

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA,            )  
                                  Plaintiff,        )  
  )  
vs.    )  
  )  
  )  
                                  Defendant.    )        Case No.

**MOTION TO QUASH THE ARREST AND TO SUPPRESS EVIDENCE**

Comes now the Defendant above, by and through his attorney of record, Glen R. Graham, and does hereby move this court to quash the arrest and/or to suppress the evidence as the same are in violation of the law under the Oklahoma Constitution and the United States Constitution, 4<sup>th</sup> and 5th Amendments, due process of law, 14<sup>th</sup> Amend., and the Oklahoma Constitution, Art. 2, Sec. 30, Art. 2, Sec. 22, and thereunder and State and Federal Case and Statutory law.

The *detention* or stop in this matter was illegal and not supported by *reasonable suspicion* of criminal activity and was *not limited in scope* and duration and was beyond the basis of the stop and all evidence arising out of the stop should be suppressed as the “fruit of the poisonous tree” and therefore this matter should be dismissed. See, *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and Okla. Const. art II, § 30, and cases cited hereinafter.

The United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions. See *Cooper v. California*, 386 U.S. 58, 62 (1967). The United States Supreme Court, through both majority and dissenting opinions, has explicitly extended invitations to the states to adopt different rules should they deem it appropriate. See *Iowa v. Tovar*, 541 U.S. 77, 94 (2004); *Nichols v. United States*, 511 U.S. 738, 748 n.12 (1994). (“[A] *State is free as*

*a matter of its own law to impose greater restrictions on police activity* than those this Court holds to be necessary upon federal constitutional standards.") (emphasis in original); *Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("Of course, *the States are free, pursuant to their own law, to adopt a higher standard*. They may indeed differ as to the appropriate resolution of the values they find at stake."); *Cooper*, 386 U.S. at 62 ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

Wherefore, Defendant prays that the court grant this motion and quash the arrest and/or suppress the evidence in this case and dismiss this case.

Respectfully submitted,

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### **BRIEF IN SUPPORT AND ARGUMENTS AND AUTHORITIES**

Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. "In the case of the self-protective search for weapons, he must be able to point to **particular facts** from which he reasonably inferred that the **individual was armed and dangerous.**" *Terry v. Ohio*, cited hereinafter, *Sibron v. New York*, 392 U.S. at 64, 88 S.Ct. at 1903, 20 L.Ed.2d 917 (1968).

As is stated in *Terry v. Ohio*, 392 U.S. at 21, 22, 88 S.Ct. at 1880, and by the Oklahoma Court of Criminal Appeals in *Francis v. State*, 1978 OK CR 101, 584 P.2d 1359:

"The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a Judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an

objective standard: Would the facts available to the officer at the moment of the seizure of the search warrant a man of reasonable caution in [584 P.2d 1364] the belief that the action taken was appropriate? \* \* \* Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused sanction." [Citations omitted]

A detaining officer "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). An officer is free to approach people and ask questions without violating the Fourth Amendment. However, the person approached under these circumstances is free to refuse to answer questions and to end the encounter. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)

Decisions based upon sound principles may often be unpopular, especially where the accused appears guilty of a crime. The judicial branch in America was envisioned by the founding fathers as an ***independent branch*** not subject to outside influences or the popular demands of the masses. The fickle whims of the public are not a proper influence, as the courts need to rise above the fray and maintain themselves as a **symbol of lawfulness**. As stated by Justice Frankfurter, "public confidence in the fair and honorable administration of justice, upon which ultimately depends the **rule of law**, is the transcending value at stake." See, *Sherman v. U.S.*, 356 U.S. 369, 380 (1957). It is in the long-term interest of society based upon the rule of law that its courts should be a symbol of lawfulness.

"Guilt by association has never been an acceptable rationale and it does not constitute probable cause to arrest." *Smith v. State*, 1974 OK CR 143, ¶ 8, 525 P.2d 1251, 1253, citing *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1947).

A traffic stop must generally "last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). However, an officer may detain a driver for further questioning unrelated to the initial traffic stop when the officer develops a

*reasonable* and *articulable* suspicion that the driver has or is engaging in illegal activity or if the initial detention has become a consensual encounter. See *Hunnicutt*, 135 F.3d at 1349.

Commons sense tells us that a *prolonged* investigative detention may be tantamount to a **de facto arrest** and without sufficient probable cause it violates the citizens rights under both the Oklahoma and United States Constitution.

However, "[t]his court has repeatedly recognized that although a defendant may lack the requisite possessory or ownership interest in a vehicle to directly challenge a search of that vehicle, the defendant may nonetheless contest the *lawfulness of his own detention* and seek to suppress evidence found in the vehicle as the fruit of the [defendant's] illegal detention." *United States v. Nava-Ramirez*, 210 F.3d 1128 (10th Cir.), cert. denied, 121 S. Ct. 206 (2000) (citations omitted). To suppress evidence as the fruit of his unlawful detention, the defendant must make two showings: (1) "that the detention did violate his Fourth Amendment rights"; and (2) that there is "a factual nexus between the illegality and the challenged evidence." *Nava-Ramirez*, 210 F.3d at 1131 (internal quotations and citation omitted).

In vehicle stop cases that once the occupants of the vehicle have established that their detention, arrest or stop was illegal, "as a general rule any evidence obtained as a result of their detention must be excluded as fruit of the poisonous tree." *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001) (referring to both driver and passenger) (citing *United States v. Villa-Chaparro*, 115 F.3d 797, 800 n.1 (10th Cir. 1997)). This result obtains unless the government can convince the factfinder that the evidence is sufficiently purged of its primary taint on the basis of one of three grounds. *Nava-Ramirez*, 210 F.3d at 1131. It may do so by "demonstrating the evidence would have been inevitably discovered, was discovered through independent means, or was so attenuated from the illegality as to dissipate the taint of the unlawful conduct." *Id.* If the government can establish any of these three grounds, the evidence is deemed to be purged of its primary taint and may be admitted.

In *United States v. Erwin*, 875 F.2d 268, 270 (10th Cir. 1989), the 10<sup>th</sup> circuit was faced with the issue of whether a passenger riding in a vehicle that is illegally stopped by the police has standing to challenge the illegal stop. The court concluded that the Fourth Amendment is implicated when a passenger is stopped as surely as it is when a driver is stopped because the passenger has a right to object to the seizure of his person. In so holding, the 10<sup>th</sup> circuit said:

[W]e see no reason why a person's Fourth Amendment interests in challenging his own seizure should be diminished merely because he was a passenger, and not the driver, when the stop occurred. Drivers and passengers have similar interests in seeing that their persons remain free from unreasonable seizure. Furthermore, we reject any notion that a vehicular stop detains for Fourth Amendment purposes *only* the driver simply because the passenger may be free to depart. *Erwin*, 875 F.2d at 270.

In *United States v. Elycio-Montoya*, 70 F.3d 1158, 1164 (10th Cir. 1995), it held that just as a passenger may challenge the illegal stop of a car in which he is riding as a seizure of his person, so may he challenge an illegal arrest stemming from a vehicular stop. It stated there that "stops, detentions, and arrests all constitute seizures under the Fourth Amendment and differ primarily in the degree to which they restrict the individual's freedom of movement." Further, it held a passenger does not relinquish her Fourth Amendment interest in protecting herself from unlawful seizures merely because she chooses to ride in a vehicle in which she has no possessory or proprietary interest.

The 10<sup>th</sup> circuit court has repeatedly recognized, the *nervousness* "is of limited significance" in determining whether probable cause to search existed, particularly when arresting officer had no prior acquaintance with subject. *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994); see also *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992); *United States v. Hall*, 978 F.2d 616, 621 (10th Cir. 1992). "It is certainly not uncommon for most citizens-whether innocent or guilty-to exhibit signs of nervousness when confronted by a law enforcement officer." *United States v. Wood*, 106 F.3d 942, at 948 (10th Cir. 1997).

The standard in Oklahoma concerning a seizure of the person or an arrest is an **objective standard** and not a subjective standard. It has been held that the facts that allegedly

justified a particular seizure must be judged against an objective standard and that the *good faith* or an **inarticulate hunch** of the arresting officer is not enough. *Revels v. State*, 666 P.2d 1298 (Okla. 1983).

Merely because a person was present near a building used for drug trafficking is not enough for reasonable suspicion for a detention or arrest. See, *Starr vs. Downs*, 10<sup>th</sup> Circuit, opinion 03-5170 citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

While recognizing that a lesser amount of information is needed to justify an investigatory detention, or "stop and frisk" as it has been termed, the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), refused to hold that the Fourth Amendment provides no protection to the individual in such situation. The Court held that the reasonableness of an investigatory detention is to be determined by weighing the interests of the State in effective law enforcement against the interest of the individual in being free from arbitrary invasions of his liberty. To overcome the strictures of the Fourth Amendment, the Court held that an officer ". . . must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S., at page 21, 88 S.Ct. at page 1880. The Court pointed out that to hold law enforcement officers to a lower standard would allow the abridgment of constitutionally guaranteed rights granted on nothing more than "inarticulable hunches."

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the Supreme Court was asked to apply its holding in *Terry*, supra, to an investigative stop of an automobile, where the officer had not observed a traffic violation nor any suspicious activity on the part of the defendant. Rather, the officer testified that he stopped the vehicle without any suspicion of unlawful activity in order to check the defendant's driver's license and registration. The [620 P.2d 449] Supreme Court, agreeing that the stop violated the petitioner's Fourth Amendment rights, stated that "[t]o insist neither upon an appropriate factual basis for

suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion `would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . .'" 440 U.S., at 661, 99 S.Ct. at 1400 quoting *Terry v. Ohio*, supra, at 22, 88 S.Ct. at 1880.

The Supreme Court summarized its holding in *Prouse* as follows:

[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment, 440 U.S., at 663, 99 S.Ct. at 1401.

It has been recognized that information received from a police radio dispatch reporting the commission of a felony giving an adequate description of the suspected felons will furnish probable cause to make an arrest or reasonable ground for an investigatory stop. *Jones v. State*, Okl.Cr., 507 P.2d 1267 (1973), *Holt v. State*, Okl.Cr., 506 P.2d 561 (1973), *McKay v. State*, Okl.Cr., 472 P.2d 445 (1970). But where the information possessed by the informing officer is **insufficient** to furnish probable cause to make an arrest the fact that a fellow officer relies on it will not carry the sufficiency. *Whitely v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

In *Florida v. Royer*, 460 U.S. 491 (1983) the Supreme Court addressed the situation where **consent to search** is given while an individual is being unlawfully detained. The Court noted that "**where the validity of a search rests on consent**, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given . . . ." The Court concluded that because Royer "was being **illegally detained** when he consented to the search of his luggage," **his consent "was tainted by the illegality and was ineffective to justify the search."**

An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer. Title 22 O.S. Sec. 190.

If a suspect is interrupted and his liberty of movement is restricted by arresting officer, then the arrest is complete. *Castellano v. State*, 585 P.2d 361 (Okla. 1978), citing in support,

*Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). Arrest is the taking into custody of the defendant and does not depend upon the exact words used by the arresting officer. “No particular form of words is necessary to constitute an arrest.” *Henry v. State*, 494 P.2d 661, 663 (Okla. 1972), citing *Heinzman v. State*, 283 P. 264, 265 (1929). It is apparent that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

It has been held that one does not have probable cause to arrest unless he has information or facts which, if submitted to a magistrate, would require the issuance of an arrest warrant; mere suspicion is not enough. *Beeler v. State*, 677 P.2d 556 (Okla. 1984), in accord, *Jacobson v. State*, 684 P.2d 556 (Okla. 1984).

The test for a valid warrantless arrest is whether at the moment the arrest was made the officer had probable cause to make it whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. *Castellano v. State*, 585 P.2d 361 (Okla. 1978), in accord, *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Moran v. U.S.*, 404 F.2d 663 (10 Cir. 1968); *State v. McLemore*, 561 P.2d 1367 (1977).

A conviction based on circumstantial evidence cannot be sustained if the proof does not exclude every reasonable hypothesis but that of guilt, and proof amounting only to a strong suspicion or mere probability is insufficient. *Roth v. State*, 582 P.2d 1397 (Okla. 1975); *Staples v. State*, 528 P.2d 1131 (Okla.); *Brown v. State*, 481 P.2d 475 (Okla. 1971).

An illegal arrest renders inadmissible any evidence obtained pursuant to the arrest. See *Hunt v. State*, 601 P.2d 464, 466 (Okla. Cr. 1979), cert. den'd., 446 U.S. 969, 100 S.Ct. 2951, 64 L.Ed.2d 830 (1980). This State "exclusionary rule," prohibiting illegally-obtained evidence

from being used against an accused, is not just a rule of evidence or procedure in Oklahoma. It is a matter of *state constitutional* magnitude, and has been for over seventy years. See Okla. Const. art II, § 30; *Turner v. City of Lawton*, 733 P.2d 375, 377-78 (Okla. 1986), cert. den'd., 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); *Michaud v. State*, 505 P.2d 1399, 1402-03 (Okla.Cr. 1973); *Gore v. State*, 24 Okla. Crim. 394, 218 P. 545, 549 (1923); *Hess v. State*, 84 Okla. 73, 202 P. 310, 314-16 (1921).

"It has been settled law since the 1970's that in order for a police officer to initiate an investigatory stop of a motorist, there must at least exist reasonable suspicion that the motorist is engaging in illegal activity." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 947-48, 951-53 (9th Cir. 2003) at 948 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

In *Terry v. Ohio*, the Court upheld the stop and subsequent frisk of an individual based on an officer's observation of suspicious behavior and his reasonable belief that the suspect was armed. See 392 U.S., at 27—28. In a *Terry*-type investigatory stop, "the officer's action [must be] justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20. In applying *Terry*, the Court has several times indicated that the limitation on "scope" is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted. *United States v. Hensley*, 469 U.S. 221, 235 (1985) (examining, under *Terry*, both "the length and intrusiveness of the stop and detention"); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] ... the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ...").

The scope of a "Terry pat-down" is and must be **strictly limited to a search for offensive weapons**. When in course of a frisk the officer feels an object, he is not justified in

seizing it unless it reasonably resembles an offensive weapon. *Ricci v. State*, Okl.Cr., 506 P.2d 601 (1973).

The first question that must be answered is whether the officers were justified in patting down the defendant in the first place. The standard for such an intrusion is contained in *Terry v. Ohio*, supra, and *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) and it is, like all Fourth Amendment standards, one of reasonableness.

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. \* \* \* And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. . ." *Terry v. Ohio*, 392 U.S. at 27, 88 S.Ct. at 1883, citations omitted.

In *Sibron v. New York*, supra, it states:

"The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. **Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.** In the case of the self-protective search for weapons, he must be able to point to **particular facts** from which he reasonably inferred that [584 P.2d 1363] the **individual was armed and dangerous.** *Terry v. Ohio*, supra." *Sibron v. New York*, 392 U.S. at 64, 88 S.Ct. at 1903.

The burden is on the prosecution to prove the investigatory stop was reasonable, once it is challenged by the accused. See, *Leigh v. State*, 587 P.2d 1379 (Okl.Cr.App. 1978).

The scope of a "Terry pat-down" is and must be strictly limited to a search for offensive weapons. When in the course of a frisk the officer feels an object, he is not justified in seizing it unless it reasonably resembles an offensive weapon. *Francis v. State*, 584 P.2d 1359, 1363 (Okl.Cr. 1978). See also *Ricci v. State*, 506 P.2d 601, 604 (Okl.Cr. 1973).

The justification for allowing searches incident to arrest also places a temporal restriction upon the police's conduct. As this court stated in *United States v. Lugo*, 978 F.2d 631, 635 (10th Cir. 1992), once the immediate rationale for conducting a search incident to arrest has passed, the police may not then engage in a search absent probable cause to do so. See *id.* ("[W]hen the search of Lugo's truck began, Lugo was no longer at the scene. He was handcuffed and sitting in the back seat of a patrol car proceeding toward Green River. Once Lugo had been taken from the scene, there was obviously no threat that he might reach in his vehicle and grab a weapon or destroy evidence. Thus, the rationale for a search incident to arrest had evaporated.").

The question whether a person's consent to be detained by officers was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, *Schneckloth v. Bustamonte*, 412 U.S. at 412 U.S. 227"]227, and is a matter which the Government has the burden of proving. *Id.* at 222, citing 227, citing *Bumper v. North Carolina*, 391 U.S. 543, 548.

To be justified as an inventory search, however, the search cannot be investigatory in nature but must instead be used only as a tool to record the defendant's belongings to protect the police from potential liability. See *South Dakota v. Opperman*, [428 U.S. 364](#), 376 (1976) (upholding inventory search where "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive"); *Haro-Salcedo*, 107 F.3d at 772-73 ("An inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence . . .").

"The Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351.

The Tenth Circuit has identified various factors relevant to whether a reasonable person would not feel free to terminate the encounter with police:

The threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public. *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996). The 10<sup>th</sup> Circuit has "steadfastly refused to view any one of these factors as dispositive." *United States v. Glass*, 128 F.3d 1398, 1406 (10th Cir. 1997).

The rule in Oklahoma concerning a warrantless arrest or search is that the burden is on the prosecution to prove it was lawful, once it is challenged. *Leigh v. State*, 587 P.2d 1379 (Okla. 1978).

Defendant is presumed innocent until contrary is proved, and in case of reasonable doubt as to whether his guilt is satisfactorily shown he is entitled to be acquitted. *Jackson v. State*, 403 P.2d 518 (Okla. 1965).

Statements made by an accused subsequent to an illegal arrest are potentially fruit of the poisonous tree and should be suppressed unless the making of such statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416-17, 9 L.Ed.2d 441 (1963). The Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), set forth several factors to be considered when determining whether the statements were obtained through the exploitation of the illegal arrest or whether they can be considered to have been voluntarily made. These factors include (1) the giving of *Miranda* warnings, (2) the "temporal proximity" of the arrest and the statements, (3) the presence of "intervening circumstances," and (4) "the purpose and flagrancy of the official misconduct." *Id.* 422 U.S. at 603-04, 83 S.Ct. at 2261-62. The burden of showing that the statements at issue were voluntary and

therefore admissible lies with the State. *Id.* The burden rests with the State to demonstrate beyond a reasonable doubt that the illegally obtained statement did not contribute to the conviction. *Pickens v. State*, 1994 OK CR 74, ¶ 7, 885 P.2d 678, 682, *overruled in part on other grounds*, *Parker v. State*, 1996 OK CR 19, ¶ 23, 917 P.2d 980, 986.

The "touchstone" of Fourth Amendment analysis "is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry*, 392 U.S. at 19). "Reasonableness, of course, depends 'on a *balance* between the public interest and the individual's right to *personal security free from arbitrary interference* by law officers.'" *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Because of "the fact-specific nature of the reasonableness inquiry," the Supreme Court has generally "eschewed bright-line rules" in the Fourth Amendment context. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

There is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. Indeed, the court has said that the Fifth Amendment's protections apply with equal force in the context of *Terry* stops, see *Terry v. Ohio*, 392 U.S. 1 (1968), where **an officer's inquiry "must be 'reasonably related in scope to the justification for [the stop's] initiation.'** " *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (*some internal quotation marks omitted*). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Ibid.* See also *Terry*, 392 U.S., at 34 (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation").

In determining whether a consensual encounter or unlawful detention transpired, a court should consider the totality of the circumstances. "A traffic stop may become a consensual encounter if the officer returns the license and registration and asks questions **without further constraining the driver by an overbearing show of authority.**" *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996). "A consensual encounter is the **voluntary cooperation** of a private citizen in response to *non-coercive questioning* by a law enforcement officer." *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000) (emphasis added and quotation marks and citation omitted). Whether an encounter is consensual "depends on whether the police conduct would have conveyed to a reasonable person that he or she was not free to decline the officer's requests or otherwise terminate the encounter." *Id.* (quotation marks and citation omitted). Although not an exhaustive list, certain factors indicating a "coercive show of authority" may suggest an encounter is not consensual: "the presence of more than one officer, the display of a weapon, physical touching by the officer, or his **use of a commanding tone of voice** indicating that compliance might be compelled." *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.), *cert. denied*, 502 U.S. 881 (1991); see *United States v. Sandoval*, 29 F.3d 537, 540-41 (10th Cir. 1994).

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-2048, 36 L.Ed.2d 854 (1973), the United States Supreme Court stated as follows:

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from **the totality of all the circumstances**. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent — the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.." (Footnote omitted)

A routine traffic stop is considered a seizure within the meaning of the Fourth Amendment, see *Hunnicuttt*, 135 F.3d at 1348. The principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), govern whether a traffic stop is reasonable under the Fourth Amendment. Under *Terry*, a traffic stop must be "justified at its inception and the detention must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Anderson*, 114 F.3d 1059, 1063 (10th Cir. 1997) (quoting *Terry*, 392 U.S. at 20).

Courts cannot presume that consent was either voluntary or involuntary. See *United States v. Hernandez*, 93 F.3d 1493, 1500 (10th Cir. 1996). Rather, to establish voluntary consent, the government must "show there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given." *Id.*<sup>2</sup> For the purposes of appellate review, the ultimate determination of "[w]hether a consent to search that does not follow a Fourth Amendment violation was voluntary is a question of fact to be determined from the totality of the circumstances." *Id.*; accord *United States v. Doyle*, 129 F.3d 1372, 1377 (10th Cir. 1997). Thus, we accept the district court's

In *United States v. Sharpe*, 470 U.S. at 682 (quoting *Terry*, 392 U.S. at 20), the Supreme Court recognized that the test for evaluating the constitutionality of traffic stops is the two-part test articulated in *Terry*: (1) "whether the officer's action was justified at its inception,"

and (2) whether the officer's subsequent actions were "reasonably related in scope to the circumstances which justified the interference in the first place."

The Supreme Court has recognized that in the case of a traffic stop, like a *Terry* stop, both "the stop *and the inquiry* must be 'reasonably related in scope to the justification for their initiation.'" In *Florida v. Royer*, 460 U.S. 491 (1983) the Supreme Court emphasized that the length and scope of an investigative detention cannot expand beyond the justification for the initial stop:

This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Hence an officer whose initial reasonable suspicion has been dispelled, and who has no other reasonable suspicion or probable cause to justify detaining an individual, has no authority to continue detaining that individual. A detention that continues beyond the point at which an officer determines that his initial rationale for the stop was mistaken can no longer be considered "reasonably related in scope" to the initial justification for that intrusion. Furthermore, *it is the State's burden* to establish that a particular investigative detention did not continue beyond the time period in which an officer's original reasonable suspicion was dispelled (and no additional reasonable suspicion had emerged).

The Tenth Circuit Court of Appeals has held that a consent was invalid when it was the fruit of an illegal detention in the *McSwain* decision *United States v. McSwain*, 29 F.3d 558 (10<sup>th</sup> Cir. 1994). The question before that court was "whether Mr. McSwain's consent to the search of his vehicle cleansed the taint of the unlawful detention, thereby validating the search." After finding that McSwain and his car were being illegally detained (after the initial reason for the stop of his car had been resolved), the court further found that McSwain's response of "Go ahead," to an officer's request for consent to search his car, did not constitute an adequate consent to search. The *McSwain* court considered three factors to be especially relevant to its determination: (1) the temporal proximity of the illegal detention and the consent, (2) any intervening circumstances, and (3) the purpose and flagrancy of the officer's unlawful conduct. The court concluded that McSwain's consent "was not sufficient to purge the taint of his illegal detention."

Supreme Court preference is for Fourth Amendment rules that are "readily administrable" and "sufficiently clear and simple," so as to be easily understood and applied by both officers on duty and courts on review. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 1553-54, 149 L.Ed.2d 549 (2001).

*See Berkemer*, 468 U.S. at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam), in holding that *Miranda* safeguards come into play when a person's "freedom of action is curtailed to a 'degree associated with formal arrest'"); *Miranda v.*

*Arizona*, 384 U.S. 436, 478 (1966) (deciding that a person is in custody when authorities have deprived him of his freedom **in any significant way**); *United States v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993) ("A prolonged investigative detention may be tantamount to a de facto arrest.").

The rule in Oklahoma concerning a warrant-less arrest or search is that the burden is on the prosecution to prove it was lawful, once it is challenged. *Leigh v. State*, 587 P.2d 1379 (Okla. 1978), *Greene v. State*, 508 P.2d 1095, 1100 (Okla. Cr. 1973).

The standard in Oklahoma concerning a seizure of the person or an arrest is an objective standard and not a subjective standard. It has been held that the facts that allegedly justified a particular seizure must be judged against an objective standard and that the good faith or an inarticulate hunch of the arresting officer is not enough. *Revels v. State*, 666 P.2d 1298 (Okla. 1983).

An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer. *Title 22 O.S. Sec. 190*.

If a suspect is interrupted and his liberty of movement is restricted by an arresting officer, then the arrest is complete. *Castellano v. State*, 585 P.2d 361 (Okla. 1978), citing in support, *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). Arrest is the taking into custody of the defendant and does not depend upon the exact words used by the arresting officer. "No particular form of words is necessary to constitute an arrest." *Henry v. State*, 494 P.2d 661, 663 (Okla. 1972), citing *Heinzman v. State*, 283 P. 264 (1929). It is apparent that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Tenth Circuit Court of Criminal Appeals has recognized **three categories of police-citizen encounters**: (1) consensual encounters which do not implicate the Fourth

Amendment[;] (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity[;] and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause. *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996) (*quotations omitted*). In determining whether a police-citizen encounter is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have **communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.**'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (*quoting Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)); *see also United States v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994) (*en banc*). *No per se or absolute rules govern this inquiry. See Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Little*, 18 F.3d at 1503-04. "Rather, every case turns on the totality of the circumstances presented." *Little*, 18 F.3d at 1503.

It has been held that one does not have probable cause to arrest unless he has information or facts which, if submitted to a magistrate, would require the issuance of an arrest warrant; mere suspicion is not enough. *Beeler v. State*, 677 P.2d 556 (Okla. 1984), *in accord*, *Jacobson v. State*, 684 P.2d 556 (Okla. 1984).

The test for a valid warrant-less arrest is whether at the moment the arrest was made the officer had probable cause to make it and whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. *Castellano v. State*, 585 P.2d 361 (Okla. 1978), *in accord*, *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Moran v. U.S.*, 404 F.2d 663 (10<sup>th</sup> Cir. 1968); *State v. McLemore*, 561 P.2d 1367 (1977).

It is a fundamental principle of federal constitutional law that evidence obtained by illegal conduct of the police may not be used to convict a defendant as it is the "fruit of the poisonous tree." *Silverthorne Lumber Company v. United States*, [251 U.S. 385](#), 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Nardone v. United States*, [308 U.S. 338](#), 60 S.Ct. 266, 84 L.Ed. 307 (1939). In *Wong Sun v. United States*, [371 U.S. 471](#), 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court concluded that evidence which was the "fruit" of unlawful police action must be excluded as the "fruit of the poisonous tree."

The rule that evidence obtained illegally must be excluded is premised on the concept that all are equally bound by the law, including public officials. As observed in *Mapp v. Ohio*, [367 U.S. 643](#), 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961), which applied the exclusionary rule to the states:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. \* \* \* If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Justice Rehnquist once said that there may be cases "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." See, *U.S. v. Russell*, 411 U.S. 423, 431-32 (1973).

Our founding fathers were sensitive to the possible abuses of power by government and created three branches of government to assure checks and balances. The idea is that 'checks and balances' involves the importance of each branch curbing the excesses of the other branch. It is the idea that power can be successfully limited if it is shared and checked and balanced. The concept of checks and balances is associated with ***the independence and integrity of the judiciary.***

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the ends justifies the means---to declare that the Government may commit crimes in order to secure the conviction of a private criminal----would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Omstead v. U.S.*, 277 U.S. 438 (1928) at 485.

All illegally obtained evidence is insufficient to convict this defendant of a crime as charged under the laws of the State of Oklahoma and the evidence obtained as a result of the illegal stop should be suppressed as the “fruit of the poisonous tree.” That this court has authority under Title 22 O.S. Section 501.4 to dismiss a case in the interest of justice to conserve limited judicial resources. Wherefore, Defendant prays that the court grant this motion and grant some relief, sustain the motion and dismiss this case in the interest of justice and conserving limited judicial resources.

Respectfully submitted,

Glen R. Graham OBA 12110  
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1612 S. Cincinnati Ave  
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(918) 583-4621

VERIFICATION

STATE OF OKLAHOMA     )  
COUNTY OF TULSA       )     ss.

Glen R. Graham, upon oath duly sworn do hereby state that I have read the above and foregoing motions and arguments and briefs and authorities and the matters stated therein are true and correct to the best of my information.

\_\_\_\_\_  
GLEN R. GRAHAM

Subscribed and sworn to before the undersigned notary public on the \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

My commission expires:

\_\_\_\_\_  
Notary Public

**Certificate of Service**

This is to certify that the undersigned hand delivered a true and correct copy of the above and foregoing motion to the Tulsa County District Attorney, 9<sup>th</sup> Floor, 500 S. Denver, Tulsa, OK, on the same day it was filed with the Tulsa County Criminal Court Clerk.

By: \_\_\_\_\_  
Glen R. Graham