CR-15-1067

(Formerly CR-14-1980)

IN THE

ARKANSAS SUPREME COURT

STATE OF ARKANSAS — APPELLANT

v.

JEREMY EDWARD WHALEN — APPELLEE

ON PETITION FOR REVIEW OF THE DECISION OF THE ARKANSAS COURT OF APPEALS

BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

CASES CITED

STATUTES AND OTHER SOURCES CITED

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The National College for DUI Defense, Inc. ("NCDD"), is a nonprofit professional organization of lawyers, with over two thousand members, focusing on issues related to the defense of a person charged with driving under the influence. Through its extensive educational programs, its website, and its email list, the NCDD trains lawyers to more effectively represent persons accused of driving under the influence.

The NCDD supports affirmance of the decision of the Court of Appeals determining the checkpoint established to stop Jeremy Whalen was unconstitutional.

ISSUE

Whether the checkpoint administered by the Arkansas State Patrol was established and conducted in such a manner as to minimize the intrusion upon the citizen and in compliance with the Fourth Amendment.

ARGUMENT

LAW ENFORCEMENT'S FAILURE TO ESTABLISH THE SITE SELECTION OR A PLAN AT THE SUPERVISORY LEVEL FOR A PROPER PURPOSE CREATES AN UNCONSTITUTIONAL CHECKPOINT

The Fourth Amendment of the U.S. Constitution frowns upon the

government's intrusion into a citizen's privacy. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall nor be violated. U.S. Const. IV Amend. The protections against government intrusions applies to citizens in their cars. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). The Fourth Amendment protects people, not places. *Katz v. U.S.*, 389 U.S. 347, 88S.Ct. 507 (1967). Only in limited and prescribed circumstances may the government invade its citizens' privacy. When those circumstances involve a checkpoint, the government must adhere to strict guidelines before seizing one of its citizens.

The Fourth Amendment provides citizens with the protection, and right, to be free from government intrusion. "As was stated in the seminal case of Terry, " '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' " 392 U.S. at 9, 88 S.Ct. 1868 (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891))" *State v. Heapy*, 151 P.3d 764, 768, 113 Hawaii 283 (Hawaii 2007). The citizen in this country is afforded the right to be free from government interference and harassment. As the Supreme Court pointed out in *U.S. v. Ortiz*, 422 U.S. 891, 895, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623, __ (1975), ". . . the central concern of the Fourth

Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials". When the government fails to impose limitations on the officers in the field, it subjects its citizens to the invasion the Fourth Amendment was designed to prevent.

A seizure of a citizen by the government is unreasonable absent some individualized suspicion of wrong doing. *Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). In order to be constitutional, a checkpoint must limit the discretion of officers in the field when seizing the citizen and the seizure must promote the public interest. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* at 51, 99 S.Ct. at 2640. When the government decides to invade the privacy of a citizen, "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.*

When the government relies upon a checkpoint to intrude upon a citizen's Fourth Amendment rights, the government must limit the discretion of the officers in the field. "When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Id.* at 52, 99

S.Ct. at 2641. Limiting the discretion of the officers in the filed starts when the site for a checkpoint is made by a supervisor. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). The discretion of the officers in the field must "be circumscribed, at least to some extent." *Michigan v. Sitz*, 496 U.S. 444, 454, 110 S.Ct. 2481, 2487, 110 L.Ed.2d 412 (1990). Ensuring that the officers in the field have limited ability to intrude upon, and possibly abuse, a citizen's Fourth Amendment rights is critical for a constitutionally valid checkpoint.

A checkpoint cannot be selected by the officers in the field. In the case before the court, the decision to conduct the checkpoint was not made at a supervisory level, but by the officers who were to conduct the checkpoint. The supervisors had no direct input on the plan to implement a checkpoint and would only be notified after the checkpoint was completed. *Whalen v. State,* 2015 Ark.App. 706 (2015). The officers in the field did not mention the checkpoint to a supervisor because they are expected to be done. *Id.* Sometimes, the officers just get together and decide to have a checkpoint. *Id.* The decision to conduct a checkpoint was implemented in Whalen's case by the officers in the field, not the supervisors. There was no limitation on the discretion of the officers in the field and the plan was improper.

The officers in the field must have a plan in order to implement the

checkpoint policies. Not only was there no supervisor establishment of the checkpoint location, there appears to be no plan. The establishment of plan is necessary for a checkpoint. *Sitz*. If a plan is created, then a reviewing court can determine if the plan sufficiently limits the intrusion on a citizens' Fourth Amendment rights. The absence of any guiding principles and application to how the officers conducted the checkpoint suggest that a plan did not exists.

Plans are imperative to a courts review of a checkpoint. The plan demonstrates the limitations on the officers in the field, and allows a court to review the protections to the citizens' Fourth Amendment rights. The checkpoint plan can then be compared to the department's policies on checkpoints to determine if there was sufficient limitation on the discretion of the officers in the field.

The following cases point out the importance of a plan and the compliance by the officer in the field. "Once the Department of Public Safety and the State police have adopted such standard, written guidelines for the conduct of roadblocks, which have been accepted as a sufficient substitute for the usual Fourth Amendment "reasonableness" demands, it follows that the Commonwealth must carefully comply with them. In order that the privacy interests of the motoring public under the Fourth Amendment and art. 14 be given fair weight in the unique balance that has been struck in favor of roadblock stops without individualized

suspicion, it is imperative that the Commonwealth follow its own rules for meeting what the court has recognized as a sui generis interpretation of the reasonableness requirement." *Commonwealth v. Anderson*, 406 Mass. 343, 547 N.E.2d 1134, 1137, (Mass. 1989); As the Nebraska Supreme court noted in *State v. One 1987 Toyota Pickup*, 233 Neb. 670 at 677, 447 N.W.2d 243, 248 (Neb. 1989), ". . . merely having such rules in effect, without adhering to these rules, is not enough. When the State Patrol disregards its own rules, the trooper in the field are free to act with unconstrained discretion."; "To ensure that an individual's expectation of privacy is not subjected to arbitrary invasion solely at the unfettered discretion of police officers in the field, seizures at roadblocks must be carried out pursuant to plans embodying explicit, neutral limitations on the conduct of the individual officer." *Hall v. Commonwealth*, 12 Va.App. 972, 972, 406 S.E.2d 674, 675, 8 Va. Law Rep. 354 (Va. App. 1991)." As the Court in *Common Wealth v. Donnelly,* 614 N.E.2d 1018, 1020 (Mass. App. 1993) stated, "there must be strict compliance with the guidelines: substantial compliance will not do, for that is no compliance at all." In the absence of a plan, or guidelines, for how the checkpoint is to be conducted, it is impossible to determine where the officers strayed from the limitations imposed.

Finally, the U.S. Supreme Court made it abundantly clear that checkpoints may not be operated for the general purpose of criminal investigations. *Edmond.*

"We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 41, 121 S.Ct. at 454. "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Id.* at 42, 121 S.Ct. at 454. When a checkpoint is established for the ordinary business of investigating crimes, its purpose is improper.

The checkpoint established in this case was not set up for a proper purpose. The main purpose of the checkpoint was to prevent the officers from *getting into trouble. Whalen.* While the checkpoint was labeled as a sobriety checkpoint, the court of appeals found differently. As the court in *Edmond* stated, the label cannot save a checkpoint. "If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program." *Id.* At 46, 121 S.Ct. At 457. Where the evidence fails to demonstrate the checkpoint is for a proper purpose, merely calling the checkpoint a vehicle safety check or sobriety check will not suffice.

Here, the evidence was the officer knew he had to conduct a checkpoint. The officer in the field then set up a checkpoint, without any input from a

supervisor and apparently, in the absence of a plan. The checkpoint was not established for a proper purpose, but was established to keep the officers out of trouble. Based on the lack of a plan, a plan that limits the discretion of the officers in the field, and the lack of a proper purpose, the checkpoint was in violation of the Fourth Amendment.

CONCLUSION

Amicus Curiae, The National College for DUI Defense, Inc., urge this court to affirm the lower courts determination that the checkpoint conducted was in violation of the Fourth Amendment and was unconstitutional.

Respectfully Submitted,

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National College for DUI Defense, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2016, the original and a true and correct copy of this Brief of Amicus Curiae were served upon Leslie Rutledge, Arkansas Attorney General, 323 Center Street, #200, Little Rock, Arkansas 7221, Johnny Collins II, 912 West 4th Street, Little Rock, Arkansas 72201, via hand delivery, to the Arkansas Supreme Court Clerk, and to the Honorable Stephen Tabor by USPS.

_____
Brad J. Williams #2004118

Case Name: Whalen v. State
Docket Number: CR-15-1067
Title of Document: Brief of Amicus Curiae

CERTIFICATE OF COMPLIANCE

I have submitted and served on opposing counsel (except for incarcerated pro se litigants) an unredacted and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF

document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

_____
(Signature of Filing Party)

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(Printed Name of Filing Party)

Bennett & Williams, PLLC
(Firm)

April 19, 2016
(Date)