No. 02 - 1060

In The Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROBERT S. LIDSTER, RESPONDENT

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether an interrogational roadblock whose sole purpose is to gather evidence regarding a one week old hit-and-run accident, by detaining motorists and interrogating them about their whereabouts and observations the week prior, violates the Fourth Amendment, particularly when there are insufficient guidelines in place to constrain the officers' activities?

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

On August 23, 1997, at about 12:15 a.m., a bicyclist was struck by a vehicle which then failed to remain at the scene of the accident. The bicyclist died as a result of his injuries. J.A. 16. At or about midnight, August 30, 1997, the Lombard police set up a roadblock on North Avenue in Lombard, Illinois. J.A. 15. The roadblock was set up one week later at the same location and at approximately the same time as the accident. The roadblock was set up to "work out a fatal hit-and-run accident", according to Detective Vasil, who stopped the defendant's vehicle that evening. J.A. 15.[1] The suspect vehicle was described as a 1980-1986 Ford full-size pickup truck or Bronco, with right front headlight damage and a missing headlight/turn signal housing unit. J.A. 9. North Avenue is a major highway passing through the western suburbs of Chicago, Illinois.

There, every eastbound vehicle on North Avenue was stopped by the police. Although Detective Vasil claimed that contact with motorists would last about 10 to 15 seconds, there was a waiting line preceding the contact, with 10 to 15 vehicles stopped in each lane**.** J.A. 20. At least three lanes of vehicles were stopped at the roadblock, with six to twelve emergency vehicles present. Detective Vasil was manning the center lane. J.A. 19. As each vehicle pulled up, a police officer would question the people in the car as to whether they were at that location the week prior, and whether they had seen anything the week prior. J.A. 18, 23. The officer would also hand the driver a flyer. J.A. 9.

Several cars, including the Defendant's, were sent to secondary staging areas.[2]

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[1] Even though Detective Vasil suggested that the roadblock was set up only to look for witnesses (J.A.24), nothing in the record explains how this same roadblock wasn't or couldn't be used to directly look for the suspect or the suspect's vehicle.

[2] Except for Lidster, it is unknown from the record as to why such cars were chosen to be further detained, or whether any cars were further detained as a result of the drivers' answers to police questioning.

The roadblock was not publicized in advance. J.A. 18. No written guidelines were in effect for this type of roadblock. Pet. App. 2a; J.A. 22.

While detective Vasil was standing in the center lane of traffic, Respondent Robert Lidster pulled up about 15 feet to the spot where Vasil was standing. J.A. 20-21. Vasil jumped back several steps. J.A. 25. Vasil then approached the defendant, and asked him why he had driven at Vasil. J.A. 25. Vasil also asked the defendant for his drivers license and insurance card. J.A. 21. After smelling an alcoholic beverage on Lidster's breath and slurred speech as Lidster spoke, Vasil directed the Defendant to a side street on the north side of North Avenue. J.A. 25-26. Thereafter, the defendant was arrested for driving under the influence of alcohol.

At the defendant's bench trial, Detective Roy Newton testified that he was assigned to the corner of North Avenue and Craig to ensure that drivers did not skirt the roadblock. Pet App. 2a. Newton stated that officers at the roadblock directed several cars, including defendant's vehicle, to his location. Pet. App. 2a.

The Illinois Appellate Court found that the roadblock in question violated the Fourth Amendment's protections against unreasonable search and seizures. Pet. App. 23a-28a. Acknowledging that the roadblock herein was somewhat different than the one at issue in *Edmond*, the Illinois Appellate Court found that the ostensible purpose of the roadblock in Lidster was to seek evidence of "ordinary criminal wrongdoing" Pet. App. 26a.

Further, the Appellate Court found that there was no emergency present which might otherwise justify a checkpoint; rather, the Appellate Court found that this roadblock was merely routine investigative work that police do everyday. Pet. App. 26a.

Lastly, the Appellate Court noted that the State had presented no empirical evidence as to the effectiveness of such a checkpoint program. Pet. App. 28a.

The State then appealed to the Illinois Supreme Court. The Illinois Supreme Court also found that the roadblock at issue violated the Fourth Amendment. Pet. App. 1a-22a. It first found that the Lombard roadblock did not fall within the scope of the limited roadblocks which have heretofore been approved by the U.S. Supreme Court. Pet. App. 3a-7a. It rejected the State's argument that this roadblock was a 'special need', finding that the roadblock herein was indistinguishable from the general interest in crime control.

The Illinois Supreme Court found that there is no fundamental difference between roadblocks set up to gather information leading to the identification of *another* motorist

as the perpetrator of a crime, and a roadblock designed to gather evidence against the detained motorist directly. Pet. App. 7a-8a.

The Illinois Supreme Court noted that, in Illinois in the year 2000 alone, there were 870 murders, 49,652 assaults, 25,168 robberies, 77,947 burglaries, 306,805 thefts, 55,222 motor vehicle accidents and 2899 arsons known to the police. The Illinois Supreme Court found that approving roadblocks for these serious crimes would lead to the troubling specter of roadblocks constantly adorning the streets of Chicago, Cook County, and the State of Illinois. Pet. App. 8a-9a.

Lastly, the Illinois Supreme Court rejected the State's argument that exigent circumstances existed, noting that the accident happened one week before the roadblock, and that there was no indication that the motorist remained in the vicinity or posed a further danger to residents. Pet. App. 9a-10a.

The Illinois Supreme Court concluded that the right of an individual to be free from unreasonable searches and seizures is an indispensable freedom, not a mere luxury, and that unless a line was drawn, the Fourth Amendment would do little to prevent intrusive searches and seizures from becoming a routine part of American life. Pet. App. 11a.

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court and the Illinois Appellate Court were both correct in finding that the roadblock held on August 30, 1997, in Lombard Illinois violated the Fourth Amendment rights of the Respondent. The suspicionless seizure of motorists, in order to question them about an unsolved accident, constitutes ordinary crime detection and is therefore unlawful. There were no exigent circumstances or national security concerns present which could justify the suspension of individualized suspicion requirements.

Historical evidence indicates that this type of roadblock would have been unlawful and unacceptable at the time of the framing of the Fourth Amendment.

Further, applying the balancing test articulated in *Brown* and *Edmond*, the interrogational checkpoint herein fails to pass constitutional muster because crime detection and control is not a legitimate first-prong governmental concern, nor does the magnitude of the public interest in solving a single accident outweigh the severity of intrusion on an innocent public. Motorists were stopped and detained for several minutes and then forced to undertake interrogation regarding their prior whereabouts and

activities. Also, police officers were put into place to stop any drivers who tried to avoid the roadblock, thus rendering the seizure involuntary.

There was a complete lack of explicit guidelines in place to control officer discretion. No written guidelines existed for this type of checkpoint. Several motorists were taken to secondary staging areas for further detention without any specific reason being disclosed in the record. In addition, there was a lack of specific restraints in place to control the nature and degree of police questioning of citizens.

No statistical evidence was presented which could overcome constitutional concerns in order to establish the effectiveness of the checkpoint in question.

To allow checkpoints or roadblocks to be established for solving common crimes, however laudable the purpose, would make roadblocks a way of life in America. Reasonable alternative means which would not infringe on the rights of innocent citizens are available, and therefore mass suspicionless seizures of citizens is not a lawful alternative.

Because no bright line can be drawn in this arena which could quell the potential proliferation of checkpoints, either vehicular or pedestrian, other than exigent circumstances and national security, the balance in favor of freedom and liberty outweighs the law enforcement's need for a checkpoint. Further, a bright line generally prohibiting checkpoints is also necessary to allow the police to know the legality of their activities with reasonable certainty, and to avoid endless litigation over checkpoints.

Lastly, to the extent that *Sitz* appears to authorize suspicionless seizures for common crimes known or unknown, it should be overruled.

ARGUMENT

I. APPLYING BASIC CONSTITUTIONAL PRINCIPLES TO THIS CASE CREATES A PRESUMPTION THAT THIS ROADBLOCK IS UNCONSTITUTIONAL.

Innocent citizens, suspected of absolutely no wrongdoing, should not be subject to involuntary seizures at roadblocks, in the absence of exigent circumstances, such as preventing an imminent terrorist attack, pursuing a fleeing felon, locating a kidnapped child, or some other ongoing serious criminal activity. The rights of the citizens to free, uninterrupted use of the public highways should not be infringed by overreaching police

investigative techniques, such as the roadblock employed here. The further expansion of roadblocks will seriously dilute the freedoms that the Constitution has granted to American citizens.

As stated in *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 285 (1925):

> " It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

This "right of free passage" remains as inviolate today as it was in 1925, and as it was in 1789 when the Bill of Rights was adopted. The right of free passage is an important and substantial liberty that the citizens of the United States enjoy. The Fourth Amendment is designed to protect this liberty from unreasonable Governmental interference.

A. The stopping of a vehicle constitutes a seizure under the Fourth Amendment, and a suspicionless seizure is presumptively unconstitutional.

It remains without doubt that the stopping of a vehicle at a roadblock or checkpoint is a seizure which falls under the protections of the Fourth Amendment. See, *e.g. City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

The Fourth Amendment requires that searches and seizures be reasonable. See, e.g. *Edmond*, 531 U.S. at 37. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

The indiscriminate stopping of individuals who are not suspected of wrongdoing, who are not being checked for roadside safety, and who are not crossing the external borders of the United States or entering the ports thereof, is presumptively a violation of the Fourth Amendment.

II. THE FRAMERS WOULD HAVE CONSIDERED THE ROADBLOCK IN THIS CASE TO BE A VIOLATION OF THE FOURTH AMENDMENT

In *Carroll v. United States* this Court stated that:

> "The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." 267 U.S. at 149.

"In deciding whether a challenged governmental action violates the (Fourth) Amendment, the Court takes care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." *Florida v. White*, 526 U.S. 559, 563 (1999). See also, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001).

A review of the history and development of the Fourth Amendment establishes that the Framers would have found suspicionless seizures of citizens at interior roadblocks for the purposes which occurred herein, to be abhorrent, and the exact kind of Government conduct that the Fourth Amendment was designed to prevent.

The Government acknowledges that it would be unconstitutional to stop an individual without reasonable suspicion on the highways of the United States. See, e.g. *Terry v. Ohio* 392 U.S. 1 (1968). However, the Government herein argues that it is ***not*** unconstitutional to stop a large group of individuals without any suspicion on that same highway, so long as everyone's individual right is equally violated. Their argument is devoid of logic.

It did not matter to the Framers whether a large group or a single individual was seized without suspicion – both were considered unreasonable. Nor does an individual citizen feel that his or her rights are any less violated simply because others are seized

without suspicion also. “The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context ...” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 671 (1995); *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

> “More important, there is no indication in the historical materials that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group. See *Delaware v. Prouse*, 440 U.S. 648, 664, 99 S.Ct. 1391, 1401- 1402, 59 L.Ed.2d 660 (1979) (REHNQUIST, J., dissenting) (referring to this as the " 'misery loves company' " theory of the Fourth Amendment)” *Vernonia*, 515 U.S. at 670.

If the Framers intended that something less than individualized suspicion could be employed when persons were traveling in ‘highly mobile’ devices, they had ample opportunity to express that intention, yet they never did. Carriages, carts, vessels and drays were commonly in use and highly regulated during the 18th century.[3] Yet Petitioner State of Illinois and their *amici* fail to identify any Colonial Acts, laws or other historical evidence which lend support for employment of suspicionless seizures of carriages or other vessels at roadblocks during the Framers’ era.

In the late spring of 1776, prior to the Declaration of Independence, the Virginia Legislature adopted the following:

> “X. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.” Va. Const. Of 1776, art. X (decl. Of Rights) as quoted in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, p. 235, n. 122 (6.3.1.8) (Neil H. Cogan ed., 1997)

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[3] See, e.g., 30 Geo. II, ch. 22, Sec. 5, 13, 22 Statutes at Large 107-108, 111 (1757) (authorizing the arrest of individuals obstructing “publick streets, lanes or open passages” with “pipes, butts, barrels, casks or other vessels” or an “empty cart, car, dray or other carriage”); 27 Geo. II, ch. 16, Sec. 7, 21 Statutes at Large 188 (1754) (authorizing arrest of negligent carriage drivers); *Atwater*, 532 U.S. at 335.

Maryland, Delaware, and North Carolina soon adopted similar provisions. Thomas Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 674-676 (1999).

Shortly after the Declaration of Independence was signed, Pennsylvania adopted the following search and seizure provision:

> "That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted." Pa. Const. Of 1776, art. X (Decl. Of Rights) as quoted in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, p. 235 (6.3.1.6a) (Neil H. Cogan ed., 1997).

Following the States' adoptions, the Fourth Amendment was adopted by Congress in 1789 and ratified by the States in 1791 as one of the provisions of the Bill of Rights.

The Fourth Amendment arose out of an English and colonial history of general searches and seizures without any specific or individualized cause. See generally, Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L.Rev. 925, 939-950 (1998).

It is from this history of abusive writs of assistance and general warrants without cause that the Framers desired to enact a prohibition against warrantless searches and suspicionless seizures. One example is a portion of the Collection Act of 1789, which provided that a warrantless search of ships could only occur if customs officials had reasonable suspicion that taxable property was concealed. Morgan Cloud, *Searching Through History; Searching for History*, 63 U. Chi. L. Rev. 1707, 1740-41 and note 118 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning).

In previous decisions, this Court noted that legislation passed by Congress from

1789 to 1799 applied probable cause and warrant requirements to customs officials before ships or vessels could be searched, and that these laws were a reflection of the Framers intent. See *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Carroll*, 267 U.S. at 150-153.

From a review of the laws in effect during and immediately preceding the adoption of the Fourth Amendment, it is clear that outside of limited customs statutes causeless seizures of carriages, vessels, persons, papers or possessions was banned and unlawful in many of the original colonies. Thus, the roadblock employed in the instant case would have been deemed unlawful under the original colonies' laws at the time of the framing of the Fourth Amendment. See e.g *Carroll,* 267 U.S., at 150-151, 154, 45 S.Ct., at 284, 285; cf. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 Mem.St.U.L.Rev. 483, 489 (1994) ("While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures.")

A suspicionless seizure of citizens in order to make intrusive, interrogational inquiries of admittedly innocent motorists, constitutes the same type of governmental harassment and abuse occasioned by the use of General Warrants and Writs of Assistance that our Framers so vehemently fought to forever prohibit.

III. THE ROADBLOCK IN THIS CASE IS CONTRARY TO EVERY ROADBLOCK OPINION WRITTEN BY THIS COURT TO DATE.

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

During the more than 200 years since the Fourth Amendment to the United States Constitution was enacted, the United States Supreme Court has rarely approved suspicionless roadblocks. In *Martinez-Fuerte*, *supra*, the Supreme Court recognized the right of our country to protect its exterior borders from the smuggling of illegal goods or persons with fixed border checkpoints. This decision was merely a reflection of the

historical "border" stops which were employed with limitation during the late 1700's under Customs statutes. See *Houghton*, 526 U.S. at 300. The Court allowed this exception to the Fourth Amendment because it has "long recognized the distinction between stopping a vehicle without cause, in the hope of finding evidence of criminal activity, and stopping persons 'crossing an international boundary because of national self-protection...'". *Edmond*, 531 U.S. at 17, citing to *Carroll*, 267 U.S. at 153-54.

In *United States v. Ortiz*, 422 U.S. 891 (1975), this Court invalidated a traffic checkpoint designed to locate illegal aliens which was too far removed from the borders; whose statistical effectiveness was unsubstantiated; and where there was too great of a discretion left to police officers due to a lack of specific guidelines. Like *Ortiz,* the roadblock here had unsubstantiated effectiveness and a lack of specific guidelines.

In *Sitz*, this Court approved of its only interior suspicionless roadblock, in order to regulate traffic safety and to check the sobriety of drivers. The Court in *Sitz* relied in part on the empirical data that 1.6 drivers passing through a checkpoint were arrested for alcohol impairment. Here, there is a complete absence of empirical data as to whether even one motorist stopped amongst one thousand would have any knowledge regarding the event upon which the roadblock was formed.

The roadblock in this case isn't intended to prevent hit-and-run accidents or any other future crime; it was employed solely in an attempt to solve a singular, isolated incident – which makes its purpose one of general law enforcement.

Sitz has been criticized as opening the door to further suspicionless seizures of the public. "By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police*." Sitz*, 496 U.S. at 458 (J. Brennan, dissenting). Law enforcement's extension of the use of roadblocks to cases such as here makes Justice Brennan's words all the more prophetic.

This Court previously has held that there was no empirical data to suggest that roving roadblocks were an effective means of promoting roadside safety. *Prouse*, *supra*. There, in disapproving suspicionless stops, this Court stated "that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Prouse*, 440 U.S. at 659-660.

In *Edmond*, this Court disapproved of roadblocks whose primary function was to detect ordinary evidence of wrongdoing. *Edmond* declined to suspend the usual requirement of individualized suspicion where police seek to employ a checkpoint for the ordinary enterprise of investigating crimes. *Edmond*, 531 U.S. at 44. The Illinois Supreme Court was correct in this case when it found that the roadblock was set up for that exact same purpose – investigating crime. Searching for evidence (which includes witnesses) to possible crimes is the daily function of every police detective. Although such efforts are absolutely laudable, they can in no way supercede the Fourth Amendment.

To put it bluntly, the Lidster roadblock is nothing more than the type of ordinary crime investigation prohibited under *Edmond*. The Lombard roadblock was set up for one reason only - "to work out a fatal hit-and-run accident". J.A. 15. Further, common sense dictates that the Lombard roadblock was designed not only to find witnesses – it was equally designed to find that driver - a general law enforcement purpose. It is as equally likely that the suspect would pass through this roadblock as it is that a witness would so pass. Thus, the claimed 'purely innocent motives' of the Government and the police (i.e. to make contact with witnesses but not the suspect) should be looked upon with circumspect.[4] The roadblock herein, as will later be argued, also contained an interrogational aspect.

One logical (but unspoken) aspect of this roadblock was the possibility that the vehicle in question would also pass through. Thus, its programmatic purpose is prohibited under *Edmond*. Both parties herein agree that the context of 'general crime control' prohibited by *Edmond* "encompasses instances where, as in *Edmond* itself, police officers intend to detect whether individuals actually passing through the checkpoint happen to be engaged in unlawful activity." Pet. Brief, p. 10.

Common sense dictates that the number of drivers who will be stopped by the kind of roadblocks used herein, in order to find possibly one witness to an accident (if anyone *other* than the suspect saw anything), will be as large and even more ineffective than the suspicionless stops disapproved by this Court in *Prouse, Edmond,* and *Ortiz.*

The approval of roadblocks *inside* the borders of the United States (as previously rejected in *Ortiz*), to make intrusive interrogational inquiries, is without precedent.

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[4] Even sixth-grade amateur sleuths know that it is 'the *criminal* who returns to the scene of the crime' - not the witnesses.

Permitting the use of these kinds of 'checkpoints' would be the modern day equivalence of a General Warrant.

IV. THE ROADBLOCK HEREIN FAILS TO PASS THE *BROWN* AND *EDMOND* BALANCING TESTS. THE SIGNIFICANT INTRUSIONS ON THE MOTORISTS LIBERTIES, COUPLED WITH THE LACK OF SPECIFIC RESTRAINTS ON POLICE DISCRETION, OUTWEIGH THE GRAVITY OF THE PUBLIC'S CONCERN IN THIS MATTER.

In the majority of cases that fall within the class of 'minimally intrusive' search and seizures, this Court has generally still required the government to prove that it had reasonable suspicion. See, e.g. *Prouse*, 440 U.S. at 661; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-883 (1975)*; Terry* 392 U.S. at 27. In roadblock cases, however, this Court has applied a balancing test involving "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty". *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

A. This roadblock fails the *Brown* test because crime detection is not a legitimate first-prong concern.

The *Edmond* decision implicitly held that the first prong of the *Brown* test could never be satisfied by reference to general crime control, lest the exceptions would inevitably swallow up the general rule that vehicle stops require "some measure of individualized suspicion" *Edmond*, 531 U.S. at 42.

Edmond recognized that the gravity of the public concern alone could not be dispositive without considering the nature of the interests threatened and their connection to law enforcement. *Id*. at 42-43. Where the particular concerns or interests involved primarily the pursuit of crime control, the *Edmond* Court refused to apply the remainder of the *Brown* balancing test, instead declaring the checkpoint unconstitutional.

The solving of a single accident with a single victim is not a legitimate first-prong governmental interest under *Brown*, because solving a stale crime is not readily distinguishable from the general interest in crime control previously rejected in *Edmond*. See also *Prouse,* 440 U.S. at 659, n.18. (noting that "controlling auto thefts" was not a legitimate first-prong interest).

Even assuming *arguendo* that the some crime concerns are legitimate first-prong interests under *Brown*, the gravity of the public concerns served by the seizure in this case, i.e. solving a single accident with a single victim, is not of such a magnitude as to justify a roadblock of a major city thoroughfare.

Although petitioner and their *amici* refer to the incident which generated this roadblock as a 'homicide', it remains open to question whether the death of the pedestrian in this case was even the result of criminal conduct. Although the motorist failed to remain at the scene *after* the accident, the Government has failed to establish that actual incident itself was anything other than purely accidental. Further, failure to remain at the scene of an accident involving death can be a mere misdemeanor offense. 625 ILCS 5/11-401 (a). Yet, upon this paucity of facts, the government feels justified in shutting down an entire major thoroughfare and intruding upon every motorist who sought to pass through it.

North Avenue, Lombard, Illinois, (the street where the checkpoint occurred) is a heavily-traveled state highway (North Avenue is also known as State Highway 64). Between 43,600 and 44,400 vehicles traveled on North Avenue through Lombard on a daily basis in 2002, according to the Illinois Department of Transportation.[5] Even at midnight, one could surmise that stopping every vehicle would have a significant impact upon the flow of traffic.

Whereas *Sitz*' justification for suspicionless seizures rested on saving lives by preventing a slaughter on the highways, which the Court found statistically a large enough problem to overcome Fourth Amendment concerns, the State has failed to prove that this roadblock will prevent any impending slaughter. It is designed for one purpose – to solve one singular and alleged crime against one singular victim one week after it occurred. The potential crime involved herein (leaving the scene of an accident), albeit serious in its consequences, is not nearly as "substantial" numerically as controlling the flow of illegal aliens and smuggling found in *Martinez-Fuerte*, 428 U.S. at 556-557 n.12, nor is it of the "magnitude" of the State's interest in combating drunk driving found in *Sitz*, 496 U.S. at 451.

Solving a hit-and-run accident, albeit laudable, cannot justify the investigative checkpoint used here, or there would essentially be no limit to the use of and breadth of checkpoints on the highways, streets, and sidewalks of America.

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[5] Illinois Dept. of Transportation, Average Daily Traffic Count, Illinois Highway 64, Lombard, Illinois (2002).www.dot.state.il.us ; http://gis.dot.state.il.us/output/ADTMainMap_ARCIMS191217807122.gif .

Nor can it be argued by the State that the solving of this one possible crime is of greater public significance than controlling the flow of illicit narcotics for which roadblocks were rejected by this Court in *Edmond*.

Thus, the Government interest at stake here is small when measured by the *Sitz* 'magnitude' test or the *Martinez-Fuerte* 'substantiality' test.

Nor is there any evidence to establish "the degree to which the seizure advances the public interest", another factor in *Brown*. As elucidated in *Edmond* ("The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program". *Edmond*, 531 U.S. at 47), the Government has failed to supply any statistical support for the effectiveness of this type of checkpoint. Instead, the Government cites to a few anecdotal stories in local newspapers, none of which even indicate that any of those crimes were actually *solved* as a result of the checkpoints.

B. The length of detention was several minutes or greater for each motorist and the degree of intrusion on the motorists was significant.

On August 30, 1997, at about midnight, every eastbound motorist who drove down North Avenue in Lombard, Illinois was stopped without suspicion and asked whether they had been in the vicinity one week ago, and whether they had seen anything suspicious. J.A. 18, 23.

According to Detective Ray Vasil, the police officer who stopped and confronted Robert Lidster, the Respondent, at this roadblock, there were virtually no guidelines in effect for this roadblock. J.A. 22. Mr. Vasil was under orders to stop every car and hand them a flyer. Vasil would also ask each individual whether they were there one week ago, and whether they had seen anything. J.A. 18, 23. At the time, the police were looking for a 1980-1986 Ford "Full Size" pick-up truck or Ford Bronco with damage to its right front headlight area. J.A. 9.

There were three lanes of traffic being stopped and interrogated at the roadblock. The record is silent as to what action these officers would or did take if they observed a vehicle matching the above description, and there were no guidelines in effect for the officers to follow if such an event occurred.

Detention is not measured by the length one is face-to-face with a police officer; it is measured by the length of time that a person's liberty is curtailed. Although the *actual* police contact for most drivers may have been 10 to 15 seconds, there were also 10 to 15 vehicles stopped in each lane J.A. 20, 24. Therefore, the length of *detention*, even

for the least detained motorist was several minutes as one waited for his or her turn to be interrogated. Further, the record shows that officers directed several cars, including Defendant's vehicle, to a secondary staging area without any explicit constraints on time. Pet. App. 2a. The length of detention for those moved to secondary staging areas is unknown, but certainly in excess of the aforementioned motorists.

The Government uses the sugar-coated term 'informational checkpoint' to describe their actions in Lombard, Illinois on the night of Robert Lidster's arrest. The correct term for this event would more appropriately be labeled as an "interrogational roadblock".

At this roadblock, police were subjecting motorists to questions of a personal nature unrelated to traffic safety. These questions were of the same type that would be put to possible suspects during general crime investigations – "where were you on the night in question?"

The questioning initiated by the police officers and posed to the seized motorists at this roadblock fall squarely within the definition of "interrogation". In *Miranda*, the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Clearly, the questions herein, being given to a motorist who could be either a passerby, a potential witness, or a suspect (since the police had no ability to distinguish amongst these categories) constituted "words...on the part of police...that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1990).

Edmond explicitly rejected the use of roadblocks whose primary purpose was interrogation and inspection:

> "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint *primarily* for the ordinary enterprise of *investigating* crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that *interrogation* and inspection may reveal that any given motorist has *committed* some crime." *Edmond*, 531 U.S. at 44. (Emphasis added).

Amicus United States argues in their brief that the detention here was no different than those approved in *Terry v. Ohio* (See United States amicus brief, p. 24 fn.14). Nothing could be farther from the truth. In *Terry*, the Court found that brief questioning was not a seizure where there was no restraint of the citizen's right to walk away. *Terry*, 392 U.S. at 16. Here, the police used emergency lights to halt all vehicles at a roadblock,

and set up a secondary patrol officer whose primary function was to ensure that *nobody* could 'skirt' the roadblock. Pet. App. 2a. The motorists herein were being involuntarily stopped, in the presence of up to a dozen emergency vehicles and a multitude of police personnel, without the opportunity to "walk away". The questioning at this roadblock was clearly compulsive and was certainly carried out in a police-dominated environment.[6]

The nature of the contact taking place at the roadblock clearly makes this roadblock far more intrusive than the brief perusal of one's condition of sobriety in *Sitz*. As in *Edmond*, the people who were stopped at the Lidster roadblock were treated like ordinary suspects -- they were involuntarily stopped by police using emergency vehicles, subsequently approached, and questioned regarding their whereabouts and activities. Depending on their answers or behavior, several were then sent to secondary areas for further intrusions.

The degree of intrusion and the interrogational aspect of this roadblock is separate and distinct from the 'purely informational' checkpoint described by *amici* for the Petitioner, whereby a motorist drives into a National Park Forest and must stop to pay an admission fee and is then informed of safety issues, regulations, closing hours, fire hazards, use of trails, etc. (Amicus Brief for the United States, p. 11 fn.1) Here, the police were not *giving* information – they were gathering it. A purely 'informational' checkpoint would not ordinarily involve questioning motorists about their activities the week before, or whether they were previously "at the scene of the crime". The questioning here is identical to traditional crime detection, and not even remotely similar to what one might be asked when entering a National Park Forest. Most importantly, in National Parks, no motorist is seized by stopping voluntarily to pay an admission, and they are always free to turn around without any consequences before they arrive at the toll plaza.

C. There was a complete lack of guidelines in place which would constrain police discretion.

"The principal protection of Fourth Amendment rights at checkpoints lies in

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[6] During custodial interrogation, the pressure on the suspect to respond flows not from the threat of contempt sanctions, but rather from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Pennsylvania v. Muniz*, 496 U.S. 582, 597 fn. 10 (1990) citing to *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

appropriate limitations on the scope of the stop." *Martinez-Fuerte,* 428 U.S. at 566-567. Roadblock seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The roadblock in this case had a complete lack of constraints on officer conduct. There were no guidelines as to the specific questions which could be asked; as to whether the officers could ask follow-up questions; as to what the officers should do if a motorist refused to answer questions; as to when a motorist should be directed to a secondary staging area; and as to whether drivers should or shouldn't be further detained if they provided information of possible value.

In previous cases, this court identified the use of specific guidelines at checkpoints as a prerequisite to acceptable checkpoints, in order to limit officer discretion. "The officer's conduct in (the *Prouse* case) was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.'" *Edmond*, 531 U.S. at 39 (insert added); see also *Ortiz*, 422 U.S. at 895-896 (invalidating a roadblock stating "moreover we are not persuaded that the checkpoint limits to any meaningful extent the officers' discretion in deciding which cars to search".) See also *I.N.S. v. Delgado*, 466 U.S. 210, 222 (1984) (explaining that the checkpoints in *Martinez-Fuerte* were constitutional because, amongst other things, " they were public and regularized law enforcement activities vesting limited discretion in officers in the field.").

The roadblock herein is unconstitutional because the guidelines left virtually unfettered discretion to the officers in the field, and because just like *in Ortiz*, there were no limitations on which motorists could be further detained by the police at the secondary staging area of the roadblock.

D. Reasonable alternatives to the use of a roadblock existed which could have accomplished the same goals.

The Petitioner's argument that there is "an absence of practical alternatives", as noted in the balancing tests of *United States v. Ross*, 456 U.S. 798, 806 (1982) and *Brignoni-Ponce* 422 U.S. at 881, is also incorrect. Reasonable practical alternatives which the police could have used in lieu of a roadblock included:

a) informational road signs seeking information (Amber alerts);

b) placing flyers on cars parked in nearby businesses[7];
c) using the media to publicize the need for witnesses; or
d) simply monitoring traffic for vehicles that matched the description and performing lawful investigations only on those vehicles.

The only significant difference between these reasonable practical alternatives and the roadblock in this case is that the roadblock forces a person to involuntarily stop and submit to police questioning, whereas the other methods allow the person to retain 'the right to be let alone' as coined by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

Even though the choice among reasonable enforcement alternatives is ordinarily left with local government officials, courts must not "blindly defer to whatever enforcement techniques are chosen by officials" because courts must analyze these techniques to ensure that they are, in fact, reasonable in the context of the Fourth Amendment as stated by the Illinois Appellate Court in their opinion on this matter. Pet. App. 28a. The government bears the burden of justifying the method employed where it implicates Fourth Amendment interests. *Terry v. Ohio, supra.*

The government has failed to establish the absence of practical alternatives which could possibly support the suspension of the rights and the liberties of citizens that occurred in this case.

V. PUBLIC POLICY, AND THE FOURTH AMENDMENT, SHOULD FORBID THE USE OF ROADBLOCKS EXCEPT FOR NATIONAL SECURITY AND EXIGENT CIRCUMSTANCES. TO THAT EXTENT, *SITZ* SHOULD BE OVERRULED.

> "The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could only be breached where the 'reasonable' requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials - perhaps even supported by a majority of citizens -

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[7] The testimony at the motion to suppress revealed that there was a post office whose shift ended within 30 minutes of the hit-and-run, and several industrial parks and businesses open in the area at that time. (J.A. 28-29).

> may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.' (Citations omitted)". *Sitz*, 469 at 459-460 (Brennan, J., with whom Marshall, J. joins, dissenting).

Approval of interrogational checkpoints such as here would virtually extinguish the 'right to be let alone' in towns large and small. "Checkpoints" could be set up within one week or longer of every so-called serious crime. With the substantial variety of offenses that are considered felonies (in Illinois) , including retail theft over $150.00 (720 ILCS 5/16A-10(2), theft of wireless services over $300.00 (720 ILCS 5/16F-3), unlawful sale of a household appliance with a missing manufacturer's identification number (720 ILCS 5/16C-2) *et cetera*, there would be no conceivable limitation on what types of crimes *wouldn't* justify the use of checkpoints.

The same arguments used by Petitioner and their *amici* in support of the Lidster checkpoint could equally be advanced for any mass suspicionless search or seizure and for any potential crime investigation. Under these facts, every person, whether a pedestrian or motorist, could be involuntarily seized in any public place and briefly interrogated, so long as some type of serious crime had taken place at that location in the not-too-distant past.

If the Court allows checkpoints, there will be no capably defined limits under which police could know with some sense of certainty the lawful boundaries of their activities. Every checkpoint would be the subject of infinite litigation and diverse judicial opinion.

In finding that this roadblock was a violation of the Fourth Amendment, the Illinois Supreme Court stated:

> "Lastly, an exception for informational roadblocks has the potential to make roadblocks 'a routine part of American life' *Edmond*, 531 U.S. at 42, 121 S.Ct. At 454, 148 L.Ed.2d at 344. In 2000, 870 murders, 49,652 assaults, 25,168 robberies, 77,947 burglaries, 306,805 thefts, 55,222 motor vehicle thefts, and 2,899 arsons were known by police to have been committed in Illinois. J. Fitch, 2001 Illinois Statistical Abstract 764 (16th ed.2001). Of those, 706 murders, 31,655 assaults, 21,691 robberies, 41,464 burglaries, 168,890 thefts, 45,083 motor vehicle thefts, and 1,525 arsons were known by police to have been committed in Cook County. J.

> Fitch, 2001 Illinois Statistical Abstract 764 (16th ed.2001). In the City of Chicago, there were 627 murders, 26,660 assaults, 19,449 robberies, 28,401 burglaries, 105,728 thefts, 35,570 motor vehicle thefts and 1,106 arsons. J. Fitch, 2001 Illinois Statistical Abstract 766 (16th ed.2001). Should the police have been allowed to set up roadblocks to obtain information from potential witnesses for each murder? What of a robbery, an aggravated criminal sexual assault, an arson or any other serious crime? According to the State, for a period of at least a week after each crime, police could set up roadblocks with the specific purpose of making inquiries of persons who were possibly witnesses to a crime. The troubling specter then arises that the streets of Cook County, or at least the streets of Chicago, would be adorned with roadblocks, an outcome clearly unacceptable under *Edmond*." Pet. App 8a-9a.

It is equally likely that the above stated crime statistics hold virtually true for all of America's urban centers. Riddling the United States of America with roadblocks for every type of 'serious' crime, could lead this country into a state of police lockdown.

There can be no doubt that the landscape of freedom in America will significantly change if interrogational checkpoints are deemed acceptable by this Court under the circumstances presented herein.

Public policy would best be served by revisiting and overruling *Sitz*, and declaring that all roadblocks, other than those used for exigent circumstances[8] and for national security[9], be declared unconstitutional. Even though driving under the influence is an extremely serious public concern, traditional methods of detection, such as monitoring the operation of the vehicle, make roadblocks there an unnecessary evil.

Stopping drivers at checkpoints to determine if they are committing a crime, have committed a crime, or have even witnessed a crime, runs counter to the principles of the Fourth Amendment to the United States Constitution, otherwise known as the Bill of Rights.

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[8] An impending attack, a fleeing felon, a police chase, a kidnapped child, or a biological epidemic are examples of the type of exigent circumstances where roadblocks could be acceptable.

[9] Border checkpoints (i.e. *Martinez-Fuerte*), customs checkpoints, government building and airport checkpoints are all areas where national security concerns (as recognized in *Carroll*) are exceptions to normal Fourth Amendment protections.

CONCLUSION

For all of the foregoing reasons, the decision of the Illinois Supreme Court should be affirmed.

Respectfully Submitted,

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