CHECKPOINTS AND THE FOURTH AMENDMENT: WHAT CAN DEFENSE LAWYERS DO?

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I. Background

A. What is a checkpoint?

- Interior enforcement operations subject to constitutional standards.

There are different types of checkpoints:

- Sobriety checkpoints
- Security checkpoints at airport bases
- Forest checkpoint services in national forests
- Traffic safety checkpoints
- Driver's license and vehicle registration checkpoints
- Checkpoints at entrance to prison parking lot

B. Checkpoints are not part of the "border"

- The Marfa checkpoint is an immigration checkpoint and not a border equivalent. *United States v. Machuca-Barrera*, 261 F.3d 425 at n. 15 (5th Cir. 2001).
- If a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. 1974).

C. Legal authority for checkpoints

- There is no explicit authority to conduct immigration checkpoints. The authority evolved from a series of court decisions interpreting Section 287(a)(3) of the Immigration and Nationality Act in light of the 4th Amendment to the U.S. Constitution. Section 287 is codified in the US Code in Title 8, United States Code, Section 1357(a)(3).
- Before 1973 immigration officers had authority, without a warrant, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle within a reasonable distance from any external boundary of the United States. Reasonable distance is 100 miles from the border. 8 C.F.R. §287.1(a)(2).
- A Breaking point came in 1973. The U.S. Supreme Court held that Border Patrol Agents may not search a vehicle under Section 287(a)(3)'s "board and search" provision unless they have probable cause to believe that the vehicle contains contraband." *Almedia-Sanchez v. United States*, 413 U.S. 266, 275 (1973).

D. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976)

- The case consolidated legal challenges to checkpoints at San Clemente, California. Defendants challenged the stops at their checkpoints as unreasonable searches and seizures. The court upheld the convictions. The Court found only minimal intrusion to motorists stopped at immigration checkpoints, and held that Border Patrol Agents may stop and question motorists at reasonably located checkpoints even in the absence of any individualized or reasonable suspicion.
- Referrals to secondary inspection need only be "selective" rather than based on "reasonable suspicion" as required in roving patrol stops. The court said that these could even be based on Mexican ancestry alone but this was later prohibited. *See United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000). The opinion also states that checkpoints need not be pre-approved by any type of warrant.

E. Important checkpoint principles

- There used to be a difference between permanent and temporary checkpoints but there is no longer a distinction. *United States v. Soto-Camacho*, 58 F.3d 408 (9th Cir. 1995) (Jacumba checkpoint is open once a month for 10 days). The checkpoint must be well advertised in advance by signs and cones. *Id*.
- Reasonable suspicion is no longer required to stop vehicles at a temporary immigration checkpoint in the Ninth Circuit, so long as the checkpoint is well-advertised in advance by sign and cones, and is highlighted and marked so that motorists can see that other vehicles are being stopped and that Border Patrol Agents are in charge. *Id*.
- There is no legal requirement that checkpoint inspections be conducted in any particular order or that certain part(s) of an inspection be conducted at primary, secondary, or both. *United States v. Massie*, 65 F.3d 843 (10th Cir. 1995).
- Primary inspection includes not only the physical stop at the stop sign at the primary position, but may also include brief questioning regarding citizenship and immigration status, a request for documents evidencing a right to be in the United States, and a visual inspection of what can be seen from outside the vehicle without a search. *Martinez-Fuerte*, 428 U.S. at 558.
- Agents may not search a vehicle at an immigration checkpoint unless they have probable cause or consent. *United States v. Ortiz*, 422 U.S. 891, 898 (1975).
- Border Patrol agents do not need any "individualized," "articulable," or "reasonable" suspicion in order to refer a vehicle for secondary immigration inspection. *Martinez-Fuerte*, 428 U.S. at 562.
- So long as there is an immigration purpose for the referral, Border Patrol Agents have broad authority to refer a vehicle to secondary inspection. *Indianapolis v. Edmond*, 531 U.S. 32 (2000).
- When BP Agents seek to detain a vehicle for secondary inspection solely for some non-immigration purpose, the law generally requires the agents to have "reasonable suspicion" of criminal wrongdoing. *See generally United States v. Ellis*, 2003 WL 21027280 (5th Cir. 2003).
- BPAs have limited general arrest authority for any federal crimes committed in their presence while conducting immigration enforcement duties. *See* Section 287(a)(5). *See also United States v. Outlaw*, 134 F.Supp.2d 807 (W.D. Tex. 2001), aff'd, 319 F.3d 701 (5th Cir. 2003)

("[a]lthough the primary task of BPAs is the enforcement of immigration law, BPAs are also authorized to enforce narcotics laws).

- A brief detention following valid immigration secondary inspection was upheld upon a "minimal showing" of suspicion of drugs. *United States v. Preciado-Robles*, 964 F.2d 882 (9th Cir. 1992). A one-minute detention for canine sniff after immigration secondary was upheld given the "grave public concern with the flow of illicit narcotics into this country." *United States v. Taylor*, 934 F.2d 218 (9th Cir. 1991), cert. denied, 502 U.S. 1074 (1992).
- Vehicle stops for general crime control purposes must be based upon individualized reasonable suspicion. *Indianapolis* 531 U.S. 32.
- Unless there is some objective evidence for a pretext to send to secondary inspection for reasons beyond immigration, judges will not examine an officer's subjective purpose. *United States v. Koshnevis*, 979 F.2d 691, 694 (9th Cir. 1992).

F. Common fourth amendment issues

A. What can happen during primary inspection?

- Stop every vehicle passing even in the absence of individualized suspicion regarding vehicle and occupants. *Martinez-Fuerte*, 428 U.S. at 562.
- Primary may also include brief questioning regarding citizenship and immigration status, request for documents, and visual inspection from outside of vehicle without warrant. *Id*.
- Agents may not search without a warrant unless there is consent or probable case. *Ortiz*, 422 U.S. 981.

B. What can happen during secondary inspection?

- Ask questions about citizenship and immigration status. *Martinez-Fuerte*, 428 U.S. at 558 (1976). Agents can ask questions about other potential criminal activity if the circumstances justify it, i.e. questions to explain suspicious circumstances. *United States v. Hudson*, 210 F.3d 1184 (10th Cir. 2000).
- Request to inspect documents. Border Patrol Agents may request to inspect any documents evidencing the occupant's right to be in the United States. Martinez-Fuerte, 428 U.S. at 558 (1976); *United States v. Benitez*, 899 F.2d 995, 997 (10th Cir. 1990); *Jasinski v. Adams*, 781 F.2d 843, 847 (11th Cir. 1986), ("Agents may request proof of citizenship ... ").
- Make plain view observations. Plain view observations are allowed, but no physical manipulation or squeezing of carry-on baggage or personal property in the passenger compartment of a bus at a USBP checkpoint. *United States v. Ellis*, 2003 WL 21027280 (5th Cir. 2003). BPAs may not disturb or move parts of a car in order to facilitate plain view). *United States v. Garcia*, 616 F.2d 210, 212 (5th Cir. 1980).
- Request consent to search. Ordinarily, the driver of a vehicle may grant consent to search, unless the owner is present and refuses consent or objects to the search. *United States v. Dunkley*, 911 F.2d 5, 22 (11th Cir. 1990), cert. denied, 498 U.S. 1096 (1991). The driver's consent extends to areas and things within the vehicle over which the driver appears to have access and

control but not personal effects belonging to the passengers. *United States v. Matlock*, 415 U.S. 164, 172 (1974) (consent only extends to areas over which a non-owner has common authority).

- Request occupants to exit vehicle. Occupants in secondary inspection may be asked to come out of the vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (driver); *Maryland v. Wilson*, 519 U.S. 408 (1997) (passengers).
- Perform exterior canine sniff. Agents do not need probable cause or consent to have a canine sniff vehicle. *Taylor*, 934 F.2d 218. Agents may not place any part of the canine into the interior of the vehicle, nor may they open enclosed portions of the vehicle (doors, hood, trunk, camper shell, gas tank, etc.) for exposure to a canine sniff unless they have warrant or probable cause. *Ortiz*, 422 U.S. 891.
- Press down on trunk. During primary or secondary inspection BPAs can press down on a vehicle's trunk if they see it as heavily laden. *United States v. White*, 766 F.2d 1328 (9th Cir. 1985). This can help determine if the vehicle may be riding low for structural reasons or because its trunk is heavily laden. *Id*.
- Tap exterior fuel tanks. This can take place at primary or secondary inspection. BPAs can tap any external fuel tanks. This can help determine if the tank's exterior has been penetrated in some manner and determine the structural integrity of the tank. *United States v. Muniz-Melchor*, 894 F.2d 1430 (5th Cir. 1990).

C. Detention issues at checkpoints:

- Immigration purpose. Only a brief detention, three to five minutes. *Martinez-Fuerte*, at 547, 558. Bus checks at immigration checkpoints usually take 30 seconds to 5 minutes. *United States v. Bengivenga*, 245 F.2d 593 (5th Cir. 1995).
- Canine sniff detention. In the Ninth Circuit a vehicle can be detained for up to a minute after the immigration inspection for a canine sniff of the outside of a vehicle if BPAs still have some minimal articulable suspicion, even after secondary immigration inspection. *United States v. Wilson*, 7 F.3d 828 (9th Cir. 1991). This is less than reasonable suspicion required to justify roving patrol stop. *See Taylor*, *supra* at 221.
- Detention for consent to search. Detention for consent to search even after secondary inspection if there is some minimal articulable suspicion. *United States v. Preciado-Robles*, 964 F.2d 882 (9th Cir. 1992). This is less than reasonable suspicion required to justify roving patrol stop. *See Taylor*, *supra* at 221.
- Probable cause is required to search vehicle and arrest person(s). *Carroll v. United States*, 267 U.S. 132, 158-162 (1925).

D. BPAs may make warrantless arrests for the following:

- Alien reasonably believed to be in the USA in violation of section 287(a)(2).
- Any person believed to have committed a federal immigration-related felony (Section 287(a)(4)).
- Any federal offense committed in agent's presence while performing immigration enforcement duties (Section 287(a)(5)(A)).
- Illegal importation or exportation of merchandise (Title 19 cross-designation).

- Any violation of federal controlled substances act or the controlled substances import and export act. Any violation for which private citizens may make warrantless arrests under state law, or other state offenses if designated as peace officer.

E. Making a U-turn before a checkpoint

- In the Ninth Circuit this does not rise to reasonable suspicion. *United States v. Ogilve*, 527 F.2d 330 (9th Cir. 1975). In other circuits it can but other factors may be required. *United States v. Hasette*, 898 F.2d 621 (9th Cir. 1981).

F. Failure to Yield

- 18 U.S.C. section 758 provides punishment for any person who flees or evades a checkpoint in excess of the speed limit. Pursuit may not be possible unless the vehicle travels beyond the speed limit.

G. Dog sniffs at checkpoints

- Use of narcotics-detection dog to sniff around exterior of motorist's vehicle did not rise to level of cognizable infringement on motorist's Fourth Amendment rights, such as would have to be supported by some reasonable, articulable suspicion. The dog arrived during lawful traffic stop. *Illinois v. Caballes*, 543 U.S. 405 (2005).
- At a checkpoint, a very limited delay while a dog walks around a lawfully stopped automobile is constitutional so long as there is some minimal justification, or a "minimal showing of suspicion." *Taylor*, 934 F.2d 218.
- A canine trained to detect both concealed humans and narcotics "does not diminish that his training for detection of hidden humans corroborates the government's assertion that the primary purpose of the [I-19] checkpoint was to control the flow of illegal aliens." *United States v. Ruiz-Hernandez*, No. CR 16-511-TUC-CKJ, 2017 WL 1047236 (D. Ariz. Mar. 16, 2017). *See also*, *Florida v. Harris*, 568 U.S. 237, 246 (2013) (generally noting that a positive alert by a properly certified canine agent may be deemed reliable for probable cause purposes.).
- A canine alert to a vehicle at "pre-primary inspection" (where cars are slowing down and approaching the checkpoint station, before any immigration stop begins) does not invalidate the stop. *United States v. Romero-Cubillas*, No. CR 15-00374-TUC-RCC (LAB), 2015 BL 314608 (D. Ariz. 2015).
- An agent's anticipatory canine search of a vehicle upon its immediate referral to secondary inspection did not constitute a pre-textual drug search as the canine "was trained to detect hidden persons well as drugs." *United States v. Wilson*, 7 F.3d 828, 833 (9th Cir. 1993).
- The government must disclose records pertaining to the training of the canine to assess the canine and the handler's reliability. This is relevant to a motion to suppress evidence following a dog sniff at a checkpoint. *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir. 2003). The defense should retain an expert to evaluate the materials and assist with interpreting results and testing. The defense expert can provide an opinion about the dog's reliability at a motion to suppressing hearing. Below are items that should be requested.

1. All training records that contain information reference the dog team (all initial training and all proficiency). The materials could include written, audio, or video materials.
2. Training materials (target odors, amount, and quality percentage of substance).
3. All certificates awarded to the team.
4. All certifications awarded to the handler.
5. Complete list of training classes and seminars attended by the handler.
6. Search warrant affidavits that mention the dog or handler and the results of those warrants.
7. Departmental policies or regulations that refer to the training of the detector team and the field use of the detector team.
8. Educational background in police service of the departmental trainer, and supervisor.

- Experts can review the disclosure and provide an opinion about the reliability of the canine or the sniff.
- A study concluded that two factors may explain the large number of false alerts identified by canine handlers: "(1) handlers were erroneously calling alerts on locations at which they believed [a] target scent was located or (2)[a] handler['s] belief that [a] scent was present affected their dogs' alerting behavior so that dogs were alerting at locations identified by handlers." Lit, Schweitzer, & Oberbauer, *Handler beliefs affect scent detection dog outcomes*, 14 Anim. Cog. 387 (2011). In this study, 18 dog/handler teams participated in the study and each team completed two searches of four different rooms. Handlers were falsely told that two rooms contained target scents when, in fact, no target scents were present in any of the four rooms. Thus, any alert identified by handlers would be false. There were 225 such alerts. The study concluded, "Handler beliefs affect working dog outcomes, and human indication of scent location affects distribution of alerts more than dog interest in a particular location."

- U.S. Supreme Court held that canine reliability is presumed based solely on certification by a bona fide organization. *Harris*, 568 U.S. at 246 (2013) (evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert).

H. Challenge the legality of the checkpoint

- Request all arrest and search statistics relating to the checkpoint operation for the time period in question. *United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016).
- Challenge "primary purpose" if drug and other crime arrests are high compared to immigration arrests.
- Assess whether arguments of "parallel construction" could apply. *See United States v. Marin-Campos*, 3:15-CR-2044-GPC, 2016 WL 6440345 (S.D. Cal. Oct. 28, 2016).

CASE SUMMARIES

Almeida-Sanchez v. United States, 413 U.S. 266 (1973)

This was a stop from a "roving" Border Patrol agent. Driver was stopped on State Highway 78, 25 air miles north of the border. There was no search warrant and no probable cause of any kind for the stop or the subsequent search. There was not even reasonable suspicion for detention. The driver, a Mexican citizen holding a valid United States work permit, was convicted of having knowingly received, concealed, and facilitated the transportation of a large quantity of marijuana.

The court ruled that in the absence of probable cause or consent, a search and seizure at least 20 miles north of the Mexican border by roving patrol is unreasonable. The Court held, "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandize."

United States v. Martinez-Fuerte, 428 U.S. 543 (1976)

The case addressed defendants in three separate criminal prosecutions. Each was arrested on three separate occasions at the permanent checkpoint on interstate 5 near San Clemente, California, the principal highway between San Diego and Los Angeles. The checkpoint is 66 road miles north of the Mexican border. The court permitted the checkpoints to operate and noted the following:

1. Before motorists reach the checkpoint there must be signs warning them of the checkpoint ahead.
2. Only a small percentage of vehicles are stopped for questioning at secondary inspection, lasting from 3 – 5 minutes.
3. In the three cases the referral to secondary inspection was made based on no articulable suspicion.
4. Operation of a fixed checkpoint need not be authorized in advance by a judicial warrant. Checkpoints are consistent with the 4th amendment if operated in the manner described in the opinion.

The court's rationale rested on the following factors:

- A requirement that stops be made only based on reasonable suspicion on major routes inland would be impractical because the flow of traffic is too heavy. Also this requirement would eliminate any deterrent conduct of "well-disguised smuggling operations."
- Consequent intrusion on 4th amendment is quite limited. The detention is very brief, all it requires is response to brief question or two and possibly production of document evidencing a right to be in the United States.
- Reasonable suspicion is required for roving patrol stops, but the circumstances relating to checkpoints are far less intrusive. Roving patrol stops typically take place at night, and at checkpoints motorists can see that other motorists are stopped, visible signs of the officers are seen, and therefore there is less fright.
- The opinion even held that "apparent Mexican-ancestry" can be the sole basis for referral to secondary inspection, but this was later abolished in *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000).

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)

In this case a fixed immigration checkpoint on Interstate 5 south of San Clemente was closed because of inclement weather but two officers were observing northbound traffic at the side of the highway. The road was dark but they were using the patrol car's headlights to illuminate passing cars. The car in question was stopped after being pursued only based on the Mexican appearance of the occupants.

Does the Fourth Amendment allow vehicle stops in border areas based solely on the apparent Mexican ancestry of occupants? No. The Fourth Amendment forbids stopping persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

The court reasoned that roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. Stopping vehicles without any suspicion would subject residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, but along the border a relatively small proportion of them are aliens. Mexican ancestry is a relevant factor but standing alone is not enough to justify stopping all Mexican-Americans.

United States v. Ortiz, 422 U.S. 891 (1975)

Border Patrol officers stopped the car for a routine immigration search at the traffic checkpoint on Interstate Highway 5 at San Clemente, California. Three aliens were found in the trunk.

Must vehicle searches at traffic checkpoints, like the roving-patrol search in *Almedia-Sanchez*, be based on probable cause? Yes. At traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause.

Checkpoint procedures do not significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those that are not, may not be reassured by seeing that the Border Patrol searches other cars as well. They will probably find these types of searches especially offensive. A search, even of an automobile, is a substantial invasion of privacy. For this reason, probable cause is the minimum requirement for a lawful search.

United States v. Taylor, 934 F.2d 218 (1991)

The checkpoint in question for this case, San Clemente, is located 66 miles north of the Mexican border on Interstate 5, between San Diego and Los Angeles. The agent referred the vehicle to secondary inspection because the occupants appeared nervous. The agent thought this indicated they may be transporting concealed aliens or perhaps narcotics. At secondary agents confirmed US citizenship of driver and asked if he could inspect the hatchback-trunk area of the vehicle. Nothing criminal was found inside (no people). At this point the immigration inspection ended and had lasted three to four minutes.

Taylor continued to show that he was nervous and uneasy. Therefore, the agent decided to use a "detector" dog trained to alert to hidden persons or narcotics. In a 60 second period the dog alerted positively. This was probable cause, the parties stipulated. 800 grams of methamphetamine, two handguns, money, and drug paraphernalia were discovered in this search.

Did the brief continuation of this checkpoint detention for purposes of the canine sniff violate the Fourth Amendment? No. The government must present some justification for brief, additional delays after immigration inspections are complete. There must be a "minimal showing of suspicion," or articulable suspicion of criminal activity. This is less than reasonable suspicion for roving patrol to stop a car.

In this case, both common sense and the evidence proffered by the government supported the conclusion that a very limited delay while the dog walked around the lawfully stopped automobile was useful in combatting Mexican border drug traffic. The intrusion interests was minimal. The dog sniff was only 60 seconds and therefore reasonable.

United States v. Preciado, 964 F.2d 882 (9th Cir. 1992)

Two Hispanic males were seen driving a black 1990 Corvette approaching the Temecula immigration checkpoint at 4:40 PM. The car did not have a front license plate and travelled at a slower rate of speed than surrounding traffic. Agent Pinto sent it to secondary inspection.

Preciado-Robles was asked by Agent Santos if he could look inside the Corvette. He was shaking but gave consent. The Agent continued to ask consent to search vehicle compartments, and received yes each time. A white bag was found, and the agent asked what was inside. Preciado said medicine from Tijuana. The agent opened the bag consensually and found a brick of what appeared to be cocaine. Preciado was arrested and later the powder tested positive for cocaine.

Was it permissible to ask for consent after the immigration investigation was complete? Yes. "We caution that there must be a valid basis for any additional intrusion, and it must be of a brief duration." This was met here due to the nervousness. Consent was given during questioning. The agent delayed Preciado for only a short period before requesting permission to search the Corvette.

United States v. Soto-Camacho, 58 F.3d 408 (1995)

The stop took place at a checkpoint open only 10 days each month and put into operation in part based on intelligence about the movement of drugs across the border. Guadalupe-Soto was stopped and referred to secondary inspection because he could not produce an immigration document and gave the agent at primary his wallet. He could not answer questions about his citizenship.

At secondary he consented to a search or his trunk after his immigration status was confirmed. The BPA thought he was trying to divert attention away from the front, so they continued the consensual search inside the vehicle and under the hood. The agent saw no aliens inside but wanted to look further to see if an alien was hidden in the rear spare tire compartment under the rear floor. Consent was given. While searching inside the wagon, the agent saw material blocking the air vents, looked under the hood, and saw narcotics packaging. Soto was arrested.

A stop conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all vehicles for illegal aliens is not unreasonable under the Fourth Amendment. The stop of the defendant was not infected by the fact that the Border Patrol decision to set it up was based in part on drug intelligence.

Except for the potential influence of drug intelligence on the decision of when within the month to activate it, the Jacumba checkpoint does not differ in any material respect from a temporary checkpoint

that was the subjection of *United States v. Hernandez*, 739 F.2d 484 (9th Cir. 1984). The purpose of the checkpoint in *Hernandez* was to "locate and confiscate unlawful weapons and other contraband, including illicit drugs, and to reduce or eliminate the threat to the security of the Base caused by the presence of illegal aliens." *Id*. at 485. The temporary checkpoint here is to check for aliens, all vehicles are stopped, the checkpoint is well identified. Agents exercise no discretion over the checkpoint's operation, and the stop itself involves a minimal intrusion.

There is no evidence to suggest that this checkpoint was temporarily set up solely for the purpose of drug interdiction, or that Soto himself was stopped, referred to secondary, or asked for permission to search his vehicle solely to look for drugs.

United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000)

The stop in this case was at the Highway 86 permanent stationary checkpoint in El Centro, California. A passing driver told Border Patrol agents that two cars with Mexicali license plates had just made U-turns on the highway shortly before the checkpoint. Two BPAs went to the area and 1 mile south of the checkpoint saw a blue Chevy Blazer and a red Nissan sedan with Mexicali plates pull off the shoulder and re-enter the highway heading south.

The BPAs testified that almost all of the stops made by BPA at the turnaround site resulted in the discovery of a violation relating to either illegal aliens or narcotics. Another agent said that stops made in connection with other turnarounds did not result in arrests nearly as frequently. In approaching the cars in question the BPAs testified that he noticed the drivers were Hispanic. The vehicles were stopped separately for other reasons besides the Hispanic appearance of the drivers.

Was it appropriate to consider Hispanic appearance as a factor in the reasonable suspicion analysis? Hispanic appearance is not, in general, an appropriate factor. Defendant's Hispanic appearance was not proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop them, in light of large number of Hispanics in the area.

Reasonable suspicion requires "particularized suspicion". Where the majority (or a substantial number) of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis.

The likelihood that in an area in which the majority-or even a substantial part-of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus. Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.

Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection that they are in effect assumed to be potential criminals first and individuals second. It would be an anomalous result to hold that race may be considered when it harms people, but not when it helps them.

SUMMARY OF LAW REVIEW ARTICLES

Elizabeth N. Jones, Possible Problems at the San Clemente Checkpoint, 6 Va. J. Crim. L. 43 (2018)

The primary purpose for permanent fixed Border Patrol checkpoints remains immigration control. However despite this narrow legal directive, a byproduct of these checkpoint stops has been the seizures of vast quantities of contraband. Courts approve of border patrol practices. The most plausible explanation is that Border Patrol Agents might be engaging in a secretive, deceitful, and arguably unlawful process known as parallel construction.

Prof. Jones argues that there's very good reason to conclude that "parallel construction" has been implemented at the San Clemente checkpoint.

Parallel construction was defined in an article published by Reuters in August of 2013.[1] It detailed a secretive unit within the U.S. Drug Enforcement Administration called the Special Operations Division (SOD). SOD is comprised of over twenty federal agencies including the NSA, FBI, CIA, IRS, and DHS. The SOD unit funnels information gathered from intercepts, wiretaps, informants, and a massive database of telephone records to authorities across the nation to help launch criminal investigations. Intelligence unrelated to national security may be discovered during the course of these investigations, and is then passed on to local police.

The term parallel construction describes the DEA's directive to recipients of SOD communications to recreate the initiation of criminal investigations so that the original source remains confidential. Law enforcement engages in parallel construction by "…manufacturing a sanitized evidentiary basis for criminal investigation in order to mask the actual methods used to obtain incriminating information about a suspect. The government fabricates a story that "the stop was the start of the case."

If providing discovery to an individual defendant risks exposing entire programs of secret surveillance then dismissal often becomes the government's only logical opinion. An example that's used is the following hypothetical – if the SOD comes across a case involving transportation of meth while investigating a separate set of facts (possibly terrorism or something else). The checkpoint could be opened simply to make this arrest, but if the defense seeks disclosure to investigate the primary purpose of the checkpoint on this date in time, or in relation to the specific client, the government may be forced to disclose documents relating to the covert investigation. If this is the case, the government may dismiss the case or, according to the author, have agents come up with a different reason for the checkpoint stop. This, according to the author, is completely impermissible. It flies in the face of ethical duties of prosecutors and violates the Fourth Amendment to the constitution.

United States v. Marin-Campos, 3:15-CR-2044-GPC, 2016 WL 6440345 (S.D. Cal. Oct. 28, 2016) provides evidence the San Clemente checkpoint was opened temporarily solely to detain the suspect, not for immigration enforcement. This is documented in facts described in the opinion.

Jesus A. Osete, The Praetorians: An Analysis of U.S. Border Patrol Checkpoints Following Martinez-Fuerte, 93 Wash. U. L. Rev. 803 (2016)

[1] John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013), http://www.reuters.com/article/us-dea-sod/exclusive-u-s-directs-agents-to-cover-up-programused- to-investigate-americans-idUSBRE97409R20130805

The article provides a brief history of checkpoints including a discussion of *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) and the aftermath of the decision on checkpoint procedures. The article discusses some ways to ease problems at checkpoints. Some problems include local residents experiencing delay in part because proving citizenship can be difficult.

The article also discusses fact that CBP agents, like others, have biases, which are most likely activated in situations requiring agents to make a split-second judgment. This affects people crossing the checkpoints. A study conducted by a group of Arivaca, Arizona residents called People Helping People indicated that agents were twenty times more likely to order a Latino-occupied vehicle to secondary inspection. Hispanics can experience harassment more frequently compared to whites or other populations. In turn, unaccounted for checkpoint operations may cause Hispanics to leave the area, and perhaps deter Hispanics from living or visiting Arivaca.

The article then discusses several options for relief for plaintiffs subject to harassment/injury:

- Judicial relief (*Bivens*[2] vs Federal Tor Claims Act (FTCA)). Under *Bivens*, undocumented immigrants may not be entitled to file claims or obtain relief. Rate of success for *Bivens* claims in terms of monetary gain is about 2%. Most of these are reversed on appeal. The FTCA sets some caps on damages and also timing but waives immunity depending on certain requirements.
- Persons can claim discrimination for being targeted due to Hispanic appearance or Mexican appearance. This is difficult as the evidence must show intent to discriminate.
- *Instituting an ombudsman to review operations:* The primary duty would be to record statistics on individual checkpoints and compile reports to determine cost-effectiveness. “Costs” go beyond those that are merely tangible; they include intangibles such as the loss of inclusivity and community, a loss of respect for the Constitution, and a biased implementation of selective law enforcement procedures on a certain group of individuals.
- *CBP complaint forum proposal:* A new complaint mechanism through the Ombudsman should provide a multilingual complaint procedure accessible online.
- *Community sticker forum proposal*: CBP could propose a Community Sticker Program much like CBP’s current “SENTRI” program implemented at international borders.
- *United States Supreme Court intervention:* The 5th, 9th, and 10th Circuits seem divided on whether CBP agents may convert an immigration-related inquiry into a non-immigration related inquiry, especially without a minimum level of reasonable suspicion of criminal activity. A Supreme Court solution could solve the checkpoint conundrum by granting certiorari in a future challenge to the checkpoint operations in the interest of clarifying *Martinez-Fuerte* and its progeny.

[2] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S. Ct. 1999, 2001, 29 L. Ed. 2d 619 (1971) (when there is no evidence that the public employer is seeking to monitor the performance of official duties, and where the search is under color of state law by virtue of the employer's government position, there may be a violation of the Fourth Amendment that may permit a recovery by the employee under 42 U.S.C.A. § 1983 or under a federal common-law theory).

TWO CASES SUGGESTING "PARALLEL CONSTRUCTION"

United States v. Soto-Zuniga, 837 F.3d 992 (9th Cir. 2016)

Hector Soto-Zuniga was convicted of possession with intent to distribute methamphetamine after a traffic stop and search at the San Clemente checkpoint. 2.9 kilograms of methamphetamine were found on the floor of the backseat of his car. His first trial resulted in a hung jury. After a second trial, he was convicted, sentenced to 6 years in prison, and appealed.

Before the first trial he filed a motion to dismiss, arguing that the checkpoint was unconstitutional. Discovery requests for arrest and search statistics relating to immigration and other crime data were denied. During the trial, he testified to the following facts: Before being stopped at the checkpoint he had given a ride to three teenagers he did not know as a favor to his cousin's husband. The government stipulated that the cousin's husband, Mr. Rios, was a known drug smuggler who recruited teenagers to import drugs into the United States. Mr. Soto's defense was that the juveniles planted the drugs in the car without his knowledge.

The Ninth Circuit agreed with Mr. Soto on two discovery motions and remanded for a new trial. The Court held that the defense is entitled to disclosure relating to statistics at the checkpoint. This includes the number of arrests during a given period of time which resulted in drug evidence as opposed to immigration related purposes. These statistics are necessary for the defense to investigate 4th amendment violations relating to the constitutionality of checkpoints. The defense is entitled to the information to investigate whether the checkpoint is used for general crime control reasons or immigration.

Federal Rule 16(a)(1) of Criminal Procedure was foundational in the decision. The Court wrote, "The government is required to produce, *inter alia*, documents or data if the item is within the government's possession, custody, or control and ... the item is material to preparing the defense." The Court found that the request was specific to the claim that the checkpoint was unconstitutional, that its primary purpose was not immigration but instead crime control. The specific request for these records, in the custody of the Border Patrol, should have been granted.

United States v. Marin-Campos, 3:15-CR-2044-GPC, 2016 WL 6440345 (S.D. Cal. Oct. 28, 2016)

Javier Marin-Campos was arrested at the San Clemente checkpoint after referral to secondary inspection. Three five-gallon water bottles containing liquid methamphetamine were found on the floor behind the second row of seats. One of the issues on appeal was whether the district court properly denied a claim that the checkpoint was unlawfully used for crime control as opposed to immigration enforcement.

Evidence presented at evidentiary hearings showed that the Lincoln Navigator entered the United States from Mexico earlier the same day. An alert activated when the car encountered CBP officers. The checkpoint was closed but was scheduled to open on this day between the hours of 4:45 PM and 6:15 PM. By 5:51 PM, the checkpoint was operational. Approval for the checkpoint was given in advance.

The BPA at primary inspection was Agent Pagan, who had no say about the opening of the checkpoint at any time. He testified that he had not received any instruction to refer any vehicle to secondary inspection.

Mr. Marin approached the checkpoint at 6:10 PM and presented his B1/B2 visa card. He was referred to secondary inspection as he admitted to entering the country of foot and picked up the Navigator just north of the border. He had borrowed the vehicle from a friend. The agent testified that Marin was sent to secondary inspection to ease the flow of heavy traffic.

During secondary inspection Mr. Marin said the purpose of the trip was to get to Anaheim and call someone that could tell him where to go to buy a vehicle. He was questioned about property in the car and consented to a dog sniff and later search of the entire car after the dog alerted. The liquid methamphetamine was found.

The District Court denied to motion to dismiss, stating that there was no evidence of parallel construction. The court's rationale focused on the following factors:

1. Evidence demonstrates that operation times for the Checkpoint were previously scheduled by the Checkpoint supervisor.
2. Agent Pagan played no role in setting up the schedule or the decision to open up the Checkpoint.
3. No evidence was presented that Agent Pagan was provided with any advance information about Mr. Marin.
4. Agent Pagan said he never, in 7 years operating checkpoints, had ever specifically opened it to stop a particular vehicle.
5. Mr. Marin failed to provide objective evidence of pretext for referral.
6. The parallel construction theory makes little sense because if they wanted to intercept the vehicle ahead of time, agents could have done so at the border, when the silent alert activated. Allowing the car to enter the United States increased chances of losing it in heavy traffic.

Mr. Marin raised and the court found unpersuasive the following arguments:

1. The existence of silent alert when it entered the border. The court said that no evidence showed it was forwarded to the San Clemente checkpoint.
2. The opening of the checkpoint soon thereafter. Evidence showed that the checkpoint schedule was predetermined prior to July 7, 2015. No evidence showed it was placed into operation as a result of any outside information.
3. Mr. Marin was picked out of heavy traffic. There was no evidence supporting anything specific about Mr. Marin.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Janice McCowan, Defendant.	CR17-0839-TUC-CKJ (EJM) **MOTION TO SUPPRESS EVIDENCE IN VIOLATION OF THE 4TH AMENDMENT** **(Hearing Requested)**

It is expected that excludable delay under Title 18, United States Code § 3161(h)(1)(D) will occur as a result of this motion or an order based thereon.

I. Introduction:

This motion seeks to suppress approximately 90.57 kg of marijuana found by Border Patrol Agents R. Chris Brewer and Mark Metheny at a Border Patrol Checkpoint located on Federal Route 15, near North Komelik, Arizona. This checkpoint is located on the Tohono O'odham Indian Reservation. After Janice McCowan was stopped for an immigration inspection, a canine trained to detect drugs sniffed the outside of her car and alerted to the trunk. The reports authored by these two agents do not specify how long the dog sniffed the car, whether it was longer or shorter than it took to conduct the immigration inspection. Even if the time period for the sniff was shorter compared to the immigration inspection, the prosecution cannot prove that the canine was reliable to sniff for drugs. Ms. McCowan

contends that the dog sniff took place after an immigration check was complete. For these reasons the dig sniff was unlawful.

The burden of proving that a warrantless search or seizure falls within an exception to the warrant requirement is on the government. *United States v. Hawkins*, 249 F.3d 867, 871-872 (9th Cir. 2001). They cannot meet it in this case and the contraband must be suppressed.

As of the filing of this motion the government has not disclosed any evidence showing that the checkpoint was primarily used for immigration. According to an e-mail by the prosecution a day before the filing of this motion, it estimates that this disclosure will be available to her office in two weeks. It will then be disclosed to the defense. The defense asks for leave to supplement this motion accordingly based on this disclosure and the disclosure relating to the canine that is also forthcoming.

II. Facts:

On May 11, 2017 at 10:30 AM Border Patrol Agent Goodin observed a silver KIA operated by a female, later identified as Ms. McCowan, travelling southbound on Federal Route 1, near the village of Guvo, Arizona. Ms. McCowan travelled alone in her vehicle. At 11:10 AM Agent Goodin observed the same vehicle travelling northbound and recognized the driver as the same individual. The Agent noted observations that alone, don't mean much: "the driver's posture appeared to be very tense while gripping the steering wheel with both hands and driving at a slow rate of speed." Based on the training and experience of the agent, and this specific area, he concluded that the pattern of travel "can indicate a driver may be in his area to transport narcotics."

The agent followed the vehicle on FR-1 to the intersection of State Route Eighty Six (SR-86). The driver turned eastbound, or right, onto SR-86 and Agent Goodin stopped the vehicle. There was no reasonable suspicion to conduct this traffic stop. The driver was identified as Ms. McCowan. Ms. McCowan told the agent she was checking on her grandfather and did not consent for Agent Goodin to search her vehicle. Agent Goodin contacted a K-9

which provided negative results. Ms. McCowan was then released after approximately 45 minutes, the time it took for a canine to arrive on scene.

At approximately 1:30 PM, Supervisory Border Patrol Agent R. Chris Brewer worked a Border Patrol checkpoint located on Federal Route 15 near Komelik, Arizona. This checkpoint is on the Tohono O'odham Reservation and is a "known alien and drug smuggling area". Agent Brewer performed a primary inspection on the 2002 KIA Optima that Ms. McCowan drove. Agent Brewer questioned Ms. McCowan's citizenship, and she responded by stating she is a U.S. citizen and handed the agent her Colorado River Indian Tribes identification card. Agent Brewer noted the following ambiguous and meaningless observation: he observed "McCowan's hand visibly shaking and speaking rapidly which he believed to be nervous behavior based on his experience working at checkpoints."

Instead of returning the card and letting her go, it appears that agents wanted more information about Ms. McCowan's car; even though they already confirmed that she was a U.S. citizen. Border Patrol Canine Handler Mark Matheny utilized his Service Canine partner, Jessy-A, to conduct a primary sniff of the vehicle. The defense requested disclosure on the type of sniffs that the canine is trained to smell. At this time, the defense does not know the reliability of the canine, nor what types of odors it is trained to detect. Is it trained to sniff drugs and humans? Was it given a command to sniff humans and drugs or only humans? Or only drugs?

Jessy-A alerted on the vehicle and McCowan "was instructed" to open the trunk of her vehicle. Agent Brewer opened the trunk after Ms. McCowan provided him with the keys. Several large cellophane-wrapped bales recognized as bundles of marijuana were located inside of the trunk. Ms. McCowan was arrested.

Ms. McCowan would testify at a motions hearing that when she arrived at the checkpoint, there was a car ahead of her. This gave her time to grab her driver's license and tribal identification. When it was her turn, she handed the documents to the inspecting agent, who looked at them and compared the photographs and information. Her radio was off, and

several other officers were present but not paying attention to her car. Agent Brewer inspected the backseat of the car and asked her to open the trunk. Mc. McCowan declined because Border Patrol had stopped her earlier without reason and she was detained unlawfully for approximately 45 minutes. She said she was a U.S. citizen and wanted to go free. It was after doing all of this, that the BPA Brewer asked for the canine to conduct a sniff of the car. As such, the dog sniff was conducted after an immigration inspection. It took a couple of minutes for the canine to prepare and conduct the sniff. The alert was positive and Ms. McCowan gave the keys to BPA Brewer, who then opened the trunk.

III. Argument:

The immigration checkpoint in question, as with any immigration checkpoint, is designed to check and investigate immigration infractions. It cannot detain individuals during primary inspection or secondary inspection, for any reason other than immigration. When the agents received and inspected Ms. McCowan's tribal identification, they received information that she was a U.S. citizen. As such, they should have let her go. The fact that they detained her for a canine inspection violated her 4th amendment rights. The canine inspection was conducted to investigate drugs and not any immigration related reason. As such, the marijuana must be suppressed as fruits of the poisonous tree. U.S. Const. amend. IV. Further, even the sniff had any immigration-based lawful reason, the reliability of the canine must be proven for the government to prevail in using the evidence against Ms. McCowan at trial. *Id.*

IV. Law and analysis:

A. The Fourth Amendment to the United States Constitution:

The Fourth Amendment to the United States Constitution provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. It is well established that a police search without a warrant is per se unreasonable, unless the government can prove that one of

the six narrowly-crafted exceptions to the warrant requirement is applicable. *Katz v.United States*, 389 U.S. 347, 357 (1967). The six exceptions are search incident to lawful arrest, plain view exception, consent, stop and frisk, automobile exception, and exigency.

B. Immigration checkpoints:

Vehicle stops at a fixed immigration checkpoint for brief questioning of its occupants, even though there is no reason to believe the particular vehicle contains illegal aliens, are consistent with the Fourth Amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Montano de Hernandez*, 473 U.S. 531, 537 (1985). On the other hand, checkpoints whose primary purpose is drug interdiction are not permissible. *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000). It is proper for agents to conduct a dog sniff around a lawfully stopped automobile at a checkpoint if a defendant's nervousness constituted sufficient basis to delay the car for a dog sniff. *United States v. Taylor*, 934 F.2d 218, 220-21 (9th Cir. 1991). In *Taylor* the 9th Circuit held that the defendant became "increasingly nervous and uneasy at the end of the initial check for aliens." This observation justified the brief delay for a drug dog to sniff. *Id.* The Tenth Circuit also ruled that a defendant's vehicle may be subject to a canine sniff during a period of lawful detention at a checkpoint, that is, the time that it takes for an officer to complete his examination of the defendant's documents. *United States v. Morales-Zamora*, 914 F.2d 200, 203 (10th Cir. 1990).

In this case, the dog sniff took place after Ms. McCowan spoke to agent Brewer. There is no mention in any report that the dog sniff took longer or shorter than the time of the initial inspection. Even so, the fact that a drug canine was used to conduct the sniff indicates that the primary purpose of this sniff was to smell for drugs, not aliens. Due to the fact that Ms. McCowan was detained longer than the immigration inspection for a canine sniff, the detention and sniff were unlawful. The contraband must be suppressed.

V. Conclusion:

The government cannot prove three critical facts in this case. 1. It cannot prove that the use of the dog took shorter or the same time as the time it took to conduct an immigration inspection (this is because the reports don't specify any time period and Ms. McCowan has an entirely different version of what took place). 2. The reliability of the dog. 3. The government also must prove that this checkpoint's primary purpose was related to immigration inspections.

The disclosure relating to the primary purpose of the checkpoint was requested weeks ago and nothing has been received by the defense as of the time of this filing. The fact that this dog was trained to alert for contraband suggests that this checkpoint conducted more than just immigration inspections. For all of these reasons, the contraband found in the vehicle must be suppressed as fruits of the poisonous tree. "Any evidence obtained as a result of such illegal searches and seizures is generally inadmissible at trial, pursuant to the exclusionary rule." *Mapp v. Ohio*, 367 U.S. 643 (1949).

RESPECTFULLY SUBMITTED this 25th day of October, 2017.

JON M. SANDS
Federal Public Defender

s/ Walter I. Gonçalves, Jr.
WALTER I. GONCALVES, JR.
Assistant Federal Public Defender

The above signed does hereby certify that on the above date, he electronically transmitted this document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Stefani Hepford
Assistant U.S. Attorney