DRUG INTERDICTION PROGRAMS: PRETEXT STOPS (CHECKPOINTS) VS. DRUG TRAPS

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I. INTRODUCTION

The extent of Fourth Amendment protection of freedom from unreasonable search and seizures has been a heavily contested legal issue for decades. The proper authority of police officials, acting in their capacity as enforcers of the law, to execute warrantless searches has provided rich debate and has produced notable judicial decisions. Due in large part to the, "War on Drugs," the constitutional authority of various circuits to regulate officials authority when effectuating traffic stops has been somewhat of a complex topic; but the way the courts analyze these issues, if not carefully decided, may have an adverse impact on our society. This case note details a case that demonstrates an example of this.

In the recent case, *United States v. Cotton*, Marvin Cotton challenged the discovery of the contraband located in his vehicle as a product of an unreasonable search and seizure procedure, which violated his constitutional rights arguing: (1) he was stopped after an inadequate claim that he violated a traffic law; (2) he was held for an unreasonable amount of time; (3) he was subjected to a search procedure that far exceeded the necessary intrusiveness; and (4) he was subjected to a search of his vehicle without a warrant and without consent.[1] The district court held in favor of the government by denying Cotton's motion to suppress.[2] However, just recently, the Fifth Circuit Court of Appeals reversed the district court's ruling and remanded the case for further proceedings.[3] The Fifth Circuit held that (1) the scope of Cotton's consent to the police officer's warrantless search of the vehicle extended only to finding and searching

[1] United States v. Cotton, 722 F.3d 271 (5th Cir. 2013).
[2] *Id*. at 274.
[3] *Id*. at 278.

limited confines, not to searching the entire car; (2) the officer impermissibly extended his meticulous search beyond the scope of consent; and (3) the fruit of the poisonous tree doctrine required suppression of not only the drugs, but also Cotton's inculpatory remarks made immediately on the heels of the officer's unlawful search and discovery of drugs.[4]

As Fourth Amendment jurisprudence, *Cotton* falls easily with the mainstream of Supreme Court and Fifth Circuit precedent. However, although *Cotton* is correctly decided, it nonetheless deferred to address a critical issue, which has been the subject of rich debate in various circuits across our nation. Cotton claimed that he was initially stopped after a faulty claim that he violated a traffic law, which was essentially set up by the police officer's trap of using an abandoned vehicle scheme to intercept Cotton.

This case note will focus on the question of whether the primary purpose of a stop should be a determinative factor in assessing the constitutionality of that stop. Particularly, whether police officials can set traps in order to effectuate a stop. In doing so, this case note will use the analogy of organized traps executed by police officials in the form of checkpoints and/or roadblocks set up with a primary purpose of catching drug offenders. This case note sets out the factual and procedural background to the issue presented in *Cotton* and details the reasoning of the majority opinion. In addition, this case note examines the court's analysis of the search and seizure issue in greater detail and the court's failure to confront the trap issue by outlining past treatment of many cases involving checkpoints/roadblocks set up with the primary purpose of catching drug offenders.

[4] *Id.*

II. UNITED STATES V. COTTON

A. Factual and Procedural Background

As part of an investigation on a suspected drug trafficker, Sgt. Fullbright of the Houston Police department conducted surveillance at a Comfort Inn in Houston, Texas.[5] While conducting surveillance, Sgt. Fullbright observed the defendant, Marvin Cotton ("Cotton") using a computer in the hotel lobby.[6] After Cotton left the computer, Sgt. Fullbright checked the computer history and noticed that Cotton attempted to book a flight from Houston to Atlanta four days later.[7] After further surveillance, Sgt. Fullbright noticed Cotton and another male exit the hotel in a vehicle with a Oklahoma license plate.[8] A computer check on the license plate uncovered that the car was a rental from Enterprise Rent-A-Car.[9] Sgt Fullbright contacted Enterprise and learned that Cotton rented the vehicle the day before and was scheduled for return three days later.[10] The computer check also uncovered that Cotton had prior convictions from drug trafficking.[11] Sgt. Fullbright followed the men as they traveled on Interstate Highway 10 east presumptively headed towards Georgia.[12] As he trailed the men, Sgt. Fullbright contacted Lt. Viator of the neighboring county's Sheriff's Office Highway Interdiction unit and warned him that Cotton was entering his jurisdiction.[13] "Sgt. Fullbright relayed his observations of Cotton's 'suspicious' behavior, that Cotton had prior drug trafficking

[5] United States v. Cotton, 2011 WL 6016451, at *1 (E.D. Tex. Nov. 7, 2011) *report and recommendation adopted*, 2011 WL 6016607 (E.D. Tex. Dec. 2, 2011) *rev'd and remanded*, 2013 WL 3329173 (5th Cir. July 2, 2013).
[6] United States v. Cotton, 2011 WL 6016451, at *1 (E.D. Tex. Nov. 7, 2011).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

criminal history, and the description of the vehicle to Lt. Viator."[14] After communicating with Sgt. Fullbright, Lt. Viator pulled over to the right shoulder of the eastbound lane of I-10 to check an abandoned vehicle.[15] Lt. Viator drove a police cruiser that was completely unmarked besides the "front and rear-mounted emergency lights."[16] Only the rear lights were activated while Lt. Viator inspected the abandoned vehicle.[17] While inspecting the abandoned vehicle, Lt. Viator observed Cotton pass him traveling at 70 mph in the lane closest to him.[18] "Under Texas Transportation Code § 545.157, all vehicles are required to vacate the lane closest to an emergency vehicle or slow down to 20 miles per hour below the posted speed limit when passing an emergency vehicle that has its emergency lights activated."[19] As a result of his observation, Lt. Viator stopped Cotton.[20] After three inquiries to search the vehicle, Cotton consented to the search of his luggage located in the vehicle.[21] Lt. Viator began searching the vehicle while another officer, who had recently arrived, guarded the men.[22] The search lasted in excess of forty minutes.[23] Squatting under the car, Lt. Viator noticed "loose screws and tool markings" on the door panel.[24] Prying back the door panel, Lt. Viator discovered a plastic wrapped bundle later determined to be crack cocaine.[25] Lt. Viator then signaled the other officer to arrest the men; however, Cotton fled on foot.[26] After a brief chase, Cotton was caught,

[14] *Cotton*, 2011 WL 6016451 at *1.
[15] *Id.* at 2.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 7.
[22] United States v. Cotton, 722 F.3d 271, 274 (5th Cir. 2013).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

arrested, and Mirandized.[27] Attempting to work out a deal with the officers, Cotton made several incriminating statements.[28]

B. The Majority Opinion

Judge Weiner's opinion for the Fifth Circuit began the Court's analysis with somewhat of a disclaimer regarding the justification of the stop, stating that:

> Although Cotton challenges the legality of the traffic stop from its inception as well as the reasonableness of its scope, we focus on his specific contention that the search exceeded the bounds of his limited consent when, instead of only searching his luggage, Viator exhaustively scoured the entire vehicle for contraband. As we conclude that Viator impermissibly extended the search beyond the scope of Cotton's consent, we need not consider whether other constitutional infractions occurred that might also require suppression of the discovered evidence.[29]

The court first addressed the scope of consent issue: whether the search impermissibly extended beyond the scope of Cotton's consent. The court used the objective standard of reasonableness in deriving its conclusion.[30] The court noted that "[t]he Supreme Court's standard, under *Florida v. Jimeno*, is 'that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'"[31] "'When conducting a warrantless search of a vehicle based on consent, officers have no more authority to search than it appears was given by the consent.'"[32] Thus, the court noted that "'it is important to take account any express or implied limitations or qualifications attending that consent, which

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[27] *Id.*
[28] *Id.*
[29] *Cotton,* 722 F.3d at 275.
[30] *Id*.
[31] *Id.* (*quoting* Florida v. Jimeno, 500 U.S. 248, 251 (1991)).
[32] *Id.* (*quoting* United States v. Garcia, 604 F.3d 186, 190 (5th Cir.2010)).

establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity.'"[33]

According to the court, although the parties in *Cotton* disputed "precisely how Cotton responded to Lt. Viator's first request for permission to search the car, they did not dispute that thereafter Lt. Viator asked twice more whether he could search the car" and "that Cotton replied both times that Lt. Viator could search [his] luggage."[34] In addition, Lt. Viator "discovered the loose screws and tool markings on the driver's-side rear door panel not as he was trying to locate Cotton's luggage and not as he was examining the contents of such luggage."[35] "Rather, after locating and searching the luggage in the backseat area of the car, Lt. Viator expanded his search for evidence of contraband to the vehicle itself by proceeding to examine, *inter alia*, the driver's-side rear door."[36] "Authority to enter and search the car for Cotton's luggage was not authority to search discrete locations within the car where luggage could not reasonably be expected to be found."[37] "Neither was it justification for lingering in and around the vehicle for 40 minutes—much longer than a search for and of Cotton's luggage should or could conceivably last."[38]

The court then concluded its analysis by addressing the issue of suppression of the evidence as fruit of the poisonous tree.[39] The court noted that, "under the fruit of the poisonous tree doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the Government shows that there was a break in the

[33] *Id.* (*citing* 4 Wayne R. LaFave, Search and Seizure § 8.1(c) (5th ed. 2012); *accord* United States v. Green, 388 Fed.Appx. 375, 382 (5th Cir.2010)).
[34] *Id.*
[35] *Id.* at 276.
[36] *Id.*
[37] *Cotton,* 722 F.3d at 276.
[38] *Id.*
[39] *Id.* at 278.

chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation."[40] Moreover, "When a confession is obtained following an unconstitutional search, the Constitution 'requires not merely that the statement meet the Fifth Amendment standard of voluntariness[,] but that it be sufficiently an act of free will to purge the primary taint.'"[41] "Relevant considerations include[:] (1) the temporal proximity of the arrest to the statement, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct."[42] According to the court, "the drugs discovered during Lt. Viator's unlawful search must have been suppressed as the direct product of that search."[43] In addition, "Cotton's inculpatory remarks, made immediately on the heels of the unlawful search and discovery of the drugs, were likewise subject to suppression."[44]

Again, although the court correctly decided in suppressing the evidence, the court used the wrong methodology in reaching its conclusion. The justification of the initial stop issue, which the court deferred to analyze, was a key issue that should have been addressed. In doing so, if the court had held that the initial stop was not justified at its inception due to the tactics used to effectuate the stop, then there would have not been a need to address the consent issue because the evidence would automatically be subject to suppression at its outset. As discussed further below, various circuits have addressed this issue in the form of traps/roadblocks set up by police officials, which will demonstrate a different analysis that the *Cotton* court could have explored.

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[40] *Id.* (quoting United States v. Rivas*,* 157 F.3d 364, 368 (5th Cir.1998)).
[41] *Id.* (quoting United States v. Cantu, 426 Fed.Appx. 253, 258 (5th Cir. 2011) (alteration in original) (quoting Brown v. Illinois*,* 422 U.S. 590, 602–03, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)); *see also* United States v. Hernandez*,* 670 F.3d 616, 621 (5th Cir. 2012).
[42] *Cotton,* 722 F.3d at 278 (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).
[43] *Id.*
[44] *Id.*

III. FACTS

Several recent cases have featured defendants bringing a constitutional challenge in the form of a motion to suppress for alleged violations of their Fourth Amendment rights from protection against unreasonable searches and seizures, particularly with checkpoints, roadblocks, and/or traps set up by police officials in order to effectuate a drug-catching motivated search.

In *United States v. Huguenin*, two signs were positioned on each side of the I-40 highway containing the words "DRUG-DUI ENFORCEMENT CHECK POINT ½ MILE AHEAD."[45] However, the checkpoint was set up at the first exit after the signs and was not immediately visible.[46] Officers stop vehicles that took the exit for questioning.[47] The stated purpose of the checkpoint was "to remove impaired drivers from our highways as safely as possible with due regard to the safety of the public and the officer(s)."[48] However, no breathalyzers were on the scene, only drug-sniffing K-9 dogs.[49] The officer that effectuated the stop on the specific encounter was a Narcotics agent.[50] An assisting officer asked motorists with "out-of-state tags" their purpose for taking the exit.[51] The defendants were stop at the checkpoint and questioned by the officers.[52] Questioned about their purpose for exiting, the defendants responded they were in search of gas.[53] The officers noticed the defendant's gas gauge indicated a full tank and that the driver

[45] United States v. Huguenin*,* 154 F.3d 547, 549 (6th Cir.1998).
[46] *Id.*
[47] *Id.*
[48] *Id.*at 550.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Huguenin,* 154 F.3d at 550.

gripped the steering wheel nervously during questioning.[54] Suspicious of criminal activity, the officers brought a drug-sniffing K-9 to the vehicle and narcotics were detected.[55] After a brief search, the officers discovered 265.7 pounds of marijuana.[56] At no point during the stop were the defendants questioned about drinking.[57]

In *Wilson v. Commonwealth*, the officer was instructed by his lieutenant to establish a "security" checkpoint at an apartment complex that was owned by the Public Housing Authority ("the Authority").[58] The checkpoint was set up at the request of the Authority to combat trespassers and drug dealers on the premises.[59] The officer, assisted by an additional officer, established a checkpoint just inside the entrance to the apartment complex.[60] The officers were instructed to stop any individual entering the complex between midnight and 2:00 a.m.[61] The defendant was stop at 1:35 a.m. while driving into the complex.[62] The defendant was arrested for driving while intoxicated.[63]

In *Galberth v. United States*, several uniformed officers in marked cars were set up at an established roadblock.[64] The officers were instructed to run computer checks on motorist if any questions arose.[65] The roadblock was part of a special operation in that area of the city announced by the mayor.[66] The defendant was stopped at the roadblock and asked by an officer for his driver's license and registration.[67] The defendant told the

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[54] *Id.* at 550-51.
[55] *Id.* at 551.
[56] *Id.*
[57] *Id.* at 550.
[58] Wilson v. Com., 509 S.E.2d 540, 541 (Va. Ct. App. 1999).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Galberth v. United States, 590 A.2d 990, 992 (D.C. 1991).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 993.

officer that he had forgotten his driver's license.[68] The officer then asked the defendant for his social security number, and a computer check disclosed that the defendant's license had expired five years prior.[69] The defendant was arrested for driving without a valid driver's license.[70] The officer conducted a pat down and discovered a .38 caliber revolver in the defendant's front coat pocket.[71]

In *United States v. Morales–Zamora*, the defendant and her son were stopped by officers at an interstate roadblock in Socorro, New Mexico.[72] The defendant was told that the purpose of the stop was to "check her driver's license, vehicle registration, and proof of insurance."[73] An officer walked a drug-sniffing K-9 around the defendant's vehicle while another checked her information.[74] The K-9 detected narcotics before the document check was complete.[75] The officer then asked the defendant for consent to search her vehicle.[76] In response, the defendant inquired about the consequences of refusing to consent.[77] The defendant gave consent to search her vehicle after the officer advised her that her vehicle would be detained until a search warrant was obtained.[78] The officers discovered marijuana in the defendant's trunk.[79]

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*at 149-50.
[78] *Id.* at 150.
[79] *Id.*

IV. AUTHORITY

A. The Fourth Amendment and Roadblocks

The Fourth Amendment states that the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[80] A seizure of a person has been identified as occurring at that point in time when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[81] Supreme Court precedent has set out that the Fourth Amendment proscribes unreasonable searches and seizures, but permits a warrantless search where the suspect consents.[82]

Properly operated checkpoints are constitutional under the Fourth Amendment.[83] A checkpoint stop such as those at issue in the cases presented in this case note is a seizure under the Fourth Amendment.[84] The Fourth Amendment prohibits only unreasonable seizures.[85] Therefore, the question then becomes whether the seizure was reasonable.[86] "The 'essential purpose' of the Fourth Amendment protections is to impose a standard of 'reasonableness' upon the exercise of discretion by law enforcement officials in order to protect the 'privacy and security of individuals' from 'arbitrary invasions.'"[87] This is the central concern of the *Brown v. Texas* test.[88] The Fourth

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[80] U.S. CONST. amend. IV.
[81] United States v. Mendenhall, 446 U.S. 544, 554 (1980); *See, e.g.*, Katz v. United States, 389 U.S. 347, 354-57 (1967); Berger v. State of New York, 388 U.S. 41, 54-60 (1967); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Terry v. Ohio, 392 U.S. 1, 21 (1968).
[82] *See* United States v. Garcia, 604 F.3d 186, 190 (5th Cir.2010).
[83] *See* Mendenhall, 446 U.S. at 554.
[84] *See* United States v. Cotton, 722 F.3d 271 (5th Cir. 2013); United States v. Huguenin, 154 F.3d 547, 549 (6th Cir. 1998); Wilson v. Com., 509 S.E.2d 540, 541 (Va. Ct. App. 1999); Galberth v. United States, 590 A.2d 990, 992 (D.C. 1991); United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992).
[85] U.S. CONST. amend. IV.
[86] *Id.*
[87] State v. Damask, 936 S.W.2d 565, 571 (Mo. 1996) (quoting Delaware v. Prouse*,* 440 U.S. 648, 653–54 (1979)).
[88] *See* Brown v. Texas, 443 U.S. 47 (1979).

Amendment generally prohibits searches and seizures, which are considered unreasonable, and usually requires the existence of probable cause.[89] However, the Supreme Court has upheld searches and seizures conducted where probable cause was lacking.[90] In some cases, the Court has required no person-specific suspicion and has instead required only that the seizure or search be conducted pursuant to some neutral criteria, which could prevent an arbitrary selection process.[91] Which, the three prong balancing test laid out in *Brown v. Texas* is the method used for determining reasonableness.[92] Essentially, the balancing test can be construed as having replaced the need for probable cause in a number of these situations. The ultimate question then becomes whether drug interdiction checkpoints fall under an exception to the Fourth Amendment such that the traditional requirement of probable cause can be replaced by the balancing test of *Brown v. Texas*.

B. Brown v. Texas: Landmark Case

Many courts have made use of the balancing test which was first introduced in *Brown v. Texas* when analyzing the constitutionality of roadblocks under the Fourth Amendment.[93] However, *Brown v. Texas* was not a roadblock case. In *Brown v. Texas*, an individual was stopped for questioning because he looked suspicious and was in an area of El Paso, Texas, that was known to have a high rate of drug traffic.[94] He was arrested and convicted for refusing to identify himself.[95] The Supreme Court overturned

[89] U.S. CONST. amend. IV
[90] *See* S. Dakota v. Opperman, 428 U.S. 364, 376 (1976).
[91] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).
[92] *See* Brown, 443 U.S. at 50-51.
[93] *See, e.g.,* State v. Damask, 936 S.W.2d 565 (Mo. 1997); United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992); Wilson v. Commonwealth, 509 S.E.2d 540 (Va. App. 1999).
[94] *See* Brown, 443 U.S. at 48-49.
[95] *Id.*at 49.

his conviction because the police officers lacked reasonable suspicion for making the stop.[96]

> The Supreme Court . . . held that: (1) when [the] officers detained [the] defendant for the purpose of requiring him to identify himself, they performed a "seizure" of his person subject to the requirements of the Fourth Amendment; (2) where the officers observed defendant and another man walking away from one another in an alley in an area which had a high incidence of drug traffic, but there was no indication that it was unusual for people to be in the alley and officer was unable to point to any facts supporting his conclusion that the situation in the alley "looked suspicious," circumstances did not justify a reasonable suspicion that defendant was involved in criminal conduct and thus did not warrant detention for questioning, and (3) since the officers lacked any reasonable suspicion to believe that the defendant was engaged or had engaged in criminal conduct, application of the Texas statute to detain the defendant and require him to identify himself violated the Fourth Amendment.[97]

The Court proposed that the constitutionality of seizures in the absence of reasonable suspicion "involve[d] a weighing of: [1] the gravity of the public concerns served by the seizure; [2] the degree to which the seizure advanced the public interest; and [3] the severity of the interference with individual liberty."[98] In balancing these factors, the Court reasoned that the intrusion on individual liberty outweighed the interests of the general public, which would be served by the seizure.[99] In addressing these "less than intrusive" seizures, the Court found that the reasonableness of the stop was dependent upon the three factors: the reasonableness of the checkpoint stop in light of these factors therefore is the determinative issue.[100]

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[96] *Id.* at 53.
[97] *Id.* at 47.
[98] *Id.* at 50-51 (emphasis added).
[99] *Id.*at 52.
[100] *Id.*

V. HOLDINGS

In *United States v. Huguenin*, the United States Court of Appeals for the Sixth Circuit held that the drug interdiction checkpoint at issue was unconstitutional under the Fourth Amendment for a number of reasons.[101] The court argued that the checkpoint was set up as a pretext to stop drivers and question them in an attempt to gain reasonable suspicion to search the car for drugs. Additionally, the court found that because the checkpoint was set up as a trap, it was more intrusive than checkpoints that had been upheld as constitutional in the past.[102] Using the balancing factors set out in *Brown v. Texas*, the *Huguenin* court opined that the roadblock did not serve a legitimate public interest effectively enough to overcome this level of intrusiveness.[103]

In *Wilson v. Commonwealth*, the court applied the *Brown v. Texas* balancing test and found that there was insufficient evidence to satisfy the second prong of the test because there was no record of any drug-related arrests at the checkpoint.[104] Consequently, the *Wilson* court ruled that the checkpoint was in violation of the Fourth Amendment because the interference with personal liberty outweighed any public interest in the checkpoint.[105]

In *Galberth v. United States*, the United States Court of Appeals for the District of Columbia looked at the primary purpose of the roadblock, which it determined to be combating crime and illegal drug activity, and held that this was not a purpose which was consistent with the Fourth Amendment.[106] The *Galberth* court argued that "The Supreme

[101] United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998).
[102] *Id.*at 560.
[103] *Id.*at 556.
[104] Wilson v. Commonwealth, 509 S.E.2d 543 (Va. App. 1999).
[105] *Id.*
[106] Galberth v. United States, 590 A.2d 990 (D.C. 1991).

Court ha[d] never upheld . . . a police roadblock designed to promote general law enforcement purposes."[107] Instead, the court argued that the Supreme Court had indicated that police would need person-specific suspicion before someone could be seized for general law enforcement purposes.[108]

Finally, in *United States v. Morales-Zamora*, the United States Court of Appeals for the Tenth Circuit held that the drug interdiction checkpoint at issue was unconstitutional under the Fourth Amendment.[109] The court reasoned that the checkpoint's stated objective of checking drivers' licenses and vehicle registrations was a pretext through which officers could determine whether an individual possessed illegal drugs.[110] The court relied on dicta of the Supreme Court in *Texas v. Brown* where the Court stated that there was no evidence "that the roadblock was a pretext" through which officers could catch drug offenders by looking for evidence in "plain view" while conducting checks for drivers' licenses.[111] The *Morales-Zamora* court reasoned that in cases where there was strong evidence that the supposed purpose of a roadblock was "a pretext to look for 'plain view' evidence of more serious crimes," the roadblock would violate the Fourth Amendment.[112]

VI. ADDITIONAL RULINGS

On the other hand, there are some cases where the courts have upheld roadblocks set by police officials using the same balancing test established in *Brown v. Texas*. In *Merrett v. Moore*, the Florida Department of Law Enforcement ("FDLE"), in an effort to

[107] *Id.* at 998.
[108] *Id.*
[109] Morales-Zamora, 974 F.2d at 153.
[110] *Id.*
[111] Morales-Zamora, 974 F.2d at 152 (quoting Texas. v. Brown, 460 U.S. 730, 743 (1983)).
[112] *Id.*

locate illegal drugs, proposed establishing highway checkpoints to stop all cars and subject the vehicles to "narcotic sniffing dogs."[113] The FDLE asked the Florida Highway patrol ("FHP") to set up drivers' license checkpoints.[114] According to the plan between the FDLE and the FHP, FHP officers would stop vehicles at the checkpoint to check for safety defects, review driver's licenses and registrations.[115] While a vehicle was stopped, dog handlers would escort a dog to the vehicle where the dog would sniff for the presence of narcotics.[116] If narcotics were detected, a second dog checked the outside of the car.[117] If narcotics were detected by the second dog, the driver was asked for consent to a search of the vehicle, and if consent was refused, the driver would be detained until officers obtained a search warrant.[118] After two days of operation involving four different sites, 2100 vehicles passed through the checkpoints.[119] Of the 1330 vehicles that were stopped, only one arrest was made for possession of narcotics.[120] A group of motorists who were stopped at the roadblocks brought suit against the officials involved.[121] The United States Court of Appeals for the Eleventh Circuit held that roadblocks set up with the primary purpose of catching drug offenders were constitutional so long as the state had at least one legal purpose which could justify the roadblock, even if the roadblock would not have been put in place but for the desire to catch drug offenders.[122] The *Merrett* court argued that it was undisputed that the police had the authority to conduct roadblocks to

[113] Merrett v. Moore, 58 F.3d 1547, 1549 (11th Cir. 1995).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Moore*, 58 F.3d at 1549.
[122] *Id.* at 1550-51.

check driver's licenses and vehicle registrations.[123] The court opined that a "mixed motive roadblock" was constitutional under the Fourth Amendment.[124]

In *Missouri v. Damask*, the Franklin County Sheriff's Department set up drug enforcement checkpoint on I-44 Highway exit 242.[125] Two signs were placed on I-44 about one quarter mile from exit 242 that read "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD."[126] The exit offers no gas, food or lodging services for travelers.[127] A uniformed police officer approached the vehicles that took exit 242 and informed the motorists they were stopped at a drug enforcement checkpoint.[128] The officer checked the motorist's drivers' license and registration, and asked the motorist why he or she exited there.[129] Motorist were allowed to proceed after a brief stop unless the officer detected a reasonable suspicion of drug trafficking.[130] If the officer developed a reasonable suspicion of drug trafficking, the motorists were asked for consent to search the vehicle.[131] Drug-sniffing dogs were used to check the outside of vehicles if a motorist refused to consent to a search.[132] The defendant took exit 242 around 4:20 a.m.[133] The defendant produced a valid Nevada driver's license, but appeared very nervous and stated he took the exit because he was "turning around and going back to the last exit to get something to eat."[134] When the defendant refused the officer's request to search his

[123] *Id.*
[124] *Id.*at 1551.
[125] State v. Damask, 936 S.W.2d 565, 568 (Mo. 1996).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Damask,* 936 S.W.2d at 568.
[134] *Id.*

vehicle, a drug-sniffing dog was used to check the outside of his vehicle.[135] Narcotics were detected in the defendant's trunk where the police found marijuana.[136] The Supreme Court of Missouri applied the *Texas v. Brown* test and held that drug interdiction checkpoints were consistent with the Fourth Amendment because the checkpoints advanced an important state interest, presented a minor level of intrusion on drivers, and were conducted in a nondiscriminatory manner.[137] The *Damask* court reasoned that the drug problem was undisputedly significant.[138] Moreover, the court argued that the question of effectiveness did not require that a particular police technique be either "more or less effective" than other techniques used to catch drug offenders. Instead, all that was required was that the checkpoints were reasonably effective in advancing the state interest.[139] Finally, the court reasoned that so long as guidelines minimized the amount of officer discretion in operating the checkpoint and the checkpoint did not significantly interfere with legitimate traffic, the intrusion upon the personal liberty of drivers was minimal enough that the roadblock would not violate the Fourth Amendment.[140]

VII. ANALYSIS

A. Application of Brown v. Texas to United States v. Cotton

As noted above, although the court in *United States v Cotton* held the search and seizure of the defendant's vehicle to be unconstitutional, it failed to address a pertinent issue, which the defendant affirmatively raised – whether the initial stop was justified as

[135] *Id.*
[136] *Id.*
[137] *Id.* at 575.
[138] *Id.* at 571.
[139] *Id.*
[140] *Id.* at 574.

its inception. The court could have applied the *Brown v. Texas* factors in addressing that issue, which could have ultimately produced the same results, but in a more efficient manner. Application of: (1) the gravity of the public interest served by the seizure; (2) the extent to which the seizure advanced the public interest; and (3) the degree of intrusion on individual liberty factors to *United States v. Cotton* would lead to a totally different analysis then that which was produced in the majority opinion.

For example, in *Cotton*, the record reflects that Sgt. Fullbright, presuming Cotton and his passenger was driving east towards Georgia, contacted Lt. Viator with the neighboring county's Sheriff's Office Highway Interdiction unit, which was operating on the Interstate Highway 10 east of Houston and warned him that Cotton was headed in his direction. While allegedly inspecting the abandoned vehicle, Lt. Viator claimed he observed Cotton's vehicle pass him traveling at 70 miles per hour, heading eastbound in the lane closest to Lt. Viator's vehicle. Cotton raised a claim that the court did not consider, that Lt. Viator was checking the abandoned vehicle on the right shoulder of Interstate 10 only in an attempt to intercept Cotton in hopes to catch him in a traffic violation to pull him over to inquire about illegal drug activity. Essentially, Cotton claimed that Sgt. Fullbright along with the help of Lt. Viator set a trap to pull him over to gain a reasonable suspicion.

The court in *Cotton* should have considered the fact that Lt. Viator and Sgt. Fullbright set a trap when Sgt. Fullbright called Lt. Viator to alert him that Cotton was headed in his direction, and that Lt. Viator pulled over on the side of the road near the abandon vehicle in anticipation of intercepting Cotton. Just like the court in *Huguenin,* the *Cotton* court could have used the *Brown v. Texas* balancing test to find that because

the checkpoint was set up as a trap, it was more intrusive than checkpoints that had been upheld as constitutional in the past. This reasoning falls in line with Supreme Court precedent, "We believe this pretextual seizure invokes the 'kind of standardless and unconstrained discretion [that] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'"[141]

The trap analysis will also be consistent with the opinion in *Wilson* because the interference with personal liberty outweighed any public interest. In *Cotton* the record is clear that Lt. Viator and Sgt. Fullbright interest in stopping Cotton substantially outweighed Cotton's personal liberty. For example, assuming *arguendo*, Sgt. Fullbright conducting random surveillance on any individual, then contacting Lt. Viator to conduct the traffic stop on that individual would lead one to believe that any person could be subject to a traffic stop by police officials in this drug-catching motivated manner. If the *Cotton* court had held the search and seizure unconstitutional on the grounds of the initial reasoning and tactic in effectuating the stop, it would sustain a higher standard for police officials effectuating traffic stops, while still leaving room to effectively fight the drug trafficking crimes in our society. This would, in turn, still preserve individuals' personal liberties.

In addition, the *Galberth* opinion is instructive in striking down the roadblock that was set up by police officials by looking at the primary purpose of the stop in the defendant's case. In *Cotton*, the primary purpose of the set up was to stop Cotton who Lt.

[141] United States v. Huguenin, 154 F.3d 547 (6th Cir.1998) (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).

Viator and Sgt. Fullbright's believed might be trafficking narcotics. That belief was not base on any probable cause and arguably even reasonable suspicion. Just like the *Brown v. Texas* court noted in its holding, if the police official is unable to point to any facts supporting his conclusion that a situation "looked suspicious," then the circumstances does not justify a reasonable suspicion that the defendant was involved in criminal conduct and thus does not warrant a detention.

Finally, following the *Morales-Zamora* court, which held that the drug interdiction checkpoint at issue was unconstitutional under the Fourth Amendment, would be consistent with the notion of preserving personal individual liberties. Just as the *Morales-Zamora* court reasoned that the checkpoint's stated objective of checking drivers' licenses and vehicle registrations was a pretext through which officers could determine whether a motorist possessed illegal drugs. Likewise, the same is true with Cotton, which the objective of Lt. Viator pulling over near the abandon vehicle was only in anticipation of intercepting Cotton, which was a pretext through which Lt. Viator could determine whether Cotton possessed illegal drugs.

On the other hand, the *Merrett* court's "mixed motive" analysis is not prevailing in the *Cotton* case specific circumstance. The *Merrett* court argued that roadblocks set up with the primary purpose of catching drug offenders were constitutional so long as the state had at least one legal purpose which could justify the roadblock, even if the roadblock would not have been put in place but for the desire to catch drug offenders. In *Cotton*, Lt. Viator did not have any legal reason for setting up the trap to effectuate the stop.

Additionally, The *Damask* court held that the drug interdiction checkpoint was consistent with the Fourth Amendment because the checkpoints advanced an important state interest, presented a minor level of intrusion on drivers, and was conducted in a nondiscriminatory manner. This is not true in the *Cotton* case. The *Damask* court reasoned that the drug problem was undisputedly significant. Moreover, the court argued that the question of effectiveness did not require that a particular police technique be either more or less effective than other techniques used to catch drug offenders. Instead, all that was required was that the checkpoints were reasonably effective in advancing the state interest. In *Cotton*, the trap was not conducted in a nondiscriminatory manner. The facts indicate that Lt. Viator and Sgt. Fullbright implemented a plan to stop Cotton to inquire about illegal drug activity. The plan was a technique that was not a minor intrusion on Cotton's interest and personal liberties.

It is also important to note that since, similarly in most cases, the individual outcome of a particular case may depend on the weight the courts give to each factor. The varying significance of the three factors combined with different often conflicting policy priorities could produce different judicial reactions to seemingly similar facts. Therefore, in *Cotton*, if the court weighs the factors equally in determining whether the tactics used by Lt. Viator and Sgt. Fullbright violated Cotton's constitutional rights then the outcome would be that of what has been detailed in this case note. Any varying on the significance of each factor may produce a slightly different result.

VIII. CONCLUSION

The Fifth Circuit analysis of the search and seizure in *Cotton* is one that could cause for future policy concerns. The thinness of the court's analysis is particularly

troubling because it leaves the door open for police officials to adopt drug interdiction practices that are intrusive to individual's rights and liberties. The list of cases in this case note, although factual distinguishable, all lay out one key principle: that the level of intrusiveness of police tactics in conducting searches and seizures should be considered when analyzing Fourth Amendment search and seizure cases. Ignoring that concept may lead to conclusions that are inconsistent with the purpose of the constitution. Not taking the officers individual intent or practices in effectuating stops into consideration will only leave room for the officers to manipulate the individual's rights in an attempt to search for illegal drug activity. It is true that drug trafficking is a major problem in our society and that police authorities are right to implement programs to stop the drug trafficking epidemic. However, in doing so, we do not need to put individual's rights and liberties at stake. *United States v. Cotton* is a prime example of how the way the courts consider these various issues will have a lasting impact on our society.