Fall 2003

# To Catch a Killer: Roadblocks and the Fourth Amendment

Michael T. Morley

# To Catch a Killer:

## Roadblocks and the Fourth Amendment

**By Michael T. Morley**

*Your children are not safe anywhere, at any time.*

—Message from the serial sniper

*The person or the people involved in this have shown a clear willingness and ability to kill people of all ages, all races, all genders, all professions, at different times, on different days, and at different locations.*

—Montgomery County Police Chief Charles Moose

**Michael T. Morley**, *a 2003 graduate of Yale Law School, is the winner of the 2003 William W. Greenhalgh Student Writing Competition, sponsored by the ABA's Criminal Justice Section. He is now clerking for Judge Gerald Bard Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit. Morley was awarded a $2,000 cash prize, which was presented in August during the Section luncheon at the ABA Annual Meeting in San Francisco, along with a one-year free membership in the Section. His winning entry "To Catch a Killer," was selected by a panel that included a judge, a prosecutor, and a public defender. For information on the 2004 contest, visit the Section Web site at www.abanet.org/crimjust/home.html and click on the "Law Student" tab.*

With the war in Iraq and the spread of the mysterious SARS disease still fresh in people's minds, the terror that gripped the Washington, D.C., metropolitan area in the midst of a serial sniper's rampage in October 2002 to many seems like nothing more than a hazy memory. It is easy to forget the feelings of fear and helplessness that pervaded the region during the killing spree that led to one of the largest manhunts in American law enforcement history. One tactic used in the investigation was the establishment of roadblocks along nearby major highways in the wake of shootings. There were two ways such roadblocks could have been conducted — police could have stopped all cars (an "all-cars roadblock"), or they could have stopped only white vans with ladders on their roofs (a "vans-only roadblock"), the type of vehicle in which the sniper was reportedly traveling. The Fourth Amendment, which governs both state and federal officials, *see Mapp v. Ohio*, 367 U.S. 643 (1961), would apply to either approach because a compulsory stop of an automobile at a checkpoint, even if "the resulting detention [is] quite brief," is a type of "seizure." (*Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also Brower v. Inyo County*, 489 U.S. 593, 594 (1989).)

Assuming the police may pull over a vehicle, they may also look through its windows for incriminating evidence because "[t]here is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed

from outside the vehicle by either inquisitive passersby or diligent police officers." (*Brown v. Texas*, 460 U.S. 730, 740 (1983).) Police may even briefly question the occupants of properly detained vehicles. (*See Mollica v. Volker*, 229 F.3d 366, 371 (2d Cir. 2000).) A separate Fourth Amendment issue arises, however, if police go beyond these measures to conduct full-fledged searches of the cars. In *Carroll v. United States*, 267 U.S. 132, 150-51 (1925), the Court held that it would be "unreasonable . . . [to] subject all persons lawfully using the highways to the inconvenience and indignity of such a search." In general, warrantless searches of automobiles must be supported by probable cause. (*Id.* at 155–56.)

This article addresses the permissibility, under federal and state constitutional law, of the initial detention and more extensive searches of vehicles at both all-cars and vans-only roadblocks. It begins by examining whether the temporary detention of cars at sniper checkpoints can be justified as "special needs" seizures that may be performed in the absence of individualized suspicion. This article then considers whether the Fourth Amendment's general requirement of probable cause for automobile searches applies at sniper checkpoints. Following a brief discussion of how the possibility of domestic terrorism affects these analyses, this article discusses whether state constitutions have been interpreted to afford drivers greater protection against sniper checkpoints.

## Caution: roadblock ahead

*Our fugitive has been on the run for 90 minutes. . . . [T]hat gives us a radius of six miles. What I want out of each and every one of you is a hard target search of every gas station, residence, warehouse, farmhouse, henhouse, outhouse, and doghouse in that area. Checkpoints go up at fifteen miles. Your fugitive's name is Dr. Richard Kimble. Go get him.*

—Deputy U.S. Marshal Sam Gerard in the film *The Fugitive*

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .*

—Fourth Amendment, U.S. Constitution

The U.S. Supreme Court has held that the police may stop cars at roadblocks, without either a warrant or any degree of individualized suspicion, if the checkpoints are intended to further a "special governmental need" other than "general crime control ends." (*City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 43 (2000).) For example, the Court has upheld sobriety checkpoints as a way of ensuring highway safety, *see Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990), and immigration checkpoints near our borders to keep our nation's boundaries secure, *see United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976). Nevertheless, the Court struck down a narcotics checkpoint at which cars were stopped so officers could look through their windows for illegal drugs. It held that the narcotics checkpoint's primary purpose—identifying and arresting drug couriers—was indistinguishable from the state's "general interest in crime control," and so did not further a "special need." (*Edmond*, 531 U.S. at 44.)

Thus, a critical threshold issue is whether apprehension of a killer who is likely to strike again is a special need independent of the government's interest in crime control. There are many factors that may initially lead one to believe that sniper checkpoints would fail this test. First, they were run by police officers and were expressly intended to lead to the sniper's arrest and prosecution. These were decisive considerations in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), in which the Court considered the constitutionality of a program at a public hospital under which urine that had been submitted by pregnant women for other purposes was tested for illegal drugs. The Court concluded that the program furthered only the state's general interest in crime control rather than the special need of protecting unborn children from drug-related illnesses because it was structured around "[t]he extensive involvement of law enforcement and the threat of prosecution." (*Id.* at 81.) Consequently, it may seem difficult to argue that sniper roadblocks further a special need other than law enforcement.

Of course, police involvement is not necessarily fatal to vehicle checkpoints; the sobriety checkpoint in *Sitz* was upheld although it was managed by the police. In *Sitz*, however, the targets of the search (drunk drivers) were both violating the law and posing a serious threat to the safety of others at the time of the brief seizures. In contrast, even if the serial sniper were fleeing the scene of a recent shooting, he would be neither committing an offense nor endangering anyone's life while driving away. Even at the immigration checkpoint upheld in *Martinez-Fuerte*, U.S. Border Patrol agents were searching for evidence of an offense (unlawful presence in the country) actually being committed at the time of the search; with the sniper checkpoints, police were searching for a person in connection with past and anticipated future crimes.

Notwithstanding these important distinctions, there is something intuitively unappealing about such a formalistic analysis. The Supreme Court, in *Delaware v. Prouse*, 440 U.S. at 663, strongly suggested that checkpoints erected for the purpose of checking drivers' licenses and registrations would be permissible. It would be odd to conclude that apprehending unlicensed drivers was a good enough reason for temporarily detaining cars, but finding the serial sniper was not.

Another important consideration is that the serial sniper made it clear that he would continue to kill until he was apprehended. Consequently, the threat to human life he presented brought him closer to the drunk drivers in *Sitz* than the drug couriers in *Edmond*. Finally, the sniper checkpoints were not fishing expeditions to look for anyone who might be breaking a law, but were

Photo: AP

directly aimed at a particular, dangerous fugitive. The *Edmond* narcotics checkpoint, in contrast, was invalidated because the Court refused to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." (531 U.S. at 44.) The Middle District of Alabama made a similar point in distinguishing between roadblocks intended to "uncover general criminal activity" and roadblocks established "to arrest individuals about whom a grand jury had concluded probable cause existed as to their involvement with criminal activity." (*United States v. Davis*, 143 F. Supp. 2d 1302, 1306 (M.D. Ala. 2001).)

For these reasons, it can be argued that apprehension of a particular, dangerous felon believed to be fleeing the area of a recently committed crime is a special need distinguishable from the state's generalized interest in crime control. Balancing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty," the brief invasion of privacy posed by a checkpoint was outweighed by the need to apprehend the sniper. (*Brown*, 443 U.S. at 50–51.) Consequently, neither a warrant nor probable cause was needed to stop vehicles at sniper roadblocks, whether they temporarily detained all cars or only white vans.

The three main federal opinions to consider this issue reached a similar conclusion. In the words of one court, police may pull over cars at a roadblock where there is "(1) belief by the officer involved that a crime might have been committed; (2) reasonable grounds for such a belief, and (3) absolute necessity for immediate investigatory activity." (*United States v. Bonanno*, 180 F. Supp. 71, 80 (S.D.N.Y. 1960).) As the Fourth Circuit explained, "[T]he exigency of fleeing, perhaps dangerous, suspects . . . justifies the minimal intrusion on privacy rights posed to passing motorists." (*United States v. Harper*, 617 F.2d 35, 41 (4th Cir. 1980).) The main consideration emphasized by these courts is not whether there is a reasonable, articulable basis for pulling over any individual car—because there generally is not—but instead whether there is a reasonable basis for believing that a serious crime was committed in the area. (*Davis*, 143 F. Supp. 2d at 1307; *see also* 3 W. LAFAVE, SEARCH AND SEIZURE (2d ed.) § 9.5 at 549 (1987).)

> Intrusion on motorists is meant to be "slight".

## Searches at sniper checkpoints

As discussed earlier, although the mobility of automobiles is an exigency that excuses police from obtaining warrants prior to searches, the Court generally frowns upon automobile searches conducted without probable cause. (*See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).) For example, although the Court upheld the brief detention of cars at immigration checkpoints, *see Martinez-Fuerte*, 428 U.S. at 557, it prevented federal officials from searching those cars without probable cause because a search of a vehicle "is a substantial invasion of privacy." (*United States v. Ortiz*, 422 U.S. 891, 896–97 (1975).) Other federal courts have approved searches of automobiles at fleeing-suspect checkpoints only when the government demonstrated probable cause to support them. For instance, in *United States v. Cusanelli*, the Sixth Circuit upheld a search of defendants' campers "at a roadblock outside the airport" when two campers were seen being loaded inside the airport with more than 1,000 pounds of marijuana. (472 F.2d 1204, 1205 (6th Cir. 1973); *see also United States v. Kuntz*, 265 F. Supp. 543, 548 (S.D.N.Y. 1967) (upholding search of vehicle at police roadblock based upon probable cause).)

Justice Jackson, in his dissent in *Brinegar v. United States*, argued that vehicles may be searched at checkpoints, even absent probable cause, when lives are at stake. He wrote:

> [If] a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car . . . [t]he officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to detect a vicious crime.

(338 U.S. 160, 183 (1949) (Jackson, J., dissenting).)

It is not clear, however, that this argument justifies searches of automobiles at sniper checkpoints. A primary reason the Court permits the detention of vehicles at checkpoints in the first place is because "the intrusion on motorists stopped briefly . . . is slight." (*Sitz*, 496 U.S. at 451.) It should take more than an articulation of a "special need beyond law enforcement" to justify the much greater invasion of privacy entailed by a full-fledged search.

If there were only one major road leading out of the area of a shooting, or if the police had reason to believe the sniper would be using a particular route, this greater invasion of privacy may be supportable—at least with regard to white vans. Searches of all cars on all highways within a few miles of a shooting, however, is precisely the type of dragnet the Fourth Amendment was designed to prevent. Even the exigent circumstances exception to the warrant requirement demands that police demonstrate probable cause for conducting searches. (*See Schmerber v. California*, 384 U.S. 757, 771 (1966).) Thus, while all-vehicles checkpoints are permissible, suspicionless searches of vehicles detained at those checkpoints are not. Although this probable cause requirement will "predictably deter the police from conducting some searches that they would otherwise like to conduct . . . this is not

an unintended result of the Fourth Amendment's protection of privacy; rather, it is the very purpose for which the Amendment was thought necessary." (*New Jersey v. T.L.O.*, 469 U.S. 325, 357 (1985) (Brennan, J., dissenting).)

## Domestic terrorism

The serial sniper's repeated killings in the vicinity of the nation's capital led many to fear that he was a terrorist. (*See Police to Sniper: 'Call us Back,'* BALTIMORE SUN, Oct. 22, 2002, at 1A.) The possibility of domestic terrorism necessarily affects any Fourth Amendment analysis. In the seminal case *United States v. United States District Court*, 407 U.S. 297, 322 (1972), the Supreme Court recognized the distinction between domestic terrorism and ordinary crime, stating, "[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime'. . . . Different standards may be compatible with the Fourth Amendment [in domestic security cases]."

The term "domestic terrorism" admittedly requires a more precise definition than currently exists. Nonetheless, when police have reason to believe, as they arguably did in the serial sniper case, that domestic terrorism is involved, the degree of probable cause necessary to support searches of cars stopped at checkpoints may be appropriately reduced. This is already the case with foreign-intelligence searches. (*See United States v. Nicholson*, 955 F. Supp. 588, 591 (E.D. Va. 1997) (upholding foreign-intelligence searches conducted with warrants issued under a greatly reduced standard of probable cause).)

## The approaches of state courts

Every state supreme court to consider the issue has upheld the use of checkpoints to catch escaping suspects in the wake of serious crimes, usually by applying a balancing test comparing the limited scope of the invasion to the magnitude of the governmental interest at stake. (*See, e.g., State v. Gascon*, 811 P.2d 1103, 1106 (*Id.* 1989).) These courts have held that individualized suspicion to stop cars is not required because "[w]hen a serious crime has been committed . . . it is necessary and therefore justifiable to resort to measures which otherwise might be considered improper intrusions, such as setting up roadblocks and checking cars or conveyances in the area." (*State v. Torres*, 508 P.2d 534, 536 (Utah 1973); *see also State v. Silvernail*, 605 P.2d 1279, 1283 (Wash. Ct. App. 1980).) No state court has ever concluded that a state constitution offers greater protection against sniper-type roadblocks than the federal Constitution.

Most of these cases, however, would not support the erection of roadblocks across three separate jurisdictions (Virginia, Maryland, and Washington, D.C.) to cover all possible major escape routes. In virtually all of the state cases in which checkpoints were upheld, police established only one checkpoint along a route on which they had reason to believe the escaping suspect may be traveling. For instance, in *State v. Gascon*, the Idaho Supreme Court upheld a checkpoint at a particular bridge because it "provided the nearest access to an interstate highway." (811 P.2d at 1106.) The Alaska Supreme Court permitted the establishment of a roadblock "across the only road exiting the [crime scene] suitable for passenger cars." (*Lacy v. State*, 608 P.2d 19, 20 (Alaska 1980).) Similarly, in *State v. Silvernail*, a Washington state court approved a roadblock at the exit to a dock where the police believed burglars were disembarking from a ferry. (605 P.2d at 1281.) The Washington court stressed that "the availability of alternative paths of escape could render a roadblock unreasonable . . . . [T]he information . . . that suspects fled in a particular direction must be reliable." (*Id.* at 1283; *see also State v. Claussen*, 522 N.W.2d 196, 197 (S.D. 1994) (upholding roadblock "on the only road leading out of the [crime scene]").) A notable exception is *State v. Tykwinski*, 824 P.2d 761, 762 (Ariz. 1991), in which the Arizona Supreme Court approved a system of roadblocks to catch a cop killer.

The conduct permitted by state courts at sniper-type checkpoints varies widely. The Idaho Supreme Court allowed police only to make drivers "proceed[] slowly through the temporary roadblock while officers visually checked for persons matching the robbery suspect's description." (*Gascon*, 811 P.2d at 1107.) Individualized suspicion was required before a car could be made to stop. (*Id.* at 1108.) The Washington Court of Appeals and the Arizona Supreme Court, in contrast, permitted police to stop and search cars (including their trunks) at checkpoints without even individualized suspicion. (*Silvernail*, 605 P.2d at 1283; *Tykwinski*, 824 P.2d at 762.) Thus, some states are willing to allow police to go further than federal courts permit.

## Conclusion

*You don't need to see his identification. . . . These aren't the droids you're looking for.*

—Obi-Wan Kenobi at a vehicle checkpoint in the film *Star Wars*

*The car used by the two suspects in the Washington-area sniper attacks was stopped at least five times at roadblocks thrown up immediately by police after many of the shootings.*

—"Cops' Missed Opportunities," *Newsday* (Oct. 6, 2002, at A5.)

As both fiction and reality demonstrate, checkpoints are far from a foolproof method of ensuring the apprehension of fugitives. Nevertheless, they can sometimes be one of the only alternatives available to the police. While the government's "special need" to apprehend dangerous felons justifies brief stops of all vehicles at sniper checkpoints, probable cause (or consent) is required to justify searches of detained cars, unless the case involves a sufficiently strong link to domestic terrorism. Because most state constitutions have not been interpreted as offering greater protection against sniper checkpoints, they remain a constitutionally viable strategy for both state and federal agents to utilize. ■

The proliferation of drug courts is testament to their success, as are the numerous local and national evaluations now being published throughout the country. In nearly all of the studies, researchers have concluded that drug court participants commit new crimes at a significantly lower rate than those who do not participate.

Drug courts continue to save lives, one at a time. For some addicts, drug court provides the structure, incentive, and encouragement to fight the daily battle against relapse. They have proven that treatment without sanctions is no more effective than sanctions without treatment.

> Being arrested might just save their lives.

## Finding new money in a time of deficits

In King County, where I have been the elected prosecutor since 1979, we have had a successful drug court since 1994. Like many fledgling drug courts, ours was started with grant money that soon ran out. In order to keep drug treatment as a realistic and permanent option for those who need it, we had to find another source of money. Even though drug court had proven itself worthy of a place at the criminal justice table, more than 70 percent of the county budget was already devoted to criminal justice costs. There was no new money to take on new treatment programs or fill the gaps left when grants ran out.

I turned to the state legislature with a proposal that would reprogram existing dollars from prison cells to treatment programs. Coming from a Republican prosecutor with a reputation for being "tough on crime," my proposal to reduce sentences for drug delivery crimes was taken seriously.

Washington State's sentencing scheme had sentenced drug dealers to 21–27 months in the state prison system regardless of the amount of drugs sold or the presence of addiction. This sentence was adopted in the late 1980s in response to the epidemic of crack cocaine that swept the nation's urban areas. Although that sentencing scheme was an appropriate response to a major problem, the consequences to the state prison population and budget were predictable and significant. Because so much of the budget was spent on corrections, little was left over to integrate drug treatment within the criminal justice system.

Our legislation set its sights on the state prison budget, reduced the sentence from an average of 24 months for drug dealing to an average of 17.5 months, and captured the resulting savings to be spent on drug treatment programs for defendants charged with felony crimes. Drug dealers still go to prison in Washington, but for a shorter period of time, and with the opportunity to receive drug treatment both in prison and upon release back into the community.

In the 2002 session, the Washington State Legislature did what we asked: It reduced prison sentences, identified the savings within the state prison system, and sent that money to local jurisdictions to fund drug treatment within the county criminal justice systems. This year, up to $8 million will be distributed for drug treatment within our state's criminal justice system.

For those with a serious drug addiction, getting arrested and charged with a felony is not their biggest problem. In fact, if we design our systems right, being arrested might just save their lives. In Washington State, we have taken an important step toward making drug treatment a true option within the justice system. ■