a glance" at them.[194] The officer in charge provided only an estimate, but he guessed that about forty-six of approximately eighty total vehicles were approached by a police officer.[195] After examining the inexactness of the *Mack* system, it tends to look more like the random scheme that was disfavored in *Edmond* rather than a system that adhered to strict, objective, state-mandated guidelines.[196] The dissent contended that because the Court ruled group searches unconstitutional in *Edmond*, the Missouri Supreme Court was obliged to do the same. The dissent also pointed out that if the police really believed that every vehicle that took the exit had drugs within it, they would not have waived all those cars through without even giving them a preliminary glance.[197]

One final and key argument made by the dissent was that defendant Mack's swerving conduct in his car did not lead to his stop as the majority contended. The record was clear that his car was stopped because he exited, not because he swerved.[198] Nowhere did the police state that they stopped him

189. *Id.* at 716-17.

190. *Id.* at 718.

191. *Id.* The defendant Mack testified that he was on his way to a bar located in Troy and that is why he exited. The police officer confirmed that this would have been an acceptable route to get from Mack's house to the bar. *Id.*

192. *Mack*, 66 S.W.3d at 719 (Stith, J., dissenting).

193. *Id.*

194. *Id.*

195. *Id.* at 719 n.7.

196. *Id.* In *Edmond*, the police stopped and talked with drivers of a group of cars on the highway, while letting others go by with no detention. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 35-36 (2000).

197. *Mack*, 66 S.W.3d at 719 (Stith, J., dissenting). The dissent found, "the fact that police were willing to send those cars on their way is a strong indicator that the police did not really form an individualized suspicion of criminal activity from the mere fact that the cars exited at Old Cap Au Gris." *Id.*

198. *Id.* at 720.

because of his conduct.[199] Accordingly, this was an "after-the fact" argument put forward to justify the stop.[200] The dissent did acknowledge that according to *Brugal*, the police are entitled to consider the "totality of the circumstances."[201] Factors such as the vehicle's swerving and the open container of alcohol in the vehicle, when considered with the circumstances surrounding the checkpoint, can be used in deciding whether there was enough of the required suspicion to detain the defendant further.[202] The dissent emphasized however, that the issue to be decided was the constitutionality of the initial stop.[203]

IV. AUTHOR'S ANALYSIS: USING *EDMOND*-PRECEDENT, RUSE CHECKPOINTS SHOULD BE ABOLISHED

As evidenced by the lengthy and somewhat inconsistent chain of court decisions on the issue of police use of vehicle checkpoints, there does not seem to be a definitive, ready-made answer to the question of the constitutionality of these checkpoints. Even the *Edmond* decision, which was intended to provide that so-called easy answer, was marked with a sharp disagreement between the majority and dissenting opinions.[204] After analyzing both opinions in *Edmond*, it is still unclear which test should be applied in determining the constitutionality of certain vehicle checkpoint cases.[205] Both the "primary purpose test" and the "*Brown* Balancing Test" have been approved by the Court in the past, and yet, as seen in *Edmond*, both tests can yield differing results. The fine line between those cases in which vehicle checkpoints are a legitimate means of remedying a social ill and do not infringe upon the constitutional rights of the motorist and those cases that do infringe on a motorist's Fourth Amendment rights is often difficult to locate. However, considering the ambiguity that courts now have to deal with in deciding

199. *Id.* "[T]he state did introduce evidence of this swerving at trial, but the issue is not whether the state recognized at trial that it needed an alternative ground for the stop to support the stop but whether the police actually had an alternative ground at the time Mr. Mack was seized by them . . . . They did not." *Id.*

200. *Id.*

201. *Id.* at 720 n.8. (Stith, J., dissenting).

202. *Mack*, 66 S.W.3d at 720 n.8.

203. *Id.*

204. This note will analyze the *Mack* decision as if it had been decided using either the primary purpose test that the *Edmond* majority used, or the "*Brown* Balancing Test" that the *Edmond* dissent used. Justice O'Connor delivered the opinion of the *Edmond* Court and was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist filed the dissenting opinion and was joined by Justice Thomas and Justice Scalia. Justice Thomas also filed a separate dissenting opinion. City of Indianapolis v. Edmond, 531 U.S. 32, 33 (2000).

205. The majority opinion analyzed the Indianapolis vehicle checkpoint according to its primary purpose. *Id.* at 41-42. The dissenting opinion applied the "*Brown* Balancing Test" to the checkpoints in order to determine their constitutionality. *Id.* at 49 (Rehnquist, C.J., dissenting).

vehicle checkpoint cases, especially those of the ruse variation, the Missouri Supreme Court should have made a different finding than it did in *Mack*. The majority opinion does not do justice to the long-established history of roadblock jurisprudence that was developed to aid future court decisions such as the one in *Mack.* The discussion of the *Edmond* principles is rather cursory, and the long-approved "*Brown* Balancing Test" is ignored altogether.

This note does not suggest that the vehicle checkpoints in *Mack* were identical to those in *Edmond.* It would be unfair to maintain that the Missouri Supreme Court had no choice but to follow *Edmond.* A case could be made, and in fact was made by the majority, that the two cases were distinguishable. However, the Missouri Supreme Court certainly could have applied the dual *Edmond* tests to this "distinguishable" ruse checkpoint case. If it had done so, the outcome in *Mack* would have been the same as that in *Edmond.* Starting with the rationale that the United States Supreme Court used in the *Edmond* majority opinion, it should have been evident that the *Mack* checkpoint was established to help eradicate the same societal problem for which the *Edmond* checkpoint was established. The checkpoint in *Mack* was not developed to serve any of the previously Court-approved purposes where the general rule of individualized suspicion is suspended, such as retarding the influx of illegal immigration,[206] reducing the number of drunk drivers,[207] serving administrative purposes,[208] or even the potentially appropriate purpose of examining driver's licenses and vehicle registrations.[209] The *Mack* checkpoint, like the *Edmond* checkpoint, was established with the aim of preventing general criminal wrongdoings. The State in *Mack* does not even attempt to use the "secondary purpose" argument that the State did in *Edmond.* The petitioners in *Edmond* tried to convince the Court that the checkpoint was justified because it had a legitimate, dual purpose of checking licenses and registrations.[210] The Court in *Edmond* immediately recognized the problems that would come with approval of "secondary purposes" for legitimizing a checkpoint. If the Court had accepted the petitioner's argument, any imaginable type of checkpoint would be allowed if it had a legitimate purpose attached.[211] The State in *Mack* did not even attempt to mask the primary purpose of its checkpoint, which was to reduce the amount of drug trafficking on Missouri highways.[212]

206. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

207. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

208. *See* New York v. Burger, 482 U.S. 691 (1987); Michigan v. Tyler, 436 U.S. 499 (1978).

209. *See* Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brugal, 209 F.3d 353, 357 (4th Cir. 2000).

210. City of Indianapolis v. Edmond, 53 U.S. 32, 40-41 (2000).

211. *Id.* at 42.

212. State v. Mack, 66 S.W.3d 706, 709 (Mo. 2002).

The State of Missouri argued that its checkpoints were fundamentally different than those in *Edmond* because the required level of individualized suspicion was present, whereas in *Edmond* it was not.[213] The State elaborated that the purpose of the Missouri checkpoints was to generate suspicion by deceiving drivers engaged in criminal activity to exit the highway.[214] This ruse however, still does not mask the primary purpose of the entire program, which was to interdict the transportation of drugs. Even assuming that the trick did generate the appropriate level of individualized suspicion, this Missouri checkpoint system still serves unconstitutional purposes. The Missouri Supreme Court should have decided, as did the majority in *Edmond*, that "because the primary purpose . . . is ultimately indistinguishable from the general interest in crime control, the checkpoints violate[d] the Fourth Amendment."[215]

Not only is the primary purpose test easily deciphered in *Mack*, the State's premise that the checkpoint's entire reason for being was to generate suspicion is also flawed. Judge Stith's dissent highlighted an abundance of non-criminal reasons for avoiding the checkpoint. In examining the results of a similar South Carolina variation[216] of the Missouri ruse checkpoint, designed to check driver's licenses and registrations, the *Brugal* court found that one driver exited because he "was nervous about not having a driver's license."[217] Two other drivers exited simply because they were lost.[218] There are a number of ways for an unsuspecting motorist to inadvertently find himself in the teeth of one of these ruse checkpoints. Courts have almost always discovered that no matter how remote the selected location for the ruse checkpoint is, an innocent motorist can somehow end up in it.[219] The dissent in *Mack* acknowledged that it was feasible for Mack to get to his Troy bar destination by taking the Old Cap Au Gris exit.[220] Using the *Edmond* decision as a guide, the Missouri

213. *Id.* at 709.

214. *Id.*

215. *Edmond*, 531 U.S. at 48.

216. The South Carolina checkpoint was a different kind of ruse. As motorists approached Exit 22, they passed two large signs on the interstate reading "DRUG CHECKPOINT AHEAD." The first sign was posted 1000 feet before Exit 22, and the second was posted five hundred feet before the exit. However, there was no drug checkpoint on Interstate 95. Instead, a checkpoint was established at Exit 22's exit ramp to verify the driver's license and vehicle registration of every motorist that exited. The decoy drug checkpoint signs were placed on the interstate intending "that people carrying narcotics will become erratic, exit off the interstate, throw the narcotics out or . . . cross the median and go back in the opposite direction." United States v. Brugal, 209 F.3d 353, 354-55 (4th Cir. 2000).

217. *Id.* at 355 n.1.

218. *Id.*

219. *See id. See also* State v. Mack, 66 S.W.3d 706, 717 (Mo. 2002) (Stith, J., dissenting); United States v. Yousif, 308 F.3d 820, 827-28 (8th Cir. 2002).

220. *Mack*, 66 S.W.3d at 718 (Stith, J., dissenting).

Supreme Court should have found that the sole fact that a motorist exited a highway cannot be enough to justify this type of drug enforcement tactic.

Certain individuals in the legal community with a heightened interest or special knowledge in roadblock jurisprudence might contend that the dissenting opinion in *Edmond* was as insightful, if not more so, than the majority opinion. The dissent's principal arguments were that the majority completely ignored the established "*Brown* Balancing Test" in determining a checkpoint's constitutionality, and that the majority essentially invented this "primary purpose" element not found anywhere in the language of the Fourth Amendment. If the Missouri Supreme Court had applied the "*Brown* Balancing Test," the answer should have been just as clear as was the original "primary purpose" test. If the United States Supreme Court found it necessary to use the "*Brown* Balancing Test" in deciding *Sitz*, the Missouri Supreme Court should have felt compelled to do so with *Mack*.

The *Mack* court could have applied the three-pronged "*Brown* Balancing Test" in an easy, straightforward manner. The logic in applying the first prong is the same as it was in *Sitz*.[221] Much like the drinking and driving problem in *Sitz*, few could deny the severity of the drug problem in the United States today or the government's interest in eliminating it. The War on Drugs is a constant battle for government officials that many citizens would contend America is losing.[222]

The second prong of the "*Brown* Balancing Test" is slightly more difficult to understand and apply. The second prong weighs "the degree to which the seizure advances the public interest" and has evolved to the point that empirical data factors into the decision. This is the area where the overall "hit rate"[223] becomes part of the equation. One of the principal reasons why the Court in *Prouse* did not offer its acceptance of a strictly license and registration checkpoint was because of the absence of any empirical data of the success of such a checkpoint.[224] In the Court-approved programs found in *Sitz* and *Martinez-Fuerte*, the hit rates were 1.6%[225] and 0.5%[226] respectively. In both of those instances, the Court found the success rates sufficient to pass constitutional muster. The Supreme Court reversed its course when it found that the nine percent hit rate in *Edmond* was insufficient to create the requisite

221. The *Sitz* Court stated, "No one can seriously dispute the magnitude of the drunken driving problem or the States' interests in eradicating it." Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

222. *See id.*

223. The overall hit rate refers to the ratio of the total number of arrests made at a certain checkpoint compared to the total number of cars stopped at that checkpoint.

224. Delaware v. Prouse, 440 U.S. 648, 659 (1979).

225. *Sitz*, 496 U.S. at 455. Out of one hundred and twenty six drivers detained at the checkpoint, two motorists were arrested for drunken driving. *Id.* at 454.

226. *Id.* at 455 (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

amount of individualized suspicion to be considered constitutionally valid.[227] The record-keeping procedures in *Mack* were so inconsistent that no accurate percentages were provided, but from the raw data estimates, it seemed that the "hit rate" was comparable to the percentages computed in *Edmond.* Courts have concluded that to satisfy the second prong of the "*Brown* Balancing Test," the checkpoints do not have to be the most effective means of achieving the State's interests. The courts "need only decide whether, balanced with the importance of the governmental interest and degree of intrusion, checkpoints are at least reasonably effective as a tool in advancing the government's interest."[228] The Missouri Supreme Court could have determined that these types of ruse checkpoints were "reasonably effective" in advancing the government's interest in removing drugs from Missouri roadways. However, the small amount of empirical data revealing inconclusive hit rates found in *Mack* refutes the argument provided by the State that the use of these ruse checkpoints is so effective that this police technique should be elevated to level all its own. This technique seems to be no more successful than any other police technique for combating drugs.

The third prong of the "*Brown* Balancing Test" should have and would have been the crux of the case had the Missouri Supreme Court used it to arrive at its decision. Although the objective intrusion on the individual motorist might have been as minimal as it was in *Edmond* or *Damask*,[229] the subjective intrusion in *Mack* certainly was not. In determining the level of subjective intrusion, the critical factor is as follows:

> [W]hether the checkpoint is planned and operated in such a manner as to minimize the amount of discretion that officers at the scene may use in running the checkpoint. Was the checkpoint conducted according to a plan prepared in advance . . . were all vehicles stopped or, if not, were there specific, non-discretionary criteria used to generate a random determination as to which vehicles would be stopped, as opposed to some sort of discretionary selection method?[230]

he *Damask* court continued, "[a] second element is also important to the subjective intrusion analysis: the extent to which the stop might generate concern or fright on the part of lawful travelers."[231] This comment is ironic because the court in *Damask* did not find a substantial subjective intrusion on motorists' rights, even though the entire checkpoint operation in that case was

227. City of Indianapolis v. Edmond, 531 U.S. 32, 35, 44 (2000). *See also* State v. Mack, 66 S.W.3d 706, 716 (Mo. 2002) (Stith, J., dissenting).

228. State v. Damask, 936 S.W.2d 565, 572 (Mo. 1996).

229. The stops in *Edmond* and *Damask* lasted for a couple minutes. *See Edmond*, 531 U.S. at 36; *Damask*, 936 S.W.2d at 574.

230. *Damask*, 936 S.W.2d at 574.

231. *Id.* "The nature of the checkpoint and the presence of law enforcement personnel should be readily ascertainable to motorists stopped at the checkpoint." *Id.*

designed to deceive unsuspecting motorists. The *Mack* checkpoint was deceptive, patterned after the one in *Damask*, and unlike the regular, permanent checkpoints in *Edmond*, *Sitz*, and the other previously-approved checkpoint cases. The operator of the vehicle was not aware of the checkpoint and was tricked into it. This element of unwanted surprise is relevant because the average motorist is afraid of the police. The dissent in *Sitz* noted that, "[t]hose who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior."[232]

Anyone who has been driving in their car and has seen the flashing red and blue lights in the rear-view mirror knows that police encounters are normally unpleasant. People are instinctively apprehensive, even if they have not broken any laws, when encountering police on the roadways. In addition to the general fear of police, most ordinary motorists want to avoid delays on the road whenever possible. Desiring to avoid delays and to avoid police officers should not criminalize an individual, but according to the State of Missouri, that is what these ruse checkpoints do. By prolonging the vitality of these checkpoints in Missouri, the court promotes feelings of distrust and dislike toward local police departments. If the Missouri Supreme Court had applied the final prong of the "*Brown* Balancing Test" to the facts of *Mack*, it would have seen that the subjective intrusion into the lives of individual motorists was certainly not minimal. The level of surprise and fear that these ruse checkpoints could generate are surely substantial enough to fail the final prong of the *Brown* constitutionality test.

One important point of emphasis found in the *Mack* majority opinion, which does not fit into the "*Brown* Balancing Test" package, is the fact that Mack's individual conduct might or might not have been part of the puzzle. The majority sought to justify its decision by the fact that Mack drove his car suspiciously while exiting the highway. The majority determined that evidence of his sudden veering and almost missing his turn, "when coupled with the deceptive checkpoint scheme, certainly compels a finding of 'individualized' suspicion."[233] The inherent flaw in this logic seems to be that Mack's particular conduct should not, and in fact did not, make any difference under this particular checkpoint scheme. The checkpoint scheme itself was unconstitutional. The dissent classified the majority's reasoning with respect to Mack's driving conduct as "an after-the-fact rationalization made to justify a stop that was clearly based on the fact that Mr. Mack exited the highway at the

232. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 465 (1990) (Stevens, J., dissenting).

233. State v. Mack, 66 S.W.3d 706, 709-10 (Mo. 2002) (en banc). The court also noted "the *only* reason [for introducing the evidence] was to show that the officers were even more suspicious of this particular driver's conduct." *Id.* at 710 (emphasis in original).

Old Cap Au Gris exit."[234] In *Yousif*, the Court of Appeals dismissed the officer's arguments that they possessed the required amount of individualized suspicion because of the defendant's conduct in exiting the highway. The court there found, "All of these indicators, [i.e.] Defendant's initial hesitation . . . nervousness and shaking . . . and the overwhelming berry-scented air freshener, would not exist but for the illegal checkpoint."[235] In much the same manner, Mack could have been driving flawlessly, he could have been driving backwards, or he could have been driving a tank, and the situation in which he found himself would have remained the same. He was stopped at the checkpoint not because he almost missed his turn, but simply because he got off at the exit. That is exactly the type of checkpoint scheme that is unreasonably intrusive on an individual motorist and should be immediately ended.

The *Mack* dissent phrased the situation succinctly: "The driver would be put in a 'Catch-22' of either proceeding down the highway and being stopped at an unconstitutional checkpoint, or exiting to avoid it and risk being stopped at a ruse checkpoint set up to catch those who had exited."[236] The dissent realized that *Edmond* had already ruled any checkpoint designed for general crime prevention purposes unconstitutional, even ones not set up as a ruse. The fact that it was a surprise to the driver made the entire decision all the more unpalatable. The dissent continued: "There is something fundamentally unsettling and counter-intuitive about labeling as suspicious a person's conduct in avoiding the state's own unconstitutional conduct."[237] The dissent wrote convincingly and presented non-criminal reason upon reason that individuals might have for avoiding a police-run drug checkpoint.[238] The entire premise that the ruse checkpoints created the requisite amount of individualized suspicion was adequately refuted by the dissent and should have been afforded more weight by the *Mack* majority.

The solution to this problem is not earth-shattering. The United States Supreme Court revealed its true intentions on the subject of vehicle checkpoints when it handed down the *Edmond* decision, and the Eighth Circuit recognized that revelation in *Yousif*. The Missouri Supreme Court's decision in *Mack* is analogous to a fish out of water. The underlying tenet of the Fourth Amendment is that an individual has a right to be free from "suspicionless searches" unless certain, court-established special circumstances are present. Therefore, a blanket rule prohibiting police departments across the country from using ruse checkpoints as a method of combating the War on Drugs

234. *Id.* at 720 (Stith, J., dissenting).

235. United States v. Yousif, 308 F.3d 820, 826 (8th Cir. 2002) (alteration in original).

236. *Mack*, 66 S.W.3d at 717 (Stith, J., dissenting).

237. *Id.*

238. *Id.* at 716-17.

seems to be the most simplistic and effective means of preventing further cases like *Mack* from arising. America's fight against drugs cannot come at the expense of the total elimination of an individual's constitutional rights. The *Edmond* Court went to great lengths to stress the fact that its decision did not alter the constitutionality of the border checkpoint cases, the sobriety checkpoint cases, and even the driver's license checkpoint cases.[239] The Court also noted, "[o]ur holding 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."[240] However, the *Edmond* Court was equally as adamant about expressing its disapproval of checkpoints with the primary purpose of general crime control. Individual motorists must still be afforded some degree of security in an automobile.

V. CONCLUSION

Obviously, many in the legal community have differing views on the subject of ruse checkpoints as evidenced by the numerous inconsistent outcomes of checkpoint cases. The problem with the unpredictable results is that the ruse checkpoint cases are capable of hitting close to home. The scenario in this note is not a made-up, purely hypothetical, academic study. There is a common, practical bond that these cases share. Any motorist, especially any Missouri motorist, could fall victim to one of these traps. Many drivers on the roads today might not have any idea that the police are even using ruse checkpoints. In order for them to be spared from the surprise and humiliation that Mack was faced with, the courts must not allow ruse checkpoints to continue. Not only do these checkpoints fail to serve a constitutional primary purpose, they are not extraordinarily effective, and they are subjectively intrusive on the liberty rights of a motorist. Ruse checkpoints will apparently continue for as long as the Missouri Supreme Court is allowed to reach decisions like it did in *Mack*. To put an end to this, either a blanket rule ending ruse checkpoints must become law in Missouri or the court must change its thinking. Until this happens, Missouri motorists everywhere must be on the lookout.

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239. City of Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000).

240. *Id.* at 47-48.

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