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7 ARIZONA SUPERIOR COURT
8 APACHE COUNTY

9 STATE OF ARIZONA,

10 Plaintiff,

11 vs.

12 [REDACTED]

13 Defendant.

) Case No. CR2010-00061

) MOTION TO SUPPRESS RE: NO PROBABLE
) CAUSE TO SEARCH VEHICLE

) (Evidentiary Hearing Requested)

14 Defendant [REDACTED] (hereinafter [REDACTED] by and through
15 undersigned counsel, moves the Court to suppress the search of his vehicle and seizure of items from
16 within his vehicle as the search and seizure violated the Fourth Amendment of the Constitution of the
17 United States and Article II, § 8 of the Arizona Constitution. [REDACTED] further moves that any
18 evidence seized subsequent to such illegal seizure be suppressed under the Fruit of the Poisonous
19 Tree Doctrine. This Motion is supported by the accompanying memorandum of Points and
20 Authorities

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22 RESPECTFULLY SUBMITTED this ____ day of November, 2010.

23
24 MARC J. VICTOR, P.C.

25 By: _____

26 Marc J. Victor
Attorney for Defendant

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTS

3 On March 12, 2010, [REDACTED] was stopped by Deputy Albert Clark (hereinafter "Deputy
4 Clark") of the Apache County Sheriff's Office while traveling eastbound on Interstate 40 in
5 Chalmers, Arizona. According to Deputy Clark's report, the stop was made because he observed [REDACTED]
6 [REDACTED] driving a 2000 Acura 4 door passenger car that drifted across the center line twice and the
7 "fog line" once.

8 After stopping [REDACTED] produced his driver license, vehicle registration, and proof of
9 insurance. Deputy Clark explained the reason for the stop and asked [REDACTED] to exit his car. [REDACTED]
10 [REDACTED] exited his car while waiting for Deputy Clark to complete the traffic stop. After verifying that
11 [REDACTED] driver license was valid and there were no outstanding warrants for his arrest, Deputy
12 Clark handed [REDACTED] driver license, vehicle registration, and proof of insurance back and [REDACTED]
13 [REDACTED] thanked Deputy Clark for the verbal warning of the traffic violation. [REDACTED] then turned
14 and started walking back to his car to depart.

15 Deputy Clark listed many factors that he claims led to reasonable suspicion that [REDACTED]
16 was engaged in criminal activity. These factors were:

- 17 - Driving behavior
- 18 - Acting very nervous
- 19 - Shaking/trembling hands
- 20 - Handing over law enforcement credentials
- 21 - Expired commission (law enforcement) card
- 22 - Stall tactics
- 23 - Stuttering
- 24 - Did not know the name of the city he was going to
- 25 - Vague answers

- 1 - Avoiding eye contact
- 2 - Strong odor of air freshener
- 3 - Vehicle had live in look
- 4 - Food trash on the floor
- 5 - Drink containers on the floor
- 6 - Removed keys from the ignition when he exited the car
- 7 - Pacing around
- 8 - Kicking at the ground
- 9 - Elevated nervousness
- 10 - Had to think about answers before answering
- 11 - Vague talk about law enforcement duties
- 12 - Tried to control conversation
- 13 - Reason for the trip
- 14 - Changed subject to the Grand Canyon
- 15 - Trip plans
- 16 - Keeping distance from Deputy Clark
- 17 - Backing up from Deputy Clark
- 18 - Shaking/trembling when shaking Deputy Clark's hand
- 19 - Deputy Clark's training
- 20 - Deputy Clark's experience

21 After [REDACTED] turned and started to return to his car, Deputy Clark asked if he could talk
22 further with him. [REDACTED] walked back and said "yes." [REDACTED] **disputes this account and**
23 **asserts that he was walking back to his car when Deputy Clark yelled out "you wouldn't mind**
24 **if I searched your car, would you?" [REDACTED] asserts that he responded "what do you mean, I**
25 **thought you pulled me over for swerving?"** Deputy Clark asked [REDACTED] why he was nervous

1 and [REDACTED] denied he was nervous. Deputy Clark then asked [REDACTED] questions about his
2 employment ([REDACTED] has presented identification showing he was a Deputy Sheriff in San
3 Francisco, California) then asked for consent to search [REDACTED] car. [REDACTED] backed up, his
4 eyes were twitching, and he shook his head no and said "no, I don't understand, I just don't
5 understand." Deputy Clark asked what [REDACTED] did not understand, and [REDACTED] responded "I
6 think you're harassing me, I don't understand."

7 According to Deputy Clark's report, he then again asked for consent for his K-9 to sniff the
8 exterior of [REDACTED] car and [REDACTED] said "yes." [REDACTED] **disputes this account and**
9 **asserts that Deputy Clark told him that he was going to have the K-9 sniff the exterior of the**
10 **car, making the sniff a foregone conclusion.**

11 Deputy Clark did have his K-9 sniff the exterior of the car and stated in his report that his K-9
12 alerted to the car by scratching the exterior of the car. Deputy Clark used that alert as probable cause
13 to search [REDACTED] car. Deputy Clark's search of [REDACTED] car revealed a quantity of
14 marijuana in the trunk.

15 A Rule 15.1 Disclosure Request revealed documents stating that Deputy Clark and his K-9
16 "Rico" were certified in narcotics detection by the Adlerhorst Police Dog Handler School in
17 Riverside, California, on May 5, 2009. Also provided were periodic evaluations conducted only by
18 Deputy Clark from August 26, 2009, to March 27, 2010. These self-evaluations described the K-9's
19 alerts to be consistent with no false alerts. The K-9's alerts were alternately described as
20 "scratching," "scratching and barking," and "scratching, barking, and biting."

21 In addition, Deputy Clark and his K-9's Activity Log was provided showing that between
22 September 28, 2009, and April 25, 2010, Deputy Clark and his K-9 were involved in 25 vehicle
23 searches and the K-9 alerted 23 times. Out of those 23 alerts, 16 resulted in "no find," and only 7
24 detected drugs.

1 **II. LAW AND ARGUMENT**

2 The search of ██████████ car and seizure of items from within the vehicle violated the
3 Fourth Amendment to the Constitution of the United States and Article II, § 8 of the Arizona
4 Constitution because the probable cause to search ██████████ vehicle was based solely on the K-9
5 alert and Deputy Clark’s K-9 has neither a consistent alert nor is his alert reliable enough to lead to
6 probable cause to search.

7 ***Constitutional Implications.*** The Fourth Amendment to the Constitution of the United States
8 guarantees people to “be secure in their persons, houses, papers, and effects, against unreasonable
9 searches and seizures.” Article II, § 8, Right to Privacy, of the Arizona Constitution reads, “No
10 person shall be disturbed in his private affairs, or his home invaded, without authority of law.”
11 Arizona Constitutional protections are parallel to those provided by the Fourth Amendment. *State v.*
12 *Johnson*, 2 CA-CR 2006-0079, p. 13, ¶ 13 (Ariz.App. 5-21-2009); *see Malmin v. State*, 30 Ariz. 258,
13 261 (1926) (Article II, § 8 of the Arizona Constitution has the same general effect as the Fourth
14 Amendment); *see also State v. Reyna*, 205 Ariz. 374, ¶ 14 (App. 2003).

15 ***Reliability of the K-9.***

16 While an alert by a well-trained K-9 may be sufficient for probable cause to search, the
17 reliability of the K-9 may be challenged and, if the K-9 is found to be unreliable, the Court may find
18 that the “alert” was not sufficient for a finding of probable cause to search.

19 It is settled law that “a canine sniff by a well trained narcotics-detection dog [is] “*sui generis*”
20 because it “discloses only the presence or absence of narcotics.” *Illinois v. Caballes*, 543 U.S. 405,
21 409 (2005), *quoting United States v. Place*, 462 U.S. 696, 707 (1983). However, “a dog alert might
22 not give probable cause of the particular dog has a poor accuracy record.” *United States v. Ludwig*,
23 10 F.3d 1523, 1528 (10th Cir.1994); *United States v. Parada*, 577 F.3d 1275, 1283 (10th Cir. 2009);
24 *United States v. Clarkson*, 551 F.3d 1196, 1203 (10th Cir.2009); *see United States v. Diaz*, 25 F.3d
25 392, 394 (6th Cir.1994) (for a positive dog reaction to support a determination of probable cause, the

1 training and reliability of the dog must be established); accord *Dawson v. State*, 518 S.E.2d 477, 480
2 (Ga. App.1999). Moreover, the mere fact that a K-9 alerted to a vehicle “does not, in the absence of
3 any other factors supporting its reliability, establish probable cause.” *United States v. Fernandez*,
4 772 F.2d 495, 504 n. 2 (9th Cir.1985); see *United States v. Spetz*, 721 F.2d 1457, 1464 (9th Cir.1983)
5 (K-9 correct in 2 out of 6 alerts not habitually accurate).

6 Once evidence is presented showing the K-9 is “generally certified as a drug detection dog,”
7 other evidence that may detract from the reliability of the dog goes to the credibility of the dog. *Diaz*,
8 25 F.3d at 394. “A party seeking to suppress evidence bears the burden of proving the dog is
9 unqualified.” *Clarkson*, 551 F.3d at 1203. This may be shown by, *inter alia*, proof of the failure rate
10 of the dog. *State v. Laveroni*, 910 So.2d 333, 336 (Fla. App.2005).

11 In this case, Deputy Clark’s K-9 was highly unreliable and an alert from the K-9 did not
12 establish probable cause to arrest. While the K-9 was certified by a private “Dog Handler School”
13 ten months before the encounter with [REDACTED], there is no record of independent training or
14 retesting. All the evaluations of the K-9 are self-evaluations signed only by Deputy Clark. These
15 evaluations show a highly reliable K-9 when it is searching for narcotics in known locations, but the
16 K-9’s real-life Activity Log shows a completely different picture.

17 Deputy Clark’s K-9 was used to sniff 25 vehicles (including two travel trailers) and alerted 23
18 times. Of those 23 alerts, drugs were found in only 7 vehicles. This 7 out of 23 accuracy rate is
19 worse than in *Spetz, supra*, where the K-9 was found to be not habitually accurate. Basing a search
20 of [REDACTED] car solely on the alert of this unreliable and inaccurate K-9, over the clear statement
21 of [REDACTED] that he did not want his vehicle searched, violates [REDACTED] 4th Amendment and
22 Arizona Constitution protection against unreasonable searches and seizures.

23 In addition, what actions by the K-9 described as an “alert” changes. In Deputy Clark’s self-
24 evaluations, alerts are alternately described as “scratching,” “scratching and barking,” and
25 “scratching, barking, and biting.” The K-9 has no consistent action that is considered an alert.

1 Moreover, there is no indication in the Activity Log what kind of alert was made on the 25 vehicles
2 sniffed. Deputy Clark reported that his K-9 alerted to [REDACTED] vehicle by scratching, but there is
3 no mention of barking or biting. There is simply no indication of what an "alert" looks like and no
4 indication that the K-9 alerted to [REDACTED] vehicle consistent with its training.

5 Deputy Clark's K-9 was unreliable. What was described as an alert by the K-9 failed to
6 establish probable cause to search. The search should be suppressed.

7 ***Fruit of the Poisonous Tree Doctrine.*** The Fruit of the Poisonous Tree Doctrine states that
8 evidence otherwise admissible, but discovered as a result of an earlier Fourth Amendment violation,
9 must be excluded from evidence as tainted. *Wong Sun v. United States*, 371 U.S. 471 (1963);
10 *Missouri v. Seibert*, 542 U.S. 600 (2004).

11 As the search of [REDACTED] vehicle violated the 4th Amendment, any items found pursuant
12 to that search should be suppressed under the Fruit of the Poisonous Tree Doctrine..

13 **III. CONCLUSION**

14 Deputy Clark's K-9 was so unreliable that an alert failed to establish probable cause for a
15 search. The evidence seized in this case was seized during a search without consent and without
16 probable cause.

17 [REDACTED] moves this Court to suppress the search of his vehicle and the seizure of items
18 from his vehicle under the Fruit of the Poisonous Tree Doctrine.

19 RESPECTFULLY SUBMITTED this ____ day of November, 2010.

20
21 MARC J. VICTOR, P.C.

22 By:

23 _____
24 Marc J. Victor
25 Attorney for Defendant