OA 5-6-96 Ofr

IN THE SUPREME COURT OF FLORIDA

PHILLIP CAMPBELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,650

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Phillip Campbell, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

Petitioner correctly argues that this case turns on whether the traffic safety checkpoint was reasonable under the Fourth Amendment of the United States Constitution (IB 5, 7, 24). However, Petitioner failed to state the issue as such, instead choosing three "factors" as apparent issues (IB 8, 12, 14). Therefore, state has restated the issue qua issue. To maximize the clarity of the disparities between Petitioner's positions and the State's, this Answer Brief will maintain the same organization as the Initial Brief, where appropriate.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State rejects the sparse level of detail contained within Petitioner's Statement of Facts, especially those details otherwise supporting the checkpoint at issue.

The police traffic safety check at which Petitioner was stopped was established in response to, and in the immediate vicinity of, a "very severe accident" with a "very, very bad injury," that had occurred the previous weekend and in response to complaints from residents regarding speeding. (T 6) It appears that speed was the cause of the accident. (T 18, 27) There also was evidence of a complaint of faulty equipment. (See T 15)

The traffic safety check was conducted pursuant to written guidelines contained within a preexisting order of the police department. (T 45-46, 49-50) As quoted by the First DCA:

> At the time of Campbell's arrest, the Jacksonville Sheriff's Office had in force Operational Order 12.1.1(iv)(B) requiring certain procedures for a 'safety check deployment':
> B. In the event a safety check deployment is utilized, the following procedures shall apply:
> 1. The supervisor of the proposed operation shall initiate a Directed Patrol Worksheet (P-883), showing themselves as the tactical leader of said operation; and
> 2. The supervisor completing the Directed Patrol Worksheet should be aware that the safety check deployment must be conducted in such a manner as to eliminate the discretion of the officers in the field. Thus, the Directed Patrol Worksheet should contain the following guidelines in the "Description of Strategy" section in an effort to accomplish this:
> a. Procedures regarding the selection of vehicles (i.e., officers will check every third vehicle or every fifth vehicle, etc.);

b. Detention Techniques--Officers shall have the driver pull over, out of traffic for safety reasons and conduct the appropriate investigation; and

c. Duty Assignments--All officers involved should have specific duty assignments while conducting the safety check deployment and these should be noted on the worksheet.

3. In choosing a site for the safety check deployment, a location should be considered which offers sufficient lighting and which would allow officers to provide sufficient warning to motorists in advance of the stop. The advance warning can be accomplished by posting a sign or an officer with a marked police unit a safe distance from the actual stopping point;

4. Officers conducting a safety check deployment should easily be identifiable by uniform or other distinguishing features. The safety vest provided by the Sheriff's Office shall also be worn.

5. The supervisor in charge of the safety check deployment shall ensure that adequate manpower is available so as to minimize the delay of the driver.

6. Appropriate enforcement action should be taken when law violations are discovered.

7. Supervisors in charge of the operation shall ensure that the Directed Patrol Worksheet is completed and submitted to their Watch Commander or appropriate supervisor.

20 Fla. L. Weekly at D2132-33.

The area in which Petitioner was stopped was "primarily residential"; Lieutenant Steve Weintraub, the watch commander (T 5) and officer in charge at the scene, testified that there were some "vacant areas" and that there was "a church there, whose parking lot we utilized." (T 16) Traffic was stopped in both directions of the two-lane road. (T 28, 30)

The traffic safety stop involved Lieutenant Weintraub, two sergeants, and six to eight patrolmen, including two or three of the patrolmen equipped with radar. (T 7) The Lieutenant and the two sergeants had supervisory status. (T 50)

Steve Weintraub was not only a lieutenant but also a watch commander for "Zone 4, South, which is the area south of Beach Boulevard in the city." (T 5)

The State rejects Petitioner's conclusion that "the record does not reflect their degree of visibility or readability" (IB 2). In addition to the number of the officers, notice of the traffic safety stop was provided to the public through the following:

1. Six large signs indicating "the function of the deployment," "alerting motorists to be prepared to stop," and "saying to stop"; (T 7) three of the signs were deployed for each direction of traffic; (T 28; see T 28-29)

2. Officers were equipped with safety vests; (T 7)

3. All officers were in uniform; (T 7)

4. Flashlights were used; (T 7)

5. Lighted cones were deployed. (T 7)

The area of the traffic safety stop contained standard pole lighting, and "the church was well lit." (T 29-30) "[A]ll cars coming through that area had notice." (T 39) T

Lt. Weintraub "gave the instructions at the scene as to how the deployment was to be handled and what the functions of each individual officer would be." Generally, the sergeants were positioned in the street, and officers were in the church parking lot, where cars would be diverted only for the issuance of "citations, warning citations, to make physical arrests if necessary, any type of vehicle storage report." (T 9) Physical arrests were under the supervision of the supervisors at the scene, "the sergeants, for the most part." (T 9) Lt. Weintraub accounted

for any variance between his instructions and their implementation on the one hand and the preexisting police department guidelines on the other hand:

> ... it would have been inappropriate to pull everybody off the side of the road and leave the roadway clear because that would have caused a bigger traffic mess than the way it was done -- the way we did it. But for the most part, yes, standard operating procedures were followed through in all cases.
> ***
> There are variances sometimes for all deployments. I mean, you can't -- every situation, daily -- every situation, by the hour, changes. And a standard operating procedure is good if you are sitting in a sterile world, but, unfortunately, that's not the way it happens.

(T 49-50)

"Except for perhaps two or three occasions, every car was stopped." (T 9) The initial plan was to stop every vehicle. (T 51) The two or three exceptions occurred when "traffic was not manageable and a safety concern for the residents" (T 11):

> ... if it got to the point for the safety of the motorists that backup of traffic could have caused, a rear end collision of somebody coming around those curves, of course we move the traffic on through.

(T 11) In other words, on those two or three occasions, all cars were "simply ... waved through" (T 35). The cars "waved through" totaled "anywhere from 10 to 20" up to a maximum of 30 to 60. (T 36) The determination of when to allow cars to pass without stopping was made by the lieutenant and the two sergeants. (T 36-37) When the safety concern was eliminated, the procedure of stopping every car was resumed. (T 11) The maximum of about ten

or twelve waiting cars never went around the curve out of sight of the police. (T 21) To minimize the waiting time, the lieutenant and two sergeants would move down the line alternating two cars apiece. (T 21, 22) No accidents occurred during the operation of the traffic safety stop, the police "were able to manage the traffic." (T 20)

According to the Lieutenant, when cars were stopped,

> ... we immediately explained to the drivers of the vehicles what the purpose was, told them that there had been a bad accident, we were doing a traffic safety stop, [asked] if they had their driver's license. And of course ... you could tell if they had their headlights on, taillights on. They were free to go if no violation occurred.
>
> If they did not have a driver's license, they were diverted into the parking lot, where the individual patrolmen did their duties.

(T 10. See T 32, 33) Stopped motorists were told that a purpose was to educate them there is a "police presence here on occasions." (T 33) Stopping the cars enabled the police to see if each motorist's brake light was functioning. (T 16) They checked for cracked windshields, (T 27) window tinting with a tint meter (T 16), "no rear view mirror," "trucks with bumpers too high," loud mufflers," (T 28) and "anything else that may have ben visible" (T 27).

Excluding time waiting in line, (T 21-23) if there were no violation, each car was stopped "less than 60 seconds." (T 10) Motorists waited in line a maximum of six minutes. (T 21-23)

The traffic safety stop began at 6:30 pm and operated for about three and one-half to five hours. (T 23-24) Traffic was heavier at 6:30 than at 8:30. (T 38) The traffic safety check stopped up to 1,000 cars. (T 55) The operation resulted in 92 "paying citations," including 49 for speeding. (R 30, T 25) The remaining 43 "would have been a combination of faulty equipment, suspended driver's license, no driver's license, insurance, and those things." (T 25) Lieutenant Weintraub "assumed" that there were some faulty equipment citations. (T 25)

SUMMARY OF ARGUMENT

While the State agrees that a stop of a motorist at a checkpoint constitutes a seizure for Fourth Amendment purposes, the State submits that traffic safety constitutes more than the enforcement of sobriety. Death can ensnare a trailing motorist who did not know, due to a defective brakelight, that the car ahead was braking, and, of course, "speed kills." In either case, the motorist is "just as dead" as one killed by an under-the-influence driver. A root of highway carnage is the deadliness of the instrumentality, placing the State's interest in traffic safety checkpoints at a pinnacle of constitutionally legitimate interest.

Here, this specific traffic safety checkpoint furthered the State's interest in traffic safety through the checkpoint's obvious general deterrence, its conspicuous police emphasis on

the radar units through signs, lights, and multiple officers, and its effectiveness statistics at least twice as high as the United States Supreme Court used to approve other roadblocks.

Much of Petitioner's argument distills to an attempt to micro-manage police policy, an approach that has been explicitly rejected in Fourth Amendment analysis.

Just as Petitioner would require, contrary to constitutional standards, perfection in the effectiveness of this checkpoint, he also would require, contrary to constitutional standards, that the most minute of details be specified in writing in advance, not allowing officers in the field any discretion whatsoever. To the contrary, as this Court has recognized and as the First DCA below recognized, the Fourth Amendment does not require the elimination of all discretion. Instead, it condemns unbridled discretion. Here, the previously existing written guidelines, in conjunction with the supervisory presence of a high-ranking officer and the readily identifiable nature of the traffic violations, provided the requisite constraint.

ARGUMENT

ISSUE

WAS THE TRAFFIC SAFETY CHECKPOINT REASONABLE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION? (Restated)

Petitioner ignores the standard of appellate review.

The trial court's conclusion that Petitioner's Motion to Suppress should be denied is entitled to benefits that Petitioner would deny. The gravamen of Petitioner's argument presumes that the trial court was incorrect and denies the trial court's ruling the benefit of a favorable interpretation of the evidence. This is contrary to well-established principles of appellate review.

> The ruling of the trial court on a motion to suppress, when it comes to the reviewing court, is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling.

McNamara v. State, 357 So.2d 410, 412 (Fla. 1978).

Basic principles support the reasonableness of the traffic safety checkpoint.

The State agrees with Petitioner that the police "seized" each car that was stopped in the traffic safety checkpoint at issue

here (IB 7), See Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.Ed.2d 412, 420 (1990).[1]

The State agrees that "reasonableness" is the basic test for determining the constitutionality of this checkpoint (IB 7), See, e.g., Delaware v. Prouse, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 59 L.Ed.2d 660, 667 (1979)("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials").

The State also agrees with Petitioner's implied recognition (at IB 8-9) that Fourth Amendment applications ultimately distill to balancing the public interest against expectations of privacy that society recognizes as reasonable. See, e.g., Michigan Dept. of State Police v. Sitz, 496 U.S. at 451-52, 110 L.Ed.2d at 420 (1990) (balance state interest against "measure of intrusion on motorists"); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)("the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests'"); U.S. v. Martinez-Fuerte, 428 U.S. 543, 555-56, 96 S.Ct. 3074, 49

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[1] Implicit throughout Petitioner's Initial Brief and this brief is the maxim that search and seizure decisions of the United States Supreme Court are binding on all Florida courts. See, e.g., Daniel v. State, 20 Fla. L. Weekly S497, S497 (Fla. Sept. 28, 1995); Perez v. State, 620 So. 2d 1256 (Fla. 1994).

L.Ed. 2d 1116, 1127 (1976)("other traffic-checking practices involve a different balance of public and private interests and appropriately are subject to less stringent constitutional safeguards").

Thus, in this case, a fundamental policy backdrop to any analysis of the state's interest served by this checkpoint is the relatively low reasonable expectation of privacy a citizen possesses while occupying an automobile. See, e.g., N.Y. v. Class, 475 U.S. 106, 112-15, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); Cady v. Dombrowski, 413 US. 433, 441-42, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The State's interest in regulating the automobile, discussed at length infra, stands in sharp contrast to this relatively low privacy interest.

More specifically, and as Petitioner points out, (IB 7) the three factors enunciated as such in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), and weighed in Sitz determine whether the checkpoint was "reasonable":

1. "the gravity of the public concerns served by the seizure,"
2. "the degree to which the seizure advances the public interest," which Sitz characterized as the "effectiveness" of a checkpoint, 496 U.S. at 453-55, 110 L.Ed.2d at 422-23, and
3. "the severity of the interference with individual liberty,"

"A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not

subject to arbitrary invasions solely at the **unfettered** discretion of officers in the field." Brown, 443 U.S. at 50-51, 61 L.Ed.2d at 363.

Thus, an overriding concern is whether this traffic safety checkpoint afforded the police "**unfettered** discretion," which has also been characterized as "**unbridled** discretion," State v. Jones, 483 So. 2d 433, 438 (Fla. 1986); Prouse, 440 U.S. at 661, 663, "**unconstrained**" discretion, Prouse, 440 U.S. at 663, and "**standardless**" discretion, Prouse, 440 U.S. at 661.

Analytically, this is the juncture where the State parts company with Petitioner's position. Petitioner minimizes the significant state interest in the public safety purpose of this checkpoint (See IB 8-11), while ignoring motorists' reduced Fourth Amendment expectation of privacy; totally ignores the effectiveness of the checkpoint by, instead, attempting to replace police supervisors with himself and this Court to choose among "reasonable alternatives," Sitz, 496 U.S. at 453-54; totally ignores this checkpoint's de-minimis level of intrusion (See IB 8-23); and gives lip-service the principle of "unbridled discretion" (IB 15, 18) then distorts it by demanding a level of constraint uncontemplated in Jones, Sitz, Prouse, or Martinez-Fuerte.

I. The "public concerns served by" this checkpoint were weighty.

"[T]he automobile has become the most deadly machine in America." Southern Cotton Oil Co. v. Anderson, 86 So. 629, 633 (Fla. 1920). As this Court pointed out:

> It is idle to say that the Legislature imposed all these restraints, regulations, and restrictions upon the use of automobiles [registration, adequate brakes, signaling devices, lights, speed limits, ...] if they were not dangerous agencies which the Legislature felt it was its duty to regulate and restrain for the protection of the public.
> * * *
> The courts seem to be unanimous on the proposition that, for the purpose of the exercise of the state's police power, the automobile in operation is a dangerous agency that requires stringent regulatory legislation in the interests of the public safety.

Southern Cotton Oil Co. v. Anderson, 86 So. at 634, 635 (dangerous instrumentality doctrine).[2] See also Williamson v. State, 111 So. 124 (Fla. 1926)(automobile constitutes a deadly weapon for purposes of Aggravated Assault).

"[V]ehicular carnage" is not limited to a lack of sobriety. State v. Potter, 438 So.2d 1085, 1087 n.2 (Fla. 2d DCA 1983)("in general and that by alcohol"). Accordingly, today, the legislature has heavily regulated the use of motor vehicles, including safety-related matters targeted in the checkpoint at

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[2] The dangerous instrumentality doctrine dictates that, subject to some exceptions, the owner of the vehicle is vicariously liable for the negligent operation of the vehicle no matter who is driving. See Hertz Corp. v. Jackson, 617 So.2d 1051 (Fla. 1993).

issue here. See, e.g., § 316.234(1), Fla. Stat. (brake light); § 316.189, Fla. Stat.(speed limits).

The purposes of this checkpoint – speeding, proper mechanical equipment such as brake lights, and educating the public – have not received the same media attention as driving under the influence, but the degree of media attention does not undermine the State's interest in them. See, e.g., Jones v. Kirkman, 138 So. 2d 513, 515 (Fla. 1962)("any reasonable restriction upon or condition attached to the continued employment of the [driving] privilege will be upheld in the interest of public safety"); Duval Lumber Co. v. Slade, 2 So. 2d 371, 372 (Fla. 1941)("regulation of traffic on public streets or highways is in the exercise of the sovereign police power"); LaFave and Israel, 1 Criminal Procedure §3.9(g) at 330 (1984)("States have a vital interest in ensuring that ... vehicles are fit for safe operation").

When someone driving a motor vehicle rear-ends a stopped car due to the stopped car's inoperative brake lights, the amount of human suffering can be tragic. Due to speed, when a car fails to stop in time or fails to maneuver, resulting in a collision, the human suffering can be tragic. "Speed kills" by reducing reaction time perhaps as much as alcohol can reduce reaction time, and defective brake lights may eliminate virtually all reaction time.

A traffic safety checkpoint like this one would have been justified if the police had been checking only for brake lights.

The inclusion of speed and other equipment checks provide an abundance of State interest in this checkpoint.

Indeed, the United States Supreme Court has approved as constitutional "inspection checkpoints," Del. v. Prouse, 440 U.S. 648, 663 n.26 (1979)(dicta) discussed approvingly in Sitz, 496 U.S. at 454. Prouse, 440 U.S. at 658, reasoned:

> Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these **vehicles are fit for safe operation**, and hence that licensing, registration, and vehicle inspection requirements are being observed.

In support of its point, the United States Supreme Court, Id. at n. 14, footnoted that in "1977, 47,671 persons died in motor vehicle accidents in this country" and cited to U.S. Dept. of Transportation, Highway Safety A-9 (1977).

As Martinez-Fuerte explicitly noted, checkpoint stops "to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters" has "a long history evidencing its utility and is accepted by motorists as incident to highway use," 428 U.S. at 560 n. 14.

Therefore, the First District Court of Appeal correctly reasoned that "[t]he state has a vital interest in the health, safety and welfare of its citizens which justifies reasonable use of roadblocks to enforce motor vehicle safety laws and to prevent

traffic accidents," Campbell v. State, 20 Fla. L. Weekly D2132, D2133 (Fla. 1st DCA Sept. 13, 1995).

II. This checkpoint advanced the public interest, that is, it was sufficiently effective.

In violation of the standard of appellate review, entitling the trial court's ruling to reasonable factual inferences, E.g., McNamara v. State, 357 So.2d at 412 (trial court's ruling entitled to inferences in its favor); U.S. v. Martinez-Fuerte, 428 U.S. 543, 554, 49 L.Ed. 2d at 1126 (1976)(although no statistical information concerning one of the roadblocks, Court "assumed that fewer pass by undetected, as every motorist is questioned"), Petitioner **speculates** that "[o]nly those motorists who were given citations for equipment failure would be impressed to repair or replace the faulty equipment" (IB 12). In essence, Petitioner has totally ignored the concept of general deterrence[3] as a valid justification for an exercise of a state's police power. See Orr v. People, 803 P.2d 509, 511 (Colo. 1990)(post-Sitz; en banc; number of arrests at checkpoint, insignificant; instead, primary purpose is deterrence). Cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404, 110 S.Ct. 2447, 110 L.Ed.2d

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[3] Bae v. Shalala, 44 F. 3d 489, 494 (7th Cir. 1995), summarized the difference between specific and general deterrence: "General deterrence aims to dissuade all persons from violating the laws. In contrast, specific or special deterrence aims to change a particular individual's behavior through negative reinforcement."

359, 381 (1990)("district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence").

The First DCA correctly reasoned that "[t]he public is best served by a regime that deters drivers from traveling in unsafe vehicles and identifies safety defects before the vehicles are involved in accidents. *See State v. Patterson*, 582 A.2d 1204 (Me. 1990)."

Accordingly, it is reasonable to infer that the police promoted general deterrence by immediately explaining to each stopped motorist the purpose of the stop and by explaining that they "were doing a traffic safety stop," that they were educating them of a "police presence," that they were responding to a speeding complaint, that the police were trying to slow people down, that they were checking for faulty equipment, and "that there had been a bad accident" (T 10, 32, 33).

Petitioner wishes to dictate to the police the tactics for enforcing Florida's speeding and equipment laws. Petitioner would replace his judgment for the judgment of the police, and he asks this Honorable Court to do the same. This is clearly inappropriate according to the United States Supreme Court in Sitz, 496 U.S. at 453-54:

> ... Brown v. Texas ... describes the balancing factor as 'the degree which the seizure advances the public interest.' This ... was not meant to transfer from politically accountable officials to courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal

> with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among reasonable alternatives remains with governmental officials who have a unique understanding of, and a responsibility for, limited resources, including a finite number of police officers.

The question here becomes whether our traffic safety check was a reasonably effective alternative, not, as Petitioner argues, whether it was the "most effective means of preventing vehicle safety violations" (IB 13).

To determine reasonableness of the roadblock alternative in Sitz, the United States Supreme Court looked at the drunk-driving arrest rate for that roadblock and held that the arrest of two drivers for alcohol impairment out of 126 detained vehicles, a 1.6 percent rate, was sufficiently effective. 496 U.S. at 454-55. Sitz also cited approvingly to rates in U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976): "illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint"; a ratio of approximately 0.5 percent of illegal aliens detected to vehicles stopped. Id. at 455. Our traffic safety check was even more effective.

The evidence introduced in the trial court was not precise, but, contrary to the inferences to which the trial court's ruling is entitled on appeal, See discussion, supra, and even viewing the evidence in a light most favorable **to Petitioner**, his argument must fail.

The officer testified that 92 paying traffic citations were issued through this safety check. Of these, 49 were for speeding, and 43 were for traffic violations other than speeding. (R 30, T 25) The number of motor vehicles processed fell somewhere below 1,000. (T 55) Following Sitz's endorsement of calculating the percent as the number of illegal aliens divided by the number of processed vehicles, we obtain the following effectiveness ratings:

> Total paying traffic citation effectiveness = 92/1,000 = **9.2%**
>
> Traffic citation effectiveness for speeding = 49/1,000 = **4.9%**
>
> Traffic citation effectiveness for non-speeding = 43/1,000 = **4.3%**

The State submits that there is only one reasonable conclusion to be drawn from the evidence in our case: **The effectiveness of our traffic safety check was at least[4] two times better than the**

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[4] If we attempt to exaggerate to Petitioner's benefit, again contrary to the standard of appellate review, the maximum number of vehicles likely processed by using Lieutenant Weintraub's estimate of less than 60 seconds per vehicle (T 10) and stretching it down to 30 seconds, we would then estimate the total number of cars processed as:

> Total number of seconds in the traffic check = 60 seconds/minute x 60 minutes/hour x a maximum of 5 hours duration
> = 18,000
>
> Total cars = 18,000 total conceivable length of the check/30 the shortest probable time that any car would be processed
> = 600

Since there were generally two officers processing cars, the maximum conceivable number of cars that may have been processed becomes 1,200, with resulting effectiveness percents of:

best effectiveness that the United States Supreme Court has approved.

Moreover, Petitioner's argument that checking for speeding absent a checkpoint would be as effective as checking for speeding in conjunction with a checkpoint, in addition to second-guessing the policy determination within the domain of the police, simply flies in the face of common sense. Motorists seeing a radar unit before and after a checkpoint are much more likely to be impressed with the importance of speeding. The impression would be that the police's commitment of resources and display of authority indicate the seriousness of the matter. And, as the police stopped and talked with each motorist, the police assured the motorist's attention. **This was police work close to its best: Educating and citing when appropriate, while maintaining a relatively non-threatening atmosphere.**

III. There was no "severe" "interference with individual liberty" whatsoever.

As a preliminary matter, it is important to note that there has been no evidence whatsoever that Petitioner or anyone else was individually harassed, individually stopped, or individually

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Total paying traffic citation effectiveness = 92/1,200
= 7.7%
Traffic citation effectiveness for speeding = 49/1,200
= 4.1%
Traffic citation effectiveness for non-speeding = 43/1,000
= 3.6%

selected for additional investigation for any constitutionally improper reason, for example, race.

A. If there is a written guidelines requirement, the checkpoint satisfied it.

Petitioner devotes almost seven pages to arguing the unconstitutionality of the checkpoint based upon the sole factor of written guidelines. He overlooks that the United State Supreme Court has expressly rejected such per se approaches to Fourth Amendment questions. See Fla. v. Bostick, 501 U.S. ___, 115 L.Ed. 2d 389, 111 S.Ct 2382 (1991).

Moreover, Petitioner is quick to attempt to distinguish Sitz's public interest in sober drivers (IB 5, 9-10) while he ignores the obvious fact that safety checks for lights and other equipment here are easier for the police to make objectively than the checks for sobriety in Sitz. For example, the light works or it does not work, compared with the judgment of whether someone is impaired from alcohol or other designated substances.[5] Therefore, the nature of

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[5] The Sitz majority approved the sobriety checkpoint there in spite of the admonition of dissenters Stevens, Brennan, and Marshall, 496 U.S. at 464:

> A check for a driver's license, or for identification papers at an immigration checkpoint, is far more easily standardized than is a search for evidence of intoxication. A Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion. A ruddy complexion, an unbuttoned shirt, bloodshot eyes, or a speech impediment may suffice to prolong the detention.

this checkpoint actually afforded less discretion to the officers in the field than Sitz's sobriety checkpoint.

Petitioner also overlooks that fact that the United States Supreme Court has never held that any written guidelines are a prerequisite to the constitutionality of any roadblock or checkpoint. To the contrary, even though there were written guidelines in Sitz, when the Sitz Court summarized its decision, it did not even mention the guidelines:

> In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment. The judgment of the Michigan Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

496 U.S. at 455.

The key to Sitz was not any per-se written guidelines requirement but rather the imposition of some sort of constraint on the police so that their discretion was not unbridled. This constitutional-level of constraint may be obtained a variety of ways,for example, through guidelines formulated in advance of establishing the checkpoint or guidelines formulated at the scene but prior to stops. See Cardwell v. State, 482 So.2d 512 (pre-Sitz, Fla. 1st DCA 1986)("best collective judgment at the command level"); State v. Madalena, 908 P.2d 756, 758, 763 (N.M. App. 1995)(post-Sitz; checkpoint authorized by supervisory personnel; "briefing session" instructed field officers on how to conduct

checkpoint); State v. Davis, 464 S.E.2d 598, 603 (W.Va. 1995)(post-Sitz; upheld roadcheck for driver's license, registration, and insurance even though it was not conducted pursuant to guidelines; no evidence conducted in a discriminatory manner because all vehicles stopped); State v. Patterson, 582 A.2d 1204, 1206, 1208 (Me. 1990)(post-Sitz, safety inspection roadblock upheld even though conducted pursuant to past police practices, not pursuant to explicit written or oral policy, and even though no supervisor pre-approved roadblock); State v. McMahon, 557 A. 2d 1324, 1325-26 (Me. 1989)(pre-Sitz; upheld roadblock that followed unwritten procedures verbally communicated); U.S. v. McFayden, 865 F. 2d 1306 (D.C. Cir. 1989)(pre-Sitz; emphasis on pre-existing neutral procedure); Nelson v. Lane County, 743 P.2d 692, 700 (Or. 1987)(pre-Sitz; manual substantially complied with, but U.S. Supreme Court "has not indicated that written standards for roadblocks are necessary").

Therefore, standards may be in writing or they may be oral. Also, see State v. Leighton, 551 A.2d 116, 116-17, 118 (Me. 1988)(pre-Sitz, oral "guidelines established in advance by supervisory personnel to ensure safety, and the sheriff himself was present to direct the operation"); Nelson v. Lane County, 743 P.2d 692, 700 (Or. 1987)(pre-Sitz, United States Supreme Court "has not indicated that written standards for roadblocks are necessary"). But see Hartsfield v. State, 629 So.2d 1020 (Fla. 4th DCA 1993)(Sitz not discussed). As in written versus oral confessions and waivers of rights, standards' status as written or oral

pertains to whether the trier of fact is convinced of their existence. If the trier of fact is convinced that they existed prior to a stop and if they sufficiently constrained discretion, they are sufficient according to the letter and the spirit of Sitz.

Accordingly, in State v. Barker, 850 P.2d 885 (Kan. 1993)(post-Sitz era), the same jurisdiction that decided State v. Deskins, 673 P.2d 1174 (Kan. 1983), which was relied upon by Jones, upheld a roadblock where officers were "briefed" on the detailed operational guidelines of the roadblock.

Consequently, the continued viability of the written guidelines requirement of Jones, 483 So. 2d at 438 ("essential that a written set of guidelines uniform guidelines be issued before a roadblock can be utilized"), is questionable and, yet, this Court need not overrule Jones to dispose of the instant case because this checkpoint satisfies its requirements:

> The [Jones] court stated that written guidelines should cover in detail the procedures which field officers are to follow at the roadblock and should ideally set out 'with reasonable specificity procedures regarding the selection of vehicles, detention techniques, duty assignments, and the disposition of vehicles.' *Id.* If the guidelines fail to cover each of these matters, they do not necessarily fail. Instead, the courts should view each set of guidelines as a whole in determining the plan's sufficiency. *Id.*

20 Fla. L. Weekly at D2133.

Accordingly, the First DCA distinguished Hartsfield v. State, supra, 629 So. 2d 1020, recognized and applied Jones, and, in contrast to Hartsfield's ignoring Sitz, harmonized this case with Hartsfield, Jones, and Sitz.

The decision in *Hartsfield v. State* does not control because in that case there were no written guidelines whatsoever. Instead, the authorities relied upon a[n unwritten] standard operating procedure in order to limit the discretion of the individual officers. 629 So.2d at 1021. Beyond noting the absence of any written guidelines, the *Hartsfield* court did not engage in a Fourth Amendment balancing analysis.

In the present case we do not find a violation of our own supreme court's written guidelines requirement. In discussing the preparation and use of guidelines, our supreme court said:

> Law enforcement officials must conduct sobriety checkpoints so as to *minimize* the discretion of field officers.... Written guidelines *should* cover in detail the procedures which field officers are to follow at the roadblock. *Ideally*, these guidelines should set out with reasonable specificity procedures regarding the selection of vehicles, detention techniques, duty assignments, and the disposition of vehicles. (Citations omitted). Of course, *if the guidelines fail to cover each of these matters they need not necessarily fail*. Rather, courts should view each set of guidelines as a whole when determining the plan's sufficiency. (Emphasis added).

Jones, 483 So.2d at 438.

In our judgment, the comprehensive Operational Order, coupled with the admittedly limited Directed Patrol Worksheet plus the oral instructions, substantially comply with the directives of *Jones* and 'minimize the discretion of field officers.' We do not find that the officers' safety concerns for eliminating congestion should be characterized as disobedience of the guidelines. Rather, the officers correctly exercised judgment, i.e., the proper use of discretion, in temporarily suspending the roadblock to alleviate a traffic hazard. The record is devoid of any other indication of discretionary or arbitrary conduct on the part of the officers.

Operational Order 12.1.1 was issued by the sheriff's office for the purpose of providing patrol personnel with procedures for developing strategies for safety check deployments. The supervising officer in this case filed a Directed Patrol Worksheet indicating the location, purpose, manpower and equipment needed, as well as the strategy for the specific roadblock at issue. We do not

> read *Jones* to require inelastic or 'one size fits all' written directions. Nor do we believe that the Fourth Amendment requires such. We also find it important for the court, both at the trial level and the reviewing level, to consider whether the guidelines, as executed, sufficiently constrain the officers' discretion so as to not run afoul of the United States Supreme Court cases we have noted in this opinion. In this case, no showing has been made that the trial court abused its discretion in finding the written guidelines sufficient under the circumstances.

20 Fla. L. Weekly at D2133-34.

In our case, discretion was sufficiently limited. There were previously existing written guidelines (R 47-49) for this police deployment, and they were substantially followed. The guideline provided for a "safety check deployment" (R 47); the deployment in this case was for that purpose. The guideline indicated that safety checks may be for law enforcement problems of illegal drugs, impaired drivers, or "any other traffic or criminal law violations" (R 47); this deployment of police to this checkpoint was to address the law enforcement "traffic" problems of an accident, speeding, and vehicular equipment. A Directed Patrol Worksheet (Form P-883) was initiated, as required by the guidelines (R 48). Form P-883 should designate the tactical leader of the operation, (R 48) and this one designated Sergeants diPerna and Tyrrell as the tactical leaders.

Even though the form did not detail how discretion will be "eliminated," which the law does not require and which probably is impossible in the arena of human affairs, discretion in the field was well-within acceptable limits. In additional to substantial compliance with previously existing written guidelines,

- The person in charge at the scene of the checkpoint was at the rank of lieutenant and, as "watch commander, Zone 4, South, which is the area south of Beach Boulevard in the city," (T 5) was a high ranking police official with 19 years of police experience (T 5);

- In the field, the lieutenant verbalized specific procedures to his personnel before the checkpoint was operational; (T 9)

- The verbalized procedures were sufficiently detailed, including the location of the officers, what would be said to the stopped motorists, the location of where any diverted cars would be sent, and what would be done with the diverted cars; (See T 9) although the initial intent was to stop every car, the police adapted to the changing traffic conditions in the interest of safety; the adaptation was determined by the lieutenant and the two sergeants, who all were supervisors. (See T 11, 35-37, 50, 51)

Other items in the order-guideline were also followed. The location for, and circumstances of, the checkpoint allowed for sufficient lighting and warning, as there were street lights, church parking lot lights, three signs in each direction, and lighted cones. (Compare R 48 with T 7, 28-30) Officers at the checkpoint were in uniform, wore safety vests, (T 7) and were therefore easily identifiable (R 48). The supervisor in charge of the checkpoint assured that there was sufficient personnel there to minimize motorists' delay (R 48), as there were six to eight total officers (T 7)[6] with three experienced supervisors generally

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[6] Lieutenant Weintraub testified that the officers at the scene involved in the operation included himself, two sergeants,, and six to eight patrolmen, including two of three equipped with radar. (T 7) The minimum number of officers at the non-radar portion of the checkpoint, then, was six: the Lieutenant, the two sergeants, and three of six patrol officers. There were nine total officers at the checkpoint as a minimum number: the

conducting the initial motorist contact (T 8, 31-32) and alternating cars so that two supervisors could simultaneously work any build-up of vehicles (T 21, 22). "Appropriate enforcement action" was "taken when law violations were discovered," (R 48) as evidenced by the effectiveness statistics presented above. And, finally, in essence, a supervisor "in charge of the operation" did "ensure that the Directed Patrol Worksheet," Form P-883, was completed and submitted to the watch commander or appropriate supervisor R 48-49), as the supervisor in charge of the operation was, in fact, the watch commander, as discussed supra.

In spite of the totality of the significant State interest in traffic safety, this checkpoint's effectiveness, and the implemented guidelines and precautions, Petitioner complains (IB 18) that the police exercised "unbridled discretion" by waving cars through the checkpoint on the limited occasions when traffic backed up. The State has three responses.

First, as a practical matter, waving traffic through at crucial times of congestion furthered the checkpoint's safety purpose. Undoubtedly, Petitioner would have loudly complained if the police failed to react to traffic congestion, thereby risking or causing an accident.

Second, as a matter of law, Jones explicitly recognized that the "police need not stop every car in order to avoid running afoul of

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Lieutenant, the two sergeants, and six patrol officers. The maximum numbers are nine and 11, respectively.

Prouse," 483 So. 2d at 438. Accord Martinez-Fuerte, 428 U.S. at 554, 554 n. 10 (upheld San Clemente checkpoint even though it was in operation "only about 70% of the time"; "downtime" caused by "peak traffic loads"; "personnel shortages" and "weather conditions" suspended operation of the upheld Sarita, Texas, checkpoint); Prouse, 440 U.S. at 663 (endorsed "spot checks that involve less intrusion"); Merrett v. Moore, 58 F.3d 1547, 1551-52 (11th Cir. 1995)(planners provided that officers wave cars through in order to avoid congestion but "officers on the spot" did not always pass cars through as instructed; traffic back-ups provide "greatest potential for constitutional violations").

Moreover, third, Martinez-Fuerte analyzed the selection of motorists for diversion to a secondary area for further law-enforcement inquiry in terms of the minimal, albeit annoying, nature of the additional intrusion, its "public and relatively routine nature," and its effect of "minimizing the intrusion on the general motoring public." 428 U.S. at 560. In other words, the constitutional focus of passing cars through part of a checkpoint – or, as here, the entire checkpoint – remains on the level of intrusion upon those who are not passed through and the public and routinized nature of the over-all checkpoint. Here, as discussed supra, the level of intrusion of those stopped was minimal; the signs, lights, cones, uniforms, safety vests, and volume of traffic of the checkpoint rendered it very public; and, checkpoint stops were executed according to a routine in which the officers

conducted a relatively very low-key conversation with each motorist vis-a-vis the questioning in Martinez-Fuerte's San Clemente checkpoint, 428 U.S. at 546-47.

B. The checkpoint was not "surprising and dangerous" (IB 21).

As indicated by the street lights, church parking lot lights, three signs in each direction, lighted cones, uniformed officers with safety vests, Petitioner's accusation that the checkpoint was "surprising" is untenable under the facts of this case. Indeed, Lieutenant Weintraub testified, without objection, that all cars coming through that area had notice. (T 39)

Similarly, under the law, Petitioner's "surprising" position is untenable according to Sitz, as it compared Prouse's roving patrols and relied upon Martinez-Fuerte.

> Comparing checkpoint stops to roving patrol stops considered in prior cases, we said [in Martinez-Fuerte]:
>
> > '[W]e view checkpoint stops in a different light because the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less in the case of a checkpoint stop. In [United States v.] Ortiz, [422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975),] we noted:
> >
> > '"[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. 422 U.S., at 894-895 [95

S.Ct., at 2587-2588]."' Martinez-Fuerte, 428 U.S., at 558, 96 S.Ct., at 3083.

Thus, the heavily traveled location of this checkpoint not only increased its effectiveness, See discussion and statistics supra, but also minimized any motorists' alarm.

Accordingly, Petitioner's reliance upon State v. Landfald, 571 So. 2d 10 (Fla. 2d DCA 1990) (IB 21-22), is mistaken. He uses Landfald to claim that a checkpoint could never be established in a residential area.[7] In addition to the precise location of this checkpoint **supporting** its constitutionality, the State points out the Petitioner is again attempting to establish a per-se test of constitutionality, where none of the leading cases (Jones, Sitz, etc.) suggest that the residential nature of the area qua residential area is even a factor.

Petitioner also claims that the checkpoint was dangerous. The record does not support his position. Instead, the guidelines-directed safety precautions were successful. "[N]o accidents" occurred during the operation of the traffic safety stop; the police "were able to manage the traffic." (T 20)

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[7] Factually, the State also points out that the checkpoint was not in a residential area as it is commonly understood. This was an area with a volume of traffic and a church and church parking lot of sufficient magnitude that accommodated the purpose of pulling motorists out of the quick-check line upon particularized suspicion.

C. The purported existence of "less intrusive alternatives" is irrelevant.

Petitioner ends his section "B" (IB 22) and devotes all of section "C" (IB 23) to the same argument. He suggests that a checkpoint for "speeders and safety equipment violators" should be implemented in the daytime,[8] (See IB 22) and then he argues that the police should have used "routine patrol," rather than a checkpoint, to monitor vehicle safety requirements. Petitioner's arguments are clearly improper attempts to micro-manage the police, thereby intruding upon "a police choice among reasonable alternatives," Sitz, 496 U.S. at 453-54. In reversing a Michigan appellate court, Sitz rejected any such "searching examination of 'effectiveness' ...," Id. at 454.

Therefore, "[b]ecause the procedure in question satisfied both the balancing test established by the United States Supreme Court and the specific requirements of the Florida Supreme Court for this type of case," 20 Fla. L. Weekly at D2132, the State submits that Petitioner's conviction should be affirmed and the First DCA's majority opinion, approved.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal, reported at 20 Fla.

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[8] Incidentally, the State also notes the obvious: Defective headlights and taillights are more readily detectable at night.

L. Weekly D2132, should be approved, and the trial court's denial of Petitioner's motion to suppress and judgment and sentence, affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Wm. J. Sheppard, Esq., and Richard W. Smith, Esq., Sheppard & White, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 18th day of March, 1996.

Stephen R. White
Assistant Attorney General

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