

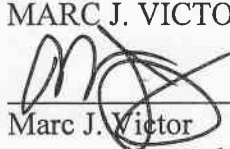
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8  
9 **WELTON JUSTICE COURT**  
10 **YUMA COUNTY**

11 STATE OF ARIZONA, ) Case No. J1403IA2009-00072  
12 )  
13 Plaintiff, )  
14 vs. ) MOTION TO DISMISS WITH PREJUDICE  
15 )  
16 STEVEN ANDERSON, )  
17 )  
18 Defendant. )

19 COMES NOW, Defendant Steven Anderson, by and through undersigned counsel, and moves  
20 this Court to dismiss the charges against him with prejudice as they were the result of an illegal  
21 seizure of his person in violation of the Fourth Amendment to the United States and Article II,  
22 Section 8 of the Arizona Constitution. This Motion is supported by the accompanying Memorandum  
23 of Points and Authorities.  
24

25 RESPECTFULLY SUBMITTED this 16 day of June, 2009.

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By: MARC J. VICTOR, P.C.  
  
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Marc J. Victor  
Attorney for Defendant

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Original mailed to the Court, and a  
copy mailed June \_\_\_\_, 2009, to:

Yuma County Attorney's Office  
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Yuma, Arizona 85364  
Attorneys for Plaintiff

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **FACTS:**

3 On April 14, 2009, at approximately 9:50 p.m., defendant Steven Anderson (hereinafter "Mr.  
4 Anderson") was driving eastbound on Interstate 8 near milepost 78 in Yuma County, Arizona. Mr.  
5 Anderson was driving a maroon 4-door Hyundai sedan. Mr. Anderson approached a Border Patrol  
6 checkpoint on Interstate 8 where there were signs, lights, temporary buildings, multiple marked  
7 Border Patrol vehicles, and numerous uniformed Border Patrol agents.  
8

9 Mr. Anderson slowed as he approached the place to stop, where Border Patrol Agent Gomez  
10 was standing. As Mr. Anderson was creeping to the stop, he passed Border Patrol Agent  
11 Spoonamore who was standing close to the traffic lane with a Border Patrol K-9. According to Agent  
12 Spoonamore, the K-9 "alerted" to Mr. Anderson's car so he signaled Agent Gomez to send Mr.  
13 Anderson to a secondary inspection area.  
14

15 When Mr. Anderson stopped next to Agent Gomez, Mr. Anderson rolled his driver window  
16 down slightly and Agent Gomez asked "are you a U.S. citizen?" Mr. Anderson replied "May I go,  
17 am I free to leave?" Agent Gomez then directed Mr. Anderson to the secondary inspection area.  
18 When Mr. Anderson questioned this direction, he was told that he was being directed to the  
19 secondary inspection area because the K-9 had alerted to his car and it was trained to alert to  
20 "concealed humans and narcotics." Mr. Anderson questioned whether the K-9 did in fact alert to his  
21 car and stated to the Border Patrol agents that he had a right to drive down the highway without being  
22 stopped.  
23

24 The Border Patrol agents refused to allow Mr. Anderson to proceed and repeatedly directed  
25 him to the secondary inspection area. Mr. Anderson refused to go to the secondary inspection area  
26

1 and stayed in his car where he was initially stopped. Border Patrol agents diverted all traffic on  
2 Interstate 8 through the other inspection lane that was in operation and called Arizona DPS.

3 Arizona DPS Officers Jones and Mitchell arrived in about 45 minutes and each asked Mr.  
4 Anderson to proceed to the secondary inspection area. Mr. Anderson again refused. This entire time,  
5 Mr. Anderson was sitting in his locked car, was non-violent, and was videotaping the encounter.

6  
7 DPS Officer Jones contacted his supervisor who instructed Officer Jones to break the car  
8 windows and use a chemical irritant spray to incapacitate Mr. Anderson while he was extracted from  
9 the car. DPS Officers Jones and Mitchell decided instead to deploy a Taser to incapacitate Mr.  
10 Anderson rather than the directed chemical irritant spray. Officer Mitchell used a small hammer to  
11 make a hole in Mr. Anderson's car's front passenger window, stuck the Taser through the hole, and  
12 shot Mr. Anderson with the Taser. Border Patrol Agent Spoonamore smashed out the front driver  
13 window with an expandable metal baton, allowing access to the driver door lock. Mr. Anderson was  
14 extracted from the car and handcuffed, suffering facial lacerations from the flying glass and glass on  
15 the ground where he was forced to lie for handcuffing.

16  
17 Mr. Anderson was charged, via Complaint, with one count of Obstructing a Highway and one  
18 count of Resisting Order Directing , Regulating, Controlling Motor Vehicle.

19 Through discovery and Rule 15 interviews, it is clear that no Border Patrol agent or  
20 supervisor at the checkpoint was aware of any written policies, procedures, or guidelines for  
21 operating the checkpoint. In addition, it was clear that cars were diverted to the secondary inspection  
22 area for no reason other than the K-9 handler signaling to the primary inspection agent that the K-9  
23 had alerted to a car.

24  
25 The K-9 agent, Agent Spoonamore, stated his K-9 was trained to detect "concealed humans  
26 and certain narcotics," but was unable to describe how his K-9 could tell the difference between

1 “concealed humans” and “unconcealed humans.” In addition, Agent Spoonamore stated there was no  
2 difference in a K-9 alert for human scent and the scent of narcotics. Agent Spoonamore is also a  
3 limited Deputy Sheriff in Yuma County for the purpose of issuing citations for personal possession of  
4 marijuana.

5 No agent could state what violation of law Mr. Anderson committed by refusing to proceed to  
6 the secondary inspection area.

7  
8 **LAW AND ARGUMENT:**

9 While border checkpoints away from the actual border with another country are permitted,  
10 their scope is limited to brief questions to verify a right to be in the country. General crime  
11 checkpoints, such as checkpoints set up to interdict narcotics, are not permitted. While the  
12 checkpoint Mr. Anderson encountered looked like a border checkpoint, the manner in which it was  
13 run, coupled with the lack of written policies or procedures and unfettered discretion of agents at the  
14 checkpoint, effectively turned it into a prohibited general crime checkpoint.

15  
16 **Constitutional Implications.**

17 The Fourth Amendment to the United States Constitution guarantees people to “be secure in  
18 their persons, houses, papers, and effects, against unreasonable searches and seizures.” Article II,  
19 Section 8 of the Arizona Constitution provides that “No person shall be disturbed in his private  
20 affairs, or his home invaded, without authority of law.” A seizure occurred here when Mr. Anderson  
21 was stopped at the checkpoint. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976)  
22 (“checkpoint stops are seizures within the meaning of the Fourth Amendment.”), *and see Michigan*  
23 *Department of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (“a Fourth Amendment seizure occurs  
24 when a vehicle is stopped at a checkpoint.”).

1 The Supreme Court has, however, held that a brief detention at a border checkpoint during  
2 which all is required is a response to a brief question or two, and possibly the production of a  
3 document, is not an unreasonable seizure. *Martinez-Fuerte*, 428 U.S. at 557-558.

4 In this case, the stop of Mr. Anderson did not involve just a brief question or two. In fact, his  
5 car was subjected to a K-9 inspection for narcotics before any stop was made or questions could be  
6 asked.

### 7 *Limitations on Border Checkpoints.*

8 The Supreme Court dealt comprehensively with border checkpoints in *Martinez-Fuerte*. In  
9 that case, the defendants challenged the constitutionality of checkpoints for illegal aliens away from  
10 the actual border. The Court upheld the checkpoint, but only because of its limited scope, lack of  
11 discretionary enforcement activity, and limited intrusion.

### 12 *Scope.*

13 The permissible scope of a border checkpoint is limited to “a brief question or two and  
14 possibly the production of a document,” and a visual inspection “limited to what can be seen without  
15 a search.” *Id.* at 558.

16 Here, Mr. Anderson was required to drive close to a K-9 that sniffed his car. Before Mr.  
17 Anderson arrived at the primary inspection area, where Agent Gomez asked if he was a U.S. citizen,  
18 Agent Spoonamore had already made the decision to have Mr. Anderson sent to secondary inspection  
19 based solely on the K-9 alert. The K-9 was trained to alert to “concealed humans and certain  
20 narcotics.” Since Agent Spoonamore could not discern the difference between an alert for  
21 “concealed humans” and “unconcealed humans,” and the K-9 did not alert to every car (all driven by  
22 humans), the alert must have been for narcotics.  
23  
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1           Since Mr. Anderson was required to slow while he drove by a K-9 sniffing for narcotics, the  
2 scope of this checkpoint exceeded that allowed by *Martinez-Fuerte*.

3 ***Discretionary Activity.***

4           Border checkpoints away from the actual border are allowed because they “both appear to and  
5 actually involve less discretionary enforcement activity.” *Id.* at 559. The Court described “The  
6 regularized manner in which established checkpoints are operated,” and “less room for abusive or  
7 harassing stops,” than in roving-patrol stops as criteria that made checkpoints less discretionary. *Id.*  
8 The discretionary activity that does occur is subject to post-stop judicial review for unreasonableness.  
9 *Id.* The discretionary activity in this case went far beyond that approved in *Martinez-Fuerte*.

11           In this case, interviews with the Border Patrol agents, the acting checkpoint supervisor, and  
12 the field operations supervisor (who happened to be at the checkpoint when Mr. Anderson arrived)  
13 revealed that none of them had knowledge of or had ever seen written policies, procedures, or  
14 guidelines for operating the checkpoint. Agent Spoonamore stated he had complete discretion as to  
15 when to deploy his K-9, when to take a break, and which vehicles in either of the two lanes to have  
16 his K-9 sniff prior to the primary inspection stop. Agent Gomez, the agent at the primary inspection  
17 stop, stated his job was to verify citizenship but could give no answer when asked what he was to do  
18 if the vehicle occupants denied citizenship. Agent Gomez stated he only sent cars to the secondary  
19 inspection area when Agent Spoonamore, or another K-9 handler, signaled him that there was a K-9  
20 alert.  
21

22           This checkpoint was run with no administrative direction known to the agents running it. No  
23 agent had any knowledge of written procedures. Complete unfettered discretion was in the hands of  
24 Agent Spoonamore and his K-9 to send vehicles for secondary inspection. This was not the  
25 “regularized manner” or “less room for abusive or harassing stops” as approved in *Martinez-Fuerte*.  
26

1 ***Intrusion.***

2 The intrusion in this case exceeds that allowed by *Martinez-Fuerte*.

3 In *Martinez-Fuerte*, the defendants argued that the checkpoint was overly intrusive because  
4 some cars were sent to secondary inspection. *Id.* at 560. The Court disagreed because “Referrals are  
5 made for the sole purpose of conducting a routine and limited inquiry into residence status that  
6 cannot feasibly be made of every motorist where the traffic is heavy.” *Id.*

7  
8 Here, Mr. Anderson was not directed to secondary inspection for a limited inquiry into  
9 residence. In fact, the decision to send him to secondary inspection was made before he ever stopped  
10 at the primary inspection area for Agent Gomez to ask if he was a U.S. citizen.

11 The Supreme Court allows border checkpoints because of the limited nature of inquiry for  
12 residence status. This case involves far more intrusion than a question or two, it involved to forced  
13 submission to a K-9 inspection before the first question could even be asked and it therefore  
14 exceeded the intrusion allowed at border checkpoints.

15  
16 ***Why Mr. Anderson was Actually Referred to Secondary Inspection.***

17 Mr. Anderson was actually sent to secondary inspection because the K-9 alerted to the  
18 perceived presence of narcotics in Mr. Anderson’s car.<sup>1</sup>

19 Border Patrol Agent Spoonamore stated that his K-9 alerts to the scent of “concealed humans  
20 and certain narcotics.” Agent Spoonamore also stated that he cannot tell the difference between his  
21 K-9 alerts, so he cannot tell what the K-9 is alerting to. Further, Agent Spoonamore was unable to  
22 say how his K-9 can distinguish between “concealed humans” and “unconcealed humans.” Common  
23 sense tells us that a person sitting up in a seat smells the same as he would lying down on a seat  
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<sup>1</sup> After Mr. Anderson was arrested, his car was thoroughly searched and no narcotics were found.



1 covered by a blanket. In other words, to suggest that a human's scent changes when he conceals  
2 himself is ludicrous. Certainly, if all known occupants exit a car and the K-9 alerts to the trunk, it is  
3 reasonable to believe that he has alerted to a concealed human, but that is only because all known  
4 humans are out of the car.

5 Here, Agent Spoonamore's K-9 alerted to Mr. Anderson's car, but did not alert to every car  
6 driven by. The K-9 must have detected something about Mr. Anderson's car that was different than  
7 every other car. Since the only other substances the K-9 is trained to alert to are certain narcotics, the  
8 K-9 must have been alerting to narcotics.

9 Since cars were only referred for secondary inspection for a K-9 alert, and the K-9 must be  
10 alerting to the odor of narcotics, this checkpoint was effectively turned into a narcotics detection  
11 checkpoint.  
12

13 **Narcotic Detection Checkpoints are Illegal General Crime Checkpoints.**

14 While some types of checkpoints are allowed, the Supreme Court has held that narcotics  
15 checkpoints, being general crime checkpoints, violate the Fourth Amendment. *City of Indianapolis v.*  
16 *Edmund*, 531 U.S. 32, 48 (2000).  
17

18 In *Edmund*, the City of Indianapolis set up checkpoints in high drug trafficking areas, stopped  
19 motorists to ask for a driver license and look in their car, and have a narcotics detection K-9 walk  
20 around the vehicle. *Id.* at 35. The Court found that the primary purpose of the checkpoints were to  
21 "advance the general interest in crime control," and declined to suspend "the usual requirement of  
22 individualized suspicion where police seek to employ a checkpoint primarily for the ordinary  
23 enterprise of investigating crimes." *Id.* at 44. Emphasizing its holding, the Court held that "Without  
24 drawing the line at roadblocks designed primarily to serve the general interest in crime control, the  
25  
26

1 Fourth Amendment would do little to prevent such intrusions from becoming a routine part of  
2 American life.” *Id* at 42.

3 Here, since the K-9 alerts to some vehicles but not others, it must be a narcotics alert. Since  
4 the reason Mr. Anderson was directed to secondary inspection was the K-9 alert, this checkpoint was  
5 effectively an illegal narcotics checkpoint. It makes no difference that Agent Spoonamore was a  
6 limited Deputy Sheriff for the purpose of investigating marijuana violations; the officers in *Edmund*  
7 were police officers with complete arrest powers.  
8

9  
10 **CONCLUSION:**

11 The Border Patrol had set up what was ostensibly a legal border checkpoint. Looking further,  
12 however, revealed that it was run without direction, policies, procedures, or guidelines. Decisions  
13 were left to the complete unfettered discretion of agents who did not even know if there were written  
14 policies, procedures, or guidelines. Agent Gomez, the agent who first speaks with motorists, stated  
15 that the only time he referred vehicles to secondary inspection was at the direction of a K-9 handler.  
16 The K-9s could not possibly detect a concealed person vis-à-vis an unconcealed person, so they must  
17 be alerting to narcotics. Referral to secondary inspection, a procedure that is supposed to be limited  
18 to verifying residency, was turned into an area for a search for narcotics.  
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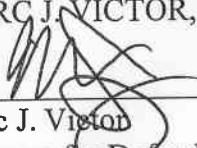
20 Narcotic checkpoints are prohibited as general crime checkpoints and are a violation of the  
21 Fourth Amendment. Mr. Anderson’s Fourth Amendment right to be free from unreasonable  
22 searches and seizures was violated and his detention and subsequent arrest were illegal.  
23

24 The defendant moves that the Court find that his Fourth Amendment rights were violated  
25 resulting in an illegal seizure of his person. The defendant further moves that the fruits of that  
26 seizure, the criminal charges he faces, be dismissed with prejudice.

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RESPECTFULLY SUBMITTED this 16 day of June, 2009.

MARC J. VICTOR, P.C.

By:   
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Original mailed to the Court, and a copy mailed June 16, 2009, to:

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