UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. SCHRAMM and GABRIELA SAENZ, **Plaintiffs,** **v.** **THE CITY OF NEW YORK, POLICE OFFICER ALAN HASSEL (#21029), POLICE OFFICER EMMANUEL DELACRUZ (#15061), SGT. NOEL JUGRAJ and POLICE OFFICERS "JOHN DOE" #1-4,** **Defendants.**	**MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION ON SUMMARY JUDGMENT** **1:16-cv-553 (AKH)**

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INTRODUCTION

Flying in the face of decades of checkpoint case law, Defendant City puts untrained officers like Defendants Jugraj and Delacruz into the field to set up and conduct checkpoints without written guidelines. These untrained officers then make arbitrary decisions without any meaningful limits on their discretion, adversely affecting innocent people like the plaintiffs in this case. In opposition to Plaintiffs' summary judgment motion (and on their own motion), Defendants fail to address the standards set forth by the US Supreme Court and the New York Court of Appeals, along with other influential cases from around the country.

ARGUMENT

I. Checkpoint Balancing Analysis

Defendants acknowledge that Sitz requires a balancing test (Defense Opposition Memo at 14). They then write five pages on the issue without citing a single case that addresses the question of balancing. Id at 14-18.

While plaintiffs agree Ingersoll is not binding precedent in this Circuit. Ingersoll v. Palmer, 43 Cal.3d 1321, 743 P.2d 1299 (Cal. Sup. Ct. 1987). However it is persuasive and a widely recognized and influential case, cited in dozens of cases across the country. E.g. Wilkinson v. Forst; 832 F.2d 1330, 1339 (2d Cir. 1987); State v. Record, 150 Vt. 84 at 88-89 (Vt. 1988); State v. Mikolinski, 256 Conn. 543, 554 (Conn. 2001); State v. Downey, 945 S.W.2d 102, 109-111 (Tenn. 1997) ("In this regard, we observe that the

criteria delineated in *Loyd, Ingersoll,* and *Deskins* provide the necessary framework for analysis."); State v. Hicks, 55 S.W.3d 515, at 532, 534 and 542 (Tenn. 2001); State v. Franklin, No. E2017-00334-CCA-R3-CD, at *30 (Tenn. Crim. App. Aug. 21, 2018); State v. Downey, No. 03C01-9307-CR-00221 (Tenn. Crim. App. Oct. 15, 1995) ("Although the lack of advance publicity is a factor of notable importance, it is the combined absence of administrative guidelines and supervisory approval which particularly exudes the stench of unfettered discretion in the field."); People v. Calhoun, 2014 Guam LEXIS 26 (Guam 2014) ("One case that provides a helpful framework for analyzing the constitutional validity of sobriety checkpoints is the California Supreme Court case of Ingersoll v. Palmer …"); State v. Henderson, 114 Idaho 293, at 305, 307 and 311 (Idaho 1988); City of Bismarck v. Uhden, 513 N.W.2d 373, at 376, 378, 381 and 382 (N.D. 1994); Higbie v. State, 780 S.W.2d 228 at 246-247 (Tex. Crim. App. 1989) (concurring opinion); Orr v. People, 803 P.2d 509, 512-513 (Colo. 1990); People v. Rister, 803 P.2d 483, 491 (Colo. 1990); State v. Parms, 523 So. 2d 1293, 1296-1298 (La. 1988); State v. Jackson, 764 So. 2d 64, 72 (La. 2000); City of Baton Rouge v. Dyson, 536 So. 2d 1297, 1300 (La. Ct. App. 1989); Seattle v. Mesiani, 110 Wn. 2d 454, at 461-462 and 464 (Wash. 1988); State v. Bolton, 111 N.M. 28, at 37, 45 (N.M. Ct. App. 1990); State v. Madalena, 121 N.M. 63, 68 (N.M. Ct. App. 1995); State v. Blackburn, 63 Ohio Misc. 2d 211, 218 (Ohio Misc. 1993); State v. Bryson, 142 Ohio App. 3d 397, 403 (Ohio Ct. App. 2001); Sanchez v. County of San Diego, 464 F.3d 916, 928-929 (9th Cir. 2006); Com. v. Yastrop, 564 Pa. 338, 344 (Pa. 2001); Davis v. Kansas Dept. of Revenue, 252 Kan. 224, 229 (Kan. 1992); Galberth v. U.S., 590 A.2d 990, 998 (D.C. 1991); State v. Gerschoffer, 738 N.E.2d 713, 724 (Ind. Ct.

App. 2000); State v. Talbot, 792 P.2d 489, 495 (Utah Ct. App. 1990); State v. Barcia, 235 N.J. Super. 311, 317 (N.J. Super. App. Div. 1989); *The Constitutionality of Sobriety Checkpoints in Alaska*, 8 Alaska Law Review 227 (1991) (cited several times); *A legal analysis of sobriety checkpoints*, 15 American Journal of Criminal Justice 24 (1990); *The Constitutionality Of Sobriety Checkpoints*, 43 Wash. & Lee L. Rev. 1469 (1986) (intermediate appellate case for Ingersoll cited on 13 different pages);

Plaintiffs did not rely solely on Ingersoll. Rather plaintiffs specifically pointed to State v. Deskins, 234 Kan. 529 (1983). Plaintiffs Memo in Support of Summary Judgment at 19-20. Defendants do not even mention Deskins in their memo.

The Deskins case lays out a list of factors similar to the one in Ingersoll:

> (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

Deskins, supra 234 Kan. at 541.

Deskins is also a widely cited case. E.g. Michigan v. Sitz, 496 US at 461, note 3;

People v. Scott, 63 N.Y.2d 518, 526-529 (N.Y. 1984); People v. Holley, 157 Misc. 2d 402, 407 (N.Y. Misc. 1993) (Criminal Court of the City of New York, New York County); Cocio v. Bramlett, 872 F.2d 889, 892 (9th Cir. 1989); State v. Downey, 945 S.W.2d 102, 109-111 (Tenn. 1997) ("In this regard, we observe that the criteria delineated in *Loyd, Ingersoll,* and *Deskins* provide the necessary framework for analysis."); State v. Jones, 483 So. 2d 433, 435-439 (Fla. 1986) (Therefore, we follow many of our sister states in adopting the bulk of the Deskins criteria.); State v. Martin, 145 Vt. 562, 567-575 (Vt. 1985); Webb v. State, 695 S.W.2d 676, 680-682 (Tex. App. 1985); Cains v. State, 555 So. 2d 290, at 294 and 296 (Ala. Crim. App. 1989) ("Many jurisdictions have adopted the thirteen-factor analysis set out in *State v. Deskins*"); State v. Kirk, 202 N.J. Super. 28, at 44-45, 50-51 and 54 (N.J. Super. App. Div. 1985); People v. Bartley; 109 Ill. 2d 273, at 284, 288, 289 and 291 (Ill. 1985); State v. Henderson, 114 Idaho 293, at 298, 308-309 (Idaho 1988); Nelson v. Lane County, 304 Or. 97, 129, 130 (1987); Commonwealth v. Trumble, 396 Mass. 81, at 86, 94, 95 and 100 (Mass. 1985); Commonwealth v. Amaral, 398 Mass. 98, 100 (Mass. 1986) ("The testimony of a field officer that he personally did not indiscriminately choose a time, place, and manner for conducting a roadblock is not sufficient. … The Commonwealth offered no evidence of a plan devised by law enforcement supervisory personnel for establishing and conducting the roadblock at which the State police stopped the defendant. The record contains no evidence of guidelines … under which this roadblock was conducted. The fact that a captain in the State police was responsible for setting up this roadblock is not sufficient. Administrative officers using carefully established standards and neutral criteria should determine the

time and location of roadblocks and the procedures to be followed. … We believe that the Commonwealth did not make an adequate showing to satisfy the requirements of the Fourth Amendment. "); State v. Cloukey, 486 A.2d 143, 146 (Me. 1985); State v. Petterson, 582 A.2d 1204, at 1205, 1208 (Me. 1990); State v. Bjorkaryd-Bradbury, 2002 Me. 44, 1085-1086 (Me. 2002); State v. McMahon, 557 A.2d 1324, 1325 (Me. 1989); State v. Leighton, 551 A.2d 116, 118 (Me. 1988); State v. Welch, 755 S.W.2d 624, 628 (Mo. Ct. App. 1988); Com. v. Leninsky, 360 Pa. Super. 49, at 63 and 65 (Pa. Super. Ct. 1986); State v. Muzik, 379 N.W.2d 599, 602 and 603 (Minn. Ct. App. 1985); State v. Jackson, 764 So. 2d 64, 72 (La. 2000); State v. Gascon, 119 Idaho 932, 934 (Idaho 1991); Pimental v. Dept. of Transp., 561 A.2d 1348, 1352, 1354 (R.I. 1989); State v. Superior Court, 143 Ariz. 45, 48-49 (Ariz. 1985); Ex Parte Jackson, 886 So. 2d 155, 162-163 (Ala. 2004); State v. Gerschoffer, 763 N.E.2d 960, 966 (Ind. 2002); State v. Wetzel, 456 N.W. 2d 115, 119 (N.D. 1990); Lowe v. Commonwealth, 230 Va. 346, 350 (Va. 1985); State v. Koppel, 127 N.H. 286, 291 (N.H. 1985); Lookingbill v. State, 2007 OK CR 7, 135 (Okla. Crim. App. 2007); State v. Madalena, 121 N.M. 63, 68 (N.M. Ct. App. 1995); Little v. State, 300 Md. 485, 501-503 (Md. 1984) (provides its own list of the courts influenced by Deskins).

In addition Plaintiffs relied (Plaintiffs' Memorandum at 18-19) on three cases from the New York State Court of Appeals: Matter of Muhammad F., 94 N.Y.2d 136, 148 (1999); People v. Abad, 98 N.Y.2d 12, 18 (2002) and People v. Scott, 63 NY 2d 518, 526 (1984).

Defendants fail to address those cases in their memo. Defendants also fail to

address United States v. Martinez-Fuerte, 428 U.S. 543 (1976) which certainly has precedential value in this Circuit:

> Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise, as they know, or may obtain knowledge of, the location of the checkpoints, and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. **The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.**

Id at 559 (emphasis added).

In Muhammad F. the New York Court of Appeals held a checkpoint improper, noting the absence "of particularized guidelines with 'listed criteria' that 'established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; [and] location of the screening areas.'" In the Matter of Muhammad F., 94 N.Y.2d 136, 148 (1999).

> Since the officers here were not even required to make a written record of stops that had taken place, in conducting our "post-stop judicial review" … we are relegated to the self-verifying evidence from the officers whose conduct is being challenged to determine whether they were using uniform and non-discriminatory procedures.

Id (citation omitted). NYPD checkpoint policy requires no written record of stops. The checkpoint documents that were disclosed show no record of stops. And the checkpoint in this case has no record of stops either. Exhibits 7 and 8 of Plaintiff's Motion for Summary Judgment.

In People v. Abad, 98 N.Y.2d 12, 18 (2002), the Court of Appeals allowed suspicionless stops where the program "requires the police to complete a detailed activity log for every stop made, which affords the possibility of 'post-stop judicial review' to the extent questions are raised as to the actual operation of the program" and "police also maintain a registration log of all vehicles participating in the program".

Here again NYPD policy does not require a detailed activity log for every stop made. Exhibit 7. And both 33rd precinct practice and the checkpoint in this case do not include such logs.

The City also ignores People v. Scott, 63 NY 2d 518, 523 (1984):

> The roadblock had been established pursuant to a March 5, 1982 memorandum of the County Sheriff ….
> In succeeding detailed paragraphs it established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; location of screening areas off the highway to which vehicles would be directed; the nature of the inquiries to be made, with

> specific direction that unless the operator's appearance and demeanor gave cause to believe him or her intoxicated sobriety tests not be given. It listed the factors to be considered and stated that neither the odor of alcohol alone nor any one of the listed factors would suffice as a basis for sobriety tests. It also directed that checkpoint sites be prescreened and that from two to four locations be used during a four-hour period.

Defendant Jugraj's checkpoint was not established pursuant to any memorandum from a policy-maker like the Sheriff in Scott. NYPD policy does not have "detailed paragraphs" establishing procedures for anything. Exhibit 7. There is nothing in NYPD policy to address "the nature of inquiries to be made" or specific direction about when sobriety tests are to be given or not. Id. Indeed in Scott "the odor of alcohol alone" was insufficient "as a basis for sobriety tests," the purported factor Defendant Delacruz and the City rely upon for supporting Schramm's arrest in this case. NYPD policy does not require that checkpoint sites be prescreened. And perhaps most notably, the deputies in Scott were obviously trained in conducting field sobriety tests, as that is mentioned in the language above. Here it is undisputed that NYPD does not require checkpoint officers to have such training and none of the officers in this checkpoint were so trained.

As the Court of Appeals put it in Scott, supra at 526:

> Moreover in light of the specific procedures devised and promulgated to law enforcement personnel by the head of their department, the Sheriff, and the way in which the particular roadblock was being operated when defendant was stopped, the courts below could properly conclude that it did not intrude to an impermissible degree upon the privacy of motorists approaching the checkpoint, that it was being maintained in accordance with a uniform procedure which afforded little discretion to operating personnel, and that adequate precautions as

to safety, lighting and fair warning of the existence of the checkpoint were in operation.

Defendants have none of that in this case. The policy offers no specific procedures devised and promulgated to personnel. There is no uniform procedure. There was no fair warning of the existence of the checkpoint. Operating personnel are given broad discretion under the policy and in practice to make innocent people like the plaintiffs play their games.

This case law is not new or surprising to the Defendants. Plaintiffs relied on Ingersoll, Muhammad F., Abad and Scott as early as our first discovery motion reply memorandum in April of 2017. Docket #34.

II. "Now You're Going To Play My Game"

A key fact in the case is Defendant Delacruz' statement to Plaintiff Schramm: "You like to play games? Now you're going to play my game." It's in the Amended Complaint. Plaintiffs' Exhibit 1 at ¶ 33. It's in Schramm's Affidavit on this motion. Exhibit 2 at ¶ 12. It's in Schramm's deposition testimony. Exhibit 9 at 99:19 to 100:1. It is an important statement because it demonstrates malice on Delacruz' part, and because it shows that NYPD checkpoint policy and practice affords NYPD officers broad discretion to make innocent drivers play police games instead of following the strict procedures that are required in checkpoints that meet the constitutional standards set forth in all the cases discussed above.

Defendants assert in their memorandum: "Officer Delacruz denies making any

such statement." Defense Memorandum in Opposition at 13. Defendants cite to no evidence in the record to back up this claim. That's because there is no evidence in the record where Defendant Delacruz denies making this statement.

It did not come up in Delacruz' deposition - the index does not even have the words "game" or "play" in it. Exhibit 10 at 101, 104. Defendants did not submit an affidavit from Delacruz on their motion nor in opposition to this motion. The evidence is undisputed - Delacruz made that malicious statement.

Loosely related to this, Defendants assert in footnote 11 of their memorandum: "it is undisputed that Officer Delacruz was not involved with setting up the vehicle checkpoint or that he stopped Schramm as part of the checkpoint, there can be no viable claim against him." Defense Memorandum at page 14, footnote 11.

While it is true that Defendant Delacruz did not set up the checkpoint, he certainly stopped Schramm as part of the checkpoint as indicated by all relevant evidence in the case.

III. Probable Cause

Defendants did not address Kent v. Katz, 312 F.3d 568 (2d Cir. 2002) in their opposition on the issue of probable cause for the arrest of Plaintiff Schramm. As discussed in further detail elsewhere (Plaintiffs Memorandum in Opposition to Defendants' Motion for Summary Judgment at 20-24), the Second Circuit found no probable cause in a case very similar to this case. Defendants also ignore People v. Scott, 63 NY 2d 518, 523 (1984), where the odor of alcohol in a checkpoint was not enough to

even support requiring sobriety tests. If NYPD policy had clear post-stop guidelines like those in Scott, Plaintiffs' ordeal could have been prevented.

There was no probable cause for the arrest of either plaintiff as detailed at length in Plaintiffs' other papers.

IV. Qualified Immunity and Monell Liability

Plaintiffs fully addressed qualified immunity and Monell liability in the original motion papers and in opposition to Defendants' motion for summary judgment. Since Defendants' opposition papers on this motion add nothing new, Plaintiffs rely on our previous papers.

V. Rule 56.1

Defendants assert that Plaintiffs' memorandum "does not cite to paragraphs contained in their Local Rule 56.1 statement." Defense Memorandum at 7. I do not claim to be an expert on the local rules. This is my first summary judgment motion in the Southern District of New York. With that said, I do not see any such requirement in Local Rule 56.1. I believe I complied with the rule, though I'm sure I could have done better in some ways.

With that said, the cases Defendants cite on this issue do not fit at all with Plaintiffs' Rule 56.1 statement. In Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona, 138 F. Supp. 3d 352 (S.D.N.Y. Sept. 29, 2015):

> Plaintiffs' Rule 56.1 Statements are certainly not "short and concise." As

> Defendants point out, Plaintiffs' main Rule 56.1 Statement is 998 paragraphs long and is supported by 11 declarations and 370 exhibits. … Plaintiffs also submitted a Supplemental Rule 56.1 Statement at the end of their Counter Rule 56.1 Statement, sporting an additional 43 paragraphs (one of which contains 31 subparagraphs) and 88 additional exhibits. … Plaintiffs' prolixity is therefore pronounced, and worsened by redundancy; many of the paragraphs in Plaintiff's Rule 56.1 Statements are repetitive, some to the point that they are nearly identical to paragraphs that precede them.

Id at 394 (citations omitted).

That is the opposite of our Rule 56.1 submission, which is only 17 paragraphs long. Plaintiffs in this case kept the Rule 56.1 Statement short and concise as the Rule indicates. Defendants then go on to assert that "the many 'facts contained in plaintiffs' 13 page statement of facts … that are not in plaintiffs' Local Rule 56.1 statement should also be disregarded." Defense Memo in Opposition at 8. Defendants want to have it both ways.

I respectfully submit that Plaintiffs' Rule 56.1 statement covered the essential facts in the case necessary for decision on this motion. Perhaps I could have included more or gone into more depth but I attempted to comply with the Rule's explicit requirement that the statement be "short and concise." If the statement is supposed to be both "short and concise" and at the same time detailed and comprehensive, then I'm just not that good of a lawyer.

In another bizarre citation Defendants rely on Epstein v. Kemper, 210 F.Supp.2d 308 for the proposition that: "any of the statements in the affidavits that are not contained within plaintiffs' Local Rule 56.1 statement should be disregarded in their entirety."

Defense Memo in Opposition at 8. They then use a quote from Epstein which says something completely different: "Statements in an affidavit or Rule 56.1 statement are inappropriate if they are not based on personal knowledge, contain inadmissible hearsay, are conclusory or argumentative, or do not cite to supporting evidence." Id. That's not the same thing.

The Defense also misinterprets Holtz v. Rockefeller & Co., Inc., 258 F.3d 62 (2d Cir. 2001), to support their assertion that Plaintiffs' 56.1 Statement was improper and should be disregarded. In that case the defense made a motion for summary judgment including a Rule 56.1 Statement. The plaintiff opposed the motion but "did not respond with a statement of disputed facts pursuant to Local Rule 56.1(b)." Id at 72.

In other words Plaintiff Holtz did not comply with Rule 56.1 at all. The Second Circuit rejected the very argument Defendants make here: "A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules. … Thus, we have previously indicated, and now hold, that while a court 'is not required to consider what the parties fail to point out' in their Local Rule 56.1 statements, it may in its discretion opt to 'conduct an assiduous review of the record' even where one of the parties has failed to file such a statement." Id at 73 (citations omitted).

VI. Checkpoints Violate the Fourth Amendment

> Taken together, our decisions in Michigan Dept. of State Police v. Sitz, 496 U. S. 444 (1990), and United States v. Martinez-Fuerte, 428 U. S. 543 (1976), stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the

> officers conducting the stops. I am not convinced that Sitz and Martinez-Fuerte were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing.
>
> Respondents did not, however, advocate the overruling of Sitz and Martinez-Fuerte, and I am reluctant to consider such a step without the benefit of briefing and argument.

Indianapolis v. Edmond, 531 U.S. 32, 56 (2000, *Justice Thomas dissenting*).

Unlike the Respondents in Edmond, Plaintiffs here do advocate the overruling of Sitz and Martinez-Fuerte. While those cases may have been well-intentioned, the facts of this case demonstrate why checkpoints are wrong. In theory balancing protects innocent people like the plaintiffs in this case and minimizes the intrusion. In practice the largest police department in the United States has gotten away with ignoring that balancing for decades, violating the Fourth Amendment rights of tens of thousands of people if not more, and subjecting them to the whims of untrained and malicious officers.

There will never be a better set of facts than this case. Plaintiffs respectfully submit this Court should rule checkpoints inherently violate the Fourth Amendment, which would could send this case up to the Second Circuit and the Supreme Court.

Respectfully Submitted,

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Dated: September 19, 2019