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OPINION	:	No. 84-902
of	:	NOVEMBER 8, 1984
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THE HONORABLE J. E. SMITH, COMMISSIONER OF THE CALIFORNIA HIGHWAY PATROL, has requested an opinion on the following question:

May a California law enforcement agency lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances?

CONCLUSION

California law enforcement agencies may lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances if sufficient safeguards are taken to minimize the intrusions on motorists.

ANALYSIS

On April 3, 1984 the National Transportation Safety Board adopted a safety study on deterrence of drunk driving and issued a report[1] thereon. The report reviews the use of sobriety checkpoints in 21 states and 4 foreign countries and makes certain recommendations. One of the recommendations is addressed to the governors of twenty states and territories including California and reads:

> "Institute the use of sobriety checkpoints on a periodic and continuing basis by the appropriate enforcement agencies under your jurisdiction as part of a comprehensive Driving While Intoxicated [DWI] enforcement program. These checkpoints should be conducted according to accepted procedures and constitutional safeguards."

The request for this opinion refers to the strong support given to the use of checkpoints by the National Highway Traffic Safety Administration and others, and we assume the checkpoints referred to in the request are those described in the National Transportation Board's report. The report describes several basic features of a typical checkpoint as follows:

> "1) Police agencies select the times of operation and locations of checkpoints, based on empirical evidence of high DWI activity or alcohol-related crashes.
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> "2) Checkpoint sites are established with high visibility, including warning signs, flashing lights, flares, police vehicles, and the presence of uniformed officers.
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> "3) Police officers conducting the check- point either stop all traffic or use some preestablished, nonbiased formula to decide which vehicles to stop; for example, every tenth vehicle.
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> "4) After being stopped, a motorist may be requested to produce a driver's license or vehicle registration and is asked questions while the officer looks for signs of alcohol impairment. In some cases where

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[1] Report No. NTSB/SS - 84/01 entitled National Transportation Safety Board, Safety Study, Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations containing 63 pages available through the National Technical Information Service, Springfield, Virginia 22161.

license/registration checks are not made, the stop is very brief (15 to 30 seconds).

"5) Based on his or her observations, the police officer either waves the motorist on or directs him or her to a secondary area for further investigation. In the latter case, a roadside psychomotor test (e.g., walking a straight line) or a breath-alcohol test is usually requested.

"6) If the driver fails these tests and the officer has probable cause, the motorist is arrested for DWI.

"7) The arrested driver is then transported to the station for booking and is requested to submit to an evidential breath-alcohol test. Refusal to submit to such a test invokes the State's implied consent penalties."

Implicit in the use of sobriety checkpoints is the fact that the officers conducting the checkpoints will stop vehicles at the checkpoint without probable cause or any reasonable suspicion that the drivers are under the influence of intoxicating substances or are otherwise violating the law. This fact raises serious questions regarding the constitutional validity of the sobriety checkpoint procedure under the Fourth Amendment and its counterpart, article 1, section 13 of the California Constitution.

Before reaching the constitutional question we consider the statutory basis for sobriety checkpoints in California. The question assumes that the California law enforcement agencies referred to have authority to detect and apprehend persons driving under the influence of intoxicants and the reach of this opinion is limited to those agencies.[2] Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. (*Clay* v. *City of Los Angeles* (1971) 21 Cal.App.3d 577, 585.) Thus we believe that the authority to use sobriety checkpoints to determine, detect and apprehend persons driving under the influence of intoxicants may be implied from the statutory authority to enforce criminal laws generally or traffic laws specifically.

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[2] Vehicle Code section 2400 provides that the Commissioner of the Highway Patrol "shall enforce all laws regulating the operation of vehicles and the use of the highways." Government code sections 26600 and 26601 provide that the sheriff shall preserve the peace, may engage in crime prevention projects and arrest those who attempt or commit a public offense. Government Code section 41601 provides that a chief of police has the same powers as a sheriff. Other statutes and charter provisions provide similar general law enforcement powers to other law enforcement officers.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasion. (*Delaware* v. *Prouse* (1979) 440 U.S. 648, 653-654.) The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. (*Id.*) Thus the more intrusive procedures of arrest (seizure of the person) and search of the person or property require greater justification than the less intrusive procedures of stop and frisk (see *Terry* v. *Ohio* (1968) 392 U.S. 1) and brief detention for questioning. The reasonableness requirement usually requires that the facts upon which an intrusion is based be capable of measurement against an objective standard. For arrests and searches that objective standard is probable cause. In *Terry* v. *Ohio*, *supra*, a less rigorous objective standard than probable cause, one that might be termed "reasonable suspicion," was used to justify a stop and frisk. In those situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field. (*Delaware* v. *Prouse*, *supra*, at pp. 654-655.)

Three cases involving the Border Patrol have applied the Fourth Amendment's reasonableness requirement to vehicle stops. In *U.S.* v. *Brignoni-Ponce* (1975) 422 U.S. 873 the high court considered whether a roving patrol may stop a vehicle near the border with Mexico and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. The court held that a vehicle stop constitutes a seizure of the occupants within the meaning of the Fourth Amendment, though it involved only a brief detention short of a traditional arrest. Such seizure invokes the reasonableness requirement and its balancing test. In balancing interests the court noted the government's need for effective measures to prevent the illegal entry of aliens at the Mexican border and the modest intrusion when a vehicle is stopped and its occupants questioned. The court noted that the stops were brief, usually no more than a minute and that all that was required was a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States. The court stated that because of the limited nature of the intrusion, stops of this sort may be justified on

facts that do not amount to the probable cause required for an arrest. The court held that except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. The court then decided that Mexican appearance, while a relevant factor, was not enough without more to meet the reasonable suspicion test.

U.S. v. *Ortiz* (1975) 422 U.S. 891 involved use of a checkpoint 66 miles from the Mexican border. The court held that the Fourth Amendment prohibited searches of vehicles at traffic checkpoints removed from the border or its functional equivalents without consent or probable cause to believe that the vehicle to be searched contains aliens.

U.S. v. *Martinez-Fuerte* (1976) 428 U.S. 543 also involved use of permanent Border Patrol checkpoints removed from the Mexican border. The checkpoints were located at strategic points near intersections of main highways leading from the border. Well lighted signs announced that all vehicles must stop one mile ahead. At the checkpoints orange traffic cones funneled traffic into single lanes where officers in full uniform stood behind large stop signs. Floodlights lighted the entire checkpoint. The officer visually screened all the northbound vehicles and most were allowed to proceed without any oral inquiry or close visual examination. In a relatively small number of cases the officer decided that further inquiry was in order and directed the vehicle to a secondary inspection area. There the occupants were asked about their citizenship and immigration status. The secondary stops lasted from three to five minutes. The vehicle was allowed to proceed unless the secondary stop provided the officers with probable cause to make an arrest or search of the vehicle. The court noted that the officer's decision to direct vehicles to the secondary search area was based on any articulable suspicion that the vehicle contained illegal aliens. The court held first that the checkpoint stops were seizures to which the Fourth Amendment's reasonableness requirement applied. After balancing the interests involved the court concluded the need for the checkpoint was great and the intrusion on motorists quite limited. The court held that the stops and questioning described may be made in the absence of any individualized suspicion at reasonably located checkpoints. The court also held that no warrant was necessary to authorize checkpoint stops.

After the three Border Patrol cases, the high court discussed vehicle checkpoints by way of dicta in a traffic case. In *Delaware* v. *Prouse*, *supra*, 440 U.S. 648 a Delaware patrolman pulled a car over for a routine stop. Asked for his reasons the patrolman testified "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." Delaware asserted that its patrolmen should be free to stop vehicles for a license and registration check as a means of ensuring highway safety. The court rejected the assertion and held that except in those situations in which there is at least

articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. Cryptically the court added:

> "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers."(440 U.S. at 663.)

The concurring opinion assumed that the court's observation concerning questioning all oncoming traffic at roadblocks also included other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100 percent roadblock stop. (440 U.S. at 664.)

The *Prouse* court noted that the crucial distinction between roving patrol and checkpoint stops was the lesser intrusion of checkpoint stops on the motorists' Fourth Amendment interests and quoted from *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. 543 as follows:

> "[T]he objective intrusion—the stop itself, the questioning and the visual inspection—also existed in roving patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop."

Thus the high court in *Martinez-Fuerte* articulated a basis for checkpoint stops of vehicles by the Border Patrol to enforce immigration laws. The *Prouse* dicta suggests that similar checkpoint stops may be used to enforce other laws.

While California courts have not addressed the validity of sobriety checkpoints, they have dealt with other types of checkpoints. In *Wirin* v. *Horrall* (1948) 85 Cal.App.2d 497 the police blocked off certain areas in Los Angeles, stopped and searched all persons and vehicles entering and leaving the area without first obtaining search warrants. The court held that the blockades violated the Fourth Amendment quoting from *Carroll* v. *U.S.* (1924) 267 U.S. 132, "[p]ersons lawfully within the United States of America are entitled to use the public highways and have the right to free passage thereon

without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law."

People v. *Gale* (1956) 46 Cal.2d 253 involved a checkstation established by the San Diego County Sheriff near the Mexican border. On his way to Mexico, defendant was stopped at the checkpoint. One officer noted recent damage on the front of the car and asked the defendant to come into his office for some questions. Another officer searched the car and found narcotics. The court held the search unconstitutional applying the rule that ordinarily in the absence of reasonable cause, or the right to arrest an occupant of the automobile, its search is not permissible without a warrant. The court pointed out that the purpose of the checkstation was not to enforce smuggling laws, but rather routine searches of vehicles were conducted "to curb the juvenile problem" and check for "anything that looked suspicious."

Vehicle Code section 2814 requires the drivers of passenger vehicles to stop and submit the vehicle to inspection of the mechanical condition and equipment at any location where the Highway Patrol is conducting inspections and has set up signs requiring such stops. The constitutionality of these vehicle inspection stops was upheld in *People* v. *De La Torre* (1967) 257 Cal.App.2d 162. In that case the defendant was stopped at a vehicle inspection checkpoint without probable cause. As a result of evidence obtained at the stop, defendant was charged with drunk driving. The court held that the stop was lawful and the evidence admissible. The *Wirin* case was distinguished because it involved indiscriminate searches of persons and vehicles which was clearly unreasonable and within constitutional inhibitions. The court also pointed out that in *People* v. *Gale* the court noted that the officers were not conducting an inspection of the vehicle's equipment pursuant to the Vehicle Code. The court then held that routine vehicle inspections pursuant to Vehicle Code section 2814 were constitutional. The California Supreme Court denied hearing in the case.

Vehicle Code section 2813 requires drivers of commercial vehicles to stop and submit to an inspection of the size, weight, equipment and smoke emission of the vehicle when the Highway Patrol is conducting such inspections and signs are displayed requiring such stops. Footnote 26 in *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663 noted: "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."

People v. *Hyde* (1974) 12 Cal.3d 158 considered the validity of pre-departure screening of prospective airplane passengers under the Fourth Amendment. The defendant activated the magnetometer at the boarding area checkpoint and he was asked to put his

hand luggage on the counter for inspection. When the bag was opened marijuana was found and the defendant was arrested. The court held that the magnetometer screening as well as the inspection of the hand luggage constituted a search under the Fourth Amendment. (*Id.*, at 164.) The court observed that "the validity of a particular search does not depend upon the individual creating a minimal level of initial suspicion by satisfying the profile, activating a magnetometer, or meeting any other indicia of questionable circumstances. Nevertheless the court unanimously upheld the constitutionality of these airport searches. The majority opinion relied upon the "administrative search" cases such as *Camara* v. *Municipal Court* (1967) 387 U.S. 523 and others. The concurring opinion rejected the administrative search approach. Both opinions applied the balancing test for determining reasonableness by balancing the need to search against the invasion which the search entails. (*Id.*, at 166 & 173.) The majority opinion noted that the governmental interest in preventing airplane hijacking was substantial. "Air piracy offers a unique opportunity for the political terrorist, the extortionist, or the mentally disturbed to command attention by placing in jeopardy the lives of passengers and crew, as well as private property worth millions of dollars. . . . When weighed against the gravity of the governmental interest involved, a pre-departure screening of all passengers and carry-on baggage sufficient in scope to detect the presence of lethal weapons or explosives cannot be viewed as unreasonable. Unlike the suspects in a criminal investigation, prospective airline passengers generally welcome routine inspection procedures because they are the direct and immediate beneficiaries of the screening system; security precautions increase the likelihood of safe arrival at their chosen destination." (*Id.*, at 166-167.) In discussing the need for a warrant, the court noted that the proper inquiry is "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." (*Id.*, at 168.) The court then found that "imposing a warrant requirement for airport screenings would lead either to inordinate and unacceptable delays in the boarding process, or else to the issuance of a pro forma warrant broad enough to cover all prospective passengers within a given period." (*Id.*, at 169.) The court held that a warrant was not necessary to justify airport screening of boarding passengers.

People v. *Dickinson* (1980) 104 Cal.App.3d 505, involved a permanent plant quarantine station near Needles, five miles west of the Arizona border. The station was operated pursuant to Food and Agricultural Code section 5341 which provides: "To prevent the introduction into or the spread within the state, of pests, the director shall maintain at such places within the state as he deems necessary plant quarantine inspection stations for the purpose of inspecting all conveyances which might carry plants or other things which are, or are liable to be, infested or infected with any pest." Warning signs giving notice that inspections would occur were placed one mile and one-half mile on the highway approaching the station. The defendant's car was stopped at the station by a uniformed Plant Quarantine Officer. The officer asked that the car trunk be opened and the defendant complied. Inside the trunk 200-300 pounds of marijuana was wrapped in

plastic. One area of the plastic was cut with vegetable material extruding from the cut. The defendant said it was compost but the officer thought it was marijuana, notified highway patrol officers who then arrested him a short distance from the station. The court held the stop constitutional stating:

> "The first question is whether motorists can be stopped at the inspection stations. To that extent the situation is comparable to fixed border patrol checkpoints designed to intercept illegal aliens. *United States* v. *Martinez-Fuerte* (1976) 428 U.S. 543, determined that checkpoints do not constitute a Fourth Amendment violation of the rights of motorists and their passengers. The court found that neither warrant nor probable cause was required to briefly stop motorists at the checkpoint to ask a few questions. The same held true of singling out some of the motorists and their passengers for further inquiry which caused an additional three- to five-minute delay in most cases."
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> ". . . . .
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> "Under the facts of this case, and particularly in light of the authorities cited, we are satisfied that there was no Fourth Amendment violation here. The scope of our decision is simply that the quarantine officers may stop motorists at the inspection stations and request to look into the trunk of the vehicle. This is in accord with *United States* v. *Ortiz* and *United States* v. *Martinez-Fuerte*. If the motorist voluntarily opens the trunk of the vehicle, the quarantine officer may look therein and, as here, remove any plant materials in plain view for further inspection. We do not address the full scope of search which may be available for quarantine purposes as that is unnecessary to our decision. We also do not decide anything concerning the refusal to allow search for that is not the case before us."[3]

While no California or federal cases have been found which address the constitutional validity of sobriety checkpoints, appellate courts in nine other states have addressed this specific issue with mixed results. Courts in New Jersey, Kansas and Maryland have upheld the use of sobriety checkpoints. (*State* v. *Coccomo* (1980, N.J. Super) 427 A.2d 131; *Kansas* v. *Deskins* (1983, S.Ct. Kansas) 673 P.2d 1174; *Little*

[3] The case of *People* v. *Guardado* (1983) reported in the advance sheets at 146 Cal.App.3d 738 involved temporary vehicle inspection checkpoints to prevent the spread of the Mediterranean fruit fly from a quarantine area within the state. Since the California Supreme Court has ordered that the *Guardado* opinion not be published, it no longer serves as precedent. (See rules 976(c)(1) and 977, California Rules of Court.)

v. *State* (1984, Md.Ct.App.) 479 A.2d 903.) Courts in South Dakota, Oklahoma and Illinois have held that sobriety checkpoints violate the Fourth Amendment. (*State* v. *Olgaard* (1976, S.Ct. S.D.) 248 N.W.2d 392; *State* v. *Smith* (1984, Ct.Crim.App. Okla.) 674 P.2d 562; *People* v. *Bartley* (1984, App.Ct. Ill.) 466 N.E.2d 346.) Courts in Arizona, Massachusetts and Florida have held that while sobriety checkpoints with adequate safeguards might be reasonable under the Fourth Amendment, the checkpoints considered in the particular case did not pass constitutional muster. (*State* ex rel. *Ekstrom* v. *Justice Court* (1983, S.Ct. Ariz.) 663 P.2d 992; *Commonwealth* v. *McGeoghegan* (1983, S.Jud.Ct. Mass.) 449 N.E.2d 349; *Jones* v. *State* (1984, Ct.App. Fla.) —So.2d—, 36 Cr.L. 2004.)

In determining the constitutional validity of sobriety checkpoints the courts employ the traditional balancing test to determine its reasonableness. The intrusion on the individual's Fourth Amendment interests is weighed against its promotion of legitimate governmental interests. The cases reveal that the courts are concerned with a number of specific factors in determining the weight to be given both to the intrusion and to the governmental interests. Those factors include (1) location, (2) time and duration, (3) method of operation, (4) advance warning to public generally, (5) advance warning to approaching motorists, (6) fear and anxiety generated in motorists, (7) maintenance of safety conditions, (8) average time motorists are detained, (9) standards set by superior officers, (10) discretion left to field officers, (11) effectiveness of the procedure, and (12) alternatives to accomplish governmental objectives. A review of those factors will provide some insight into the balancing process.

1. <u>Location of Sobriety Checkpoints</u>

In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. 543 the high court approved the use "reasonably located checkpoints" for immigration law enforcement. The court noted that such fixed checkpoints are not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited resources. This suggests two things. The location of checkpoints should be determined by policy-making officials rather than by officers in the field. The sites chosen should be those which will be most effective in accomplishing governmental objectives. In the case of sobriety checkpoints this would be on roadways having a high incidence of drunk driving as revealed by arrest and accident statistics. (See *State* v. *Coccomo*, *supra*, 427 A.2d at p. 134.) The permanency of the checkpoint is significant. In *State* v. *Olgaard*, *supra*, 248 N.W.2d at page 394 the court distinguished the sobriety checkpoint it held unconstitutional from the immigration checkpoints in *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. 543, principally because it was not at a permanent location. However, in *Little* v. *State*, *supra*, 479 A.2d 903, 35 Cr.L. at page 2398 the Maryland court said that the temporary nature of sobriety checkpoints does not render them unconstitutional. The

Florida Supreme Court observed that permanency of the sobriety checkpoint may not be as significant a factor as in illegal-alien checkpoints. (*Jones* v. *State*, *supra*, —So.2d—, 36 Cr.L. at p. 2005.) Since the safety of motorists is a related factor, it must also be considered in the location of sobriety checkpoints.

In *People* v. *Hyde*, *supra*, 12 Cal.3d at 167 the court observed that "the airport departure lounge is the one channel through which all hijackers must pass before being in a position to commit their crime. It is also the one point where airport security officials can marshal their resources to thwart such acts before the lives of an airplane's passengers and crew are endangered."

2. Time and Duration of Sobriety Checkpoints.

Most of the sobriety checkpoints reviewed in the cases have taken place at night and are only a few hours in duration. No doubt the timing of sobriety checkpoints is related to times drunk drivers are on the road. In *State* v. *Coccomo*, *supra*, 427 A.2d at page 135 the court observed that the hours of the sobriety checkpoint "were chosen to coincide with the closing hours of local taverns". While none of the cases discuss a statistical correlation, a study indicating the time of day drunk driving arrests are made would be useful in justifying the times chosen for operation of sobriety checkpoints. The time chosen may also affect the related factor of anxiety and fear generated at the checkpoint.

3. Method of Operation of Sobriety Checkpoints.

In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at page 558 the high court indicated that it viewed checkpoint stops differently from a roving patrol stop "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." It is apparent that the anxiety created by a sobriety checkpoint will largely depend on the methods and procedures used in its operation. The more the procedures used produce concern or fear in innocent motorists, the less likely the procedure is to pass constitutional muster. More generally, the less intrusion on motorists caused by the checkpoint procedures, the more likely they will be approved. Some examples from the cases will serve to illustrate these points. Asking the driver to produce a driver's license or vehicle registration was approved in *State* v. *Coccomo*, *supra*, 427 A.2d at page 133. Production of a driver's license was approved in Kansas sobriety checkpoints. (*Kansas* v. *Deskins*, *supra*, 673 P.2d at p. 1177.) In Maryland's sobriety checkpoints the officers did not interrogate motorists and if a driver refused to roll down the car window, he was allowed to proceed. (*Little* v. *State*, *supra*, 479 A.2d 903, 906.) Stopping only a portion of the motorists passing the checkpoint in a systematic and predetermined manner has been described as less intrusive than 100 percent

checkpoints stops. (*Delaware* v. *Prouse*, *supra*, 440 U.S. at pp. 663-664, concurring opinion. See also *State* v. *Coccomo*, *supra*, at p. 133 (every fifth vehicle stopped).) The use of a flashlight by the officer was approved in *Little* v. *State*, *supra*, at page 914.

Appropriate sobriety checkpoint procedures may include diversion of motorists from the initial stop to a secondary stop for further inquiry. In *U.S.* v. *Martinez-Fuerte*, supra, 428 U.S. at pages 563-564 the court stated:

> "We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. Cf. *United States* v. *Brignoni-Ponce*, 422 U.S., at 885-887. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."

Applying this rationale to sobriety checkpoints, the inclusion of criteria for diversion to secondary stops in the methods of operating the checkpoint would appear desirable. Such criteria would indicate a basis for some suspicion of the use of intoxicants by the driver, though it need not be enough to create the reasonable suspicion necessary to justify a vehicle stop by a roving patrol. Such criteria might include instructions to divert to secondary stops those vehicles in which the odor of alcoholic beverages was detected, the driver's speech was slurred, an open alcoholic beverage container or other intoxicants are seen, the occupants conversation indicates they have been using intoxicants or other specified indicia giving rise to some suspicion that the driver has been ingesting intoxicants. While the quote from *Martinez-Fuerte* indicated that Border Patrol Officers should have wide discretion to divert motorists to secondary stops, the caution against "unbridled discretion of peace officers" in *Delaware* v. *Prouse*, *supra*, 440 U.S. at page 663 would indicate the wisdom of including the criteria for diversions to secondary stops in the instructions to the field officers for operation of the checkpoint. Prudence would also dictate the inclusion of the kind of further investigation to be conducted at the secondary stop, such as questions to be asked and tests to be made. In *State* v. *Coccomo*, *supra*, 427 A.2d at page 133 the court noted that the officer asked the driver if he had been drinking and received an affirmative reply. He then asked the driver to recite the alphabet backwards and then to walk heel to toe. When the driver flunked these tests he was arrested. In *Little* v. *State*, *supra*, 479 A.2d 903, 905-906, the court noted that the regulations detailed the duties of each officer. If there was no immediate evidence of intoxication, a motorist was given a brochure and permitted to drive on, but if an officer

had reason to believe a driver was intoxicated, he was to refer the vehicle to the shoulder for field sobriety tests. The motorist was arrested if these tests produced sufficient evidence of intoxication.

In *People* v. *Hyde*, *supra*, 12 Cal.3d at 169 the court observed that "airport screening procedures must be as limited in intrusiveness as is consistent with their justification, and an individual may avoid submitting to a search by electing not to board the airplane.

Of course the number of procedures employed at sobriety checkpoints must be carefully considered since this will affect the related factor of average time motorists are delayed.

4. Advance Publicity of Sobriety Checkpoints.

The courts have looked with favor on giving sobriety checkpoints advance publicity. Advance publicity serves to establish the legitimacy of sobriety checkpoints in the minds of motorists. As noted in *Jones* v. *State*, *supra*, —So.2d—, 36 Cr.L. at page 2005 "advance publication of the date of an intended roadblock, even without announcing its precise location, would have the virtue of reducing surprise, fear and inconvenience." The concurring opinion in *State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at page 1001 points out that advance publicity enhances the deterrent effect of sobriety checkpoints.

5. Advance Warning to Approaching Motorists.

Roadside signs giving notice of sobriety checkpoints being approached have played a significant role in the cases. In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at page 3077 the court described in detail the signs placed one mile and 1-3/4 mile from the immigration checkpoint and at the checkpoint itself. Courts holding sobriety checkpoints unconstitutional have pointed out that they came to motorists as a total surprise without any prior warning. (See *State* v. *Olgaard*, *supra*, 248 N.W.2d at p. 394; *State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at p. 993 and *State* v. *Smith*, *supra*, 674 P.2d at p. 564.) In *Little* v. *State*, *supra*, 479 A.2d 903, 913 which upheld Maryland's sobriety checkpoint procedures, the court noted that "adequate advance warning of the checkpoint is given; motorists who do not wish to stop may make a U-turn and follow a different route." However, no mention was made of advance warning signs in the sobriety checkpoints approved in *Kansas* v. *Deskins*, *supra*, 673 P.2d 1174 and *State* v. *Coccomo*, *supra*, 427 A.2d 131.

The concurring opinion in *People* v. *Hyde*, *supra*, 12 Cal.3d at 175-176 noted: "Of signal importance is the fact that airline passengers have *advance notice* that they will be subjected to a pre-entry screening for weapons and explosives. Although advance notice in itself cannot operate to deprive an individual of his Fourth Amendment rights, it nevertheless has been recognized by the courts and commentators as a factor of major significance in evaluating the extent to which individual privacy is compromised and intruded upon by governmental action. Advance notice enables the individual to avoid the embarrassment and psychological dislocation that a surprise search causes."

6. *Fear and Anxiety Generated in Motorists.*

Closely akin to the advance warning factor is that of the fear and anxiety generated in motorists by the check- point operation. In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at page 588 the high court stated: "we view checkpoint stops in a different light [from roving patrol stops] because the subjective intrusion—the generating of concern or even fear on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." And in *Delaware* v. *Prouse*, *supra*, 440 U.S. at page 657 the court observed: "[f]or Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. '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 intrusions'" In *State* v. *Smith*, *supra*, 674 P.2d at page 565 the court found that the element of fright is potentially much greater in the Oklahoma roadblock procedures than in the immigration checkpoints in *U.S.* v. *Martinez-Fuerte*. In *State* v. *Coccomo*, *supra*, 427 A.2d at page 134 the court noted that the defendant had not attempted to show that the stop at the checkpoint had generated any fright, anxiety, concern or even annoyance.

7. Maintenance of Safety Conditions.

The courts which have considered the constitutionality of sobriety checkpoints have been concerned with the safety of motorists. The first court to approve sobriety checkpoints noted that the practice was used only when the traffic was light. (*State* v. *Coccomo*, *supra*, 427 A.2d at p. 135.) The court added that "stopping every fifth car when traffic is heavy, or even moderate, would create a substantial risk of danger both to motorists and to police." In describing the criteria to set up lawful sobriety checkpoints the Florida Supreme Court observed that the safety of motorists must be assured by proper means, including lighting, warning signs or signals and clearly uniformed or otherwise identifiable peace officers. (*Jones* v. *State*, *supra*, —So.2d—, 36 Cr.L. at p. 2005.)

8. Average Time Motorists are Detained.

In measuring the degree of intrusion caused by sobriety checkpoints the courts have often looked at the average time motorists are detained by the checkpoint. In the immigration checkpoint case traffic was slowed and most cars were waved on without any oral inquiry. Those pulled into secondary stops were delayed from three to five minutes. (*U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at p. 547.) In the Arizona case holding the checkpoints unconstitutional the delays lasted from 30 seconds to 5 minutes. (*State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at p. 993.) In the Maryland checkpoints approved by the court the "stop lasts between fifteen and thirty seconds." (*Little* v. *State*, *supra*, 479 A.2d 903, 906.) In the Florida case holding the sobriety checkpoints invalid the court pointed out that the record did not indicate how long the average motorist waited. (*Jones* v. *State*, *supra*, —So.2d—, 36 Cr.L. at p. 2005.)

9. Standards Set by Superior Officers.

In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at page 559 the high court observed that "checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." The three courts which have upheld sobriety checkpoints have all stressed that the key features of the operation were planned in advance by supervisory personnel leaving little discretion to the officers conducting the checkpoints. In New Jersey the Police Chief adopted regulations governing checkpoint operation pursuant to procedures recommended by the county prosecutor and approved by the attorney general. (*State* v. *Coccomo*, *supra*, 427 A.2d at p. 133.) In Kansas the 35-40 officers taking part in the joint operation were briefed ahead of time by supervisory personnel who had selected the site and determined who was to be stopped, leaving little discretion with the field officers. (*Kansas* v. *Deskins*, *supra*, 673 P.2d at p. 1185.) In Maryland the checkpoints were operated pursuant to a comprehensive set of detailed regulations approved by high level administrators. (*Little* v. *State*, *supra*, 479 A.2d 903, 913.) On the other hand, in the states rejecting sobriety checkpoints the courts often pointed to the lack of standards to guide the field officers. In Arizona the court noted that the field officers "were not told what to do if a vehicle turned around to avoid the roadblock. They were not told whether to inspect visible cans or bottles. They were not told whether to shine flashlights in each vehicle that was stopped after dark. They were not told whether to smell inside each vehicle to detect the smell of alcohol." (*State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at p. 993.) In Massachusetts the roadblock held unconstitutional was "the result of a plan formulated earlier that day by the police chief and four subordinates." (*Com.* v. *McGeoghegan*, *supra*, 449 N.E.2d at p. 350.) In Florida the court noted that it had "no evidence as to what level of law enforcement

personnel made the decision to set up the roadblock or made the decisions regarding location and method of operation." (*Jones* v. *State*, *supra*, —So..2d—, 36 Cr.L. at p. 2005.) In Massachusetts the court said that "while we do not suggest that roadblocks can only be constitutional if prescribed by statute or appropriate governmental regulation, we think that procedures conducted pursuant to such authorizations and standards would be more defensible than would other procedures." (*Com*. v. *McGeoghegan*, *supra*, 449 N.E.2d at p. 353.)

10. Discretion Left to Field Officers.

In *Delaware* v. *Prouse*, *supra*, 440 U.S. at page 661, the high court observed: "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every vehicle on the roads to seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the *unbridled discretion* of law enforcement officials." (Emphasis added.) It is the standards fixed by superior officers which controls the discretion of field officers that provides the objective standard by which the constitutionality of the checkpoint operation is judged and replaces the probable cause or reasonable suspicion ordinarily required to justify a vehicle stop. In *State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at page 996, holding the roadblocks unconstitutional, the court noted that the "record establishes that the Kingman checkpoints involved not an insubstantial amount of discretionary law enforcement activity and that the manner in which the roadblocks were operated was somewhat irregular. The roadblocks were set up at the discretion of local highway patrolmen and were operated without specific directions or guidelines. Officers were uncertain whether they should simply question the occupants of motor vehicles or whether they should seize the opportunity to cursorily search the vehicles for evidence of a violation. . . . We find present in the Kingman operation the grave danger that such discretion might be abused by the officer in the field, a factor which caused the court in *United States* v. *Prouse*, *supra*, much concern."

In *People* v. *Hyde*, *supra*, 12 Cal.3d at 169 the court noted that "because all passengers are required to undergo a screening as a condition to boarding the airplane, there is no danger as there was in *Camara* that the decision to search a particular individual will be subject to the discretion of the official in the field."

11. Effectiveness of Sobriety Checkpoints.

All the cases agree that decreasing the amount of drunk driving on our highways with its resulting deaths, injuries and damage is a legitimate governmental objective of high priority. There is considerable disagreement, however, on the effectiveness of sobriety checkpoints to achieve that objective. In *U.S.* v. *Martinez-Fuerte*, *supra*, 428 U.S. at page 554 the court noted that the record provided a rather complete

picture of the San Clemente checkpoint. It showed that during 1973, 17,000 illegal aliens were apprehended there. And in an eight-day period of the arrests in question in 1974, during which time 146,000 vehicles passed through the checkpoint, 820 were referred to the secondary inspection area where 725 deportable aliens were found in 171 vehicles. In *Delaware* v. *Prouse*, *supra*, 440 U.S. at page 660 the court was considering random stops by roving patrols to find unlicensed drivers and the court observed: "The contribution to highway safety by discretionary stops selected from among drivers generally will therefore be marginal at best." Thus courts considering the validity of sobriety checkpoints have been concerned with the effectiveness of sobriety checkpoints to reduce drunk driving.

In *Little* v. *State*, *supra*, 479 A.2d at 913 the court observed:

> "The record before us demonstrates that for the limited period of its operation, the sobriety checkpoint program has been a moderately effective technique for detecting and deterring the drunk driver. The State's statistics show, for example, that there was a seventeen percent decrease in alcohol related accidents in Harford County compared with the preceding three-month period. Comparing this statistic with statistics maintained for less populous Frederick County, where the sobriety checkpoint program was not in operation, reveals that conventional drunk driving techniques in the latter county achieved only a twelve percent decrease. During the period of the pilot program, traffic fatalities declined from eleven to eight in Harford County; Frederick County recorded three fatalities compared with four in the preceding three months."

Other courts have discounted the effectiveness of sobriety checkpoints. (See *People* v. *Bartley*, *supra*, 466 N.E.2d at 348; and also the dissents in *Little* v. *State*, *supra*, 479 A.2d at 917 and *Kansas* v. *Deskins*, *supra*, 673 P.2d at 1188.) In the Florida case the court noted that one question to be addressed is whether the roadblock procedure was "significantly more effective to combat an egregious law enforcement problem of very serious proportions than other available less intrusive means." (*Jones* v. *State*, *supra*, — So.2d—, 36 Cr.L. at p. 2005.) The court noted that between 100 and 200 cars were stopped and 5 or 6 drunk driving arrests were made. The court added that there was no evidence as to how these figures compare with the number of drunk driving arrests which can be anticipated from using the same number of officers to conduct another type of operation, such as roving patrols acting on reasonable suspicion. (*Id.*)

While the courts have looked to the number of drunk driving arrests made at sobriety checkpoints as a convenient measure of their effectiveness, it should be stressed that a more significant indication of effectiveness will be the degree to which the driving habits of drinking drivers are changed by checkpoint operations. Though such habit

changes may be difficult to quantify there are indications that they do occur. In *Little* v. *State*, *supra*, 479 A.2d at 913, the court stated:

> "Of greater significance is the evidence in the record indicating that the pilot program had a substantial impact on the drunk driving problem. Police attending the checkpoints found that many drunk individuals asked a sober spouse or companion to drive instead. Taxi companies reported a substantial increase in business from intoxicated persons who had been deterred from driving. Furthermore, some groups chartered buses or other vehicles to transport revelers. The prospect of being stopped at a roadblock thus convinced some intoxicated individuals to find alternate means of transportation."

12. Alternatives to Sobriety Checkpoints.

Closely connected to the factor of effectiveness of sobriety checkpoint procedures is the existence and effectiveness of other less intrusive procedures to reduce drunk driving. In *Delaware* v. *Prouse*, *supra*, 440 U.S. at page 659 the court was considering the constitutionality of spot checks by roving patrols without probable cause or reasonable suspicion to detect unlicensed drivers. The court observed: "Given the alternative mechanisms available, both those in use and those that might be adopted), we are unconvinced that the incremental contribution to highway safety of the random spot check justified the practice under the Fourth Amendment." The court then stated: "The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations." In *State* ex rel. *Ekstrom* v. *Justice Court*, *supra*, 663 P.2d at page 996 the court noted that the record was silent on whether the drunk driving roadblocks were more effective in dealing with the problem than the traditional roving patrols acting on reasonable suspicion. The concurring opinion was of the view that sobriety checkpoints with adequate safeguards could be justified by their deterrent value rather than just for their investigative value, but agreed that the Kingman roadblocks did not pass constitutional muster.

In *People* v. *Hyde*, *supra*, 12 Cal.3d at 167 the court noted that "it is doubtful that any other canvassing technique would achieve acceptable results. Little can be done to deter the hijacker once he has successfully boarded the airplane, and as yet no unerringly accurate procedure has been devised to restrict pre-departure searches only to those who are potential hijackers."

It is readily apparent that the factors discussed above interrelate with one another. The location, timing and method of operation of sobriety checkpoints all affect safety, anxiety and fear generated, and their effectiveness. By enumerating the factors we

do not mean to suggest that each is indispensable or that each will carry the same weight in the Fourth Amendment balancing process. After enumerating the relevant factors in *Kansas* v. *Deskins*, *supra*, 673 P.2d at page 1185 the court observed: "Not all of the factors need to be favorable to the state but all which are applicable to a given roadblock should be considered. Some, of course, such as unbridled discretion of the officer in the field, would run afoul of *Prouse* regardless of other favorable factors.

The discussion of the relevant factors and the cases make it clear that considerable planning and preparation is necessary to the operation of a successful sobriety checkpoint. This should commence with high level management and policy-making officers and personnel. The location and timing of the checkpoints should be carefully chosen, preferably with statistical verification that they correlate with high incidence of drunk driving. The methods and procedures to be used should be spelled out in detail so that little discretion is left to the officers conducting the checkpoint. Care must be taken to assure the safety of motorists and that traffic is not allowed to back up. Sufficient personnel and equipment must be provided to fully implement the plans. All of the foregoing should be fully documented so that it may be presented to the court to justify any arrests that may be made. To establish the effectiveness of the operation, the actual operation of the checkpoint should be monitored and records kept of the total number of stops made, the number of secondary detentions made and the number of arrests that resulted.

The foregoing discussion has focused on the Fourth Amendment and its balancing test to determine the reasonableness of a seizure or search. Article 1, section 13 of the California constitution is written in language nearly identical to the Fourth Amendment.[4] In the past the California courts have applied broader prohibitions in search and seizure practices than the United States Supreme Court under the doctrine of independent state grounds, i.e. by applying article 1, section 13 construed more broadly than the corresponding provision of the Fourth Amendment has been construed by the United States Supreme Court. (See *People* v. *Superior Court (Kiefer)* (1970) 3 Cal.3d 807.) However, in 1982 the people added section 28 to article 1 of the California Constitution, the so called "Victims' Bill of Rights." Subdivision (d) of that section entitled "Right to Truth in Evidence" prohibited the exclusion of relevant evidence in criminal cases. In the case of *In re Lance W.* (1983) 149 Cal.App.3d 838, the Court of Appeal held that the Truth-in Evidence provision abolished the use of independent state grounds to exclude evidence from criminal proceedings and that where evidence would be admissible

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[4] Article I, section 13 provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

under decisions of the United State Supreme Court, California courts no longer have authority to suppress it. The California Supreme Court granted a hearing in *In re Lance W.*, thus vacating the decision of the Court of Appeal and we must await the Supreme Court's decision to learn how article 1, section 28 affects California's independent state grounds doctrine in search and seizure cases.

California courts have already upheld that constitutionality of checkpoints stops without individualized suspicion (1) to inspect the mechanical condition and equipment of vehicles for traffic safety purposes; (2) to search prospective airplane passengers for weapons and explosives as an air safety measure; and (3) to inspect vehicles entering the state for agricultural pests to protect California agriculture. It seems likely they would also approve the use of sobriety checkpoints conducted with safeguards minimizing the intrusion on motorists to reduce the carnage on our highways caused by intoxicated drivers. We therefore conclude that California law enforcement agencies may lawfully utilize checkpoints in the detection and apprehension of persons driving under the influence of intoxicating substances if sufficient safeguards are taken to minimize the intrusion on motorists.

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