IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAWRENCE SCHEEL	APPELLANT
vs.	No. 2007-KM-00345
CITY OF FLORENCE	APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF RANKIN COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

Submitted by:

James L. Kelly (M.S.B. [redacted]
Kelly Law Office, P.C.
202 East Government Street
Brandon, Mississippi 39042
Telephone: (601)825-6455
Facsimile : (601)825-6552
Attorney of Record for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAWRENCE SCHEEL	**APPELLANT**
vs.	**No. 2007-KM-00345**
CITY OF FLORENCE	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Honorable Samac Richardson
   Circuit Court Judge
   Rankin County Justice Center
   Brandon, Mississippi 39042

2. Honorable Kent McDaniel
   Rankin County Court Judge
   Post Office Box 1599
   Brandon, Mississippi 39043

3. Honorable David Ringer
   Counsel for the City of Florence
   Post Office Box 737
   Florence, Mississippi 39073

4. Lawrence Scheel

5. James L. Kelly, Esq.
   Counsel for Lawrence Scheel
   202 East Government Street
   Brandon, Mississippi 39042

James L. Kelly

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE
ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS FRUITS OF UNLAWFUL SEARCH AND SEIZURE

STATEMENT OF THE CASE

This is an appeal from a conviction of driving under the influence, first offense, which resulted from the defendant having been stopped and seized at a temporary roadblock. On or about the 22 day of July, 2006, at approximately 11:00 p.m. (R-Vol. 3, Pg. 30, Line 6), with little or no supervision, patrol officer Will Nelson[1] set up a roadblock within the city limits of Florence, Mississippi near the intersection of Highway 469 and Williams road. Officer Nelson had only been there a few minutes when Larry Scheel approached the roadblock driving in a safe and reasonable manner. (R- Vol. 3, Pg. 27, Line 16). Without having committed any traffic offense or the benefit of any standardized field sobriety testing (R-Vol. 3, pg. 24, Line 21), Mr. Scheel was taken out of his vehicle and to the police station by officer Nelson, for driving under the influence of alcohol. No other D.U.I. arrests or traffic citations were made or given at the roadblock, before or after, Mr. Scheel was arrested. The so-called "fixed" roadblock was in existence for all of fifteen (15) minutes. (R-Vol. 3, pg. 30, Line 18).

Prior to trial, the Defendant filed a Motion to Suppress Fruits of Unlawful Search and Seizure. R-Vol. 2, Pg. 21; RE exhibit "A". The thrust of the argument was that the warrantless search and seizure was unlawful in that there was admittedly no probable cause for the initial traffic stop. The Government countered that such roadblocks were permissible under ***Michigan v. Sitz*** and ***Sasser v. City of Richland.*** The parties agreed and the Trial Court concurred that the testimony of

---

[1]This officer had been working DUIs for three months at the time of the stop (R-25) and was no longer employed at Florence P.D. at the time of trial.

the arresting officer would be taken only once, for the purposes of both trial and the motion to suppress. During testimony, it became abundantly clear that there were no written guidelines concerning the roadblock and that neither the officer conducting the roadblock, nor any one else offered by the Government, had considered any of the important factors necessary to render such suspicionless traffic stops constitutional. Despite the Government's substantial difficulty in establishing the mandatory twenty (20) minute observation period[2], the lack of field sobriety testing, and the defendant's motion to suppress the ill harvested fruits of the unlawful search and seizure, the defendant was convicted of having violated M.C.A. Sections 63-11-30(1) (a) and 63-11-30(1) (c), first offense. The County Court entered a written order denying the Defendant's motion to suppress (R-Vol. 2, Pg. 54; RE exhibit "B") and a separate judgement of conviction (R-Vol. 2, Pg. 58, RE exhibit "C"). An appeal was timely perfected to the Circuit Court and thereafter, by permission of the Circuit Court, to this Court.

SUMMARY OF THE ARGUMENT

It is admitted by the State that this case involves a suspicionless stop, one that was made without any probable cause to believe that a traffic offense had occurred or that there was any criminal activity afoot. It is agreed by the parties that the evidence in this case depends upon a warrantless search and seizure, which was initiated without any probable cause or reasonable suspicion to believe that the defendant had done anything wrong. All warrantless searches are per se unreasonable. Thus, it is incumbent upon the State to establish that the search at issue falls into

[2]"However, it's clear that the twenty-minute observation period included the time in the rest room because the officer quite candidly said that there were less than fifteen minutes between the bathroom break and the running of the intoxilyzer 8000." Trial Court, T53, Line 11.

one of the well defined exceptions to the warrant requirement.

The State attempts to "save" this search, seizure and conviction by relying upon a line of jurisprudence which allows brief detentions at fixed checkpoints that are conducted pursuant to demonstrated needs, and specific guidelines adopted by policy level personnel. However, testimony in the Court below established the following:

a. The defendant did not violate any traffic laws. R-Vol. 3, Pg. 27, L14

b. The chain of command in the Florence Police Department is:

Chief

Assistant Chief

Captain

Lieutenant

Sergeant

Patrolman R-Vol. 3, Pg. 28, Line 23

c. Patrolman Nelson, at the bottom of the hierarchy, was ordered to set up a roadblock by Sergeant Bunkley, who was one rung up the ladder of authority from the bottom (and Nelson). R-Vol. 3, Pgs. 28-29

d. Sergeant Bunkley does not set policy for the Florence Police Department. R-Vol. 3, Pg. 29, L8

e. Patrolman Nelson had no idea regarding what criteria was used in deciding the particular place and time of the roadblock. R-Vol. 3 Pg. 29, L9.

f. Patrolman Nelson had been given no instruction about the manner in which to conduct the roadblock, other than to check driver's license and insurance. R-Vol. 3,

Pg. 29, L22-25

g. Nelson's roadblock was present that night no longer than fifteen (15) minutes and was concluded when he made the DUI arrest of the Defendant. R-Vol. 3, Pg. 30, L 18

h. The roadblock produced no other citations or arrests of any sort, other than the Defendant. R-Vol. 3. Pg. 32, L 3-9

i. The roadblock was conducted pursuant to Sergeant Bunkley's discretion. R-Vol. 3., Pg. 31, L 18

j. There was no written plan authorizing the roadblock or describing how it should be conducted. R-Vol. 3., Pg. 31, L 23

k. Patrolman Nelson could not tell the Court how many cars came through the roadblock; no one was counting. R-Vol. 3., Pg. 32, L14

l. There was no person keeping time as to how long each motorist was detained. R-Vol. 3., Pg. 32, L 16.

m. Patrolman Nelson was given no guidance or criteria regarding how long he was to detain each driver. R-Vol. 3., Pg. 32, L 19.

n. There was no data recorded regarding the average length of each stop at the roadblock. R-Vol. 3., Pg. 32

o. There was no prior publicity of the roadblock. R-Vol. 3 Pg. 32, L27

p. No traffic studies were made of the area which support the need for a roadblock in that area. R-Vol. 3., Pg. 31, L 29

q. Patrolman Nelson is aware of no methods developed by officer Bunkley or the State

of Mississippi that involves less intrusion than an ordinary traffic stop. (There are no written guidelines.) R. Vol. 3., Pg. 32-33

It is thus clear that the roadblock at hand was more of a temporary, roving checkpoint than it was fixed. Being "fixed" for only 15 minutes underscores it's mobile, temporary nature. Without any guidelines therefore, it was ripe for officer discretion and could only have been conducted by such discretion, since there were no guidelines. Temporary roadblocks conducted pursuant to operational level officer discretion have been banned by the appellate Courts as unconstitutional. No evidence was presented that officers in the Department with policy making authority had anything to do with the roadblock at hand. There was no demonstrated need for the roadblock, no prior warning to the public of it's existence and the patrolman in charge had no guidance as to how long to detain motorists. The roadblock at issue was fraught with Fourth Amendment infringments and the trial Court was in error for not suppressing the fruits thereof. ***Michigan v. Sitz,* 496 US 444 (1990); *U.S. vs. Green*, No. 01-50536** (5th Cir. June 11, 2002).

ARGUMENT

On or about July 22, 2005, the defendant, while in his vehicle, was stopped for no apparent reason other than that the officers wanted to stop him. They had no probable cause or reasonable suspicion to believe that he had committed any offense. (R-Vol. 3., Pg. 27, L 16) He was stopped at a roadblock that was an unconstitutional infringement upon his rights as a United States Citizen and Citizen of the State of Mississippi.

While under the control and custody of a law enforcement officer, the defendant was ordered to comply with several procedures. No warrant was produced for the defendant's arrest and neither was he advised prior to that point that he had committed a misdemeanor in the officer's presence.

Later, the defendant was taken to a police station to submit to an intoxilizer test.

He was thereafter charged with violating M.C.A. § 63-11-30(1)(1972) as amended and further detained but still, no warrant for his arrest was produced.

1. UNREASONABLE SEIZURES OF THE PERSON ARE PROHIBITED

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Miss. Const. Art. 3, Sec. 23 (1890).

> 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...

United States Constitution, Amendment IV.

2. WARRANTLESS ARRESTS FOR MISDEMEANORS ARE UNREASONABLE UNLESS THE MISDEMEANOR IS COMMITTED IN THE OFFICERS' PRESENCE

> (1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted **in his presence**; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

M.C.A. § 99-3-7 (1972) emphasis added.

> An offense is being committed in the presence of an officer when he acquires knowledge thereof through one of his senses. Where through the sense of sight, or smell, or hearing, an officer receives knowledge that an offense is being committed in his presence, he may arrest the offender without a warrant.

Corry v. State, 1998 WL 162121, (Miss. 1998)

Officer Nelson admits that immediately prior to the traffic stop at the roadblock, Defendant Scheel was driving well and had not committed any offense in officer Nelson's presence (T27, L16); thus, the seizure of Defendant Scheel was unreasonable, violative of the Fourth Amendment.

3. THE INITIAL STOP OF THE DEFENDANT WAS A SEIZURE PROHIBITED BY THE FOURTH AMENDMENT

A Fourth Amendment seizure results when a defendant submits to a show of authority. Moreover, an arrest is made when an arrestee has been physically controlled or consents to authority. ***Harper v. State***, 635 So.2d 864 (Miss. 1994). The defendant submitted to the initial officer's show of authority by stopping at the unlawful roadblock set up by the police, pulling his vehicle off of the road and exiting the same upon his command. He was physically controlled by the officer. Clearly then, the defendant's person was "seized" for purposes of fourth amendment analysis. Since the arrest was without a warrant and not based upon probable cause to believe that the suspect was under the influence of intoxicating liquor, it was unreasonable.

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

Riddles v. State, 471 So.2d 1234 (Miss. 1985).

It is without question that a reasonable person under the defendant's circumstance, would have believed that he was not free to leave. Thus, the Fourth Amendment and Mississippi's Constitutional counterpart are here implicated by seizure.

As previously stated, in this jurisdiction, an arrest (seizure) of a misdemeanant is unreasonable unless the arrest is founded upon a warrant or unless the offense was committed in the presence of the officer. Neither of the saving requirements are present in this case.

Moreover, the temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***Whren v. U.S.***, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. ***Boyd v. State***, 758 So. 2d 1032 (Miss. Ct. App. 2000). The Government concedes that no probable cause existed prior to the intrusion upon the defendant's constitutional rights at issue.

4. THE GOVERNMENT FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT THE WARRANTLESS SEIZURE AT ISSUE FALLS INTO A RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT

Except for a few specifically established exceptions, warrantless searches are per se unreasonable.

Millsap v. State, 767 So. 2d 286 (Miss. Ct. App., 2000); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The State bears the burden of establishing that the seizure and search at hand falls squarely into one of the well defined recognized exceptions to the warrant requirement. "[T]he **burden** is on those seeking the exemption to show the need for it.'" ***Coolidge v. New Hampshire***, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (quoting *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951)). As will be discussed in the next section, the State fails to

establish that the suspicionless traffic stop at issue fails to fall into the "properly conducted checkpoint" exception, or any other exception to the warrant requirement recognized by our courts.

5. THE COURT ERRED AS A MATTER OF LAW BY FINDING THAT THE WARRANTLESS, SUSPICIONLESS TRAFFIC STOP FELL WITHIN AN EXCEPTION TO THE WARRANT REQUIREMENT

To be conducted properly, a roadblock must be conducted pursuant to departmental policy and/or written guidelines, with demonstrated need and effectiveness, with little officer discretion and with minimum intrusion upon the public. ***Michigan v. Sitz,*** **496 US 444 (1990)**; ***Delaware v. Prouse,*** 440 U.S. 648 (1979); ***United States v. Martinez-Fuerte***, 428 U.S. 543 (1976); ***U.S. vs. Green***, 2002 WL 1275692 (5th Cir. June 11, 2002). On the other hand, "random", unconstitutional, suspicionless, traffic stops involve "standardless and unconstrained discretion" among officers "[which] is the evil" the United States Supreme Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed. ***Michigan v. Sitz,*** **496 US 444 (1990)**; ***Delaware v. Prouse,*** 440 U.S. 648 (1979). The roadblock at issue today was conducted with nothing but officer discretion.

A) ESTABLISHED POLICY (WRITTEN GUIDELINES) vs. OFFICER DISCRETION

In *Michigan v. Sitz*, 496 U.S. 444 (1990), the Court upheld a checkpoint plan based upon guidelines adopted by officials of the highest levels within law enforcement of the State of Michigan.

> **The Director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Pursuant to its charge, the Advisory Committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.**

Michigan v. Sitz, **496 US 444 (1990)**

The respondents in *Sitz* argued that the roadblock policy was unconstitutional, in part, because of the subjective fear that such suspicionless stops cause motorists. The lower courts agreed with the respondents (Sitz) and ruled in their favor. Reversing the lower courts, the U.S. Supreme Court reasoned that:

> **We believe the Michigan courts misread our cases concerning the degree of "subjective intrusion" and the potential for generating fear and surprise. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop. This was made clear in Martinez-Fuerte. Comparing checkpoint stops to roving patrol stops considered in prior cases, we said, we view checkpoint stops in a different light because the subjective intrusion -- the generating of concern or even fright on the part of lawful travelers -- is appreciably less in the case of a checkpoint stop. In [United States v.] Ortiz, [422 U.S. 891 (1975),] we noted: [496 U.S. 453] [T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints, the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. 422 U.S. at 894-895. Martinez-Fuerte, 428 U.S. at 558. See also id. at 559. Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in Martinez-Fuerte.**

Id. Emphasis added.

That the guidelines provided for fixed checkpoints and also left little room for officer discretion, allowed the Supreme Court to uphold the guidelines as constitutional.

Much unlike *Sitz* however, case instant involves no guidelines at all. The patrol officer conducting the roadblock had no guidance, other than that he was told by sergeant Bunkley to set up a roadblock. Patrolman Nelson, at the bottom of the chain of command, was ordered to set up a roadblock by Sergeant Bunkley, who was one rung up the ladder of authority from the bottom (and one up from Nelson). R-Vol. 3, Pgs. 28-29. Sergeant Bunkley did not set policy for the Florence

Police Department. R-Vol. 3, Pg. 29, L8 Patrolman Nelson had no idea regarding what criteria was used in deciding the particular place and time of the roadblock. R-Vol. 3, Pg. 29, L9. Patrolman Nelson had been given no instruction about the manner in which to conduct the roadblock, other than to check driver's license and insurance. R-Vol. 3, Pg. 29, L22 The roadblock was conducted late at night and was present for no longer than fifteen (15) minutes . R-Vol. 3, Pg. 30, L 18. **Moreover, the roadblock was conducted pursuant to Sergeant Bunkley's discretion.** R-Vol. 3, Pg. 31, L 18. There was no written plan authorizing the roadblock **or describing how it should be conducted**. R-Vol. 3, Pg. 31, L 23 and patrolman Nelson could not tell the Court how many cars came through the roadblock, as no one was counting. R-Vol. 3, Pg. 32, L14

There was no person at the roadblock keeping time as to how long each motorist was detained. R-Vol. 3, Pg. 32, L 16. **Patrolman Nelson was given no guidance or criteria regarding how long he was to detain each driver.** R-Vol. 3, Pg. 32, L 19. There was no data recorded regarding the average length of each stop at the roadblock R-Vol. 3, Pg. 32, and there was no prior publicity of the roadblock. R-Vol. 3, Pg. 32, L27. Moreover, no traffic studies were made of the area which support the need for a roadblock in that area. R-Vol. 3, Pg. 31, L 29

It is thus clear that the roadblock at hand was more of a temporary, roving checkpoint than it was "fixed". Being in existence for a mere 15 minutes only underscores the mobile, temporary nature of the traffic stop at hand. The encounter at issued between patrolman Nelson and Lawrence Scheel, was nothing more than a roving, random, suspicionless traffic stop, which the government attempts to cloak with the constitutionality of fixed check-points.

The requirement of having a plan in place, prior to conducting roadblocks has been adopted by other appellate courts. In *U.S. v. Green*, the Fifth Circuit approved checkpoints conducted

pursuant to specific guidelines that limited officer discretion.

> **Roadblock seizures are consistent with the Fourth Amendment if they are 'carried out <u>pursuant to a plan</u> embodying explicit, neutral limitations on the conduct of individual officers.' "**

U.S. vs. Green, 2002 WL 1275692 (5th Cir. June 11, 2002) emphasis added.

A reading of officer Nelson's testimony (see Appellants Record Excerpt, Exhibit "C") makes a mockery of even the concept of a "plan embodying explicit, neutral limitations" as required in *Green.*

Consider the following testimony of the State's only witness, patrolman Nelson:

R-Vol. 3, Page 27, line 27

Q: who...decided to set up the checkpoint?
A: Sergeant Bunkley.

Page 28

Q: And what was his rank at the time?
A: Sergeant.

A: The chain of command goes from patrolman to sergeant to lieutenant, captain, up to assistant chief and then chief.

Q: Okay. And on the hierarchy where were you?
A: I was on the bottom.
Q: You were at the bottom?
A: Patrolman, yes sir.

Page 29

Q: And one step above the bottom was Sergeant Bunkley?
A: That's correct.
Q: He wasn't setting policy for the whole department?
A: No.
Q: Now, what criteria was used in deciding this particular place and time to set up the roadblock?
A: I cannot advise that...
Q: Well, then, what about the manner in which the roadblock would be conducted? What criteria

was used to determine that?
A: We were just to set up a checkpoint to check driver's license and insurance.
Q: Did you–is that all you can tell me?
A: Yes.
Q: About the manner and the criteria?
A: Yes.

Page 31.
Line 23
Q: Are you aware of any written plan that Sergeant Bunkley or anyone else would have come up with allowing y'all to implement this roadblock?
A: No.
Q: Is there one–was there one?
A: Not to my knowledge.

Line 18
Q: So it would have been in officer Bunkley's discretion, then?
A: Yes, sir.

Page 32.
Line 19
Q: Was there any criteria or guidance as to how long you were to detain each driver?
A: No, it's not.

There was obviously no plan, other than to go out and stop motorists, without reasonable suspicion to do so.

B) NEED AND EFFECTIVENESS

Having a plan, however (which was not present in this case), is merely the first step to constitutionality. There must also be a demonstrated need or governmental interest in maintaining a checkpoint and then, the weight of that need is balanced against the intrusion upon the public. *Dixon v. State,* 828 So.2d 844 (Miss. Ct. App.2002); *Graham v. State*, 878 So.2d 162 (Miss. 2004).

Likewise, in *United States vs. Green*, the Fifth Circuit Court of Appeals observed that:

> **The Court's decisions require us to balance the objective and subjective intrusion on the individual against the Government interest and the extent to which the program**

can reasonably be said to advance that interest...

U.S. vs. Green, 2002 WL 1275692 (5th Cir. June 11, 2002)

R-Vol. 3, Page 31 (Officer Nelson continuing)

Q: Are you aware of any traffic studies in that area that have to do anything with driver's license or safety?

Page 32

A: Not to my knowledge.

Q: can you tell us what the effectiveness of the roadblock was that night? In other words, how many DUI arrests were made or how many driver's license violations or things like that? Can you give us any idea as to the effectiveness of the roadblock other than you made this one arrest?

A: The one DUI arrest is all that I can advise to.

Page 33.

Line 5

Q: Are you aware of any studies or any particular need showing a necessity for the roadblock at that point on that night?

A: No.

Thus it is clear, that the State fails to establish any need or governmental interest in having the "driver's license and insurance" checkpoint in place. The Government's own witness denies knowledge of any documented need for the roadblock. Hence, there is no governmental interest to put on the scales when this court attempts to balance the governmental need against the objective and subjective intrusions upon the public. The public, citizen Defendant, then, wins the balancing test with even the slightest intrusion placed on his side of the scale.

In ***Delaware v. Prouse***, 440 U.S. 648 (1979), the Court disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles.

The Court observed that **no empirical evidence** indicated that such stops would be an effective means of promoting roadway safety. Prouse, 440 U.S. at 659-660, emphasis added. As in *Prouse*, the reason for the stop of Defendant Scheel was to check driver 's licenses. R-Vol. 3, Pg. 31, Line 2. Also similar to *Prouse*, there is no evidence in the record below that a 15 minute roadblock, late at night in Florence, Mississippi would be an effective means of promoting roadway safety. The State's one and only witness testified that no traffic studies were made of the area which supported the need for a roadblock in that area. R-Vol. 3, Pg. 31, L 29. Thus, there was no method by which effectiveness could be measured. Without effectiveness being established, the suspicionless stop of appellate Scheel cannot be constitutionally justified. The State must produce some legitimate basis for a suspicionless traffic stop in order to outweigh the constitutional rights of motorists. *Brown v. Texas,* 443 U.S. 47 (1979); *McLendon v. State*, 2006 So.2d (2005-KM-01480-SCT). The societal problem of driving while under the influence cannot, in and of itself, be enough. The state must also show that the need of promoting road safety can be met to a reasonable extent, by the otherwise unconstitutional invasion (suspicionless stop). Without any data regarding the effectiveness of suspicionless traffic stops, the state fails to show that the need of promoting road safety can, in any way, be met by suspicionless traffic stops. Thus, Lawrence Scheel's right to be free of arbitrary governmental intrusion was infringed upon, without any prior demonstrated need therefore.

C) SUBJECTIVE INTRUSION

The checkpoint at issue was at 11:00 at night, with apparently little traffic, since only one arrest was made. There was no doubt significant subjective intrusion at such an hour and place.

As to subjective intrusion, the touchstone is the "potential for generating fear and

surprise." Everyone entering Fort Sam Houston was warned with signs about the possibility of searches. At the checkpoint, there were signs, cones, and flares. That the checkpoint stopped every sixth vehicle, rather than every single vehicle, counters any suggestion of subjective intrusion because it might dispel any concern of a law-abiding motorist that she had been singled out.

U.S. vs. Green, 2002 WL 1275692 (5th Cir. June 11, 2002)

Unlike Green, this case involved no prior warning to motorists.

R-Vol. 3, Page 32, Line 25

Q: Was there any prior publicity of the roadblock to you knowledge?

A: No.

Without any prior warning of the roadblock, the tendency to create public fear was and is obvious. Thus, the State comes up short on the balancing test required by the Fifth Circuit Court of Appeals.

CONCLUSION

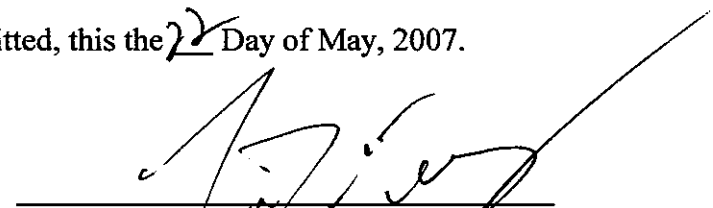
The trial Court erred by failing to grant the Defendant's motion to suppress the fruits of the unlawful seizure of the defendant. All warrantless searches are per se unreasonable, unless the Government can show that the search falls into one of the few, narrowly defined exceptions to the warrant requirement. The search and seizure in this case was warrantless. The Government has failed to show that the initial stop (seizure) falls into any one of the exceptions to the warrant requirement, thus, the fruits thereof, must be suppressed. The State called only one witness to testify at the motion to suppress. The State's own witness testified that the roadblock at issue was authorized by and at the discretion of one low level officer within the department, was not conducted pursuant to any written policy, plan or procedure, was in place for only fifteen (15) minutes and netted only one arrest, the Defendant. The same witness was not aware of any need for the roadblock, failed to demonstrated any effectiveness of the roadblock toward meeting any need or

governmental purpose and testified that he had no guidance regarding how long he was to detain each motorist. It is clear that he had broad discretion in regard to how long to detain motorists.

This is the very procedure that our Courts have routinely warned against. Roving, spot checks, conducted pursuant to no real authorized plan, involving lower level officer discretion, have been clearly and repeatedly forbidden by the United States Supreme Court, the Fifth Circuit Court of Appeals and lower Courts of Appeal.

For the foregoing reasons, the Defendant requests that this Court reverse the trial Court and enter an order suppressing the evidence procured from the unlawful seizure of the defendant and render an order acquitting the defendant of all charges; or, in the alternative, without waiving prior argument, that after ruling, as a matter of law, that the trial Court erred by failing to grant Lawrence Scheel's motion to suppress, that the Court remand this cause to the lower Court for further proceedings.

Respectfully Submitted, this the 22 Day of May, 2007.



James L. Kelly, Esq, for the Appellant

CERTIFICATE OF SERVICE

I, James L. Kelly, legal counsel for the appellant, certify that on this day a true and correct copy of the foregoing document was served via United States Mail, or hand delivery, upon the following:

Honorable Samac Richardson
Circuit Court Judge
Rankin County Courthouse
Brandon, Mississippi 39042

Honorable Kent McDaniel
Rankin County Court Judge
Post Office Box 1599
Brandon, Mississippi 39043

Honorable David Ringer
Post Office Box 737
Florence, Mississippi 39073

This the 14 Day of May, 2007.

James L. Kelly

Kelly Law Office, P.C.
202 East Government Street
Brandon, Mississippi 39042
Telephone: (601)825-6455
Facsimile : (601)825-6552
MSB No. [redacted]