STATE OF MICHIGAN
IN THE WASHTENAW COUNTY 15th DISTRICT COURT

The State of Michigan,

Plaintiff,

v

Lester A. Wallen, File No.: DR-1-11-5078-SD

Hon.: Christopher S. Easthope

Defendant.

/

Brian Mackie (P25745)	Lloyd E. Powell (P19054)
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DEFENDANT'S MOTION TO SUPRESS THE UNLAWFULLY OBTAINED EVIDENCE AND RESPONSE TO THE PEOPLE'S REPLY

Now comes Defendant, Mr. Lester A. Wallen ("Mr. Wallen"), by and through his attorney, Mr. Lloyd E. Powell, and Moves for the Suppression of both of Mr. Wallen's unlawfully obtained blood samples. For the reasons stated in the Brief in Support of this Motion, Defendant respectfully requests that this Honorable Court grant his Motion to Suppress.

Respectfully Submitted:

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Dated: April 17, 2012

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPRESS THE EVIDENCE

SUMMARY OF FACTS

On August 22, 2011, Superior Township dispatch, at 2:05 P.M., put out a "be on the look out warning" ("BOL") regarding a "***possible intoxicated driver*** who was in a red Ford Fusion." See *Deputy Joseph Montgomery's Washtenaw County Sheriff's Crime Report*, 1 of 8 (attached **Exhibit B**) (emphasis added). At approximately 2:05 P.M., Deputy Montgomery "positioned his patrol vehicle at [the intersection of] Cherry Hill [Road] and Prospect Road and ***started working on [his] patrol log***." *Id*. (emphasis added). At approximately 2:30 P.M. that day, a red Ford Fusion turned onto Cherry Hill Road from Prospect Road and pulled up next to Deputy Montgomery's patrol vehicle. *Id*.

When the red Ford Fusion pulled up next to Deputy Montgomery's vehicle, Deputy Montgomery ***ordered*** the driver of the vehicle, Mr. Lester A. Wallen ("Mr. Wallen") to pull his vehicle over to the side of Cherry Hill Road "***so he could speak to him***"; meaning, he has not spoken to him yet at this point. *Id*. (emphasis added). ***After ordering*** Mr. Wallen to the side of Cherry Hill Road, ***then*** Deputy Montgomery claims he detected an odor of intoxicants as he approached the side of Mr. Wallen's vehicle. *Id*. Deputy Montgomery returned to his vehicle, ***turned on the vehicle's emergency lights***, and proceeded to call Sergeant Cook and advised him of what he had observed. *Id*.

Sergeant Cook then advised Deputy Montgomery that both Sergeant Fox and Corporal Stanton would be making the scene "to [allegedly] continue with the OWI investigation." *Id*. Corporal Stanton then arrived on scene and engaged himself in the matter. *Id*. Immediately thereafter, according to Deputy Montgomery's Washtenaw County Sherriff's Crime Report, the following events transpired: "We requested that Mr. Wallen take a PBT. ***Mr. Wallen did not straight out refuse but would*** not take it until a [Sergeant] arrived." *Id*. (emphasis added). Mr. Wallen's "non-straight out" refusal to take the PBT is not the reason Deputy Montgomery arrested Mr. Wallen that day.

Deputy Montgomery states why he arrested Mr. Wallen in his Washtenaw County Sherriff's Crime Report:

> ***Because of the dispatch BOL***, Mr. Wallen [allegedly] voluntarily informing [Deputy Montgomery] that he had been drinking, [the alleged] slurred speech, the [alleged] strong odor of intoxicants, Mr. Wallen's [alleged] increasing agitation, and [alleged] refusal to cooperate with testing, Mr. Wallen ***was [in fact] handcuffed behind the back with the cuffs being double locked and tension checked***.

Id. at 2 (attached **Exhibit C**) (emphasis added).

Prior to transporting Mr. Wallen to the Washtenaw County Jail ("WCJ"), Sergeant Fox also arrived on the scene, thus making this now the third police officer that Mr. Wallen encountered. *Id*. When Sergeant Fox arrived on scene, Mr. Wallen was allegedly provided with his third opportunity to submit to a PBT, but except this time – as even Deputy Montgomery himself indicates in his report – ***Mr. Wallen consented, so long as the police officers would tell him the last date of calibration and serial number of the instrument that was being used***. *Id*. "***Mr. Wallen kept stating that he was not refusing to take the PBT*** . . . ." *Id*. (emphasis added).

Once at WCJ, Sergeant Armstrong engaged himself in this matter as well; now, Mr. Wallen has encountered four, different police officers. *Id*. Deputy Montgomery "briefed" Sergeant Armstrong on Mr. Wallen allegedly "being difficult and [allegedly] continuing to stall on submitting to any testing." *Id*. "'It' was [then] decided to complete a search warrant." *Id*.

"A search warrant" was completed with the assistance of ***a Deputy Losey – who had not witnessed any of the events that transpired that day***. *Id*. Deputy Montgomery's defective affidavit was sent to the Honorable Richard E. Conlin for a neutral and detached magistrate's probable-cause finding. *Id*. "The search warrant was signed for a blood kit." *Id*.

Although Deputy Montgomery may claim that "[a] copy of the search warrant sent to be attached to report[,]" ***it is not***. *Id*. Then, after "it" was already decided to obtain this defective search warrant in order to seize Mr. Wallen's property (his blood), Mr. Wallen was allegedly asked another time (thus, making this the fourth time) if he was going to submit to testing. *Id*. In response, ***Mr. Wallen consented*** – again –except this time, to take a Datamaster Test rather than a PBT, ***so long as the police officers would tell him the last time the Datamaster device had been serviced***. *Id*.

After obtaining a search warrant from the Honorable Richard E. Conlin – based off Deputy Montgomery's defective affidavit – Deputy Montgomery transported Mr. Wallen to Saint Joseph's Mercy Hospital to have his blood drawn ***by or at the discretion of a licensed physician***. See *Deputy Joseph Motgomery's Return and Tabulation* (attached **Exhibit F**) (emphasis added). However, as Deputy Montgomery's Washtenaw County Sherriff's Crime Report states, "Blood kit was completed by [***Resident Nurse***] Kelly Korycki." *See* **Exhibit C** (emphasis added). Important to note, the blood draw was not conducted at the discretion of a license physician as instructed on the warrant, but rather "in [Sergeant] Armstrong and [Deputy Montgomery's] presence."

ARGUMENT

The Fourth Amendment

The Anonymous Informant

Although the Prosecution contends that the 911 caller is not an anonymous informant, the Prosecution makes the following statement in the People's Response on the first page, "The 911 caller – along with his father, ***Leslie Darren Wallen***, who is occasionally heard on the 911 call supplying information . . ." Leslie Darren Wallen is not even a real person in this matter. Leslie Darrell Wallen (going by Darrell) is the informant who called 911, and the informant providing hearsay to the 911 caller still remains unknown. Accordingly, this case should be analyzed under the anonymous informant standard set by the United States Supreme Court.

An anonymous telephone call made to 911 identifying a person either by description, location, or both, ***is insufficient to justify a warrantless Terry-stop***. *Florida* v *J.L.*, 529 U.S. 266 (2000). In *Adams* v *Williams*, 407 U.S. 143 (1972), the United States Supreme Court stated an anonymous informant's tip ***can*** serve as a basis for a *Terry* stop ***if*** the top was give face-to-face ***and*** the informant is personally known to the officer from past interaction. *Id*. It is apparent that the distinction stems from the rationale that if the information turns out to be false, that the informant – who is known – can be prosecuted for providing false information to police, but the anonymous informant cannot be. Justice Kennedy's statement in his concurring opinion in *J.L.* supports this contention. "If the telephone call is truly anonymous, the informant has not placed his credibility at risk ***and can lie*** with impunity. The reviewing court cannot judge the credibility of the informant ***and the risk of fabrication becomes unacceptable***." *J.L.*, 529 U.S. at 275 (emphasis added).

In *Alabama* v *White*, 496 U.S. 325, 329 (1990), police received an anonymous tip alleging that a female was carrying cocaine and that this female would leave an apartment at a specific and particularized time, get into a car matching a specific and particularized description, and drive to a named hotel. The prior-mentioned facts – standing alone – ***would not have*** justified a *Terry* stop the United States Supreme Court declared. *Id*. Only ***after police corroborated*** the allegations and the informant had accurately depicted the woman's movements did it become reasonable to think that the anonymous informant had actual knowledge about the suspect and allegations; therefore, finding the anonymous informant's credible. *Id*. at 332.

This matter, even though the 911-caller provided a name and call back number, is analogous to aforementioned *Florida* v *J.L.* First and foremost, Deputy Montgomery, nor any other Washtenaw County Sherriff involved in this matter, did anything whatsoever to verify the name, address, or location of the informant prior to accosting Mr. Wallen. Unlike the cases involving anonymous informants which have been found to be sufficiently corroborated by our judicial system, the 911-caller did the opposite of placing his anonymity at risk – ***he requested that he remain anonymous***. This raises suspicion, in and of itself, because if you listen to the 911 recording carefully, it can be easily inferred that whoever is in the background yelling all the information relayed to dispatch wanted to remain an anonymous informant. At the end of the recording, the following questionable statement is made: "He is getting enough breaks, and he is terrorizing this whole household . . . something needs to be done here." See *911 Recording, 08/22/2011, at 03:30.*

Because Deputy Montgomery chose to accost Mr. Wallen – ordering him to pull his vehicle over to the side of the road – coupled with the fact that Deputy Montgomery did not even take a single step to attempt to verify the caller's identity, this matter should be analyzed under the same standards used for anonymous informants as in *Florida* v *J.L.* Justice Ginsburg, writing for a unanimous Supreme Court decision in *Florida* v *J.L.*, emphasized the importance of predictive information stating the following:

> The information provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. . . .

> Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There was a young black male wearing a plaid shirt at the bus stop. [This misapprehends] the reliability needed for a tip to justify a Terry stop.
>
> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has actual knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinative person. (citing 4 W. LaFave, Search and Seizure § 9.4 (h), p. 213 (3rd Ed. 1996)) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip [cases].)

Florida, 529 U.S. at 271-272. The instant matter suffers the same or similar infirmities, as did the anonymous tip in *Florida* v *J.L.*

"'[I]n the absence of any *indica* of the informants' reliability, courts insist that the affidavit ***must contain substantial independent police corroboration***.'" *United States* v *Brown*, 2012 U.S. Dist. LEXIS 1441, at *4-*5 (citation omitted) (emphasis added) (attached **Exhibit A**).

Deputy Montgomery did – nothing – to corroborate the BOL put out by dispatch. Deputy Montgomery testified that while "posted" at the intersection of Prospect and Cherry Hill Roads, "[Deputy Montgomery] was working on his patrol log," and not corroborating the BOL put out by dispatch. *See* **Exhibit B**. Although Deputy Montgomery may have testified, "Every time a vehicle would come up, he would have to see it go by his location," that is not adequate grounds for corroboration giving rise to a particularized suspicion that could even – by implication – give rise to a legitimate, reasonable suspicion.

The Unlawful Seizure

"The *Fourth Amendment* provides that 'the right of the people to be secure in their ***persons***, houses, papers, ***and effects***, against [both] unreasonable searches and seizures shall not be violated . . . .'" *Terry* v *Ohio*, 392 U.S. 1, 9 (1968) (quoting U.S. CONST. amend. IV) (emphasis added). "***This inestimable right of [one's] personal security belongs as much to the citizen of the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs***." *Terry*, 392 U.S. at 9 (emphasis added). In our case, Mr. Wallen's *Fourth Amendment* rights to be secure in his person and in his effects against unreasonable searches and seizures have been violated according to our Constitution.

Deputy Montgomery had no reasonable suspicion that any criminal activity was afoot at the time the seizure occurred. There is no indication that Mr. Wallen was intoxicated prior to unlawful seizure occurring. There is no indication that Mr. Wallen was going to even receive a traffic citation. There is no indication whatsoever that Mr. Wallen was driving poorly – period. Significant to note, Deputy Montgomery did not even ask Mr. Wallen to submit to any field-sobriety testing.

The fact of the matter remains, Deputy Montgomery had no reasonable suspicion to ***order*** Mr. Wallen to pull his vehicle over to the side of the road and ***engage his vehicle's emergency lights***. Therefore, an unlawful seizure occurred. Accordingly, any evidence against Mr. Wallen after the initial, unlawful seizure (when he is accosted by Deputy Montgomery) should be inadmissible as evidence under the Exclusionary Rule.

The Unlawful Arrest

Deputy Montgomery had no probable cause to arrest Mr. Wallen without an arrest warrant because he did not corroborate any suspicion that he may even have had triggered by the BOL. Deputy Montgomery never witnessed any indication of bad driving by Mr. Wallen. Deputy Montgomery failed to conduct any field-sobriety tests. Although Deputy Montgomery mistakenly claims that Mr. Wallen refused a PBT, the fact of the matter remains, there was no PBT conducted which Mr. Wallen ***expressly consented to***. Deputy Montgomery had no probable cause to lawfully arrest Mr. Wallen without an arrest warrant.

The Defective Affidavit

In *United States* v *Brown*, 2012 U.S. Dist. LEXIS 1441 (attached **Exhibit A**), Brown filed a Motion to Suppress the Search Warrant that was obtained against him. *Id*. at *1. "Brown seeks to suppress evidence found at Brown's residence . . . because the search warrant signed on March 30, 2011, and executed on March 31, 2011, has no nexus to the events which occurred on March 08, 2011, as described in the Affidavit that formed the basis for the March 30, 2011, warrant." *Id*. at *1-*2. The Government responds . . . that even if the search warrant was defective, the evidence found should not be suppressed since Brown cannot show that the search warrant rose to the level of deliberate, reckless, or grossly negligent conduct by the affiant." *Id*. at *2.

In our case, apparent is grossly negligent, lawless police conduct at the least. Public policy would be outraged if our community were to allow such lawless, police conduct; and the downstream consequences of permitting the lawless, police conduct violating a citizen's constitutional rights are substantially outweighed (assuming they are even given weight) by any governmental interest under the *Fourth Amendment* to our Constitution.

"[T]he *Fourth Amendment* requires officers to obtain a search warrant prior to conducting a search." *Id*. (citing *United States* v *Smith*, 510 F.3d 641, 647 (6th Cir. 2007)).

"A warrant will be upheld if the affidavit provides a 'substantial basis' for the issuing magistrate to believe 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id*. (quoting *Smith*, 510 F.3d at 652). "'Review of an affidavit and search warrant should rely on a 'totality of the circumstances' determination, rather than a line-by-line scrutiny.'" *Id*. at *3 (quoting *United States* v *Green*, 250 F.3d 471, 479 (6th Cir. 2001)). "A court's review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the ***four-corners of the affidavit and the court cannot consider any other testimony***." *Id*. (citing *United States* v *Fraizer*, 423 F.3d 526, 531 (6th Cir. 2005)) (emphasis added).

"A court considers four factors in determining whether a probable cause finding is stale: the defendant's course of conduct; the nature and duration of the crime; the nature of the relevant evidence; and any corroboration of the older or more recent information." *Id*. at *3-*4 (citing *United States* v *Helton*, 314 F.3d 812, 822 (6th Cir. 2003)).

As the United States Supreme Courts has instructed, we must look within the four corners of Deputy Montgomery's Affidavit, and ***must not consider any other evidence*** while doing so. Applying the four-factor test enunciated in *Helton*, a reasonable person, in like circumstances, would most likely make the following rational inferences based off of the facts and circumstances in this matter: 1) Mr. Wallen's course of conduct was merely to inquire whether or not a former fellow Washtenaw County Sherriff was in need of any assistance; 2) the nature and duration of the "crime" is Mr. Wallen asking a police officer if he needed assistance and approximately 30-minutes; 3) the nature of the relevant evidence is the vague BOL;

and 4) there was no corroboration that took place since the moment that Mr. Wallen was unlawfully seized in direct violation of the *Fourth Amendment*.

The Good Faith Exception is Inapplicable in This Case

"The good faith inquiry is to be made objectively and the following exceptions to the good faith inquiry may be considered: 1) the supporting affidavit contained knowing or reckless falsity; 2) the issuing magistrate wholly abandoned his or her judicial role; 3) ***the affidavit is so lacking in probable cause to render official belief in its existence entirely unreasonable***; or 4) the officer's reliance on the warrant was neither in good faith nor objectively reasonable." *Id*. at *5-*6 (citing *Leon*, 468 U.S. at 923) (emphasis added). Black's Law Dictionary defines "**reckless**" as: "a gross deviation from what a reasonable person would do." Black's Law Dictionary (online) 9th Edition (2009). A gross deviation from procedural safeguards set up by the United States Constitution is what exactly what occurred in this matter.

The following facts and circumstances, when taken into consideration with the totality-of-circumstances, illustrate reckless, or grossly negligent (at the least), conduct by the police officers involved in this case:

- *Deputy Montgomery's Affidavit for Search Warrant*, (attached **Exhibit D**), contains the following incorrect, false information: 1) the year of Mr. Wallen's vehicle is not 2011, but actually 2010; 2) the model of Mr. Wallen's vehicle is a Fusion, not a Focus; and 3) the Michigan license number provided, "3FAHP," is not accurate – the license plate number is BKU3013. Furthermore, Deputy Montgomery's sworn affidavit directly conflicts with his testimony regarding the following specific instances of conduct that he alleges: 1) Deputy Montgomery "positioned" his vehicle behind Mr. Wallen's vehicle,

2) that Deputy Montgomery did not manually activated his vehicle's emergency lights, and 3) that Mr. Wallen refused to submit to any field-sobriety tests.

- *Deputy Joseph Montgomery's Return and Tabulation*, (attached **Exhibit E**), has a hand written portion signed and dated April 05, 2012, when the day of the alleged incident occurred August 22, 2011.
- *The Washtenaw County Sherriff's Department Impounded Vehicle Supplement Report*, (attached **Exhibit F**), questionably marks that the glove box was unlocked, and then, for whatever reason, scratches out the mark indicating that the glove box was unlocked and then marks the glove box as locked.
- *Breath, Blood, Urine Test Report: Notice of Blood or Urine Test Report*, (attached **Exhibit G**), expressly states on ***the form itself***: "After this form is completed, mail it to the arrested person." However, Mr. Wallen was ***never*** provided with a copy of this notice, and there is no proof of service to indicate that he was provided with a copy of any notice.
- *Michigan State Police, Forensic Science Division, Alcohol & Drug Determination*, (attached **Exhibit H**), indicates that Resident Nurse Kelly Korycki – ***who is not a licensed physician*** – conducted the blood draws of Mr. Wallen at the oversight of Deputy Montgomery and Sergeant Armstrong, rather than a licensed physician as instructed on ***Deputy Montgomery's Affidavit for Search Warrant***, as well as ***Deputy Montgomery's Return and Tabulation itself***. *See* **Exhibit D;** *See* **Exhibit E**.

- *Saint Joseph Mercy Emergency Services Blood Alcohol Collection Checklist*, (attached **Exhibit I**), indicates that Nurse Korycki certified Mr. Wallen's blood draws (although she did not have the authority to certify the blood draws) at 5:03 P.M. Here is the chronology of events that the totality-of-circumstances indicate (to be brief): 1) 5:04 P.M. – Mr. Wallen's first blood draw occurs; 2) 5:08 P.M. – Mr. Wallen's second blood draw occurs; 3) 5:03 P.M. – Resident Nurse Kelly Kyorcki certifies both her own blood draws of Mr. Wallen. How does anyone, whether a licensed physician or not, anywhere certify a blood draw prior to even conducting a blood draw?
- *Directions from Mr. Letser A. Wallen's Home Address to the Humane Society*, (attached **Exhibit J**), shows the quickest route from Mr. Wallen's home address to the Humane Society located on Cherry Hill Road. **Exhibit J** illustrates that Mr. Wallen does not even need to pass the intersection of Prospect and Cherry Hill Roads where Deputy Montgomery ***was working on his patrol log***.
- *Directions from Deputy Joseph Montgomery's "Post," then at the intersection of Prospect Road and Cherry Hill Road, to the Humane Society*, (attached **Exhibit K**), illustrates the distance from Deputy Montgomery's post to the Humane Society – a whopping 4.51 miles. Any reasonable officer, in like circumstances, that had any intent to corroborate the BOL would have simply driven to the Humane Society on Cherry Hill Road and waited for a red Ford Fusion to corroborate the BOL.

Taking all of the above-mentioned facts – while considering those facts in the totality-of-circumstances – the police conduct and procedure in this case was, at the very least, grossly negligent. Accordingly, the good faith exception should not be applicable to the facts and circumstances of this instant matter.

Notably, not only does the Defense assert that the Good Faith Exception is inapplicable in this case in good faith, but also to preserve the right to rebut the Good Faith Exception for potential appellate purpose(s).

The Testimony of Deputy Joseph Montgomery

On April 10, 2012, the date and time set for Mr. Wallen's evidentiary hearing, Deputy Montgomery swore an oath, took the stand, and testified. During the cross-examination of Deputy Montgomery, even more inconsistent allegations were revealed. Accordingly, the Defense's assertion that the good faith exception should be inapplicable in this case was only bolstered.

When Deputy Montgomery was questioned about whether or not he made contact with Mr. Wallen in response to the BOL put out by dispatch, Deputy Montgomery responded, "I'm sure it's in the report." Deputy Montgomery's report indicates that he was working on his patrol log – ***not corroborating the BOL, but working on his patrol log*** – when Mr. Wallen pulled up along side Deputy Montgomery's marked patrol vehicle. Consistent with this is Deputy Montgomery's sworn testimony that he pulled over ***to work on his patrol log***.

Important to note, Deputy Montgomery's affirmation that Mr. Wallen was being compliant directly conflicts from his police report. Not only does Deputy Montgomery's testimony regarding Mr. Wallen's compliance that day directly conflict with his police report, but it is also inconsistent with Corporal Stanton's report. Furthermore, directly conflicting with his testimony is Deputy Montgomery's tape-recorded action, coupled with his own police report, that although he can manually activate the emergency lights on his vehicle, Deputy Montgomery's testimony, "It wasn't done," is not true.

Perhaps most importantly, Deputy Montgomery admitted during his testimony that he would not have pulled Mr. Wallen over for a traffic citation prior to his unlawful seizure. Given his testimony, Deputy Montgomery's admission would appear to be a true and accurate statement. Because Deputy Montgomery further testified that "he did not see [Mr. Wallen's] vehicle [even] move."

So when asked why he ordered Mr. Wallen over, Deputy Montgomery testified, "I ***believe*** the sole reason was the BOL [by dispatch]." Again, this would appear to be a true and accurate statement because it is apparent from the inconsistencies throughout this entire matter that although Deputy Montgomery may have ***believed*** that the BOL was the sole reason he pulled Mr. Wallen over, as his own police report indicates, it is not the reason he pulled Mr. Wallen over. Even Deputy Montgomery is unsure of why he ordered Mr. Wallen to pull his vehicle over to the side of the road on August 22, 2011. Deputy Montgomery – himself – even admitted during his cross-examination, "There was no mention of alcohol until ***after*** he [had already] pulled Mr. Wallen over."

The People's Response

Although the Prosecution may assert that the computerized D-Card that was generated should be taken into consideration when evaluating the totality-of-circumstances – ***it should not***. Deputy Montgomery testified that he only heard the BOL verbally through the BOL previously put out by dispatch. Meaning, Deputy Montgomery never even saw the computerized D-Card. Without Deputy Montgomery having personal knowledge of the computerized D-Card, there is no justification in giving it any weight when determining whether or not Deputy Montgomery lawfully seized Mr. Wallen. If Deputy Montgomery never saw the computerized D-Card, then how can the computerized D-Card be the basis for the seizure?

Even though the Prosecution is correct in stating that the 911 caller "gave the dispatcher the Defendant's correct name (Lester Wallen), age (67), race (white), eyewear (glasses), vehicle color (red), brand and model (Ford Fusion), clothing (blue jeans and a blue short-sleeved shirt), intended purpose (to pick up a dog at the Humane society), and route (Prospect and Cherry Hill [Roads])," the information supplied by the 911 caller is irrelevant. The reason that the information provided by the 911 caller to dispatch is irrelevant is because the BOL that dispatch put out only contained the following, vague information, "Leaving from South Harris en route to Humane Society, dark red Ford Fusion, no plate, Lester Wallen, 70 year old male." The BOL only accurately depicted the Defendant's correct name (Lester Wallen), brand and model (red Ford Fusion), and intended purpose (to pick up a dog at the Humane Society); the route (Prospect and Cherry Hill) is only speculative because Mr. Wallen does not even need to pass the intersection of Prospect and Cherry Hill to reach the Humane Society (as is illustrated by **Exhibit J**).

Also speculative is the allegation that Mr. Wallen drank a fifth of alcohol on 08/22/2011. According to *J.L.*, even if Mr. Wallen drank a fifth of alcohol August 22, 2011, the ends do not necessarily justify the means; meaning, as stated in *Florida* v *J.L.*: "That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *J.L.*, 529 U.S. at 271. Analogous in this matter is the fact that just because the unlawfully obtained blood samples of Mr. Wallen indicated that he had consumed alcohol, is not justified by the fact that alcohol was actually found in his blood system, but rather, we must look to Deputy Montgomery's knowledge prior to the unlawful seizure.

Although the People contend that *People* v *Rizzo*, 243 Mich App 151 (2000), provides that "the strong odor of intoxicants on a motorist's breath, standing alone, can provide an officer with a reasonable, articulable, particularized suspicion that the motorist was driving under the influence of intoxication liquor," they are missing the most important, pertinent, material fact. *Id*. at 158. In *Rizzo*, the ***seizure was lawful***. "[Michigan State Police Trooper Dennis] Dillard decided to stop the vehicle ***for a defective equipment violation and pulled it over to the side of the freeway***." *Id*. at 152 (emphasis added).

The Fifth Amendment

In *Miranda* v *Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id*. at 444. "As for the procedural safeguards to be employed, unless other effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required." *Id*. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*.

Mr. Wallen was deprived of his freedom of action the moment that he was initially seized when uniformed Deputy Montgomery ***ordered*** him to the side of the road and turned on ***his police vehicle's emergency lights***. Throughout the unreasonable search and seizure of Mr. Wallen's person and effects – Mr. Wallen was never *Mirandized*. Accordingly, the Defense asserts that none of Mr. Wallen's alleged statements after his unlawful seizure – ***without being Mirandized*** – should be considered; specifically, the alleged slow, slurred speech.

The Testimony of Deputy Joseph Montgomery

Furthermore, even assuming that this Honorable Court allows the alleged slow, slurred speech be given weight when analyzing the totality-of-circumstances, Deputy Montgomery's testimony on April 10, 2012, should dispel any correlation between Mr. Wallen's speech and any suspicion that Deputy Montgomery may have had. Deputy Montgomery testified that Mr. Wallen's speech was "very slow, slurred." Next, Deputy Montgomery testified during his cross-examination, "There [was] no [notable] difference in [Mr. Wallen's] speaking." Deputy Montgomery confirmed "[Mr. Wallen's] pattern of speech remained 100% consistent." This testimony by Deputy Montgomery would appear to be a true and accurate statement when reviewing the tape-recording of Mr. Wallen's unlawful arrest on August 22, 2011. Mr. Wallen's speech remains consistent throughout, and would remain the same even if he were to speak today.

Public Policy Demands Suppression of the Evidence Unconstitutionally Obtained

"Ever since its inception, the rule excluding evidence seized in violation of the *Fourth Amendment* has been recognized as a principal mode of discouraging ***lawless police conduct***." *Terry*, 392 U.S. at 12 (emphasis added). "[E]xperience has taught that it is the ***only effective deterrent*** to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a 'mere form of words.'" *Id*. (quoting *Mapp* v *Ohio*, 367 U.S. 643, 655 (1961)) (emphasis added). "Courts which sit under ***our Constitution cannot and will not*** be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry*, 392 U.S. at 12 (emphasis added).

The facts and circumstances of this case do not – even by implication – begin to give rise to even a reasonable suspicion, let alone to the higher standard of probable cause. If the type of police conduct in this case were generally permitted, then Americans would be subjected to both unlawful searches and unlawful seizures without any suspicion. The degree of intrusion regarding Mr. Wallen's privacy rights substantially outweighs any, if existing, governmental interest in invading Mr. Wallen's fundamental, constitutional rights.

PRAYER FOR RELIEF

In sum, if this Honorable Court allows the admission of the unconstitutionally obtained evidence, or takes into consideration any of the statements made by Mr. Wallen after his initial, unlawful seizure coupled with never being *Mirandized*, then public policy would be outraged. To tolerate such unconstitutional violations would not only be detrimental to Mr. Wallen alone, but also to every American that is protected by the United States Constitution then could be subjected to unconstitutional violations. **WHEREFORE**, the Defense moves that this Honorable Court grant the Defendant's Motion to Suppress the Evidence.

Respectfully Submitted:

Lloyd E. Powell (P19054)
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