

Bypassing the Fourth Amendment: The Missouri Supreme Court's Use of "Ruse" Reasonable Suspicion to Justify De Facto Drug Interdiction Checkpoints [*State v. Mack*, 66 S.W.3d 706 (Mo. 2002)]

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*The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.*¹

I. INTRODUCTION

America is in a full-fledged war against drugs and the problems they create.² However, America should be careful that a move toward victory in the war against drugs does not come at the expense of the Fourth Amendment to the United States Constitution. Drug trafficking is a very serious problem that needs to be dealt with, but sacrificing Fourth Amendment protections in the name of victory is not the answer.

In *Indianapolis v. Edmond*³ the United States Supreme Court unequivocally banned drug interdiction checkpoints as violations of the Fourth Amendment.⁴ Yet, in *State v. Mack*,⁵ the Missouri Supreme Court nevertheless upheld just such a checkpoint, ruling that an otherwise unconstitutional drug checkpoint could be justified, after the fact, with reasonable suspicion created from a motorist "suddenly" exiting a highway at a "ruse" checkpoint.⁶ In *Mack*, the Missouri Supreme Court failed to recognize applicable United States Supreme Court precedent, wrongly upheld a de facto drug interdiction checkpoint, and allowed the reasonable suspicion standard to be satisfied by nothing more than a simple "hunch."

In *Mack*, the Missouri Supreme Court may have moved one step closer to winning the war on drugs, but in the process it ambushed one

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1. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

2. As stated by the United States Supreme Court, "[t]he nationwide drug epidemic makes the war against drugs a pressing concern." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559, 2567 (2002).

3. 531 U.S. 32 (2000).

4. *Id.* at 48.

5. 66 S.W.3d 706 (Mo. 2002).

6. *Id.* at 709-10.

of America's greatest protections: the Fourth Amendment. If the illegal seizure of Mack can be justified, after the fact and in conflict with United States Supreme Court precedent, then the Fourth Amendment has become nothing more than an unfortunate casualty of war.

II. CASE DESCRIPTION

In June of 1999, the Troy Police Department established a drug interdiction checkpoint on a little-used exit off Highway 61 in Missouri.⁷ A warning sign was set up that read "DRUG ENFORCEMENT CHECKPOINT ONE MILE AHEAD."⁸ However, the checkpoint was not one mile ahead; it was at an exit offramp only a quarter mile past the warning sign.⁹ The purpose of the misleading warning sign was to trick drivers who were nervous about the checkpoint into exiting early to avoid it.¹⁰ In doing so, the driver (as well as any other motorist who took that exit, whether nervous or not) would actually end up at the drug interdiction checkpoint.¹¹

Pursuant to the department's written plan of action titled the "*Troy Police Department Drug Enforcement Checkpoint*," officers were to stop all vehicles leaving Highway 61 at the Old Cap Au Gris exit, record driver's license and registration information, and uncover the motorist's reason for using the exit.¹² The officers were also to look for signs of drug trafficking and to interview the other occupants of the automobile if necessary.¹³ If the process resulted in "reasonable suspicion of drug trafficking," the officers were allowed to further detain the vehicle and request permission to search the vehicle.¹⁴ If permission was denied, the officers were to circle the exterior of the vehicle with a drug dog.¹⁵

At approximately 11:00 p.m. on June 24, 1999, Todd Mack supposedly "took the bait" and exited at the checkpoint.¹⁶ An officer testified that Mack "almost missed the turn" and "suddenly veered off onto the off ramp."¹⁷ Mack, a resident of a nearby town, was stopped and when questioned reported that he was headed to a local bar in

7. *Id.* at 707.

8. *Id.*

9. *Id.*

10. *See id.*

11. *See id.*

12. *Id.* There was evidence that this plan was not followed. *Id.* at 719 (Stith, J., dissenting). According to the dissent, many cars were waved through the checkpoint by officers without being stopped. *Id.* (Stith, J., dissenting).

13. *Id.* at 707.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Troy.¹⁸ The officer was unconvinced though, and continued questioning Mack and his passenger.¹⁹ The passenger of the car was arrested on an unrelated traffic warrant.²⁰ Mack subsequently consented to a search, and officers found methamphetamine, cocaine, and methylphenidate in the car.²¹

Mack moved to suppress the drug evidence on the grounds that officers lacked a warrant, probable cause, or exigency to conduct a search.²² The trial court initially denied the motion to suppress, citing the Missouri Supreme Court's approval in *State v. Damask*²³ of suspicionless drug checkpoint searches.²⁴ However, after the United States Supreme Court invalidated drug interdiction and other suspicionless general law enforcement checkpoints in *Edmond*, Mack filed a motion for reconsideration.²⁵ The motion for reconsideration was granted, and the evidence was suppressed as fruit obtained from an illegal drug interdiction checkpoint.²⁶

On appeal, the Missouri Court of Appeals recognized that under Missouri precedent set in *Damask*, the *Mack* checkpoint was valid, whereas under United States Supreme Court precedent set in *Edmond*, the checkpoint was invalid.²⁷ For this reason, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court so the high court could reexamine whether *Damask* was still good law in light of *Edmond*.²⁸

III. BACKGROUND

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”²⁹ The constitutional drafters’ reasoning for including the Fourth Amendment in the Bill of Rights was to

18. *Id.* at 718 (Stith, J., dissenting). Mack lived in a neighboring town, and the Old Cap Au Gris exit was one of four routes to the City of Troy from Mack’s home. *Id.* (Stith, J., dissenting).

19. *Id.* at 708.

20. *Id.*

21. *Id.*

22. *Id.*

23. 936 S.W.2d 565 (Mo. 1996).

24. *Mack*, 66 S.W.3d at 708.

25. *Id.*

26. *Id.* Pursuant to the exclusionary rule, any evidence obtained as a result of a constitutional violation is suppressed. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (reaffirming the exclusionary rule and extending it to state courts).

27. *State v. Mack*, No. ED79237, 2001 Mo. Ct. App. LEXIS 1399, at *9-10 (Aug. 21, 2001).

28. *Id.* at *10. In a concurring opinion, Judge Crahan of the Missouri Court of Appeals recognized that *Edmond* rejected, at least in part, the basis for the Missouri Supreme Court’s decision in *Damask*. *Id.* (Crahan, J., concurring). However, Judge Crahan also expressed his belief that *Mack* and *Damask* could be distinguished from *Edmond* based on the “ruse” aspect of the checkpoint. *Id.* at *10-11 (Crahan, J., concurring). In his eyes, the misleading warning sign and placement of the checkpoint on the little-used exit were sufficient to create the particularized reasonable suspicion needed for a *Terry* stop. *Id.* at *11-12 (Crahan, J., concurring).

29. U.S. CONST. amend. IV.

limit the ability of government actors to seize and search citizens with unfettered discretion.³⁰ Requiring all searches and seizures to be “reasonable” serves to prevent such arbitrary actions.³¹

A. Checkpoint Law

1. United States Supreme Court Treatment

The United States Supreme Court first approved the limited use of suspicionless checkpoint stops in *United States v. Martinez-Fuerte*.³² In *Martinez-Fuerte*, several permanent border patrol checkpoints were set up to detect illegal aliens entering the United States.³³ Several Mexican aliens challenged the checkpoint seizures, arguing that officials lacked reasonable suspicion to stop them.³⁴ Noting the heavy flow of traffic near the border, the Court recognized the impracticability of requiring a particularized study of each car to justify the brief stop of possible illegal aliens.³⁵ To solve this problem, the Court employed a balancing test to determine the reasonableness of such a checkpoint.³⁶ The balancing test essentially weighed the government’s interest in border checkpoints against the degree of intrusion.³⁷ The Court upheld the checkpoint absent a finding of particularized reasonable suspicion, ruling that the public interest in preventing illegal immigration justified the minimally intrusive checkpoint.³⁸ The Court, however, emphasized that such a suspicionless checkpoint must be strictly administered according to proper guidelines and procedures in order to be valid.³⁹

In *Michigan Dep’t of State Police v. Sitz*,⁴⁰ the United States Supreme Court expanded the legal use of checkpoint seizures to sobriety

30. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (“The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”).

31. See *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

32. See 428 U.S. at 545.

33. *Id.*

34. *Id.*

35. *Id.* at 557.

36. *Id.* at 556. Specifically, the test is used to determine if it is reasonable to stop a motorist without reasonable suspicion. *Id.*

37. See *id.* at 557-58.

38. *Id.* at 562. The Court came to this conclusion based on several assumptions. See *id.* at 557-62. First, the Court recognized that the absence of border checkpoints would allow “illegal aliens a quick and safe route into the interior [of the United States].” *Id.* at 557. The Court also noted the impracticability of thwarting illegal immigration with the use of stops based upon reasonable suspicion. *Id.* (noting the heavy flow of traffic prevented an individualized study of each car and the existence “of well-disguised smuggling operations”). The Court then found that the subjective intrusion upon the motorists’ Fourth Amendment rights was minimal, as the stops were very brief, and fright caused from investigation was “appreciably less in the case of a checkpoint stop.” *Id.* at 558.

39. See *id.* at 559. Essentially, officers must be given little or no discretion in the field. See *id.* at 559 n.13.

40. 496 U.S. 444 (1990).

checkpoints.⁴¹ In *Sitz*, the balancing test employed in *Martinez-Fuerte* was again used in determining the reasonableness of a checkpoint seizure.⁴² The Court overwhelmingly agreed that the State of Michigan had a great interest in preventing drunk driving.⁴³ The Court also found that the checkpoint was only minimally intrusive, both objectively and subjectively.⁴⁴ The checkpoint was thus upheld under the balancing test.⁴⁵

However, the checkpoint exception to the need for individualized reasonable suspicion does not extend to general crime detection.⁴⁶ In *Edmond*, the United States Supreme Court held that drug interdiction checkpoints were unreasonable seizures that violated the Fourth Amendment.⁴⁷ According to the Court, drug interdiction checkpoints did not fall in the same class as the checkpoints approved of in *Martinez-Fuerte* and *Sitz* because the primary purpose of a drug checkpoint was to advance only “the general interest in crime control.”⁴⁸ To the Court, without specifically limiting the uses of checkpoints to special circumstances,⁴⁹ “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”⁵⁰

The Court emphasized that immigration-related border checkpoints and sobriety checkpoints were still valid under its reasoning.⁵¹ However, the Court declined to extend such seizures “justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”⁵²

41. *Id.* at 455.

42. *Id.* at 450. The Court stated that “[w]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Id.* at 449-50 (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

43. *Id.* at 451 (“No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.”).

44. *Id.* at 452. Objective intrusion is measured by the length and intensity of the seizure. *Id.* Subjective intrusion is measured by the “fear and surprise engendered in law-abiding motorists by the nature of the stop.” *Id.* Specifically, the Court found that the subjective intrusion was much less than that of a “roving patrol stop,” which “often operate at night on seldom-traveled roads, and their approach may frighten motorists.” *Id.* at 453.

45. *Id.* at 455. According to the Court, the state interest in safety on the roadways outweighed the minimal intrusion of the checkpoint. *Id.*

46. *See Indianapolis v. Edmond*, 531 U.S. 32, 48 (2002).

47. *Id.*

48. *Id.* at 43-44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)) (holding that narcotics checkpoints further only the “the general interest in crime control,” and declining “to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes”).

49. Special circumstances where checkpoints are permissible include border checkpoints, sobriety checkpoints, and possibly license and registration checkpoints. *Id.* at 37-38.

50. *Id.* at 42.

51. *Id.* at 47.

52. *Id.* at 44.

2. Other Courts' Treatment

The Missouri Supreme Court first upheld the constitutionality of drug interdiction checkpoints in its pre-*Edmond* case of *State v. Damask*.⁵³ In *Damask*, the Franklin County Sheriff's department set up a "ruse" checkpoint consisting of a misleading warning sign that read "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD."⁵⁴ The actual checkpoint, however, was set up on the first exit past the sign.⁵⁵ In its decision, the court first made the assumption, based on its reading of *Martinez-Fuerte* and *Sitz*, that "stopping motorists on public highways may be reasonable even in the absence of particularized suspicion of crime as long as those stops are conducted under certain procedures."⁵⁶ The court then analyzed the "ruse" checkpoints under the *Martinez-Fuerte* and *Sitz* balancing test, finding the state interest in drug trafficking outweighed the intrusion of the seizure.⁵⁷ As a result, the court upheld the "ruse" checkpoints based on its interpretation of checkpoint law.⁵⁸

Conversely, in *United States v. Green*,⁵⁹ the Eighth Circuit held that a seizure made pursuant to a "ruse" drug checkpoint was unconstitutional.⁶⁰ In *Green*, a "ruse" drug interdiction checkpoint was set up on a little-used exit off of Interstate 44 in Missouri.⁶¹ Green was a passenger in a car that was stopped at the checkpoint.⁶² In an effort to cooperate with the officers, the driver admitted to being a drug courier and voluntarily consented to the car being searched.⁶³ Green, as a passenger, was charged with possession and intent to distribute cocaine.⁶⁴ When assessing the legality of the initial seizure, the court recognized that as a checkpoint seizure the case was controlled by *Edmond*.⁶⁵ The court then held that the drug interdiction checkpoint violated the Fourth Amendment.⁶⁶ As a separate matter, however,

53. 936 S.W.2d 565, 575 (Mo. Ct. App. 1996).

54. *Id.* at 568. The Texas County Sheriff's department set up a similar checkpoint in Texas County. *Id.* at 569.

55. *Id.* at 568.

56. *Id.* at 570-71 (implying that all "[p]roperly operated checkpoints are constitutional under the Fourth Amendment").

57. *Id.* at 575.

58. *See id.* The court based the decision on its assumption that the United States Supreme Court case of *Martinez-Fuerte* allowed such suspicionless stops for the purpose of drug interdiction. *Id.* at 572. However, as *Edmond* later illustrated, this assumption was incorrect. *See Indianapolis v. Edmond*, 531 U.S. 32, 44, 48 (2000).

59. 275 F.3d 694 (8th Cir. 2001).

60. *Id.* at 700.

61. *Id.* at 697.

62. *Id.*

63. *Id.*

64. *Id.* at 698.

65. *See id.* at 699-700.

66. *Id.* at 700.

the fruit of the illegal search was still allowed into evidence under the independent source exception.⁶⁷

The Sixth Circuit, in *United States v. Huguenin*,⁶⁸ has also held that “ruse” drug interdiction checkpoints violate the Fourth Amendment.⁶⁹ In *Huguenin*, a motorist exited an interstate highway after seeing a warning sign of an upcoming drug-DUI checkpoint.⁷⁰ In its pre-*Edmond* decision, the Sixth Circuit addressed the “ruse” checkpoint head on, holding that drug checkpoints were not reasonable under the Fourth Amendment.⁷¹ Even though it was argued that the checkpoint was justified under *Sitz* as a sobriety checkpoint, the court determined that the true purpose of the checkpoint was to detect narcotics.⁷² As such, the court ruled that under the checkpoint balancing test the public interest in preventing drug trafficking did not outweigh “the interference with individual liberty.”⁷³ Alternatively, the court held that even if the checkpoint could be justified under *Sitz*, it would still be unreasonable under the Fourth Amendment because it lacked proper guidelines and procedures.⁷⁴

B. Reasonable Suspicion

1. United States Supreme Court Treatment

In *Terry v. Ohio*,⁷⁵ the United States Supreme Court held for the first time that a seizure could be justified by something less than probable cause.⁷⁶ In *Terry*, an experienced officer noticed what he be-

67. *Id.* Generally, the exclusionary rule mandates that evidence obtained from a constitutional violation be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). However, there are limited exceptions to the exclusionary rule, including the independent source exception. *Murray v. United States*, 487 U.S. 533, 537 (1988). In short, “[i]n the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source.” *Id.* at 538-39 (quoting *United States v. Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986)).

68. 154 F.3d 547 (6th Cir. 1998).

69. *Id.* at 558.

70. *Id.* at 549.

71. *Id.* at 555-56, 563.

72. *Id.* at 555. In discounting the prosecution’s theory that the checkpoint was justified as a sobriety checkpoint, the court noted that the officers’ “actions speak louder than their words.” *Id.* Factors that led the court to find that the checkpoint was for drug interdiction rather than another purpose included: the existence of the “Drug-DUI” warning sign; supervision by a narcotics officer; the use of a D.A.R.E. vehicle; that all proceeds went to the county drug fund; the checkpoints were funded by the drug fund; the lack of DUI detection training of the officers administering the checkpoint; the lack of a breathalyzer machine; the questioning of motorists by the officers was unrelated to sobriety; that the checkpoint was administered during the daytime when sobriety is less of a problem; and the results of the checkpoint revealed that most arrests resulted in drug charges instead of DUI charges. *Id.* at 555-56.

73. *Id.* at 556.

74. *Id.* at 559, 563. The court took particular issue with the “ruse” itself, stating that the “trap” made the seizure “more akin to a roving patrol stop than a sobriety checkpoint.” *Id.* at 561. The court also criticized the checkpoint procedures because of the amount of discretion allowed in the decision of whom to stop. *Id.* at 563.

75. 392 U.S. 1 (1968).

76. *See id.* at 30.

lied to be two men planning a daytime robbery.⁷⁷ The men were observed taking turns walking past a store, peering in as they walked past, and turning around to repeat the cycle.⁷⁸ After watching this continue for several minutes, the officer approached the men, identified himself, and asked them their names.⁷⁹ The men then mumbled something.⁸⁰ Fearing for his safety, the officer conducted a pat down of the outer clothing of one of the men and found a weapon.⁸¹

Citing the overriding need for officer safety, the Court held that the lesser intrusion of a brief and limited seizure for investigatory purposes could be justified by something less than probable cause.⁸² The Court held that this new level of suspicion, termed reasonable suspicion, was present when an officer could “reasonably . . . conclude in light of his experience that criminal activity may be afoot.”⁸³ But, the court noted that an “inchoate and unparticularized suspicion or ‘hunch’” was insufficient to meet the reasonable suspicion standard.⁸⁴ Instead, the “officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”⁸⁵ This type of brief seizure based on reasonable suspicion has commonly become known as a “*Terry* stop.”⁸⁶

Terry’s progeny have interpreted the reasonable suspicion standard to be “a less demanding standard than probable cause . . . [that] requires a showing considerably less than preponderance of the evidence.”⁸⁷ The standard is to be measured in the “totality of the circumstances” rather than by looking at each factor individually.⁸⁸ However, an investigatory stop must still “be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”⁸⁹ This objective manifestation must be a “particularized and objective basis for suspecting the particular person” is involved in criminal activity.⁹⁰

77. *Id.* at 6.

78. *Id.*

79. *Id.* at 6-7.

80. *Id.* at 7.

81. *Id.*

82. *See id.* at 24, 27. The Court in *Terry* also authorized the limited frisk of an individual for the purposes of checking for weapons. *Id.* at 30. However, because this portion of the case is irrelevant to this comment, it will not be discussed.

83. *Id.* at 30.

84. *Id.* at 27.

85. *Id.* at 21.

86. *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (referring to a stop made pursuant to *Terry* as a “*Terry* stop”).

87. *Id.* at 123.

88. *See, e.g., United States v. Sokolow*, 490 U.S. 1, 8 (1989).

89. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

90. *Id.* at 417-18. The Court further stated that “this demand for specificity in the information upon which police action is predicated is the central teaching of this Court’s Fourth Amendment jurisprudence.” *Id.* at 418 (quoting *Terry*, 392 U.S. at 21 n.18).

Additionally, the Court has held that refusing to acknowledge law enforcement officers is not sufficient to create reasonable suspicion.⁹¹ In *Florida v. Royer*,⁹² the United States Supreme Court stated that a citizen has a right to ignore an officer and “go on his way.”⁹³ In *Royer*, officers approached and questioned a traveler in an airport because he fit the profile of a drug courier.⁹⁴ After inspecting and retaining the traveler’s airline ticket and identification, the officers asked the traveler to follow them to a room adjacent to the concourse.⁹⁵ There, the traveler produced a key for one of his suitcases and allowed the officers to pry open the other.⁹⁶ Drugs were found and the traveler was arrested.⁹⁷

The *Royer* Court first held that the traveler was seized under the Fourth Amendment because “a reasonable person would have believed that he was not free to leave.”⁹⁸ When addressing whether such a seizure was justified by reasonable suspicion, the Court stated that a citizen is not required to respond to a police officer and may even “decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.”⁹⁹ Since the Court concluded that the detention went beyond the bounds of a *Terry* stop, it suppressed the evidence found as a result of the detention.¹⁰⁰

The United States Supreme Court took the principle that one can ignore the police without the fear of creating reasonable suspicion one step further in *Florida v. Bostick*.¹⁰¹ In *Bostick*, the Court cited with approval “that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”¹⁰²

Even though the Court does not require a person to cooperate or even acknowledge police officers, it has held that headlong evasive flight may be taken into consideration in developing reasonable suspicion.¹⁰³ In *Illinois v. Wardlow*,¹⁰⁴ a man in a high-crime area fled

91. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

92. *Id.*

93. *Id.*

94. *Id.* at 493-94.

95. *Id.* at 494.

96. *Id.*

97. *Id.* at 495.

98. *Id.* at 501-02 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

99. *Id.* at 498.

100. *Id.* at 507.

101. *See* 501 U.S. 429, 437 (1991).

102. *Id.*

103. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). “Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Id.*

104. *Id.*

when he saw a caravan of four police cars drive past.¹⁰⁵ Officers pursued the man and arrested him after an illegal weapon was found in his possession.¹⁰⁶ The Court held that the evasive flight, combined with the high crime area in which it occurred, was sufficient to create individualized reasonable suspicion.¹⁰⁷ However, Justice John Paul Stevens, with Justices Ruth Bader Ginsburg and Stephen Breyer joining, emphasized that flight was not a *per se* justification to seize an individual.¹⁰⁸ Rather, it was only one factor to be taken into consideration in the “totality of the circumstances.”¹⁰⁹

The Court also emphasized that its decision was consistent with prior precedent that allowed one to “go about his business,” as Wardlow’s act was “simply not a mere refusal to cooperate.”¹¹⁰ The Court elaborated by stating that “[f]light, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite.”¹¹¹

2. Other Courts’ Treatment

Prior to *Mack*, no court had dealt specifically with whether exiting at a “ruse” alone could create the reasonable suspicion needed to justify an *initial* stop.¹¹² However, the Fourth Circuit Court of Appeals had held that a “ruse” could be taken into account to justify the *further* detention of a motorist at a checkpoint.¹¹³ The issue in *United States v. Brugal*¹¹⁴ was only whether there was reasonable suspicion to justify *further* detention of a motorist, as the initial stop was justified as a suspicionless checkpoint.¹¹⁵ The court held that there was reasonable suspicion to justify *further* detention of the motorist based on several factors, including the fact that the motorist exited at the “ruse.”¹¹⁶

However, the court also based its finding of reasonable suspicion on ten other factors, including the fact that the stop occurred at three-thirty in the morning at a “dead” exit¹¹⁷ and numerous factors that supported the inference that the motorist was smuggling drugs from

105. *Id.* at 121.

106. *Id.* at 122.

107. *Id.* at 124-25.

108. *Id.* at 126 (Stevens, J., concurring in part and dissenting in part). The majority also inferred this, but not as directly as the dissent. *See id.* at 124 (“Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

109. *See id.* at 126-27 (Stevens, J., concurring in part and dissenting in part).

110. *Id.* at 125.

111. *Id.*

112. *See generally* State v. Mack, 66 S.W.3d 706, 710 (Mo. 2002).

113. United States v. Brugal, 209 F.3d 353, 358-59 (4th Cir. 2000).

114. *Id.* at 353.

115. *Id.* at 357-58.

116. *Id.* at 359-60.

117. *Id.* at 358 n.5, 359-60. The motorist indicated that he was searching for a gas station, yet his rental car still had a quarter of a tank of gas; he had just passed an exit with several 24 hour gas stations; and there were no signs of activity off the exit that the motorist took at 3:30 a.m. *Id.*

Florida to New York.¹¹⁸ To the court, these factors effectively eliminated innocent reasons for taking the exit and thus resulted in reasonable suspicion.¹¹⁹

Other courts have also held that exiting after seeing a “ruse” checkpoint sign may be taken into account in the “totality of the circumstances” in determining if reasonable suspicion exists.¹²⁰ In *United States v. Klinginsmith*,¹²¹ “ruse” checkpoint signs were posted on a major Kansas highway in an effort to persuade possible out-of-state drug traffickers to exit at the next off-ramp.¹²² When motorists took the exit immediately following the warning sign, they were secretly followed and observed for signs of drug trafficking.¹²³ When Klinginsmith took the exit, officers followed him as he traveled down an unmarked gravel road and stopped at a gas station.¹²⁴ An officer approached the vehicle, requested permission to ask a few questions, and subsequently obtained consent to search the vehicle.¹²⁵

The court did not examine whether the “ruse” itself violated the Fourth Amendment, as it was determined that the motorist was not actually seized at the “ruse.”¹²⁶ The court found that no seizure occurred until after additional factors helped develop reasonable suspicion.¹²⁷ According to the court, reasonable suspicion was created by several factors besides the “ruse,” including that the highway was known for drug trafficking; the out-of-state motorist’s use of an unmarked gravel road; and the motorist’s general nervousness.¹²⁸ The court ultimately held that by the time the officer approached the vehicle there was reasonable suspicion to support a seizure.¹²⁹

The United States Supreme Court has determined that evasive flight is a factor that can be used in the development of reasonable suspicion.¹³⁰ However, there is a great deal of confusion as to what

118. *Id.* It was common practice for drug couriers to fly to Florida and transport drugs in a rental vehicle. *Id.* The motorist was driving a rental car from Miami and had a New York license and address. *Id.* Additionally, the motorist had very little luggage for such a trip. *Id.*

119. The *Brugal* court recognized that “[u]nder *Sokolow*, an officer’s articulated factors in their totality must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.” *Id.* at 361.

120. *See* *United States v. Klinginsmith*, 25 F.3d 1507, 1510 n.1 (10th Cir. 1994).

121. *Id.* at 1507.

122. *Id.* at 1508-09.

123. *Id.* at 1509.

124. *Id.*

125. *Id.*

126. *See id.* at 1509-10.

127. *Id.* Klinginsmith’s Fourth Amendment rights were not implicated from simply being followed, as no seizure had yet occurred. *Id.*

128. *Id.* at 1510 n.1. The court also recognized the suspicion raised from the driver’s responses to the consensual questions and how the driver’s responses conflicted with those of the passenger. *Id.*

129. *Id.* at 1510.

130. *See* *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

constitutes evasive flight and what weight evasion should be given.¹³¹ In *State v. Webb*,¹³² the Georgia Court of Appeals held that the act of making a U-turn before encountering a checkpoint was evasive enough to create reasonable suspicion.¹³³ Conversely, in *United States v. Montero-Camargo*,¹³⁴ the Ninth Circuit Court of Appeals held that a U-turn could not in itself create the minimum quantum of reasonable suspicion needed to justify a *Terry* stop.¹³⁵ The *Montero-Camargo* court did find, however, that the U-turn, when combined with several other suspicion factors, resulted in reasonable suspicion.¹³⁶

IV. ANALYSIS

The issue before the Missouri Supreme Court in *State v. Mack* was really two-fold. First, the court had to determine whether a deceptive drug interdiction checkpoint violated the Fourth Amendment according to United States Supreme Court precedent set in *Indianapolis v. Edmond*.¹³⁷ If so, the court then had to determine whether “suddenly” exiting from a highway after passing a “ruse” checkpoint warning could create the requisite individualized reasonable suspicion needed to justify a *Terry* stop.¹³⁸

A. Parties' Arguments

Mack asserted that under the United States Supreme Court precedent set in *Edmond*, a checkpoint with the primary purpose of detecting general criminal activity, such as drug trafficking, was a violation of the Fourth Amendment.¹³⁹ Mack argued that because his seizure was at a drug interdiction checkpoint, it was a per se violation of the Constitution under *Edmond*.¹⁴⁰

Mack also contended that the checkpoint should not be controlled by the pre-*Edmond* case of *Damask* simply because a “ruse”

131. See *id.* at 123 n.1.

132. 386 S.E.2d 891 (Ga. Ct. App. 1989).

133. *Id.* at 893. In *Webb*, a motorist made a U-turn after seeing, but before encountering, a roadblock. *Id.* at 892. Although the particular U-turn in question was not a violation of Georgia law, the court still found that it was “sufficiently suspicious and deliberately furtive” to create reasonable suspicion. *Id.* at 893.

134. 208 F.3d 1122 (9th Cir. 2000).

135. See *id.* at 1137-38. Likewise, in *Commonwealth v. Scavello*, the Pennsylvania Superior Court held that a legal U-turn, by itself, did “not give rise to reasonable suspicion” of criminal activity. 703 A.2d 36, 38-39 (Pa. Super. 1997). According to the court, “a motorist’s avoidance . . . must be coupled with other articulable facts in order to give a police officer reasonable suspicion.” *Id.* at 38. Stated another way by the Utah Court of Appeals, “if a person may choose to avoid or ignore an officer when approached on the street, we see no reason why he or she should not be able to avoid an equally if not more intrusive confrontation at a roadblock” without creating reasonable suspicion. *State v. Talbot*, 792 P.2d 489, 494 (Utah Ct. App. 1990).

136. *Montero-Camargo*, 208 F.3d at 1139.

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

138. *Id.*

139. Respondent’s Brief at 5, *Mack* (No. 79237).

140. See *id.*

was used.¹⁴¹ According to Mack, the “ruse” aspect of the checkpoint could not distinguish it from a normal drug checkpoint.¹⁴² Mack reasoned that *Edmond* focused on the intended purpose of a checkpoint rather than its method of operation.¹⁴³ Essentially, Mack argued that the “ruse” was still a drug checkpoint, and thus must be governed by United States Supreme Court checkpoint law.¹⁴⁴

Finally, Mack pointed out that there was nothing suspicious about taking the Old Cap Au Gris exit that would support a finding of reasonable suspicion.¹⁴⁵ Mack stated that there were many innocent reasons for taking the exit.¹⁴⁶ The town of Troy was easily accessible, and there were several residences just off that exit.¹⁴⁷ Mack specifically pointed out that he was traveling from a nearby town to a destination within the City of Troy when he was stopped at the checkpoint.¹⁴⁸

The State of Missouri argued that Mack’s seizure was justified on two levels: as a checkpoint and as a *Terry* stop based on reasonable suspicion.¹⁴⁹ First, the State argued that the seizure was justified under Missouri law relating to checkpoints.¹⁵⁰ It was argued that *Damask* was still good law and controlled any Missouri case that dealt with “ruse” checkpoints.¹⁵¹ The State contended that *Edmond* did not affect “ruse” checkpoints, implying that the use of deception sufficiently distinguished such checkpoints from normal drug checkpoints.¹⁵² Under this theory, the “ruse” effectively took the case out of the purview of *Edmond* and into the realm of *Damask*.¹⁵³

Alternatively, the State argued that even if *Edmond* did undermine *Damask*, the seizure could still be justified by reasonable suspicion.¹⁵⁴ The State contended that by taking the exit, Mack was evading the checkpoint.¹⁵⁵ Therefore, Mack’s unprovoked act of exiting Highway 61 was “evasion” that created reasonable suspicion of criminal activity according to United States Supreme Court precedent set in *Wardlow*.¹⁵⁶

141. *Id.*

142. *Id.*

143. *Id.* Therefore, if the *purpose* of a checkpoint is drug interdiction, it is unconstitutional, regardless of how it is administered. *See id.*

144. *See id.*

145. *See id.* at 3.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Petitioner’s Brief at 5, *Mack* (No. 79237).

150. *Id.*

151. *Id.*

152. *See id.*

153. *See id.*

154. *Id.*

155. *Id.*

156. *Id.*

B. Majority Opinion

The *Mack* majority impliedly agreed that under *Edmond* drug interdiction checkpoints violate the Fourth Amendment.¹⁵⁷ However, the court immediately held that *Edmond* did not apply to the “ruse” checkpoint in *Mack* because the use of deception created “individualized [reasonable] suspicion.”¹⁵⁸ The court further distinguished the *Mack* checkpoint by stating that in *Edmond* and *Green* there was no attempt to develop reasonable suspicion before the stop, whereas in *Mack* “the entire purpose of the checkpoint was to generate the suspicious conduct necessary to constitute ‘individualized suspicion.’”¹⁵⁹

According to the court, the scheme created reasonable suspicion “by deceiving drivers who were engaged in criminal activity into exiting the highway.”¹⁶⁰ The court relied heavily on *Brugal* to support its finding that a “ruse” could be used to develop reasonable suspicion.¹⁶¹ Moreover, the court asserted that the seizure was reasonable under the Fourth Amendment because of “the significant efforts to reduce legitimate reasons for taking the exit.”¹⁶²

Finally, the court stated that even if the “ruse” did not alone create individualized reasonable suspicion, *Mack*’s sudden decision to exit, when combined with the “ruse,” created the required suspicion of criminal activity.¹⁶³

C. Dissenting Opinion

In a strong dissent, Justice Laura Stith, with Justices Ronnie White and Michael Wolff joining, wrote that the *Mack* checkpoint seizure was unreasonable under the Fourth Amendment and under *Edmond*.¹⁶⁴ Justice Stith pointed out that the Eighth Circuit and the Sixth Circuit had already invalidated two “ruse” checkpoints that

157. See *Mack*, 66 S.W.3d at 709. The court never specifically stated that *Damask* was inconsistent with *Edmond*, or even that *Edmond* invalidated drug interdiction checkpoints. See *id.*

158. *Id.*

159. *Id.* at 709-10.

160. See *id.* at 709.

161. See *id.*

162. See *id.* at 710. The “efforts” the court cited in the opinion include that the checkpoint was on an exit that led only to a school, church, and residential area. *Id.* at 707. According to the court, there were no direct routes to services or gas from the exit. *Id.* at 707, 709. The court also referred to *Damask*, where it was stated that this type of checkpoint scheme was planned to “increase the likelihood of discovering drug trafficking predictably associated with persons stopped at this type of focused roadblock.” *Id.* at 709 (citing *State v. Damask*, 936 S.W.2d 565, 573 (Mo. 1996)). The court further backed its finding of reasonable suspicion by claiming that the “ruse” was effective, as it was modeled after other successful checkpoints. *Id.*

163. *Id.* at 709-10.

164. *Id.* at 710-11 (Stith, J., dissenting). It was clear to Justice Stith that the *Mack* seizure was a drug checkpoint. *Id.* (Stith, J., dissenting). She was also unpersuaded by the majority’s attempt to distinguish *Mack* from *Edmond* by simply comparing the effectiveness of both techniques. *Id.* at 715 (Stith, J., dissenting). Justice Stith stated that the constitutionality of a “chosen path of law enforcement” cannot be justified simply because it is effective, and even if it could, the “ruse” was not effective enough to distinguish it from a normal drug checkpoint. *Id.*

were nearly identical to the checkpoint employed in *Mack*.¹⁶⁵ Further, even if the seizure was not controlled by *Edmond* as a checkpoint, the State failed to show that the “ruse” part of the checkpoint could develop the required individualized reasonable suspicion needed for a *Terry* stop.¹⁶⁶

Justice Stith also recognized that the *Mack* seizure could not be justified under *Damask*, as *Edmond* undercut the very basis for the *Damask* decision.¹⁶⁷ Justice Stith explained that the *Damask* court somewhat reluctantly upheld a “ruse” drug checkpoint based only on the incorrect belief that United States Supreme Court precedent allowed drug checkpoints.¹⁶⁸ After *Edmond*, however, it became obvious that the United States Supreme Court did not approve of drug checkpoints.¹⁶⁹ It was clear to Justice Stith that in light of *Edmond*, the *Damask* reasoning was incorrect, the *Damask* seizure violated the Fourth Amendment, and any similar “ruse” drug checkpoint violated the Fourth Amendment.¹⁷⁰ To Justice Stith, the *Mack* checkpoint was thus unconstitutional.¹⁷¹

Additionally, according to Justice Stith, the majority’s finding of reasonable suspicion was based on misapplied precedent.¹⁷² In *Brugal*, the issue was whether exiting at a “ruse” checkpoint could be considered in developing reasonable suspicion for *further* detention, not an *initial* seizure.¹⁷³ In fact, the *Brugal* court did not even question the initial stop in that case.¹⁷⁴ Consequently, Justice Stith recognized that it was incorrect to rely on *Brugal* for the contention that exiting at a “ruse” checkpoint could create the required individualized suspicion to justify an initial seizure.¹⁷⁵

165. *Id.* at 710, 711-13 (Stith, J., dissenting). In addressing the reasonableness of the “ruse” aspect of the checkpoint, Justice Stith agreed with the Sixth Circuit case of *Huguenin* that a “ruse” checkpoint is “*more rather than less objectionable*” than a normal drug checkpoint because it was “intentionally set up as a trap.” *Id.* at 713 (Stith, J., dissenting).

166. *Id.* at 711 (Stith, J., dissenting).

167. *See id.* at 712 (Stith, J., dissenting).

168. *Id.* (Stith, J., dissenting). Specifically, the *Damask* court wrongly believed that *Martinez-Fuerte* supported the use of checkpoints for drug interdiction. *Id.* (Stith, J., dissenting). The court in *Damask* even went so far as to comment that “[b]ut for the illegal immigration cases, one might agree that [the evidence should be suppressed].” *State v. Damask*, 636 S.W.2d 565, 572 (Mo. 1996). However, the *Edmond* Court specifically stated that *Martinez-Fuerte* did not allow drug interdiction checkpoints. *Mack*, 66 S.W.3d at 712 (Stith, J., dissenting) (referencing *Indianapolis v. Edmond*, 531 U.S. 32, 43-44 (2000)).

169. *See Mack*, 66 S.W.3d at 712 (Stith, J., dissenting).

170. *See id.* at 710, 712 (Stith, J., dissenting).

171. *See id.* at 712 (Stith, J., dissenting). Due to the remarkable similarity between *Damask* and *Mack*, the dissent could not understand why the majority would uphold the *Mack* checkpoint. *Id.* (Stith, J., dissenting).

172. *Id.* at 713-14 (Stith, J., dissenting).

173. *Id.* (Stith, J., dissenting).

174. *Id.* at 714 (Stith, J., dissenting).

175. *Id.* (Stith, J., dissenting). In *Brugal*, the initial seizure was justified under checkpoint law. *United States v. Brugal*, 209 F.3d 353, 357 (2000).

Justice Stith further pointed out that Fourth Amendment precedent required *individualized* suspicion of criminal activity to justify a *Terry* seizure.¹⁷⁶ She explained that if exiting at the “ruse” could in fact create reasonable suspicion, it would be purely group, rather than individualized, suspicion.¹⁷⁷ Justice Stith emphasized that group suspicion was not sufficient to create reasonable suspicion because “[n]either *Edmond*, nor any other Supreme Court case, nor the Fourth Amendment, support such a basis for approval of a drug checkpoint.”¹⁷⁸

Justice Stith also reasoned that a motorist’s use of a particular exit was not suspicious enough to create reasonable suspicion of criminal activity.¹⁷⁹ Specifically, she took issue with the majority’s assumption that “only those engaged in criminal activity would have reason to exit.”¹⁸⁰ Justice Stith pointed out that there were many innocent reasons for exiting at that location, none of which entailed criminal activity.¹⁸¹

Finally, Justice Stith stated that Mack was not stopped because he swerved or because of any other reasonable suspicion.¹⁸² It was clear from the record that Mack was seized merely because he exited at a checkpoint, not because of any alleged “swerve.”¹⁸³ In her opinion, this justification was developed only after-the-fact to help justify the illegal basis for the stop.¹⁸⁴

D. Commentary

The Missouri Supreme Court, in *State v. Mack*, failed to correctly apply Fourth Amendment and United States Supreme Court precedent not once, but twice. First, the court failed to recognize the *Mack* seizure for what it truly was: a checkpoint. Under *Edmond*, a drug interdiction checkpoint is unconstitutional.¹⁸⁵ The facts of *Mack* overwhelmingly suggest that the Old Cap Au Gris seizures were made pur-

176. *Mack*, 66 S.W.3d at 714-15 (Stith, J., dissenting).

177. *Id.* at 714 (Stith, J., dissenting).

178. *Id.* (Stith, J., dissenting). In any event, the dissent recognized that even if *Edmond* did approve of the use of “group suspicion” in order to bypass its prohibition on drug interdiction checkpoints, it would be the burden of the state to demonstrate this heightened success rate. *Id.* at 715 (Stith, J., dissenting). Yet, such a showing would be impossible because proper records were not kept by the officers administering the checkpoint. *Id.* (Stith, J., dissenting) (commenting that testimony was “so vague, inexact and at times self-contradictory that no firm numbers [could] be determined”).

179. *Id.* at 716 (Stith, J., dissenting).

180. *Id.* at 712 (Stith, J., dissenting).

181. *Id.* at 716 (Stith, J., dissenting). Examples of such innocent reasons include living in the area, avoiding delay or inconvenience, and fear of police bias. *Id.* (Stith, J., dissenting).

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

183. *Id.* at 716 (Stith, J., dissenting).

184. *See id.* (Stith, J., dissenting).

185. *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

suant to a checkpoint.¹⁸⁶ However, the court failed to recognize this, and thus failed to strike down the unconstitutional checkpoint as required by *Edmond*.

The Missouri Supreme Court's second mistake was its failure to consider dispositive United States Supreme Court precedent before it ruled that "suddenly" exiting at a "ruse" checkpoint created reasonable suspicion of drug trafficking. Under *Wardlow*, evasion in itself is not sufficient to create reasonable suspicion.¹⁸⁷ Further, since Mack's decision to take the Old Cap Au Gris exit was, at best, only avoidance of a checkpoint, it did not create the quantum of suspicion necessary for a *Terry* stop.

1. Mack is a Checkpoint Case

The most obvious error made by the Missouri Supreme Court in *Mack* was its failure to recognize the seizure as a checkpoint. The United States Supreme Court in *Edmond* unequivocally outlawed drug and all other general crime detection checkpoints.¹⁸⁸ No matter how the picture is painted, *Mack* was a checkpoint case, both in form and substance.

The plain language of the Troy Police Department's plan of action indicates that the nature of the *Mack* seizure was a suspicionless checkpoint. The plan of action was titled the "*Troy Police Department Drug Enforcement Checkpoint*."¹⁸⁹ By its own self-summarizing title, the "ruse" was a drug enforcement checkpoint.

Further, the plan of action stipulated that if the process of stopping and questioning a motorist *resulted in reasonable suspicion*, an officer could *further* detain the motorist.¹⁹⁰ This language plainly did not require any reasonable suspicion until after the motorist was stopped. If reasonable suspicion would have been created simply by taking the exit, as the court suggests,¹⁹¹ then the manual would not have needed to state that *if* stopping and questioning *results* in reasonable suspicion the motorist may be further detained.

Moreover, if the key to the whole "ruse" operation was really to create reasonable suspicion for an initial stop, then surely it would have been specified in the plan of action. However, the plan of action, as outlined in the state's brief, reveals that "[a]fter this [initial] contact

186. See generally *Mack*, 66 S.W.3d at 707-08.

187. See *supra* notes 107-09 and accompanying text.

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

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

190. See *id.* ("If the officers did not find suspicious circumstances that warranted reasonable suspicion of drug trafficking, they released the vehicle and its occupants. However, if circumstances did raise reasonable suspicion, the officers directed the vehicle to the entrance side of the ramp . . .").

191. *Id.* at 709.

[with the motorist] the officer would use his training and experience to assess for reasonable suspicion of criminal activity.”¹⁹² This language suggests that the officers did not need reasonable suspicion for the initial stop. If the department itself did not think that there needed to be reasonable suspicion for the initial seizure, then surely officers did not take the extra effort to make the reasonable suspicion assessment before they stopped the motorists.

Additionally, the Troy Police Department’s actions in the field suggest that the *Mack* seizure was a checkpoint, as opposed to a series of individual stops based on reasonable suspicion.¹⁹³ According to the majority, there was individualized reasonable suspicion that every motorist who used the Old Cap Au Gris exit was involved in drug related criminal activity.¹⁹⁴ The record indicates, however, that several cars were waived through without much more than a glance.¹⁹⁵ Not only does this violate the “plan of action,” but it also goes against the finding that the “ruse” created reasonable suspicion. If the officers administering the checkpoint truly felt that each motorist who took the Old Cap Au Gris exit was engaged in drug trafficking, they would not have let them pass without further investigation.¹⁹⁶

Finally, the trial court, as the finder of fact, also recognized *Mack* as a checkpoint case.¹⁹⁷ At trial, the stop was justified only as a drug interdiction checkpoint; reasonable suspicion was not even an issue.¹⁹⁸ In fact, until *Mack* was heard by the Missouri Supreme Court, the only justification for the seizure was that it was a checkpoint.¹⁹⁹ It was only after the decision in *Edmond* that the reasonable suspicion argument even arose.²⁰⁰

The facts surrounding the *Mack* seizure give no basis for the court’s reasonable suspicion justification. The reasonable suspicion argument was created after *Edmond*, presumably in an effort to avoid its implications. If the Missouri Supreme Court’s decision would have

192. Petitioner’s Brief at 2, *Mack* (No. 79237).

193. See generally *Mack*, 66 S.W.3d at 714.

194. See *id.* at 708-09.

195. *Id.* at 719 (Stith, J., dissenting). It was estimated that the Troy Police Department stopped anywhere from 60-150 vehicles over a six-hour period. *Id.* at 714 (Stith, J., dissenting). As pointed out in the dissent, there were only estimates as to these numbers because the officers failed to keep accurate records of motorists stopped and searched. *Id.* at 715 (Stith, J., dissenting).

196. This discretion also creates other problems that were not discussed in the opinion. Namely, it allowed the officers unfettered discretion as to whom they wanted to stop, and the discretion made this type of stop more akin to a “spot check” banned by the United States Supreme Court in *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

197. See *State v. Mack*, No. ED97237, 2001 Mo. Ct. App. LEXIS 1399, at *5 (Aug. 21, 2001).

198. See *id.*

199. See *id.* at *5, *9-10.

200. Compare *Mack*, 66 S.W.3d at 709 (upholding the seizure based on a reasonable suspicion analysis), with *Mack*, 2001 Mo. Ct. App. LEXIS 1399, at *5 (analyzing the seizure only under checkpoint law).

been based on the facts of the case, the court would have applied *Edmond* and held that the *Mack* seizure was made pursuant to a drug interdiction checkpoint.

In addition to being a checkpoint case factually, *Mack* was also a checkpoint seizure according to precedent.²⁰¹ In *Damask*, the Missouri Supreme Court analyzed a “ruse” exclusively under checkpoint law.²⁰² In keeping with its reasoning in *Damask*, the court should have recognized the nearly identical “ruse” in *Mack* as a checkpoint, but it did not. Further, since the basis for upholding the checkpoint in *Damask* was later invalidated in *Edmond*, it follows that any future “ruse” drug interdiction checkpoint must also be invalidated in order to remain consistent with both cases.²⁰³

Damask also implies that a “ruse” checkpoint does not create reasonable suspicion.²⁰⁴ Since the *Damask* court was unsure about its checkpoint analysis,²⁰⁵ it surely would have examined the case under the framework of reasonable suspicion. However, the court in *Damask* did not recognize reasonable suspicion as an issue;²⁰⁶ most likely because it was not. If reasonable suspicion was not created from the “ruse” checkpoint in *Damask*, then the almost identical “ruse” in *Mack* should not be able to produce reasonable suspicion either. This could explain why the Missouri Supreme Court declined to examine *Damask*, binding precedent with almost identical facts, with much detail in its *Mack* decision.²⁰⁷

All other courts that have addressed this issue have also held that stops made pursuant to “ruse” checkpoints are checkpoint seizures.²⁰⁸ In *Green*, a Missouri “ruse” checkpoint nearly identical to the “ruse” in *Mack* was properly treated as a checkpoint by the Eighth Circuit Court of Appeals.²⁰⁹ Remarkably, the checkpoint in *Mack* was based

201. See *United States v. Green*, 275 F.3d 694, 699-700 (8th Cir. 2001); *United States v. Huguenin*, 154 F.3d 547, 558 (6th Cir. 1998); *State v. Damask*, 936 S.W.2d 565, 567-68, 570 (Mo. 1996).

202. See *supra* notes 56-58 and accompanying text.

203. *Damask* indicated that a “ruse” checkpoint should be controlled by checkpoint law. See *Damask*, 936 S.W.2d at 570. *Edmond* stated that all drug checkpoints were unconstitutional. *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

204. See *Damask*, 936 S.W.2d at 570-71 (classifying the seizure as a checkpoint, and stating that “stopping motorists on public highways may be reasonable even in the absence of particularized suspicion of crime as long as those stops are conducted under certain procedures”).

205. In *Damask*, the court looked only to the then unsettled area of checkpoint law to justify the stop. See *id.* at 570-72. The court eventually upheld the “ruse” checkpoint, but recognized that it was a close call. *Id.* at 572, 575.

206. Presumably, the *Damask* court did not think that reasonable suspicion was an issue, as it did not even mention, let alone discuss, the possibility of the “ruse” checkpoint seizure being justified by reasonable suspicion. See *id.* at 570-72.

207. See *State v. Mack*, 66 S.W.3d 706, 708-09 (Mo. 2002). *Damask* was not discussed by the court, and it was cited only once. *Id.* at 709.

208. See *United States v. Green*, 275 F.3d 694, 699-700 (8th Cir. 2001); *United States v. Huguenin*, 154 F.3d 547, 558 (6th Cir. 1998).

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

on the same plan of action as used in *Green*.²¹⁰ Yet, this same plan of action resulted in opposite outcomes in different courts.²¹¹ In *Green*, the checkpoint was held unconstitutional by the Eighth Circuit,²¹² while in *Mack* it was found to be constitutional.²¹³

The Missouri Supreme Court tried to distinguish *Mack* from *Green* on the basis that in *Green* officers made no attempt to create reasonable suspicion.²¹⁴ This contention is simply without merit, as the two checkpoints were based on the same plan of action.²¹⁵ Since *Mack*, the Eighth Circuit reaffirmed its position taken in *Green* that a “ruse” checkpoint should be examined under *Edmond*.²¹⁶ In *United States v. Yousif*,²¹⁷ the court specifically rejected the argument that a “ruse” checkpoint seizure could be justified based on reasonable suspicion.²¹⁸

Likewise, in *Huguenin*, the Sixth Circuit Court of Appeals treated a “ruse” checkpoint stop as a checkpoint seizure.²¹⁹ In neither *Green* nor *Huguenin* was it even suggested that such a checkpoint could be upheld based on reasonable suspicion.²²⁰ Nor did either of these courts suggest there was some type of middle ground between a checkpoint and a *Terry* stop.²²¹ There is no support for creating a distinction between a “ruse” checkpoint and a regular drug interdiction checkpoint. This distinction was simply a creation of the Missouri Supreme Court; a creation that did not follow the Fourth Amendment.

Every drug interdiction checkpoint, whether it includes a “ruse” or not, violates the Fourth Amendment. Under *Edmond*, drug interdiction checkpoints are unquestionably unconstitutional.²²² Under *Green*, *Huguenin*, and *Yousif*, the “ruse” aspect of a drug interdiction

210. The *Green* checkpoint was located in Franklin County. *Id.* at 697. The checkpoint in *Mack* was based off of the Franklin County procedure and used it as a model. Petitioner’s Brief at 5, *Mack* (No. 79237).

211. Compare *Green*, 275 F.3d at 700 (holding the “ruse” checkpoint to be unconstitutional), with *Mack*, 66 S.W.3d at 709-10 (holding the “ruse” checkpoint to be constitutional).

212. *Green*, 275 F.3d at 700.

213. *Mack*, 66 S.W.3d at 709-10.

214. *Id.* at 710.

215. See *supra* note 209 and accompanying text. The court did not elaborate, but it is difficult to distinguish such similar cases with only one unsupported generalized statement. Additionally, as the dissent points out, even if there had been additional reasonable suspicion, it was not relied upon in making any of the stops. *Mack*, 66 S.W.3d at 720. The analysis thus should have turned on whether the “ruse” in itself created reasonable suspicion of drug trafficking in every car that took the Old Cap Au Gris exit.

216. No. 01-2288, 2002 U.S. Cir. WL 31235500, at *6 (8th Cir. Oct. 7, 2002).

217. *Id.* at *6.

218. *Id.* at *6-7.

219. *United States v. Huguenin*, 154 F.3d 547, 555 (6th Cir. 1998).

220. See *United States v. Green*, 275 F.3d 694, 700 (8th Cir. 2001); *Huguenin*, 154 F.3d at 558.

221. See *Green*, 275 F.3d at 700; *Huguenin*, 154 F.3d at 558.

222. *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

checkpoint does not change the analysis.²²³ As these courts have correctly held, all checkpoints set up with the primary purpose of drug interdiction should be analyzed under checkpoint law, regardless of the specific methodology used.²²⁴

It is understandable that the Missouri Supreme Court did not want to hamper the police in their effort to fight America's war on drugs. However, it is unreasonable to classify the *Mack* seizure as anything other than a checkpoint. No matter how the issue is framed, in substance and form this was a drug checkpoint, not several stops made based on reasonable suspicion. As such, it was unconstitutional.

2. Lack of Reasonable Suspicion

Even if the Missouri Supreme Court's suspicious exit theory could withstand scrutiny, the *Mack* seizure was still not supported by the United States Supreme Court's interpretation of individualized reasonable suspicion.²²⁵ The issue of reasonable suspicion has evolved greatly from its beginnings in *Terry*.²²⁶ However, a "hunch" that someone may be involved in criminal activity has never been sufficient to satisfy the requirement.²²⁷

Although it is not entirely clear from the opinion, it appears the *Mack* majority based its theory of reasonable suspicion on the inference that in taking the exit, Mack was evading the police.²²⁸ *Wardlow* is the closest United States Supreme Court ruling on whether evasion is sufficient to create reasonable suspicion.²²⁹ In *Wardlow*, the Court held that evasion of police, when done in a high-crime area, was sufficient to generate reasonable suspicion.²³⁰

Mack's act of exiting at a "ruse" checkpoint did not generate the minimum quantum of suspicion set out in *Wardlow* for at least three reasons. First, Mack's actions were not necessarily evasive. Unlike the headlong flight in *Wardlow*, the act of taking a normal highway exit is not inherently evasive. Rather, Mack's act of exiting at a normal interstate exit was more consistent with simply "going on his

223. See *Yousif*, 2002 U.S. Cir. WL 31235500, at *6-7; *Green*, 275 F.3d at 700; *Huguenin*, 154 F.3d at 558.

224. See Respondent's Brief at 5, *State v. Mack*, 66 S.W.3d 706 (Mo. 2002) (No. 79237).

225. See *supra* notes 75-111 and accompanying text.

226. See generally *United States v. Arvizu*, 122 S. Ct. 744, 750-51 (2002) (outlining, at length, the *Terry* standard).

227. *Arvizu*, 122 S. Ct. at 751 (stating that a "hunch" is insufficient to justify a [*Terry*] stop"); *Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court consistently refused to sanction.").

228. See *Mack*, 66 S.W.3d at 709.

229. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

230. *Id.*

way.”²³¹ According to *Royer* and *Bostick*, a citizen has the right to avoid police officers without fear of creating reasonable suspicion.²³²

Further, evasiveness in other cases, such as the U-turn cases, has been unmistakable.²³³ A U-turn made by a motorist immediately after seeing, but before encountering, a checkpoint would seem to support the inference of evasion, since there are very few legitimate reasons for making such a maneuver under the circumstances.²³⁴ Yet, even as evasive as a U-turn may seem, there is still much disagreement in the courts as to whether a U-turn is evasive enough to create reasonable suspicion.²³⁵

On the other hand, simply continuing in the same direction and taking a normal exit is not inherently evasive.²³⁶ Mack did not turn around or do anything else out of the ordinary; he just took a normal exit.²³⁷ There are many legitimate reasons for taking any highway exit.²³⁸ Taking an exit is not in any way evasive or indicative of criminal activity.

Second, even if officers could conclude that the way Mack exited was evasive, then evasion would be the only factor used in the determination of reasonable suspicion.²³⁹ Yet, the finding of reasonable suspicion in *Wardlow* was based on two well-established factors: high crime location and evasive flight.²⁴⁰ In *Wardlow*, the United States Supreme Court held that neither high crime area, nor evasive flight could alone create reasonable suspicion.²⁴¹ Since the purported reasonable suspicion in *Mack* was based on only one of those factors, evasive flight, it must follow that there was not enough suspicion to warrant the seizure.

Finally, the factor that was definitely missing in *Mack*, high-crime location, is a significant factor in the reasonable suspicion analysis.²⁴²

231. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

232. See *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 497-98.

233. See, e.g., *State v. Webb*, 386 S.E.2d 891, 892 (Ga. Ct. App. 1989).

234. The timing of the U-turn, not the U-turn itself, is what makes the act suspicious. There are many legitimate reasons for making a U-turn, but none of these seem to fit when the U-turn is made only after the motorist is in view of a checkpoint.

235. See *supra* notes 131-36 and accompanying text.

236. This is because, as the dissent points out, there are many innocent reasons for taking a normal highway exit. *State v. Mack*, 66 S.W.3d 706, 716 (Mo. 2002). Motorists take normal highway exits everyday. Conversely, there are not nearly as many innocent reasons for making a U-turn, especially when the U-turn is made after coming into sight of a checkpoint.

237. See *id.* at 707.

238. The fact that the government built an off-ramp should be enough to indicate that there are at least a fair number of reasons to leave the highway at that location.

239. See *Mack*, 66 S.W.3d at 709. “The record is clear that they stopped—that is, seized—Mr. Mack’s car because he exited, not due to the alleged swerve.” *Id.* at 720 (Stith, J., dissenting).

240. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

241. See *id.* at 124 (noting both the high crime area and evasive flight were pertinent factors, but requiring both to make the determination that reasonable suspicion existed).

242. See *id.* (“Accordingly, we have previously noted the fact that the stop occurred in a ‘high crime area’ among the relevant contextual considerations in a *Terry* analysis.”).

In *Wardlow*, the police were driving through a known high crime and drug prone area when they spotted Wardlow take off in headlong flight.²⁴³ In *Mack*, however, the location was not a high crime area.²⁴⁴ While being in a high crime area is not sufficient in itself to create reasonable suspicion, the Court has historically given it great weight.²⁴⁵ Therefore, without this factor, the level of suspicion in *Mack* was much lower than in *Wardlow*.

Since the decision in *Mack*, the United States Supreme Court has handed down one more case that is relevant to a reasonable suspicion analysis. In *United States v. Arvizu*,²⁴⁶ the Court held that a border patrol agent had reasonable suspicion to stop a motorist who, among other things, was apparently trying to avoid a border checkpoint.²⁴⁷ In *Arvizu*, officers became suspicious of a motorist who traveled down an unpaved road that was notoriously used by smugglers to avoid a border checkpoint.²⁴⁸ They observed the motorist, followed him, and eventually stopped the vehicle.²⁴⁹ As a result of the stop, over 100 pounds of marijuana was seized.²⁵⁰

The reasonable suspicion factors that the Court considered “in the totality of the circumstances” included two acts of possible avoidance.²⁵¹ However, the Court also based its finding of reasonable suspicion on several other factors, including ones that suggested the motorist was a drug smuggler,²⁵² was overly nervous,²⁵³ and lacked an innocent reason to take the route in question.²⁵⁴

The evidence in *Mack* fails to meet the “ruse” related reasonable suspicion standard set in *Arvizu*.²⁵⁵ One of the factors relied upon in making the *Terry* stop in *Arvizu* was the inference that the motorist

243. *Id.* at 121.

244. *See generally Mack*, 66 S.W.3d at 709-10 (failing to mention any evidence of the exit being a frequent route of drug couriers or anything else that would indicate a high-crime location).

245. *See Wardlow*, 528 U.S. at 124.

246. 122 S. Ct. 744 (2002)(*United States Reports* pagination not available at time of publication).

247. *Id.* at 752.

248. *Id.* at 748.

249. *Id.* at 749-50.

250. *Id.* at 750.

251. *Id.* at 752. The two acts of possible avoidance were the motorist’s use of an unpaved road to avoid a border checkpoint and the use of the road at a time when agents were changing shift and thus would not be on patrol. *Id.*

252. *See id.* at 748-49, 752-53. The road was known to be used by drug smugglers; the type of automobile used by the motorist was commonly used by smugglers; and the motorist’s children seemed to have elevated knees, as if something was beneath their feet. *Id.*

253. *See id.* at 749, 753. Nervousness was shown by the driver’s specific actions of straightening in his seat, slowing down, ignoring a passing police officer, and the methodical wave of the motorist’s children. *Id.*

254. *Id.* at 752. The road was used regularly only by local ranchers and drug smugglers. *Id.* at 748. Additionally, the absence of a local picnic or recreation area that the motorist could be trying to find further ruled out the possibility of an innocent reason for using the road. *Id.* at 752.

255. *See supra* notes 245-53 and accompanying text.

was trying to avoid the checkpoint.²⁵⁶ However, avoidance was not the key component in the finding of reasonable suspicion in *Arvizu*.²⁵⁷ The *Arvizu* Court found that several factors, not just one, created reasonable suspicion.²⁵⁸ Only after the Court painstakingly analyzed each of the ten factors did it hold that there was reasonable suspicion in the “totality of the circumstances.”²⁵⁹ Since the Court used all ten factors, meeting only one is likely not sufficient to warrant a finding of reasonable suspicion.

Additionally, the one factor that was the same in *Arvizu* and *Mack*, suspected evasion, was much stronger in *Arvizu*.²⁶⁰ First, the route taken by the motorist in *Arvizu* was a road “known” to be used only by drug smugglers, forestry personnel, and local ranchers.²⁶¹ In contrast, the route taken in *Mack* was not a road “known” to be used with any frequency by drug smugglers.²⁶² In fact, the exit in *Mack* was used by many innocent people for many innocent reasons.²⁶³ Second, the motorist in *Arvizu* used an unpaved road that was a “round about way” to his intended location,²⁶⁴ whereas the route taken by Mack was conceded to be one of several routes to his intended destination.²⁶⁵ These distinctions show that even the inference of avoidance was much stronger in *Arvizu* than in *Mack*. Accordingly, suspected evasion should be given less weight in *Mack* than it was given in *Arvizu*.

Assuming that Mack did, in fact, see the misleading warning sign, the strongest inference that can be legitimately made from exiting the highway is that Mack was trying to avoid the police. Under United States Supreme Court precedent set in *Royer* and *Bostick*, simply avoiding officers cannot create reasonable suspicion.²⁶⁶ In extending this precedent to *Mack*, it becomes apparent that, even if Mack did see the misleading warning sign, taking the next exit to avoid interac-

256. *Arvizu*, 122 S. Ct. at 752.

257. *See id.* at 752-53.

258. *See id.*

259. *Id.*

260. *Id.* at 752; *State v. Mack*, 66 S.W.3d 706, 709 (Mo. 2002).

261. *Arvizu*, 122 S. Ct. at 744.

262. *See generally Mack*, 66 S.W.3d at 709-10.

263. *Id.* at 716 (Stith, J., dissenting).

264. *See Arvizu*, 122 S. Ct. at 752 (“[A]reas farther to the north would have been easier to reach by taking [the highway], as opposed to the 40-to-50-mile trip on unpaved and primitive roads.”).

265. *Mack*, 66 S.W.3d at 718 (Stith, J., dissenting) (The Old Cap Au Gris exit “was one of up to four routes to Troy and, depending on traffic, could be as quick as the other available routes to Troy from Mr. Mack’s home.”).

266. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

tion with the police could not create reasonable suspicion of criminal wrongdoing.²⁶⁷

Moreover, if the warning sign was not misleading and the checkpoint was actually one mile down the road on Highway 61, an officer could not legally stop a motorist at the checkpoint because according to *Edmond* this would be a classic drug interdiction checkpoint.²⁶⁸ Under *Royer* and *Bostick*, a motorist could therefore, without creating any type of suspicion, refuse to cooperate with the officers at the “consensual” checkpoint.²⁶⁹

There is no difference between refusing to make contact with police at the illegal checkpoint and refusing to make contact with the officers by exiting the highway before the illegal checkpoint. There is no requirement that a citizen wishing to not engage in a “consensual” conversation with an officer first approach the officer and then walk away; one can go about his or her business without even giving the officer a second glance.²⁷⁰ Therefore, exiting Highway 61 amounted to no more than Mack’s constitutional right to “walk away.”²⁷¹

Mack’s act of exiting Highway 61 was not evasive, and even if it was, it still was not sufficient to meet the reasonable suspicion standard. The Missouri Supreme Court would have realized this if it had examined applicable United States Supreme Court precedent. However, instead of analyzing *Mack* in light of *Wardlow*, *Royer*, and *Bostick*, the court made conflicting new law based on its own misguided interpretation of the Fourth Amendment.

V. CONCLUSION

State v. Mack should have been a very straightforward case for the Missouri Supreme Court. Every fact of the *Mack* seizure suggested that it was made pursuant to a drug interdiction checkpoint. Likewise, the United States Supreme Court in *Edmond* made it clear that drug interdiction checkpoints violate the Fourth Amendment.²⁷² However, the Missouri Supreme Court disregarded the facts of the case, and ignored United States Supreme Court precedent.

The most egregious of these errors was the court’s blatant refusal to decide the case based on the facts. Mack was clearly a checkpoint case. By substituting an after-the-fact justification for an illegal drug checkpoint, the court greatly undermined its integrity. To a lesser ex-

267. See *State v. Talbot*, 792 P.2d at 489, 494 (Utah Ct. App. 1990) (“[I]f a person may choose to avoid or ignore an officer when approached on the street, we see no reason why he or she should not be able to avoid an equally if not more intrusive confrontation at a roadblock.”).

268. *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

269. See *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 497-98.

270. See *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 497-98.

271. See *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 597-98.

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

tent, the court also undermined its integrity by misapplying the reasonable suspicion standard. The court completely ignored dispositive United States Supreme Court precedent in its determination that that “suddenly” exiting a public highway at a “ruse” checkpoint created individualized reasonable suspicion of drug trafficking.

To the court, and probably the vast majority of Americans, the *Mack* stop may not have been too unreasonable, especially since Mack was “guilty.”²⁷³ Americans are understandably tired of seeing “guilty” criminals let off the hook because of “technicalities.” The only problem with this reasoning is the Fourth Amendment should not be considered a “technicality.” Without the benefit of Fourth Amendment “technicalities,” such “minor” infringements may not always be the case, especially when a truly innocent person is the victim.²⁷⁴

273. The problem with this logic is that many of the motorists who were illegally seized at the drug checkpoint were “innocent,” yet they still had to put up with the same constitutional violation as those who were “guilty.”

274. “Like the rains from heaven, constitutional rights fall on the just and the unjust.” *United States v. Morales-Zamora*, 974 F.2d 149, 153 (10th Cir. 1992). Likewise, I suppose, the loss of Fourth Amendment protections will cause just as many hardships on the “innocent” as the “guilty.”