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1 JON R. SMITH
YUMA COUNTY ATTORNEY

WELTON ARIZONA

2 William P. Katz Arizona State Bar No. 026286 FILED IN COURT 3RD PRECINCT
3 DEPUTY COUNTY ATTORNEY
4 250 W. SECOND STREET, STE. G, YUMA, AZ 85364
(928) 817-4300

5 IN THE JUSTICE COURT - THIRD PRECINCT

6 IN AND FOR THE COUNTY OF YUMA, STATE OF ARIZONA

8 STATE OF ARIZONA,

No. J1403MS2009-00009

9 Plaintiff,

10 vs.

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

11 STEVEN L. ANDERSON,

12 Defendant.

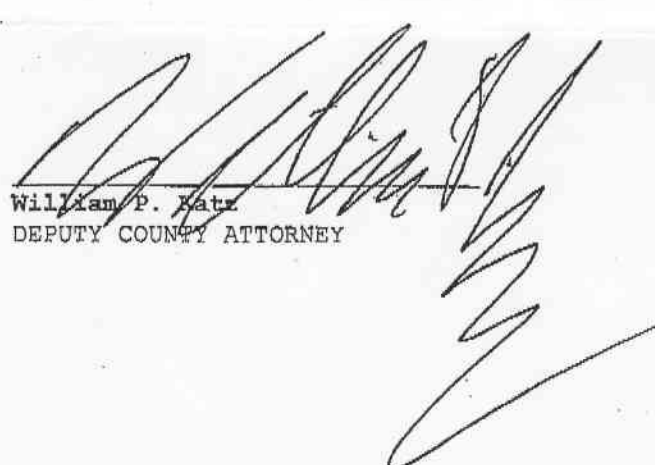
(Request for Hearing)

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14 The State of Arizona, through the Office of the Yuma County
15 Attorney, by the undersigned deputy, hereby responding to Defendant's Motion
16 to Dismiss. The State asks that this court deny Defendant's Motion. This
17 motion is supported by the attached Memorandum of Points and Authorities.

18 RESPECTFULLY SUBMITTED this 25th day of June, 2009.

19 JON R. SMITH
YUMA COUNTY ATTORNEY

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23 William P. Katz
DEPUTY COUNTY ATTORNEY



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MEMORANDUM OF POINTS AND AUTHORITIES

Inquiry Construct

The State would note for the Court that the Defendant's Motion to Dismiss argues that he was subject to an illegal seizure of his person in violation of applicable constitutional provisions. Defendant's motion presents only the question of whether the stop of a motorist at the Border Patrol checkpoint at milepost 78 is constitutional. The Defendant's recitation of facts includes matters beyond the scope of the Defendant's purported constitutional argument. For example, recitation of Mr. Anderson's belief in his right to drive on the highway without being stopped is not necessary to this Court's determination as to whether Mr. Anderson was "seized" under applicable constitutional doctrine. Additionally, it is irrelevant to inquiry presently before the Court that no contraband or concealed persons were discovered in

Most importantly, Defendant's recitation of alleged facts dealing with the removal of Mr. Anderson from his automobile is beyond the scope of this Court's inquiry into whether the stop of the Defendant complied with constitutional law. This Court's inquiry should not take into account any of the following: the method of Mr. Anderson's extraction, the use of a Taser to gain compliance and subdue resistance to lawful authority, nor any injuries to Mr. Anderson. Such facts are irrelevant to the present inquiry before the Court. The State will not speak to such matters at this time due to the limited scope of the analytical inquiry before this Court.

1. Facts

Steven Anderson was driving eastbound on Interstate Eight (I-8) on April 14, 2009. He encountered a clearly identified United States Border Patrol Checkpoint at milepost 78 located within Yuma County. The checkpoint covers both lanes of traffic and has two separate primary points of inspection (one per lane) where agents briefly stop motorists to gather information concerning

1 citizenship status. The determination of motorists' citizenship allows the
2 United States Border Patrol agents at the checkpoint to enforce federal
3 immigration laws.

4 Certain agents at the checkpoint are certified as canine handlers.
5 Canine handlers (K-9 agents) utilize their trained canine's to determine the
6 location of any concealed persons within passing vehicles who are attempting
7 to enter the United States illegally. The presence of these trained K-9 teams
8 at the checkpoint directly serves the purpose of enforcement of federal
9 immigration laws and the preservation of national security. Additionally, the
10 canines are trained in the detection of odors of certain narcotics. As a
11 vehicle approaches the primary inspection point, the vehicle passes at a slow
12 pace by the K-9 team. This area is referred to as "pre-primary."

13 The canine while in pre-primary conducts a brief sniff of the exterior
14 of the passing vehicle. Once a vehicle arrives at the primary inspection
15 point, a Border Patrol agent determines the citizenship status of the
16 occupants. The agent asks a few questions concerning citizenship which
17 generally results in the entire stop and interaction lasting only a few
18 seconds. If further questioning or investigation of a motorist's citizenship
19 status is determined by the primary agent to be necessary, the vehicle is
20 referred to the secondary inspection area which is located in close proximity
21 to the primary inspection point. Additionally, if a canine alerts to the
22 presence of concealed persons or the odors of certain narcotics during pre-
23 primary exterior canine sniffs, the K-9 agent will request that the vehicle be
24 referred to the secondary inspection area.

25 While in pre-primary K-9 Agent Spoonamore's canine assistant alerted to
26 Mr. Anderson's car as it slowly approached the point of primary inspection.
27 Agent Spoonamore immediately signaled to the primary agent that his canine had
28 alerted to Mr. Anderson's vehicle. Agent Spoonamore's canine is trained to
detect and alert to either the presence of concealed persons or the odors of

1 certain narcotics.

2 While in the primary inspection area, the first question asked by Agent
3 Gomez attempted to establish the citizenship status of Mr. Anderson.
4 (Conceded by Defendant's Brief, Pg. 3 Ln. 15-16). The Defendant further
5 concedes that he was non-responsive to this question and responded, "May I go,
6 am I free to leave?" Defendant's Brief, Pg. 3 Ln. 16-17. Defendant
7 additionally concedes that he did not comply with the first agent's request
8 that he move his vehicle to the secondary inspection area. This is clear from
9 the Defendant's brief, "Mr. Anderson refused to go to the secondary inspection
10 area and stayed in his car where he was initially stopped." Defendant's Brief,
11 Pg. 3 Ln 24-26. Various Border Patrol agents made numerous requests for Mr.
12 Anderson to remove his vehicle to the secondary inspection area. Mr. Anderson
13 refused at all times to move to the secondary inspection area, and remained
14 seated in his vehicle at the primary inspection point blocking an entire lane
15 of traffic on I-8.

16 The Defendant further concedes that D.P.S. Officers Jones and Mitchell
17 made requests for him to move his vehicle into the secondary inspection area.
18 Defendant's Brief, Pg. 4, Ln. 3-6. Once again, the Defendant refused to
19 adhere to the requests of the D.P.S. officers and continued to remain seated
20 in his vehicle in the primary inspection area blocking an entire lane of
21 traffic on I-8. Defendant's Brief, Pg. 4, Ln. 3-6. Overall, Mr. Anderson
22 refused to comply with multiple requests to move his vehicle into the
23 secondary inspection made by either D.P.S. officers or Border Patrol Agents.

24 The State disputes the Defendant's characterization of defense counsel's
25 interviews with Border Patrol agents and D.P.S. officers.

26 **2. Legal Argument**

27 **A. The Defendant's Motion Fails to Present a Cognizable Claim for Relief And**
28 **Is Not Authorized Pursuant to A.R.C.P. 16.6(b).**

The State respectfully asserts that this Court should not consider the
merits of the Defendant's motion for dismissal. This Court should first make

1 a determination as to whether the Defendant's motion is procedurally proper
2 before engaging in any inquiry concerning the merits of the Defendant's
3 motion. This Court must first determine whether it is authorized by law to
4 grant the Defendant's requested relief. "A court has no power, in the absence
5 of statute or rule, to dismiss a good information or indictment over the
6 protests or objection of the prosecuting attorney." State v. Stevens, 93
7 Ariz. 375, 378(1963). The first question before the Court amounts to whether
8 applicable law authorizes the Court to dismiss the criminal complaint filed
9 against the Defendant.

10 The Defendant has failed to cite law authorizing this Court to grant the
11 requested remedy of dismissal. As such it appears that the Defendant is
12 relying upon Rule 16.6(b) as a default remedial provision. However, Rule
13 16.6(b) does not vest a court with plenary power to grant the dismissal of a
14 case. Reference to both the rule itself and case law reveals that a court's
15 authority to dismiss pursuant to Rule 16.6(b) is narrowly tailored to certain
16 circumstances. Rule 16.6(b) provides a court with limited authority to
17 dismiss a complaint or count of complaint when the court makes a determination
18 of insufficiency as a matter of law. This Court cannot grant Defendant's
19 requested relief pursuant to Rule 16.6(b) because the checkpoint's compliance
20 or noncompliance with constitutional doctrine does not implicate the standard
21 that the complaint filed against the Defendant is "insufficient as a matter of
22 law."

23 Insufficiency as a matter of law as a standard by which to evaluate a
24 motion for dismissal pursuant to Rule 16.6(b) occurs if, "A defendant can
25 admit to all the allegations charged in the indictment and still not have
26 committed a crime." Mejak v. Granville 212 Ariz 555, 556 (2006). If the
27 Defendant in this case admits to the allegations charged, it is rather clear
28 that he will have committed a crime punishable under Arizona law.

In State ex. rel. Berger, the Court determined that a defendant's motion

1 to dismiss based on denial of a timely preliminary hearing was not properly
2 made pursuant to former Rule 16.5(b), which is analogous to the current
3 version of Rule 16.6(b), and as a result the trial court could not properly
4 grant the Defendant's requested relief because denial of a timely preliminary
5 hearing did not rise to the required standard of "insufficient as a matter of
6 law." State ex. rel. Berger v. Superior Court In and For Maricopa County, 112
7 Ariz. 451, 453 (1975). State ex. rel Berger demonstrates that Rule 16.6(b) is
8 not a catch-all provision which authorizes dismissal on any proffered basis.
9 Rule 16.5(b), a predecessor to Rule 16.6(b), was " 'not intended to create any
10 new grounds for dismissing a prosecution . . .'" 112 Ariz. 451, 453 (1975)
11 citing Comments to Rule 16.5(b). The Defendant's motion may not properly
12 rely upon Rule 16.6(b) as a default remedial provision. The State requests
13 that this Court deny the Defendant's motion for failure to state a claim upon
14 which the remedy requested may properly be granted.

14 **B. THE MILEPOST 78 CHECKPOINT IS CONSTITUTIONALLY PERMISSIBLE BECAUSE THE**
15 **CHECKPOINT'S PRINCIPAL OR PRIMARY PURPOSE DOES NOT INVOLVE THE DETECTION AND**
16 **SEIZURE OF NARCOTICS**

16 The checkpoint at issue is not a "narcotics checkpoint" and is distinct
17 from the narcotics checkpoint which was invalidated by the United States
18 Supreme Court in City of Indianapolis v. Edmond, 531 U.S. 32, 41-2 (2000).
19 As a preliminary matter, the State concedes that the stop of a motorist at the
20 milepost 78 checkpoint on I-8 results in a seizure under the Fourth Amendment.
21 Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990); U.S. v.
22 Martinez-Fuerte 428 U.S. 543 (1976). However, the classification of the stop
23 of a motorist at a checkpoint as a "seizure" does not render such a stop to be
24 *per se* unreasonable or constitutionally improper. The Fourth Amendment
25 proscribes only unreasonable seizures and the determination of the
26 constitutionality of the stop and detention of Mr. Anderson at the milepost 78
27 United States Border Patrol Checkpoint necessitates an assessment of the
28 checkpoint's reasonableness with reference to its purpose of enforcing federal
immigration laws in relation to a plurality of variables such as the public

1 interest and individual liberties. Illinois v. Lidster, 540 U.S. 419, 427,
2 (2004); Finally, the State would further highlight for the Court, that a
3 canine sniff of the exterior of an automobile passing through pre-primary and
4 primary inspection areas of the checkpoint does not result in a "search"
5 within the meaning of the Fourth Amendment. United States v. Place 462 U.S.
6 696 (1983).

7 The primary inquiry before this Court is into whether the brief stop of
8 motorists to determine citizenship at the milepost 78 checkpoint is an
9 unreasonable seizure pursuant to the Fourth Amendment of the United States
10 Constitution and Article II, Section Eight of the Arizona Constitution.

11 Reference to controlling case law such the progeny of Martinez-Fuerte reveals
12 that the milepost 78 checkpoint is constitutionally proper. U.S. v. Martinez-
13 Fuerte 428 U.S. 543 (1976).

14 The Court in Martinez-Fuerte validated vehicle stops in the absence of
15 individualized suspicion at border checkpoints similar to the checkpoint at
16 milepost 78. Id at 562. The Court based its validation of such border patrol
17 checkpoints on factors including: 1) a motorist's reduced expectation of
18 privacy while in an automobile; 2) the significant public interest in
19 enforcing federal immigration laws in an effort to prevent unlawful entry into
20 the United States; 3) minimal intrusion on individual liberties due to the
21 brief inquiry into citizenship; 4) the necessity of such checkpoints away from
22 the border to comprehensively enforce federal immigration laws.

23 The State understands that the Court in Martinez-Fuerte examined border
24 patrol checkpoints which did not involve the presence of K-9 teams. In
25 Martinez-Fuerte the checkpoints involved referrals [to secondary inspection]
26 "for the sole purpose of conducting routine and limited inquiry into residence
27 status that [could not] be made of every motorist where the traffic is heavy."
28 Id at 560. The State would further contend that a referral to the secondary
inspection area at the milepost 78 checkpoint on the basis of a canine alert

1 does automatically alter the nature of the stop from one predicated on a
2 citizenship or immigration inquiry. Rather, since the canine is trained to
3 alert to the presence of concealed persons, as well as certain narcotics, the
4 stop and continued detention may properly be characterized as continued
5 federal immigration investigation.

6 Martinez-Fuerte did contemplate situations involving probable cause or
7 consent as permitting the continued detention and search of vehicles at
8 checkpoints similar to the milepost 78 checkpoint. Id at 567. The Court in
9 Edmond did explain that its invalidation of "narcotics checkpoints" and other
10 ordinary crime detection checkpoints did not impair the constitutional
11 propriety of Martinez-Fuerte type immigration checkpoints and that, "police
12 officers [may] act appropriately upon information that they properly learn
13 during a checkpoint stop justified by a lawful primary purpose, even where
14 such action may result in the arrest of a motorist for an offense unrelated to
15 that purpose." 531 U.S. 32, 47-8. Explained further, even though the milepost
16 78 checkpoint primarily operates to investigate and enforce compliance with
17 federal immigration law, when confronted with evidence of other criminal
18 activity the Border Patrol agents may properly act.

19 The canine alert to Mr. Anderson's vehicle in pre-primary did supply
20 sufficient probable cause for his further detention and a search of his
21 vehicle, and due to the inherent mobility of an automobile a search warrant
22 was unnecessary. State v. Weinstein 190 Ariz 306, 310, (Ariz. App. Div. 2.
23 1997); Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399
24 U.S. 42, (1970). The Weinstein court explains that a positive alert by a
25 trained canine will provide probable cause sufficient to validate the search
26 of an automobile. Id. at 310.

27 C. THE DEFENDANT'S REFUSAL TO PROVIDE HIS CITIZENSHIP STATUS WHEN ASKED BY
28 THE AGENT AT THE PRIMARY INSPECTION POINT PROVIDES ADDITIONAL SUPPORT FOR THE
LAWFULNESS OF THE DEFENDANT'S REFERRAL TO THE SECONDARY INSPECTION AREA AND
FURTHER DETENTION

1 As stated previously, the checkpoint at milepost 78 operates to enforce
2 federal immigration laws in an effort to protect the nation's border. The
3 first question presented to Mr. Anderson concerned his citizenship status, and
4 Mr. Anderson subsequently refused to respond. Mr. Anderson's refusal to
5 answer the agent's question concerning his citizenship provided a reasonable
6 and particularized basis to refer Mr. Anderson to the secondary inspection
7 area for further questioning concerning his citizenship. Although such
8 reasonable suspicion developed at this point, it is well-established that a
9 border patrol agent need not have a particularized and articulable suspicion
10 to refer a motorist to the secondary inspection. Martinez-Fuerte, 428 U.S.
11 543, 563 . The Court in Martinez-Fuerte explained that the referral of a
12 motorist to the secondary inspection area presents "sufficiently minimal"
13 intrusion that "officers must have wide discretion in selecting the motorists
14 to be diverted for the brief questioning involved." Id. at 563. Mr. Anderson
15 failed to comply with the primary agent's brief immigration investigation (a
16 single question) and it was completely proper and reasonable for Mr. Anderson
17 to be directed to the secondary inspection area for further inquiry into his
18 citizenship status on this basis alone.

18 The agents and officers at the scene explained that Mr. Anderson was
19 being referred to secondary many times because of the canine alert in pre-
20 primary. This canine's alert was a proper basis to refer Mr. Anderson's
21 vehicle to secondary. This Court may additionally use an objective analysis
22 in evaluating whether the further detention of Mr. Anderson was proper and in
23 doing this Court may properly disregard the agent's subjective lawful reasons
24 for referring Mr. Anderson to the secondary inspection area. State v. Acosta
25 166 Ariz. 254, 256-7 (App. Div. 1 1990); State v. Jeney, 163 Ariz. 293, 296-7
26 (App. Div. 1 1989). An objective inquiry may properly take into account an
27 unarticulated lawful basis for further detention which was not understood or
28 conveyed by the agents and officers at the scene. Despite the proper referral

1 to secondary on the basis of the canine alert and the numerous times this
2 basis was conveyed to Mr. Anderson, this Court may properly determine the
3 legality of Mr. Anderson's stop and continued detention by the Border Patrol
4 agents based solely on Mr. Anderson's failure to comply with the citizenship
5 investigation.

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14 **3. Conclusion**

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16 Therefore, the State respectfully requests this Court deny the
17 Defendant's motion to dismiss and determine that the Defendant's requested
18 remedial relief of dismissal is procedurally improper and not authorized by
19 law. Finally, the State respectfully requests that this Court deny
20 Defendant's motion for dismissal on the basis that the stop and subsequent
21 detention of the Defendant were constitutionally permissible.

22
23 RESPECTFULLY SUBMITTED this **25TH** day of **JUNE**, 2009.

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25 JON R. SMITH
YUMA COUNTY ATTORNEY

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28 WILLIAM P. KAIN
DEPUTY COUNTY ATTORNEY

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JUNE 25, 2009 TO:

JUSTICE COURT THIRD PRECINCT &
M. VICTOR
BY: KWfirst