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LAW SUMMARY

Missouri's Foggy Fog Line Law

CHARITY WHITNEY*

I. INTRODUCTION

When told that crossing the fog line is not sufficient grounds for a traffic stop in Missouri, most people will answer, “What is the fog line?” Though the term may be unfamiliar to many, anyone who drives would recognize the object to which it refers – the white or yellow line on the side of the road that indicates the end of the lane and the beginning of the shoulder.¹ Fog lines have been the subject of much civil and criminal litigation in Missouri, at both the state and federal levels.² Crossing a fog line is a traffic violation for failing to stay in the correct lane, and law enforcement officers have frequently initiated traffic stops based on such violations.³ Yet case law within Missouri has created a strange rule regarding crossing the fog line. Federal law

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1. *State v. Kempa*, 235 S.W.3d 54, 58 n.2 (Mo. App. S.D. 2007).

2. *See infra* Part II.

3. *See* MO. REV. STAT. § 304.015 (Supp. 2010) (“All vehicles in motion upon a highway having two or more lanes of traffic proceeding in the same direction shall be driven in the right-hand lane except when overtaking and passing another vehicle or when preparing to make a proper left turn or when otherwise directed by traffic markings, signs or signals. . . . Violation of this section shall be deemed a class C misdemeanor”); *see, e.g.*, *United States v. Barry*, No. 4:08CR405 CDP, 2009 WL 705965, at *6 (E.D. Mo. Mar. 16, 2009) (“[T]he car drove onto and across the fog line on the road, which is a violation of Missouri vehicle law.”); *United States v. Wills*, No. 05-0014-01-CR-W-NKL, 2006 WL 2483210, at *4 (W.D. Mo. Aug. 25, 2006) (“[T]he vehicle’s crossing of the fog line [is] a violation of Missouri traffic laws.”); *State v. Collins*, 72 S.W.3d 188, 195 (Mo. App. S.D. 2002) (stating that crossing the center line and travelling on the highway shoulder “was a violation of state law for failing to drive in the right-hand lane”). Where there has been any uncertainty about whether this is a violation of law, the question has been whether driving on, but not over, the fog line is a violation. *See infra* notes 35 & 55 and accompanying text. The author of this Law Summary frequently refers to the act of crossing the fog line, which is itself a law violation for failure to maintain a right hand lane, by the shorter term “fog line violation.”

clearly states that any observation of a traffic law violation is sufficient for a stop,⁴ and Missouri case law has likewise held for many years that any traffic law violation is sufficient cause for a law enforcement officer to initiate a traffic stop.⁵ However, Missouri courts have also insisted that crossing the fog line is not sufficient cause to stop a vehicle.⁶ The combined effect of these holdings puts Missouri state law in an internally inconsistent position – how can courts insist that observing a law violation is not sufficient cause for a law enforcement officer to reasonably suspect a law violation, and therefore initiate a traffic stop?

The possible explanations for these holdings regarding fog line violations are many, but none are satisfactory. The Missouri Court of Appeals may be trying to create a class of violations that are considered so minor that a driver may not be stopped for them.⁷ Alternatively, the court may believe it is acceptable to stop an individual for a fog line violation but it intends to limit the offenses for which an officer may ticket that individual.⁸ Finally, the court may be making an analytical mistake by confusing reasonable suspicion of a lane violation with reasonable suspicion for other crimes, such as driving while intoxicated.⁹ No matter the explanation, the mere fact that Missouri's appellate court has taken this position regarding fog line violations has a broader implication: the court has decided that failure to maintain a right hand lane, a misdemeanor crime, is unenforceable if violated in the specific manner of crossing the fog line. The Missouri Court of Appeals' fog line rulings are at odds with federal courts' interpretation of Missouri law, and possibly disregard precedent from the Supreme Court of Missouri with regard to reasonable suspicion of fog line violations.¹⁰ Application of the appellate court's pronounced fog line rule is confusing as a practical matter, and this confusion makes guidance for law enforcement officers in this area unclear.¹¹ For these reasons, it is an anomaly in the law that deserves to be examined and altered.

4. *Whren v. United States*, 517 U.S. 806, 810 (1996).

5. *State v. Pike*, 162 S.W.3d 464, 473 (Mo. 2005) (en banc) (“Reasonable suspicion – and therefore a traffic stop – may be based on the officer’s observation of a traffic violation.” (citing *State v. Barks*, 128 S.W.3d 513, 516 (Mo. 2004) (en banc))); *Barks*, 128 S.W.3d at 516 (“A routine traffic stop based on the violation of state traffic laws is a justifiable seizure under the Fourth Amendment.” (citing *State v. Slavin*, 944 S.W.2d 314, 317 (Mo. App. W.D. 1997))).

6. *See, e.g., State v. Roark*, 229 S.W.3d 216, 220-21 (Mo. App. W.D. 2007); *State v. Abeln*, 136 S.W.3d 803, 812 (Mo. App. W.D. 2004).

7. *See infra* notes 131-35 and accompanying text.

8. *See infra* notes 146-47 and accompanying text.

9. *See infra* notes 139-40 and accompanying text.

10. *See infra* notes 148-53, 166-69 and accompanying text.

11. *See infra* notes 154-65 and accompanying text.

II. LEGAL BACKGROUND

The “fog line” is the solid line that marks the end of the road and the beginning of the shoulder.¹² Fog lines generally appear on both the left and right sides of the roadway and are usually white or yellow in color.¹³ Missouri Revised Statutes section 304.015 makes driving on or over the fog line a traffic violation.¹⁴ The pertinent part reads,

All vehicles in motion upon a highway having two or more lanes of traffic proceeding in the same direction shall be driven in the right-hand lane except when overtaking and passing another vehicle or when preparing to make a proper left turn or when otherwise directed by traffic markings, signs or signals.¹⁵

Courts have interpreted this statute to mean that, unless one falls into an exception, failure to stay within the lines demarcating the right hand lane is a violation of the statute.¹⁶ Under the statute, driving on or over the fog line, or any other line demarcating the end of the lane, is a law violation.¹⁷

The Fourth Amendment of the United States Constitution and fifteenth section of Article One of the Missouri Constitution protect against unreasonable searches and seizures.¹⁸ The Supreme Court of Missouri has stated that “the Missouri Constitution provides the same guarantees against unreasonable search and seizures” as the United States Constitution, and the analysis under both is the same.¹⁹ It is a “seizure” for a law enforcement officer to stop a vehicle, but such a stop is permissible if the officer has “reasonable suspicion” that a crime has occurred.²⁰ Reasonable suspicion is a standard, more than a hunch but considerably below preponderance of the evidence, which justifies an officer’s investigative stop of an individual upon the articulable and particularized belief that criminal activity is afoot.²¹ “In the traffic stop

12. *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 333 (Mo. 1999) (en banc).

13. *United States v. Delgado-Hernandez*, 283 F. App’x 493, 494 (9th Cir. 2008); *United States v. Jones*, 501 F. Supp. 2d 1284, 1285 (D. Kan. 2007).

14. *State v. Collins*, 72 S.W.3d 188, 195 (Mo. App. S.D. 2002) (citing MO. REV. STAT. § 304.015.2 (2000)).

15. MO. REV. STAT. § 304.015.6 (Supp. 2010).

16. *See supra* note 3.

17. *Collins*, 72 S.W.3d at 195. Driving over the center line is thus treated the same as traversing the fog line, though this conduct is more accurately termed a “center line violation” rather than a “fog line violation.” *See infra* notes 41, 43, 116 and accompanying text.

18. U.S. CONST. amend. IV; MO. CONST. art. I §, 15.

19. *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. 2009) (en banc).

20. *Ornelas v. United States*, 517 U.S. 690, 693, 696 (1996); *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. 1992) (en banc).

21. *Ornelas*, 517 U.S. at 695-96.

context, ‘reasonable suspicion’ is defined as a particularized and objective basis for believing that the person being stopped is committing or did commit a traffic violation and requires a lesser showing than probable cause.”²² Observation of an actual traffic violation is enough for an officer to have reasonable suspicion.²³ Probable cause is a standard more stringent than reasonable suspicion.²⁴ Probable cause “exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.”²⁵

A. Missouri State Case Law

1. Fog Line Violations in Criminal Proceedings

In 2002, the Missouri Court of Appeals for the Southern District decided *State v. Mendoza*.²⁶ In that case, a Missouri Highway Patrol sergeant observed a vehicle driving in the passing lane, though it was not passing any other vehicle.²⁷ The vehicle was on, but not over, the yellow line of the left shoulder.²⁸ The sergeant stated that this manner of operation was not unsafe.²⁹ In determining whether the officer’s observation warranted a stop, the court quoted *State v. Slavin*,³⁰ stating that “[a] police officer is authorized to stop a vehicle observed violating the traffic laws of the state.”³¹ Then, the court mentioned the facts of several cases where traffic stops were justified by “unusual operation”³² of a vehicle, including one where the driver “abruptly dropped his speed by nearly twenty miles per hour when passing a police officer,”³³ and another in which the driver “was weaving erratically within his lane of traffic.”³⁴ However, the court held that the sergeant’s stop was unjustified because of the possibility that the driver “moved to the left

22. 68 AM. JUR. 2d *Searches and Seizures* § 89 (2011).

23. *Whren v. United States*, 517 U.S. 806, 810 (1996); *State v. Pike*, 162 S.W.3d 464, 473 (Mo. 2005).

24. *Alabama v. White*, 496 U.S. 325, 330 (1990); *Pike*, 162 S.W.3d at 473.

25. *Ornelas*, 517 U.S. at 696; see *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

26. 75 S.W.3d 842 (Mo. App. S.D. 2002).

27. *Id.* at 845.

28. *Id.*

29. *Id.*

30. 944 S.W.2d 314 (Mo. App. W.D. 1997).

31. *Mendoza*, 75 S.W.3d at 845 (quoting *Slavin*, 944 S.W.2d at 317).

32. *Id.* at 845 (quoting *State v. Malaney*, 871 S.W.2d 634, 637 (Mo. App. S.D. 1994)).

33. *Id.* at 846 (citing *State v. Bunts*, 867 S.W.2d 277, 279-80 (Mo. App. S.D. 1993)).

34. *Id.* (citing *Malaney*, 871 S.W.2d at 635, 637-38).

lane out of prudence,” and because the statute did not “specifically proscribe” the driver’s actions.³⁵

Following *Mendoza* were multiple Missouri appellate cases in which a fog line violation was at least part of the reason for a traffic stop.³⁶ First was *State v. Collins*,³⁷ in which an officer saw a truck driving on Highway 160 with its right tires on the fog line and following another vehicle too closely.³⁸ The truck also “went off onto the shoulder and then corrected, causing the left tires to cross over the center line,” then “corrected the other way, going onto the shoulder of the road.”³⁹ Though the case revolved mainly around whether the officer could make a stop outside of city limits, the court noted that following too closely on the highway is a class C misdemeanor,⁴⁰ and that crossing the center line and travelling on the highway shoulder “was a violation of state law for failing to drive in the right-hand lane.”⁴¹

Second was *State v. Belton*,⁴² in which a Highway Patrol corporal witnessed a car on Interstate 70 “repeatedly cross the fog and center lines.”⁴³ After turning on his emergency lights, but before the defendant’s vehicle stopped, the corporal also witnessed several plastic bags being thrown from the car’s window.⁴⁴ Although the court did not specifically address the issue, the court seemed to presume that the initial stop was valid based on the fog line violation in addition to the driver’s other suspicious conduct.⁴⁵

After *Collins* and *Belton*, the Court of Appeals encountered cases where the defendant did argue that a fog line violation was insufficient grounds for a traffic stop. In *State v. Abeln*,⁴⁶ the Missouri Court of Appeals for the Western District explicitly held that, even in addition to other circumstances,⁴⁷ a

35. *Id.*

36. In the following cases, the defendants failed to argue that the fog line violation was insufficient grounds for a traffic stop. See *infra* notes 37-45 and accompanying text.

37. 72 S.W.3d 188 (Mo. App. S.D. 2002).

38. *Id.* at 190.

39. *Id.*

40. *Id.* at 195 (citing MO. REV. STAT. § 304.017 (2000)).

41. *Id.* (citing MO. REV. STAT. § 304.015.2).

42. 108 S.W.3d 171 (Mo. App. W.D. 2003).

43. *Id.* at 172.

44. *Id.* at 172-73.

45. See *id.*

46. 136 S.W.3d 803 (Mo. App. W.D. 2004).

47. The State Trooper who initiated the traffic stop in *Abeln* was informed that someone driving a burgundy pickup truck and wearing a tan coat had been seen in a hardware store purchasing starter fluid after having bought funnels and hoses earlier that week. *Id.* at 811-12. The Trooper saw Abeln driving down the highway in a burgundy pickup while wearing a tan coat, so the Trooper followed Abeln in his patrol vehicle. *Id.* at 812. From two cars behind Abeln, the Trooper claimed to see Abeln “moving as if he were putting something into or taking something out of his glove box,” and also claimed to see the “passenger-side wheels of the truck twice

driver's act of crossing the fog line twice "d[id] not add enough to the equation to give rise to a reasonable suspicion of criminal activity" and therefore was improper grounds for a traffic stop.⁴⁸ The court highlighted the fact that the Trooper who conducted the traffic stop gave ambiguous testimony regarding "how far onto or beyond the fog line Respondent's tires went or how long they remained there."⁴⁹ The court also noted that the Trooper did not immediately stop the defendant after observing the fog line violation.⁵⁰

The dissent in this case made several points. First, the dissent noted that traffic stops are "valid under the Fourth Amendment if . . . supported by reasonable suspicion that criminal activity is afoot,"⁵¹ or if there is "probable cause to believe a traffic violation, however, minor, has been committed."⁵² Applying these rules to the facts of the case, the dissent stated that it was not unreasonable to find "that the [defendant's] movements could lead an officer to believe the driver was being inattentive. While inattentiveness may not rise to the level of careless and imprudent driving outlined in the statute, it could justify a stop and a warning by a law enforcement officer."⁵³ The dissent noted, referring to the license revocation case *Riche v. Director of Revenue*,⁵⁴ that "Missouri case law does not directly say whether a car's driving on the fog line twice in a non-emergency situation justifies a traffic stop."⁵⁵ Finally, the dissent pointed out the many other states and federal jurisdictions that have held that fog line violations warrant a traffic stop.⁵⁶

travel[] over the fog line." *Id.* The Trooper ran a check on Abeln's license plate, and remembered recently hearing that Abeln "was involved in local methamphetamine trade" and may have been carrying a firearm. *Id.*

48. *Id.*

49. *Id.* at 810 n.7.

50. *Id.* (citing for support *State v. Mendoza*, 75 S.W.3d 842, 845-46 (Mo. App. S.D. 2002)).

51. *Id.* at 815 (Lowenstein, J., dissenting) (citing *State v. West*, 58 S.W.3d 563, 568 (Mo. App. W.D. 2001)).

52. *Id.* (citing *Whren v. United States*, 517 U.S. 806, 810, 813 (1996); *State v. Scott*, 926 S.W.2d 864, 870-71 (Mo. App. S.D. 1996)).

53. *Id.* at 817.

54. 987 S.W.2d 331 (Mo. 1999) (en banc).

55. *Abeln*, 136 S.W.3d at 816 (Lowenstein, J., dissenting) ("The Court did not address whether the car's crossing the fog line twice gave the officer probable cause to stop Riche, since the Director never raised the issue on appeal. In any event, the Court held that for purposes of driver's license revocation hearings it is untrue that the initial stop of a motorist must be supported by probable cause. Thus, whether there was probable cause to stop Riche was a moot issue, at most, then even any implicit approval of the trial court's conclusion was *dicta*." (emphasis added) (citing *Riche*, 987 S.W.2d at 336) (internal citation omitted)). After this, the dissent distinguished *Mendoza*, upon which the majority relied. *Id.* at 817 ("The Southern District did not opine on whether a car's crossing the yellow line (or the fog line) gives an officer probable cause or reasonable suspicion to make a traffic stop.").

56. *Id.* at 817.

In 2005, the Supreme Court of Missouri decided *State v. Pike*.⁵⁷ In that case, a Highway Patrol Trooper observed the defendant's vehicle cross the fog line twice, "by as much as one foot" each time.⁵⁸ As a result, the defendant was driving partially on the shoulder of the road.⁵⁹ The court noted that the reasonable suspicion necessary to justify a traffic stop may be based on observation of a traffic violation or on erratic or unusual driving.⁶⁰ The court highlighted that the incident took place at 2:20 a.m., that the defendant was following another vehicle at only one car length, that there was no circumstance that necessitated the defendant's fog line violations, and the Trooper's experience as a Highway Patrol officer.⁶¹ Therefore, the court held that the evidence supported the trial court's finding that "[t]he stop was constitutionally permissible."⁶² The court further noted "that the [T]rooper could point to specific facts – the distance between the vehicles and the transgressions over the fog line – that provided a reasonable suspicion that Pike had committed at least one traffic violation."⁶³

Two years later, the Missouri Court of Appeals Western District decided *State v. Roark*,⁶⁴ in which the defendant, driving in heavy traffic, crossed the fog line twice with his passenger-side tires.⁶⁵ The court stated that the "only articulable fact" to support reasonable suspicion was the fog line "transgression," and it concluded that because no other cars "took evasive action to avoid Roark's car" there was no evidence that "Roark was driving erratically or in a dangerous manner."⁶⁶ The court rejected a comparison to *Abeln*, stating that "the similarities between the present case and *Abeln* are of no great import," because the *Roark* court's review was "conducted in light of the totality of the circumstances."⁶⁷ Citing *Pike* to support this standard of review, the court stated parenthetically that *Pike* "not[ed] that reasonable suspicion may be based on erratic or unusual driving."⁶⁸ Based on these findings, the court ruled that the trial court's decision was "clearly erroneous" and that the officer did not have reasonable suspicion upon which to stop the defendant.⁶⁹

57. 162 S.W.3d 464 (Mo. 2005) (en banc).

58. *Id.* at 468.

59. *Id.*

60. *See id.* at 473.

61. *Id.*

62. *Id.*

63. *Id.*

64. 229 S.W.3d 216 (Mo. App. W.D. 2007).

65. *Id.* at 217.

66. *Id.* at 220-21.

67. *Id.* at 222.

68. *Id.* (citing *Pike*, 162 S.W.3d 464).

69. *Id.*

In *State v. Loyd*,⁷⁰ the Western District affirmed its holding that fog line violations are insufficient grounds for traffic stops.⁷¹ In *Loyd*, the defendant's car drove upon, but did not cross, the white dividing line between lanes while turning a corner.⁷² The court stated that video from the officer's dashboard mounted camera "clearly establishe[d] that there was no illegal or unusual driving in th[at] case."⁷³ The defendant was not swerving, speeding, or driving erratically before being stopped by the officer, and the court held that the fog line violation was, on its own, "an insufficient basis to provide the police probable cause to conduct a traffic stop."⁷⁴

2. Fog Line Violations in Civil License Revocation Proceedings

Fog line violations appear in many license revocation cases; however, revocation cases are different from criminal cases in several respects. The case of *Jones v. Director of Revenue*⁷⁵ explains the primary difference, stating that whether an officer "had a reasonable suspicion for a lawful stop is irrelevant in a civil driver's license revocation proceeding."⁷⁶ This is because only three issues exist in such a proceeding: "(1) whether or not the person was arrested or stopped; (2) whether the officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; and (3) whether or not the person refused to submit to the [breath] test."⁷⁷ Though a person "has a statutory right to refuse chemical analysis of his blood alcohol level," the Director of Revenue will revoke that person's driver's license for one year for refusing to take the breath test "[i]f the arresting officer ha[d] reasonable grounds to believe that the person was driving while intoxicated."⁷⁸ In *Riche v. Director of Revenue*,⁷⁹ the Supreme Court of Missouri held that the probable cause requirement for traffic stops, and thus the exclusionary rule as well, does not apply in section 302.505 proceedings for license revocations.⁸⁰

70. 326 S.W.3d 908 (Mo. App. W.D. 2010).

71. *Id.* at 915-16.

72. *Id.* at 915.

73. *Id.*

74. *Id.* The court in *Loyd* only discussed the *Pike* decision in relation to the standard for review. *Id.* at 911.

75. 291 S.W.3d 340 (Mo. App. S.D. 2009).

76. *Id.* at 344.

77. *Id.* at 343 (citing MO. REV. STAT. § 577.041.4 (2000)).

78. *Id.* (quoting *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 619-20 (Mo. 2002) (en banc)).

79. 987 S.W.2d 331 (Mo. 1999) (en banc).

80. *Id.* at 336. The court wrote:

[e]xtending the exclusionary rule to section 302.505 proceedings would unnecessarily complicate and burden an administrative process designed to remove drunken drivers from Missouri's roads and highways as quickly

3. Unusual Operation

Cases dealing with fog line violations are closely related to cases that more generally discuss unusual operation of a vehicle.⁸¹ The first notable case discussing unusual operation is *State v. Marshall*.⁸² In that case, a motor home was pulled over for drifting back and forth within its lane.⁸³ The Missouri Court of Appeals for the Southern District found that these circumstances were sufficient to justify the traffic stop, as the sergeant “questioned whether the operator [of the motor home] was sleepy or intoxicated.”⁸⁴

Other cases, such as *State v. Huckin*, affirm that it is permissible to conduct a traffic stop after seeing a vehicle weave within its own lane.⁸⁵ In that case, the vehicle drifted between the center line and the shoulder four times before being stopped.⁸⁶ In another such case, *State v. Malaney*,⁸⁷ an officer pulled over the defendant after observing the vehicle weave toward the center lane and then correct its course.⁸⁸ On appeal, the defendant argued that there was not probable cause for the officer to stop the vehicle.⁸⁹ The court found that “[w]eaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle.”⁹⁰ In

as possible. In addition, application of the exclusionary rule would preclude consideration of probative, reliable evidence and would allow many drivers to remain on the road who would otherwise lose their licenses. . . . Imposing the exclusionary rule in civil license revocation and suspension proceedings would have little force in deterring unlawful police action, because the director of revenue has no control over the actions of local police officers.

Id. at 334-35 (internal citations omitted).

81. There is no statute in Missouri specifically addressing unusual operation of a vehicle, erratic driving, or weaving; if such activities were to be pursued with a criminal charge, it is most likely that they would be considered careless and imprudent driving under section 304.012. That section reads:

Every person operating a motor vehicle on the roads and highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

MO. REV. STAT. § 304.012.1 (2000).

82. 825 S.W.2d 341 (Mo. App. S.D. 1992).

83. *Id.* at 342.

84. *Id.* at 347.

85. 847 S.W.2d 951, 955 (Mo. App. S.D. 1993).

86. *Id.*

87. 871 S.W.2d 634 (Mo. App. S.D. 1994).

88. *Id.* at 635.

89. *Id.*

90. *Id.* at 637 (quoting *People v. Loucks*, 481 N.E.2d 1086, 1087 (Ill. App. Ct. 1985)).

State v. Hernandez,⁹¹ the court also upheld the stop of a vehicle that had weaved into the next lane of traffic.⁹²

B. Federal Case Law

Law within the United States Court of Appeals for the Eighth Circuit regarding the permissibility of traffic stops based on fog line violations differs from Missouri's. The first notable case from the Eighth Circuit that dealt with the federal interpretations of state law on this topic is *United States v. Pulliam*.⁹³ In that case, the defendant drifted onto the fog line twice in two miles, which was a violation of an Arkansas law⁹⁴ that required a vehicle to be driven within a single lane.⁹⁵ In determining whether the traffic stop was justified by the fog line violation, the court wrote, "It is well-established that a traffic violation, however minor, creates probable cause to stop the driver of a vehicle," adding later that "even under a strict construction, [the officer] had him dead to rights for a traffic violation."⁹⁶ To support its holding, the court cited Eighth and Tenth Circuit precedent.⁹⁷

In *United States v. Herrera-Gonzalez*,⁹⁸ the Eighth Circuit dealt with a driver who crossed the fog line for ten to fifteen seconds while traveling near multiple tow trucks.⁹⁹ Looking at the full circumstances of the incident, the court considered the possibility that the driver was crossing the fog line for safety reasons, but decided that the facts gave the officer an "objectively reasonable basis to believe that a violation of the Iowa statute had occurred."¹⁰⁰

Federal District Court cases interpreting Missouri law have reached a similar conclusion when examining suspicious driving conduct that included fog line violations. In *United States v. Sanchez-Guevara*,¹⁰¹ a defendant argued that driving on the fog line was not a traffic violation under Missouri law.¹⁰² The United States District Court for the Western District of Missouri

91. 880 S.W.2d 336 (Mo. App. W.D. 1994).

92. *Id.* at 337-38.

93. 265 F.3d 736 (8th Cir. 2001).

94. *Id.* at 739; ARK. CODE ANN. § 27-51-302(1) (LEXIS through 2011 Reg. Sess. and updates) ("A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that movement can be made with safety . . .").

95. *See Pulliam*, 265 F.3d at 739.

96. *Id.*

97. *Id.* (citing *United States v. Ozbirn*, 189 F.3d 1194, 1198 (10th Cir. 1999); *United States v. Barberena-Jimenez*, No. 95-3202, 1996 WL 83002, at *2 (8th Cir. Feb. 28, 1996)).

98. 474 F.3d 1105 (8th Cir. 2007).

99. *Id.* at 1110-11.

100. *Id.*

101. No. 05-03059, 2005 WL 2649493 (W.D. Mo. Oct. 17, 2005).

102. *Id.* at *1.

affirmed *Pulliam*'s holding and found against the defendant, adding that "so long as police have probable cause to believe that a traffic violation has occurred, the stop is valid even if the police would have ignored the traffic violation but for their suspicion that greater crimes [were] afoot."¹⁰³ The court also noted, with the uncertain wording of the statute in mind, that it is reasonable for an objective officer to find that driving on the fog line is a traffic violation sufficient for a stop.¹⁰⁴ Responding to the defendant's reliance on the Missouri Court of Appeals cases of *Abeln* and *Mendoza*, the court stated that "none of these cases dispositively state whether merely driving onto, but not over the line was a violation, leaving the issue open for interpretation."¹⁰⁵ Finally, the court noted that the officer had stated that in his experience, fog line violations could possibly indicate drunken, tired, or impaired driving, and the court stated that it found the officer persuasive on this point.¹⁰⁶

The defendant in *United States v. Gray*, decided by the United States District Court for the Eastern District of Missouri, drove his pickup beyond a stop sign and swerved outside of the fog line.¹⁰⁷ The court approved of the traffic stop and unequivocally stated that "[t]he case law is clear: When a police officer observes a traffic violation – however minor – he has probable cause to stop the vehicle."¹⁰⁸

In *United States v. Wills*, decided by the United States District Court for the Western District of Missouri, an officer saw a vehicle drift across the fog line and pulled it over accordingly.¹⁰⁹ The defendant argued that there were insufficient grounds for the stop, but the court held that the officer "had the requisite reasonable suspicion to stop a vehicle that he believed was being operated in a careless and dangerous manner, as evidenced, in part, by the vehicle's crossing of the fog line – a violation of Missouri traffic laws."¹¹⁰

In *United States v. Barry*,¹¹¹ the United States District Court for the Eastern District of Missouri held that crossing the fog line is a violation of Missouri traffic law, and thus is lawful grounds for stopping a vehicle.¹¹²

103. *Id.*

104. *Id.* at *2.

105. *Id.* *Pike* is not mentioned in the opinion. See *id.*

106. *Id.*

107. *United States v. Gray*, No. 4:06CR00160 SNL(AGF), 2006 WL 1523012, at *3 (E.D. Mo. May 30, 2006), *report and recommendation adopted*, No. 4:06CR160 SNL(AGF), 2006 WL 1888544 (E.D. Mo. July 7, 2006).

108. *Id.* (citing *Whren v. United States*, 517 U.S. 806 (1996)). The court cited *Pike* for the contention that "transgressions over the fog line" provide reasonable suspicion to believe [a] traffic violation occurred." *Id.* at *4.

109. *United States v. Wills*, No. 05-0014-01-CR-W-NKL, 2006 WL 2483210, at *2 (W.D. Mo. Aug. 25, 2006).

110. *Wills*, 2006 WL 2483210, at *4.

111. No. 4:08CR406CDP, 2009 WL 705965 (E.D. Mo. March 16, 2009).

112. *Id.* at *7.

They held that this is so, regardless of the officers' subjective suspicions of greater crimes.¹¹³

Another Eastern District case, *United States v. Del Real*,¹¹⁴ held that a defendant travelling over the fog line is sufficient grounds for a traffic stop.¹¹⁵ The defendant's vehicle in that case "travel[ed] over the fog line onto the shoulder," then "weaved onto the center line from the right lane."¹¹⁶ The court found that the defendant's act of driving on the center line, and not driving in the right hand lane, gave the officer probable cause to stop the vehicle.¹¹⁷

III. RECENT DEVELOPMENTS

The Missouri Court of Appeals has continued to write decisions that affect this area of law. Recently, the Missouri Court of Appeals for the Southern District decided a case involving fog line violations as the unusual operation of a vehicle.¹¹⁸ In *State v. Brown*, the defendant asserted that driving on the center dividing line was not a traffic violation, which the State did not challenge.¹¹⁹ Instead, the State argued that the deputy initiated the traffic stop because the center line violation was accompanied by weaving within a single lane, which was an unusual operation.¹²⁰ Citing both *Malaney*¹²¹ and *Huckin*,¹²² the court found that the officer's stop was proper.¹²³ The court also cited *Pike* to support the proposition that "erratic or unusual operation" of a vehicle is grounds for stop, relegating mention of that case's discussion of fog line violations to a footnote.¹²⁴ The court dismissed the defendant's reliance on *Abeln* and *Mendoza*, finding that *Abeln* turned on a stipulation

113. *See id.*

114. No. 1:10CR 52 SNLJ (LMB), 2010 WL 3258608 (E.D. Mo. July 30, 2010), *report and recommendation adopted*, No. 1:10CR000 52 SNLJ, 2010 WL 3258610 (E.D. Mo. Aug. 16, 2010).

115. *Id.* at *2.

116. *Id.*

117. *Id.*

118. *State v. Brown*, 332 S.W.3d 282, 285-87 (Mo. App. S.D. 2011).

119. *Id.* at 285. *See supra* note 17 and accompanying text for the lack of legal distinction between crossing the fog line and crossing the center line.

120. *Brown*, 332 S.W.3d at 285.

121. *State v. Malaney*, 871 S.W.2d 634, 635, 638 (Mo. App. S.D. 1994) (noting that a vehicle that weaved toward the center lane and then corrected course was stopped permissibly).

122. *State v. Huckin*, 847 S.W.2d 951, 955 (Mo. App. S.D. 1993) (noting that a vehicle that drifted between the center line and the shoulder four times was stopped permissibly).

123. *Brown*, 332 S.W.3d at 287.

124. *Id.* at 285 & n.5.

issue, and that the driving in *Mendoza* could be explained as avoidance of vehicles on the other side of the road.¹²⁵

The court then discussed the “community caretaking” function of law enforcement, namely that “a law enforcement officer may approach a vehicle for safety reasons, or if a motorist needs assistance, so long as the officer can point to reasonable, articulable facts upon which to base his actions.”¹²⁶ The court likened the case at bar to *Malaney* and *Huckin* in that all of the officers testified that they “wanted to find out whether fatigue, illness or impairment accounted for Defendant’s erratic driving.”¹²⁷

IV. DISCUSSION

In *State v. Abeln*, the Missouri Court of Appeals for the Western District wrote: “Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible. They are commonplace, nontechnical conceptions that deal with ‘the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians, act.’”¹²⁸ After stating this, the court proceeded to articulate a specific action that is not, on its own, sufficient for reasonable suspicion: a fog line violation.¹²⁹ Missouri’s appellate court rulings regarding fog line violations are a cause for discussion in several respects. It seems that, to at least some extent, the court is stating that the law violation of failing to maintain a lane is unenforceable if it is based on a driver crossing the fog line. What are the court’s reasons for deciding this? What are the practical implications of the court’s reasoning, as well as the implications of the fog line rule in light of the larger body of Missouri law?

Crossing the fog line is a violation of Missouri law, punishable as a Class C misdemeanor.¹³⁰ Since this particular driving conduct is a law violation, is Missouri’s appellate court really saying that one cannot be pulled over and ticketed for violating the law in this particular way?

It is possible that the court is trying to say that there is an undefined class of law violations that are so minor that one cannot be stopped for such a violation. Perhaps if the statute defined the transgression as an infraction, this would be logical on the part of the court. However, the statute clearly makes the driving conduct of failing to maintain a right hand lane a misdemeanor law violation.¹³¹ Logic shows that “reasonable suspicion of a law violation”

125. *Id.* at 286.

126. *Id.* at 287.

127. *Id.*

128. *State v. Abeln*, 136 S.W.3d 803, 816 (Mo. App. W.D. 2004) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

129. *See id.* at 812.

130. MO. REV. STAT. § 304.015 (Supp. 2010).

131. *Id.*

does not, by its own terms, mean “reasonable suspicion of a particularly bad law violation.” Yet, that seems to be what the appellate court wishes it to mean, as it continuously makes statements such as: there was no evidence of “driving erratically or in a dangerous manner,”¹³² or, the driver “was not swerving; wasn’t driving erratically; wasn’t speeding; wasn’t about to strike anything.”¹³³ Simply because one can point to the lack of danger in a particular traffic violation does not negate the fact that it is, in fact, a violation of law. It almost seems as though the court dismisses the fact that failure to maintain a right hand lane is a law violation and instead presumes that the State must show careless and imprudent driving¹³⁴ on the part of the defendant in order to justify a stop. The court has even called fog line violations “transgressions,”¹³⁵ perhaps to avoid the contradictory legal holding that observing a fog line violation is not enough for an officer to have reasonable suspicion of a law violation. Simply put, the Missouri appellate court’s rule that observation of a crime (if it is a fog line violation) is not enough for reasonable suspicion of criminal activity is bizarre.

An example of the application of this strange rule can be seen in the comparison between *Abeln* and *Pike*. The comparison demonstrates that if an officer is articulate in his claim that a fog line violation is enough for reasonable suspicion, it is more likely to be favored. Where in *Abeln* the Missouri Court of Appeals for the Western District pointed out the lack of specific details in a Trooper’s testimony about the fog line,¹³⁶ the Supreme Court of Missouri in *Pike* commended a Trooper for stating the time of the incident, the distance crossed beyond the fog line, and deferred to the Trooper’s experience.¹³⁷ Whether the *Abeln* fog line violation was drastically different from the *Pike* fog line violation is unknown; it was the recall of specific facts that made a difference to the courts. However, in both cases the only absolutely essential fact regarding the lane violation was the same: the vehicles crossed the fog line while driving.¹³⁸ While the time, weather, surrounding traffic, and other details are relevant to a traffic case, they do not alter the simple fact that a law violation occurred.

Another possibility for the court’s holdings is that Missouri’s appellate court is confusing the issue of whether a solitary fog line violation is sufficient for reasonable suspicion of driving drunk (or another crime), and the issue of whether a fog line violation is sufficient for reasonable suspicion of a moving violation. This confusion may stem from the fact that reasonable suspicion for a moving violation based on crossing the fog line in many cases

132. See, e.g., *State v. Roark*, 229 S.W.3d 216, 221 (Mo. App. W.D. 2007).

133. See, e.g., *State v. Loyd*, 326 S.W.3d 908, 915 (Mo. App. W.D. 2010) (internal quotation marks omitted).

134. See MO. REV. STAT. § 304.012 (2000).

135. *State v. Pike*, 162 S.W.3d 464, 473 (Mo. 2005) (en banc).

136. See *State v. Abeln*, 136 S.W.3d 803, 809 (Mo. App. W.D. 2004).

137. See *Pike*, 162 S.W.3d at 473.

138. See *id.* at 486; *Abeln*, 136 S.W.3d at 817.

leads to the discovery of circumstances that raise suspicion of driving while intoxicated or other crimes. This would explain why the court seems concerned with evidence of the defendant "driving erratically or in a dangerous manner,"¹³⁹ swerving, speeding, or being about to strike an object.¹⁴⁰ To say that driving across the fog line is not sufficient for an officer to have reasonable suspicion that a driver is intoxicated seems logical enough. Yet, repeatedly finding that a fog line violation is not sufficient grounds for reasonable suspicion *at all* means that the court is holding that officers may not pull a driver over for an observed violation of law. If officers are unable to stop a vehicle for a lane violation based on crossing the fog line, how can this law be enforced?

Perhaps Missouri courts are concerned that stops based on fog line violations are pre-textual in nature. Under the United States Constitution, however, there is no question that pre-textual stops are permissible.¹⁴¹ In so far as federal law is concerned, stopping a vehicle for a lane violation while pre-textually looking for evidence of intoxication is legal; if there is a law violation, officers may stop a vehicle, period.¹⁴² The Missouri appellate court could perhaps rely on the state's constitution to challenge the validity of these pre-textual stops, yet none of the fog line cases analyzed the issue through the lens of state constitutionality.¹⁴³ Further, the Supreme Court of Missouri has held, like the United States Supreme Court, that an officer's subjective motives or possible pretext are irrelevant as long as "the police do no more than they are objectively authorized and legally permitted to do."¹⁴⁴ It is very odd, then, for Missouri's appellate court to single out fog line crossing for different treatment than any other driving behavior that might lead to pre-textual stops.¹⁴⁵

There is another, final, possible explanation for what Missouri's court of appeals has held in its cases. Maybe the court believes that there are some law violations that are so minor that after being stopped for such a violation, the only thing an officer may permissibly do is ticket the driver for that viola-

139. *State v. Roark*, 229 S.W.3d 216, 221 (Mo. App. W.D. 2007).

140. *State v. Loyd*, 326 S.W.3d 908, 915 (Mo. App. W.D. 2010).

141. *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

142. *See id.* at 819.

143. *See supra* Part II.A.

144. *State v. Mease*, 842 S.W.2d 98, 105-06 (Mo. 1992) (en banc) (citing *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990)).

145. The Missouri Court of Appeals' unusual operation cases (discussed *supra* Part II.A.3) came before the 1996 *Whren* decision, further mystifying the court's thought process. The unusual operation cases allow officers to stop vehicles in situations where there is no observed violation of law. *See supra* Part II.A.3. If the Court of Appeals were concerned about stops for fog line violations being pre-textual in nature, why would they have given officers such wide discretion in unusual operations cases before pre-textual stops were even declared constitutional?

tion.¹⁴⁶ This approach could explain cases like *Loyd*, where the officer pulled over a driver and despite clear signs of the driver's intoxication, the court precluded the introduction of that evidence because the initial stop was based on a fog line violation.¹⁴⁷ The problem with this approach is obvious: under this interpretation, an officer could pull over a vehicle for crossing the fog line, approach that vehicle, see dead bodies lying in the backseat of the car, but could only proceed to write the driver a ticket for failure to maintain a right hand lane. This evidence of a much more serious crime is legally indistinguishable from evidence of intoxication. To the author's knowledge, there is no other legal scheme in the country that would thusly restrict an officer to acting only upon their initial observation and force them to disregard anything else seen.

No matter whether the Missouri Court of Appeals fashioned its rule regarding fog line crossings out of fear of pre-textual stops, confusion of multiple reasonable suspicion standards, or some other reason, the effect is the same: the court has attempted to make the class C misdemeanor of failure to maintain a right hand lane unenforceable if committed by means of crossing the fog line. The mere notion that the court may so seriously undermine a criminal statute passed by the legislature is unnerving; additionally, it is possible that the Missouri Court of Appeals has disregarded the Supreme Court of Missouri's own ruling on this issue. Besides these intellectual concerns, though, is also the uneasiness caused by the practical effects of what the court has ruled.

Pike is the only fog line case decided by the Supreme Court of Missouri in which the validity of the traffic stop was at issue.¹⁴⁸ In *Pike*, the defendant followed another vehicle too closely and crossed the fog line twice, and the court found that the defendant had committed "at least one traffic violation," making the stop permissible.¹⁴⁹ The court did not say whether it was the fog line violations or the act of following too closely that was the traffic violation

146. Under this construct, the purpose would basically have to be to eliminate the plain-view exception and the other existing legal means of using this particular type of initial stop to gather evidence about any other sort of law violation. Otherwise, cases such as *Loyd* would be irreconcilable. See generally *State v. Loyd*, 326 S.W.3d 908 (Mo. App. W.D. 2010).

147. See *id.* at 912, 915.

148. See *State v. Pike*, 162 S.W.3d 464, 473 (Mo. 2005) (en banc); *supra* notes 57-63 and accompanying text. The Supreme Court of Missouri mentioned the fog line while reciting the facts of one other case. *Walker v. Dir. of Revenue*, 137 S.W.3d 444 (Mo. 2004) (en banc) (per curiam). In that case, the defendant was stopped after "swerving, crossing the centerline, and driving on the fog line." *Id.* at 446. Though the defendant in that case challenged whether there was probable cause for his arrest, he did not challenge the validity of the initial stop and the Supreme Court of Missouri accordingly did not discuss it either. See *id.* at 446-47.

149. *Pike*, 162 S.W.3d at 473.

to which it was referring.¹⁵⁰ It is arguable that this implies that *both* acts were violative; because it did not matter *which* violation it was, either one was sufficient for reasonable suspicion to stop the vehicle.¹⁵¹ Despite this ruling seven years ago, the Missouri Court of Appeals has failed to even discuss the possibility that *Pike* is controlling on this issue of fog line violations.¹⁵² Instead, the Court of Appeals has continued to hold fog line violations insufficient to stop a vehicle.¹⁵³

There are troubling implications when one examines the practical application of the fog line rule in the context of the greater body of Missouri law. In Missouri, a traffic stop can result in multiple types of legal proceedings if a law violation is discovered.¹⁵⁴ As discussed previously,¹⁵⁵ there is a difference between license revocation cases, civil proceedings initiated by the Director of Revenue, and criminal traffic cases initiated by the appropriate prosecuting authority. Missouri Revised Statutes section 302.505 states: “The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person’s blood, breath, or urine was eight-hundredths of one percent or more”¹⁵⁶ Because there is no requirement that the *initial stop* be based on reasonable suspicion, only that the *arrest* of the person be based on probable cause, whether a person did more than cross the fog line is immaterial.¹⁵⁷ This leads to an inconsistency: an officer can stop a driver for a fog line violation, discover that the driver is intoxicated over the .08 blood alcohol content level, arrest him, and revoke his license for driving while intoxicated. However, the exact same driver cannot be convicted criminally of driving while intoxicated, due to the fact that the appellate court has decided that fog line violations are not “enough” of a law violation to warrant reasonable suspicion for stopping him in the first place.¹⁵⁸ To the average citizen, it is confusing that a person can simultaneously have his license revoked for driving while intoxicated but be found criminally not guilty of driving while intoxicated.

150. *See id.*

151. *See id.*

152. *See supra* Part II.A.

153. *See, e.g.,* State v. Loyd, 326 S.W.3d 908, 915 (Mo. App. W.D. 2010); State v. Roark, 229 S.W.3d 216, 217, 222 (Mo. App. W.D. 2007). Though the Supreme Court of Missouri did not explicitly make a statement on the fog line rule, it is still notable that the appellate court did not seem to change its approach to this issue at all after *Pike* was announced. *See supra* Part II.A.1. One would hope that the appellate court would at least address *Pike* in order to harmonize that case with its own rulings.

154. *See supra* Part II.A.

155. *Supra* Part II.A.

156. MO. REV. STAT. § 302.505.1 (Supp. 2010).

157. *See Jones v. Dir. of Revenue*, 291 S.W.3d 340, 344 (Mo. App. S.D. 2009).

158. *See supra* notes 46-50, 64-74 and accompanying text.

The thrust of the fog line case law in Missouri is also at odds with the principle of “unusual operation” cases. None of Missouri’s courts have explained why crossing the fog line is different from actions that are deemed unusual operations. Cases like *Marshall*,¹⁵⁹ *Huckin*,¹⁶⁰ and *Malaney*¹⁶¹ have all upheld traffic stops based on a vehicle weaving within its own lane.¹⁶² It is worth noting that weaving within a lane of traffic without failing to remain in that lane is not necessarily a violation of Missouri’s traffic laws.¹⁶³ It is peculiar that a non-violation is sufficient to find reasonable suspicion of criminal activity, but an actual violation of law is not sufficient to make the same finding. This incongruous set of holdings could be interpreted to mean that if a car weaves within its own lane it may be stopped with reasonable suspicion, yet if the same car drives in an identical fashion a few feet to the right, across the fog line, it may not be stopped with reasonable suspicion.¹⁶⁴ Both situations indicate similar levels of inattentive driving, yet where an actual lane violation has occurred, a traffic stop would either be lacking reasonable suspicion, or the officer would have to point to factors in addition to the fog line violation to make the stop permissible. If the appellate court fears that officers will abuse their discretion if they are granted leeway to stop vehicles for a mere fog line crossing, then why would the court not likewise fear officers’ ability to stop vehicles for weaving within a lane?¹⁶⁵ If the court is concerned that officers are not giving sufficiently detailed explanations to support reasonable suspicion, then why would the court not require additional factors for in-lane weaving the way it does for fog line crossings?

159. *State v. Marshall*, 825 S.W.2d 341, 342, 347 (Mo. App. S.D. 1992) (motor home that drifted back and forth within its lane was stopped permissibly).

160. *State v. Huckin*, 847 S.W.2d 951, 955 (Mo. App. S.D. 1993) (vehicle that drifted between the center line and the shoulder four times was stopped permissibly).

161. *State v. Malaney*, 871 S.W.2d 634, 635 (Mo. App. S.D. 1994) (vehicle that weaved toward the center lane and then corrected course was stopped permissibly).

162. *Id.* at 635, 637; *Huckin*, 847 S.W.2d at 955; *Marshall*, 825 S.W.2d at 342, 347.

163. *See* MO. REV. STAT. § 304.015 (2000).

164. *Compare* *State v. Roark*, 229 S.W.3d 216, 217, 222 (Mo. App. W.D. 2007) (vehicle crossed over fog line twice, insufficient for reasonable suspicion), *with Huckin*, 847 S.W.2d at 955 (vehicle weaved towards line four times but corrected course, sufficient for reasonable suspicion).

165. The incongruity compounds if one considers that Missouri courts have also affirmed that law enforcement officers have a legitimate community caretaking function under which a law enforcement officer, even with no suspicion of criminal activity, “may approach a vehicle for safety reasons, or if a motorist needs assistance, so long as the officer can point to reasonable, articulable facts upon which to base his actions.” *State v. Schroeder*, 330 S.W.3d 468, 473 (Mo. 2011) (en banc). Does this mean that if an officer articulates that he believed a driver’s fog line violations were indicative of said driver having a health problem, or some other need of assistance, that the stop would then be found permissible? What if such a stop yielded proof of driving while intoxicated?

Finally, the lack of consistency regarding fog line violations is not limited to applications of state law. Because the Eighth Circuit has found that any traffic violation is sufficient cause for a traffic stop,¹⁶⁶ Missouri's rulings on this issue are at odds with federal rulings. It is not uncommon for state and federal laws to differ on similar subject matters.¹⁶⁷ However, this incongruity leads to a strange result. If an officer pulls over a vehicle for a fog line crossing and subsequently finds evidence that the driver committed a federal crime, this evidence will not be barred because of the nature of the stop. On the other hand, if the officer finds evidence that the driver committed a state crime, the evidence will likely be excluded. Perhaps this would not offend common sense if all federal crimes were more serious than state crimes; however, this is not the case. A man caught with an illegally imported lobster in the front seat of his car may be guilty of a federal crime,¹⁶⁸ and if stopped for crossing the fog line, charges may be brought. On the other hand, a man caught with a bloody knife and several dead bodies in the backseat of his car could not have that evidence brought against him if he was stopped for a fog line violation, because murder is a state crime.¹⁶⁹ Aside from the disparity of culpability in this fanciful situation, the obvious problem is that a law enforcement officer on routine patrol can almost never know beforehand whether the driver of the car he observes making a traffic violation will be caught committing a federal or state crime, if any other crime at all, when stopped.

With this discrepancy between how federal and state courts in Missouri view the fog line violation, how can law enforcement officers know how to conform their conduct to the law? Similarly, how can the court tell officers that the standard they are expected to meet when stopping a vehicle is "reasonable suspicion of criminal activity" and also tell officers that certain crimes (such as failure to maintain one's lane) are not sufficient to meet that standard? The confusion this creates is most likely not remedied by officers

166. See *supra* Part II.B.

167. For example, Missouri's ban on "retrospective" law is broader than the United States Constitution's ban on ex post facto laws, which affects statutes restricting sex offenders. See Lauren Standlee, *The Current State of Retrospective Laws as Applied to Missouri Sex Offenders*, 66 J. MO. B. 256, 260 (2010). Washington law also differs dramatically from federal law, as pre-textual traffic stops are impermissible in that state. See Kelly Montgomery, Note, *Leaving Well Enough Alone – Why the "Would Have" Standard Works Well for Determining Pretext Stops in Washington State: A Critical Analysis of the Whren Decision*, 21 SEATTLE U. L. REV. 159, 161 (1997).

168. The man might be charged with violating the Lacey Act. 16 U.S.C. §§ 3371-78 (2006). Illegal lobsters are not an original hypothetical of this author. See James Duane, *Don't Talk to the Police*, REGENT U. SCH. LAW (Mar. 14, 2008), http://www.regent.edu/acad/schlaw/faculty_staff/duane.cfm#police.

169. See MO. REV. STAT. § 565.020 (2000). The plain view exception would make no difference in this case. *State v. Miller*, 894 S.W.2d 649, 656 (Mo. 1995) (en banc) (plain view doctrine is inapplicable where initial stop is illegal); see also *Horton v. California*, 496 U.S. 128, 135-37 (1990).

refusing to pull over drivers for fog line violations; rather, prosecutors probably encourage officers to recall other specific “factors” that can emphasize that the case is one of “unusual operation” instead of “fog line transgression.” Instead of encouraging officers, Troopers, and prosecutors to bend the facts to satisfy the court’s nonsensical rulings, Missouri courts should make a clear ruling that is consistent with the meaning of “reasonable suspicion.”

For prosecutors and law enforcement officers, there is simple and practical advice for how to deal with this imperfect case law. Prosecutors who desire to maintain that a stop based on a fog line violation is valid have multiple avenues open to them. First, they can gather more details from the law enforcement officer that articulate why the fog line violation was dangerous or unusual, thus necessitating a traffic stop.¹⁷⁰ Second, they may elect to characterize the stop as based on “unusual operation” rather than a fog line violation, and thus meet only the lower burden from that line of cases. Either avenue requires the use of additional articulated details beyond the mere fact that the driver crossed the fog line. Such facts could include those mentioned in the discussed cases, like time of day, weather, and traffic patterns. It may also be helpful for the officer to describe the lack of certain factors, for example, that there was no obstacle in the road necessitating the driver to leave their lane and cross onto the shoulder. With the advent of many officers having video cameras attached to their vehicles, identifying such details should pose no need for fabrication or exaggeration if the defendant-driver truly did cross the fog line without an adequate reason.

V. CONCLUSION

The current case law in Missouri regarding fog line violations, created by the Missouri Court of Appeals, is a contradictory mess. It lacks internal consistency, lacks consistency with federal standards, and defies common sense. Even worse, by insisting that a vehicle may not be pulled over for a fog line violation, the appellate court appears to be attempting to write Missouri’s lane violation statute out of the books. The court’s opinions on the fog line issue may seem too minor to warrant attention, yet they have a broader implication: Missouri’s appellate court seems to feel comfortable saying that certain misdemeanor crimes are unenforceable. Even if one is not concerned with the fog line rulings themselves, it should still cause anyone concerned that the court is usurping the role of the legislature. There is no reason for the appellate court to maintain its fog line position, and they should instead affirm that any law violation – even a fog line violation – is sufficient cause for a traffic stop.

170. For a comparison between *Abeln* and *Pike*, see *supra* notes 136-38 and accompanying text.