IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	
	*	**Criminal No. 99-1242 JKB** **(Magistrate Judge Gauvey)**
CHRISTOPHER LESTER	*	

* * * * *

MOTION IN REPLY TO GOVERNMENT'S MOTION IN OPPOSITION
TO DEFENDANT'S MOTION TO SUPPRESS TANGIBLE AND DERIVATIVE EVIDENCE

The Defendant, through counsel James Wyda, Federal Public Defender for the District of Maryland, and Kathryn Frey Balter, Assistant Federal Public Defender, respectfully requests that any tangible or derivative evidence seized or statements made be suppressed on the ground that the stop of defendant's vehicle was unconstitutional in violation of the Fourth Amendment to the U.S. Constitution.

Summary of the Argument

The issue presented in this case is whether reasonable suspicion existed to justify a stop of Mr. Lester's vehicle after he made a safe, legal u-turn approximately 1,500 feet from a gate check. The determination of whether reasonable suspicion existed turns on the totality of the circumstances and is made through an objective lense. However, the government asks the Court to adopt and apply a per se rule, to wit, that a legal "turn made to avoid a gate check," by itself, provides reasonable suspicion to implement a Terry stop.[1] 392 U.S. 1 (1968). This Court should reject the government's

[1] The government's use of the word "avoid" assumes too much. Whether it is objectively reasonable to infer that the turn was made to "avoid" detection of criminal wrongdoing will be decided by the Court in making its ultimate reasonable suspicion determination. For reasons discussed herein, there did not exist objective, particularized facts which could reasonably

proposed bright line rule because it directly conflicts with the Supreme Court's consistent pronouncements that, "[t]he concept of reasonable suspicion . . is not readily, or even usefully, reduced to a neat set of legal rules," but must be determined by looking to "the totality of the circumstances -- the whole picture." United States v.Cortez, 449 U.S. 411, 417 (1981). Moreover, in Illinois v. Wardlaw, the Supreme Court refused to announce a per se rule, consistent with the historic teachings of the Fourth Amendment reasonable suspicion analysis. __ U.S. __, 120 S.Ct. 673 (2000). The concurrence underscored that, notwithstanding each parties' request that it do so, the majority "wisely" refused to endorse a per se rule within the context of a reasonable suspicion analysis. Id. at 677. Consistent with the Supreme Court's teachings, the defense does not ask the Court to apply a per se rule -- that a safe, legal u-turn before a gate check does not give rise to reasonable suspicion -- but rather, simply asks the Court to find that an application of the settled Fourth Amendment jurisprudence to the specific facts of this case results in a finding that the constitutional requirements of reasonable suspicion were not met here, that the stop was therefore unconstitutional, and that any evidence seized as a result be accordingly suppressed.

In support of this position, the defendant relies on an application of the following legal principles to the case at hand: (1) settled Fourth Amendment jurisprudence; (2) factors announced by state courts which have resolved the identical issue; and (3) the United States District Court for the District of Maryland's decision in United States v. Beckman, 3 F.Supp.2d 654 (D.Md. 1998). The defendant submits that Illinois v. Wardlaw does not apply to the facts of this case. 120 S.Ct. 673.

I. The Fourth Amendment to the United States Constitution

When an individual is the subject of an investigatory stop, the Fourth Amendment to the United States Constitution requires that the stop be justified by reasonable, articulable suspicion that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1. Reasonable suspicion requires specificity: "the

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suggest that the defendant made the turn for the purpose of "avoidance."

police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. A seizure is unreasonable, and hence unconstitutional, if it is based only on an "unparticularized hunch." Id.

It is well established that reasonable suspicion must be not only particularized but objectively reasonable. United States v. Cortez, 449 U.S. at 417 ("An investigatory stop must be justified by some objective manifestation that the person stop is, or is about to be, engaged in criminal activity."); INS v. Delgado, 466 U.S. 210, 217, 104 S.Ct. 1758, 1763(1984) ; Terry v. Ohio, 392 U.S. at 21. Terry made crystal clear that an officer's subjective good faith belief of criminal activity falls short of satisfying the protections of the Fourth Amendment. Id. at 21.

The totality of the circumstances is the gauge for determining whether law enforcement officers had a particularized and objective basis for suspecting that a person stopped may be involved in criminal activity. See Cortez, 449 U.S at 417. In Cortez, the Supreme Court stated that:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Id.. The "whole picture" consists of two elements, first an assessment of all of the circumstances and second, the process must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Id.

Each of these constitutional rules apply to an investigative stop of a motor vehicle. Delaware v. Prouse, 440 U.S. 648 (1979).

II. State Courts' Application of Fourth Amendment Principles to Factually Similar Cases

State courts' analyses are instructive on application of Fourth Amendment principles of reasonable suspicion to the facts in this case because the identical issue has been raised within the

analogous context of sobriety roadblocks. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (no reasonable suspicion necessary to conduct a sobriety roadblock). While the government cites eight state cases, there are a total of twenty which address the very issue presented in this case.

We disagree with the government's analysis of the case law. The government submits in its Memorandum that "the majority of states that have directly addressed the issue have determined that a turn made to avoid a road check does by itself provide reasonable suspicion to implement a Terry stop." See Gov't Memorandum at page 3. It asks this court to "join the majority of States which have determined that avoidance of a roadblock or gate check, by itself, provides an officer with reasonable suspicion to stop. . ." Id. The government is wrong on two counts: First, the cases cited by the government do not announce a per se rule. Second, the majority of states do not hold in the government's favor. A closer look at each of the cases the government cites, and at the entire body of law which applies to the issue at hand, discloses the erroneous interpretation suggested by the government.

A synthesis of each of the twenty state cases exposes two lines of analysis. First, a minority of states have improperly announced a per se rule; these states are split. Compare Commonwealth v. Scavello, 734 A.2d 386 (Pa. 1999) (a turn made before a roadblock, without more, is per se not reasonable suspicion); Pooler v. Motor Vehicles Division, 755 P.2d 701 (Or. 1988) (state concedes that u-turn upon approach to roadblock is per se not reasonable suspicion), with Boches v. State, 506 So.2d 254 (Miss. 1987) (turn before roadblock per se reasonable suspicion); Coffman v. State, 759 S.W.2d 573 (Ark. App. 1988) (same). We don't ask the court to apply either per se rule to this case because, as noted above, the Supreme Court has consistently rejected such rules in favor of a totality of the circumstances approach.

The second line of analysis exposed by a reading of the twenty cases is that the vast majority of the cases apply a totality analysis, consistent with the Supreme Court's reasonable suspicion jurisprudence. Of the sixteen cases which have analyzed this issue under the particiularlized, objective, totality of the circumstances test, nine held that reasonable suspicion did not exist to

justify the stop of an automobile and accordingly suppressed evidence seized in connection with the unconstitutional stop. See Bass v. Commonwealth, 525 S.E.2d 921 (Va. 2000) (no reasonable suspicion where, 500 feet from roadblock, motorist made a series of legal driving maneuvers the effect of which was to reverse direction (turned left into gas station parking lot, didn't stop, traveled through it, and reversed course), finding "reasons for which a driver may reverse direction other than to evade a traffic checkpoint are legion in number and are a matter of common knowledge and experience" thus, considering the totality, the most the government established was a "hunch" that the driver chose to avoid the checkpoint), and Murphy v. Commonwealth, 384 S.E.2d 125 (Va. App. 1989) (lawful turn made 350 feet from roadblock "does not give rise to a reasonable suspicion of criminal activity unless the driver's turn or action is coupled with other articulable facts, such as erratic driving, a traffic violation, or some behavior which independently raises suspicion of criminal activity"; lawful turn may have justified a "hunch" that the driver was in violation of the laws but standing alone doesn't rise to the necessary reasonable suspicion); State v. Lear, 722 A.2d 1266 (Me. 1998) (no reasonable suspicion where u-turn made 600 feet before roadblock finding that the "officer's suspicion of criminal activity based solely on defendant's u-turn was not objectively reasonable.") and State v. Powell, 591 A.2d 1306 (Me. 1991) (adopting the lower court's holding that no reasonable suspicion existed where left turn into driveway to reverse course made 2,100 feet before roadblock at 10:15 p.m., no erratic driving, and driver complied with command to stop, because "although the officer may have suspected that Powell reversed his direction to avoid the roadblock, the [lower] court did not find that suspicion reasonable. The court found that the most the officer reasonably could conclude from Powell's actions was that he turned around in the face of police lights and cruisers in the distance."); State v. Miller, 1996 WL 75344 (Tenn. App. 1996) (unpublished) (no reasonable suspicion where turn made 2,000 feet before the roadblock into another roadway, where officers saw no other unlawful conduct, because there was an absence of factors indicating defendant turned with intent to avoid roadblock; the officer's claim of "suspicious activity" based on "merely deduc[ing] that those who turned off the road were more likely violators"

was only a "mere hunch" under Terry and thus could not pass constitutional muster) see Attachment 1,and State v. Binion, 900 S.W.2d 702 (Tenn. App. 1994) (upon application of several factors, no reasonable suspicion where turn made into parking lot located 1,000 feet from roadblock because distance does not suggest driver turned to "intentional[ly]" avoid the roadblock, because no other driver error, and because the place where the roadblock was not "controlled" – a person could turn around in a safe, legal manner); Howard v. Voshell, 621 A.2d 804, 807 (Del. Sup. Ct. 1992) (no reasonable suspicion where, u-turn made 1,000 feet before a roadblock, because there existed "a lack of an identifiable way for a police officer to determine whether motorists 1,000 feet away from the checkpoint truly had notice of what lay ahead to be significant"; the court specifically refused to adopt a per se rule making clear that "each case must be decided on its own facts."); People v. Rockett, 594 N.Y.S.2d 568 (1992) (no reasonable suspicion where motorist exited onto public road before checkpoint, relying on the analysis of Murphy, Powell, and Howard); and State v. Talbot, 792 P.2d 489 (Utah App. 1990) (no reasonable suspicion where, at 1:00 a.m. after cresting a hill, car stopped abruptly and turned around about 1,400 feet from a roadblock consisting of two police cars stopped in the road with flashing lights, no signs giving notice as to what was occurring ahead, court found that at best the facts give rise to a "mere hunch.").

Of the sixteen cases properly analyzed under the "totality" test, six of the remaining seven result in a finding of reasonable suspicion.[2] See Steinbeck v. Commonwealth, 862 S.W.2d 912 (Ky.

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[2] In its motion, the government cites eight cases suggesting that they announce a per se rule that a turn before a roadblock automatically amounts to reasonable suspicion. However, only two of the eight cases stand for that proposition, see Boches v. State, 506 So.2d 254 and Coffman v. State, 759 S.W.2d 573, and for reasons set forth above, per se rules are contrary to the Supreme Court's reasonable suspicion jurisprudence. Of the remaining six cases it cites, five are analyzed under the totality of the circumstances standard which is requested by Mr. Lester, consistent with the Supreme Court's teachings. However, only four of the five result in a determination that reasonable suspicion existed. The fifth (which the government erroneously cites as ruling in its favor), State v. Hester, 584 A.2d 256 (N.J. Super. 1990), remands for more fact finding on the dispositive issue of whether actual notice was posted. The eighth case, Oughton, is irrelevant as set forth below. Thus, the six cases reviewed below consist of four of the cases cited by the government and two Virginia State cases not cited by the government. See

App. 1993) (reasonable suspicion where, at 3:15 a.m., approximately 300 feet before roadblock, driver made left turn onto unpaved country road which had no visible structures of housing); State v. Thill, 474 N.W.2d 86 (S.D. 1991) (reasonable suspicion "in this instance" where turn, comprised of a turnabout and a "subsequent circuitous route," which resulted in travel in the same direction as the roadblock, made 350 feet before the roadblock at 1:00 a.m.); Commonwealth v. Eaves, 408 S.E.2d 925 (Va. App. 1991) (over a dissent which would have held that the facts amounted only to an unparticularized hunch, the majority of the Court held that there existed reasonable suspicion where turn made 100 feet to 1/10th of a mile before roadblock because close proximity made it objectively reasonable to conclude purpose of turn was to avoid the checkpoint) and, Stroud v. Commonwealth, 370 S.E.2d 721 (Va. App. 1988) (reasonable suspicion where abrupt u-turn made 150 feet before a roadblock); Snyder v. State, 538 N.E.2d 961 (Ind. App. 1989) (reasonable suspicion where, after passing posted notice of a sobriety roadblock ahead, made turn approximately 300 feet from roadblock, which was well lit, at 1:00 a.m.); Smith v. State,515 So.2d 149 (Ala. App. 1987) (reasonable suspicion where, at 11 p.m., approximately 600 feet before roadblock, driver turned rapidly into a private driveway, stopped 50 feet from the house, turned off its lights but not the engine). The government cited Oughton v. Director of Revenue, State of Missouri, 916 S.W.2d 462 (1996) for the principle that a u-turn made before a roadblock constituted reasonable suspicion; however, this case did not announce any such rule and is not relevant to the issue at hand.[3]

Stroud v. Commonwealth, 370 S.E. 721 (Va. App. 1988) and Commonwealth v. Eaves, 408 S.E.2d 925 (Va. App. 1991).

[3] Oughton is not relevant to the issue at hand because it involved a civil matter to which the exclusionary rule did not apply, thus the legality of the initial stop was not analyzed. The issue in Oughton was whether a motorist's driver's license should be reinstated. The motorist avoided a roadblock after seeing a sign giving notice. Upon the stop the officer detected, among other things, the odor of alcohol. The only question in Oughton was whether, after the stop, there was probable cause to arrest the defendant for driving while intoxicated. Accordingly, while the U-turn was a valid factor with respect to whether probable cause to arrest existed, reasonable suspicion for the stop was not analyzed because the exclusionary rule did not apply.

In the final case, State v. Hester, 584 A.2d 256 (N.J. Super. 1990), where the motorist made a u-turn 3-400 feet from a roadblock, the Court remanded to the trial court on the dispositive issue of whether there existed posted notice.

Application of all sixteen of the cases analyzed under the totality of the circumstances standard support Mr. Lester's position that reasonable suspicion to stop his vehicle did not exist. While the "majority" of states have held that there exists no reasonable suspicion, the label "majority" or "minority" with respect to outcomes is misleading because it is not the number of states which have ultimately held one way or the other that is persuasive, rather it is the case by case assessment of the presence or absence of particularized factors which is persuasive. Although the outcomes of the different cases may be split, the process of reaching the outcome is the same. Thus, as set forth below, the factors which are extracted from each case and used in the process of assessment are critical in conducting a case specific evaluation of the instant case.

III. Factors Gleaned From the Case Law Which are Relevant to Making Reasonable Suspicion Determination Under the Particularized, Objective, Totality of the Circumstances Test

A host of factors are be distilled from the sixteen cases properly analyzed under the objective, totality of the circumstances test. The following factors provide guidance in applying the totality test in this case.

1. The Distance Between the Lawful Turn and the Roadblock or Gate Check

The distance between the lawful turn and the roadblock or gate check is a significant factor in making the reasonable suspicion determination. The distance is suggestive of whether it is objectively reasonable to infer the turn was indicative of guilt. The farther away a motorist is from the roadblock, the less objectively reasonable it is to infer that the turn was made out of a consciousness of guilt. For example, in Howard, in holding that there was no reasonable and articulable suspicion to justify the seizure of the defendant and the vehicle the court "consider[ed] the lack of an identifiable way for a police officer to determine whether motorists 1,000 feet away

from the checkpoint *truly had notice of what lay ahead to be significant*." 621 A.2d at 807 (emphasis added). Likewise, in Binion, the Court found that "the evidence did not did not establish specific and articulable facts upon which to base a reasonable suspicion that the defendant had *intentionally avoided* the roadblock to evade arrest or detection" where the motorist made a safe, lawful turn 1,000 feet before the roadblock. 900 S.W.2d at 706 (Tenn. 1994) (emphasis added). See also Miller, 1996 WL 75344 (no reasonable suspicion where turn made 2,000 feet before roadblock); Murphy, 384 S.E.2d 125 (350 feet); Bass, 2000 WL 237776 (550 feet); Lear, 722 A.2d 1266 (600 feet); Powell, 591 A.2d 1306 (2,100 feet); Talbot, 792 P.2d 489 (1,320 feet).

Conversely, the closer a motorist is to a roadblock, the more objectively reasonable it may be to infer the turn was made out of a consciousness of guilt. In Thill, the court found reasonable suspicion when, in combination with other factors, the motorist turned just 350 feet before the roadblock. 591 N.W.2d 86. See also Snyder, 538 N.E.2d 961 (reasonable suspicion where turn, in combination with other factors, made 300 feet from roadblock); Steinbeck, 862 S.W.2d 912 (300 feet); Smith, 515 So.2d 149 (600 feet); Eaves, 408 S.E.2d 925 (approximately 500 feet); Stroud, 370 S.E.2d 721 (150 feet); Hester, 584 A.2d 256 (3-400 feet). Of note is that in most of the cases where the distance between the turn and the roadblock is closer, reasonable suspicion is still not found unless coupled with other facts. See e.g., Steinbeck ,862 S.W.2d 912 (turn made onto unpaved country road which had no visible structures of housing); Smith, 515 So.2d 149 (rapid turn made into a private driveway, stopped 50 feet from house, turned off lights but not engine); Hester,584 A.2d 256 (remand to determine whether notice given).[4]

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[4] The law governing when a "flight" jury instruction is appropriate dovetails with the inference that may be drawn from the distance between the lawful turn and the roadblock. Under certain circumstances, a jury may be instructed that it may infer consciousness of guilt from a defendant's flight. The Fourth Circuit has held that "the inference that one who flees from the law is motivated by consciousness of guilt is weak at best . . ." United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976). To support a flight instruction the government must "ensure that each link in the chain of inferences leading to that conclusion is sturdily supported." United States v. Beahm, 664 F.2d 414, 420 (4th Cir. 1981). The chain of inferences is incomplete 'where

2. Actual Posted Notice of The Roadblock

Not uncommonly, notice of a roadblock is posted giving motorists advance warning of what lay ahead. Like the distance between the turn and a roadblock, whether notice was posted is relevant to whether it would be objectively reasonable to infer guilt, and thus support articulable, particularized reasonable suspicion. In Hester, the issue of posted notice was dispositive and required remand for further fact finding where the motorist made a turn 3-400 feet from a roadblock. 584 A.2d 256. In Snyder, reasonable suspicion was found where a turn was made 300 feet from a roadblock, after passing posted notice. 538 N.E.2d 961. Conversely, in Howard, the court found that a turn made 1,000 feet from a roadblock was too far to give rise to objective belief that motorist know what lay ahead for turn to be significant. 621 A.2d at 807. In Talbot, there existed no reasonable suspicion where, among other things, there was no sign giving notice of what lay ahead. 792 P.2d 489.

3. Unsafe, erratic driving or other driver error

A turn coupled with unsafe, erratic driving, or other driver error would give rise to reasonable suspicion. In Smith, reasonable suspicion existed where motorist stopped and turned off lights but not his engine after he make a rapid turn into a private driveway. 515 So.2d 149 . See also Stroud, (abrupt turn). A safe turn not made in conjunction with any unsafe or erratic driving has been found not to constitute reasonable suspicion to conduct a stop. See Powell, supra (no erratic driving); Bass supra (no violation of traffic or other law); Miller supra (no unlawful conduct); Murphy supra (no driver error); Lear supra (safe driving); Binion supra (manner of turn relevant; nothing unlawful or erratic, therefore, under the totality, no reasonable suspicion).

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a defendant flees after "commencement of an investigation . . . of which the defendant was unaware." Beahm, 664 F.2d at 419-420. In Beahm there was ample evidence that the defendant left the jurisdiction but there was no evidence that when he did he was aware that he was the subject of a criminal investigation. As discussed below and noted in footnote 1, the government's contention that Mr. Lester "turn[ed] to *avoid* a roadblock" (emphasis added) asks this Court to draw an inference not supported by the facts.

4. Police officer experience

Several cases give weight to an officer's inference based on his experience. Compare Binion, supra (no reasonable suspicion where nothing in police officer's personal experience led him to believe defendant was avoiding roadblock), with Steinbeck, supra (police officer experience is a factor supporting reasonable suspicion). The defense contends that this factor should not be relevant (though, in the instant case, no facts are present one way or the other) because it injects hunches, and non-objective factors into the analysis. See Terry, supra (the subjective good faith belief of an officer that a turn signifies criminal activity falls short of the protections of the Fourth Amendment; a mere hunch is not enough to constitute reasonable suspicion).

5. Other factors

Other suspicious behavior or circumstances may factor into the totality of the circumtances. See Steinbeck, supra (reasonable suspicion, where, among other things, turn made onto unpaved road with no visible structures); Thill, supra (reasonable suspicion where turn followed by motorist taking a circuitous route); Snyder, supra (reasonable suspicion where, among other things, area of roadblock well lit); Binion, supra (no reasonable suspicion where, among other things,location of turn was not controlled so that a motorist could turn around in safe, legal manner).

IV. Beckman

In United States v. Beckman, 3 F.Supp.2d 654 (D. Md. 1998), a United States District Court Judge for the District of Maryland held that a legal u-turn made 600 feet from the entrance gate to a federal facility (Aberdeen Proving Ground) was not reasonable suspicion or probable cause to conduct an investigatory stop. Accordingly, evidence that the defendant was driving while intoxicated was suppressed and the conviction which was entered upon a conditional plea of guilty was reversed. In the instant case the turn before the gate check was even less suspect that the turn in Beckman. In Beckman, at the place and time the motorist made the u-turn, it was clear that there was a gate through which the motorist had to pass. Here, at the time and place where Mr. Lester made the turn, it was not at all clear what lay ahead in the road. As in Beckman, in the instant case,

the legal u-turn made 1,500 feet from the police who were conducting a compliance check at Fort George G. Meade, should likewise be deemed to fall short of the requisite constitutional justification to effectuate a stop and the evidence obtained in connection with the illegal stop should be suppressed.

V. Wardlaw Does Not Apply to The Instant Case

In Illinois v. Wardlaw, 120 S.Ct. 673, the Supreme Court held that "headlong flight," in combination with other factors, formed reasonable suspicion to conduct a Terry stop. Defendant Wardlaw was seen standing next to a building in a high crime neighborhood holding an opaque bag. Upon seeing a caravan of four police cars, Wardlaw broke into "headlong flight" running through a gangway and an alley before he was cornered by police and stopped. Id. at 675. Wardlaw validated the use of "headlong flight" as an appropriate consideration in a reasonable suspicion determination. Wardlaw is inapposite to the instant case for two reasons.

First, there does not exist "headlong flight" in the instant case. See also Bass v. Commonwealth, 525 S.E.2d 921 (Va. 2000) (finding that Wardlaw did not apply to the effective u-turn made in Bass). "Headlong" is defined by The American College Dictionary: 1. headforemost; 2. hastily, rashly, without deliberation. The American Heritage Dictionary, 2nd College Edition, defines "headlong" as 1. impetuously; rashly. It further defines "impetuously" 1. characterized by sudden energy, action, or emotion; impulsive; 2. having or marked by violent force.

The u-turn in the instant case is not fairly characterized as "headlong flight." Rather, in the instant case, the defendant made a safe, legal u-turn. Had the defendant sped away, spun his wheels, turned in a reckless or unsafe manner, or otherwise driven in a manner tantamount to "headlong flight," then the Wardlaw flight factor might apply. However, Lester did not turn or otherwise drive or act in a rash manner or in a manner marked by violent force, sudden energy or rashly or without deliberation, thus the Wardlaw factor does not apply. Put differently, had defendant Lester been walking, his actions would not be akin to defendant Wardlaw's; a defendant in Wardlaw's position that turns around and walks away from the police would not be subjected to a Terry stop. See

Florida v. Royer, 460 U.S. 491 (1983) (when approached by the police, an individual has the right to ignore the police and go about his business).

Moreover, the u-turn in this case is not fairly characterized as "headlong flight" because such flight assumes flight *from* the police. In Wardlaw, the defendant was seen to make eye contact with the an officer in the last of four police cars traveling in a caravan through the neighborhood. It was only after such eye contact that the "headlong flight" occurred . For reasons discussed above, in the instant case there is no objective evidence that the defendant's turn was "flight" from the police with an intention to avoid detection of illegal conduct.

Second, even had Lester turned in a manner tantamount to "headlong flight," such flight is but one factor to be considered. Wardlaw did not announce a per se rule. Id. at 677. In Wardlaw, in addition to "headlong flight," the defendant was in a high crime neighborhood, holding an opaque bag, when he saw the police he ran through alleyways. Here, unlike Wardlaw, the defendant made a safe turn 1,500 feet from what we now know was a gate check, but what then could reasonably be deemed to have looked like a traffic accident or road work, which would not make the inference of flight an objectively fair one.

Significantly, in a very recent case on all fours with the instant one, Wardlaw was found not to be "implicated." In Bass v. Commonwealth, 525 S.E.2d 921, the defendant made a series of legal maneuvers, effectively a u-turn, at a point 500 feet from a roadblock. He committed no driver error. The officer in the "chase" car (like Sgt. Reid in the instant case) effectuated a stop solely on the basis of the turn. In finding that no individualized articulable suspicion existed to effectuate the stop, the Supreme Court of Virginia suppressed the evidence. In remarking on the applicability of Wardlaw, the Supreme Court of Virginia found that "[c]ontrary to the Commonwealth's assertion, the evidence in this case does not support a reasonable suspicion that Bass' maneuvers were conducted in such a manner as to constitute "headlong flight" from the police conducting the checkpoint. Accordingly, the recent decision [in Wardlaw], is not implicated here." Id., 925, fn. 3 (citations omitted).

VI. Application of the above Legal Principles to the Facts of the Instant Case Under a Particularized, Objective, Totality of the Circumstances Analysis Yields a Finding that Reasonable Suspicion to Execute the Stop Did Not Exist

Based on the Stipulation of Facts, we propose that the Court make the following factual findings. Defendant made a safe, legal u-turn1,500 feet from what we now was a gate check. However, a motorist in Mr. Lester's shoes who crested the hill was simply confronted with two police cars, one situated in the right lane and one in the breakdown lane, with lights flashing, and flares in the road. There was no permanent gate structure. In addition, no notice was posted alerting Mr. Lester to the fact that the police cars up ahead constituted a "roadblock" which would require him to interact with the police. The officer did not view Mr. Lester violate any traffic or other law. Mr. Lester complied with Sgt. Reids order to stop in an orderly and lawful manner.

Based on these proposed findings of fact, we propose that the Court make the following findings of law. No specific, individualized, articulable suspicion existed under the totality of the circumstances to justify the stop of Mr. Lester. In this case, a safe, legal u-turn made 1,500 feet from the gate check, absent notice alerting cars to what lay ahead, absent erratic driving or other driver error, does not rise to the level of suspicion required by Terry v. Ohio. At best it constitutes only a "mere hunch" which does not rise to a constitutionally acceptable level.

In this case, the distance between the turn and the "gate" alone, and in combination with the absence of posted notice of the purpose of the police cars, does not give rise to the objectively reasonable inference that the turn was made with the intention of avoiding police interaction because criminal activity was afoot. In Howard, where the turn was made 1,000 feet from police cars, lights, and flares, there was a "lack of a[] identifiable way for a police officer to determine whether motorists 1,000 feet away from the checkpoint truly had notice of what lay ahead to be significant." 621 A.2d at 807. In Powell, the court found that while the officer may have suspected that the defendant's u-turn 2,100 feet from the roadblock which bore no warning signs was to avoid detection, that suspicion was not "reasonable" because the most the officer reasonably could

conclude was that the motorist "turned around in the face of police lights and cruisers in the distance." 591 A.2d at 1308. Both of these cases are on all fours with the instant case where Mr. Lester made a turn 1,500 feet from police cars, without having received any notice as to the police cars' purpose, and support a finding of no reasonable suspicion. Thus, the distance between where Mr. Lester made the turn and the location of the police cars establishes that it is not objectively reasonable to conclude that criminal activity was afoot.

In addition to the significant distance between the turn and the gate check, the government's choice of phraseology, to wit, that the issue at hand is whether a "turn to avoid a roadblock" constitutes reasonable suspicion, must be scrutinized. As suggested above in footnote one and again in footnote five, its use of the word "avoid" assumes too much. By assuming the turn was made to avoid the gate check the government draws an inference without the necessary evidentiary support. It equates the turn with guilt-ridden flight. In essence, it asks the court to infer consciousness of guilt from what it deems to be "flight." Automatic attribution of guilt-ridden flight with a turn is erroneous. See Foutz, 540 F.2d 733; Beahm, 664 F.2d 414. Whether it is objectively reasonable to infer that the turn was made to "avoid" the gate check will be decided by the Court in making its ultimate reasonable suspicion determination.

Mindful of the principles underlying the appropriateness of a "flight" instruction as laid out in Foutz, supra, and Beahm, supra, it is clear that the government makes two erroneous assumptions which should not be given weight under the objective, particularized, totality of the circumstances standard. First, it assumes the turn was made with the specific intent to avoid or flee the roadblock. A turn must be assessed under all of the facts available to a reasonable police officer before any inference is drawn. The distance, whether notice is posted, the driver's control of the vehicle, are all factors that must be assessed *before* the worst inference of flight or avoidance is drawn. Applying these factors to this case does *not* support an objectively reasonable determination that the turn was made with the purpose of "avoiding."

Second, the government erroneously assumes that, even if the turn was made to avoid the

roadblock, that it was made out of a consciousness of guilt of criminal wrongdoing, and not due to an innocent factor. See Bass, 525 S.E.2d at 925 fn.3 (the reasons a motorist may turn are "legion in number"). Avoidance can occur for perfectly innocent reasons. In this case, when Mr. Lester made the lawful u-turn, there was not objectively reasonable evidence to establish the chain of inferences necessary to support the conclusion that he turned to "avoid" detection because criminal activity was afoot. Based on the distance between the place where the turn was made and the roadblock and the lack of posted notice, there are a host of equally inferable conclusions consistent with innocence, including the following: the police cars with lights flashing and flares in roadway gave rise to the belief that a motorist had come upon an accident and wished to avoid a delay; same gave rise to the belief that the road might be closed; that there might be a slowdown due to road work; that he was lost and needed to turn around; that he had no time to delay due to accident or road work because he was low on gas; or because he had to use the bathroom; that he intended to turn around before he even saw the police cars as he headed up the hill but could not turn until it was safe to do so, which was not until after he crested the hill; or, simply that he did not want to have contact with the police, for a myriad of other innocent reasons, including perhaps due to a prior bad experience, but not because he was engaged in criminal behavior. Accordingly, while distance between a turn and a roadblock is significant as an indicator of what inference can be fairly drawn by virtue of a turn, this factor must be carefully evaluated under a totality of the circumstances, and not in isolation, before drawing the most punitive inference of guilt.

In addition to the significant distance between the turn and the gate check and the absence of posted notice, there was also no speeding, reckless driving or other driver error in the instant case. Rather the only basis for the stop was the lawful u-turn. Unlike the defendant in Smith, 515 So.2d 149, who turned rapidly into a private driveway, stopped and turned off his lights but not his engine, and the defendant in Stroud, 370 S.E.2d 721, who made an abrupt turn, (both of whom were deemed to have stirred reasonable suspicion), Mr. Lester did not drive erratically or suspiciously. Like the defendants in Powell, 591 A.2d 130, Bass, 1000 WL 237776, and Miller, 1996 WL 73344, and a

host of other cases wherein the motorist did not drive erratically, Mr. Lester's act of making a u-turn 1,500 feet from a gate check does not, alone, constitute articulable reasonable suspicion.

Further, there were no other unusual factors present in this case. Unlike Steinbeck, 862 S.W.2d 912, where the turn was made into an unpaved road with no visible structures and no homes, and Smith, supra, where the defendant turned, stopped and shut off his lights but not the engine, Mr. Lester did not act in a strange or suspect way. In other words, Mr. Lester's actions did not serve to make reasonable any suspicion.

In summary, that there was a considerable distance between the turn and the "gate" (1,500 feet), that no notice was posted advising Mr. Lester as to what lay ahead, that Mr. Lester did not speed, or otherwise drive recklessly, that there were no other unusual or suspicion factors present in this case, and that there exist a wide array of inferences that can be drawn from the act of turning which are consistent with an innocent explanation, indeed they are "legion in number," Bass, 525 S.E.2d at 925, demonstrates why the stop of Mr. Lester was the product of an unparticularized "mere hunch," based on subjective beliefs and mere speculation. Accordingly, the suspicion was not reasonable and the stop was unlawful. The evidence must be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Stipulation of Fact and Motion In Reply To Government's Motion In Opposition To Defendant's Motion To Suppress Tangible and Derivative Evidence was delivered this 10th day of May, 2000 to Capt. Michael Mierau, Special Assistant United States Attorney, Office of the Staff Judge Advocate, 2257 Huber Road, Ft. Meade, Maryland, 20755.

_____
Kathryn Frey Balter
Assistant Federal Public Defender