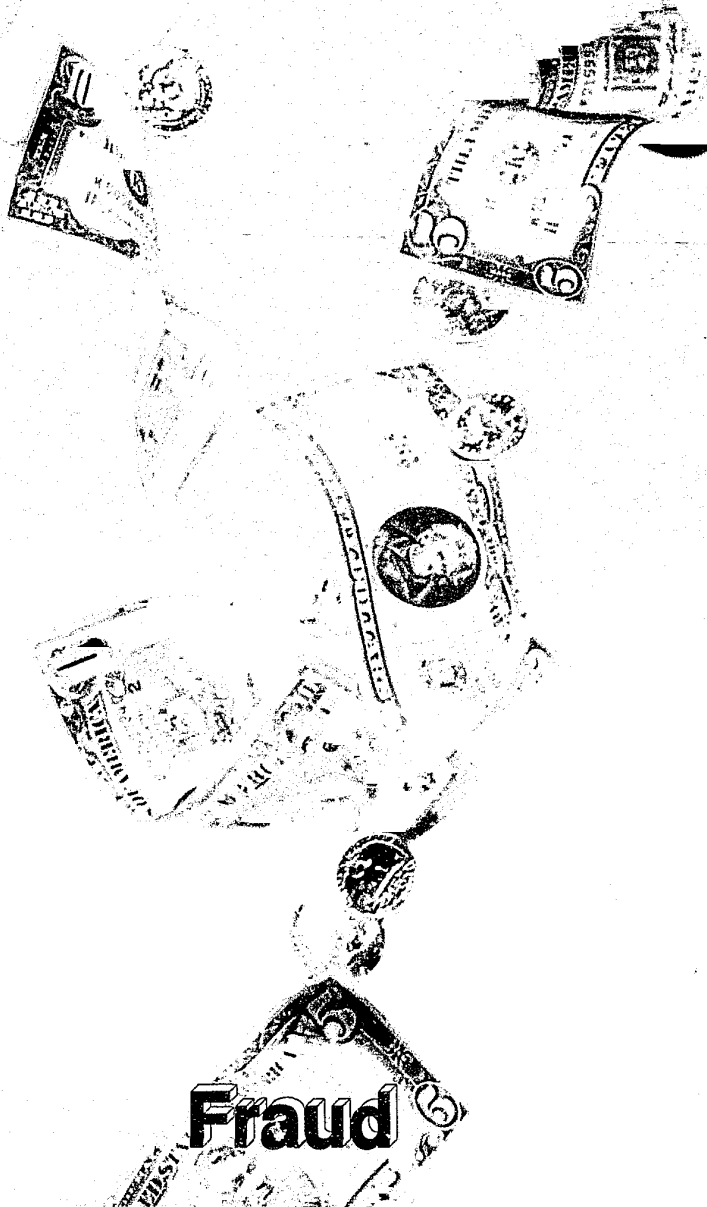




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**Fraud**

# FBI Law Enforcement

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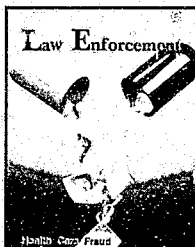
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**Cover:** Health care fraud directly challenges law enforcement. This issue focuses on law enforcement's concerted efforts to strategically address this crime problem. (Cover photo © 1992, M. Simpson, FPG International Corp.)

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William S. Sessions, Director

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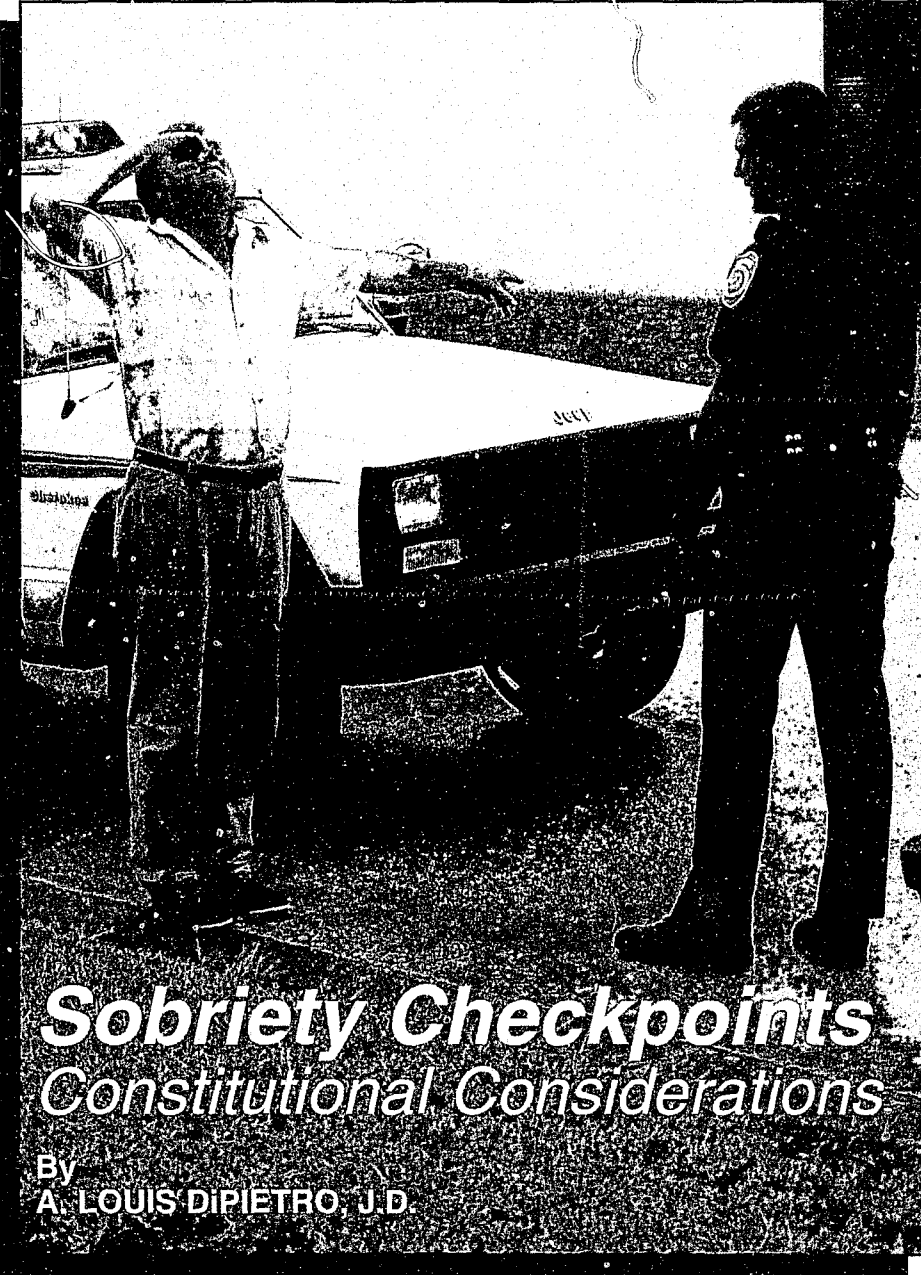
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Photo by Kathy L. Morrison



# Sobriety Checkpoints Constitutional Considerations

By  
A. LOUIS DIPIETRO, J.D.

Assume that your community experienced a spate of alcohol-related auto accidents during the past year, several of which involved fatalities or serious injuries. Also assume that the police department has come under mounting pressure to "do something" to get drunk drivers off the road. Although special vigilance for drunk

driving violators during routine patrol produced some driving-under-the-influence (DUI) arrests, a high alcohol-related accident rate continues unabated. Therefore, the department considers implementing a sobriety checkpoint program to attack this stubborn problem.<sup>1</sup>

This article addresses general fourth amendment principles appli-

cable to roadblock stops in the context of *Michigan Department of State Police v. Sitz*,<sup>2</sup> in which the U.S. Supreme Court approved a sobriety checkpoint. Specific recommendations relevant to checkpoint legality are offered to ensure that sobriety checkpoints comply with fourth amendment reasonableness standards.

## FOURTH AMENDMENT PRINCIPLES GOVERNING ROADBLOCK STOPS

When police stop a vehicle and detain its occupants, a fourth amendment seizure occurs, regardless of the reason for the stop or the length of the detention.<sup>3</sup> Courts determine the reasonableness of any seizure by balancing the intrusiveness of that seizure against its promotion of legitimate governmental interests.<sup>4</sup>

As a general rule, police may not conduct an investigatory stop of a vehicle without individualized or founded suspicion that the occupants are involved in criminal activity. However, roadblock stops designed to address special governmental needs, such as license and sobriety checks, can be deemed constitutionally reasonable in the absence of individualized suspicion.<sup>5</sup> In determining whether a particular sobriety checkpoint seizure is constitutional, courts employ a three-prong balancing test that involves a weighing of 1) the gravity of the public concerns served by the seizure, 2) the degree to which the seizure advances the public interest, and 3) the severity of the interference with individual liberty.<sup>6</sup>



SA DiPietro is a legal instructor at the FBI Academy.

“  
**Any sobriety checkpoint stop should be carried out pursuant to specific departmental guidelines that carefully limit officer discretion and the degree of intrusion of motorists' liberty.**  
”

## **SUPREME COURT APPROVES SOBRIETY CHECKPOINTS**

In *Michigan Department of State Police v. Sitz*,<sup>7</sup> the U.S. Supreme Court upheld the constitutionality of a sobriety checkpoint.<sup>8</sup> In that case, the director of the Michigan Department of State Police appointed State and local police officials, prosecutors, and transportation researchers from the University of Michigan to a Sobriety Checkpoint Advisory Committee, which created guidelines governing site selection, publicity, and police procedures for conducting sobriety checkpoints.

Under the guidelines, checkpoints would be set up at selected sites, and all drivers passing through the checkpoints would be stopped and briefly examined for signs of intoxication. Drivers would be allowed to proceed unless checkpoint officers detected signs of intoxication. In these cases, drivers would be directed out of the traffic flow for a license and registration check, and if warranted, further sobriety tests. If the tests suggested intoxication, an arrest would be made.

Pursuant to these guidelines, the checkpoint at issue in *Sitz* was operated for 1 hour and 15 minutes, during which the State police stopped 126 individuals for an average delay of 25 seconds each. Officers detained two drivers for field sobriety testing, one of whom they arrested for DUI. A third motorist, who drove through the checkpoint without stopping, was pulled over by an officer in an observation vehicle and arrested for DUI.

The two DUI arrests amounted to approximately 1.5 percent of the stopped drivers. To analyze the constitutionality of the sobriety checkpoint in *Sitz*, the Supreme Court applied the three-prong balancing test, which focused on 1) the gravity of the public concerns addressed by the checkpoint, 2) the effectiveness of the checkpoint, and 3) the severity of the checkpoint's interference with individual liberty.<sup>9</sup>

### **Gravity of Public Concerns**

The Court found a significant State interest in reducing drunk driving based on the legion of media reports of alcohol-related death and mutilation on the Nation's roads and

statistics comparing the slaughter on the highways to battlefields. The Court concluded that the magnitude of the problem and the State's interest in eradicating it could not seriously be disputed.

### **Checkpoint Effectiveness**

The Michigan courts examined the degree to which the checkpoint advanced the public interest in getting drunk drivers off the highway and concluded that it failed the "effectiveness" prong. The Supreme Court, however, held that although experts in police science might disagree over which method of apprehending drunk drivers is most effective, the choice of implementation should be with law enforcement officials who have the understanding of, and the responsibility for, the allocation of limited police resources. The Court considered the 1.5 percent arrest rate (two drivers out of 126 vehicles stopped) adequately demonstrated that the checkpoint advanced the State interest and was a reasonable law enforcement technique to combat a serious public danger.

### **Severity of Interference With Individual Liberty**

To measure the severity of the checkpoint's interference with personal liberty, the Court examined the level of "objective" and "subjective" intrusion on the motorist. The Court assessed the objective intrusion by examining the duration of the seizure and the intensity of the investigation. Except for differences in the nature of the questions asked, the Court found the level of objective intrusion of the *Sitz* sobriety checkpoint to be the same as highway checkpoints for detecting

illegal aliens, which the Court previously approved.

The subjective intrusion of a checkpoint is gauged by its potential to generate fear and surprise in a motorist. Obviously, a motorist who has recently been drinking would naturally experience surprise and fear upon encountering a DUI roadblock. However, the Court cautioned that "the 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop."<sup>10</sup>

The Court found, by analogy, the level of subjective intrusion involved in a checkpoint stop to be appreciably less than in a roving patrol stop. The Court reached this finding because a motorist approaching a traffic checkpoint 1) can see that other vehicles are also being stopped, 2) may not be surprised because of prior publicity regarding the checkpoint's location, 3) can see visible signs of the officer's authority, and 4) is much less likely to be frightened or annoyed or have the substantial anxiety often generated from a roving patrol stop.<sup>11</sup>

#### **SPECIFIC RECOMMENDATIONS RELEVANT TO CHECKPOINT LEGALITY**

A department desiring to establish a sobriety checkpoint program should carefully consider the following recommendations. These recommendations help to ensure that any sobriety checkpoint challenged in the courts will withstand

scrutiny under fourth amendment reasonableness standards.<sup>12</sup>

#### **Establish Specific Operational Guidelines**

Since most DUI roadblock stops are made on a suspicionless basis, they should be carried out pursuant to written departmental guidelines that explicitly set out procedures directing officers' conduct at the checkpoint. The guidelines should be promulgated by high-ranking law enforcement or governmental officials who have the ultimate responsibility for managing and allocating police resources.<sup>13</sup> A predicate to the guidelines should recite the severity of the drunk driving problem and set out the goals and specific objectives of the sobriety checkpoint program.

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**...written guidelines for  
conducting DUI  
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”

#### **Limit Officer Discretion**

The written departmental guidelines for conducting DUI roadblock stops should set forth specific rules governing the who, when, where, and how for setting up and operating a sobriety checkpoint. These guidelines should significantly minimize officer discretion to ensure that an individual motorist is not subject to an arbitrary stop.

The lack of such policy constraints on an officer's decision to

stop a particular motorist substantially increases the likelihood of a successful judicial challenge.<sup>14</sup> For example, the guidelines should set forth specific stopping procedures, such as every vehicle, every third vehicle, every vehicle until a backup of four occurs, or some similar objective criteria, so that the officers operating the roadblock have limited discretion concerning which vehicles to stop.

#### **Establish Objective Site Selection Criteria**

The location of DUI roadblocks should not be left to the discretion of officers in the field, but instead, should be decided by management officials responsible for the allocation of limited enforcement resources. For example, in *Hall v. Commonwealth*,<sup>15</sup> the Court of Appeals of Virginia invalidated a traffic checkpoint despite departmental guidelines that 1) limited troopers discretion in choosing a site to 1 of 54 locations in the county previously approved by the first sergeant, 2) permitted troopers to conduct such details only when assigned by a supervisor; each week, one or two troopers were ordered to conduct a checkpoint, and 3) permitted individual troopers in their sole discretion to determine the time for conducting the checkpoint based on work-related criteria.

The court was critical of the fact that not only was the time left to troopers' discretion but also that the troopers could select from 1 of 54 sites. This was not an effective limitation on officer discretion, since a police officer who decided to stop a particular person arbitrarily could do so within these guidelines by

ascertaining when that person would travel through a particular intersection and establishing a roadblock accordingly. Thus, the court held that even though the guidelines did contain some limitations on the exercise of officer discretion, the considerable discretion left to officers concerning the time and location of the checkpoint exceeded the limitations permitted by law.

### Notify the Public of Sobriety Checkpoint Program

Public notice of the use of DUI roadblocks serves two purposes. First, public awareness that law enforcement intends to employ sobriety checkpoints might discourage some intoxicated persons from driving, which should be a primary goal of the program. Second, advance publicity in the form of press releases, public notices, and media announcements will reduce the amount of anxiety felt by motorists who encounter a DUI roadblock.

The notice need not specify the precise time and location of the roadblock. Although this lack of specificity may engender some element of surprise for drivers encounter-

ing a checkpoint, public notice that a sobriety checkpoint program is in effect and the concomitant potential for being stopped at a checkpoint should substantially diminish any anxiety caused.<sup>16</sup>

For example, in *Christopher v. State*,<sup>17</sup> a Georgia appellate court considered a prior warning as an important factor in upholding the constitutionality of a sobriety checkpoint. The decision to set up the checkpoint on a particular road was made only after officers had been called at 11 p.m. to investigate a complaint of a loud party at a residence on that road. After police warned the host of the party that drivers leaving his house would have to pass through a sobriety checkpoint, all vehicles traveling that road past the checkpoint for the next two hours were stopped, including one operated by Christopher, who was a guest at the party.

The court held that it was not unreasonable to locate a roadblock where drunk drivers would be expected, since the purpose of such roadblocks is to deter drunk driving and to arrest those who choose to drive while intoxicated. The court noted approvingly that officers

actually warned the host of the party of the checkpoint prior to its implementation.

### Narrow the Scope of the Intrusion

#### *Duration*

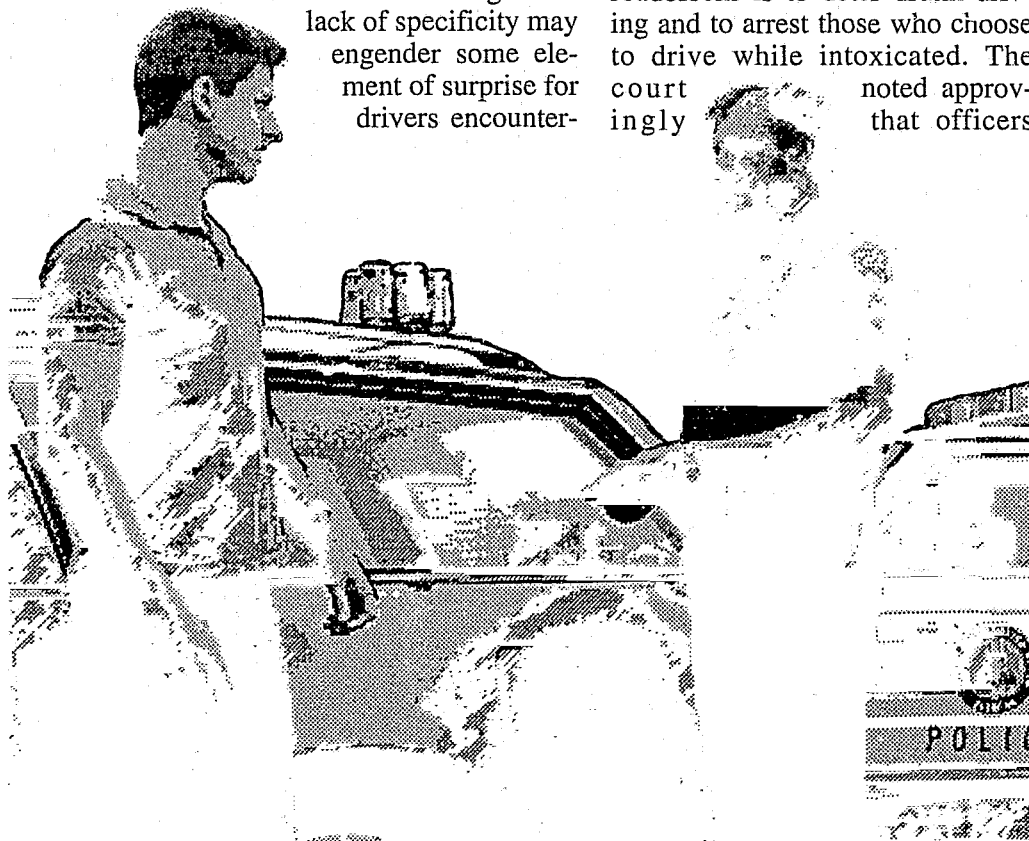
The lawful stop of a motorist at a validly constituted sobriety checkpoint must be limited in scope to the objectives of deterring and apprehending drunk drivers. The duration of the stop should last no longer than necessary to ascertain indications of intoxication, with the average stop lasting 2 to 3 minutes.<sup>18</sup>

#### *Questioning*

Moreover, officer discretion to question a motorist should be circumscribed. Inappropriate questioning about matters unrelated to drunk driving increases the subjective intrusion and may engender fear and resentment in otherwise law-abiding citizens, who expect to be detained briefly for the sole purpose of determining their sobriety.<sup>19</sup>

#### *Intrusiveness*

Finally, departmental guidelines should limit unnecessary intrusions on a motorist's liberty and ensure uniformity in the investigative techniques employed, such as when to require drivers to produce their license and vehicle registration, answer certain questions, or perform other conduct. The Court in *Sitz* suggests that officers may be granted limited discretion to send certain vehicles selectively to secondary areas out of the traffic flow for expanded field sobriety tests, based on objective



criteria that restricts the officer's discretion.<sup>20</sup>

### Establish Procedures for Handling Avoidance Maneuvers

A policy decision should be made in advance and set forth in departmental guidelines concerning whether and under what circumstances officers should pursue and detain a motorist who deliberately avoids the checkpoint without violating any traffic law. Some courts hold that avoidance of confrontation with the police at a checkpoint does not, without more, create reasonable suspicion to justify an investigatory stop.<sup>21</sup> These courts follow the rule that to justify the stop of a vehicle *not passing through* a roadblock checkpoint, the officer must have reasonable and articulable suspicion that the occupants are engaged in criminal activity.

Some courts have held that DUI roadblock guidelines need not provide an opportunity for motorists to avoid the checkpoint. These courts would likely uphold a sobriety checkpoint program that alerts motorists that all vehicles coming within a reasonable area of proximity to the checkpoint will be stopped, if necessary, by a police pursuit vehicle.<sup>22</sup>

Other courts analyze the specific facts of each case to determine whether avoidance of a roadblock constitutes reasonable suspicion in that particular case.<sup>23</sup> In view of this diversity of opinion in the courts, police administrators would be well advised to consult with their legal advisor and prosecutor before establishing departmental policy for handling avoidance maneuvers as part of a sobriety checkpoint program.

### CONCLUSION

Although DUI roadblock stops constitute a fourth amendment seizure, the Supreme Court in *Sitz* approved their use without a showing of individualized suspicion, based on a balancing of governmental and individual interests.<sup>24</sup> Any sobriety

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checkpoint stop should be carried out pursuant to specific departmental guidelines that carefully limit officer discretion and the degree of intrusion on motorists' liberty. Sobriety checkpoints operated in accordance with the foregoing principles provide a powerful tool in the law enforcement arsenal to both deter and apprehend motorists who choose to drive the public roads while intoxicated. ♦

#### Endnotes

<sup>1</sup> National statistics of DUI accidents reveal that many people are willing to take the risk of driving under the influence of alcohol despite the fact that they are more likely to drive carelessly, resulting in severe injury or death, apparently because they believe there is only a slight chance of causing an accident. It is possible that an individual, who is not inhibited by the fact that particular acts are against the law and demand stiff sentences, may be inhibited by the very real possibility of

detection. *Jones v. Murray*, 763 F.Supp. 842 at 846, n.7 (W.D. Va. 1991).

<sup>2</sup> 110 S.Ct. 2481 (1990).

<sup>3</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>4</sup> *Id.* at 654. For a pre-*Sitz* discussion of drunk driving roadblocks, see Campana, "The Constitutionality of Drunk Driving Roadblocks," *FBI Law Enforcement Bulletin*, July 1984.

<sup>5</sup> For cases involving other special government needs justifications, see *New Jersey v. TLO*, 469 U.S. 325, 351 (1985) (school searches); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (search of probationer's home); *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 619 (1989) (drug testing railroad workers); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing Customs Service employees).

<sup>6</sup> *Brown v. Texas*, 443 U.S. 47 (1979).

<sup>7</sup> 110 S.Ct. 2481 (1990).

<sup>8</sup> This article uses the terms "DUI roadblock" and "sobriety checkpoint" interchangeably to refer to police stops of traffic at fixed locations to check briefly for indications of drunk driving.

<sup>9</sup> *Sitz* addresses only the initial stop of each motorist passing through the checkpoint and the associated preliminary questioning and observation by checkpoint officers. The Court cautioned that detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.

<sup>10</sup> 110 S.Ct. at 2486.

<sup>11</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>12</sup> Judicial disagreement on the legality of roadblocks for purposes other than identifying drunk drivers is beyond the scope of this article. In *State v. Everson*, 474 N.W. 2d 695 (N.D. 1991), the court held the State could validly conduct a checkpoint for the purpose of apprehending drunk drivers on the grounds it is a societal harm at least equal in magnitude to drunk driving. However, in *Galberth v. United States*, 590 A.2d 990 (D.C. Ct. App. 1991), the court said police may not use roadblocks to make suspicionless stops to detect crimes related to "violence, drugs and guns."

<sup>13</sup> Sobriety checkpoints were invalidated by the Texas Court of Appeals in two cases, because the guidelines were not the product of a legislatively developed scheme. *King v. State*, 816 S.W.2d 447 (Tex. App. 1991) and *State v. Wagner*, 821 S.W.2d 288 (Tex. App. 1991).

<sup>14</sup> See, e.g., *United States v. Walker*, 941 F.2d 1086 (10th Cir. 1991).

<sup>15</sup> 406 S.E.2d 674 (Va. App. 1991).

<sup>16</sup> See *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (suspicionless random drug testing—notice is a relevant consideration, and in a particularly close case, could help tip the scales.)

<sup>17</sup> 413 S.E.2d 236 (Ga. App. 1991).

<sup>18</sup> While the average delay in *Sitz* was 25 seconds, lower courts have approved average delays in the 2- to 3-minute range. See *Chock v. Commissioner of Public Safety*, 458 N.W.2d 692 (Minn. Ct. App. 1990) (2-3 minutes); *People v. Rister*, 803 P.2d 483 (Colo. 1990) (3 minutes); *Cahill v. State*, 595 So.2d 258 (Fla. App. 2 Dist. 1992) (3-4 minutes).

<sup>19</sup> In *United States v. Walker*, 941 F.2d 1086 (10th Cir. 1991), the court held such questioning to be more than a "mere inconvenience" and declared the detention unreasonable under the fourth amendment.

<sup>20</sup> 110 S.Ct. at 2485.

<sup>21</sup> See, e.g., *State v. Powell*, 591 A.2d 1306 (Me. 1991) (no reasonable and articulable suspicion arose from officer's observation of a vehicle turning around 70 yards before the roadblock).

<sup>22</sup> *State v. Hester*, 584 A.2d 256 (N.J. Super A.D. 1990).

<sup>23</sup> See, e.g., *State v. D'Angelo*, 605 A.2d 68 (Me. 1992); *State v. Paterson*, 582 A.2d 1204 (Me. 1990).

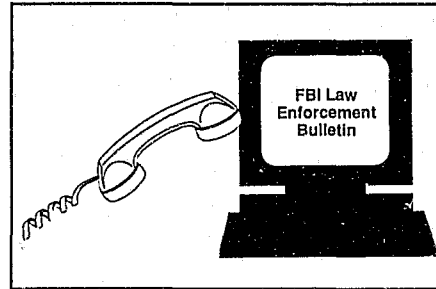
<sup>24</sup> After the U.S. Supreme Court found the sobriety checkpoint in *Sitz* to be constitutional, the Michigan Court of Appeals decided that the Michigan constitution provides greater protection against suspicionless stops at sobriety checkpoints than does the fourth amendment. Accordingly, the Michigan court held that the roadblock in *Sitz* violated the State constitution, which requires "some facts constituting the basis for a particularized suspicion" to justify an investigative stop of a vehicle and that suspicionless stops at drunk driving roadblocks are impermissible under State law. *Sitz v. Michigan Department of State Police*, 485 N.W.2d 135 (Mich. App. 1992).

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*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

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