SC90978

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI

Respondent,

vs.

JACOB WALDRUP, JR.

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court Of Clay County, Missouri
Seventh Judicial Circuit, Division 5
The Honorable David Chamberlain, Associate Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Jacob Waldup, Jr., incorporates by reference the Jurisdictional Statement as set forth in his substitute brief on page 6.

STATEMENT OF FACTS

Appellant Jacob Waldup, Jr., incorporates by reference the Statement of Facts as set forth in his substitute brief on pages 7-18. Additionally, Mr. Waldrup wishes to clarify the following statements of fact in Respondent's Substitute Brief:

Respondent correctly notes that the Parvin Road exit from Interstate 35, the location of the drivers' license checkpoint, had been previously identified by the police as having a high rate of traffic accidents and unlicensed drivers. (Resp. Br. at 8). However, Mr. Waldrup further notes that, according to Trooper Isringhausen, a particular location for a drivers' license checkpoint is also chosen to target areas of high crime generally:

> The purpose of the driver's license checkpoint, there are several, but basically you pick areas and we target unlicensed drivers and people with no insurance, ***people with criminal activity*** and areas that can create high accidents, ***high incidents for crime*** and citizen complaints, things like that.

(Tr. 28) (emphasis added).

Second, Respondent again correctly notes that the drivers' license checkpoint, at which the officers stopped every vehicle exiting off of I-35 onto Parvin Road, was set up according to "established policy." (Resp. Br. at 8). However, Mr. Waldrup additionally points out that policy is silent on when or in

what circumstances the officers would merely visually inspect a driver's license, or would run a check for warrants through the computer. (Tr. 28-30, Ex. 1, 2). Moreover, the officers testified that in most cases they merely visually inspected the license and sent drivers on their way. (Tr. 36, 247). They ran the license through the computer only "if the situation called for it," but did not elaborate on what would cause them to conclude that "the situation called for it." (Tr. 36). Thus the record, as shown by the terms of the policy and the officers' testimony at the suppression hearing and at trial, shows that the decision to run a check of the driver's license was entirely discretionary with the officers. No evidence was presented showing that the decision to run a check of the license was based on any predetermined or established criteria.

Third, while Respondent's assertion that the officers believed that Mr. Waldrup was apparently reaching for something or stuffing something down around his feet is again technically correct, Respondent overlooks the troopers' repeated testimony that what they believed he might be reaching for was a weapon – their concern was for officer safety. (Tr. 14, 37, 39, 52-53, 57, 58-59, 60, 257-258). Not once during the suppression hearing or the trial did either officer testify that he believed Mr. Waldrup may have been reaching for or concealing drugs.

Fourth, Respondent correctly notes that right after Trooper Primm frisked Mr. Waldrup outside of his vehicle, he obtained Mr. Waldrup's name, social

security number and birth date. (Resp. Br. at 9). Mr. Waldrup additionally clarifies that at the point the officers "ran" this information through dispatch, the driver of the vehicle had already been issued a citation and released and the officers had determined that Mr. Waldrup was unarmed. (Tr. 59, 217).

Finally, Respondent concludes that after Mr. Waldrup's identifying information was run through dispatch and his outstanding warrants were discovered, the "trooper placed Defendant under arrest." (Resp. Br. at 9). It is true that the troopers' testified that after they discovered the warrants, they placed Mr. Waldrup under arrest. (Tr. 40, 45). However, whether and at what point a reasonable person in Mr. Waldrup's position would have felt free to ignore the officers' demands once they ordered him out of the car, frisked him and asked for his identifying information is a question of law to be determined ***de novo*** by the Court. ***Davalos, Terry, infra.***

ARGUMENT ON APPEAL

THE TRIAL COURT CLEARLY ERRED AND ABUSED ITS DISCRETION IN OVERRULING MR. WALDRUP'S MOTION TO SUPPRESS AND IN OVERRULING HIS OBJECTIONS AT TRIAL TO A) THE ADMISSION INTO EVIDENCE OF STATE'S EXHIBITS 2 AND 3, AN EVIDENCE BAG AND CRACK COCAINE; AND B) THE TESTIMONY OF TROOPER ISRINGHAUSEN, TROOPER PRIMM AND CRIMINALIST JAMES BURGIO REGARDING THE DISCOVERY, SEIZURE AND TESTING OF THE CRACK COCAINE, BECAUSE THIS EVIDENCE WAS OBTAINED AS THE RESULT OF MR. WALDRUP'S UNLAWFUL SEIZURE, IN VIOLATION OF MR. WALDRUP'S RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 15 OF THE MISSOURI CONSTITUTION, IN THAT ONCE TROOPER ISRINGHAUSEN ISSUED A TICKET TO THE DRIVER AND RELEASED HIM, THE PURPOSE OF THE CHECKPOINT STOP HAD BEEN FULLY EFFECTUATED, AND MR. WALDRUP'S CONTINUED DETENTION AND THE SUBSEQUENT COMPUTER CHECK OF HIS IDENTIFICATION WERE NOT JUSTIFIED BY CONSENT, PROBABLE CAUSE, OR CONCERNS FOR OFFICER SAFETY.

Respondent's primary arguments throughout its Substitute Brief are founded on two incorrect assumptions: 1. that the officers had a reasonable, particularized

suspicion based on articulable facts to suspect Mr. Waldrup of committing a crime when they chose to run his identification information (thus his seizure was a valid ***Terry***[1] seizure) , and 2. that the officers' continued seizure of Mr. Waldrup once they had written the driver a ticket and after they had determined that Mr. Waldrup was unarmed, and the computer check of Mr. Waldrup's identifying information, was sufficiently "attenuated" from Mr. Waldrup's illegal detention to justify the officers' violation of his rights against unreasonable search and seizure under the Fourth Amendment and preclude exclusion of the illegally-obtained evidence. (Resp. Br. at 12-26, 27-40). These arguments fail as follows:

Detention of Mr. Waldrup Was Illegal Once Officers Discovered No Weapon and Issued Driver a Citation

As Mr. Waldrup argued in his opening brief, the officers here lacked even a reasonable, particularized suspicion based on articulable facts justying his continued detention after no weapon was discovered and after the driver was issued a citation, let alone probable cause. He reiterates that any seizure at a routine traffic checkpoint must be "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." ***City of Indianapolis v. Edmond***, 531 U.S. 32, 37 (U.S. 2000) (quoting ***Brown v. Texas***, 443 U.S. 47, 51, (1979)). The goal of any such plan, including a demand for

[1] References to ***Terry*** are to ***Terry v. Ohio,*** 392 U.S. 1 (1968).

identification information, must not be for ordinary law enforcement purposes – for example, for the purpose of discovering individuals who have outstanding warrants. ***Id***. And any further detention beyond that plan must be based on consent or probable cause. ***Id.*** (quoting ***United States v. Brignoni-Ponce,*** 422 U.S. 873, 882 (1975)).

There is no suggestion that Mr. Waldrup consented to be detained and searched. Moreover, Respondent does not appear to dispute that Mr. Waldrup did not consent to his continued detention once no weapon was found, to the computer check of his identifying information, or to the search of his person. (Resp. Br. at 33-34). And even if Respondent did dispute this, the record supports that the trooper's demand for identification was, under the circumstances, coercive. A request from the police that cannot be refused without negative consequences is coercive and the Fourth Amended imposes objective justification to validate the detention or seizure. ***I.N.S. v. Delgado***, 466 U.S. 210, 216-217 (1984); ***Florida v. Bostick***, 501 U.S. 429, 435 (1991) (police may question citizen without suspicion as long as they do not convey a message that compliance with their requests is required).

Moreover, Mr. Waldrup's detention once the officers ascertained he was unarmed and once they had issued the driver a ticket was a ***de facto*** arrest. A seizure may occur if an officer "by means of physical force or show of authority"

restrains the liberty of a citizen. ***State v. Davalos***, 128 S.W.3d 143, 147 (Mo. App. S.D. 2004) (citing, ***Terry, supra).*** The test is whether a reasonable person, considering the totality of the circumstances, would feel free to leave, i.e. disregard police questioning and walk away. ***Id.*** (citing, ***State v. Manley***, 115 S.W.3d 398, 401 (Mo. App. S.D. 2003).

Here, Mr. Waldrup was surrounded by a significant police presence of marked highway patrol vehicles and uniformed officers. (Tr. 32-33). He had been ordered out of the car and frisked. (Tr. 58). A reasonable person in Mr. Waldrup's circumstances would not have concluded that giving the trooper his personal identification information was optional or that he was free to ignore the troopers' questions and choose to walk away. The contact with the troopers was not consensual.

Nor was his continued detention supported by probable cause. If an arrest is made, either expressly or ***de facto***, it must be based on probable cause or it is illegal. ***Id.*** (citing, ***State v. Kampschroeder***, 985 S.W.2d 396, 398 (Mo. App. E.D.1999)). Probable cause exists when an officer possesses facts which would warrant a reasonable person to believe that a criminal offense has been committed by the individual to be arrested***.*** ***Singleton v. State***, 120 S.W.3d 218, 222 (Mo. App. W.D. 2003) (internal citation omitted). Bare suspicion is not enough to

support a finding of probable cause for a warrantless arrest. ***State v. Duncan***, 944 S.W.2d 225, 226 (Mo. App. W.D. 1997) (internal citations omitted).

Whether probable cause existed is determined based upon the knowledge the police officer had ***prior*** to the arrest. ***Hack v. Vincent,*** 257 S.W.3d 667, 670 (Mo. App. W.D. 2008) (emphasis added). Facts which would tend to show the defendant is guilty of a crime discovered after the arrest cannot be used to bolster an insufficient prior showing of probable cause. ***Gant v. State***, 211 S.W.3d 655, 659 (Mo. App. W.D. 2007); ***see also, State v. Dickson***, 252 S.W.3d 216, 220 (Mo. App. E.D. 2008).

Here, neither trooper testified -- even once -- that they suspected that Mr. Waldrup had drugs in his possession. Since they were aware at the time of the suppression hearing and at trial that Mr. Waldrup was seeking to suppress the evidence as a violation of his Fourth Amendment rights, reasonably at least one of the troopers would have testified that they suspected Mr. Waldrup was concealing illegal drugs – if that is what they had believed. But the Court doesn't have to guess the "articulable facts" forming the officers' basis for their continued detention of Mr. Waldrup. Trooper Primm testified that it was because he "wasn't certain at that point that he was no longer a threat to his safety or our own. So I remained with him outside of the vehicle and spoke with him." (Tr. 60).

This is nothing more than inchoate hunch of vague "dangerousness." It is not an individualized, particularized suspicion based on specific, articulable facts, because the officers had already determined Mr. Waldrup was unarmed. (Tr. 59). The officers consistently testified that their concern was that he had a weapon, but that concern was dispelled once they performed a frisk. (Tr. 59).

Moreover, Respondent's attempts to "dress up" the officers' basis for Mr. Waldrup's continued detention by stressing the officers' testimony about Mr. Waldrup's surprised look at encountering a checkpoint and his reaching toward the floorboard do not cure the lack of a reasonable, particularized suspicion to detain him and run a check of his identification. (Resp. Br. at 17, 20). This argument fails because neither officer testified that these factors caused them to conclude that Mr. Waldrup had illegal drugs. In fact, nothing in the record shows that the officers had even a "bare suspicion" or "inchoate hunch" about drugs, they were concerned about weapons. (Tr. 14, 37, 39, 52-53, 57, 58-59, 60, 257-258).

Furthermore, numerous cases have explicitly or implicitly recognized that a police traffic checkpoint will understandably engender fear and surprise in law-abiding motorists as well as those engaged in illegal activity. ***See, e.g., State v. Mack***, 66 S.W.3d 706, 717 (Mo. banc 2002); ***Michigan Dept. of State Police v. Sitz***, 496 U.S. 444, 452-453 (1990) (in determining if checkpoint is unconstitutionally intrusive, 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). Mr. Waldrup had been sleeping in the car and woke up when the driver exited the freeway and stopped for the checkpoint on the exit ramp. (Tr. 314). There is nothing in the record – based on the information available to the officers at the time – that distinguishes his surprised look from the natural fear and surprise by encountering a checkpoint.

Similarly, there is nothing in inherently suspicious about reaching toward a floorboard, or police officers would be justifying in searching and seizing anyone who did not immediate "freeze" upon seeing a police officer. And again, the officers testified that this alleged "furtive movement" caused them to be concerned for officer safety – they believed it formed the legal basis for them to conduct a brief pat-down search for weapons. (Tr. 14, 37, 39, 52-53, 57, 58-59, 60, 257-258). Indeed, if they had believed due to Mr. Waldrup's alleged "furtive movement" in reaching toward the floorboard that he was concealing illegal drugs, reasonably they would have arrested him immediately and searched the vehicle.

Respondent concludes that the "protective frisk partially alleviated the troopers concerns; it revealed that Defendant was not carrying a concealed weapon. But further inquiry was warranted to determine whether Defendant had other contraband on his person or had a weapon or other illegal items in the car.

The protective frisk enabled the troopers to conduct their investigation in safety, but it did not ***end*** the investigation." (Resp. Br. at 25-26) (emphasis in original). Respondent overlooks that the officers had no probable cause or reasonable suspicion to conduct any further investigation at that point. By their own admission they were concerned for officer safety, but had already executed the constitutionally-permissible pat-down for weapons to its fullest permissible scope. ***State v. Courtney***, 102 S.W.3d 81, 87 (Mo. App. W.D. 2003) (internal citation omitted). And after they discovered Mr. Waldrup was unarmed, they did not search the vehicle; they checked his identifying information for warrants. This was nothing more than a fishing expedition based on an inchoate hunch. The subsequent "search incident to arrest" was unlawful because the arrest itself was unlawful. ***See, State v. Hudson***, 793 S.W.2d 872, 881 (Mo. App. E.D. 1990) (search incident to a lawful arrest exception to the warrant requirement presumes a lawful arrest); ***State v. Martin***, 79 S.W.3d 912, 917(Mo. App. W.D. 2002) (invalid arrest transforms search incident to arrest into an unlawful act). Thus discovery of the crack cocaine was obtained as derivative "fruit of the poisonous tree." See, ***New York v. Harris, infra***. The trial court erred in denying suppression of the crack cocaine evidence and all related testimony.

Respondent Waived Any Claim of Attenuation by Failing to Raise Attenuation in the Court of Appeals

Initially, Mr. Waldrup notes that Respondent argues for the first time in its Substitute Brief that even if Mr. Waldrup's search and seizure were illegal, "the troopers' discovery of outstanding warrants for Defendant's arrest was an intervening circumstance sufficient to attenuate the causal connection between the initial stop and the seizure of the drugs." (Resp. Br. at 27). But Respondent has waived any claim of attenuation because attenuation alters the basis of the claim Respondent raised in its court of appeals' brief.

Any substitute brief filed in this Court by a party "shall not alter the basis of any claim that was raised in the court of appeals brief." Rule 30.27, 83.08; ***State v. Moore***, 303 S.W.3d 515, 523 (Mo. banc 2010); ***Blackstock v. Kohn***, 994 S.W.2d 947, 953 (Mo. banc 1999). In its brief in the Western District, Respondent did not argue that the evidence illegally obtained from Mr. Waldrup by the troopers was sufficiently attenuated from his unlawful seizure so as to preclude its exclusion. Respondent argued instead that the search and seizure of Mr. Waldrup were lawful, therefore the evidence was obtained legally[2]. ***State v. Jacob Waldrup, Jr.***, 2010 WL 1655989 (Mo. App. W.D. June 1, 2010) (Resp. Br. at 11-21).

[2] Nor did Respondent argue in the alternative that even if the search and seizure were unlawful, discovery of the evidence was attenuated.

It is well-settled, however, that attenuation analysis is only appropriate where, as a threshold matter, courts determine that the challenged evidence is in some sense the product of illegal governmental activity. ***Powell v. Nevada***, 511 U.S. 79, 92 n. 2 (1994) (quoting ***Harris***, ***United States v. Crews***, 445 U.S. 463, 471 (1980)). Because Respondent is arguing for the first time in its Substitute Brief that even if the search and seizure were illegal, the discovery of the outstanding warrants was sufficiently attenuated from the illegality, Respondent has altered the basis of its claim in violation of Rule 83.08; thus Respondent has waived its claim of attenuation.

Discovery of Warrants Was Not Attenuated From Illegal Detention of Mr. Waldrup at the Traffic Checkpoint

Even if the Court were to consider Respondent's attenuation argument, that the officers' discovery of the warrants was an "intervening" circumstance sufficient to attenuate the illegality, this argument fails. (Resp. Br. at 27). Respondent argues that discovery of an outstanding warrant, which would not have been discovered "but for" the police officer's illegal seizure of an individual, is ***per se*** "attenuated" and the exclusionary rule does not bar admission of subsequent evidence discovered incident to an arrest for that warrant. (Resp. Br. at 30-36). This misinterprets the holdings of ***Hudson*** and ***Brendlin***, ***infra***, upon which it principally relies. (Resp. Br. at 30-36).

The United States Supreme Court has repeatedly stated that the principal purpose of the Fourth Amendment's exclusionary rule is to eliminate incentives for police officers to violate that Amendment. ***New York v. Harris***, 495 U.S. 14, 22 (1990) (Marshall, J., dissenting) (citing ***United States v. Leon***, 468 U.S. 897, 906, (1984)). A police officer who violates the Constitution usually does so to obtain evidence that he or she could not secure lawfully. ***Harris***, 495 U.S. at 22. The best way to deter him or her is to provide that any evidence so obtained will not be admitted at trial. ***Id***. Deterrence of constitutional violations thus requires the suppression not only of evidence seized during an unconstitutional search, but also of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search. ***Id***. (quoting ***Murray v. United States***, 487 U.S. 533, 536-537 (1988); ***see also***, ***Nardone v. United States***, 308 U.S. 338, 341 (1939); ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963)).

Not all evidence connected to a constitutional violation is suppressible, however. ***Id***. Rather, the Supreme Court has asked whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. ***Hudson v. Michigan***, 547 U.S. 586, 591-92 (2006) (quoting ***Wong Sun, supra).*** Three

doctrines or rules are used to determine whether there are means sufficiently distinguishable to be purged of the primary taint: the attenuation doctrine, the independent source rule, and the inevitable discovery rule. ***State v. Renfrow***, 224 S.W.3d 27, 34 (Mo. App. W.D. 2007) (citing ***State v. Miller***, 894 S.W.2d 649, 654 n. 5 (Mo. banc 1995).

Under the attenuation doctrine, three factors are considered: (1) the temporal proximity of the illegality and the unlawful activity; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***Id***. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. ***Illinois v. Brown***, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)

Here, Respondent concedes that the first ***Brown*** factor -- temporal proximity -- weighs in favor of suppression because only a few minutes passed between Defendant's seizure and the search incident to arrest which uncovered the drugs. (Resp. Br. at 33). But without direct authority, Respondent argues that the temporal proximity factor "receives minimal weight where the intervening circumstance – in this case the discovery of outstanding arrest warrants—does not involve a voluntary act by the suspect and thus cannot be explained as an exploitation of the illegal seizure (unlike, for example a consent to search, which

may be coerced). (Resp. Br. at 33-34). This is exactly backwards - there was no "intervening" event here, the officers made a coercive demand for Mr. Waldrup's identifying information while he was illegally detained and directly exploited that information to discover his outstanding warrants. A voluntary act by a suspect, for example a freely-given consent to search or voluntary statement following a valid Miranda waiver, might in some circumstances be considered an "intervening" event cutting off the chain of illegality of the seizure or search. But no such intervening consent or waiver occurred here.

Respondent further argues that the second ***Brown*** factor, the presence of an intervening circumstance, weighs "heavily in favor of admissibility. (Resp. Br. at 34). Relying heavily on the California case of ***People v. Brendlin***, 195 P.3d 1074 (Cal. 2008), Respondent claims that, "a valid arrest warrant, premised on facts independence of the circumstances of the allegedly unlawful stop," may be held to be an "extraordinary intervening circumstance that dissipates the taint associated with an illegal initial seizure." (Resp. Br. at 34). Respondent further asserts that the ***Brendlin*** holding is in accord with the United States Supreme Court's ruling in ***Hudson, supra***, that "evidence will not be considered "fruit of the poisonous tree" "simply because it would not have come to light but for the illegal actions of the police." (Resp. Br. at 35).

Respondent misinterprets the holding of ***Hudson***. The ***Hudson*** Court did not hold that any evidence that would not have been discovered "but for" the illegal actions of the police is categorically attenuated, therefore it is admissible. It held that merely because it would not have been discovered "but for" the illegal detention, without more, does not mean it must automatically be excluded.

In ***Hudson v. Michigan***, the Court addressed whether the exclusionary rule would apply to suppress evidence discovered after a violation of the knock-and-announce requirement. ***Id***. at 590. The Court determined that the evidence did not have to be suppressed. ***Id***. at 601. The Court reasoned that the purpose of the knock and announce rule is to avoid surprise and violence from the occupants' mistaken attempts at self-defense, and to give occupants the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. ***Id.*** at 594. However, said the Court, what the knock-and-announce rule has never protected is one's interest in preventing the government from seeing or taking evidence described in a valid warrant. ***Id***. Contrary to Respondent's assertion, the Court in ***Hudson*** did not state that "but-for" causation was ***per se*** too remote to the illegal conduct of the police to justify exclusion of the evidence. The Court instead ruled that but-for cause, or "causation in the logical sense alone," ***can be*** too attenuated to justify exclusion. ***Id***. at 592 (citing ***United States v. Ceccolini***, 435 U.S. 268, 274 (1978)) (emphasis added). Of course, "but-for"

causation is a direct link between the officer's illegal conduct and the discovery of illegal evidence. But a close reading of ***Hudson*** shows that the Court is recognizing that "but for" causation can be rendered too remote by independent, intervening factors. Clearly, in ***Hudson***, the independent, intervening factor was the valid search warrant. A neutral magistrate had made a previous determination that there was probable cause to search the premises. As such, the evidence would inevitably be discovered anyway – through legal means. The only impact a failure to knock and announce would have had on the officer's inevitable (and lawful) discovery of the evidence under the valid warrant is that the occupants would have had time to destroy or hide the evidence, which the ***Hudson*** Court found, of course, was not a valid purpose of the knock-and-announce rule.

Mr. Waldrup's case is plainly distinguishable. No independent, intervening factor attenuated the "but for" causation between his illegal detention and the officer's discovery of the warrants. There is no way that the warrants would have been inevitably discovered through any independent lawful means as a result of the checkpoint stop. ***Hudson*** does not help Respondent.

Respondent also argues that the third ***Brown*** factor -- the purposefulness and flagrancy of the police misconduct– also weighs in favor of attenuation and admissibility. (Resp. Br. at 35). Respondent asserts there is "nothing in the record to suggest that the troopers acted in bad faith in detaining Defendant." (Resp. Br.

at 35). Mr. Waldrup disagrees. Neither officer, at either the suppression hearing or at trial, testified he had a reasonable, particularized suspicion based on articulable facts that Mr. Waldrup had committed a crime. They consistently testified they were concerned for officer safety. (Tr. 14, 37, 39, 52-53, 57, 58-59, 60, 257-258). But even after they frisked Mr. Waldrup, and determined he was unarmed, they continued to detain him because they "still weren't sure" if he was dangerous. (Tr. 60).

This is not a particularized, articulable suspicion. Neither officer gave any specific, articulable facts ***why*** he believed Mr. Waldrup to be dangerous after they had already frisked them; this was merely an inchoate hunch. At the suppression hearing and at trial, both officers were aware that defense counsel was seeking to suppress the evidence as obtained in violation of Mr. Waldrup's Fourth Amendment rights (and corresponding rights under the Missouri Constitution). Certainly, at least one of the officers reasonably would have testified at least once that he suspected Mr. Waldrup was in possession of illegal drugs -- if in fact the officers had actually believed this and based their detention of Mr. Waldrup on that belief at that time.

Moreover, the officer's arbitrary exercise of their apparently unlimited discretion in deciding which drivers to release after a mere visual check of their driver's license and deciding which to run through the computer, indicates that

they were basing this decision on impermissible factors, since in most cases they merely visually checked the license. (Tr. 36, 247). Indeed, such unbridled discretion at a traffic checkpoint would permit officers to improperly single out certain drivers and vehicles based on improper considerations, such as race or socioeconomic status.

And that the officers had been trained about the permissible scope of a traffic safety checkpoint is demonstrated by the terms of the written checkpoint policy and its specific reference to the United States Supreme Court case of ***City of Indianapolis v. v. Edwards, supra***. (Ex. 1, 2). The very fact they prolonged Mr. Waldrup's' detention after the purposes of the checkpoint had been effectuated without further articulable suspicion and without fear for officer safety supports the conclusion that the officers acted in bad faith. This is exactly the kind of "roving patrol" that the United States Supreme Court has ruled the Constitution forbids. ***See, Brendlin v. California***, 551 U.S. 249 (2007).

Finally, Respondent argues that the societal costs of applying the exclusionary rule in cases like Mr. Waldrup's outweigh any deterrence benefits. (Resp. Br. at 36). Again this is a mere argument that the ends justify the means. What about the social costs of a police power that can routinely violate citizens' rights against unreasonable searches and seizures with immunity? To follow Respondent's logic to its natural conclusion, the exclusionary rule would be

rendered a complete nullity because it will almost always involve suppressing the evidence necessary to convict.

Respondent also argues that if the Court held that an arrest on a valid warrant is unlawful simply because its discovery followed an illegal seizure, this would in effect invalidate the warrant and force the officers to look the other way, saying, "Gentlemen, be on your way. I am sorry to have unlawfully detained you." (Resp. Br. at 37) (citing ***State v. Rothenberger***, 440 P.2d 184, 186 (Wash. 1968)). But isn't Respondent suggesting that Americans look the other way while government officials violate their Fourth Amendment rights? Respondent's argument overlooks that – without more -- its hypothetical officer apologizing for an unlawful detention after discovering a valid warrant would not know about the valid warrant but for an illegal detention. It overlooks that to hold otherwise would have broad implications not only for Mr. Waldrup but for all Americans: finding that the officers in this case were justified in coercively demanding Mr. Waldrup's identification information and running a computer check for warrants, in the absence of any probable cause or reasonable suspicion, is tantamount to ruling that a government officer may Constitutionally walk up to anyone, anytime, and without reason demand his or her personal identifying information. This is reminiscent of Gestapo officers in Nazi Germany demanding at will, "Papiere

bitte! [Papers, please];" ***see also***, ***Fletcher v. State***, 90 S.W.3d 419, 420 (Tex. App. 2002).

The Fourth Amendment is not self-enforcing. Moreover, it does not impose obligations on the citizen but instead provides rights against the government. ***Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County***, 542 U.S. 177, 187 (2004). Thus, logically, there must be a remedy for citizens and consequences to the government for violation of those rights or the Fourth Amendment would become an empty promise. Pursuit and prosecution of criminal activity must be conducted within the bounds of law, not to protect only the rights of suspects, but the rights of society. A regime that suppresses only ***some*** fruits of constitutional violations is a regime that barely begins to eliminate the incentives to violate the Constitution. ***Harris***, ***supra*** at 23.

The circuit court clearly erred and abused its discretion, because as a matter of law, the crack cocaine and related evidence was obtained in violation of Mr. Waldrup's Constitutional rights to due process and against unreasonable searches and seizures. Public policy dictates that these rights must be enforced by consequences to the government for their violation, particularly in the context of a broad-based sweeping stop of a drivers license checkpoint. Mr. Waldrup respectfully requests therefore that this Court reverse his conviction and remand

the case to the circuit court with directions to order the crack cocaine evidence suppressed.

CONCLUSION

Because the circuit court clearly erred in denying the motions to suppress the crack cocaine and related evidence, Appellant Jacob Waldrup, Jr., respectfully requests that this Court reverse his conviction and remand the case to the circuit court with directions to order the crack cocaine and related evidence suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, S. Kathleen Webber, hereby certify as follows:

√ 1. The attached Reply Brief was completed using Microsoft Word 2007, in Times New Roman, at least size 13 point font. Excluding the cover page, table of contents, table of authorities, signature block, and this certificate of compliance and service, the brief contains 5,136 words, which does not exceed the word limit of Rule 84.06.

√ 2. The CD-ROM disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on November 12, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

√ 3. Two true and correct copies of the attached reply brief and a CD ROM disk containing a copy of this reply brief were mailed, postage prepaid , on November 12, 2010, to James B. Farnsworth, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, 207 West High Street, Jefferson City, Missouri 65102.

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