THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

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JUN - 5 2012
S C Supreme Court

North Point Development Group, LLC, PETITIONER,

v

South Carolina Department of Transportation, Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

vs

South Carolina Department of Transportation Respondent

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	C A No 2009 CP-21-2961
North Point Development Group LLC, et al Petitioner	
vs	ORDER
South Carolina Department of Transportation. Respondent	

This matter is before the Court on the petition of North Point Development Group LLC (Landowner) to review pursuant to S C Code Ann §57 5 1120 (Rev 2006) the decision of the South Carolina Department of Transportation (the department) to deny its application for an encroachment permit to construct a drive entrance onto U S Route 378 near Kingsburg in Florence County

In its petition, filed December 9 2009 Landowner asserts that it is the owner of 2 9 +/ acres of land adjacent to U S 378 near Kingsburg that it applied to the department on November 10 2009 for an Encroachment Permit onto the highway that that application was denied by the department on November 20 2009, on the grounds that the intersection was a controlled access facility and that that denial was unconstitutional in excess of the department's statutory authority made upon unlawful procedure, clearly erroneous and arbitrary and capricious and characterized by an abuse of discretion Landowner argues that the department s action in denying the permit application was an unconstitutional taking of private property rights in that it had not complied with S C Code §57 5-1070 to legally acquire access rights from its property

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Connie Reel-Stearns
CLERK OF COURT C P & G S
FLORENCE COUNTY, S C

The department submitted a Return to the petition on December 9 2009 It asserted that the Court lacked jurisdiction under S C Code §57 5 1120 to review the department's actions with regard to the petitioner s property According to the department, the judicial review authorized by S C Code §57 5 1120 applies only to denials by it to applications for private driveway entrances onto non-controlled access State Primary Highways It argues that it purchased the appurtenant access rights to the property from the petitioner s predecessor in title Jeanne H Swintz, in 1997 The rights were acquired pursuant to highway plans designating all quadrants of the intersection as controlled access The department presented the recorded deed from Ms Swintz and the title page and relevant plan sheets for Project NH 0052(131) file no 21 938 in 1997 It argues that there is no statute conferring a right to judicial review of its decisions designating highway facilities as controlled access and, even if there were, the current challenge would be time-barred See Act 621 1956 S C. Acts 1594 ([A]ccidents can be greatly reduced in number and severity by controlling access to and egress from the main traveled way to suitable safe points as determined by engineering principles ")

A hearing was held before this Court in Florence on December 18 2009 At the hearing the petitioner did not contest the existence of the recorded Swintz title nor the highway plans rather it argued that the deed instrument was deficient and did not effectively transfer access rights to the department The Swintz Title to Real Estate recorded March 11 1997, in Deed Book A490 at Page 643 in the land records of Florence County, refers to highway plans dated April 23 1996 whereas the title sheet of the plans presented by the department whereupon the controlled access lines were purported established bears dates of April 29 and 30 1997

Titles to real property acquired by the Department of Transportation for State Highway purposes are recorded in same manner as titles to real estate in general *i e* in the offices of the

Registrars of Deeds in the various counties S C Code Ann §§30 7 10 *et seq* (Rev 2007) In addition, titles and other instruments must be filed and indexed in the offices of the Department of Transportation in Columbia S C Code Ann §57 5 ɔ50 (Rev 2006) Under S C Code Ann §57-5-ɔ70 (Rev 2006) all highway plans are required to be maintained in the office of the tax assessor for each county 'for the convenience of persons making inquiry as to the right of the State in and to the right of-way for roads constructed by the department in any county "

The plans so filed under §57 ɔ 570 are of course, the "as built" plans filed after project completion. Prior to completion there are often many iterations of the plans during each project phase beginning with right-of way acquisition and ending with acceptance of the project into or back into the State Highway System for purposes of operation and maintenance Revisions are noted on each sheet with regard to changes made to the preliminary plans as to the section of road and surrounding properties shown on that sheet

Having reviewed the project plans for SCDOT file 21 938 and the Title to Real Estate from Jeanne H Swintz to the South Carolina Department of Transportation recorded April 18 1997 in Deed Book A490, Page 643 the Court finds the following

1 A new control of access line extends the full extent of tract 7 then owned by Jeanne H. Swintz shown on the plan sheets 7 and 12 of file 21 938 No revisions to that notation are indicated on either sheet after the earliest date appearing on the plans The earliest date appearing on the second title sheet is April 23 1996 The latest date. appearing on the top title sheet is May 12 1997

2 By reference to those plans Jeanne H. Swintz conveyed to the South Carolina Department of Transportation 0 ɔ70 acres of land, access rights required by file 21 938 and a 50 x ɔ0 triangular area at the intersection of US Route 378 and Road S 57

Consideration for the conveyance was $21 000, the construction on the owner s behalf of a new driveway at approximate survey station 30+25 and merchantable timber that was to be cut and placed on the grantor's property

3 On the basis of the foregoing the department legally acquired access rights from the petitioner s predecessor in title under the terms of S C Code Ann. §57-5 1070 and validly established the intersection as a controlled access facility Main v S C Dep t of Hwys and Pub Transp 300 S C 453 455 388 S E 2d 792 794 (1990)

Because of this Court's conclusion that the segments of US Route 378 and State road S 57 adjacent to petitioner s property are controlled access primary routes the Court does not have jurisdiction under S C Code Ann §57 5-1120 to review the department s refusal to consider the petitioner s request for a driveway across the controlled-access line The judicial review under Code section 1120 applies only to encroachment permit applications under Code sections 1080 1110 referring to non controlled access primary highways

Because the Court lacks jurisdiction over petitioner's claims. the petition must be and hereby is dismissed

AND IT IS SO ORDERED

January 12, 2010
Florence. S C

Circuit Judge

FILED IN FLORENCE COUNTY, SC

I HEREBY CERTIFIED A TRUE COPY
Connie Reel-Spearman
CLERK OF COURT C P & G S
FLORENCE COUNTY, S C

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CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

C A No 2009-CP-21-2961

North Point Development Group, LLC,

Petitioner,

vs

ORDER

South Carolina Department of Transportation,

Respondent.

Petitioner, North Point, has moved the court to reconsider its Order entered January 26, 2010 That Order dismissed the Petitioner-Landowner's petition for judicial review of the Department's denial of its request for a driveway encroachment permit onto the abutting State highways owned and operated by the Department. The reason for the dismissal was that the intersection Petitioner's land abuts has been designated a controlled-access facility by the Department under S C Code §57-5-1030 (Rev. 2006) The provision for judicial review, S C. Code §57 5-1120 only confers jurisdiction on the courts to review denials of driveway permit applications onto non-controlled primary highways No statute grants court authority to review the Department's decision to designate highway facilities as controlled-access in the first instance Having had the benefit of memoranda from both parties and oral argument heard in Florence on April 28 2010, the petitioner's motion for reconsideration is denied for the reasons, set forth below

Petitioner claims that the court's order contains two erroneous factual findings and, as a result, it has been denied due process of law by the Department's refusal to grant it a permit and the court s refusal to review that administrative decision

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Connie Reel-Shearin
CLERK OF COURT C P & G S
FLORENCE COUNTY, S C

1

In its first assignment of factual error, Petitioner asserts that, because State highway plans in Florence County are maintained in the SCDOT District Office in Florence and not in the office of the Florence County Tax Assessor as set forth in S C Code Ann § 57-5-570, the public has been deprived of "its entitlement to such right-of way information" and the petitioner has been deprived of its right to have such right-of-way information available at the location required by law The Department responds that due to space limitations in the Florence County tax assessor's office highway plans delivered to that office are forwarded to the Department s District Office in Florence where they are available to the public during normal business hours Thus, the Department argues that it substantially complies with S C Code §57-5-570 which has as its purpose the local availability of highway plans for the convenience of landowners researching the boundaries of their land with State highways The Department argues that, in any event the petitioner has failed to show how it was prejudiced by this alleged error in that it was able to commission a survey that accurately depicts its boundary with the highway

The court has reviewed the title to real estate whereby the petitioner's predecessor in title, Jeanne H. Swintz conveyed to the Department her access rights for the establishment of a controlled-access intersection That instrument, recorded in Book A490 at Page 643 in the land records for Florence County, states on its face that, in consideration for $21 000, Ms Swintz conveyed to the Department "0 570 acres of land, damages, and all improvements thereon, if any, including rights of access as may be needed for controlled access facilities." (Emphasis added) Ms Swintz further conveyed a 50 foot by 50 foot sight triangle and the Department agreed as additional consideration to construct a drive entrance at the extreme end of her property onto Secondary Route 57 and to cut and stack merchantable timber on her land for her benefit The conveyance is in reference to highway plans under file number 21 938 Thus the

instrument, by its own terms is sufficient to put purchasers of the Swintz tract on notice that access rights have been alienated and impose upon those persons a duty of further inquiry into the status of that title irrespective of the technical issue of strict compliance with the statute regarding local storage of highway plans This conclusion is further supported by the language of S C Code §57-5-570 which requires that a copy of all highway plans be *maintained by the* Department in the offices of the individual tax assessors. The originals of those plans, and the primary source of the relevant information, is the Department of Transportation itself Thus, I do not agree that the maintenance of highway plans at the Department's office in the City of Florence in lieu of the offices of the Florence tax assessor is sufficient to support a finding that the petitioner has been deprived of a liberty or property interest that is protected by the due process clauses of the State or Federal constitutions

The petitioner s second assignment of error is that the Department's plans are inaccurate and invalid and insufficient to establish the intersection as a controlled-access facility In support of this argument, the petitioner claims that there is no recorded instrument whereby one of the landowners abutting the intersection conveyed his access rights to the Department for the establishment of a controlled-access intersection. The Department responds that the acquisition of access rights from James Wilma Johnson was by condemnation rather than by an arm's-length conveyance The practice where property is acquired by condemnation where there is no deed is to record the condemnation notice which contains the description of the property acquired, the quality of title taken, and the amount of the verdict or settlement The condemnation notice for the Johnson property is recorded in Deed Book A 490 at Page 643. The court finds this title to be sufficient and further notes that its relevance to the state of petitioner's title is not at all clear In a land case, an owner must recover only on the strength of his own title and not upon the

weakness of the title of the defendant. Hoogenboom v. City of Beaufort, 315 S C 306, 433 S.E 2d 875 (Ct. App 1992), Bradley v Drayton, 48 S C 234, 26 S E 613 (1897) The transaction between the Department and Mr Johnson is simply irrelevant to the petitioner's title Likewise the petitioner's second assignment of error is insufficient to support a finding that it has been deprived of due process

CONCLUSION

The petitioner's assignments of error have failed to convince the court that its Order is incorrect. Accordingly, that Order is re-affirmed and the petition should be and hereby is DISMISSED

AND IT IS SO ORDERED

May 3, 2010
Florence, S C

Michael G Nettles, Judge

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2010 MAY 14 PM 4:12
CONNIE REEL SHEARIN
CCCP & GS
FLORENCE COUNTY SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C A NO

North Point Development Group, LLC,

Petitioner,

v

South Carolina Department of Transportation

Respondent

PETITION FOR JUDICIAL REVIEW

Petitioner North Point Development, LLC, by and through its undersigned attorneys, does hereby petition this Honorable Court for judicial review of a decision of the Respondent S C Department of Transportation pursuant to S C Code Ann § 57 5-1120 (2006) Specifically Petitioner is challenging the Respondent's denial of authorization for direct access to U S Highway 378 from Petitioner's property abutting said highway Furthermore, Petitioner moves for a hearing on this matter in ten days or as soon thereafter as this matter may be heard, as expressly allowed in Section 57-5 1120

Background

North Point Development, LLC is a limited liability company organized and existing under the laws of the State of South Carolina. It owns property in Florence County adjacent to U S Highway 378 in Kingsburg, South Carolina. The Petitioner's deed for this +/ 2 9 acres of property was recorded in the land records of Florence County in Deed Book B007 at page 174 on May 3, 2006 (herein "Property') See Attachment A.

Intending to develop the Property, Petitioner submitted an Application for Encroachment Permit to the Respondent on November 10, 2009 See Attachment B On November 20, 2009

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CLERK OF COURT C P & G S
FLORENCE COUNTY, SC

Mike Kirby, an employee of Respondent stated in an email that the Petitioner s request for an encroachment permit has been denied See Attachment C Respondent s agent said "The area you requested an encroachment permit for is a controlled access area. A new driveway would not be allowed at all so the request must be denied In addition to further objections expressed below Petitioner disputes Respondent s view that the Property has been lawfully established as a controlled access area

Arguments

As an initial matter Petitioner objects to Respondent s position that a controlled access area has been lawfully established along Petitioner s U S Highway 378 frontage Petitioner asserts that its right to access U S Highway 378 is a substantial real property right of significant value Pursuant to S C Code Ann § 57-5 1070, Respondent is required to take rights of access "in the same manner as now or hereafter authorized by law for acquiring property or property rights Respondent has not satisfied the foregoing statutory requirement or standard requirements concerning the conveyance of interests in real property

Furthermore, Petitioner asserts that Respondent's denial of the encroachment permit for access to the Property is (a) in violation of constitutional and statutory provisions (b) in excess of the statutory authority of the agency (c) made upon unlawful procedure, (d) affected by other error of law (e) clearly erroneous in view of the reliable probative and substantial evidence and (f) arbitrary and capricious and characterized by abuse of discretion In conducting the judicial review, this Court is authorized to "determine whether the action of the department is in accordance with the provisions of law ' S C Code Ann § 57 5-1120

Respondent s claim of restricted access and denial of authorization constitute violations of Petitioner s constitutional due process rights under the federal and state constitutions *See* U S Constitution Fifth and Fourteenth Amendments and S C Constitution Article I, §§3 and 22 Alternatively, Respondent's total denial of direct access to U S Highway 378 from the Property constitutes a taking of private property rights without just compensation under the Fifth Amendment of the U S Constitution and Article I, Section 3 of the S C Constitution

Pursuant to S C Code Ann § 57 5-1070, Respondent is required to take rights of access in the same manner as now or hereafter authorized by law for acquiring property or property rights Respondent has not satisfied the foregoing requirement and consequently its actions are *ultra vires* and otherwise void, on the basis of being unsupported by statutory authority, based upon unlawful procedure and clearly affected by an error of law This is further reflected in Mr Kirby's misreading of the law as prohibiting the Respondent from granting access to areas it deems controlled access Section 57-5 1040 expressly authorizes the Respondent to issue encroachment permits across controlled access facilities, if such even exists at the Property

Petitioner's request was reasonable but improperly denied without the Respondent providing a legitimate factual basis for denial In addition to being factually unsubstantiated, Respondent's denial of Petitioner's encroachment permit is arbitrary and capricious and characterized by abuse of discretion *See generally* S C Code Ann Regs 63 370 (1983)

Conclusions

Based on the foregoing, the Petitioner respectfully asks that this Honorable Court

1) conduct a hearing on this matter in ten (10) days or as soon thereafter as this matter may be heard

2) issue an order a) reversing the Respondent s denial of the encroachment authorization such that Petitioner be allowed to have direct access to U S Highway 378 as requested in the encroachment permit application, or, in the alternative b) requiring Respondent to pay Petitioner for its loss of direct access to U S Highway 378 and related damages

3) grant such other relief as this court may deem appropriate

HAYNSWORTH SINKLER BOYD, P.A

By _____
Evander Whitehead
vwhitehead@hsblawfirm com

P O Box 6617
Florence, SC 29502 6617
(843) 669 6002

Attorneys for Petitioner

November 30, 2009
Florence, South Carolina

FILED
LCLF & L
FLORENCE COUNTY

THIS PROPERTY DESIGNATED AS
MAP 138 BK 05 PARCEL 069
ON FLORENCE COUNTY TAX MAPS

SPLIT FROM _____
FLORENCE COUNTY TAX ASSESSOR

Prepared by Haynsworth Sinkler Boyd, P A
1835 West Evans Street Suite 315 (29501)
Post Office Box 6617 Florence, South Carolina 29502-6617
HSB File 31375 02

THE STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

TITLE TO REAL ESTATE

$ STATE FEE 541.00
COUNTY FEE 231.00

Grantee s Address Post Office Box 6617
Florence South Carolina 29502 6617

KNOW ALL MEN BY THESE PRESENTS that I Joel E Hanna, *Trustee of the William H Swintz IV Trust Dated December 23, 2004* hereinafter referred to as the Grantor, for and in consideration of the sum of *Two Hundred Ten Thousand & No/100 ($210 000 00) Dollars*, paid by North Point Development Group LLC a Limited Liability Company Organized and Existing Under the Laws of the State of South Carolina hereinafter referred to as the Grantee, the receipt of which is hereby acknowledged have granted, bargained sold and released and by these presents do grant bargain sell and release unto North Point Development Group LLC Its Successors and Assigns forever the following described property

All that certain piece parcel or lot of land lying, being and situate in School District #2 County of Florence containing 3 5 acres as shown on a certain map of the property by J D Brown Sr Surveyor surveyed December 15 1971 and recorded in Plat Book 24 at page 625 in the office of the Clerk of Court for

Florence County with the said plat being incorporated herein by reference and with the property being bounded generally as follows On the North by the property of J Joseph Eaddy Jr on the East by Road S 21 57 on the South by the property now or formerly of Stone Oil Company and on the West by the property of J Joseph Eaddy Jr

Excepting Therefrom 0 570 acre of land damages and all improvements thereon, if any including rights of access as may be needed for controlled access facilities conveyed to the South Carolina Department of Transportation Also within 70 feet of the survey centerline of Line 'X on the left, between approximate survey stations 29+81 and 33+37 Also herein conveyed is property for a 50 x 50 triangular area left of the survey centerline of Line "W" at approximate survey station 28+00 at the intersection of US Route 378 and Road S 57 Also it is understood and agreed that all merchantable timber will be cut into commercial lengths and placed on property adjacent to the right of way of the grantor

This being the same property conveyed to Joel E Hanna as Trustee of Trust Agreement of William H Swintz IV dated December 23 2004 and recorded December 28, 2004 in Deed Book A 894, page 1037 in the office of the Clerk of Court for Florence County

Tax Map Number 428-05-069

TOGETHER with all and singular, the rights, members hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said **North Point Development Group, LLC** its Successors and Assigns forever

AND the Grantor does hereby bind himself and his successors to warrant and forever defend all and singular the said premises unto the said Grantee its successors and assigns against himself and his successors and against every person whomsoever lawfully claiming, or to claim the same or any part thereof

IN WITNESS WHEREOF the undersigned has executed this Deed, this 3 day of May 2006

Signed, Sealed and Delivered
In the Presence of

JOEL E. HANNA Trustee of the
William H Swintz IV Trust dated
December 23 2004

THE STATE OF SOUTH CAROLINA,
COUNTY OF Fflorence

I the undersigned notary public do hereby certify that the grantor(s) herein personally appeared before me this day and acknowledged the due execution of the foregoing instrument in the presence of the witnesses whose signatures appear above.

WITNESS my hand this 3 day of May 2006

Notary Public for South Carolina
My Commission Expires

THE STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says

1 I have read the information on this Affidavit and I understand such information.

2 The property being transferred is known generally as 3.5 Acres, more or less bearing Florence County Tax Map Number(s) 00428-05-069, was transferred by Joel E. Hanna, Trustee of the William H. Swartz IV Trust dated December 23, 2004 to North Point Development Group, LLC on May 3, 2006

3 Check one of the following The deed is

(a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth

(b) ___ subject to the deed recording fee as a transfer between a corporation a partnership or other entity and a stockholder partner or owner of the entity or is a transfer to a trust or as a distribution to a trust beneficiary

(c) ___ exempt from the deed recording fee because (See Information section of Affidavit)
(If exempt, please skip items 4-7 and go to item 8 of the Affidavit)

4 Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this Affidavit)

(a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $210,000.00

(b) ___ The fee is computed on the fair market value of the realty which is $ 0.00

(c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is $ 0.00

5 Check Yes ___ or No ___ to the following A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer If "Yes" the amount of the outstanding balance of this lien or encumbrance is $ 0.00

6 The deed recording fee is computed as follows:

(a)	Place the amount listed in item 4 above here	$ 210,000.00
(b)	Place the amount listed in item 5 above here (If no amount is listed place zero here)	$ 0.00
(c)	Subtract Line 6(b) from Line 6(a) and place result here	$ 210,000.00

7 The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee is $777.00

8 As required by Code Section 12 24 70 I state that I am a responsible person who was connected with the transaction as, Grantor

Florence 60387 v 1

9 I understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction must be fined not more than One Thousand ($1 000) Dollars or imprisoned not more than one (1) year or both

By _____
JOEL E HANNA *Trustee of the William H Swintz IV Trust dated December 23 2004*

SWORN TO BEFORE ME this
5 day of May 2006

_____
Notary Public for South Carolina
My commission expires _____

INFORMATION

Except as provided in this paragraph the term "value" means the consideration paid or to be paid in money or money's worth for the realty Consideration paid or to be paid in money's worth includes, but is not limited to, other realty personal property stocks bonds partnership interest and other intangible property the forgiveness or cancellation of a debt the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money s worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value If the consideration in the case of realty transferred between a corporation, a partnership or other entity and a stockholder partner or owner of the entity and in the case of realty transferred to a trust or as distribution to a trust beneficiary value means the realty's fair market value A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land tenement, or realty after the transfer Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law

Exempted From The Fee are Deeds

1 transferring realty in which the value of the realty as defined in Code Section 12-24 30 is equal to or less than one hundred dollars

2 transferring realty to the federal government or to a state, its agencies and departments and its political subdivisions, including school districts

3 that are otherwise exempted under the laws and Constitution of this State or of the United States

4 transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A)

5 transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty

6 transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39

7 that constitute a contract for the sale of timber to be cut;

8 transferring realty to a corporation a partnership or a trust in order to become, or as a stockholder partner or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation interest in the partnership beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor However the transfer of realty from a corporation, a partnership or a trust to a stockholder partner or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership or trust;

9 transferring realty from a family partnership to a partner or from a family trust to a beneficiary provided no consideration is paid for the transfer other than a reduction in the grantee s interest in the partnership or trust. A family partnership is a partnership whose partners are all members of the same family A family trust is a trust, in which the beneficiaries are all members of the same family The beneficiaries of a family trust may also include charitable entities Family means the grantor and the grantor s spouse parents, grandparents sisters, brothers children stepchildren grandchildren and the spouses and lineal descendants of any the above. A charitable entity means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A)

10 transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation

11 transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership

12. that constitutes a corrective deed or a quit claim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quit claim deed

13 transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed pursuant to foreclosure proceedings

14 transferring realty from an agent to the agent s principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty

15 transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S. C. Section 791(1)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

Florence 60387 v 1

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FLORENCE | CHARLESTON COLUMBIA GREENVILLE

Haynsworth
Sinkler Boyd, P.A. | ATTORNEYS AND COUNSELORS AT LAW

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POST OF ICE BOX 01 (29502 01)
FLORENC SOUTH CAROLINA
TELEPHON 843 665 600
FACSIMILE 84 669 3816
WEBSITE www hsblawfirm c m

SANDRA R BAR IELD
PARALEG
DIR CT DIAL NUMB R 843 673 530
EMAIL sb rfiel @nsblawfirm.com

November 10 2009

Mr Mike Kirby
South Carolina Department of Transportation
PO Box 150
Kingstree SC 29556

Re Application for Encroachment Permit

Dear Mr Kirby

Enclosed please find an Application for Encroachment Permit for ingress and egress onto property located on South Carolina Highway 378 on behalf of North Point Development Group, LLC Your expeditious review and response to this application would be greatly appreciated as we are working toward the pending sale of this property

Please do not hesitate to contact me should you have any questions or need further information

Very truly yours

Sandra R Barfield
Paralegal for John R Chase

/srb
Enclosure (s)

Application for Encroachment Permit

S C Department of Transp rtation
Form 03 (Rev 4/2008)

Permit Number _____

Applicant	North Point Development Group LLC		County Florence	
			Road / Route	Road Name
Street	1831 W Evans Street Suite 315	1		
		2		
City	Florence	3		
State & Zip	South Carolina 29501	4		
Phone	843 673 5301 Fax 843 669 3815	5		
Contact	John R. Chase			

1 Type of Encroachment Curb Cut for Ingress/Egress

2 Description of Location

See attached

(Attach sketch indicating roadway features such as, pavement width, shoulder width, sidewalk and curb and gutter location, significant drainage structure, north arrow, right of way width, and location of the proposed encroachment with respect to the roadway centerline and the nearest intersecting road on the State system.)

3 The undersigned applicant hereby requests the SCDOT to permit encroachment on the SCDOT right of way as described herein It is expressly understood that the encroachment, if and when constructed shall be installed in accordance with the sketch attached hereto and made a part hereof

The applicant agrees to comply with and be bound by the SCDOT's A Policy for Accommodating Utilities on Highways Rights of way Standard Specifications for Highway Construction the General Provisions and "Special Provisions attached hereto or made a part hereof by reference during the installation operation and maintenance of said encroachment within the SCDOT's Right of Way

DISCHARGES OF STORM WATER AND NON-STORM WATER Work within State Highway right-of-way shall be conducted in compliance with all applicable requirements of the National Pollutant Discharge Elimination System (NPDES) permit(s) issued to the Department of Transportation (Department) to govern the discharge of storm water and non-storm water from its properties Work shall also be in compliance with all other applicable Federal State and Local laws and regulations and with the Department's Encroachment Permits Manual and encroachment permit. The encroachment permit will not be issued until the applicant has received an NPDES construction permit from SC Department of Health and Environmental Control

The applicant agrees to comply with all current SCDOT Standards Specifications for Highway Construction including all Supplemental Technical Specifications The applicant hereby further agrees and bind- his/her/its heirs personal representatives successors assigns to assume any and all liability for accident or injuries to persons or damage to property including the highway that may be caused by the construction maintenance use moving or removing of the physical appurtenances contemplated herein and the applicant agrees to indemnify and hold SCDOT harmles from and against any and all claims for personal injury and/or property damage which may be sustained by any person by reason of the construction maintenance or existence of said encroachm nt on the SCDOT's right of way

Applicant's Name North Point Development Group LLC (Please print or type) Date November 10 2009

Applicant s Sig _____ Title Manager

In accordance with your request and subject to all the provisions terms conditions and restrictions stated in the application and the general and special provisions attach d hereto the SCDOT hereby approves your application for an encroachment permit. This permit shall become null and void unless the work contemplated herein shall have been completed prior to: _____

☐ See Attached Special Provisions and/or Permit Requirements NPDES Permit Number _____

(Date received by Res Maint Engr) (SCDOT Approval) (Date)

☐ Resident Maintenance Engineer ☐ Deputy Secretary for Engineering

☐ District Engineering Administrator ☐ District Maint /Constr Engineer

Application for Encroachment Permit
General Provisions

Permit Nbr

1 DEFINITIONS The word Permittee used herein shall mean the name of the person firm or corporation to whom this permit is addressed his her
its heirs personal representatives successors and assigns The word DEPARTMENT" shall mean the South Carolina Department of Transportation

2 NOTICE PRIOR TO STARTING WORK Before starting the work contemplated herein within the limits of the highway right of way the Department's Resident Maintenance Engineer in the county in which the proposed work is located shall be notified 24 hours in advance so that he may be present while the work is under way

3 PERMIT SUBJECT TO INSPECTION This permit shall be kept at the site of the work at all times while said work is under way and must be shown to any representative of the Department or law enforcement office on demand

4 PROTECTION OF HIGHWAY TRAFFIC The applicant shall be responsible for the protection of the highway traffic at all times during the construction maintenance removing or moving of the encroachment permitted herein Detours barricades warning signs and flagmen as necessary shall be provided by and at the expense of the Permittee and shall be in accordance with the Manual on Uniform Traffic Control Devices (MUTCD) The work shall be planned and carried out so that there will be the least possible inconvenience to the motoring public. The Permittee agrees to observe all rules and regulations of the Department while carrying on the work contemplated herein and take all other precautions that circumstances warrant

5 STANDARDS OF CONSTRUCTION All work shall conform to the Department's standards or construction and shall be performed in a workman like manner The applicant shall make adequate provisions for maintaining the proper drainage of the highway as it may be affected by the encroachment permitted herein All work shall be subject to the supervision and satisfaction of the Department.

6 FUTURE MOVING OF PHYSICAL APPURTENANCES If in the opinion of the State Highway Engineer it should ever become necessary to move or remove the physical appurtenances or any part thereof contemplated herein on account of change in location of the highway widening of the highway or for any other sufficient reason such moving shall be done on demand of the Department at the expense of the Permittee

7 RESTORATION OF HIGHWAY FACILITIES UPON MOVING OR REMOVING OF PHYSICAL APPURTENANCES If and when the physical
appurtenances contemplated herein shall be moved or removed either on the demand of the Department or at the option of the Permittee the highway and facilities shall immediately be restored to their original condition at the expense of the Permittee

8 COSTS All work in connection with the construction maintenance moving or removing of the physical appurtenances contemplated herein shall be
done by and at the expense of the Permittee

9 ADDITIONAL PERMISSIONS

(a) It is distinctly understood that this permit does not in any way grant or release any rights lawfully possessed by the abutting property owners The Permittee shall secure any such rights as necessary from said abutting property owners.

(b) The Permittee shall be responsible for obtaining all other approvals or permits necessary for installation of the encroachment from other government entities

(c) There shall be no excavation of soil nearer than two feet to any public utility line or appurtenant facility except with the consent of the owner thereof or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility

10 ADDITIONAL WORK PERFORMANCE

(a) All crossings over the highway shall be constructed in accordance with Specifications for Overhead Crossings of Light and Power Transmission Lines and Telegraph Lines over each other and over Highway Rights of Way in South Carolina as approved by the Public Service Commission of South Carolina and effective as of date of this permit.

(b) All tunneling boring or jacking shall be done in such a way as not to disturb the highway surfacing

(c) No pavement shall be cut unless specifically authorized herein

(d) No excavation shall be nearer than three feet to the edge of pavement unless specifically authorized herein

(e) Underground facilities will be located at minimum depths as defined in the "Utility Accommodations Manual for the transmittant generally as follows 4 feet minimum for hazardous or dangerous transmittant 3 feet minimum for other lines The Department may approve shallower depths if adequate protection is provided Such approval must be obtained in writing

(f) Service and other small diameter pipes shall be jacked driven or otherwise forced underneath the pavements on any surfaced road without disturbing the pavement. The section under the highway pavement and within a distance of three (3) feet on either side shall be continuous without joints

11 ACCESS

(a) Permittee is responsible for maintaining reasonable access to private driveways during construction

(b) It is expressly provided that with respect to any limited access highway the Permittee shall not have or gain access from the main traveled way of the highway or the on or off ramps to such facility except upon approval by the Department.

12 DRIVEWAYS

(a) The existing crown of the highway shall be continued to the outside shoulder line of the highway

(b) If the driveway or approach is concrete pavement, the pavement shall be constructed at least 6 inches thick and with a minimum of class 2500 concrete There shall be a bituminous expansion joint not less than 3/4 inches in thickness placed between the highway paving and the paving of the approach for the full width of the approach

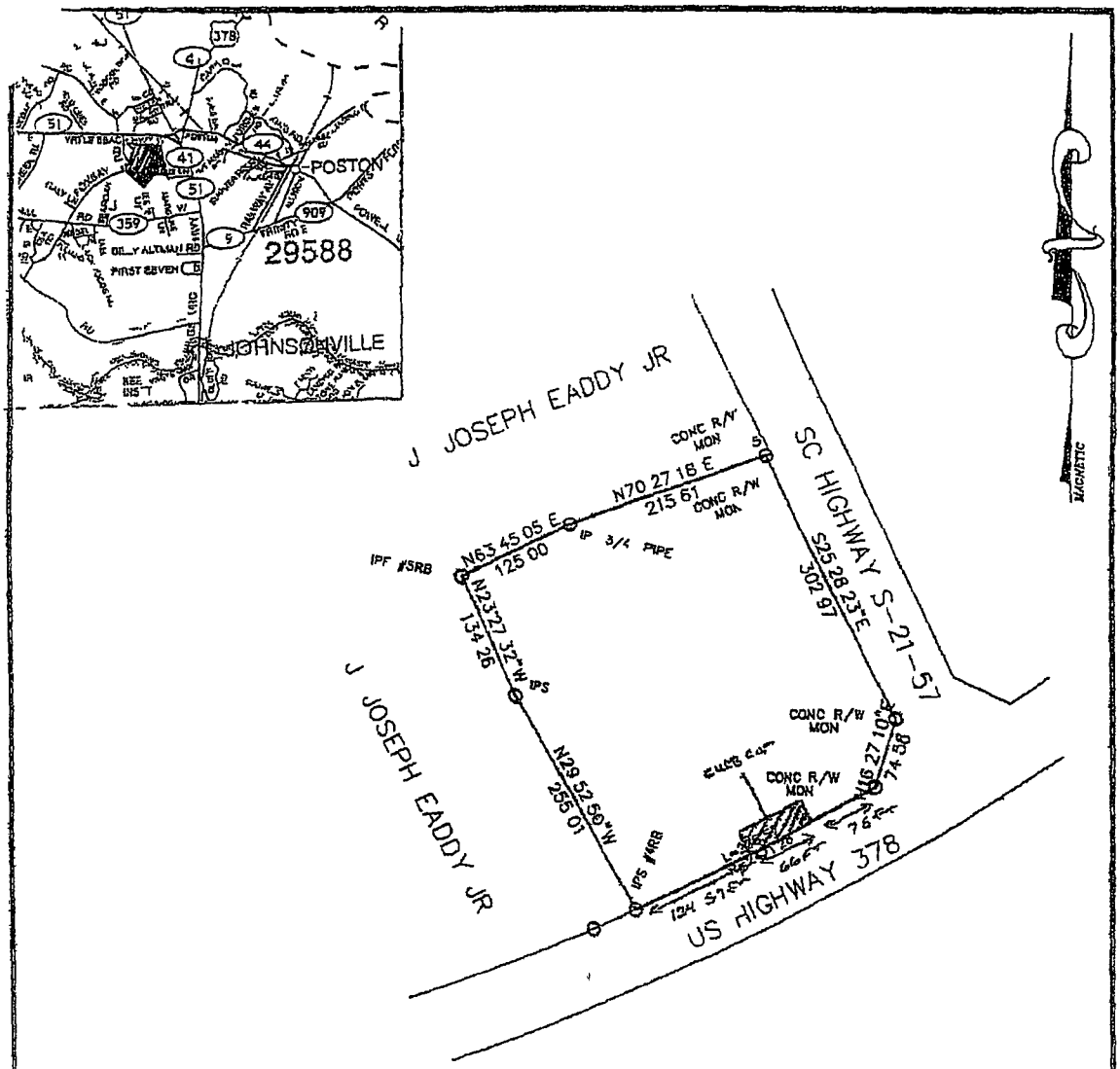
13 BEAUTIFICATION

(a) All trees plants flowers etc shall be placed in accordance with the provisions specifically stipulated herein

(b) All trees plants flowers etc shall be maintained by and at the expense of the Permittee and the provisions of this permit shall become null and void if and when said Permittee ceases to maintain said trees plants flowers etc

1 AS BUILT PLANS

(a) The applicant shall provide the Department with survey-quality as-built plans in accordance with the requirements set forth in the Department's "A Policy for Accommodating Utilities on Highway Rights of Way



NOTE. This lot is not in a flood hazard boundary area designated by FEMA.
I.R. = ½ 5 BAR & CAP

FLORENCE COUNTY
SOUTH CAROLINA

P L A T

OF

TWO AND 902/1000 (2 902) ACRES BEING THE REMAINDER OF THAT LOT SHOWN ON A PLAT BY J D BROWN RLS DATED DECEMBER 15 1971 AS RECORDED IN PLAT BOOK 24 AT PAGE 625 SURVEYED APRIL 5, 2007

FOR

NORTH POINT DEVELOPMENT GROUP LLC

SCALE 1 = 150

GRAPHIC SCALE

Barfield, Sandra

From Kirby Michael C [KirbyMC@dot state sc us]
Sent Friday November 20 2009 3 11 PM
To Barfield Sandra
Subject RE Encroachment Permit

Mrs Barfield

The area you requested an encroachment permit for is a controlled access area A new driveway would not be allowed at all, so the request must be denied
Sorry it took me a few days to get this settled but I had to send the request to the Distnct I will send you out a follow up letter on this issue
If I can be of any further assistance please let me know

Thanks

Mike Kirby

From Barfield, Sandra [mailto sbarfield@hsblawfirm com]
Sent Tuesday, November 17, 2009 4 30 PM
To Kirby, Michael C
Subject RE Encroachment Permit

Thank you so much

Sandra R Barfield
Paralegal to Benjamin T Zeigler
Haynsworth Sinkler Boyd P.A. | 1831 W Evans Street Suite 315| Florence, South Carolina 29501
dir 843 673 5306 F 843.669.3815 | e-mail sbarfield@hsblawfirm com

---

From Kirby Michael C [mailto KirbyMC@dot.state sc.us]
Sent Tuesday, November 17, 2009 4 29 PM
To Barfield, Sandra
Subject RE Encroachment Permit

Mrs Barfield

I checked with Buddy and he did not receive the permit app either I will get started on this first thing in the morning and will try to give you an estimate for completion sometime tomorrow

Thanks
Mike Kirby

From Barfield, Sandra [mailto sbarfield@hsblawfirm com]
Sent Tuesday, November 17 2009 4 17 PM

11/30/2009

Exhibit C

To Kirby, Michael C.
Subject FW Encroachment Permit

Mr Kirby

As per our telephone conversation this afternoon I have attached the information mailed to you last week

Please advise of the status as soon as possible

<<Florence 100202 v1 Encroachment Permit packet for SCDOT PDF>>

Thank you

Sandra R Barfield
Paralegal to Benjamin T Zeigler
Haynsworth Sinkler Boyd P.A. | 1831 W Evans Street Suite 315| Florence South Carolina 29501
dir 843 673.5306 f 843 669.3815 | e-mail. sbarfield@hsblawfirm.com

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11/30/2009

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	C A No 2009-CP 21 2961
North Point Development Group LLC, Petitioner	
vs	RETURN TO PETITION FOR JUDICIAL REVIEW
South Carolina Department of Transportation Respondent	

Comes now the Respondent South Carolina Department of Transportation (the Department) for its response to the petition states the following

Upon information and belief the petitioner is the owner of a parcel of land at the intersection of U S Route 378 and S C Route 41/51 in Florence County near Kingsburg Petitioner is the successor in interest to Ms Jeanne H. Swintz By Title to Real Estate recorded April 18 1997 Ms Swintz conveyed to the Department 0 570 acres of land along with all improvements thereon if any including rights of access as may be needed for controlled access facilities Exhibit 1 The purchase and sale of the land and access rights was made on the basis of design plans for intersection improvements on U S Route 378 for Project No NH-0052(131) Exhibit 2 The plans established a controlled-access line along the Swintz parcel's boundaries with US 378 and S C 41/51

The Department is authorized to acquire rights of access to establish controlled-access facilities by S C Code §57 5-1070 (Rev 2006) Once a controlled-access facility has been established no person may have rights on ingress and egress across the controlled access lines Id S C Code §57 5 1040 There is no provision in the Code for judicial review of the

Department s decisions to establish controlled access facilities or to designate existing facilities as such.

Contrary to the petitioner s arguments the denial of its application for an encroachment permit to access the roads its property abuts is not reviewable by the Court and the Court lacks jurisdiction over the claim presented. S C Code §57 5-1120 does not authorize such judicial review under the facts of this case That section provides for judicial review of the Department s decisions under S C Code §57-5-1080—1110 to determine whether the Department s action is in accordance with law S C Code §57-5 1080 provides for a permit system for side road entrances or private driveways onto the State highway primary system. However the permit authority expressly excludes controlled-access facilities Thus, the Department may not issue encroachment permits where the permit impacts and area previously designated as controlled access Because the area under consideration herein is a controlled-access facility the Department has no authority to issue an encroachment permit and the Court has no jurisdiction to review any such decision

To the extent the Court may determine to accept jurisdiction in this matter we argue that the Department s decision to designate the intersection as controlled-access and acquire access rights from the petitioners predecessor in title was in accordance with law and not arbitrary or without factual basis Main v S C Dep't of Hwys and Pub Transp , 300 S C 453 455 388 S E 2d 792 794 (1990) The 1997 project was planned to address the high volume of vehicle accidents at this location by eliminating a number of road segments into two intersecting highways See Exhibit 2 Access control is an important tool in promoting safety at intersections Exhibit 3

Conclusion

The Court lacks jurisdiction to consider the claims of the petitioner herein To the extent the Court may have jurisdiction over the subject matter the Department s decision was reasonable and based on sound engineering principles and should be affirmed The petition should be dismissed

Respectfully submitted

Beacham O Brooker Jr SC Bar # 909
Assistant Chief Counsel SCDOT
Post Office Box 191
Columbia, South Carolina 29202 0191
(803) 737 1347
brookerbo@scdot org

Columbia S C
December 7 2009

SCDOT R/W Form 802 (Revised 6-26-95)

THE STATE OF SOUTH CAROLINA

COUNTY OF Fflorence

Road/Route No U S Route 378

Item/File No 300120/21 938

Project No NH 0052(131)

Pin No 8264

Mar 25 12 26 PM '97

TITLE TO REAL ESTATE
Approximate Survey Station

24+82.8 To 28+42 Lt. (Line "W")

To

To

REQUESTED 3/14 97

KNOW ALL MEN BY THESE PRESENTS, That I (or we) Jeanne H Swiotz 1823 Old River Road, Johnsonville, South Carolina 29555 in consideration of the sum of Twenty One Thousand and No/100 Dollars ($21,000.00) and other valuable consideration to me (or us) in hand paid at and before the sealing and delivering thereof by the South Carolina Department of Transportation Columbia, South Carolina receipt of which is hereby acknowledged have granted bargained, sold and released, and by these presents do grant, bargain sell and release unto the said South Carolina Department of Transportation its successors and assigns all that certain real property in fee simple absolute Intersection survey on U S Route 378, S C Route 41, 51, & Road S 57 State and County aforesaid as shown on plans prepared by the South Carolina Department of Transportation and dated April 23, 1996 said property being herein conveyed to have a width of xxxx feet, that is 75 feet on the left side(s) of the survey centerline of the highway as shown on the reference plans

SPECIAL PROVISIONS

The above consideration is for 0.570 acre of land damages and all improvements thereon if any including rights of access as may be needed for controlled access facilities Also within 70 feet of the survey centerline of Line "X on the left, between approximate survey stations 29+81 and 33+37 Also herein conveyed is property for a 50 x 50 triangular area left of the survey centerline of Line "W" at approximate survey station 28+00 at the intersection of US Route 378 and Road S-57 Also it is understood and agreed that a drive entrance will be constructed left of the survey centerline of Line "X" at approximate survey station 31+80 and also left at approximate survey station 32+90 and eliminating existing drive left of approximate survey station 30+25 during this construction. Also it is understood and agreed that all merchantable timber will be cut into commercial lengths and placed on property adjacent to the right of way of the grantor This being a portion of the property acquired from J Joseph Baddy Jr by deed dated November 19 1985 and recorded November 20 1985 in Deed Book A238 Page 339 in the records for Florence County and shown as Tax Map No 428-05-069

THIS PROPERTY DESIGNATED AS
MAP 428 BLOCK 05 PARCEL 069
ON FLORENCE COUNTY TAX MAPS

SPLIT FROM
FLORENCE COUNTY TAX ASSESSOR

Apr 18 12 01 PM 97

Exhibit 1

12:01 RECORDED
PM 4-18-97
BOOK A490 PAGE 643
BERNICE B PARKER
C C C P FLORENCE COUNTY

000633

Checked _____ By _____

Recorded 3-11-97 By _____

Project NH 0052(131) File No 21938

TRACT 1

DIRECTOR RIGHTS OF WAY
SCDOT P O BOX 191
COLUMBIA, SOUTH CAROLINA 29202

Together with all and singular the rights members hereditaments and appurtenances thereunto belonging, or in any wise incident or appertaining

And I (or we) do hereby bind my (or our) heirs executor and administrators to warrant and forever defend all and singular the said premises unto the said South Carolina Department of Transportation it s successors and assigns against me (or us) and my (or our) heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof

TO HAVE AND TO HOLD in fee simple absolute and singular the said property and the rights hereinbefore granted unto the said South Carolina Department of Transportation its successors and assigns forever

IN WITNESS WHEREOF I (or we) have hereunto set my (or our) hand(s) and seal(s) this 28th day of February, in the year of our Lord One Thousand Nine Hundred and 97

Signed sealed and delivered in the presence of

Shelly L Moody
1st Witness

Jeanne H. Simmons (L.S.)

Daryl S Hardwick
2nd Witness

(L.S.)

NOTE All right of way agreements must be in writing and are subject to rejection by the South Carolina Department of Transportation

THE STATE OF South Carolina)
) PROBATE
COUNTY OF FLORENCE)

Personally appeared before me the undersigned witness and made oath that she/he saw the within named grantor sign seal and as the grantor's act and deed deliver the within written title and that she/he with the other witness whose signature appears above witnessed the execution thereof

Shelly L Moody

SWORN to before me this 28th

day of February 19 97

Daryl S Hardwick

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 7-24 2000

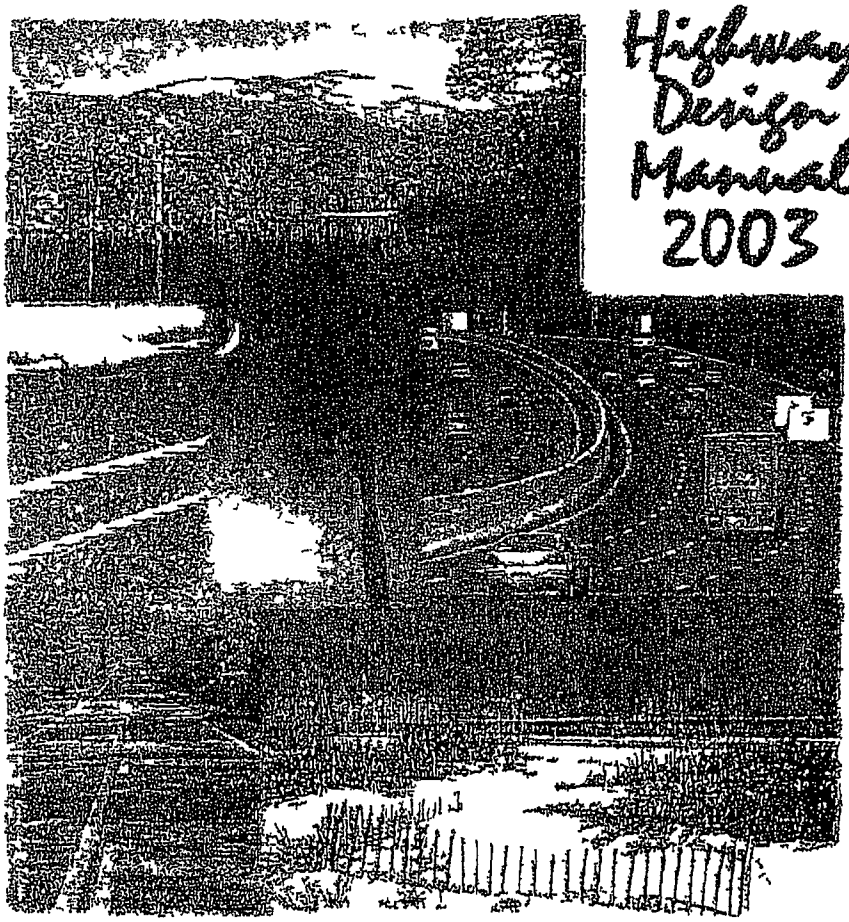
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TRACT 7

Exhibit 2

SCDOT

South Carolina Department of Transportation



Highway Design Manual 2003

31

9 8 ACCESS MANAGEMENT/ACESS CONTROL

9 8 1 Definitions

The following definitions apply to access management and access control

1 Access Control The condition where the public authority regulates the right of abutting owners to have access to and from a public highway by declaring the highway to be either fully or partially access controlled This is accomplished through the purchase of access rights driveway controls turning restrictions or geometric design (e g grade separations)

2 Access Management The process of governing access to land development by a public agency where the agency considers the highway facility and its surrounding activities as part of an overall system Individual parts of the system (e g zoning land use planning site plan development driveway permits public transportation, roadway network) should be properly integrated and coordinated Through proper application of access management, the objectives of providing safe and efficient traffic flow coupled with access to abutting properties can be achieved

3 Controlled-Access Highway *South Carolina Code* 57-5-1010 states Controlled-access facility means a State highway or section of State highway especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property or others shall have only a controlled right or easement of access The abutting landowner or others have no legal right of access except at points and manners as determined by the Department.

4 Full Control of Access/Limited Access Highways that are designated to have full control of access are referred to as freeways Priority is given to through traffic and access to the highway is only provided at interchanges with selected public roads All other intersecting roads are terminated at the right of way line perpetuated with grade separations or interconnected with other roads Access is provided to properties abutting the freeway via frontage roads service drives or the existing public road system Full control of access maximizes the capacity safety and vehicular speeds on the highway

5 Partial Control of Access/Limited Access An expressway design is the common term used for this type of facility Priority is given to through traffic Some intersections will be provided and private entrance connections will be allowed by permit. The proper selection and spacing of intersections and other connections provides a balance between the mobility and access functions of the highway

6 Control by Regulation All highways warrant some degree of access control by permit or by design Control by regulation is exercised by the Department, county highway departments or municipalities to specify the location of private

accesses to and from the public road system Occasionally statutory control is used to restrict access to only public roads and major traffic generators Zoning may be used to effectively control development on adjacent property so that major generators do not hinder traffic operations However zoning restrictions are at the discretion of the local government. Driveway regulations and permits are used to control the geometric design of an entrance driveway spacing and driveway proximity to public road intersections

7 Control Access Line A line established by the Department that delineates areas where ingress to and egress from a highway facility is prohibited When an existing access-controlled highway is reconstructed the access control lines should be reviewed for possible revisions

9 8.2 Access Management

Access management is a public authority's selective use of regulations policies and procedures to limit or control public access to and from property abutting highways It plays an important part in providing a safe and efficient highway system

Highway transportation involves the movement of persons and goods along highways A complete system of transportation services must also provide access to abutting properties There is a trade-off between the mobility and access uses of a highway In developed areas arterial highways are particularly susceptible to decisions which conflict with and compromise the principal function of mobility for which the arterial was designed Generally the high-capacity full controlled access highway and the local access residential or commercial street at the other end of the capacity range present the fewest access management problems and best meet service characteristics noted in the functional classification system

Traditionally as a community grows, land subdivides and develops, and businesses are attracted to busy highways Direct and frequent access is obtained by constructing driveways and intersections To be effective address access management in the early stages of land development. As crossroad traffic volumes increase, traffic signals are warranted and the need to plan for major access points is critical to the mobility function of major highways Total disregard of access management can create traffic congestion and lead to public demands for better transportation service

The control and regulation of access to roadways offers the following benefits

- protects the safety of the motoring public,
  protects the level of service and carrying capacity of the roadway
- provides reasonable access to development in accordance with needs, and
- delays the need for expensive new projects

The designer should consider the following objectives of access management

- limit the number of conflict points
- separate conflict areas
  limit the severity of conflicts
- limit vehicular speed change requirements, and
  maintain the performance of the roadway

9 8 3 Procedures

The Project Planning Report should identify the type of control proposed for each project. Where it is necessary to revise the control access line the designer should coordinate with the Right of Way Office

Control Access or 'Limited Access lines should be clearly denoted on the plan drawings' see Chapter 34 Record any breaks in existing access lines on the right of way instrument of record

9 8 4 Criteria

9 8 4 1 Intersections

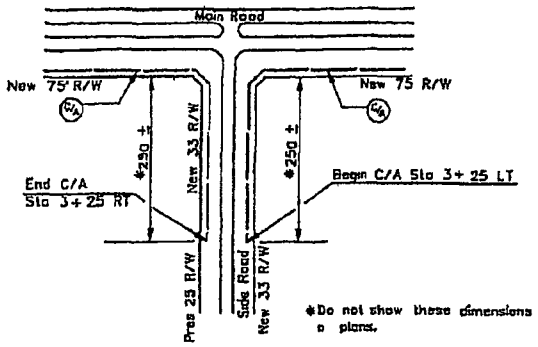
Locate all points of access as far from the roadway intersections or railroads as feasible and practical See SCDOT's *Access and Roadside Management Standards* for additional guidance In determining the access lines, consider the following

1 Intersection Radii Do not locate an access within the radius of the intersecting roadways

2. Sight Distance At intersections where the Department has purchased the triangular or sight distance areas driveways are not permitted to cross or enter the area except where the elongation of areas may warrant special considerations

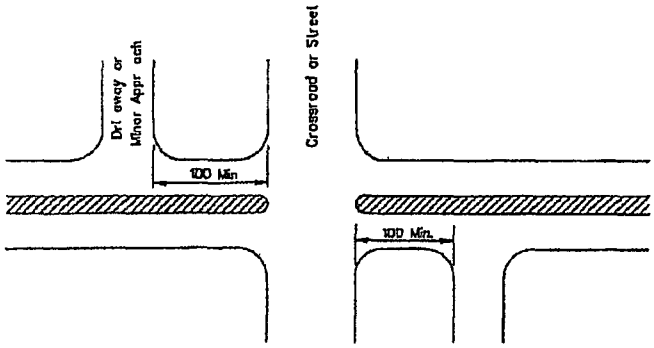
3 Limited Access Facilities Projects that allow vehicular access to the mainline via at-grade intersections are considered Limited Access The control access line will turn away from the mainline facility and follow the side road right of way for a distance of approximately 250 feet see Figure 9 8A This distance may be adjusted to accommodate property access along the side road

4 Median Openings Wherever applicable points of access should align directly with existing median openings Relocate points of access that do not align directly a minimum of 100 feet (edge to edge) from the nearest crossover so that conflicts with traffic using the crossover can be avoided see Figure 9 8B



CONTROL OF ACCESS
(Limited Access Facilities)

Figure 9 8A



POINTS OF ACCESS WITH MEDIAN CROSSOVERS

Figure 9 8B

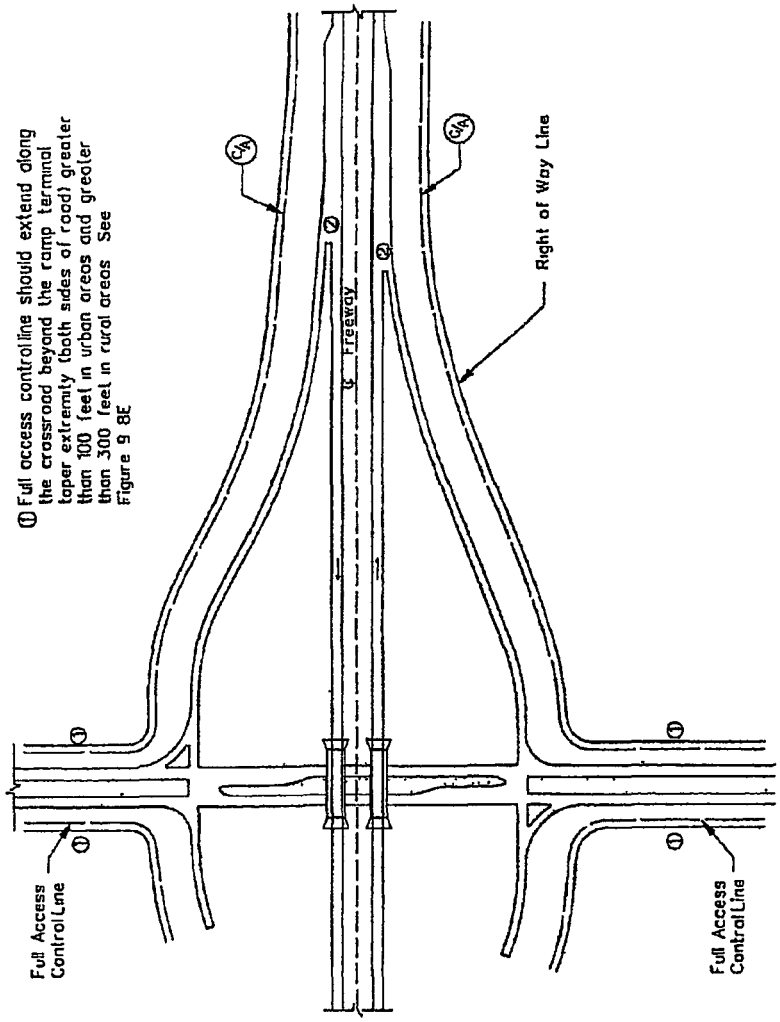
9 8 4 2 Interchanges

Proper access control must be provided along the crossing road in the vicinity of the ramp/crossing road intersection or along a frontage road where present. This will insure that the intersection has approximately the same degree of freedom and absence of conflict as the freeway itself The access control criteria should be consistent with these goals

Figures 9 8C 9 8D and 9 8E present access control for several typical interchange designs These provide SCDOT policy for the location of the limits of control of access lines along the ramp at ramp/crossroad intersections across from the ramp terminal and along frontage roads

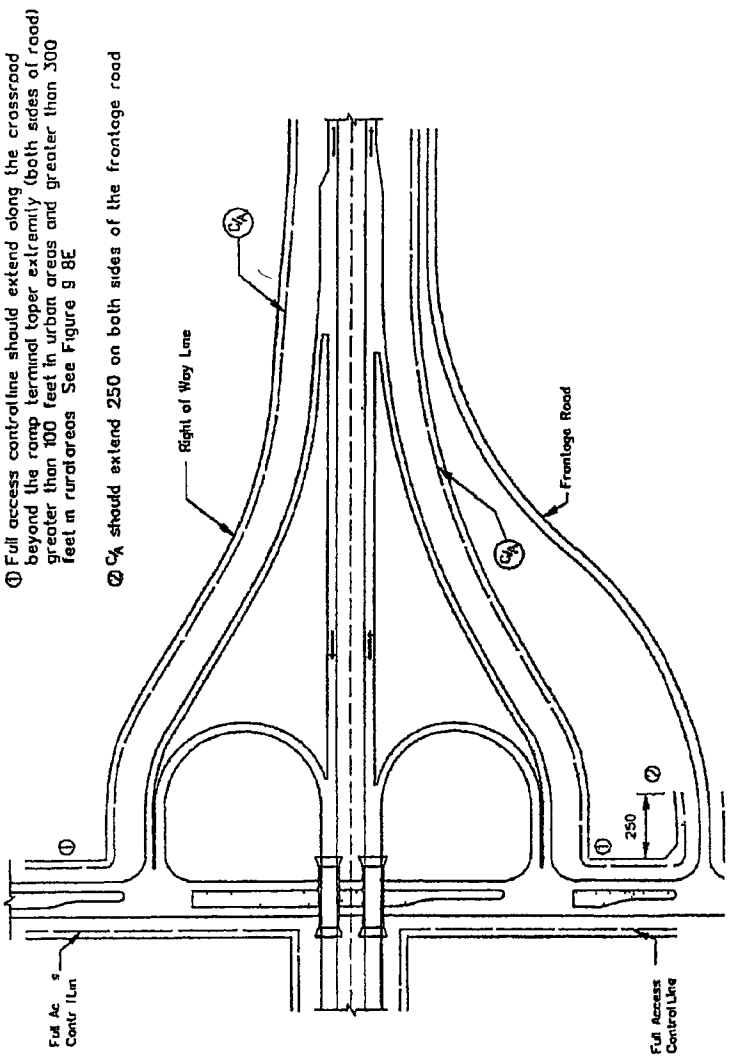
As indicated in the figures the control of access limits extend a distance along the crossing road away from the ramp or frontage road intersection The 100 feet in urban areas and 300 feet in rural areas should usually satisfy any congestion concerns However in areas where the potential for development exists that would create traffic problems it may be appropriate to consider longer lengths of access control In addition, many areas have changed over the years from rural to urban A change in area character alone is not a sufficient justification to alter the location of the control of access line when an existing interchange will be rehabilitated or when SCDOT receives requests for additional access points from outside interests

These figures note that, on the crossing road the limit of no access should extend the indicated distance beyond the ramp terminal This is defined as the tangent point (PT) of a radius return or the end of a taper for an auxiliary lane on the crossing road



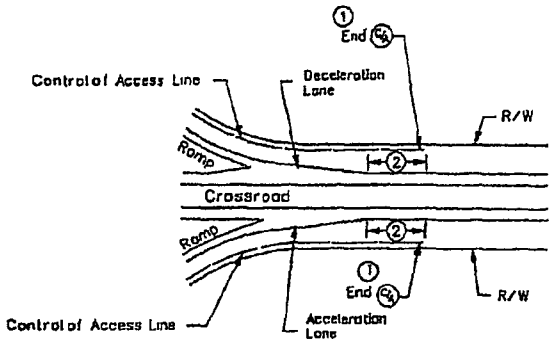
TYPICAL ACCESS CONTROL FOR A DIAMOND INTERCHANGE

Figure 9.8C



TYPICAL ACCESS CONTROL FOR A PARTIAL CLOVERLEAF INTERCHANGE

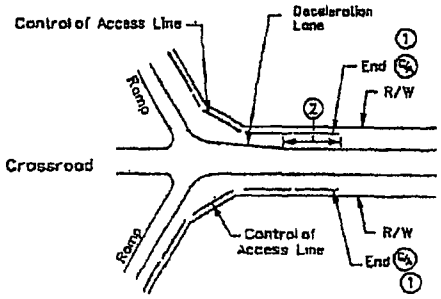
Figure 9 8D



MULTI-LANE ROADWAY
CASE I

① Full access control line should extend along the crossroad beyond the ramp terminal (per extremity (both sides of road) greater than 100 feet in urban areas and greater than 300 feet in rural) as The end of access control should be at opposite points where feasible

② In Case I and II the auxiliary lane terminating the greater distance from the interchange area should govern



TWO LANE ROADWAY
CASE II

ACCESS CONTROL AT RAMP TERMINALS

Figure 9 8E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C.A NO 2009-CP 21-2961

North Point Development Group, LLC,

Petitioner

v

South Carolina Department of Transportation

Respondent

Petitioner's Motion for Reconsideration

Pursuant to Rule 59 and such other authorities permitting reconsideration, Petitioner hereby moves this honorable court for reconsideration of the January 25 2010 Order, received January 28, 2010 As described herein, Petitioner asserts that the Order contains factual statements unsupported by the record as well as errors of law

Factual Determinations Unsupported By Record

The Order contains factual determinations which are not supported by the record before the Court and are material in that they lead the court to an erroneous conclusion First SCDOT provided the court with the Affidavit of Oscar Rucker wherein he identifies highway plan sheets 'maintained by the SCDOT and as transmitted by his office to the tax assessor of Florence County If not trying to represent that the referenced plans are maintained at the office of the Florence County Tax Assessor, Mr Rucker s statement leans towards suggesting such The court has been misled on this point as demonstrated in the court s statement. The plans so filed under §57-5-570 " (Order, p 3) It is important to note that sending and maintaining are not the

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PTCP&GS
OF COUNTY, SC

same Section 57-7-570 requires "The department shall maintain a copy of all highway plans" The factual matter, however, was dispositively addressed by the Affidavit of Sandra Barfield and the supporting letter of the Florence County Tax Assessor, both filed with the court Regardless of what SCDOT claims it sent to the Florence County Tax Assessor, he has declared, "The South Carolina Department of Transportation does not maintain DOT highway plans in the Florence County Tax Assessor's Office" Thus SCDOT has failed its charge As recognized by SCDOT, the express purpose for SCDOT maintaining those records in the Tax Assessor s office is "for the convenience of persons making inquiry as to the right of the State in and to the right-of-way for roads constructed by the department in any county" Therefore, SCDOT s disregard for the mandate of the General Assembly deprives the public of its entitlement to such right-of-way information Consequently, the Petitioner has been specifically deprived of the protections and benefit the statute affords of having such right-of-way information available for review in the location where the law requires it to be made available Quite plainly, Petitioner should not suffer for SCDOT's failure

Next, the court states, "The rights were acquired pursuant to highway plans designating all quadrants of the intersection as controlled-access" (Order, p 2) Respondent has represented that it established controlled access on all corners of the intersection. However, Petitioner has previously provided the Affidavit of Sandra Barfield documenting that after searching the real property records of Florence County she was unable to locate any instruments suggesting that SCDOT acquired access rights for at least one of those corners Therefore, the court s reliance on SCDOT's highway plans as being accurate is inappropriate and contrary to the facts This point damages SCDOT's position that all changes to preliminary plans are reflected on "as-built" plans *See* Order, p 3 The as-built plans provided by SCDOT do not reflect that it failed to

acquire rights of access on the property formerly owned by James Wilma Johnson The laws of South Carolina require of real property conveyances terms that are "clear, definite, certain and precise *White v Felkel*, 222 S C 313 324 (1952) SCDOT has failed to establish such with respect to the real property at the heart of this dispute and instead relies on shifting engineer drawing that are not filed in the land records of Florence County or even maintained with the Florence County Tax Assessor

Legal Error as to Availability of Judicial Review

Based in part on the above factual inaccuracies the court has concluded that "the segments of US Route 378 and State road S 57 adjacent to petitioner's property are controlled access primary routes, the Court does not have jurisdiction under S C Code Ann §57-5-1120 to review the department's refusal to consider the petitioner s request for a driveway across the controlled-access line" (Order p 4) Petitioner respectfully asserts that this conclusion is in error and overlooks applicable law

First Petitioner disagrees that SCDOT has established that it has legally acquired rights of access Section 57-5 1070 requires SCDOT to take rights of access 'in the same manner as now or hereafter authorized by law for acquiring property or property rights ' As previously argued, the content of the Swintz instrument is fatally defective and fails to specifically communicate what is to be conveyed with respect to access as a matter of law *See generally* U S Constitution Fifth and Fourteenth Amendments and S C Constitution Article I §§3 and 22, S C Code Ann §§ 57-5-570 & 1120 (Court is authorized to "determine whether the action of the department is in accordance with the provisions of law") *Hardin v S C Dep t of Trans* 371 S C 598 606 (2007), *Cash v Maddox* 265 S C 480 (1975), *White v Felkel*, 222 S C 313,

324 (1952) The court cites to *Main v S C Dep t of Hwys and Pub Transp* in support of its determination on this issue 300 S C 453 (1990) That case does not address the core issues in the instant dispute It merely stands for the proposition that where SCDOT has undisputed restricted access mandamus will not lie when the Department has discretionary rather than ministerial functions In the instant case, the establishment of restricted access is in dispute and the Department summarily refused to consider the request rather than considering but denying At best, the *Main* case supports the claim that Respondent is obligated to thoughtfully exercise that discretion upon receipt of encroachment permit requests, which it has obviously failed to do in summarily rejecting Petitioner s application

Building upon the foregoing, Petitioner asserts that S C Code Ann. § 57 5-1120 (2006) does support the court s review of this action In further support of the court's jurisdiction Petitioner s raised Article I, Section 22 of the S C Constitution

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard, nor shall he be subject to the same person for both prosecution and adjudication nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review

According to the foregoing authorities, this court certainly has the authority to review the Respondent's denial of the Petitioner's application but the court has failed to explain why such may not apply *See generally* S C Code Ann § 57 5-1120 (Court is to determine whether the action of the department is in accordance with the provisions of law ")

Conclusions

Based on the foregoing the Petitioner respectfully asks that this Honorable Court to reconsider its Order of January 25 2010 to address the arguments above and to grant the following relief

1) issue an order a) declaring that the Petitioner s property is not subject to controlled access by virtue of the Swintz Instrument and b) directing Respondent to issue a encroachment permit to Petitioner for direct access to U S Highway 378 as requested in the encroachment permit application

2) in the alternative, order Respondent to pay Petitioner for its loss of direct access to U S Highway 378 and related damages, as may be determined in later proceedings

3) grant such other relief as this court may deem appropriate

Respectfully Submitted

HAYNSWORTH SINKLER BOYD P A

By _____

Evander Whitehead
vwhitehead@hsblawfirm com

P O Box 6617
Florence SC 29502-6617
(843) 669-6002

Attorneys for Petitioner

February 2 2010
Florence, South Carolina

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	C A. No 2009-CP-21 2961
North Point Development Group LLC Petitioner	
vs	Respondent s Return to Petitioner's Motion for Reconsideration
South Carolina Department of Transportation Respondent.	

Respondent respectfully submits this Return to Petitioner s motion for reconsideration of the Court s Order that was entered January 26, 2010 Petitioner argues that the Order is based upon two factual errors and, as a result it has been deprived of its constitutional right of due process We assert that the matter was correctly decided, is supported by the record, and there was no deprivation of rights to which the due process clause would apply

1 *Availability of Highway Plans*

In its first assignment of factual error Petitioner asserts that, because State highway plans in Florence County are maintained in the SCDOT District Office in Florence and not in the office of the Florence County Tax Assessor as set forth in S C Code Ann § 57-5-570 the public has been deprived of its entitlement to such right-of-way information and the petitioner has been deprived of its right to have such right of-way information available at the location required by law

Copies of SCDOT highway plans are forwarded by the SCDOT Right-of Way section to county tax assessors offices upon letting of those plans for construction In the case of Florence County because of space limitations in the Assessor's office the plans are then sent to the

SCDOT District Five[1] office where they are available for inspection by the public during normal business hours This system complies with the intent of S C Code §57-5-570 of providing a secondary and local, source for landowners and surveying professionals seeking to locate the boundaries of their land with respect to State highway rights of-way The primary source is of course the headquarters of SCDOT itself

In any event, the Code section in question is arguably obsolete Highway plans are now scanned and computerized Professional land surveyors know to simply call SCDOT where the county engineering office or the Right-of-Way section (which assigns a dedicated agent to assist surveyors and the general public with property searches) will email digitized plan sheets to the surveyor or mail a hard copy

Importantly however Petitioner has not shown how it is prejudiced by any alleged defect in the foregoing procedures Petitioner was able to obtain a plat of its property prepared by Prosser Surveying Co , Inc upon a survey dated April 7, 2007 That plat accurately describes the boundaries between petitioner s land and U S Route 378 and State Secondary Route 57 which it adjoins Thus SCDOT has caused no hardship to the Petitioner in its efforts to determine its property rights SCDOT s title to the access rights appurtenant to the North Point tract is duly recorded in the Florence County land records pursuant to S C Code § 30-7 10 (Rev 2007)

2 *The James Wilma Johnson property*

The second factual error Petitioner asserts is that his counsel has searched the land records of Florence County and was unable to find an instrument conveying access rights from James Wilma Johnson to SCDOT Thus Petitioner argues SCDOT s highway plans are

[1] The regional or District office of SCDOT for eight counties in the Pee Dee region is located in the city of Florence

inaccurate and invalid Petitioner is incorrect SCDOT acquired those rights from Mr Johnson by settlement of a condemnation case in 1997 In accordance with the recording laws of the State the original condemnation notice to Mr Johnson was annotated by the Clerk of Court of Florence County and recorded and indexed under the grantor's and grantee's names in the land records of Florence County A copy of the Condemnation Notice annotated with the compensation of $51 500 for 2 558 acres and access rights and recorded in Deed Book A522 at Page 252 is attached hereto

Of course, the state of SCDOT's title to the Johnson property is irrelevant to the issue in this case It is axiomatic that in a land case an owner must recover only on the strength of his own title and not upon the weakness of the title of the defendant Hoogenboom v City of Beaufort, 315 S C 306 433 S E.2d 875 (Ct App 1992), Bradley v Drayton, 48 S C 234 26 S E 613 (1897) The title SCDOT obtained from Petitioner's predecessor in title, Jeanne H Swintz, by Title to Real Estate is recorded in Deed Book A490 at Page 643 By that instrument, Ms Swintz conveyed all access rights to her land from the highway to SCDOT This conveyance is later cut down in the same instrument to provide her property with a driveway at SCDOT expense at the point on her land furthest remote from the intersection onto Secondary Route 57 Thus the strength of the Petitioner's title does not support any access to U S 378 or State Road 57 with the exception of the driveway onto the latter

3 *Due process argument*

Based upon the foregoing alleged errors of fact, Petitioner claims that it has been denied procedural due process in the rejection of its effort to break access control of the highway In determining whether due process procedures are required a court must look at the nature of the interest at stake a person clearly must have more than an abstract need for a protectable right

and more than a unilateral expectation of it—instead, he or she must have a legitimate claim of entitlement to it 16B Am Jur 2d Constitutional Law §905

Interests protected as "liberty or "property under the procedural guarantees of the due process clause include interests that are recognized and protected by state law Id Article 7 of Title 57, S C Code of Laws (Rev 2006), 'the controlled-access statute," clearly provides that the Department of Transportation may acquire such rights of access as may be needed for controlled-access facilities §57-5-1070 Thereafter abutting property owners shall not be entitled to access the highway at those locations Id The General Assembly has provided for judicial review of the Department's decisions to deny driveway permits on non-access-controlled primary highways §57 5-1120 However, no judicial review is available regarding the decision to designate a highway or part thereof as controlled-access in the first place Nevertheless mandamus has been considered by courts to determine whether the Department of Transportation has exercised its discretion in designating highways controlled-access Main v S C Dep't of Hwys and Pub Transp 300 S C 453 455 388 S E 2d 792-794 (1990) However, no statute confers jurisdiction on the courts to review that decision or substitute its discretion for the Department s Here the Department clearly exercised discretion in designating the intersection controlled-access and acquiring for compensation the access rights of the four abutting landowners

Conclusion

Because the areas Petitioner seeks to enter from its property onto the highways are controlled-access facilities Petitioner has no property right for the Court to protect under the due process clause The Court's dismissal of the complaint for lack of jurisdiction was correct as a matter of law and should stand The Petition for Reconsideration should be denied

April 7 2010

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF TRANSPORATION

Beacham O Brooker Jr , SC Bar #909
Assistant Chief Counsel
P O Box 191
Columbia, South Carolina 29202-1091
(803) 737-1347
brookerbo@scdot org

SCDOT R/W Form 813 (11 15 96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP-21-432
COUNTY OF FLORENCE)

Road/Route U S Route 378
File 21 938
Item
Project NH-0052(131)

South Carolina Department of Transportation,)
)
Condemnor,)
)
VS)
)
James Wilnia Johnson and Dale C Johnson,)
)
Landowner(s))

CERTIFIED, A TRUE COPY
Bernice B. Parker
CLERK OF COURT, C P & G S
FLORENCE COUNTY, S C

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BERNICE B. PARKER
CLERK OF COURT
FLORENCE, SC

FILED
MAR 25 12 40 PM '97
BERNICE B. PARKER
CLERK OF COURT
FLORENCE, SC

LIS PENDENS

NOTICE IS HEREBY GIVEN that the Condemnor above named pursuant to the South Carolina Eminent Domain Procedures Act Section 28-2-10, et seq , of the South Carolina Code of Laws 1976, as amended, has brought an action against the Condemnee(s) above named to acquire the real property described herein for public purposes to-wit

All that parcel or strip of land, in Fee Simple, with improvements thereon, if any, including rights of access as may be needed for controlled access facilities, containing 2 558 acres of land and being described as follows Within 80 feet of the survey centerline of Line "W", on the right, between approximate survey stations 21+75 and 28+29 Also herein condemned is all property on the right of the survey centerline of Line "W" within the designated right of way extending to the present right of way of U S Route 378 between approximate survey stations 18+30 and 21+75 Also herein condemned is all property on the left of the survey centerline of Line "W" within the designated right of way extending to the joint property line(s), now or formerly, of J Joseph Eaddy, Sr , and Jeanne H Swintz Also herein condemned is property within 60 feet of the survey centerline of Road S 57

Lis Pendens (Cont'd)

Line "X", on the left, between approximate survey stations 26+53 and 28+31 Also herein condemned is property for a 60' x 60' triangular area right of approximate survey station 27+90 at the intersection of US Route 378 (Line W) and Road S 57 (Line X)

Tax Map Numbers 428 05-033 & 428-05 046

The property sought herein is to be acquired for public purposes more particularly for the construction of U S Route 378, S C Route 41, 51, and Road S-57 intersection survey

BARBARA M WESSINGER
Assistant Chief Counsel

ELIZABETH S MABRY
Deputy Chief Counsel

BY Barbara M Wessinger
Attorney for Condemnor (SCDOT)
PO Box 191
Columbia, SC
803-737-1347

Columbia, South Carolina

March 12 19 97

STATE OF SOUTH CAROLINA)
)
FLORENCE COUNTY)
)
SCDOT)
Condemnor Plaintiff)
)
vs)
)
James Wilnia Johnson , et al)
Landowner(s) Defendant)

IN THE CIRCUIT COURT FOR THE

TWELFTH JUDICIAL CIRCUIT

COVER SHEET FOR
CIVIL ACTIONS

File No 97-CP-21-432

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law This form is required for the use of the Clerk of Court for the purpose of docketing It must be filled out completely signed and dated A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint

NATURE OF ACTION *(check one category for the main cause of action)*

( )	TORT	Motor Vehicle	( )	CONTRACT	Debt Collection
( )	TORT	Professional Malpractic	( )	CONTRACT	Employment
( )	TORT	Unfair Trade Practices and Other Economic or Business Related Wrongs	( )	CONTRACT	Construction
			( )	CONTRACT	Wrongful Breach
			( )	CONTRACT	General or Other
( )	TORT	Products Liability			
( )	TORT	General or Other	(X)	REAL PROPERTY	
( )	PCR		( )	MINOR SETTLEMENTS	
			( )	DOMESTICATE FOREIGN JUDGMENT	
( )	GOV/ADM	Workers Comp	(X)	OTHER *(Please Describe)*	
( )	GOV/ADM	General or Other		Condemnation Action	

FILED
MAR 25 12 40 PM '97
BEP - FLORENCE COUNTY

JURY DEMAND (X) YES ( ) NO

Note Information requested on this form is preliminary in nature and for administrative purposes only The response to this request for information on jury demand merely indicates a likelihood that a jury trial will or will not be requested and does NOT constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes

DOCKETING INFORMATION *(Check one box)*

( ) This case is subject to arbitration (all cases with monetary damages less than $25 000 are subject to arbitration unless otherwise exempt)

(X) This case is subject to mediation (all cases not subject to arbitration must be mediated unless otherwise exempt)

( ) This case is exempt from ADR and certificate is attached

CERTIFIED, A TRUE COPY

Barbara M Wessinger
Signature of Plaintiff's Attorney

Bernice P. Cribb

PO Box 191
Mailing Address

CLERK OF COURT C P & G S
FLORENCE COUNTY S C

Columbia SC 29202
City State Zip

Date 3-25-97

737-1347
Telephone

ARB (11/96) SEE REVERSE SIDE FOR FURTHER IMPORTANT INFORMATION

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
Florence COUNTY) Twelfth JUDICIAL CIRCUIT
)
SCDOT)
Condemnor Plaintiff) CERTIFICATE OF
) EXEMPTION/WITHDRAWAL
vs) FROM ARBITRATION
)
James Wilnia Johnson, et al)
Landowner Defendant) File No _____

FILED
MAR 25 12 40 PM '97
FLORENCE COUNTY, S.C.

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE

____ monetary relief requested in this case exceeds $25 000

____ this is a class action

____ there is a substantial claim for injunction or declaratory relief requested in this case

__X__ this case involves *(check one or more of the following)*

- __X__ title to real estate,
- ____ wills, trusts and decedents estates;
- ____ mortgage foreclosure
- ____ partition

____ this is a special proceeding or action seeking extraordinary relief such as mandamus habeas corpus or prohibition

____ monetary relief requested in this case is unspecified but exceeds $25 000

____ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue

____ this action is appellate in nature

____ this is a post conviction relief matter

____ this is forfeiture proceeding brought by the State or

____ this is a contempt of court proceeding

CERTIFIED, A TRUE COPY
Bernice B. Parker
CLERK OF COURT C P & G S
FLORENCE COUNTY, S.C.

Date 3-25-97

Barbara M. Goldinger
Attorney for SCDOT
PO Box 191
Columbia, SC 29202
737-1347

NOTE Motion must be presented to the court a hearing held and a finding made for exemption o withdrawal from arbitration for strong and compelling reason sough pursuant to Rule 1(d) Rules of Circuit Court Arbitration

ARB (11/95)

SCDOT R/W Form 814 (11 15 96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP-21-132
COUNTY OF FLORENCE)

Road/Route U S Route 378
File 21 938
Item
Project NH-0052(131)

South Carolina Department of Transportation,

Condemnor,

VS

James Wilnia Johnson and Dale C Johnson,

Landowner(s)

SUMMONS

FILED
MAR 25 12 40 PM '97
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CERTIFIED; A TRUE COPY

Bernice B. Parker

CLERK OF COURT, C P & G S
FLORENCE COUNTY S C

TO THE LANDOWNER(S) ABOVED NAMED

YOU ARE HEREBY SUMMONED advised and notified, that pursuant to the South Carolina Eminent Domain Procedures Act Section 28-2-10 et Seq that the within Notice of Condemnation copy of which is herewith served upon you was filed with the Clerk of Court for Florence County on March 25, 1997

The purpose of this lawsuit is to enable the Condemnor the South Carolina Department of Transportation to acquire certain real property for its public purposes as is more fully stated in the

Summons (Cont d)

attached Notice of Condemnation Responsive pleadings to the Notice of Condemnation are not necessary

BARBARA M WESSINGER
Assistant Chief Counsel

ELIZABETH S MABRY
Deputy Chief Counsel

BY
Attorney for Condemnor (SCDOT)
PO Box 191
Columbia SC
803 737-1347

Columbia South Carolina

March 12, 1997

SCDOT R/W Form 613 (11 15 96)

Book A52 Page 252
Date Recorded 4-28-1998

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP-21-432
COUNTY OF FLORENCE)

Road/Route U S Route 378
File 21 938
Item
Project NH-0052(131)

South Carolina Department of Transportation,

Condemnor

VS

James Wilnia Johnson and Dale C Johnson,

Landowner(s)

CONDEMNATION NOTICE
AND
TENDER OF PAYMENT

JURY TRIAL DEMANDED

FILED
BEP
MAR 25 12 40 PM '97

CERTIFIED A TRUE COPY
Bernice B. Parker
CLERK OF COURT C P & G S
FLORENCE COUNTY S C

TO THE LANDOWNER(S) ABOVE-NAMED

Pursuant to the South Carolina Eminent Domain Procedure Act Section 28 2 10 et seq Code of Laws of South Carolina, 1976, as amended you are hereby notified as follows

1 The South Carolina Department of Transportation (SCDOT) is the Condemnor herein and seeks to acquire the real property described herein for public purposes

2 James Wilnia Johnson and Dale C. Johnson are named as Landowners in this action by virtue of their claim(s) of title (or other interests) as shown by that certain Deed from George E Terry, Clerk of Court, dated November 20, 1992 and recorded November 20, 1992 in Deed Book A376, Page 589 in the records of the RMC for Florence County

3 The following is a description of the real property subject to this action and a description of the interest sought to be acquired in and to the property by the Condemnor

All that parcel or strip of land, in Fee Simple, with improvements thereon, if any, including rights of access as may be needed for controlled access facilities, containing 2 558 acres of land and being described as follows Within 80 feet of the survey centerline

PAYMENT RECORDED 3 11 97 BY
REQUESTED
3-14-97 FILE 21 938 Page 1 of 4 Pages Tract 6
PROJECT NH-0052(131)

Wilnia Johnson letter dated 4-20-98, Check #119246118 Voucher #131132

Mail to: Barbara M Wessinger PO Box 191 Columbia 29202

SCDOT R/W Form 815 (11 15 96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP-21-432
COUNTY OF FLORENCE)

4:05 RECORDED
P M 4-28-98
BOOK A522 PAGE 252
BERNICE B PARKER
C C C P FLORENCE COUNTY

Road/Route	U S Route 378
File	21 938
Item	
Project	NH-0052(131)

South Carolina Department of Transportation

Condemnor

VS

James Wilnia Johnson and Dale C Johnson,

Landowner(s)

CONDEMNATION NOTICE
AND
TENDER OF PAYMENT

JURY TRIAL DEMANDED

TO THE LANDOWNER(S) ABOVE-NAMED

Pursuant to the South Carolina Eminent Domain Procedure Act Section 28-2 10 et seq Code of Laws of South Carolina, 1976 as amended you are hereby notified as follows

1 The South Carolina Department of Transportation (SCDOT) is the Condemnor herein and seeks to acquire the real property described herein for public purposes

2 James Wilnia Johnson and Dale C Johnson are named as Landowners in this action by virtue of their claim(s) of title (or other interests) as shown by that certain Deed from George E Terry, Clerk of Court, dated November 20, 1992 and recorded November 20, 1992 in Deed Book A376, Page 589 in the records of the RMC for Florence County

3 The following is a description of the real property subject to this action and a description of the interest sought to be acquired in and to the property by the Condemnor

All that parcel or strip of land, in Fee Simple, with improvements thereon, if any, including rights of access as may be needed for controlled access facilities, containing 2 558 acres of land and being described as follows Within 80 feet of the survey centerline

000252

Page 1 of 4 Pages Tract 6

This condemnation action has been ended pursuant to a settlement in the amount of Fifty One Thousand Five Hundred ($51 500 00) Dollars and Consent Order of Dismissal dated April 24 1998

April 28 1998

Bernice B. Parker Clerk of Court

BERNICE B PARKER CLERK OF COURT FOR FLORENCE COUNTY

BOOK A522 PAGE 252

Condemnation Notice and Tender of Payment (Cont d)

of Line "W", on the right, between approximate survey stations 21+75 and 28+29 Also herein condemned is all property on the right of the survey centerline of Line "W" within the designated right of way extending to the present right of way of U S Route 378 between approximate survey stations 18+30 and 21+75 Also herein condemned is all property on the left of the survey centerline of Line "W" within the designated right of way extending to the joint property line(s), now or formerly, of J Joseph Eaddy, Sr , and Jeanne H Swintz Also herein condemned is property within 60 feet of the survey centerline of Road S 57 Line "X", on the left, between approximate survey stations 26+53 and 28+31 Also herein condemned is property for a 60' x 60' triangular area right of approximate survey station 27+90 at the intersection of US Route 378 (Line W) and Road S 57 (Line X)

Tax Map Numbers 428-05 033 & 428-05-046

4 The SCDOT is vested with the power of eminent domain pursuant to Section 57 5 320 and Section 28 2 60 Code of Laws of South Carolina 1976 as amended

5 The property sought herein is to be acquired for public purposes more particularly for the construction of U S Route 378, S C Route 41, 51, and Road S 57 intersection survey

6 This action is brought pursuant to Section 28 2 240 Code of Laws of South Carolina 1976 as amended

7 The SCDOT has complied with the requirements set forth in Section 28-2-70(a) Code of Laws of South Carolina 1976 as amended by having the subject property appraised and making the appraisal available to the Landowner(s) where required by law and certifies to the Court that a negotiated resolution has been attempted prior to the commencement of this action or pursuant to Section 12 27 405 Code of Laws of South Carolina 1976 as amended an appraisal of this property was not required

8 Project plans may be inspected at the office of South Carolina Department of Transportation, Florence County Maintenance Office, 3018 East Palmetto Street, Florence, South Carolina 29506, under File 21 938, U S Route 378, Tract 6

9 THE CONDEMNOR HAS DETERMINED JUST COMPENSATION FOR THE PROPERTY AND RIGHTS TO BE ACQUIRED HEREUNDER TO BE THE SUM OF

Condemnation Notice and Tender of Payment (Cont d)

SEVENTEEN THOUSAND EIGHT HUNDRED THIRTY AND NO/100 DOLLARS ($17,830 00) AND HEREBY TENDERS PAYMENT THEREOF TO THE LANDOWNER(S)

10 Payment of this amount will be made to the Landowner(s) if within thirty (30) days of service of this Condemnation Notice the Landowner(s) in writing requests payment, and agrees to execute any instruments necessary to convey to the Condemnor the property interests and rights described hereinabove The Agreement and Request for Payment must be sent by first class certified mail with return receipt requested or delivered in person to Mr E V Kelly Director Rights of Way, South Carolina Department of Transportation, 955 Park Street Columbia South Carolina 29202 If no Agreement and request for Payment is received by the Condemnor within the thirty (30) day period the tender is considered rejected

11 If the tender is rejected the Condemnor has the right to file this Condemnation Notice with the Clerk of Court of the County where the property is situated and deposit the tender amount with the Clerk The Condemnor shall give the Landowner(s) and Other Condemnee(s) notice that it has done so and may then proceed to take possession of the property interests and exercise the rights described in this Condemnation Notice

12 AN ACTION CHALLENGING THE CONDEMNOR S RIGHT TO ACQUIRE THE PROPERTY AND RIGHTS DESCRIBED HEREIN MUST BE COMMENCED IN A SEPARATE PROCEEDING IN THE COURT OF COMMON PLEAS WITHIN THIRTY DAYS OF THIS CONDEMNATION NOTICE OR THE LANDOWNER(S) WILL BE CONSIDERED TO HAVE WAIVED THE CHALLENGE

13 THE CONDEMNOR HAS ELECTED NOT TO UTILIZE THE APPRAISAL PANEL PROCEDURE Therefore if the tender herein is rejected the Condemnor shall notify the Clerk of Court and shall demand a trial to determine the amount of just compensation to be paid A copy of that notice must be served on the Landowner(s) That notice shall state whether the Condemnor demands a trial by jury or by the Court without a jury The Landowner(s) has the right to demand a trial by jury The case may not be called for trial before sixty (60) days after the service of that notice but it may thereafter be given priority for trial over other civil cases The Clerk of Court shall give the Landowner(s) written notice by mail of the call of the case for trial

Condemnation Notice and Tender of Payment (Cont d)

14 THEREFORE IF THE TENDER HEREIN IS REJECTED THE LANDOWNER(S) IS ADVISED TO OBTAIN LEGAL COUNSEL AT ONCE IF NOT ALREADY OBTAINED

15 In the event the Landowner(s) accepts the amount tendered in this Notice the attached Agreement and Request for Payment form should be signed and returned to the Condemnor within thirty (30) days of your receipt of this Notice

BARBARA M WESSINGER
Assistant Chief Counsel

ELIZABETH S MABRY
Deputy Chief Counsel

BY Barbara M Wessinger
Attorney for Condemnor (SCDOT)
PO Box 191
Columbia SC
803-737-1347

Columbia South Carolina

March 12 1997

FILED
MAR 25 12 10 PM '97
FLORENCE COUNTY, S.C.

000255

SCDOT R/W Form 841 (11 15-96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP-21-432
COUNTY OF FLORENCE)

Road/Route U S Route 378
File 21 938
Item
Project NH-0052(131)

South Carolina Department of Transportation,

Condemnor,

VS

James Wilnia Johnson and Dale C Johnson,

Landowner(s)

FILED
MAR 25 12 40 PM '97

NOTICE OF FILING

CERTIFIED, A TRUE COPY
Florence B. Tucker

CLERK OF COURT, C P & G. S
FLORENCE COUNTY, S C

TO THE LANDOWNER(S) ABOVE NAMED

Pursuant to the South Carolina Eminent Domain Procedure Act Section 28-2-230(b), et seq Code of Laws of South Carolina 1976 as amended, you are hereby notified that as you have rejected the amount tendered as just compensation as stated in the Condemnation Notice the Condemnor has filed the condemnation Notice with the Clerk of Court for Florence County pursuant to Section 28 2-90 Code of Laws of South Carolina 1976, as amended may now proceed to take possession of the property or interest described in the Condemnation Notice

E V Kelly
Director, Right of Way

Columbia South Carolina

Tract 6

SCDOT R/W Form 839 (11 1o 96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO
COUNTY OF FLORENCE)

Road/Route U S Route 378
File 21.938
Item
Project NH-0052(131)

South Carolina Department of Transportation)
)
Condemnor,)
)
VS)
)
James Wilnia Johnson and Dale C Johnson,)
)
)
Landowner(s))

FILED
Mar 25 12 40 PM '97
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FILED, A TRUE COPY
CLERK OF COURT
FLORENCE COUNTY, S C

PERSONALLY APPEARED before me [illegible] who, being first duly sworn, says and deposes.

1 That the amount tendered by the Condemnor to the Landowner(s) in the Condemnation Notice has been rejected

2 That the Condemnor demands a trial not earlier than sixty (60) days after the date of service of this affidavit upon the Landowner(s)

3 That the Condemnor demands a trial by jury

4 That at this time the Condemnor does not demand that this action be given priority over other cases

SCDOT R/W Form 839 (11 15 96)

Affidavit (Cont d)

5 That the Clerk of Court should notify the following Landowner(s) of the call of the case

James Wilnia Johnson [redacted]

Dale C Johnson [redacted]

Evelyn S. Turner
Evelyn S Turner
Rights of Way Administrator

SWORN to before me this 18th
day of March 1997
Jeryce J Goodwin
NOTARY PUBLIC FOR South Carolina
My Commission Expires 6 12 06

File 21 938 U S Route 378 Florence County Tract 6
Page 2 of 2 Pages

SCDOT RW Form 812 (Revised 2 2[illegible])

SOCIAL SECURITY NUMBER INFORMATION

REQUEST FOR SOCIAL SECURITY NUMBER OR TAXPAYER IDENTIFICATION NUMBER AND CERTIFICATION

File No 21.938

Road /Route No US Route 378

Project No NH-0052 (118)

Tract No 6

Pin No 8264

TMS No 428-05-033 & 046

Amount

Acquisition (Sq Ft / Acres) 2.558 ac.

You are required by law to provide the South Carolina Department of Transportation (Hereinafter "SCDOT") your correct Social Security Number or Taxpayer Identification Number If you do not provide SCDOT your correct Social Security Number or Taxpayer Identification Number, you may be subject to civil or criminal penalties imposed by law

Please print or type

NAME James Wilma Johnson and Dale C. Johnson
(If the husband & wife filing jointly enter both names and circle name of person whose Social Security Number appears below)

MAILING ADDRESS. [redacted]

CITY [redacted] STATE. SC ZIP CODE [redacted]

SOCIAL SECURITY NUMBER AND TAXPAYER ID NO [redacted]

Under penalties of perjury I certify that the number shown on this statement is my correct Social Security Number or Taxpayer Identification Number

Date 6-5-96 James Wilma Johnson
Signature of Landowner

You are further requested to provide to the South Carolina Department of Transportation the dollar amount of your share of the gross proceeds or if gross proceeds are not known, the percentage of your share

Your Share $ \ or 100 % of ownership

James Wilma Johnson
Signature of Landowner

SCDOT R/W Form 840 (11 15 96)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) C/A NO 97-CP 21-432
COUNTY OF FLORENCE)

CERTIFIED, A TRUE COPY
Patricia B. Parker
CLERK OF COURT, C P & G S.
FLORENCE COUNTY S. C

Road/Route U S Route 378
File 21 938
Item
Project NH-0052(131)

South Carolina Department of Transportation,

Condemnor,

VS

James Wilnia Johnson and Dale C Johnson,

Landowner(s)

CERTIFICATE OF MAILING

FILED
MAY 6 8 54 AM '97
[illegible]
FLORENCE, SC
UNIT SC

I hereby certify that I have caused a copy of the South Carolina Department of Transportation s Lis Pendens Summons Condemnation Notice and Tender of Payment Affidavit and Notice of Filing in this matter to be deposited in the United States mail marked Certified Mail Return Receipt Requested Delivery Restricted to the Address Only with postage prepaid and affixed thereto addressed as follows, this 25th day of March, 1997

SCDOT R/W Form 840 (11 15 96)

Certificate of Mailing (Cont d)

James Wilnin Johnson [redacted]

Dale C Johnson [redacted]

CERTIFIED, A TRUE COPY

Tiffanie B Parker

CLERK OF COURT C. P. & G. S.

Attached hereto is a copy of the returned receipt card or returned envelope showing whether the mailing was accepted returned or rejected

Evelyn S Turner

Evelyn S Turner
Rights of Way Administrator

SWORN to before me this 5th

day of May 19 97

Joyce J Woodruff

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 6-12-06

FILED

MAY 6 8 54 AM '97

FLORENCE COUNTY SC

File 21 938 U S Route 378 Florence County Tract 6
Page 2 of 2 Pages

FILED

MAY 6 8 54 AM '97

CLERK OF COM'PT C P & G S
FLORENCE COUNTY S C

...ERTIFIED A TRUE COPY

CLERK OF COM'PT C P & G S
FLORENCE COUNTY S C

Is your RETURN ADDRESS completed on the reverse side?

SENDER
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee)
1 ☐ Addressee's Address
2. ☒ Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Dale C. Johnson
[redacted]

4a. Article Number
P 581 697 154

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
5-2-97

5. Received By: (Print Name)
JAMES W JOHNSON

8. Signature: (Addressee or Agent)
X [signature]

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994
Domestic Return Receipt

Thank you for using Return Receipt Service

Is your RETURN ADDRESS completed on the reverse side?

SENDER
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee).
1 ☐ Addressee's Address
2. ☒ Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
James Wilma Johnson
[redacted]

4a. Article Number
P 581 697 154

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
5-2-97

5. Received By: (Print Name)
JAMES W JOHNSON

8. Signature: (Addressee or Agent)
X [signature]

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994
Domestic Return Receipt

Thank you for using Return Receipt Service

• Print your name address and ZIP Code in this box •
21 938
Route US 378
Florence Co
Notice of Cond fil etc
Tract 6
DIRECTOR PLANS OF WAY
SCDOT P
COLUMBIA SOUTH CAROLINA 29202
UNITED STATES POSTAL SERVICE
First-Class Mail
Postage & Fees Paid
USPS
Permit No G 10
• Print your name address and ZIP Code in this box •
21 938
Route US 378
Florence County
Notice of Cond fil etc
Tract 6
DIRECTOR PLANS OF WAY
SCDOT P O BOX 191
COLUMBIA, SOUTH CAROLINA 29202

STATE OF SOUTH CAROLINA)
) **RELEASE AGREEMENT**
COUNTY OF FLORENCE)

WHEREAS the South Carolina Department Transportation (hereinafter referred to as the 'Department) properly served the Condemnation Notice and Tender of Payment on James Wilma Johnson and Dale C Johnson (hereinafter referred to as the 'Landowners') for a certain portion of property necessary for the construction of U S Route 378 in Florence County South Carolina, and

WHEREAS the plans for the Department, File No 21 938 Project No NH-0052(131) Road/Route U S Route 378, for Tract 6, is specifically made a part hereof by reference, which plans reflect the property of the Landowners condemned by the Department, and

WHEREAS, the Landowners rejected the Department's offer for just compensation, and

WHEREAS, the Department filed a Condemnation Notice and Tender of Payment with the Florence County Clerk of Court on March 25, 1997, and

WHEREAS prior to the trial of this case in the Court of Common Pleas for Florence County, the parties agreed upon the figure of Fifty-one Thousand Five Hundred and No/100 Dollars ($51,500 00) as the just compensation and damages to be paid by the Department to the Landowners for the acquisition of the property condemned by the Department and

WHEREAS, the parties have also agreed that the Department will quit claim a portion of the old U S Route 378 roadbed to the landowners in settlement of this case.

KNOWN ALL MEN BY THESE PRESENTS that for and in the consideration of

1 The sum of Fifty one Thousand Five Hundred and No/100 Dollars ($51 500 00) to the undersigned in hand paid by the Department receipt of which is hereby acknowledged, and

2 A quitclaim deed issued to the Landowners by the Department for a portion of old U S Route 378 said portion is described by the "Plat of a Lot located at the intersection of Road S-21-57 and US Hwy 378' which plat was prepared by survey of Department on 12-4-97 by John L Johnson R L S & P E., No 7220, it is agreed that the quit claim deed will not be issued until the U.S Highway 378 Relocation Project is complete and the Old U S Hwy 378 right of way is released by the Department

the Landowners for themselves their heirs administrators, executors and assigns, do hereby acknowledge the aforesaid as payment in full for the just compensation to them as a result of the aforesaid condemnation and acquisition by the Department, and do hereby release, acquit and forever discharge the State of South Carolina, its agencies, departments, institutions, boards and commissions, and officials, agents or employees thereof or successors thereto, and particularly the South Carolina Department of Transportation from any and all claims demands damages, actions, causes of action, and suits at law or in equity, of whatsoever kind or nature arisen, arising, or to arise from or because of any matter relating to the construction of U S Route 378 in Florence County, South Carolina

IN WITNESS WHEREOF we have hereunto set our hands and seals this 3rd day of June, 1998

IN THE PRESENCE OF

JAMES WILNIA JOHNSON
Landowner

DALE C JOHNSON
Landowner

2

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

C/A NO 97 CP-21-432

Road/Route US Route 378
File 21 938
Item
Project NH-0052(131)
Tract 6

South Carolina Department of Transportation

Condemnor,

vs

James Wilma Johnson and Dale C. Johnson,

Landowners

CONSENT ORDER OF DISMISSAL

This matter comes before me upon the motion of the Condemnor South Carolina Department of Transportation, pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure for an Order to end this case because the case has been settled pursuant to S. C. Code Ann. § 28-2-40 1976, as amended

IT IS THEREFORE ORDERED that this case be ended and stricken from the calendar and that the Clerk of Court be ordered to annotate a copy of the Condemnation Notice and Tender of Payment with the amount of settlement as Fifty one Thousand Five Hundred and No/100 Dollars ($51 500 00) and file the annotated Condemnation Notice and Tender of Payment with the Register of Mesne Conveyance or the Register of Deeds for Florence County as provided by law for the recording and indexing of deeds and

CERTIFIED, A TRUE COPY

Bernice B. Parker

CLERK OF COURT C. P & G S
FLORENCE COUNTY S C

IT IS FURTHER ORDERED that the Condemnor is hereby exempt from pay recording fees as provided under S C Code Ann, § 12-24-40 (Cum Supp 1997), and

IT IS FURTHER ORDERED that the Clerk of Court shall return the Seventeen Thousand Eight Hundred Thirty and No/100 Dollars ($17,830 00) previously deposited with it minus any amounts the Landowners may have drawn down, plus any interest that may have accrued, made payable to the South Carolina Department of Transportation to the attention of Barbara M Wessinger, Assistant Chief Counsel Post Office Box 191, Columbia, South Carolina 29202

AND IT IS SO ORDERED

JOHN L BREEDEN JR.
Chief Administrative Judge
Twelfth Judicial Circuit

Florence, South Carolina
April 29, 1998

WE HEREBY CONSENT TO THE ABOVE ORDER

BARBARA M WESSINGER
Attorney for Condemnor

JEROME P ASKINS, III
Attorney for Landowners

LARRY D REDDECK
Attorney for Landowners

2

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2009-CP-21-2961
	)	
	)	
	)	
	)	
North Point Development Group, LLC	)	)
	)	
vs	)	TRANSCRIPT OF RECORD
	)	
SCDOT	)	)
DEFENDANT	)	December 18, 2009
		Florence, South Carolina

B E F O R E

THE HONORABLE MICHAEL G NETTLES, JUDGE

A P P E A R A N C E S

VAN WHITEHEAD, ESQ
Attorney for the Plaintiff

BEACHAM O BROOKER, JR , ESQ
Attorney for the Defendant

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, no witnesses were called.)

THE COURT The first case is North Point Development Group, LLC vs South Carolina Department of Transportation 2009-CP-21-2961 Be glad to hear from the moving party

MR WHITEHEAD Thank you, Your Honor Van Whitehead on behalf of North Point Development Group We got a brief that I prepared for you, Your Honor, if I may bring that up

THE COURT Very good

MR WHITEHEAD Additionally, I brought with us a survey of the subject property provided a copy to the department just for your reference

THE COURT Very good

MR WHITEHEAD Your Honor, just to provide a quick reminder of the background on this matter On November 10th, North Point submitted an application for an encroachment permit to the South Carolina Department of Transportation On November 20th, that application was summarily rejected by way of e-mail from an employee of the Department of Transportation Subsequently on November 30th, a petitioner filed this petition for judicial review, which we are here on today I like to move to a central issue at the heart of this matter first and somewhat out of order with the sequence of my brief and that is the issue of DOT's failure to establish controlled access on the

frontage of petitioner's property on U S Highway 378 The issue of access from (inaudible) and including corner property is a substantial right that has been traditionally recognized in South Carolina And in fact, in 2007 Supreme Court case of Harden vs South Carolina Department of Transportation, the Court stated that a property owner in South Carolina has an easement for access to and from any public road that abuts his property regardless of whether he has access to and from an additional public road Additionally, the Department of Transportation is required by statute that when it is taking or requiring property rights, it must do so in the same manner as now or hereafter authorized by law for requiring property or property rights So the basic point here DOT is required to take actions in the traditional fashion when requiring property rights, if they're going to take access

With respect to the petitioner's property here it s our position that DOT has not lawfully required the right of access from Highway 378 In the brief, I cite some case law which outlines the further point that an integral element of any deed or property conveyance must clearly identify the property or interest being conveyed With respect to this situation, DOT looks to what I refer to as a swince instrument for its claim that they have required this right of access When you read that instrument, it simply

does not clearly communicate that the right of access has been taken along the entirety of the petitioner's property on Highway 378 and would require a great amount of speculations and conjecture on the part of the Court to read that in

' Additionally, case law establishes that it's improper for the Court to consider parol evidence to rehabilitate such defective property description Therefore, it's our position that swince instrument upon which DOT relies is fatally defective Of particular note here, that instrument feigns reference April 23, 1996, DOT plan DOT has provided us with drawings which they've already submitted to the Court Those drawings -- let me back up We've never been provided with an April 23rd 1996 plan or drawing The drawings that DOT provided that they represent us being controlling in the situation are dated April 29th and April 30th 1997, and even more importantly the swince instrument or deed, if you want to give it that much weight, was filed April 18th 1997 And so these drawings that DOT is providing post date the instruments itself and it simply does not line up for purposes of conveying the property So our position that it's between such an indefinite and certain unprecise description of the -- of what DOT is claiming that the petitioner's right of access both as matter of law and equity should dictate

that the petitioner's right of access controls

Your Honor, we believe that that -- those issues alone establish that that property along Highway 378 still has the right of access for free ingress and egress along 378 and it's entitled to a normal and proper application and authorization from DOT as requested by the petitioner

THE COURT All right I hate to interrupt you, but this is going from like Lake City to Conway right around the Kingsburg area?

MR WHITEHEAD Yes, sir

THE COURT All right Everybody knows where that big big house -- the Bazen house on the right is Where is that in relation to that?

MR WHITEHEAD This is a little further towards Conway at the intersection with Old River Road

THE COURT Okay There use to be a -- sort of a road that went off to the right, it's been closed and there was sort of a truck stop there that's abandoned by there

MR WHITEHEAD Yes, Your Honor

THE COURT All right And it's that piece of property where the truck stop was or a little bit closer towards the intersection?

MR WHITEHEAD If you're traveling towards Conway and Badger Bazen's house is on the right and that old wedge that you re thinking of will be on your right as well little

bit further down, this property is on the left as you come to the intersection with Old River Road and 378 there

THE COURT I know exactly where you're talking about Now, we're talking

MR WHITEHEAD The left corner ---

THE COURT Now, I got a visual, you can proceed Go ahead

MR WHITEHEAD Your Honor, in that location, you know, there's no curve, it's just road and petitioner's property

THE COURT I think there is a curve there, isn't it?

MR WHITEHEAD Your Honor, my recollection from my most recent travels down there was that there was not However, I understand the department's position that they still like to have access, even though people refer to these as curb-cut permits I think we recognize that they like to utilize that permitting system even if there's technically not a curb present, but the point being this is not a congested ---

THE COURT I think you're talking about -- did you say that the road was straight and there is no curve and therefore it wouldn't pose a problem, did you curb or curve?

MR WHITEHEAD Curb

THE COURT Okay, I got you, I understand Go

ahead

MR WHITEHEAD Yes, Your Honor And, Your Honor, one key point reflected on the survey drawing and reflected in the application is that frontage there is approximately 275 feet long In the prospect of DOT taking the entire right of access along that entire frontage simply does not flow out of the instrument upon which they are relying

THE COURT All right Why do you need access to that road if it's on a -- I'm just asking why do you need access on that road?

MR WHITEHEAD Your Honor, it's my understanding that there's a potential purchaser who would like to make use of that property And it's my understanding that access at least on 378 perhaps both frontages will be preferred

THE COURT Okay, I got you, that answers that question

MR WHITEHEAD Yes, Your Honor With respect to DOT's decision on this application, they summarily reject it They don't even consider it As reflected in a letter file by DOT's counsel, they express the position that DOT didn't deny it, they just didn't consider it And it's our position that they are required to consider that application and to the extent they gave it any consideration, it was so summarily rejected that that is holy improper on behalf of DOT

I've outline in our brief some of the additional arguments as to due process and in the way DOT has handled this application Furthermore to the extent DOT is claiming this property has restricted access or controlled access, it's our position that their denial is ultravires because they have not properly established controlled or restricted access along that frontage

Your Honor, I believe the additional arguments are sufficiently outlined in our petition as well as the brief I'm happy to address any further questions you have, but we certainly stand by the petition and the brief The remedy we are requesting is an order from this court declaring that the petitioner's property is not subject to the controlled access claim by the Department of Transportation based on the swince instrument And we would ask that the order also direct the Department of Transportation to issue an encroachment permit for direct access to Highway 378 as requested in the encroachment permit application, which has also been presented to the Court

THE COURT I'm not very familiar with this particular type controversy When I think of controlled access, I think of I-95 where there no roads that go into it and various other freeway type situations, loops around town and things of that nature But you think about 378, I mean, I think there's probably thousands of driveways and all I

assume that the proposed restricted access will be where it's four lane as it approaches that intersection, is that how ---

MR WHITEHEAD Well, Your Honor, I have not explored the status of the surrounding area

THE COURT Maybe, the department can explain that, but you don't know?

MR WHITEHEAD I don't know as far as the extent of DOT's claims of restricted access along 378

THE COURT Okay Is the purchaser that's going to buy is a gas station or do you know?

MR WHITEHEAD I don't know, Your Honor

THE COURT Okay, very good All right Yes, sir, be glad to hear from you

MR BROOKER Thank you, Your Honor I'm Beach Brooker, I'm assistant chief counsel of DOT And this is Mike Bethea, he's the head traffic engineer for us in this region He will be ---

THE COURT How about we start off with that question about how long is the proposed or the alledged limited access?

MR BROOKER Well, I can probably show you on the plans, Your Honor It varies as the -- on legs of this major intersection There will be a notation on there called in controlled access on the department The reason,

of course, and, I guess, I'm starting off with some engineering testimony as you can see from those plans the -- prior to this intersection modification, there was a real mess There were roads coming in at all angles It was a very high accident area and we eliminated most of those as you can see in making it to a right angle -- highways crossing over right angle And because of that, we bought controlled access lines along all four quadrants from the adjoining property owners for a distance to make sure, of course, that turning vehicles don't come out of those properties across the turn lanes You see they have right turn lanes, left turn lanes, heavy traffic to a certain point and those standards have actually increased since this time 1997 It's now -- it use to be, I think, 75 feet, which is now -- has to extend further But also just to explain the statutory system, Your Honor, I want to hand you up a statute that establish this Article 7 -- what is now Article 7 of Title 57 of the code And this is what we refer to as the controlled access statute and 1956 Statute 21, it was allow South Carolina participate in the interstate system, which is just getting started just enacted by Congress in that year But it also goes further and establishes this permit system for access to primary highways So it really has three parts new facilities, new controlled access facilities that Legislature declared when

you take land for that purpose the landowner and the condemnation doesn't have any right to special damages because of the lack of access to the new facility, which, of course, he wouldn't have had in the first place because it wasn't there

And then secondly it sets up a system for converting existing highway facilities to controlled access and says that it gets the department authority to buy the access rights from the adjoining landowners, which is what we concerned with here And then thirdly for non-access primary highways that sets up its permit system, which is what the local maintenance guys do and what Mr Whitehead is referring to as request for permit application process The reason I think this statute even though all the sections are -- Title 27 has a preamble -- what Legislature telling us what they were doing They were saying that we -- because of all the accidents primarily attributable to people entering into primary highways from driveways and side roads, we want this permit system to be set up where those decisions can be made by the highway department based on sound engineering principles

They did provide for judicial review for the encroachment permits from the state primary highways and then that's what Mr Whitehead has sued under here, but there is provision for judicial review for the decision to

establish facilities controlled access in the first place Now, when we did this, we did this project 1997 We brought from Mrs Swintz the -- all of her rights of access to the highway and paid her for that And that's what's included in her deed in the language that says for certain acres damages to any rights of access that might be needed for controlled access facilities or the way it would have gone as you -- as any condemnation we go to the landowner present the plans, the plans for the road to be built and showing her where the controlled access lines will lead negotiate a price for that, plus the taking of whatever land As far as the dates on the plans, the normal progress of a highway project as you have the preconstruction plans which the right of way is negotiated on the bids for the contractors are let out Then as the project goes along you have working plans that are changed by the various notations when things come up What I have shown you is the as-built plans and that is where the controlled access line was established pursuant to Mrs Swintz grant to us of the right to do that

Finally, Your Honor, putting the two systems together the personal permit system on the applications on the primary highway system with the controlled access decision, type decision, type process would allow someone to novate a cause of action of an item challenging the original decision to establish controlled access I think that that

brings this time bar problems and I don't think that that should be heard under 57-5-1120, which is what we're reporting here I also take any questions you like or Mr Bethea can answer engineering

THE COURT Mr Whitehead, be glad to hear from you in reply

MR WHITEHEAD Your Honor, very briefly Although, you know, we certainly understand the important efforts the DOT takes for safety and such The preamble to the act itself obviously does not negate the statutory requirements that are adopted in that act The core issue here is that the statute requires that access be taken in the ordinary course of property right acquisitions And DOT simply has not followed those formalities And if you take a moment and look at the swince instrument reading it plainly, it simply does not communicate that this right of access has been taken It make this reference to plans prepared by the Department of Transportation and dated April 23rd 1996, said property being herein conveyed to have a width of X X X X feet That is 75 feet on the left sides of the survey center line of the highway as shown on the reference plans And then it goes on to include some additional language that reading it on its face it simply fails to communicate what is being taken

THE COURT He maintains that they negotiated a

price for the taking of the land and to compensate them for limited access And what you're saying is that the deed itself refers to a document, a 1996 document that you have never been provided?

MR WHITEHEAD Yes, Your Honor

THE COURT All right What do you have to say about that?

MR BROOKER I imagine they still exist They would be working plans, but it's sort of like the doctrine of merger type thing All mergers in the as-built plans what was shown in 1996 to Mrs Swintz I couldn't find, I think but

THE COURT Okay What you're maintaining is in fact it was the preliminary for the as-built plans? How do we know there weren't changes to it?

MR WHITEHEAD Well, what I would argue, Your Honor, is Mrs Swintz sold us all of her access If there s less than all of the access established on the plans, then that's to their benefit and I think the controlled access line does end before the end of her property as you notice on the plans, but nevertheless, she's -- we paid her for any access

THE COURT Well, he's saying that the deed doesn't say that other than by reference of the -- to these plans I think that if we have as-built plans here, that we

probably need to see where the lines were in the 1996 document, don't you think? You tell me, I'm asking

MR BROOKER I think they're referring to the '96 plans probably for the area to be taken from her as far as where footage, but when it comes to any rights of access that maybe needed for controlled access facilities, I would think from that language by signing the deed she would have understood that all of her access was being bought

THE COURT Say that again?

MR BROOKER When she signs a deed -- when she signed the deed saying that she is selling any rights of access to her property ---

THE COURT He's saying that the deed doesn't say that I've never seen the deed He's saying that the deed doesn't say that

MR WHITEHEAD Your Honor, I've got a copy, I'll be happy hand up

THE COURT Why don't you hand it to him and see if he can show me where it says that she selling all access

MR BROOKER All right The above consideration, in the above consideration was $21,000 even above consideration is for 570 acre of land damages and all improvements thereof including rights of access as may be needed for controlled access ---

THE COURT Okay, well, it does indeed say that

MR WHITEHEAD Well, Your Honor, to the extent it says ---

THE COURT Of course, we need to figure out where the lines were based on that document

MR WHITEHEAD Exactly It says I'm giving you something, but it doesn't delineate the extent of what is being conveyed All that we've been provided are drawings created a year after the reference instrument and filed or created even after the date the swince instrument was filed and so to say that those April 29 and April 30, 1997, drawings represent the agreement that had previously been filed, that simply does not follow with traditional principles of conveyance in corporation by reference

THE COURT All right

MR WHITEHEAD I would just stand on my argument, Your Honor, that the language saying any rights of access that may be needed is selling all of her rights of access We could come in today if controlled access lines on the plans is being argued here ended before her property line ends I think we still have the right to establish controlled access line all along her property boundaries if she sold all of her rights and I believe that's what the language says

THE COURT What you say to that?

MR WHITEHEAD Well, again, Your Honor, this is a

corner lot and to suggest that that language says she sold all of her access, it would make no sense for someone to convey away all their access to a corner parcel Therefore, it leaves the question of, you know, if she is conveying access, where is it And we again, the face of the deed or the swince instrument does not delineate the bounds of such We haven't been provided a drawing And there's certainly no filed record -- no filed drawing delineating that With respect to my client, they were good faith purchasers for value in the situation and did not have record notice as to a complete lack of access as the department is now claiming

THE COURT Let me see that deed All right, Mr Whitehead, how you gone say that the purchaser of this property doesn't have notice of the language that says the above consideration is for 57-acres of land, plus any damages related to the taking of it, which would also involve access and all improvements there on if any including the rights of access as may be needed for controlled access facilities, kind of as needed?

MR WHITEHEAD Well, Your Honor, again, that would be like, you know, me conveying property, you know, to be determined to make such a conveyance without specifying what is being conveyed is just ---

THE COURT Well, at least, he was on notice that there was some going to be some limitation just by the

language of the deed

MR WHITEHEAD You know, we can't dispute the recitation of language in the deed, but as to giving fair notice as required by South Carolina law for conveyance of property rights, DOT is not exempt from those traditional requirements and that sort of language is just fatally defective

THE COURT All right, what do you propose -- this action was brought because you petition for right of access and they summarily denied it And what is the relief you want me to do? Do you want me to mandate that they conduct a hearing on this? Mandate that they provide to you the '96 plans? What do you want me to do?

MR WHITEHEAD Well, Your Honor, our request for relief in light of the fact we think that this is not controlled access is that DOT should have authorize the encroachment permit as requested We believe it's a reasonable request

THE COURT How do we determine whether its controlled access They have this map that is highlighted where they may maintain it's controlled access And how do we make that determination whether it's controlled access? He says it isn't

MR BROOKER Well, Your Honor, these are official highway plans

THE COURT Well, all I'm looking at is a map of a intersection with highlighted area Explain how I can look at this and see that that says it's limited access?

MR BROOKER Explain how ---

THE COURT I want you to explain how I can look at this map right here and determine whether or not it's limited access?

MR BROOKER All right Well, you'll see little circle pointing to a dotted line that says new CAC slash A, that means new controlled access line And then you follow that line along the property boundaries with the road until it says end controlled access NCA Mike can have a larger set of the plans and Mike can point it out to you

THE COURT He maintains it's not limited access What is the foundation for you saying it's not limited access?

MR WHITEHEAD Well, Your Honor, South Carolina case law just to quote some language that's included in the brief This is from the South Carolina Supreme Court in a 1975 case says, One of the essential terms of a contract of sell of land is the identification of the land -- I removed a little bit of language and then continued, hence the land must be described so as to indicate with reasonable certainty what is to be conveyed parol evidence cannot be relied upon to supplement a vague in uncertain description

With respect to DOT's swince instrument, it simply cannot provide adequate notice to subsequent purchasers as to what is being conveyed and to leave it open ended and clapping in the wind as to where or what the nature of this controlled access is

THE COURT All right Now, you gone have to help me with this Parol evidence as I understand is evidence to explain the written word, isn't that right?

MR WHITEHEAD Correct, Your Honor

THE COURT All right This -- do you think that the instrument they make reference in here the '96 instrument, that's not parol evidence, is it?

MR WHITEHEAD Well, Your Honor, to the extent we've never been provided with that instrument -- I recognize that in corporation my references a standard tool used with deeds However, those references need to be available and identifiable Normally, it's done by references to recorded plats, here we do not have a recorded plat The only reference we have is to that '96 plan And we've never been provided with those plans, we never seen those plans And so essentially that is a dead end to the description of what is being conveyed And it's our argument that that renders this instrument defective and sufficiently defective that subsequent good faith purchasers for this property should not be so constrained by the

department relying on deficient instruments

THE COURT Well, Mr Whitehead, if you were buying some property and you read the very first sentence of the description that says including rights of access as may be needed for controlled access facilities A prudent buyer ought to look and figure out what the parameters are, don't you think?

MR WHITEHEAD Well, Your Honor, I think it's important to also consider ---

THE COURT I mean, that's about as good a notice as you can get, if there's a problem at least

MR WHITEHEAD I think it's also important to consider the proceeding language said said property being herein conveyed to have a width of X X X X feet, so essentially it gives no reference to the width and feet And then says that is 75 feet on the left side, so trying to read those together again creates substantial confusion in this instrument

THE COURT All right This is what I'm gone -- so essentially what you want to do is you want to hear it?

MR WHITEHEAD Well, Your Honor, we love to have you go ahead and make that determination today We think that for Department of Transportation to assert their claim of controlled or restricted access, you should be able to pick up that instrument today and read it on its face and be

comfortable knowing what and where that controlled access is, We don't believe that the swince instrument or the plans the DOT has provided can do that And we don't think -- we think, you know, most likely that's by the best showing they can make as to their claim for controlled access But that's the best claim they can make as to controlled access, it's our position that they have not sufficiently satisfied the legal requirements in South Carolina for the taking of that valuable property right and accordingly ---

THE COURT So what you're saying is I ought to from the bench here today grant access to the 378?

MR WHITEHEAD Yes, Your Honor

THE COURT Okay In the alternative perhaps hear it? In the alternative perhaps a hearing?

MR WHITEHEAD If, Your Honor, deems that appropriate

THE COURT I'm sure the Department of Transportation maintains that they aren't obligated to -- since its controlled access, he doesn't have a right to a hearing And under any set of circumstances, I don't have the right of the jurisdiction to grant him access?

MR BROOKER Well, Your Honor, I think that the main case, which is the only time the courts has ever taken up one of these, they did it under mandamus and the result

was that the Court looks at whether the department exercises its discretion, but doesn't look behind that to second guess the department I think we got enough evidence here that we actually exercise discretion to establish controlled access

THE COURT All right This what I would propose and I'll be glad to hear from both of y'all I think we probably do need to look at this 1996 -- is that the right date '96? The '96 date?

MR WHITEHEAD That's what the swince instrument resites

THE COURT All right I would propose and I'll be glad to hear y'all input I would propose that you exchange or give to Mr Whitehead this '96 document and suggest that each of y'all send me a proposed order after having given him access to that document You send me one saying, which I anticipate is going to say that its -- we've established through this document and through the '96 swince document, that it's controlled access and their -- the highway department does not -- is not required to conduct a hearing nor do I have the authority to grant access I assume whatever your proposal would be, whatever you think the law provides and set forth the case law and the statutory provisions that support that

And, Mr Whitehead, I understand what you're argument is that the document is vague and that you can have

the ability to look at this '96 document like I assume the purchasers probably could have and you can fashion an order to support your various arguments And I anxiously await to read to these very interesting documents and we'll handle that shortly

MR WHITEHEAD Thank you, Your Honor

THE COURT How long do you think it will take for you to get this document? I wouldn't anticipating getting them today, but you can put your hands on them

MR BROOKER Well, certainly they're down in the basement of the office I work in

THE COURT All right Well, that's good And you think you can provide that to Mr Whitehead within the next week or so?

MR BROOKER Yes, sir

THE COURT All right Let's do that Why don't we -- when would y'all feel comfortable getting proposed orders together, Mr Whitehead? We do have the holidays coming up

MR WHITEHEAD Well, I feel like I've identified some substantial background work as far as my side of that in preparing a brief depending on what, if anything, the DOT is able to provide to us on the '96 I feel pretty well prepared in terms of providing something as quickly as I can

THE COURT Okay, very good All right
How about the department?
MR BROOKER As soon as reasonable after the holidays
THE COURT How about January 15th, that give everybody plenty of time?
MR BROOKER That's plenty of time
MR WHITEHEAD That will be fine, Your Honor
THE COURT Everybody have a good Christmas, thank you
END OF REQUESTED TRANSCRIPT

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out, that I was authorized to and did transcribe the said proceedings, and that the foregoing and annexed paged, numbered 1 through 27, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing In the Court of Common Pleas for Florence County, South Carolina, on the 18th day of December, 2009

I do further certify that I am neither of kin, counsel nor interest to any party hereto In witness whereof, I have hereunto affixed my signature this 14th day of March 2010

Keshia Reed, Court Reporter
My Commission Expires 6-5-2010

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF FLORENCE) 2009-CP-21-2961

NORTH POINT DEVELOPMENT GROUP, LLC)
PLAINTIFF)
vs) TRANSCRIPT OF RECORD
)
SCDOT)
DEFENDANT)

April 28, 2010
Florence, South Carolina

B E F O R E

THE HONORABLE MICHAEL G NETTLES, JUDGE

A P P E A R A N C E S

JOHN CHASE, ESQ
Attorney for the Plaintiff

BEACHAM O BOOKER, JR , ESQ
Attorney for the Defendant

CAROL M THUEME, RPR
Official Court Reporter

I N D E X

(There were no witnesses produced)

EXHIBITS

(There were no exhibits marked)

THE COURT Madam Court Reporter, the first matter before the Court is North Point Development Group, LLC versus South Carolina Department of Transportation, 2009-CP-21-2961

I think this is a motion for reconsideration I'll be glad to hear from the moving party

MR CHASE May it please the Court

THE COURT Yes

MR CHASE This is John Chase Good morning, Your Honor

THE COURT Good morning

MR CHASE I'm here with my partners, Van Whitehead and Ben Zeigler The three of us are with Haynsworth Sinkler Boyd and we're here on behalf of the petitioner We drew straws this morning and I have the pleasure of making this argument before the Court

THE COURT Good

MR CHASE If I may, I'd like to approach the board and draw a brief visual diagram that might help in illustrating the points that we are here to discuss today

THE COURT Sure

MR CHASE If Your Honor please, this is a reconsideration request If you will recall, this matter relates to the November 30, '09 petition of North Point challenging the denial of a curb cut by the Department of

Transportation

In its response, the Department's most particular position is that this is a controlled access area

In the Court's order dated January 25, 2010 -- I trust the file's been delivered back before Your Honor -- the Department's argument was, and the Court relied upon it, that it had purchased the appurtenant access rights from North Point's predecessor in title prior to North Point's acquisition of the property We've asked the Court to reconsider its ruling denying the curb cut based on several matters

The first I'd like to address is the ruling by the Court to the effect that the plans for this roadway improvement were filed as required by 57-7-570 That's a statute, if Your Honor please, that makes it a duty of the Department of Transportation to maintain -- and that's the word used in the statute -- to maintain plans of the nature we're discussing today in the tax assessor's office And then the statute goes on to provide, Your Honor, the reason why the Department is required to maintain plans, and that is so that persons in need of relying thereon may have access to them The statute says specifically that

These plans are not maintained in the tax

assessor's office, and the implication that they are so maintained is not correct, Your Honor

The Court relied on that implication in its ruling The Court's order stated that the plans are so filed They are not filed, Your Honor Whether they were provided or not is a representation made by the Highway Department, but they are in fact not there And that's an important point, Your Honor

And if I may, the reason why I'd like to illustrate is an important point being with reference to the drawing I just put up

This intersection where River Road runs into Highway 378, it's no more a controlled access road than Irby Street is To me, a controlled access road is, well, let's say I-95 One may not get curb cuts onto I-95 And I would ask the Court take notice of the fact that U S 378 is replete with any number of curb cuts into U S 378, from people living on 378, having businesses on 378, stores in the immediate vicinity of this property

And, therefore, if the area that we're dealing with -- and specifically the area we're dealing with is this area here, Your Honor -- if this area is a controlled access area, which clearly the road itself is not, but if that area is a controlled access area, as the Department, I think, would have to acknowledge, it must be because it,

the Department, purchased access rights appurtenant to other property that it acquired from our predecessor in title

I would like to hand up to the Court, if Your Honor please, and this is the same document that the Court has before it from the record, but just for the convenience of all parties, this is the deed to the Department signed by the predecessor in title of the petitioner and I would ask the Court to focus on the granting clause

Now, the granting clause is not the special provisions paragraph, Your Honor The granting clause is in the two or three lines immediately above the special provisions

And the granting clause states that the grantor is conveying property having a width of XXXX feet, and then it goes on to say that is 75 feet on the left side of the center line of the highway

Well, there are four highways mentioned two lines above that And I think the point is an important one, Your Honor, because if the Department says that its purchased access rights, then it has got to have purchased the access rights appurtenant to that land

What land? The land that is XXX feet, that is, 75 feet left of the center line of the highway

Now, if Your Honor please, I don't know the square footage and I don't know the dimensions and I don't know the acreage of that area, but when the petitioner acquired this property, it was -- its property -- when the petitioner acquired its property, it was reasonably concluded by it that what the Highway Department had gotten was this, that triangular strip, because the intersection had been widened

Now, the Highway Department takes the position that the deed that you have before you, that it acquired XXX feet, one dimension -- let alone that there's XXX feet by something else, it doesn't say that -- we can't tell if it's a triangle, a rectangle, a parallelogram, a square -- it's just that it's XXX feet

The Department apparently takes the position that in acquiring this deed from the predecessor in title and access rights appurtenant to that land, that this entity now is barred from having access whatsoever to Highway 378

This is 300 feet, Your Honor Three hundred feet from this intersection This is not a limited access highway Certain portions of it may be limited access, I don't know what access rights --

THE COURT I think we talked about that in the original hearing That was one of the questions I had was

that 378 is not like 95 and other interstates that have limited access, but the Highway Department was clear that when you have busy intersections like this, they quite often reserve a section that's limited access

MR CHASE They might well do that, Your Honor But the document upon which they claim, and I think the Department upon inquiry would concede, that if it is to have as to our property the right to bar a curb cut, it would have to have acquired the same, that deed pursuant to that language It is an appurtenant right to the legal description of the property acquired In other words, if it had just bought the land -- let alone the poor description of what it bought, but if it had just bought the land, it wouldn't have been able to bar access right Its deed has got to go on to say what additional rights it might have

That deeds does It says, in very inartful language I might point out, including rights of access as may be needed for controlled access facilities

It doesn't say, as one would think, from the word of deeds such as this, more plainly to state that all access rights are being acquired All it says is in the special provisions second line, including rights of access as may be needed for controlled access facilities

Presuming, as the Department wishes to take the

position, that that means it's acquiring the access rights for the property which is the subject of this deed, we have to look to see what property was acquired under this deed to see whether the land that we're interested in was impacted by it

And, Your Honor, you cannot look at this deed and discern that what the Department acquired access rights over is an entire 300-foot strip of land There's nowhere in the deed that describes it as so

And more importantly for purposes of this reconsideration hearing, Your Honor, there's nowhere in the plans maintained in this courthouse that describes any of this, because those plans are not maintained And representations made to the Court which caused the Court to rule in its order that the plans so filed are maintained is not correct They are not

That is the principal argument upon which the petitioner asks the Court to reconsider its ruling

As a secondary matter, Your Honor, we feel that the representation made and which was implicit in the Court's ruling that 378 is a limited access highway is incorrect For these reasons we would ask the Court to reconsider its ruling and direct the Department to grant a curb cut to the petitioner on the southern portion of its property in the boundary it shares with U S Highway 378

THE COURT Very good I'll be glad to hear from the Department

MR BROOKER Thank you, Your Honor Did my return have time to get to you?

THE COURT I'm not real sure if it did or not, but you can share it with me right now and we'll go over it

MR BROOKER Of course, Your Honor, we don't believe there's any vagueness in the title to real estate from North Point's predecessor in title, Mrs Spence Back at the time in 1997, she conveyed to the Department some land for the widening of U S 378 because this intersection of U S 378 was designed to be controlled access and conveyed in this instrument all her access rights to the abutting highways that might be needed by the Department

Now, this -- any other evidence, anything else contained extraneous to the deed or even in the deed can only cut down a conveyance of ultimate access rights, and in fact it's plain on the face of the instrument that what happened was we -- she had two driveways which she conveyed her access rights to those so they could be designated as controlled access lines and we gave her a new driveway which we built at our expense up at the far end of her property

As far as the alleged vagueness of the title of what we took from her, this XXX business, that is -- this is obviously a form title and we used this form so it would be uniform across the state that's alternative to a 75 foot from the center line measurement and I would submit that the highway plans, as engineered and accurate as they are, are the better measurement instead of going out and trying to survey the actual meets and bounds of a triangle like this, a site triangle like this, or land taking from someone is distance from the center line of the highway And I think that you can ask any surveyor and they would prefer that method as a more accurate way to measure real estate, real property boundaries with respect to public highways

Regarding the filing with the tax assessor's offices of the state highway plans, state highway plans, of course, are official statutory state documents That is a secondary source, that particular statute gives a secondary source in each county for landowners to go research their titles and their boundaries with the State Highway System, the roads in the State Highway System

The primary source, as any surveyor would know, is at the DOT headquarters itself That's where the official plans are kept These that are filed with the tax assessor is just a secondary source and a convenience

to the public

Surveyors don't use them They know to call the right-of-way section at DOT headquarters and there's someone called a duty officer on duty all the time and we just e-mail them the plans They're scanned in and that's a much more efficient way to do it

North Point has not shown how this harmed them They have a survey by a licensed professional surveyor who was able to locate their boundary, the boundary of their land they bought from Ms Spence, with the highway So what is the harm? I mean, this is a technical argument that really doesn't hold up and they've not shown that it caused them any trouble and I just don't see that as a reason for destroying a property right that the Department purchased for good value from the predecessor in title

Concerning the argument that this is not really a legitimate controlled access facility, there are many types of controlled access facilities and this is in the standard engineering manual that's used nationwide limiting controlled access, full control of access like you see on I-95 and I-20

What this is is a limited controlled access facility intersection and all the quadrants of the intersection we acquired under the statutory method for acquiring it by deed or condemnation and we acquired the

access rights from all four corner property owners prior to this project, for which we acquired the controlled access

It was a mess It had about six or seven roads coming in at all angles and it was a very high-accident dangerous intersection When we got the money, the federal money to do this project as a safety project, we eliminated a lot of those crossings and made it a good cross-angle intersection, bought controlled access for several hundred feet from each of the landowners and in fact we're maintaining it as a controlled access

We have not mentioned before in these proceedings, but U S 378, of course, is one of the major routes to the beach and ultimately as one of our government DOT's policies, we're trying to make major U S primary highways ultimately to the beach areas for tourism reasons or whatever fully controlled access so when we have the funds to purchase access rights along U S 378 we do it, such as we did here

And, Your Honor, in their motion for reconsideration they were challenging our acquisition of controlled access rights to a parcel across the street to the southeast That was done by condemnation and the settlement of the condemnation was made And when you have a verdict or a settlement in a condemnation, because

you have no title when you record with the R&C with the register of deeds, is to have the original condemnation notice which shows the property condemned annotated with the amount of the settlement or verdict That is what is recorded in lieu of a deed with the R&C, and it's legitimately done here

In summary, Your Honor, the argument is based on some defect in this title to real estate, which frankly I don't see what we bought from Mrs Spence was some land, a 50-foot triangular area The land was described as from a distance from the center line of the highway, which we were certainly able to locate, and then we bought access rights as may be needed under official highway plans which are kept at the Highway Department, the ones in Florence, because the tax assessor apparently doesn't have room in this office, sends them over to District 5 DOT headquarters, which are open the same hours as the tax assessor

If someone goes to the tax assessor, they say, "We can't keep them here, go over to the DOT offices and they'll be happy to help you," and they also have, of course, regional staff of right-of-way people that will assist with that It's a much better system than having it at the tax assessor, which frankly doesn't work anywhere

In York and Aiken Counties, the ones that I've seen, they just throw them in a corner and you couldn't make any sense out of them It's a much better system in Florence

But in summary again, Your Honor, I don't see any defects in this The Department purchased for value the access rights from the predecessor in title, Mrs Spence, and we own it

A challenge to the designation as controlled access, going back to our earlier returns and to the motions herein, is not judicially reviewable A driveway curb cut permit to a primary highway is, but there is no judicial review of the decision by the DOT to designate a facility as controlled access in the first place, and we ask that the motion to reconsider be denied

THE COURT All right Yes, sir, Mr Chase, I'll be glad to hear -- let me ask you just one question

Essentially it's your position that this document that I'm holding in my hand, Title to Real Estate, the approximate survey station that was filed March 25th, '97, this document here in and of itself is adequate notice?

MR BROOKER Yes, Your Honor

THE COURT All right But you concede that the plans are not filed with the tax assessor's office?

MR BROOKER I will concede that they are delivered and filed with the tax assessor's office who doesn't have the room and sends them over to the DOT regional district office where they're maintained and indexed

THE COURT Okay All right Mr Chase, I'll be glad to hear from you

MR CHASE On that last point, Your Honor, briefly the statute --

THE COURT Let me ask you first procedurally about the fact that it's not judicially reviewable, the designation of a restricted access intersection

MR CHASE Well, Your Honor, we're here because what is reviewable is the Department's denial of a curb cut

THE COURT Right

MR CHASE That is reviewable

THE COURT Right

MR CHASE Now, their position is that they have a restricted access highway here, which the decision to make a restricted access cannot be reviewed

But let alone that point for just a moment, the issue that we're here on is we want a curb cut from our land to the highway and the only way that they can assert that this is a restricted access highway is through that

deed

THE COURT Right

MR CHASE We're not asking that the decision to make a restricted access highway be reviewed We're asking whether that deed makes that portion of this property to a good faith purchaser without notice like us aware by reviewing that document that this property has been so barred

A blind man can see it, Your Honor That deed is defective on its face Nobody looking at it can tell what it's referring to And the records are not in the Clerk's office

If I may go into that argument

THE COURT Certainly

MR CHASE We've been using the word "filed" in this context That's not the language of the statute, Your Honor 57-5-570, "The Department shall maintain " It doesn't say anything about filing, doesn't say anything about sending there and then transferring back over to the district office It says, "The Department shall maintain in the office of the tax assessor for each of several counties a copy of all highway plans," and so forth

The next sentence says, "These records must be for the convenience of persons making inquiry as to the right of the State in and to the right-of-way for roads

constructed by the Department in any county "

So we have a statute that says it must maintain these plans in this office and that we, a good faith purchaser, have a right to rely that they're there so that we can look at them to get ourselves from being in this situation And the Department takes the position that there's no harm?

It is the law of the State, Your Honor, that a property owner has the right of access to roads abutting his property I don't think anybody would question that

The Harvey case, the Supreme Court of South Carolina, 641 SE2nd 437, "The property owner has more rights As we have held, the property owner has an easement for access to and from any public road that abuts his property "

We have a right to access the public road, Your Honor, unless it has been bargained away And the Department wants to say that it was bargained away in that deed And its position under that deed is no different than any other person who would have a deed filed in the courthouse It has got to be sufficiently described in its deed what it got to give people like us an opportunity to know what's of record

We had no actual notice of its position All we can see was constructive notice of this deed being in the

chain And you cannot discern from it what is being conveyed to it and you can't decide from that deed what was conveyed, the specific land conveyed to Department, you cannot determine where or over what area its restricted access applies in the special provisions

And the other point, the final point I'd like to raise, Your Honor, it having been brought to the Court's attention in the reply brief of the Department and in oral argument just now, this business of condemnation across the street It's an attachment to the Department's reply brief and it's referring to this land here

Because the representation was made at the earlier hearing that this is a restricted access area, that this intersection, that these property owners had all given up access rights to this intersection

We questioned that in our reconsideration request We questioned it with specific regard to this piece of property here Because we couldn't find any kind of release conveyance of access rights It's not there

Now, the Department in its reply brief says, well, what is there is the condemnation material We condemned this property

Look closely at the condemnation materials, if Your Honor please, attached to the respondent's reply brief just now handed up to you

What is condemned is a specific area of land There is nothing in those materials, Your Honor, no special provisions whatsoever precluding the condemnees' access rights to this property

It is not correct to take the position that this property is a limited access area All the Department has done is acquire the title to real estate, nothing more, no special provisions, no acquisition of access rights

My guess is there's all kind of areas for these people to do business here It's certainly not a part of its condemnation material and nothing has been handed up to the Court that would indicate those people do not have access rights to Highway 378, which is not a limited access highway, and it is inappropriate for the Department to use this deed to burden that property of ours or of the petitioners with that preclusion

Thank you

THE COURT All right What does the Department have to say about -- they maintain there is no limited access on the south end of the intersection First of all, is that true? And if it is true, does that make a difference?

MR BROOKER That's not true, Your Honor The attachment to the return that I handed up to you has the condemnation notice and tender of payment against James

Wilne of Johnston and Dale C Johnson which was duly annotated and recorded with the land records of Florence County The condemnation notice, which describes the property being condemned reads, "All that parcel or strip of land in fee simple with improvements thereon, if any, including rights of access as may be needed for controlled access facilities " The same language was used in the acquisition from Mrs Spence

Both the condemnation notices and our titles to real estate refer to official highway plans that have in the granting clause as to what is being granted And these highway plans show a C/A and a little circle with an arrow pointing to a line that is the controlled access line, and that exists on all four quadrants of the official highway plans for File No 21938 for this project and relevant to this case

It was done correctly, Your Honor That's the way it is done and has always been done is by reference to official highway plans

You don't go out and survey everyone's land That would be useless That's the way the descriptions of titles for highway purposes are done

And it's fully accurate Any surveyor can follow them In fact, highway plans are the base data for most surveyors when they start a survey of private land

There's nothing inaccurate, nothing improper done here We acquired for value access rights to all four of those parcels of that intersection in order to make a controlled access intersection facility

THE COURT All right Mr Chase, the deed that we're talking about which the Highway Department maintains does indeed restrict access does make reference to the plans And, of course, the argument is that it isn't physically in the tax assessor's office as required by statute

I'm just curious Did the purchasers make an attempt to look at the reference plans that are set forth in this deed to determine what the Highway's position, what the plans provide for? Did your purchaser, your client, make an attempt to look at the highway plans when they bought it? Because it certainly makes reference to it in the deed

And where it's located might have -- you know, the statute says it ought to be in the tax assessor's office But I understand from the Highway Department that they say they are provided with a copy of it and if people inquire about it, they refer to where they're located, and that might be a location thing rather than whether or not they actually have it available

MR CHASE A couple of points, Your Honor

First, I've been examining titles for real estate for over 30 years To the best of my knowledge, the only occasion, if ever, that any person examining titles to real estate ventures outside of this courthouse to review records is with regard to environmental liens on file in the United States courthouse

No, Your Honor, no contact or effort of contacting any office of the Department outside of the confines of this building was made by the title examiner when this property was acquired The examination was limited to the records in this building And, of course, the Highway Department's records are not maintained here as the statute requires

THE COURT Wouldn't one thing that they make reference to the plans, that maybe even though it's not maintained in the tax assessor's office, that you're put on notice there might be a problem with it?

MR CHASE Your Honor, the ability of -- that we've experienced -- the difficulty that we've experienced in reviewing the plans of the Department even in this proceeding or with regard to trying to get this curb cut has been prevalent The plans that we've been given are dated a year after the date that's dated for these documents in the deed

THE COURT So you're saying the plans were made

after this deed was effectuated?

MR CHASE The records of the initial hearing, yes, Your Honor, right And the records of the initial hearing would reflect that And the explanation of the Department at that time and then the materials filed with the Court is -- well, it's an ongoing fluid situation

Highway Department plans are frequently modified We've yet to be presented with plans that are dated the date that is mentioned in this deed They've not yet to this day been provided to us

THE COURT All right What do you have to say about that? What does the Highway Department have to say about that?

MR BROOKER I thought we had cleared that up in our previous hearing, Your Honor

The plans start with design plans That's one set Then you go to right-of-way plans which is the date that is referred to in this deed

THE COURT Okay And I know that we did address that to some extent in the first hearing But my question to you is, if on the date of this deed, if they were to look at the plans, would they have been able to determine that it was limited access?

MR BROOKER Absolutely

THE COURT Okay And how so?

MR BROOKER Because it has designated on there controlled access line, Your Honor -- C/A and a circle -- and that's what we were going over in the last hearing on this matter I pointed out on each of those the C/A with an arrow to the line that's the controlled access line

Now, regarding -- everything regarding a parcel of land as to here in this building, that's just simply not true The primary depository of the state highway plans are in Columbia in the Plan Storage Office in which they have a couple of clerks there that will hand them out to you

However, in 1987, the highway distrainment deeds, easements and that sort of thing weren't even filed with the county courthouse The primary source led by statute was the DOT headquarters in Columbia That statute was repealed in 1987 and now we do record our titles in the courthouse

But that's simply not true There's nothing that requires -- other than that, there's nothing that absolutely requires that everything be in the Florence County Courthouse

THE COURT All right If you were to assume that they should be in the Florence County Courthouse, I want you to delineate for the record how this title that I'm holding in my hand right now puts them on notice that

it's controlled access

MR BROOKER Well, Your Honor, at the top it designates the road, the DOT File No 21 93821 for Florence County Project No 938

And then it says that Mrs Jean Spence is conveying land, real property in fee simple on an intersection survey on U S Route 378 4151, Road S-57 in the state and county aforesaid, as shown on plans prepared by the South Carolina Department of Transportation dated April 23rd, 1996

As I say, you can easily get that by calling the right-of-way section of DOT And it's described it as width that is 75 feet on the left of the survey center line of the highway

And special provisions go on to say that for above consideration, which being $21,000 even, is for the land and any improvement or any damages to the remaining land, which is part of the Condemnation Eminent Domain Procedure Act All improvements thereon, if any, including rights of access as may be needed for controlled access facilities

And then it goes on to talk about the driveway we're going to give her at our expense at the top of her property and the fact that we're going to cut timber and leave it stacked on the land for her and she'll be able to

keep that

And then it describes that 50-by-50-foot triangular site right-of-way at the corner

That's absolutely all you need to know what you're left with after this taking by the Department, Your Honor

THE COURT Anything further, Mr Chase?

MR CHASE Nothing other than all we seek, Your Honor, is a curb cut We requested a 66-foot wide curb cut We requested it at the center portion of the property It's a matter of relative indifference to us whether it's there or at the western perimeter where just adjacent to that property the next adjoining landowner has a driveway

This is not a matter of safety of the motoring public, Your Honor It's a matter of technicality with regards to a document filed with the courthouse that could not be reasonably construed bar the relieve that we now seek

THE COURT All right Thank you

This does present sort of an interesting question I am going to take the opportunity to review it I'm going to go over all the documents again I'm going to review both memorandums and I anticipate -- what's today? Wednesday Hopefully by Friday I'll have a

decision I'll notify both of you all

Thank you

MR CHASE Thank you, Your Honor

(The proceedings were concluded)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, CAROL M THUEME, RPR, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Florence County, South Carolina, on the 28th day of April, 2010

I do further certify that I am neither of kin, counsel nor interest to any party hereto

October 6, 2010

Carol M Thueme

CAROL M THUEME, RPR
Circuit Court Reporter

South Carolina
Department of Transportation
Office of Chief Counsel

Linda C McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J Moore
Barbara M Wessinger
Beacham O Brooker Jr
Amanda T Taylor Claims
Hart Baker

Claims Office
737 1250

December 21, 2009

FILE COPY

Evander Whitehead, Esquire
Haynsworth Sinkler Boyd P A
Post Office Box 6617
Florence South Carolina 29502-6617

RE North Point Development v SCDOT
C/A No 2009-CP-21-2961

Dear Van

Enclosed are two title pages plus plan sheets 7 and 12 for SCDOT File No 21 938 Those sheets are relevant to the Swintz parcel that is the subject of this litigation

These plans are final "as-built" plans which incorporate all revisions during the course of the project beginning with the right-of-way plans You will note that the second sheet indicates the final seal and approval for right-of-way purposes by the road design engineer on 4/23/1996 Revisions, the date revisions were made and the engineer approving the revisions appear on each sheet No right-of-way revisions were made after April 22 1996

With regard to the Swintz property the title delivered includes all rights of access as needed for controlled-access facilities The plan sheets indicate an end of controlled-access 'End C/A 30 7" which conforms to the language in the special provisions of the title i e , Ms Swintz was granted driveways to be constructed by the Department at survey stations 31+80 and 32+90 This and the monetary compensation were in consideration for the closure of her existing driveway at survey station 30+25 within the C/A line

Based on the foregoing I believe the Department validly established controlled access at this parcel and legally conveyed her rights in accordance with the plans

Please call me if you wish further explanation of the foregoing

Very truly yours,

Beacham O Brooker, Jr

Enclosure

bobjr

955 Park Street Suite 343 Post Office Box 191 Columbia South Carolina 29202 0191 (803) 737 1317 Fax 737 2071

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	C A NO 2009-CP 21-2961

North Point Development Group, LLC	)	
	)	
Petitioner,	)	
	)	
v	)	AFFIDAVIT OF
	)	SANDRA BARFIELD
South Carolina Department of Transportation	)	
	)	
Respondent	)	
	)	

PERSONALLY APPEARED BEFORE ME the undersigned, Sandra Barfield who being duly sworn, deposes and states as follows

1 I am a citizen and resident of Florence, South Carolina

2 I am over the age of eighteen (18) years and am otherwise of sound mind and competent to testify by way of this affidavit.

3 I am informed by knowledgeable staff of Florence County that the Florence County Tax Assessor s Office is not in possession of South Carolina Department of Transportation highway plans that indicate the widths of the rights-of-way for each road in Florence County

4 I have searched the available electronic and hardcopy real property records of Florence County for any conveyance of rights of access on U S Highway 378 to the S C Department of Transportation from the owners of TMS Parcel 00428 05-033 (formerly owned by James Wilma Johnson) from 1996 forward After conducting searches based on TMS parcel number S C Department of Transportation as Grantee and in the names of the property owners

as Grantors from 1996 forward I discovered no such conveyance of rights of access to the SCDOT

Further Deponent Saveth Not.

AFFIANT

Sandra Barfield

January 12 2010
Florence South Carolina

SWORN to me this 12th
day of January, 2010

Susan R McDonald
Notary Public for the State of South Carolina
My Commission Expires 10/19/11

FLORENCE | CHARLESTON COLUMBIA GREENVILLE

Haynsworth
Sinkler Boyd, P.A. | ATTORNEYS AND COUNSELORS AT LAW

1631 W EVANS STREET SUITE 315 (29501 3300)
POST OFFICE BOX 6617 (29502 6617)
FLORENCE SOUTH CAROLINA
TELEPHONE 843 669 6002
FACSIMILE 843 669 3815
WEBSITE www hsblawfirm.com

EVANDER WHITEHEAD
ASSOCIATE ATTORNEY
DIRECT DIAL NUMBER 843 673 5303
EMAIL vwhitehead@hsblawfirm.com

January 15 2010

VIA U S MAIL and EMAIL (MNettlesLC@sccourts org)

Honorable Michael G Nettles
Florence City-County Complex
180 North Irby Street, MSC XX
Florence SC 29501

Re North Point Development Group, LLC v SCDOT
2009-CP 21-2961
HSB File No 31591 0009

Dear Judge Nettles

Thank you for your thoughtful consideration of both proposed orders presented in this matter Having now received by mail the Affidavit of Oscar K Rucker filed by SCDOT and in support of the Affidavit of Sandra Barfield, I submit for your consideration a copy of the January 11 2010 letter of the Florence County Tax Assessor declaring, "The South Carolina Department of Transportation does not maintain highway plans in the Florence County Tax Assessor s Office Recognizing that there has been significant post-hearing communication and submittals I stand ready to appear should you find it beneficial to re convene the hearing of this matter

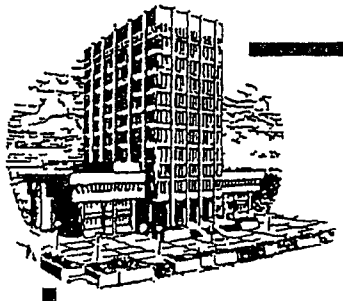
Finally I must confess that in my in my hasty transmittal of the proposed order I missed a typographical error In my letter of January 13 and the proposed order there are dates of April 29 and 30 2007 but, as should be clear from the context of this matter that date should be April 29 and 30 1997 I apologize for not catching this and will email your clerk a revised proposed order containing the corrected date

Sincerely,

Van Whitehead

enclosures

cc Beach Brooker
Conme Reel Shearin



Florence County Assessor's Office
State of South Carolina

City-County Complex
180 North Irby Street MSC-A
Florence South Carolina 29501-3456
843-665-3056
843-394 2186
FAX 843-676-1100

JACK NEWSOME
ASSESSOR

January 11 2010

Mr Van Whitehead
1831 W Evans Street
Florence, S C 29502

Re SCDOT Highway Plans

Dear Mr Whitehead

The South Carolina Department of Transportation does not maintain DOT highway plans in the Florence County Tax Assessor's Office However the Florence County District DOT Office does maintain these maps at 3018 E Palmetto Street Their telephone number is 661-4715

Sincerely

Jack Newsome

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	C A No 2009-CP-21 2961
North Point Development Group, LLC Petitioner	
vs	Affidavit of Oscar K Rucker
South Carolina Department of Transportation, Respondent.	

Comes now Oscar K. Rucker being first duly sworn, deposes and states that

1 He is the Director of Rights-of Way of the South Carolina Department of Transportation and

2 His office has the responsibility of transmitting, pursuant to S C Code Ann §57 5-570, copies of final plans for State highway projects to the tax assessors of the several counties upon completion of those projects, and

3 The attached plan sheets consisting of two title pages and sheets 7 and 12 from SCDOT File No 21 938 are true and correct copies of those maintained by the SCDOT and as transmitted by his office to the tax assessor for Florence County

Further affiant saith naught

Oscar K. Rucker

Oscar K Rucker

Sworn and subscribed before me this
12th day of January, 2010

Notary Public
My commission expires March 10, 2012

INDEX OF SHEETS

	TITLE SHEET
	SUMMARY OF ESTIMATED QUANTITIES
2-3	TYPICAL SECTIONS
	RIGHT-OF-WAY SHEET
4A	PROPERTY LAYOUT
	GENERAL CONSTRUCTION NOTES
5-22	PLAN AND PROFILE SHEETS
TCI TC7	TRAFFIC CONTROL
PM1-PM9	PAVEMENT MARKING PLANS
EC1	EROSION CONTROL PLANS
X1 X24	CROSS SECTIONS
	TOTAL SHEETS 26
4A	INTERSECTION LAYOUT

SCDOT

South Carolina Department of Transportation

COLUMBIA

PLAN AND PROFILE OF PROPOSED STATE HIGHWAY FLORENCE COUNTY

FILE 21938 PROJ NH-0052(131)

U S ROUTE 378 S C ROUTE 41 51 & ROAD S 57

INTERSECTION SURVEY

PROJECT DEVELOPMENT ENGINEER

ROAD DESIGN ENGINEER

TRAFFIC DATA

AOT

AOT

TRUCKS

LAYOUT

LEGEND

3 DAYS BEFORE DIGGING SOUTH CAROLINA

CALL 1 800 922 0983

MISS UTILITY PROTECTION SERVICE

NPDES PERMIT INFORMATION

RAILROADS INVOLVED ? NO

CDV45048\SE043\325411.dgn 25 APR 1997

INDEX OF SHEETS

TLE	SHEET	
	SUMMARY OF ESTIMATED QUANTITIES	
2S	MOVING LITEM SHEET	
3-3A	TYPICAL SECTIONS	3
	RIGHT OF-WA DATA SHEET	1
4A	PROPERTY STRIP MAP	
S	GENERAL CONSTRUCTION NOTE	1
E-22	PLAN AND PROFILE SHEETS	7
TC	TRAFFIC CONTROL	1
PM	PAVEMENT MARKING PLANS	1
EC1	EMBSION CONTROL PLANS	21
10 X34	CROSS SECTIONS	28
	TOTAL SHEET	78

SCDOT

South Carolina Department of Transportation

COLUMBIA

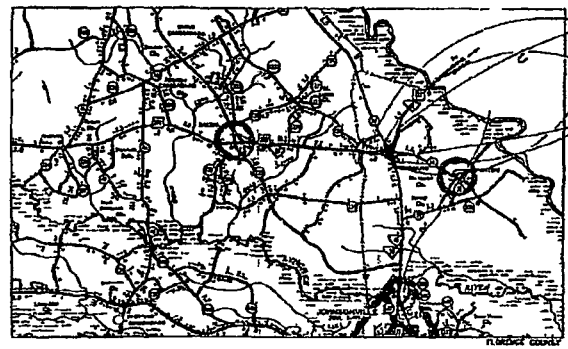
PLAN AND PROFILE OF PROPOSED STATE HIGHWAY FLORENCE COUNTY

FILE 21938 PROJ NH 0052(118)

U S ROUTE 378 S C ROUTE 4151 & ROAD S-57

INTERSECTION SURVEY

For Signatures Only



PROJECT DEVELOPMENT ENGINEER

FOR RIGHT OF WAY _____ DATE

OR CONSTRUCTION _____ DATE

ROAD DESIGN ENGINEER

FOR RIGHT OF WAY _____ DATE

FOR CONSTRUCTION _____ DATE

NPDES Disturbed

Area _____ Acres

Approximate Location Roadway Is

Longitude _____

Latitude _____

TRAFFIC DATA

20__ ADT _____

20__ ADT _____

TRUCKS __% __%

LEGEND

PROPOSED PAVED THOR ROADS

DATE BEFORE DIGGING IN SOUTH CAROLINA

CALL 1 800 922 0983

PALMETTO UTILITY PROTECTION SERVICE

LAYOUT

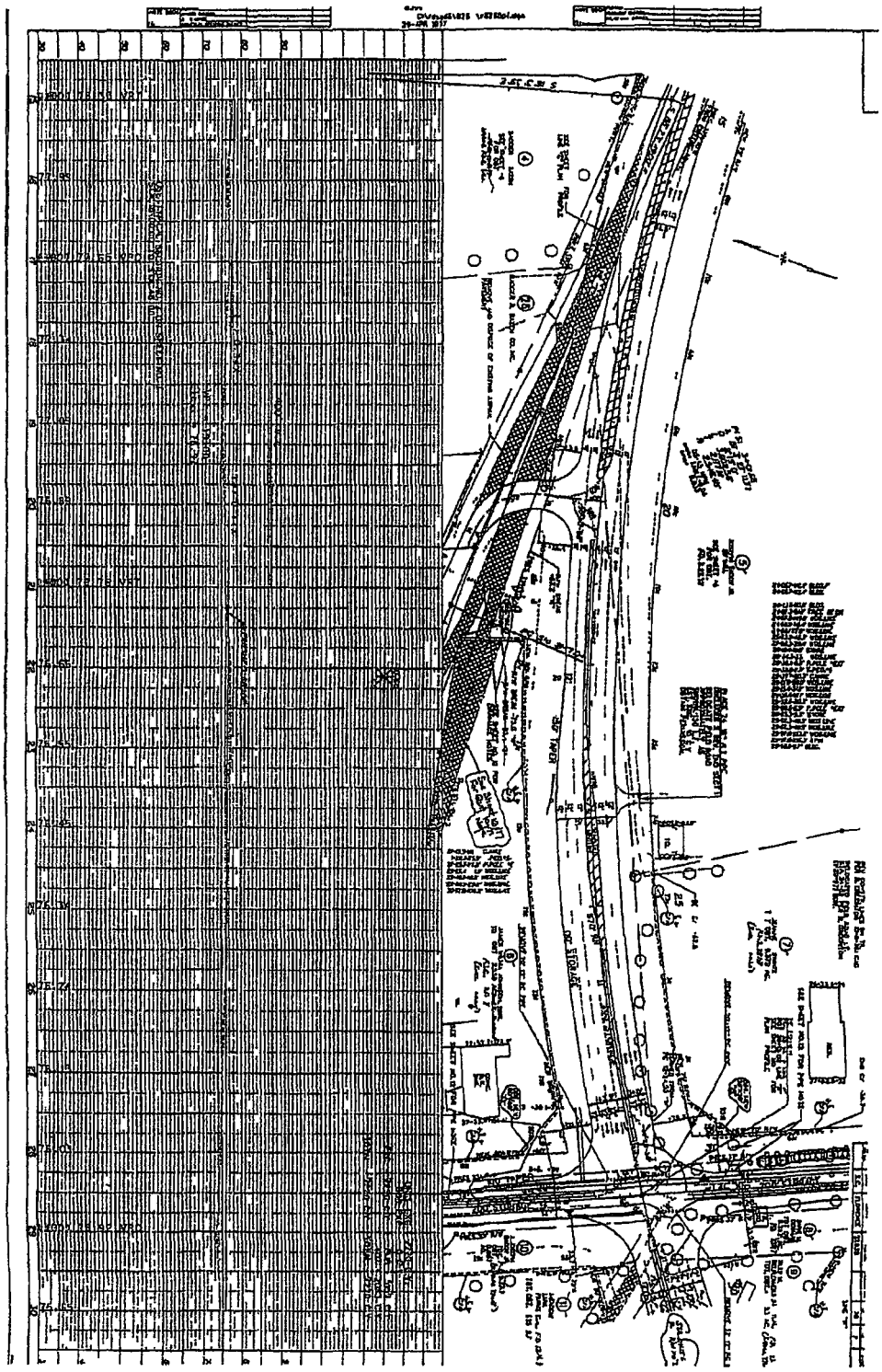
SCALE INCH = 1000 FEET

NET LENGTH OF ROADWAY	1.858	0.835	1.023	MILES
NET LENGTH OF BRIDGES	—	—	—	MILES
TOTAL LENGTH OF PROJECT	1.858	0.835	1.023	MILES
LENGTH OF EXCEPTIONS	—	0.74	—	MILES
GROSS LENGTH OF PROJECT	1.858	0.1	1.023	MILES

EXCEPTIONS IN STATIONING

NOTE: ALL WORKSHOP AND DRAWING ON THIS PROJECT IS CONFORM WITH SECTION 1200.2(3) OF THE SOUTH CAROLINA HIGHWAY DESIGN MANUAL. SEE ROADWAY CONSTRUCTION ITEMS FOR BOOK OF STANDARDS DRAWINGS FOR ROAD CONSTRUCTION.

	RIGHT-OF-WAY WITH	RIGHT-OF-WAY DATE	CONSTRUCTION WITH	CONSTRUCTION DATE
TRAFFIC ENGINEER-ROAD DESIGN	CPA	7/8/15		
ROAD DESIGN PLAN PREPARATION ENGINEER	RDJ	7/7/15		
DESIGN SERVICES GROUP	WDD	7/15/15		
HYDRAULIC ENGINEER	N/A	N/A		
PRECAST ENGINEER	N/A	N/A		



THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation Respondent

APPENDIX TO THE RECORD ON APPEAL

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

Beacham O Brooker Jr
Assistant Chief Counsel
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347
brookerbo@scdot org

Attorney for Respondent

HAYNSWORTH SINKLER BOYD, PA

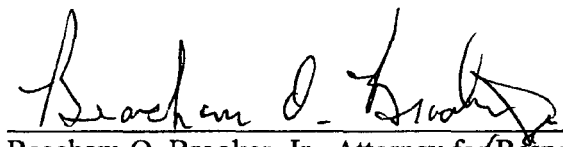
John R Chase
Sarah P Spruill
Post Office Box 11889
Columbia, South Carolina 29211-1889
803-779-3080

Attorneys for Appellant

Respondent, the South Carolina Department of Transportation, with the consent of counsel for Appellants, pursuant to Rule 212 (b) of the Appellate Court Rules, submits this Appendix to the Record on Appeal

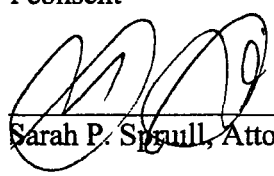
Pursuant to Rule 210(g), Respondent's counsel certifies that the material contained herein is the same as included in the Record on Appeal as pages 136-39 except that they have been enlarged to improve their legibility and contain highlighting of the relevant notations as presented to the trial court

Filing requested by



Beacham O Brooker, Jr , Attorney for Respondent

I consent



Sarah P. Spruill, Attorney for Appellant

PIN NO. 8284		ITEM NO. 2300120						
FED. ROAD DIST. NO.	STATE	COUNTY	FED. NO.	PROJECT NO.	PROJECT NO.	SHEET NO.	TOTAL SHEETS
	S.C.	FLORENCE	21.938	NH-0052(118)	NH-0052(118)	1A	78

INDEX OF SHEETS

1	TITLE SHEET	1
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2A	MOVING ITEM SHEET	1
3 38	TYPICAL SECTIONS	3
4	RIGHT OF WAY DATA SHEET	1
4A	PROPERTY STRIP MAP	1
5	GENERAL CONSTRUCTION NOTE	1
6 22	PLAN AND PROFILE SHEETS	17
TC	TRAFFIC CONTROL	7
PM	PAVEMENT MARKING PLANS	6
EC1	EROSION CONTROL PLANS	1
X1 X34	CROSS SECTIONS	34
	Total Sheets	78

SCDOT

South Carolina Department of Transportation

COLUMBIA

PLAN AND PROFILE OF PROPOSED STATE HIGHWAY FLORENCE COUNTY

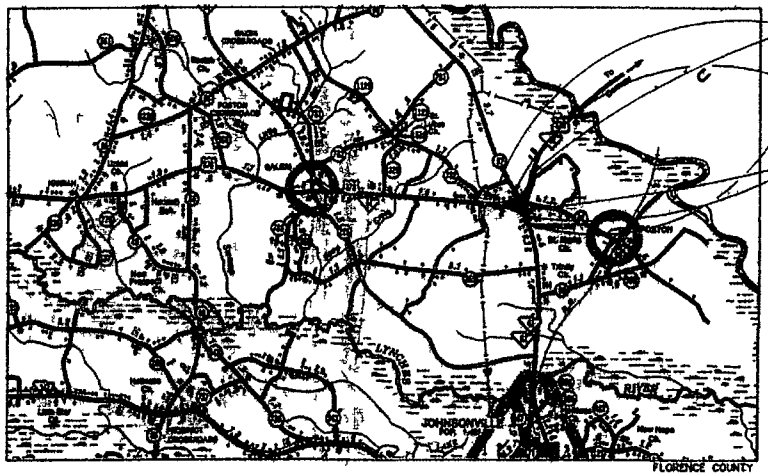
FILE 21 938 PROJ NH-0052(118)

U S ROUTE 378, S C ROUTE 41,51 & ROAD S-57

INTERSECTION SURVEY

FOR SIGNATURES ONLY

(145)



FILE 21.938 PROJ NH 0052(118) US RTE. 378 RELOC. LINE "W"
STA 2-00.00 TO STA 80+00.00
SEE SHEET 6 10

FILE 21.938 PROJ NH-0052(118) SC RTE. 41 &51 RD.S 57 LINE "X"
STA 10+00 00 TO STA 39 00 00
EXCEPTION TO PROJECT
STA 28 79 07 TO STA.29 54 43
SEE SHEET 11 13

FILE 21.938 PROJ NH 0052(118) SC RTE. 14 & US RTE. 378 LINE "Y"
STA 2 26 73 TO STA 8 00 00
SEE SHEET 14 15

FOR US 378 ORIG RELOC LINE "Z"
SEE SHEETS 16-18

NPDES Disturbed
Ar 25.9 Acre

Appr imate Location of Roadway is
L gitud 79°52 48
Latitude 33°52-48

PROJECT DEVELOPMENT ENGINEER

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO. 8896 ROBERT L PRATT

FOR RIGHT OF WAY 4/22/96 DATE

FOR CONSTRUCTION _____ DATE

ROAD DESIGN ENGINEER

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO. 8858 DAVID SYLVESTER CAUDLE

FOR RIGHT OF WAY 4/24/96 DATE

FOR CONSTRUCTION _____ DATE

TRAFFIC DATA

2001 ADT 8200

2011 ADT 10500

TRUCKS 12 /

LAYOUT

SCALE 1 INCH 5280 FEET

	LINE "W"	LINE "X"	LINE "Y"	
NET LENGTH OF ROADWAY	1.098	0.535	0.103	MILES
NET LENGTH OF BRIDGES	—	—	—	MILES
NET LENGTH OF PROJECT	1.098	0.535	0.103	MILES
LENGTH OF EXCEPTIONS	—	0.014	—	MILES
GROSS LENGTH OF PROJECT	1.098	0.549	0.103	MILES

EQUALITIES IN STATIONING

—NONE—

	RIGHT OF WAY INITIAL	RIGHT OF WAY DATE	CONSTRUCTION INITIAL	CONSTRUCTION DATE
SQUAD LEADER-ROAD DESIGN	CAG	3-8-96		
ROAD DESIGN / PLAN PRODUCTION MANAGER	REW	3-12-96		
DESIGN SERVICES GROUP	[illegible]	3-18-96		
HYDRAULIC ENGINEER	MHH	4-19-96		
PROJECT ENGINEER	[illegible]	[illegible]		

LEGEND

PROPOSED PROJECT OTHER ROADS PAV OR

3 DAYS BEFORE DIGGING IN SOUTH CAROLINA

CALL 1 800 922 0983

PALMETTO UTILITY PROTECTION SERVICE

NOTE: ALL WORKMANSHIP AND MATERIAL ON THIS PROJECT TO CONFORM WITH SOUTH CAROLINA DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION STANDARD SPECIFICATIONS FOR HIGHWAY CONSTRUCTION (LATEST EDITION), AND BOOK OF STANDARD DRAWINGS FOR ROAD CONSTRUCTION.

APPROVED FOR DATE

MAYOR

COUNCIL MEMBERS

CLERK

PIN NO. 8284	ITEM NO. 300120						
FED. ROAD DOLLAR	STATE	COUNTY	FILE NO.	PROJECT NO.	PROJECT NO.	SHEET NO.	SHEET TOTAL
	S.C.	FLORENCE	21938	NH-0052(131)	N/A	1	78

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3 38	TYPICAL SECTIONS	3
4	RIGHT OF WAY DATA SHEET	1
*4A	PROPERTY LAYOUT	1
5	GENERAL CONSTRUCTION NOTE	1
6 22	PLAN AND PROFILE SHEETS	17
TC1 TC7	TRAFFIC CONTROL	7
PM1 PM9	PAVEMENT MARKING PLANS	9
EC1	EROSION CONTROL PLANS	1
X1 X34	CROSS SECTIONS	34
	TOTAL SHEETS	78

* 4B *Intersection Layout*

SCDOT

South Carolina Department of Transportation

COLUMBIA

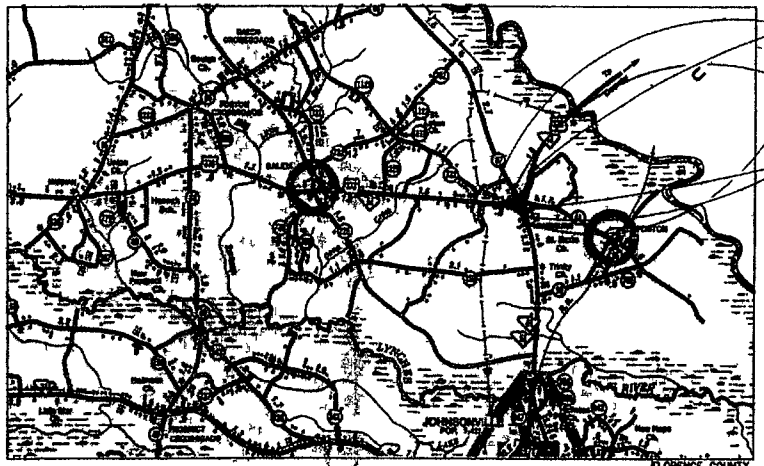
PLAN AND PROFILE OF PROPOSED STATE HIGHWAY FLORENCE COUNTY

FILE 21 938 PROJ NH-0052(131)

U S ROUTE 378, S C ROUTE 41,51 & ROAD S-57

INTERSECTION SURVEY

(146)



FILE 21938 PROJ NH 0052(131) US RTE. 378 RELOC. LINE "W"
STA. 2+00.00 TO STA. 60+00.00
SEE SHEET 6 10

FILE 21938 PROJ NH 0052(131) SC RTE. 41 &51, RD S-57 LINE "X"
STA. 10+00.00 TO STA. 38+00.00
EXCEPTION TO PROJECT
STA. 28 79.07 TO STA.29 54.43
SEE SHEET 11-13

FILE 21938 PROJ NH 0052(131) SC RTE. 49
& US RTE. 378 LINE "Y"
STA. 2 55.73 TO STA. 8+00.00
SEE SHEET 14 18

FOR US 378 ORIG. RELOC LINE "Z"
SEE SHEETS 16 18

NPDES PERMIT INFORMATION
NPDES Disturbed Area 25.9 Acr
Approximate Location of Road way Longitude 79-52-48 Latitude 33°52 48"

RAILROAD INVOLVEMENT?
(YES) / NO

PROJECT DEVELOPMENT ENGINEER

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO. 6895 ROBERT I. PRATT

FOR RIGHT OF W _____
FOR CONSTRUCTION _____ 5/14/02
DATE

ROAD DESIGN ENGINEER

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO. 6858 EDWIN SYLVESTER EARLE II

FOR RIGHT OF WAY _____ _____
FOR CONSTRUCTION _____ 5/14/02
DATE

TRAFFIC DATA

2001 ADT 6200

2011 ADT 10500

TRUCKS 12 /

LEGEND

PROPOSED PROJECT P
OTHER ROADS ER

3 DAYS BEFORE DIGGING IN SOUTH CAROLINA
CALL 1 800 922 0983
PALMETTO UTILITY PROTECTION SERVICE

LAYOUT

SCALE 1INCH =5280'FEET

	LINE "W"	LINE "X"	LINE "Y"	
NET LENGTH OF ROADWAY	1.098	0.535	0.103	MILES
NET LENGTH OF BRIDGES	—	—	—	MILES
NET LENGTH OF PROJECT	1.098	0.535	0.103	MILES
ENGTH OF EXCEPTIONS	—	0.014	—	MILES
GROSS LENGTH OF PROJECT	1.098	0.549	0.103	MILES

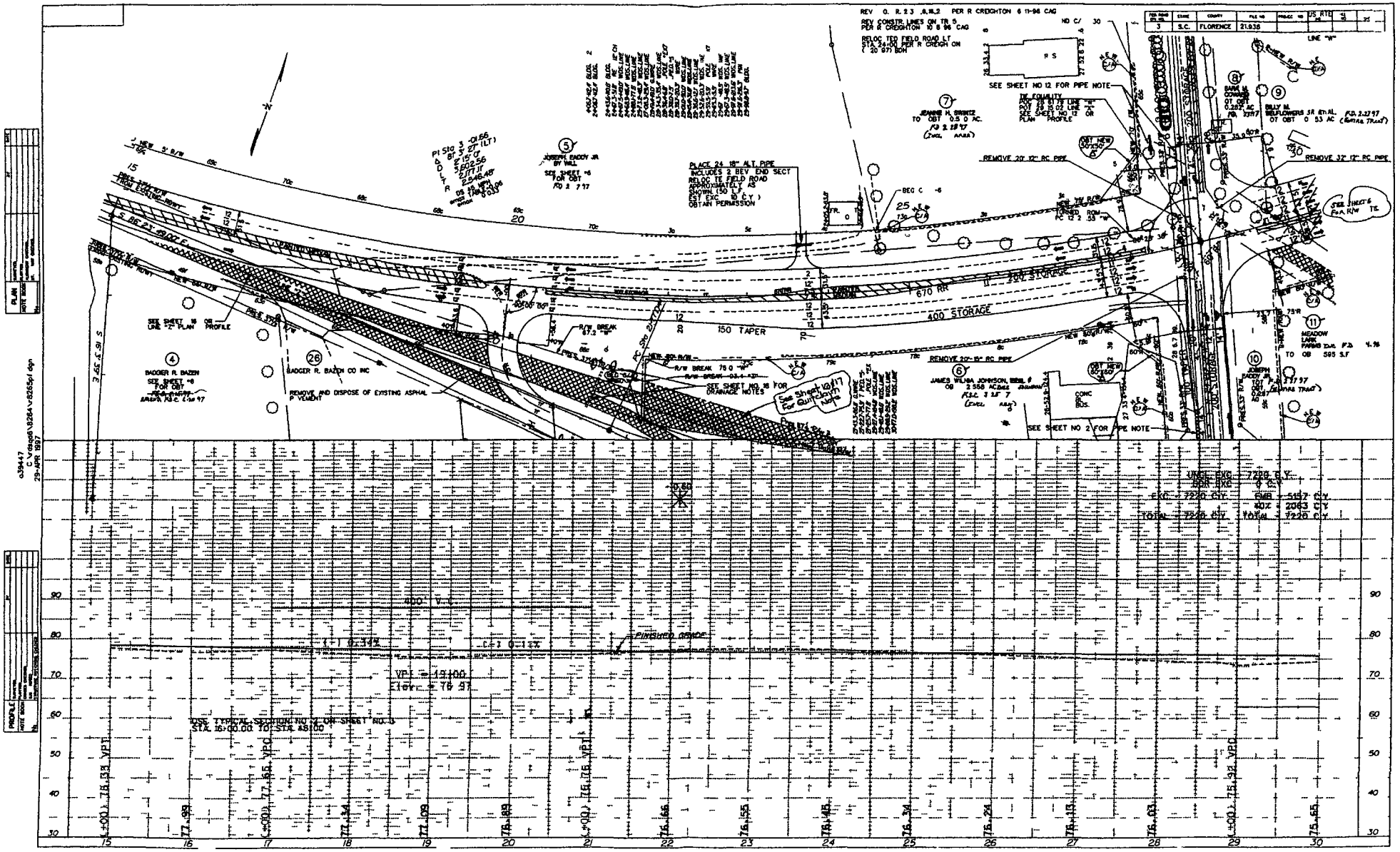
EQUALITIES IN ST TIONING
—NONE—

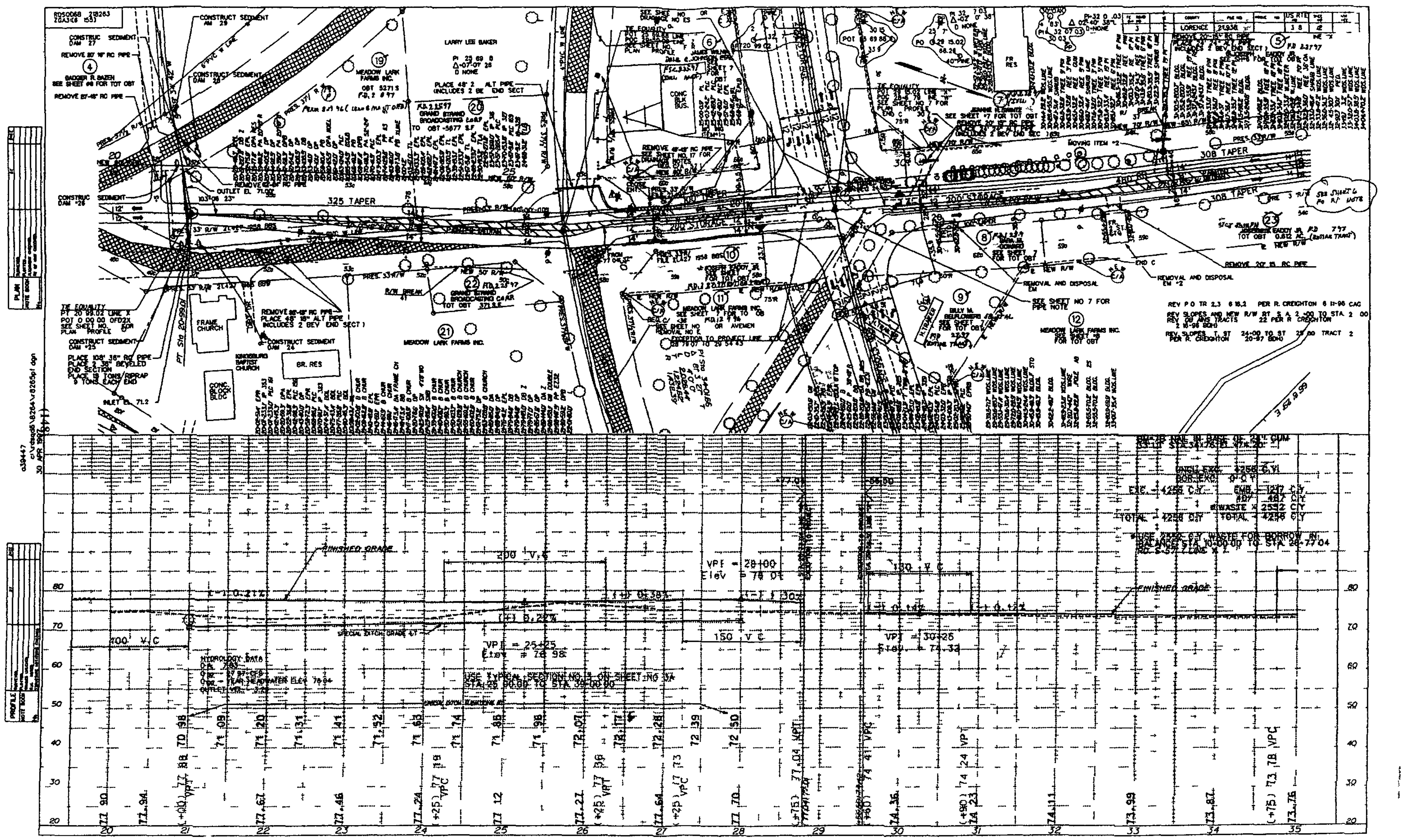
NOTE ALL WORKMANSHIP AND MATERIAL ON THIS PROJECT TO CONFORM WITH SOUTH CAROLINA DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION STANDARD SPECIFICATIONS FOR HIGHWAY CONSTRUCTION (LATEST EDITION), AND BOOK OF STANDARD DRAWINGS FOR ROAD CONSTRUCTION.

SD 6 CAG BBS

APPROVED FOR _____ DATE _____
MAYOR _____
COUNCIL MEMBERS
_____
_____
_____
_____
_____
_____
CLERK _____

	RIGHT OF WAY INITIAL	RIGHT OF WAY DATE	CONSTRUCTION INITIAL	CONSTRUCTION DATE
SQUAD LEADER ROAD DESIGN	CAC	3-8-96	CAC	4-17-97
ROAD DESIGN / PLAN PRODUCTION MANAGER			RELW	4-21-97
DESIGN SERVICES GROUP			JWBC	4-28-97
HYDRAULIC ENGINEER			WMH	4-29-97
PROJEC ENGINEER			[illegible]	5-14-97


REMOVE 20" RC PIPE
REMOVE 32" RC PIPE
REMOVE 20" RC PIPE
PLACE 24" ALT PIPE
INCLUDES 2 REV END SECT
RELOC TE FIELD ROAD
APPROXIMATELY AS
SHOWN (50 L F
EST EXC 10 C Y)
OBTAIN PERMISSION
400 STORAGE
670 RR
150 TAPER
REMOVE AND DISPOSE OF EXISTING ASPHAL P VEMENT
SEE SHEET NO 12 FOR PIPE NOTE
SEE SHEET NO 2 FOR PIPE NOTE
SEE SHEET NO 18 FOR DRAINAGE NOTES
UNCL EXC 7220 C Y
ROCK EXC 0 C Y
EXC 7220 C Y
EMB 5157 C Y
40% 2063 C Y
TOTAL 7220 C Y
TOTAL 7220 C Y
FINISHED GRADE
VPI =13+00
Elev = 76 91
USE TYPICAL SECTION NO 2 ON SHEET NO 3
STA 16+00 00 TO STA 43+00



325 TAPER
308 TAPER
200 STORAGE
LARRY LEE BAKER
MEADOW LARK FARMS INC.
FRAME CHURCH
BR. RES
CONC. BLOCK BLDG
REMOVAL AND DISPOSAL
SEE SHEET NO 7 FOR PIPE NOTE
REV P O TR 2,3 & 18,2 PER R. CREIGHTON 6 11-96 CAC
FINISHED GRADE
VPI = 25+25
Elev = 78.98
VPI = 28+00
Elev = 78.01
VPI = 30+25
Elev = 74.33
200 V C
150 V C
130 V C
HYDROLOGY DATA
USE TYPICAL SECTION NO 1 ON SHEET NO 3A
PLAN
PROFILE
30 APR 1997
(148)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation, Respondent

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I Did the circuit court err in finding it lacked jurisdiction to consider the Petition of North Point Development Group, LLC for an encroachment permit where there was no indication from the chain of title or the records on file with the Florence County tax assessor's office that the property in question was located at a controlled access intersection?

STATEMENT OF THE CASE

This appeal arises from the efforts of North Point Development Group, LLC ("North Point") to obtain an encroachment permit for a curb cut for property it owns fronting U S Highway 378 ("378") in Kingsburg, South Carolina The property in question is in Florence County, not far from Johnsonville, South Carolina

On November 10, 2009, North Point submitted an Application for Encroachment Permit to the South Carolina Department of Transportation ("SCDOT") (R at 19-21) On November 20, 2009, a SCDOT employee responded by email that "the request must be denied" (R at 22-23) Pursuant to S C Code Ann § 57-5-1120, North Point appealed this denial to the circuit court by filing a Summons and Petition for Judicial Review on November 30, 2009 ("Petition") (R at 9-12) SCDOT submitted a return to the Petition on December 7, 2009, asserting that North Point was not entitled to access onto 378 because it is a controlled-access facility (R at 24-26)

The matter was heard on December 18, 2009, and the circuit court dismissed the Petition by order dated January 12, 2010 (R at 1-4) North Point filed a timely motion for reconsideration on February 2, 2010 (R at 40-44) That motion was heard on April 28, 2010 The trial court issued an order fully considering North Point s arguments and re-affirming the earlier order dismissing the Petition on May 3, 2010 (R at 5-8) After receiving written notice of the entry of judgment on May 18, 2010, North Point filed a notice of appeal with this Court on June 8, 2010

FACTS

North Point is a limited liability company organized and existing under the laws of the State of South Carolina North Point's deed for the property in question (approximately 2 9 acres) was recorded in the land records of Florence County in Deed Book B007 at page 1746 on May 3, 2006 (R at 13-17) North Point purchased the property from the William H Swintz, IV Trust Nothing in the sale transaction, the survey dated April 5, 2007, the chain of title, or the records of the Florence County tax assessor revealed that the property was adjacent to a controlled access section of 378 (R at 13-17, 21, 130-31) Further, there was no indication on the property at the time North Point acquired it that this section of 378 was controlled access (R at 119)

As part of a plan to develop the property, North Point submitted an Application for Encroachment Permit to the SCDOT on November 10, 2009 (R at 19-21) On November 20 2009, Mike Kirby, of SCDOT, stated in an email that North Point's request for an encroachment permit was denied (R at 22-23) This action followed (R at 9-12)

ARGUMENT

North Point looks to S C Code Ann § 57-5-1120 for its express authorization of judicial review of SCDOT's action on the encroachment application This section provides

> Any abutting property owner or lessee may file an application within thirty days from a decision of the department in the administration of Sections 57-5-1080 to 57-5-1110 for a hearing in the matter before a circuit judge at chambers or in open court in the judicial circuit in which the property is located, and such court or judge is hereby vested with jurisdiction to set the matter for a hearing upon ten days' written notice to the department of such hearing and thereupon to determine whether the action of the department is in accordance with the provisions of law The decision of the circuit judge may be appealed in the manner provided by the South Carolina Appellate Court Rules

Here, there is no dispute that North Point submitted a request for an encroachment permit and that SCDOT did not grant that request SCDOT argues that the property abuts a controlled access stretch of 378 that was designated as such pursuant to S C Code Ann § 57 7-1030, and therefore it cannot grant North Point's request As found by the trial court, no statute provides for review of denials of enrichment permits on controlled access facilities

North Point also sought review under Article I, Section 22 of the S C Constitution, to the extent SCDOT has asserted this decision is not reviewable under S C Code Ann § 57-5-1120 Under this provision

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard, nor shall he be subject to the same person for both prosecution and adjudication, nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review

The circuit court erroneously found that it had no jurisdiction over this matter (R at 1-8) North Point disagrees and argues nothing in its chain of title or on record with the Florence County tax assessor put it on notice that the property it purchased was subject to a controlled access designation

I The chain of title does not show a grant of access rights to SCDOT as to the property purchased by North Point

As an initial matter, S C Code Ann § 57-5-1070 requires SCDOT to take rights of access "in the same manner as now or hereafter authorized by law for acquiring property or property rights" This includes taking the access rights of adjoining property owners for purposes of establishing a controlled access facility

North Point contends that no controlled access facility has been lawfully established along its 378 frontage This access right is a substantial real property right of significant value *See Hardin v S C Dep't of Transp*, 371 S C 598, 606, 641 S E 2d 437, 442 (2007) ("a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road")

Drawing from the Statute of Frauds, an integral requirement of any deed or contract for sale of land is that the land or interests to be conveyed are clearly identified *See generally Cash v Maddox*, 265 S C 480, 484-85, 220 S E 2d 121, 122-23 (1975) In discussing this topic, the Supreme Court explained

> One of the essential terms of a contract of sale of land is the identification of the land Hence, the land must be described so as to indicate with reasonable certainty what is to be conveyed Parol evidence cannot be relied upon to supplement a vague and uncertain description

Id (citation omitted) "It would be inequitable to carry a contract into effect where the court is left to ascertain the intention of the parties by mere guess and conjecture' *Id* An earlier expression of the same principle is that

> The terms of contract must be so clear, definite, certain, and precise, and free from obscurity or self-contradiction that neither party can reasonably misunderstand them, and the court can understand and interpret them, without supplying anything

White v Felkel, 222 S C 313, 324, 72 S E 2d 531, 536 (1952) Courts may not look to parol evidence to rehabilitate the vague and uncertain description *Cash* at 484-85, 220 S E 2d at 122-23

Here, SCDOT points to a Title to Real Estate between Jeanne H Swintz and itself (herein "Swintz Instrument") as a basis for claiming that the right of access along the entire frontage of 378 has been eliminated from North Point's property (R at 27-28) The face of the Swintz Instrument fails to communicate what is to be conveyed, especially with respect to the issue of access The Swintz Instrument is printed on SCDOT Right of Way Form 802 The header designates that the road is 378 and that the deed falls into File No 300120/21 938 as project number NH-0052(131) with Pin number 8264 The body of the deed shows that Jeanne Swintz is selling 57 acres of land of some indeterminate ("xxxx feet") width that is 75 feet on the left side of the SCDOT survey center line In the special provisions section, the deed says SCDOT is paying for "0 570 acre of land, damages, and all improvements thereon, if any, including rights of access as may be need for controlled access facilities "

Nothing in the deed specifies that it is to be controlled access, directs the scope of any controlled access or references the access rights of the remainder of the property (the property ultimately purchased by North Point) The plain reading of the Swintz

Instrument shows that Swintz deeded away the access right to the 570 acres that are the subject of the deed "as may be needed for controlled access facilities " The deed is silent as to the access rights of her remaining property

SCDOT also claims that the deed is clarified by reference to plans dated April 23 1996, but there is no information underlying the reference even if the Court were allowed to consider parol evidence SCDOT has provided the circuit court with two drawings, which it represents to be relevant to this matter (R at 29-30) However, those drawings are dated April 29 and 30, 1997—after the date of the Swintz Instrument Accordingly, the drawings cannot be what is referenced in the Swintz Instrument As between such an indefinite, uncertain, and unprecise description and the North Point's right of access, both law and equity dictate that North Point's right of access must prevail

The circuit court's reliance on *Main v S C Dep t of Hwys and Pub Transp* , 300 S C 453, 388 S E 2d 792 (1990) is misplaced That case does not address the core issues in the instant dispute It merely stands for the proposition that where SCDOT has undisputed restricted access, mandamus will not lie when SCDOT has discretionary rather than ministerial functions In the instant case, the very establishment of restricted access is in dispute, and SCDOT summarily refused to consider North Point's request

In addition, North Point asserts that SCDOT's denial of the encroachment permit for access to the Property is (a) in violation of constitutional and statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative, and substantial evidence, and (f) arbitrary and capricious and characterized by abuse of discretion In conducting the judicial review, the circuit court was charged to ' determine

whether the action of the department is in accordance with the provisions of law " S C Code Ann § 57-5-1120

SCDOT's claim of restricted access and denial of authorization constitute violations of North Point's constitutional due process rights under the federal and state constitutions *See* U S Constitution amends V & XIV, S C Constitution art I, §§3[1] & 22 Alternatively, SCDOT's total denial of direct access to 378 from the North Point's property constitutes a taking of private property rights without just compensation under the Fifth Amendment of the U S Constitution and Article I, Section 3 of the S C Constitution

Pursuant to S C Code Ann § 57-5-1070, SCDOT must obtain access rights "in the same manner as now or hereafter authorized by law for acquiring property or property rights " SCDOT has not satisfied the foregoing requirement and consequently its actions are *ultra vires* and otherwise void, on the basis of being unsupported by statutory authority, based upon unlawful procedure, and clearly affected by an error of law

Moreover, SCDOT may issue encroachment permits across controlled access facilities, it just declined to even consider such a request in this case S C Code Ann § 57-5-1040 SCDOT has argued it did not deny the request, but rather refused to consider it This refusal is an abandonment of the discretion provided by statute Thus, SCDOT's denial of North Point's encroachment permit is arbitrary and capricious and characterized by abuse of discretion *See generally* 25A S C Code Ann Regs 63-370 Accordingly, this matter should be remanded so that SCDOT can fully consider North Point's request for an encroachment permit

II SCDOT did not maintain the plans for this stretch of 378 with the Florence County tax assessor's office

The circuit court found that the Swintz Instrument was by reference to the SCDOT plans for the project (R at 1-8) However, those plans admittedly were not properly maintained with the Florence County tax assessor's office as required by S C Code Ann § 57-5-50 (R at 115) In addition to the absence of notice as to the controlled access in North Point's chain of title, SCDOT failed to comply with the requirement that it 'maintain" a copy of all highway plans with the county tax assessor's office as set forth in S C Code Ann § 57-5-50 Contrary to SCDOT s argument that any surveyor would be able to determine the access rights for this property (R at 111) nothing on the survey performed on April 5, 2007 indicates the 378 frontage is controlled access (R at 21)

The circuit court noted that the plans had been filed with the tax assessor, however, there is no dispute that the plans did not remain there as shown by the affidavit of Sandra Barfield, the letter submitted by the Florence County tax assessor's office, and the admission of SCDOT's counsel at the hearing on the motion to reconsider (R at 130-31, 134, 115) Instead, the plans were taken away from the tax assessor's office in the courthouse to the SCDOT regional office The fact that the plans passed through the tax assessor's office does not mean the plans were maintained there as required by the statute Nothing in Florence County's records indicated that this property's entire 378 frontage was subject to controlled access Therefore, the failure to maintain the records was prejudicial to North Point

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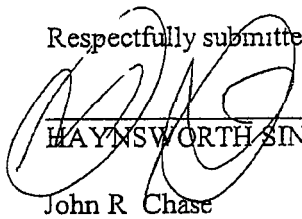
[1] The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged nor shall any person be deprived of life liberty or property without due process of law, nor shall any person be denied the equal protection of the laws S C Constitution art I §3

The express purpose for SCDOT maintaining those records in the tax assessor's office is "for the convenience of persons making inquiry as to the right of the State in and to the right-of-way for roads constructed by the department in any county" S C Code Ann § 57-5-50 Therefore, SCDOT's disregard for the mandate of the General Assembly deprives the public of its entitlement to such right-of-way information Consequently, North Point has been specifically deprived of the protections and benefit the statute affords of having this information available for review in the location where the law requires it to be made available Quite plainly, North Point should not suffer for SCDOT's failure

CONCLUSION

For the above reasons, SCDOT wrongly failed to consider North Point's application for an encroachment permit, and the circuit court wrongly determined it did not have jurisdiction to review that failure Accordingly this matter must be reversed and remanded for further consideration

Respectfully submitted,



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December 20, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation. Respondent

BRIEF OF RESPONDENT

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The respondent, the South Carolina Department of Transportation (hereinafter "the department" or "SCDOT") respectfully submits this respondent's brief

Statement of the Issues on Appeal

Whether the trial court correctly found that it lacked jurisdiction to review the Department's decision to designate the intersection at U S Route 378 and State Road 57 in Florence County as a controlled-access facility?

Statement of the Case

This is a suit by a developer to break control of access between its property and U S 378 (East Myrtle Beach Highway) at Kingsburg, South Carolina

On November 10, 2009, appellant applied to the Department's Resident Maintenance Engineer in Florence for an encroachment permit to open a driveway onto U S 378 Upon review of the permit application, the engineer determined that the intersection that appellant's land abuts was established as a controlled-access facility as part of a highway safety improvement project in 1996 and 1997 R p 22 The project eliminated a number of intersections and controlled access on the one that remained as a remedy to the high accident count at this location The Department had purchased access rights from appellant's predecessor in title in February of 1997 R p 27 Thereafter, appellant filed a petition with the Florence County Circuit Court seeking a review of the Department's decision under S C Code Ann §57-5-1120 (Rev 2006) and seeking a reversal of that decision on the grounds that the denial of the permit was *ultra vires,* a taking of a property right, and violated a number of constitutional protections R p 9 Appellant sought an expedited hearing of its request for judicial review under the terms of that Code section

On December 4, 2009, the Department responded by letter to Judge Michael G Nettles stating its position that, because the section of highway to which appellant sought access was a controlled-access facility, the court had no jurisdiction to review the matter and the expedited hearing provided by that section was not applicable We suggested that the case proceed on the docket as an inverse condemnation cause of action We filed a return to the petition on December 8, 2009, and the court heard counsel on the matter in Florence on December 18, 2009, where it requested proposed orders from the parties The court issued its Order on January 12, 2010, finding that appellant's predecessor in title, Jeanne H Swintz, had conveyed her rights of access to the Department along with land to accommodate highway improvements for consideration of $21,000 and the construction of a driveway to her property at a designated point on State Road 57 R p 1 The court also found that the Department had properly established a control of access line on its highway plans filed at 21 300120/21 938 The court dismissed the complaint for lack of jurisdiction to review encroachment permits onto controlled-access highways under S C Code §57-5-1120

Appellant moved for reconsideration of the court's order on February 2, 2010, arguing new theories that the Department had failed to establish control of access because (1) its highway plans were not stored locally at the offices of the Florence County Tax Assessor, rather at the District Headquarters of District 5 in Florence, and (2) that it failed to obtain access rights from another landowner at the intersection, James Wilma Johnson Because of these alleged failures, appellant argued that the department failed to establish access control and its refusal to grant it a permit deprived it of its constitutional rights R p 40 Thereafter, at the judge's suggestion, counsel for SCDOT wrote counsel for

appellant explaining the system for dating highway plans R pp 97, 129 The department responded to the motion for reconsideration on April 26, 2010 R p 45

The court rejected appellant's motion in a written Order finding that the terms of the Swintz deed was sufficient to put purchasers on notice that access rights had been alienated and that the location of the highway plans in Florence County was immaterial in that they were only a secondary source of those plans under the terms of S C Code Ann §57-5-570 (Rev 2006) R p 5 Further, the court found that the acquisition of access rights from Mr Johnson is duly evidenced by the recording of the condemnation notice in the Florence County land records

Of the arguments advanced below, only the procedural due process and plans storage theories are preserved for review by this Court

Argument

I The department followed proper procedures for acquiring access rights and establishing the intersection as a controlled-access facility

In its argument I, appellant challenges the deed by which its predecessor in title conveyed the access rights to her property to the department as defective in that it relies on parol evidence to describe the rights conveyed in violation of the statute of frauds Alternately, appellant argues that the official highway plans referred to and incorporated into the Swintz title were incorrect Thus, according to appellant, the denial of a driveway permit violated constitutional prohibitions against taking of private property without just compensation and the due process clause

Appellant argues that the language of the deed on its own fails to establish the precise location of any control of access line and that the access rights acquired through

that instrument may only be construed as being within the area of the land taken for the highway improvements While appellant is correct that the precise location of the control of access line is not contained in the property description of the acquisition from Ms Swintz, the plans referenced therein do contain such location The highway department has always acquired its rights-of-way and other property obtained from private landowners by reference to official State Highway plans for the relevant project The plans are the source document for surveyors statewide in determining the boundaries between private parcels and routes on the State Highway System *See*, S C Code Ann §57-5-10 Moreover, titles based upon such plans are routinely accepted in the deed registrars' offices of the various counties and are used by all forty-six county tax assessors to adjust real property taxes The plans are tolerant to one-half inch This practice is no different from the sales and titles to lots in subdivisions or planned unit developments Plans and plats referred to in deeds are not parol evidence This Court explained the relevant law as follows

> Notice of a deed is notice of its entire contents and whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue *Binkley,* 348 S C At 71, 558 S E 2d at 909 Further, "where a deed describes land as is shown as a certain plat, such becomes a part of the deed." *Carolina Land Co v Bland,* 265 S C 98, 105, 217 S E 2d 16, 19 (1975) The law imputes to a purchaser of real property notice of the recitals contained in the written instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained *McDonald v Welborn* 220 S C 10, 16, 66 S.E 2d 327, 330 (1951), *LoPresti v Burry* 364 S C 271, 276, 612 S E 2d 730, 732-33 (Ct App 2005), *S Ry Carolina Div v Howell* 79 S C 281, 286, 60 S E 677, 679 (1908) (finding the equivalence of notice in circumstances where one has knowledge of such facts as were sufficient to put one on inquiry, which if pursued with due diligence, would have led to the knowledge of one's rights)

Frierson v Watson, 371 S C 60, 67-68, 636 S E.2d 872, 876 (Ct App 2006)

Appellant's argument that the language of the deed purports to convey only access to the portion of property acquired from Ms Swintz is not a reasonable interpretation of that instrument's language It would make no sense for the department to separately acquire access rights to land it acquires for highways Rather, the language regarding access rights for the establishment of a controlled-access highway is one of a list of property rights conveyed by the landowner in return for the various items of consideration contained in the deed Authority to acquire access rights is contained in S C Code Ann §57-5-1070 (Rev 2006) which states that such rights may be acquired the same as land by the methods set forth in S C Code Ann §57-5-320, *i e* by gift, purchase or condemnation [1]

Regarding the dating of the plans cited by appellant at page 7 of its brief, our December 21, 2009, letter to plaintiff's counsel, our memoranda, and the trail judge's Order, each explained the system for such dating The working plans presented to Ms Swintz and referred to in her deed bear the date April 23, 1996 The final plans for the project contain, as is customary, a second title sheet bearing a 1997 date The latter title sheet contains the engineer's final certification of the as-built project All changes to a project between the creation of right-of-way plans and the final plans are noted on the relevant plan sheets themselves and initialed by the responsible SCDOT engineer No changes were ever made to the control of access line between Ms Swintz's property and the highway

[1] With regard to the strikeout ('xxx') in the Swintz title this is an alternative contained in SCDOT electronic form for real estate titles Where the new right-of-way boundary can be based upon a known existing centerline, the distance from that line is used as the most accurate description of the acquisition Where no centerline exists the acquisition is expressed in square feet taken from the landowner

Regarding appellant's constitutional arguments, both the due process and the just compensation requirements are based on a complainant being able to demonstrate a property interest in the first instance Due process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property *State v Brown,* 178 S C 294, 182 S E 838 (1935) However, it is well settled that due process is only implicated where a person is deprived of a liberty or property interest *Brown v State Board of Education,* 301 S C 326, 391 S E 2d 866, 60 Ed Law Rep 1004 (1990), *Board of Regents v Roth,* 408 U S 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972) Just compensation is only required when the interest asserted is inherent in the plaintiff's ownership rights *Rick's Amusement Inc v State* 351 S C 352, 359, 570 S E 2d 155, 158 (2001) As in any land case, the plaintiff must recover on the strength of its own title, not on the alleged weakness of the defendant's title *Hoogenboom v Beaufort,* 315 S C 306, 313, 433 S E 2d 875, 880 (Ct App 1992) One claiming title by deed has no greater title than the original grantor in the chain of title upon which he relies *Id*, 433 F 2d at 880-81 The burden is not on the State to establish its title but on the plaintiff-landowner to establish its *Id* The State comes into court with a presumption of title, and, if an individual is to prevail, the must recover on the strength of his own title, on which he must make proof *Low Country Open Land Trust v State* 347 S C 96, 552 S E 2d 778 (Ct App 2001) [2] Here, appellant's chain of title clearly indicated and alienation of "all" rights of access That conveyance was cut

[2] To the extent appellant seeks support in the regulations governing the highway encroachment process, S C Code Ann Regulations 63 370, we refer the court to subsection (h) which exempts controlled-access routes from that process

down in the deed only to provide Ms Swintz with a drive at the far end of her property on the adjoining secondary road—not U S 378

Moreover, appellant's challenge, in its current iteration, is not one of denial of a driveway permit, but to the decision to designate the intersection as controlled-access in the first place These decisions are discretionary and not adjudicative to which due process protections would apply[3] *See, e g , Kurschner v City of Camden,* 376 S C 165, 172, 656 S E 2d 346, 350 (2008) ("Specifically, the decision to deny the Kurcshner's (sic) application to subdivide their land was an exercise of discretionary authority, as opposed to adjudicatory power The legislature expressly granted this discretionary authority in the area of local planning to the Commission") At least, the department's actions herein constituted a mere assertion of its property rights A party is always entitled to assert its property rights *Santoro v Schulthess* 384 S C 250, 265, 681 S E 2d 897, 904 (Ct App 2009)

II The availability of SCDOT's plans in Florence County at a location other than the tax assessor's office is not a material breach that prejudiced appellant

Appellant's argument II is that the system for local filing of SCDOT highway plans causes its right-of-way at their location to fail Appellant claims that the location of the plans at the SCDOT District office in Florence instead of the Florence County tax assessor "deprives the public of its entitlement to right-of-way information" Further,

[3] *See* Act 621, 1956 S C Acts 1594 ("[A]ccidents can be greatly reduced in number and severity by controlling access to and egress from the main traveled way to suitable safe points, as determined by engineering principles") *See also* S C Code Ann §57 5 1020 (Rev 2006) ("The Department may designate ") (emphasis added)

appellant notes that nothing in its survey indicates a controlled-access line and nothing in the County's records indicates the same

First, it should be noted that State highway plans are not county records but State records Highway plans are easily obtainable from any SCDOT office The plan library is available for download by any SCDOT employee and by professional land surveyors throughout the State on a subscription basis Despite the apparently minimal effort appellant's surveyor exerted on its behalf, he could have reviewed those plans by following the tax assessor's instructions to visit the SCDOT District office or by simply calling the Department where a duty officer is available at all times to assist the public with their titles The trial court was correct that the statute directing local location of plans is only a secondary source of those plans by the statute's use of the words "a copy" Hard copy originals are maintained in Columbia, however, all SCDOT employees and most private sector engineers utilize the on-line computerized plans

Appellant is incorrect that the location of the plans in Florence, actually between the property and the tax assessor's office, is a material breach of duty that prejudiced it in any way The trial court correctly decided this issue

Conclusion

Appellant has demonstrated no facts that would entitle it or the court to disregard the department's establishment of a controlled-access line prevent it from entering directly onto U S 378 The Court should affirm the trial court's dismissal of the petition for lack of jurisdiction to review this discretionary decision of SCDOT

Respectfully submitted,

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Columbia, S C

December 29, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

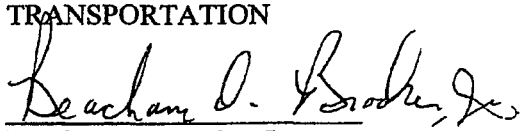
v

South Carolina Department of Transportation Respondent

CERTIFICATE OF COMPLIANCE

I certify that the final respondent's brief in this matter complies with Rule 211(b), SCACR, and the August 13, 2007, order of the South Carolina Supreme Court relating to personal data identifiers

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

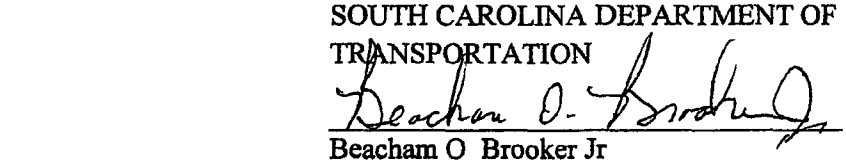
v

South Carolina Department of Transportation Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent and Certificate of Compliance on North Point Development Group, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on December 29, 2010, addressed to its attorneys of record, John R Chase, Post Office Box 6617, Florence, South Carolina 29502-6617, and Sarah P Spruill, Post Office Box 11889, Columbia, South Carolina 29211-1889

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation, Respondent

Appeal From Florence County
Michael G Nettles, Circuit Court Judge

Opinion No 4954
Heard January 12, 2012 – Filed March 14, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John R Chase, of Florence, and Sarah P Spruill, of Columbia, for Appellant

Beacham O Brooker, Jr , of Columbia, for Respondent

LOCKEMY, J North Point Development Group, LLC (North Point) appeals the circuit court's finding that it lacked jurisdiction to review the South Carolina Department of Transportation's (the Department) decision to deny North Point's application for an encroachment permit North Point contends neither the chain of title, nor the Florence County tax assessor's

records, indicate the property at issue was located at a controlled-access intersection North Point also argues the Department's denial of its permit application was arbitrary, capricious, and characterized by an abuse of discretion We affirm in part, reverse in part, and remand

FACTS/PROCEDURAL BACKGROUND

North Point owns a parcel of land (the Property) at the intersection of U S Highway 378 and S C Highway S-21-57 in Florence County On November 10, 2009, North Point applied to the Department for an encroachment permit to construct a driveway from the Property onto U S 378 The Department determined the area of the proposed driveway was a controlled-access facility and denied North Point's request for a permit [1] Thereafter, North Point petitioned the circuit court for judicial review of the Department's decision North Point sought a reversal of the Department's decision on the grounds that the denial of the permit application was a taking of a property right and violated several constitutional protections, or, in the alternative, reimbursement from the Department for its loss of direct access to U S 378 North Point also argued the Department's denial was arbitrary, capricious, and characterized by an abuse of discretion

In response, the Department argued it did not have the authority to issue an encroachment permit for a controlled-access facility and the circuit court did not have jurisdiction to review the matter According to the Department, the judicial review authorized by section 57-5-1120 of the South Carolina Code (2006) applies only to denials of applications for private driveway entrances onto non-controlled-access highways [2] The Department

---

[1] The Department is authorized to acquire rights of access to establish controlled-access facilities by section 57-5-1070 of the South Carolina Code (2006) Once a controlled-access facility has been established, no person may have rights of ingress and egress across the controlled-access lines, "except at such designated places at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department " S C Code Ann § 57-5-1040 (2006)

[2] Pursuant to section 57-5-1120, "any abutting property owner or lessee may file an application within thirty days from a decision of the department in the

maintained it purchased access rights to the Property from North Point's predecessor-in-title, Jeanne Swintz, in 1997

On December 18, 2009, a hearing was held before the circuit court At the hearing, North Point argued the Swintz deed was deficient and did not effectively transfer access rights to the Department North Point maintained the Swintz deed refers to highway plans dated April 23, 1996, whereas the plans presented by the Department bear the dates of April 29 and 30, 1997 The Department explained the April 29 and 30, 1997, plans are the "as-built" plans filed after the completion of the project showing the controlled-access line created after Swintz granted the rights of access to the Department According to the Department, pre-construction plans are changed into as-built plans as projects progress and rights of access are negotiated

In a January 12, 2010 order, the circuit court dismissed North Point's complaint for lack of jurisdiction to review encroachment permits onto controlled-access highways The court held the judicial review authorized by section 57-5-1120 applied only to encroachment permit applications for non-controlled-access highways The court determined the Department legally acquired access rights to the Property from Swintz under the terms of section 57-5-1070 The court also found the Department validly established the intersection was a controlled-access facility The court noted no revisions to the notation of the new control of access line were indicated after the earliest date appearing on the plans, April 23, 1996

On February 2, 2010, North Point filed a motion for reconsideration North Point argued the court erred in finding the plans at issue were "so filed under [section] 57-5-570" of the South Carolina Code (2006) North Point maintained that because the Department's highway plans are stored at the Department's District Office in Florence and not at the office of the Florence County Tax Assessor as required by section 57-5-570, it was deprived of its

---

administration of Sections 57-5-1080 to 57-5-1110 for a hearing in the matter before a circuit judge " S C Code Ann § 57-5-1120 (2006) Section 57-5-1080 provides for a permit system for side-road entrances or private driveways onto highways not designated as controlled-access facilities S C Code Ann § 57-7-1080 (2006)

right to have such information available at the location required by law North Point also argued the Swintz deed was unclear regarding the grant of access rights to the Department, and the circuit court had jurisdiction to review the Department's decision pursuant to Article I, Section 22 of the South Carolina Constitution

The circuit court denied North Point's motion for reconsideration The court determined the language of the Swintz deed was sufficient to put purchasers on notice that access rights had been "alienated and impose upon those persons a duty of further inquiry into the status of that title irrespective of the technical issue of strict compliance with the statute regarding local storage of highway plans " This appeal followed

LAW/ANALYSIS

I Chain of Title

North Point argues the circuit court erred in finding the chain of title was sufficient to establish a grant of access rights from Swintz to the Department We disagree

According to the Swintz deed, Swintz conveyed to the Department "0 570 acre of land, damages, and all improvements thereon, if any, including rights of access as may be needed for controlled access facilities " The Swintz deed specifically references the Department's highway plan dated April 23, 1996 North Point argues the Swintz deed fails to specify the precise location of the controlled-access line, the scope of any controlled access, or the access rights of the remainder of the Property North Point contends the presence of a controlled-access line is uncertain because the April 23, 1996 plan referenced in the deed was not produced The Department argues that although the Swintz deed does not contain the precise location of the controlled-access line, the plans referenced therein contain the location of the line

We find the Swintz deed was sufficient to establish a grant of controlled access rights The record contains two title pages and two highway plan sheets from the Department's file which pertain to the area at

issue The plan sheets, dated April 29 and 30, 1997, indicate a controlled-access line extends the full length of the Property along U S 378 According to the Department, these plans are "as-built" plans which incorporate all revisions made during the course of the project beginning with the right-of-way plans The title pages contain the dates any revisions to the plans were made and the names of the engineers approving the revisions The second title sheet in the record indicates the final seal and approval for right-of-way purposes by the road design engineer was made on April 23, 1996 Pursuant to the first title sheet, no right-of-way revisions were made after April 23, 1996 Accordingly, we find the highway plans referenced in the deed show Swintz conveyed access rights to the Department See Fuller-Ahrens P'ship v S C Dept of Highways & Public Transp , 311 S C 177, 181, 427 S E 2d 920, 922 (Ct App 1993) (holding where a deed incorporates highway plans by reference, those plans and the notations thereon must be read with the deed)

North Point also argues the Department's denial of its encroachment permit constitutes a taking of a private property right without just compensation We disagree Pursuant to the Swintz deed, Swintz conveyed access rights to the Property to the Department in 1997 Therefore, because Swintz conveyed the access rights before North Point purchased the Property, North Point does not have a property right to protect

II Plan Maintenance

North Point argues the circuit court erred in finding the Department properly maintained the official highway plans for the intersection at issue We disagree

Pursuant to section 57-5-570,

> [t]he [D]epartment shall maintain in the office of the tax assessor for each of the several counties a copy of all highway plans on which are indicated the widths of the rights-of-way for each road in the related district or county and an alphabetical list of property owners on each road for which rights-of-way have

> been acquired These records must be for the convenience of persons making inquiry as to the right of the State in and to the right-of-way for roads constructed by the [D]epartment in any county

S C Code Ann § 57-5-570 (2006) The circuit court found the Swintz deed was sufficient to provide notice to potential purchasers that access rights to the Property had been conveyed and impose on those persons a duty "of further inquiry into the status of that title irrespective of the technical issue of strict compliance with the statute regarding local storage of highway plans " The circuit court determined the maintenance of the highway plans at the Department's Florence office instead of the Florence County Tax Assessor's office did not deprive North Point of any constitutional right The court noted its finding was supported by the "language of S C Code § 57-5-570 which requires a copy of all highway plans be *maintained by* the Department in the offices of the individual tax assessors " The court found the originals, or the "primary source of relevant information, is the [Department] itself "

North Point contends that because the Department's highway plans are not stored at the Florence County Tax Assessor's office as required by section 57-5-570, it was deprived of its right to have such information available at the location required by law The Department argues highway plans are easily obtainable from any Department office and the plan library is available for download by professional land surveyors We find the language of the Swintz deed was sufficient to put potential purchasers on notice that access rights to the Property had been conveyed to the Department and that such conveyance was noted on the highway plans Although a copy of the plans was not located in the tax assessor's office, the originals were located in Florence County and were available for review

III Jurisdiction

North Point argues the circuit court erred in finding it lacked jurisdiction to review the Department's refusal to consider North Point's permit application We agree

Pursuant to section 57-5-1040, once a controlled-access facility has been established, no person may have rights of ingress and egress across the controlled-access lines, "except at such designated places at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department " S C Code Ann § 57-5-1040 (2006) North Point maintains the Department abused its discretion under section 57-5-1040 by summarily rejecting its encroachment permit application We find the circuit court has jurisdiction to determine whether the Department's refusal to consider North Point's permit request is an abandonment of the discretion provided by the statute See Cole v Manning, 240 S C 260, 267-68, 125 S E 2d 621, 625 (1962) (holding that while the courts may not substitute judicial discretion for administrative discretion, capricious or arbitrary exercise of administrative discretion is subject to judicial review) Accordingly, we reverse the circuit court's finding that it lacked jurisdiction to review the Department's denial of North Point's permit application and remand to the circuit court for reconsideration Should the circuit court determine the Department abused its discretion in failing to consider North Point's permit application, it should remand to the Department for reconsideration

CONCLUSION

We affirm the circuit court's findings that (1) the chain of title was sufficient to establish a grant of access rights from Swintz to the Department, and (2) the maintenance of the highway plans at the Department's Florence office did not deprive North Point of any statutory right We reverse the circuit court's finding that it lacked jurisdiction to review the Department's denial of its permit application, and remand to the circuit court to determine whether the Department abused its discretion in declining to consider North Point's permit application

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

HUFF and PIEPER, JJ , concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G Nettles, Circuit Court Judge

Case No 2009-CP-21-2961

RECEIVED
MAR 27 2012
SC Court of Appeals

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation, Respondent

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant North Point Development Group, LLC ("North Point") petitions the Court for a rehearing of the opinion filed in this case on March 14, 2012 In that opinion, the Court found the South Carolina Department of Transportation ("DOT") purchased the access rights to North Point's property from North Point's predecessor in title The Court also found the fact that DOT failed to maintain plans as required by statute did not alter the rights purchased by DOT from North Point's predecessor in title The Court reversed and remanded the matter to require the trial court to consider whether DOT abused its discretion in summarily denying the permit request North Point respectfully submits that the Court overlooked or misapprehended the following points [1]

---

[1] North Point incorporates its earlier briefs by reference herein

ARGUMENT FOR REHEARING

The property in question is located on Highway 378 ("378") in Florence County Contrary to the Court's opinion, the Swintz deed does not convey, "0 570 acre of land, damages, and all improvements thereon, if any, including rights of access as may be needed for controlled access facilities " Instead, it conveys,

> all that certain real property in fee simple absolute intersection survey on U S Route 378, S C Route 41, 51, & Road S-57, State and County aforesaid, as shown on plans prepared by the South Carolina Department of Transportation and dated April 23, 1996, said property herein conveyed to have a width of xxxx feet, that is 75 feet on the left side(s) of the survey centerline of the highway as shown on the reference plans

(R at 27) The language quoted by the Court is found in the special provisions section following the actual granting clause Further, the language quoted by the Court refers to the property purchased by DOT ("0 570 acre of land") It does not contemplate any additional diminution of the remainder of the tract, including the access rights, which is the property ultimately purchased by North Point

As previously argued, S C Code Ann § 57-5-1070 requires SCDOT to take rights of access "in the same manner as now or hereafter authorized by law for acquiring property or property rights " This includes taking the access rights of adjoining property owners for purposes of establishing a controlled access facility

The granting clause here only provides that the parameters of the property purchased are as shown in DOT plans (the plans which were not kept at the Florence County Courthouse as required by S C Code Ann § 57-5-570) Nothing in the language of the granting clause does anything more than define the boundaries of the property conveyed by reference to DOT plans dated April 23, 1996 The granting clause refers to DOT plans to define the boundaries of the

property, not to limit the remainder of the property in any other way It defies the plain language of the deed to incorporate all provisions of DOT plans based on the language used Quite simply, the deed does not incorporate DOT plans by reference as a suggested by the Court

As for the special provisions, the plain language used refers to the portion of the tract that was purchased, not the property remaining Nothing in that language suggests the remainder of the property will be subject to controlled-access restrictions in the future For this reason, North Point argues the Court incorrectly found the Swintz deed was sufficient to convey all access rights along its 378 frontage

North Point also argues that the lack of clarity in the deed is compounded by DOT's failure to maintain the as-built highway plans as required by statute Given the language of the Swintz deed and DOT's failure to maintain the plans North Point was left with no ready way of knowing that DOT considered the property controlled-access

The language of the deed and DOT's failure to maintain plans at the Courthouse as required by statute left North Point without notice that DOT believed the property was controlled- access That failure constitutes a violation of North Point's constitutional due process rights under the federal and state constitutions *See* U S Constitution amends V & XIV, S C Constitution art I, §§3 & 22 Alternatively, DOT's total denial of direct access to 378 from the North Point's property constitutes a taking of private property rights without just compensation under the Fifth Amendment of the U S Constitution and Article I, Section 3 of the S C Constitution

North Point concurs with the Court's finding relating to the jurisdiction of trial court to determine whether DOT accurately For that reason, it does not seek rehearing as to that portion of the opinion

CONCLUSION

For these reasons and those contained in its briefs, North Point urges the Court to grant rehearing in this matter

Respectfully submitted,

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March 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G Nettles, Circuit Court Judge

RECEIVED
MAR 27 2012
SC Court of Appeals

Case No 2009-CP-21-2961

North Point Development Group, LLC, Appellant,

vs

South Carolina Department of Transportation Respondent

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on the South Carolina Department of Transportation by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2012, addressed to his attorney of record, Beacham O Brooker Jr , Post Office Box 191, Columbia, South Carolina 29202

Jacquelyn C Miller

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The South Carolina Court of Appeals

North Point Development Group, LLC, Appellant,

v

South Carolina Department of Transportation, Respondent

The Honorable Michael G Nettles
Florence County
Trial Court Case No 2009-CP-21 02961

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing

It is, therefore, ordered that the Petition for Rehearing be denied

Thomas C. Hoff J

D. Pieper J

James E. Kelly J

Columbia South Carolina

cc Sarah P Spruill, Esquire
Beacham O Brooker, Jr , Esquire

FILED
May 11, 2012

2012-212201

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
JUN - 4 2012
SC Supreme Court

Certiorari to the Court of Appeals
Appeal From Beaufort County
The Honorable J Ernest Kinard, Jr ,, Circuit Court Judge

The State, Petitioner,

v

Diamon D Fripp, Respondent

Opinion No 4956(S C Ct App filed March 21, 2012)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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TABLE OF CONTENTS

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CERTIFICATION OF COUNSEL

The South Carolina Court of Appeals denied the petition for rehearing by Order filed May 3, 2012

STATEMENT OF QUESTIONS PRESENTED

1 When there is evidence that an accused has planned and performed a skit to mislead the police and to temporarily conceal contraband in the publically accessible parking area of a nightclub, is a jury instruction on constructive possession of the contraband either irrelevant, inapplicable, or erroneous?

2 When there is evidence that one has in the nighttime furtively placed contraband - out of ordinary visibility to patrons using a business' publicly accessible parking lot - within freshly disturbed pine straw, is a jury instruction on constructive possession of the contraband either irrelevant, inapplicable, or erroneous?

3 Is the furtive, nighttime concealment of packaged cocaine within the area of a business' publicly accessible parking lot - accompanied by a theatrical performance to mislead the police into believing that ordinary stones are contraband and there is then no reason to look further - evidence of maintaining dominion and control of cocaine that supports a jury instruction on constructive possession?

STATEMENT OF THE CASE

The Grand Jury of Beaufort County charged the defendant with trafficking cocaine (2009-GS-07-0196) The defendant and his counsel came to trial October 26-27, 2009 before the Honorable J Ernest Kinard, Jr , Judge, and a jury The jury found the defendant guilty, and the court imposed a sentence of twelve years imprisonment and a fine of fifty thousand dollars The defendant served opposing counsel a timely notice of appeal

The South Carolina Court of Appeals reversed and remanded the judgment of the circuit court on the basis of one of the defendant's three assignments of error the state's evidence supported only the actual possession of cocaine, and the trial court erred charging the jury on both actual and constructive possession of cocaine In fine, there was no evidence that the defendant was in constructive possession of the drugs, and the trial court's constructive possession charge was irrelevant, inapplicable, and erroneous since it had the potential to confuse the jury, and affect the outcome of the trial The evidence upon which the state could rely in proving actual possession was entirely circumstantial, but Sergeant Rodriguez offered no testimony demonstrating circumstantial evidence of actual possession, and there was a dearth of direct evidence of actual possession State v Fripp, Op No 4956 (S C Ct App decided March 21, 2012)

The state served its petition for rehearing on March 22, 2012, and the South Carolina Court of Appeals denied the petition for rehearing by Order filed May 3, 2012

ARGUMENT

Trial evidence supported the court's jury instruction on constructive possession (Questions Presented for Review 1-3)

Issue and Rulings

At trial the defendant objected to a charge on constructive possession since the drugs were found 30 feet away from him, and there was no evidence of dominion and control The court declined to adopt his reasoning (ROA pp 101-102, 137, lines 1-7) The court instructed the jury on constructive possession (ROA p 130, line 21- p 132, line 15)

The South Carolina Court of Appeals found no evidence that the defendant was in constructive possession of the drugs, and the trial court's constructive possession charge was irrelevant, inapplicable, and erroneous since it had the potential to confuse the jury and to affect the outcome of the trial State v Fripp, Op No 4956 (S C Ct App decided March 21, 2012)

Trial Evidence

Police responded to a nightclub's request for service involving a disturbance and a person refusing to leave the premises At the club owner's instance, the police attempted to approach and to investigate the defendant, but he fled with marked persistence and, at one point, went behind a truck Officers apprehended the defendant, and he allowed that they had no evidence Police searched the defendant and found just under $600 in crumpled cash and eight or nine "rocks" or "stones" in his pocket While handcuffed, the defendant theatrically attempted to retrieve - with his mouth - the stones or rocks The rocks or stones that he

apparently attempted to ingest, were field tested and tested by a forensic chemist and were actual rocks or stones - not a controlled substance A drug dog found a bag of white powdery substance (34 35 grams of cocaine) within freshly disturbed pine straw - like somebody had tried to bury it - right behind the truck where the defendant had been (ROA pp 31-51, 57-58, 62-63, 67-69, 88-89, 97-99, line 4)

Applicable Law

Constructive possession of contraband is the exercising of dominion and control over either the substance or the premises where the substance is kept State v Ballenger, 322 S C 196, 470 S E 2d 851 and n 3 (1996) "The law to be charged to the jury must be determined by the evidence presented at trial" State v Harris, 382 S C 107, 674 S E 2d 532 (Ct App 2009)

Discussion

Circumstantial evidence supports a reasonable inference that the defendant had the cocaine in his constructive possession During the defendant's fleeing from the police, he went behind the truck When apprehended, the defendant assured the police that they lacked evidence Upon the police finding the crumpled cash in his pocket and - apparently - the evidence [the eight or nine actual rocks], the defendant theatrically attempted to consume that benign evidence The police, having supposedly found the evidence, would have no reason to retrace the route he took while attempting to flee and no reason to suspect that he had secreted any contraband while fleeing The defendant, or a confederate, could then recover

the hidden treasure [34 35 grams of cocaine] at an opportune time Fleeing, secreting the cocaine within the freshly disturbed pine straw behind the truck, and attempting to mislead the police into believing that they had found incriminating evidence, demonstrate that the defendant exercised dominion and control over the cocaine and support the trial court's jury instruction on constructive possession of drugs The trial judge soundly charged the jury on constructive possession [1]

---

[1] In State v Ballenger, 322 S C 196, 470 S E 2d 851 and n 3 (1996) evidence did not support a jury charge on constructive possession since the only reasonable inference was that the defendant had either discarded and abandoned the crack or simply lost the crack In the present case the defendant did not toss, discard, lose, or abandon his cocaine Rather, the defendant maintained constructive possession of his cocaine by secreting his packaged cocaine within freshly disturbed pine straw and then, through his theatrics, attempting to misdirect the police from discovering his treasure

CONCLUSION

The case presents circumstantial evidence supporting a jury instruction on constructive possession of cocaine by the exercise of dominion and control over the substance in a publicly accessible area The trial court ruled on an objection to its jury charge and applied the correct law The case forensically illustrates circumstantial evidence and constructive possession, and the Court should exercise its discretionary review

Respectfully submitted,

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June 4, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Beaufort County
The Honorable J Ernest Kinard, Jr ,, Circuit Court Judge

The State, Petitioner,

v

Diamon D Fripp, Respondent

Opinion No 4956(S C Ct App filed March 21, 2012)

PROOF OF SERVICE

I, HAROLD M COOMBS, JR , certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to

Jared Sullivan Newman, Esquire
Jared S Newman, P A
Post Office Box 515
Port Royal, SC 28835

I further certify that all parties required by Rule to be served have been served This 4th day of June, 2012

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HAROLD M COOMBS, Jr

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ALAN WILSON
ATTORNEY GENERAL

June 4, 2012

RECEIVED
JUN - 4 2012
S C Supreme Court

Jared Sullivan Newman, Esquire
Jared S Newman, P A
Post Office Box 515
Port Royal, SC 28835

Re State v Diamon D Fripp

Dear Mr Newman

I am enclosing two (2) copies of the Petition for Writ of Certiorari to the Court of Appeals and the Appendix in the above-referenced case

If you have any questions concerning this matter, please contact me

Sincerely,

Harold M Coombs, Jr
Senior Assistant Attorney General

HMC erd

cc Honorable Daniel E Shearouse (original and six enclosed)
Honorable Jenny A Kitchings
Victim Services (enclosure)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable J Ernest Kinard, Jr Circuit Court Judge

Opinion No 4956 (S C Ct App Filed March 21, 2012)

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S C Supreme Court

THE STATE PETITIONER,

V

DIAMON D FRIPP RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

J Ernest Kinard, Jr , Circuit Court Judge

THE STATE,

RESPONDENT,

V

DIAMOND FRIPP,

APPELLANT

RECORD ON APPEAL

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DELIBERATIONS AND SO FORTH HAVE A GOOD NIGHT WHAT DID I SAY? 9 20? BE BACK ABOUT 9 25 ELECT THE FOREPERSON, AND WE'LL START RIGHT AT 9 30 I NEED EVERYBODY HERE THOUGH I NEED EVERYBODY HERE THE BAILIFFS WILL SHOW YOU WHERE TO REPORT AND HOW TO GET IN HERE OKAY?

(WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR THE DAY AT 3 09 P M)

THE COURT YOU HAVE A JACKSON/DENNO YOU WANTED TO DO?

MR BANNON YES, JUDGE

THE COURT ALL RIGHT LET S DO IT

MR BANNON YOUR HONOR---

THE COURT DO Y'ALL NEED A BREAK OR ARE YOU READY TO GO? I'M NOT A SLAVE DRIVER I MEAN, I'VE GOT THINGS TO DO

MS JORDAN I THINK WE'RE FINE, YOUR HONOR THANK YOU

THE COURT YOU KNOW, EVERY HOUR OR SO I'VE GOT TO CHECK AND MAKE SURE THE CLERK HASN'T MADE ANY MORE MISTAKES NO, I'M KIDDING

THE CLERK THANKS, JUDGE

THE COURT OR THINGS LIKE THAT OKAY

MR BANNON THE STATE CALLS SERGEANT RODRIGUEZ

THE COURT ALL RIGHT SERGEANT, COME AROUND

SCOTT RODRIGUEZ, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS IN CAMERA

DIRECT EXAMINATION

BY MR BANNON

Q GOOD AFTERNOON, SERGEANT

A GOOD AFTERNOON

Q COULD YOU PLEASE STATE YOUR NAME JUST FOR THE RECORD?

A SCOTT RODRIGUEZ

Q AND WHERE DO YOU WORK?

A THE BEAUFORT COUNTY SHERIFF'S OFFICE

Q WERE YOU INVOLVED WITH AN INVESTIGATION INVOLVING DIAMON FRIPP ON JANUARY 1ST OF 2009?

A YES, I WAS

Q AND COULD YOU PLEASE TELL US HOW YOU CAME TO BE INVOLVED IN THAT?

A I WAS WORKING THE ROAD I AM NORTHERN ROAD -- ONE OF THE NORTHERN ROAD SUPERVISORS, AND WE RECEIVED A CALL AT THE STUDIO SEVEN NIGHTCLUB IN REFERENCE TO A DISTURBANCE IN THE PARKING LOT

Q AND WHAT TIME OF NIGHT WAS THIS?

A AFTER DARK ABOUT 2 00 IN THE MORNING OR SO

Q OKAY AND SO JUST INTO THE NEW YEAR

A YES

Q OKAY AND WHAT KIND OF COMPLAINT DID YOU RECEIVE?

A IT WAS A DISTURBANCE IN THE PARKING LOT, A MAN WEARING BLUE CAUSING SOME FORM OF DISTURBANCE

Q AND DID YOU GO TO THE PARKING LOT?

A YES I RESPONDED IN MY PATROL VEHICLE, PARKED IN THE PARKING LOT
Q AND IS THAT AT 44 DONALDSON CAMP ROAD?
A YES, IT IS
Q AND DID YOU SEE -- WHAT DID YOU SEE WHEN YOU ARRIVED?
A WHEN I PULLED INTO THE PARKING LOT, I STOPPED ABOUT 40 YARDS FROM THE FRONT ENTRANCE I COULD SEE THE SECURITY GUARD HANDLING A ROW OF FEMALE CUSTOMERS LINED UP WAITING TO GET INTO THE NIGHTCLUB AND ONE MALE WITH HIS BACK TO MY PATROL VEHICLE
Q OKAY AND COULD YOU DESCRIBE WHAT THE MALE WITH HIS BACK TO YOU WAS WEARING?
A HE WAS WEARING A BLUE SHIRT-TYPE JACKET
Q OKAY
A BAGGY
Q AND WHAT HAPPENED NEXT?
A THAT MALE LOOKED OVER HIS RIGHT SHOULDER AT MY PATROL VEHICLE AND THEN STARTED WALKING TOWARDS THE LEFT PARKING LOT
Q OKAY AND WHAT AFTER THAT?
A I EXITED MY VEHICLE, WALKED UP TO THE SECURITY GUARD, LOOKED AT HIM HE CONTINUED DEALING WITH THE FEMALE CUSTOMERS INSIDE THE VESTIBULE WHERE THE SECURITY GUARD WAS THERE WAS A VESTIBULE TO HIS RIGHT THE OWNER OF THE CLUB WAS STANDING IN THERE BEHIND ONE OF THE WINDOWS, AND HE WAS

POINTING AT THAT MALE WHO WALKED AWAY

Q OKAY SO WHAT DID YOU DO AFTER THAT?

A I PROCEEDED AFTER THE MALE WHO WALKED AWAY

Q AND DID YOU CALL OUT TO HIM?

A YES, I SAID -- I CALLED OUT I SAY, "HEY, COME HERE CAN I TALK TO YOU?" I WHISTLED

Q AND DID HE STOP?

A HE STOPPED HE TURNED AROUND AND LOOKED STRAIGHT AT ME TURNED BACK AROUND AND CONTINUED WALKING AT A FASTER PACE BETWEEN PARKED CARS

Q OKAY AND DID YOU FOLLOW HIM?

A I ACTUALLY HEADED IN THE SAME DIRECTION, BUT I DIDN'T FOLLOW HIS PATH I FOLLOWED IN THE AREA OF THE PARKING LOT WHERE VEHICLES WOULD NORMALLY TRAVEL I DIDN'T FOLLOW BETWEEN THE CARS

Q HOW FAR DID YOU FOLLOW HIM?

A APPROXIMATELY 400 YARDS FROM THE FRONT ENTRANCE

Q OKAY AND---

A I'M SORRY 400 FEET

Q 400 FEET? OKAY AND ARE YOU -- DID YOU JUST CALL HIM THE ONE TIME?

A FROM THAT INITIAL POINT? YES THEN I SAID, "SHERIFF'S OFFICE, STOP," OR "STOP SHERIFF'S OFFICE " I DO NOT REMEMBER WHICH ONE IT WAS

Q OKAY DID THE DEFENDANT STOP OR DID HE JUST CONTINUE ON

HIS WAY?
A NO, HE CONTINUED ON HIS WAY
Q AND AT ANY POINT DID YOU EVER GET A GOOD LOOK AT THE PERSON WHO WAS WEARING BLUE?
A I SAW HIS FACE WHEN HE TURNED AROUND, AND I SAW HIS BACK THE WHOLE TIME I WAS BEHIND HIM
Q AND DO YOU SEE THAT PERSON IN THE COURTROOM TODAY?
A YES, I DO
Q WOULD YOU POINT HIM OUT PLEASE?
A HE'S SITTING RIGHT OVER HERE WITH A BLACK-AND-WHITE CHECKERBOARD SHIRT ON (THE WITNESS POINTS TO THE DEFENDANT)
Q AND WHAT HAPPENED THEN?
A HE GOT FARTHER DOWN IN THE PARKING LOT THEN HE CUT ACROSS ONE OF THE ROWS OF PARKED CARS, CUT ACROSS THE PATHWAY THAT I WAS TAKING WHERE VEHICLE TRAFFIC WOULD NORMALLY TRAVEL AND RAN BEHIND A BLACK PICKUP TRUCK
Q OKAY AND WHAT DID YOU DO NEXT?
A I LOST SIGHT OF HIM, AND I TOLD MY DISPATCHERS, "I GUESS HE DOESN'T WANT TO TALK TO ME," AND HE REAPPEARED
Q OKAY WHAT HAPPENED NEXT?
A HE STARTED COMING BACK TOWARDS ME, AND HE LOOKED LIKE HE WANTED TO WALK PAST ME
Q OKAY DID HE SAY ANYTHING?
A AT THAT POINT, NO

Q OKAY
A I COULDN'T SEE HIS HANDS
Q SO WHAT HAPPENED THEN?
A I DREW MY SERVICE WEAPON, AND I ORDERED HIM TO LET ME SEE HIS HANDS
Q AND WHY DID YOU DO THAT?
A IT'S A SAFETY ISSUE AT THAT POINT I DON'T KNOW IF HE HAS A GUN IN HIS HANDS I DON'T KNOW WHAT IF HE DOESN'T HAVE ANYTHING IN HIS HANDS, HE PRETTY MUCH CAN'T HURT ME
Q OKAY
A SO I ORDERED TO SEE HIS HANDS
Q AND WHAT HAPPENED THEN?
A HE SAID, "YOU GOT NOTHING ON ME I DON'T GOT ANY DRUGS," AND I CONTINUED ORDERING HIM TO LET ME SEE HIS HANDS, LET ME SEE HIS HANDS
Q OKAY AND DID HE EVER SHOW YOU HIS HANDS?
A YES, EVENTUALLY HE DID
Q AND WHAT HAPPENED NEXT?
A I TOLD HIM TO GET ON THE GROUND HE SAID, "NO, IT'S COLD OUTSIDE " HE SQUATTED HE PUT HIS LEFT HAND DOWN NUMEROUS TIMES TO THE FLOOR, BUT HE NEVER GOT ON THE GROUND
Q OKAY WERE YOU EVER ABLE TO TAKE THE DEFENDANT INTO CUSTODY?
A YES, EVENTUALLY I WAS ABLE TO
Q OKAY DID YOU PUT HANDCUFFS ON HIM?

A I WAS ABLE TO GET THE LEFT HANDCUFF ON HIM FIRST, AND I WAS ABLE TO HOLSTER MY DUTY WEAPON, AND I WAS ABLE TO GET THE RIGHT HANDCUFF ON HIM AND FULLY HANDCUFF HIM

Q WAS HE SAYING ANYTHING DURING THIS?

A HE WAS SAYING ALL TYPES OF THINGS "YOU'RE DIRTY YOU GOT NOTHING ON ME THIS AIN'T RIGHT " ALL TYPES OF STUFF

Q OKAY AND ONCE YOU HAD HIM IN CUSTODY, DID YOU -- WERE YOU EVER ABLE TO SEARCH HIM?

A YES

Q AND DID YOU FIND ANYTHING?

A IN HIS PANTS POCKET WE FOUND CLOSE TO $600 OF CRUMPLED-UP BILLS THEY WEREN'T ALL CRUMPLED IN ONE BUNDLE IT WAS LIKE TISSUE PAPER WITH IDEAS YOU CRUMPLE THEM UP AND THROW THEM OUT CLOSE TO $600 I BELIEVE IT WAS 594 OR 5 DOLLARS

Q WAS THERE ANYTHING ELSE?

A HE ALSO HAD SOME STONES IN HIS POCKET

Q AND WHAT DID YOU DO WITH THE STONES?

A THE BILLS AND THE STONES WERE PLACED ON THE TRUNK OF THE PATROL CAR THAT HE WAS UP AGAINST HE WAS CHEST UP AGAINST THE PATROL CAR, AND HIS CONTENTS OF HIS POCKETS WERE EMPTIED ON TO THE TRUNK OF THE VEHICLE

Q AND WHAT HAPPENED NEXT?

A HE TRIED TO BEND OVER AND SCOOP UP THOSE STONES WITH HIS MOUTH

Q OKAY DID YOU EVER DO ANY PRELIMINARY TESTS ON THE

STONES TO DETERMINE IF THEY WERE NARCOTICS OR NOT?
A PRIOR TO THAT POINT? NO
Q DID YOU AFTERWARDS?
A YES
Q DID THEY REACT IN ANY WAY?
A THEY DIDN'T REACT TO MY NIK KIT, MY COCAINE ANALYSIS KIT, NO
Q WHAT DID YOU DO NEXT?
A AT THAT POINT I HAD CALLED FOR ANOTHER UNIT, AND ANOTHER UNIT SHOWED UP I TOLD THEM TO COME AROUND THE PARKING LOT BECAUSE THERE'S ONLY ONE WAY IN HE HAD TO DRIVE AROUND BEHIND ME TO GET HIS VEHICLE TO MY POINT, AND MR FRIPP WAS PLACED IN THAT CAR
Q AND WAS A SEARCH OF THE AREA PERFORMED?
A YES, THAT WAS ALSO DONE
Q AND WAS ANYTHING FOUND?
A YES, A BAG OF WHITE POWDERY SUBSTANCE WAS LOCATED
Q AND DO YOU KNOW WHO FOUND THAT?
A YES, OFFICER MOONEY FOUND IT
Q AND DID HE EVER GIVE IT TO YOU?
A YES, HE DID
Q WHAT DID YOU DO WITH THE BAGGY OF POWDER ONCE YOU FOUND IT?
A THAT WAS FIELD-TESTED RIGHT THERE ON THE TRUNK OF THAT PATROL VEHICLE WITH A DEPARTMENT-ISSUED NIK KIT WHICH IS A

COCAINE TEST KIT, AND IT REACTED POSITIVE FOR THE PRESENCE OF COCAINE

Q WHERE IS THE DEFENDANT WHEN YOU'RE DOING THIS?

A HE'S IN THE BACK SEAT OF THAT PATROL VEHICLE

Q OKAY IS HE ABLE TO SEE OR ARE YOU IN VIEW OF HIM?

A YES HE WAS TURNED AROUND IN THE SEAT, YELLING OBSCENITIES AND SCREAMING AND YELLING THE WHOLE TIME

Q OKAY AND WAS HE ALONE IN THE CAR?

A YES HE WAS

Q OKAY WHAT HAPPENED THEN?

A AT THAT POINT THE COCAINE -- THE BAG THAT WAS FOUND WAS PLACED INTO AN EVIDENCE BAG TO BE TURNED IN TO THE LAB FOR TESTING

Q OKAY DID YOU EVER INFORM MR FRIPP WHAT HE WAS GOING TO BE CHARGED FOR?

A INITIALLY WHEN HE SAID, "WHAT ARE YOU ARRESTING ME FOR?" AND I TOLD HIM "FOR FLEEING TO EVADE ARREST "

Q OKAY

A AND I ALSO TOLD HIM THIS IS BEING -- "YOU'RE BEING CHARGED WITH THIS "

Q OKAY AND WHAT DID -- DID HE REPLY WHEN YOU TOLD HIM---

A HE SAID, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE "

Q OKAY HAD YOU TOLD HIM ANYTHING ABOUT COCAINE PRIOR TO THAT?

A NO

Q OKAY AND NOW STUDIO SEVEN, IS THAT A NIGHTCLUB?

A YES, IT IS

Q AND WOULD YOU CALL IT A HIGH-CRIME AREA?

A YES

Q IS THERE A LOT OF DRUG ACTIVITY AT THAT LOCATION?

A I WOULDN'T KNOW ABOUT DRUG ACTIVITY

Q OKAY WAS THE DEFENDANT EVER MIRANDIZED?

A HE WAS, NOT BY ME

Q OKAY DO YOU KNOW WHO MIRANDIZED HIM?

A I BELIEVE IT WAS FERGUSON AT THE JAIL

Q OKAY SO YOU NEVER MIRANDIZED HIM

A NO AFTER HE WAS PLACED IN THE VEHICLE, I HADN'T HAD A CONVERSATION WITH HIM

Q OKAY DID YOU EVER ASK HIM ANY DIRECT QUESTIONS?

A I ASKED HIM WHAT HIS NAME WAS, AND HE WOULDN'T TELL ME

MR BANNON OKAY NO FURTHER QUESTIONS

CROSS-EXAMINATION

BY MS JORDAN

Q SO THE ONLY TIME YOU SPOKE TO DIAMON -- IN FACT, YOU DID KNOW IT WAS DIAMON FRIPP, CORRECT?

A I DIDN'T KNOW WHO HE WAS AT THAT TIME

Q YOU NEVER CALLED DISPATCH WITH THAT NAME?

A NOT UNTIL AFTER I FOUND OUT WHAT HIS NAME WAS

Q AND SO BASICALLY YOU HAD TWO CONVERSATIONS WITH HIM, ONE WHEN YOU TOLD HIM TO GET TO THE GROUND - IS THAT CORRECT -

WHEN HE SAID THE FIRST STATEMENT, "I HAVE NOTHING ON ME"? IS THAT CORRECT?

A WHEN I SAID, "LET ME SEE YOUR HANDS"?

Q RIGHT WHEN HE CAME---

A I SPOKE TO HIM PRIOR TO THAT TELLING HIM, "LET ME TALK TO YOU " HE WOULDN'T -- HE WOULDN'T TALK TO ME

Q RIGHT I UNDERSTAND YOU SAID THAT WAS THE FIRST TWO-WAY CONVERSATION, I GUESS---

A YES

Q ---AT THAT POINT?

A YES

Q AND THE ONLY OTHER TIME YOU TALKED TO HIM WAS WHEN HE WAS BACK IN THE PATROL CAR AND YOU PUT THE DRUGS -- SHOWED HIM THE DRUGS AND TOLD HIM, "YOU'RE CHARGED WITH THAT " IS THAT CORRECT?

A I SAID, "YOU'RE BEING CHARGED WITH THIS "

Q RIGHT

A IT WASN'T A TWO-WAY CONVERSATION HE WAS IN A CLOSED VEHICLE

Q OKAY SO THE WINDOW WAS UP AND HE WAS INSIDE

A THE WINDOW WAS UP IT WAS DECEMBER IT WAS COLD

Q BUT YOU COULD HEAR HIM

A OH, YEAH HE WAS YELLING

Q COULD HE HEAR YOU?

A I DON'T KNOW MAYBE

Q OKAY SO BACK UP TO THE FIRST CONVERSATION YOU HAD WITH HIM BY THE TRUCK, YOU HAD YOUR GUN YOU ORDERED HIM TO THE GROUND, AND IS IT TRUE THAT DIAMON SAID HE DIDN'T HAVE ANY DRUGS ON HIM?

A I ORDERED HIM TO LET ME SEE HIS HANDS AND HE SAID, "YOU GOT NOTHING ON ME I HAVE NO DRUGS "

Q OKAY AND WHEN HE WAS IN THE CAR, YOU SHOWED HIM THE BAG AND SAID THAT YOU'RE CHARGING HIM WITH THIS AND IT WAS A CONVERSATION -- HIS RESPONSE WAS "THAT'S NOT MINE" OR -- I'M SORRY

A HE SAID, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE," MA'AM

MS JORDAN NOTHING FURTHER

MR BANNON NO REDIRECT, YOUR HONOR IT WOULD JUST BE THE STATE'S CONTENTION THAT THOSE STATEMENTS WEREN'T MADE UNDER INTERROGATION AND THEY WERE VOLUNTARILY GIVEN

THE COURT OKAY

MS JORDAN SORRY, YOUR HONOR YOUR HONOR, FOR THIS HEARING WE AGREE THE FIRST -- THE FIRST STATEMENT CAN BE -- WE FEEL THAT YOU PROBABLY COULD FIND THAT THERE WAS A SPONTANEOUS UTTERANCE AT THAT POINT THE SECOND TIME HE WAS IN THE CAR, NO MIRANDA RIGHTS HAD BEEN GIVEN TO HIM HE WAS SHOWN A BAG, WHICH IT DOESN'T NECESSARILY HAVE TO BE ACTUAL WORDS VERBAL WORDS, BUT BECAUSE HE WAS ELICITING SOME KIND OF RESPONSE BY SHOWING HIM HE WAS CHARGED WITH THAT, I

BELIEVE THAT WOULD BE SOMETHING THAT YOUR HONOR MAY CONSIDER BEING NOT VOLUNTARY

THE COURT ALL RIGHT IT CAN COME IN AS I UNDERSTAND IT, ALL HE SAID IS, "I DON'T KNOW NOTHING ABOUT NO COCAINE " HE DIDN'T SAY, "I DON'T KNOW ANYTHING ABOUT 28 23 GRAINS OF COCAINE " ALL RIGHT YOU CAN STEP DOWN

THE WITNESS THANK YOU, YOUR HONOR

MR BANNON JUST ONE SECOND, YOUR HONOR YOUR HONOR, NEXT THE STATE WOULD CALL OFFICER VORTISCH, AND I BELIEVE HE'S IN THE BACK, AS HE WAS---

THE COURT OKAY YOU CAN---

MR BANNON ---COMING FROM THE DETENTION CENTER

THE COURT ---GET HIM

MR BANNON SO THANK YOU JUDGE

THE COURT SERGEANT SCOTT RODRIGUEZ, YOU CAN STEP DOWN

THE WITNESS THANK YOU, YOUR HONOR

JEFF VORTISCH, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS IN CAMERA

DIRECT EXAMINATION

BY MR BANNON

Q GOOD AFTERNOON, OFFICER

A GOOD AFTERNOON, SIR

Q PLEASE STATE YOUR NAME FOR THE RECORD

A JEFF VORTISCH

Q AND WHERE DO YOU WORK?

MR BANNON THAT WOULD CONCLUDES THE STATE'S JACKSON VERSUS DENNO HEARING THANK YOU, OFFICER NO FURTHER QUESTIONS

COURT REPORTER SO THAT EXHIBIT IS NOT GOING TO BE PART OF THIS TRIAL?

MR BANNON I DON'T THINK SO

THE COURT NO, UNLESS THEY WANT IT I MEAN, Y'ALL DON'T WANT IT, DO YOU?

MS JORDAN NO, YOUR HONOR THANK YOU THANK YOU, YOUR HONOR

THE COURT ALL RIGHT WHAT MOTIONS DO YOU HAVE?

MS JORDAN YOUR HONOR, THE DEFENSE MAKES A MOTION AT THIS TIME TO EXCLUDE ANY TESTIMONY OR REFERENCE TO THE DEFENDANT IN ANYTHING FLEEING, EVADING, OR SUSPICIOUS BEHAVIOR RELATED TO THE CHARGE OF FLEEING TO EVADE ARREST AND DETENTION YOUR HONOR IN MARCH THIS CASE WAS BROUGHT BEFORE A MAGISTRATE COURT THE MAGISTRATE COURT JUDGE AT THAT TIME -- IT WENT TO THE TRIAL IT WENT TO THE JURY THE JURY CAME BACK THE MAGISTRATE REVISITED THE JURY WAS HUNG, CAME BACK TO THE MAGISTRATE THE MAGISTRATE REVISITED HIS -- I ASKED HIM TO -- I RENEWED MY MOTIONS AT THAT TIME HE GRANTED A DIRECTED VERDICT OF NOT GUILTY AT THAT TIME ON THAT CHARGE AT THIS TIME, YOUR HONOR, I BELIEVE THAT WOULD BE FOLLOWING THE RULES OF COLLATERAL ESTOPPEL TO BRING ANYTHING RELATED TO HIS NOT-GUILTY VERDICT UNDER THAT TRIAL AT THAT

TIME

THE COURT I DON'T KNOW ANYTHING ABOUT IT HE CAN'T -- HE CAN'T BRING THAT UP, BUT I CAN'T KEEP OFFICER RODRIGUEZ FROM TESTIFYING ABOUT WHAT HAPPENED OUT THERE THAT DAY

MS JORDAN YOU KNOW, WE'RE WORRIED THAT ANYTHING RELATED TO THE -- ANYTHING ABOUT HIM NOT STOPPING, FLEEING FROM THE OFFICER, WILL AGAIN PUT THAT IN THE JURY'S MIND THAT THERE IS SOMETHING -- HE'S DOING SOMETHING WRONG WHEN HE'S ALREADY BEEN FOUND NOT GUILTY FOR THAT TRIAL

THE COURT WELL, GOOD LUCK, BUT THE PROBLEM IS THE OFFICER IS ENTITLED TO TESTIFY AS TO WHY HE DETAINED HIM AND SO FORTH, AND THAT'S GOING TO COME IN, IF THAT'S WHAT YOU'RE TRYING TO GET EXCLUDED THE TRIAL ITSELF IS NOT GOING TO COME IN UNLESS YOU BRING IT IN

MS JORDAN YEAH, BUT HE'S ALREADY BEEN TRIED AND FOUND NOT GUILTY OF THOSE CHARGES

THE COURT WHO -- I MEAN, YOU CAN BRING THAT OUT IF YOU WANT TO, BUT THEY CAN'T BRING IT OUT, BUT I CAN'T STOP OFFICER RODRIGUEZ, IF THAT'S WHAT YOU'RE ASKING ME TO DO, FROM SAYING WHY HE STOPPED HIM IS THAT WHAT YOU'RE TRYING TO DO?

MS JORDAN BASICALLY, YOUR HONOR, I GUESS BECAUSE THAT WAS THE UNDERLYING -- THAT WAS WHY HE ARRESTED HIM HE ARRESTED HIM ONLY BECAUSE HE SAID FLEEING TO EVADE ARREST WELL, IF HIS ONLY REASON TO ARREST HIM WAS FLEEING TO EVADE

AND HE WAS FOUND NOT GUILTY ON THAT CHARGE, THEN THAT -- THAT WAS THE REASON HE WAS ARRESTED

THE COURT WELL, YOU KNOW, IN YOUR HEART OF HEARTS, AS YOU THINK BACK, AS JUSTICE SCALIA SAID IN I THINK IT WAS THE CASE OF FIERA VERSUS CALIFORNIA (PHONETIC), QUOTING SOME BIBLICAL SCRIPTURE A GUILTY MAN FLEETH WHEN NONE PURSUETH THAT'S WHY HE WENT AFTER HIM HE CAN TESTIFY TO THAT I CAN'T KEEP HIM FROM SAYING THAT

MS JORDAN OKAY WELL, THEN I HAVE THE STATE V SNOWDEN, COLLATERAL ESTOPPEL, WHERE THE COURT HAS CITED THAT, "COLLATERAL ESTOPPEL PREVENTS A PARTY FROM RELITIGATING IN A SUBSEQUENT SUIT AN ISSUE ACTUALLY NECESSARILY LITIGATED IN A PRIOR ACTION " THIS HAS ALREADY BEEN DETERMINED TO OUR ARGUMENT I GUESS, YOUR HONOR, IS THAT TO PUT HIM ON TRIAL FOR THE SAME OFFENSE WOULD FALL UNDER STATE V SNOWDEN THAT IT WOULD BE---

THE COURT HE CANNOT BE TRIED FOR RESISTING -- FOR FLEEING THE SCENE OR RESISTING ARREST THAT'S NOT ONE OF THE COUNTS OF THE INDICTMENT THAT I'M LOOKING AT

MS JORDAN CORRECT YOUR HONOR, BUT THAT WAS THE CHARGE THAT HE WAS ARRESTED ON THERE WAS NO DRUGS FOUND ON HIM, AND HE WASN'T THERE INVESTIGATING A DRUG REPORT

THE COURT SO THEN IF YOU CAPTION YOUR MOTION INTO THROW IT OUT BECAUSE THEY HAD NO PROBABLE CAUSE FOR MAKING AN ARREST

MS JORDAN THAT'S WHAT I'M SAYING, THERE'S NO PROBABLE CAUSE

THE COURT WHICH WOULD BE -- WHICH WOULD BE A PROPER MOTION, NOT THIS STUFF ABOUT COLLATERAL ESTOPPEL ON THAT, THEN I CAN CONSIDER THAT, BUT I'M NOT GOING TO THROW IT OUT AT THIS POINT

MS JORDAN MY UNDERSTANDING, I THOUGHT I WAS SAYING IT THE RIGHT WAY - EXCUSE ME - THAT THE JUDGE FOUND -- RULED ON A DIRECTED VERDICT THAT THERE WAS NO PROBABLE CAUSE FOR THE ARREST ITSELF AND THAT'S WHY WE PUT THE MOTION IN AND THAT IT SHOULD BE

THE COURT BUT HE -- HE DETAINED HIM, AND THEN THE DRUGS WERE FOUND AS I UNDERSTOOD IT, JUST FROM HIS TESTIMONY

MS JORDAN WELL, I UNDERSTAND THAT'S FINE IF HE WAS DETAINED, BUT I JUST DON'T WANT ANYTHING THAT WOULD RELATE TO THE CHARGE THAT THE JUDGE FOUND NO PROBABLE CAUSE FOR

MR BANNON I'M NOT PLANNING ON MAKING THIS A TRIAL ABOUT HIM---

THE COURT RIGHT

MR BANNON ---WANTING -- WE'RE GOING TO TALK ABOUT THE FACT THAT HE WALKED AWAY, BUT I'M NOT GOING TO TALK ABOUT THE FACT THAT HE HAD A PRIOR CHARGE

THE COURT RIGHT YOU CAN'T DO THAT HE'S BEEN ACQUITTED OF THAT THERE YOU GO

MS JORDAN SO I GUESS I'M -- IF HE WAS ARRESTED, HE'S GOING TO SAY HE PUT HIS GUN TO HIM AND ARRESTED HIM

THE COURT WELL, HE'S GOING TO TESTIFY AS TO WHAT HE DID HE'S NOT GOING TO GO ANY FURTHER THAN THAT THAT'S -- THAT'S ALL I MEAN, I DON'T KNOW ANYTHING ABOUT THE CASE UNTIL I WALK IN HERE ALL RIGHT?

MS JORDAN I UNDERSTAND

THE COURT YOU KNOW, CIVIL CASES LAWYERS DO SOME HOMEWORK AND THEY FILE BRIEFS WITH THE JUDGE SO EVERYTHING IS NOT OFF THE TOP OF YOUR HEAD AND YOU GET ERRONEOUS RULINGS WHICH IS WHY YOU LOSE A CRIMINAL CASE NOBODY DOES THEIR HOMEWORK AND NOBODY EDUCATES THE JUDGE, SO THERE YOU GO SO BASED ON WHAT THE OFFICER SAID, ALL THAT COMES IN INCLUDING, "I DON'T KNOW NOTHING ABOUT NO DRUGS ON THE BACK OF THE CAR, NO COCAINE " BUT HE CAN'T GO INTO HE WAS ARRESTED FOR THAT

MR BANNON WE'RE JUST GOING TO GO INTO THE FACT THAT HE WAS THEN ARRESTED

THE COURT BUT HE CAN SAY THAT HE ARRESTED HIM YOU JUST CAN'T GO INTO DISPOSITION OF THAT

MR BANNON YES YES YOUR HONOR

THE COURT ALL RIGHT WHICH DOESN'T HELP THEM A LOT, BUT I CAN'T HELP THEM ANYTHING ELSE?

MS JORDAN WE MAKE A MOTION ALSO, YOUR HONOR, TO SUPPRESS OFFICER MENENDEZ FROM MAKING A STATEMENT AS TO THE DRUG MONEY AND ASK THAT THAT BE SUPPRESSED AT THE TIME OF

THE ARREST THEY TALKED ABOUT THE ROCKS THE ROCKS ARE NOT DRUGS IT WAS TESTED, AND THEY'RE NOT DRUGS THEREFORE, IT WOULD BE A PREJUDICE TO THE JURY TO INSINUATE THAT HE WAS TAKING THEM FOR DRUG MONEY

THE COURT THAT HE HAD $600 ON HIM IS EVIDENCE IN THE CASE, ISN'T IT? I'M NOT GOING TO SUPPRESS THAT

MS JORDAN WELL, MY ONLY -- ANY REFERENCES TO DRUG MONEY

THE COURT HE HAD $600 ON HIM THAT'S EVIDENCE IN THE CASE THAT'S ALL

MS JORDAN BASED BACK TO IT WAS AN ILLEGAL SEARCH YOUR HONOR, THAT THERE WAS NO PROBABLE CAUSE FOR THE ARREST IT WAS AN ILLEGAL SEARCH THEREFORE, THE MONEY SHOULDN'T BE PUT IN

THE COURT MAYBE IT SHOULD BE, BUT I'M NOT GOING TO RULE THAT WAY

MS JORDAN I'M SORRY DID YOU SAY -- SO YOU'RE NOT GOING TO RULE ON IT, YOUR HONOR? I'M SORRY

THE COURT I'M NOT RULING FOR YOU I GUESS THAT MEANS I'M RULING AGAINST YOU

MS JORDAN OKAY

THE COURT WERE I TO TAKE A WILD GUESS, THAT'S WHAT I WOULD SAY

MS JORDAN WE ALSO MAKE A MOTION TO EXCLUDE---

THE COURT Y'ALL DIDN'T MAKE ALL THESE MOTIONS IN THE

LAST TRIAL?

MS JORDAN WELL, I TRIED, YOUR HONOR TO BE HONEST, I DON'T KNOW I COULD TELL YOU I WAS

THE COURT I MEAN, THIS IS THE SECOND TIME AROUND YOU DON'T THROW THINGS OUT ON A SECOND TRIAL THAT YOU DIDN'T MORE OR LESS WAIVE BEFORE, I GUESS

MS JORDAN WELL, YOUR HONOR, I GOT REAL SICK DURING THE FIRST TRIAL AND SOME THINGS WERE MISSING THE LAST THING I HAVE IS THE SUPPRESSION OF THE ROCKS

THE COURT THE WHAT?

MS JORDAN THE ROCKS THEMSELVES IN THAT THEY ARE IRRELEVANT

THE COURT HE'S ENTITLED TO TESTIFY AS TO WHAT HAPPENED THEY WERE NOT---

MS JORDAN CORRECT

THE COURT ---DRUGS THEY FIELD-TESTED THE OTHER WAY THAT'S HARMLESS FROM MY VIEWPOINT

MS JORDAN UNDER CUTNER VERSUS STATE, IT HAS THE ARGUMENT - DO YOU NEED THE CASE, YOUR HONOR - IN WHICH THE SUPREME COURT RULED THAT ON A SIMILAR CASE THAT IT WAS A P W I D MARIJUANA CASE AND IN THAT CASE THEY ALSO FOUND CRACK ROCKS, AND BECAUSE HE WASN'T BEING ON TRIAL FOR THE CRACK ROCKS, THE SUPREME COURT SAID THAT THAT SHOULD NOT BE BROUGHT IN IT'S NOT ANYTHING TO DO WITH THE CASE AT HAND I HAVE THE CASE HERE IF YOU WOULD LIKE TO LOOK AT IT YOUR

HONOR AND SO WE---

THE COURT HE'S NOT BEING CHARGED WITH THAT, SO I DON'T UNDERSTAND WHY YOU

MS JORDAN I THINK IT'S PREJUDICIAL TO THE JURY YOUR HONOR, TO ASSUME THAT THESE ROCKS WERE SOMETHING THEY'RE -- THAT DRUG-RELATED

THE COURT THEY WEREN'T HE SAID HE FIELD-TESTED THEM AND THEY WERE NOT I MEAN, IF HE SAID HE EMPTIED HIS POCKETS AND IN HIS POCKETS HE HAD $600, CAR KEYS, A POCKETKNIFE, FIVE STONES, THAT'S JUST EVIDENCE IN THE CASE I DON T HAVE ANY INFERENCE ONE WAY OR THE OTHER FROM ANY OF THAT

MS JORDAN WELL I UNDERSTAND THAT, YOUR HONOR I JUST FELT IT WAS ALL CONNECTED TO THE -- THAT THERE WAS NO PROBABLE CAUSE FOR THE ARREST IN THE FIRST PLACE, AND ALL THIS IS THE FRUIT OF THE PROBABLE CAUSE -- OF NO PROBABLE CAUSE FOR THE ARREST AND IT ALL SHOULD BE MOVED TO BE SUPPRESSED

THE COURT I DON'T KNOW HE'S GOT THE RIGHT TO DETAIN HIM WHEN HE STARTS WALKING AWAY I THINK, FOR A BRIEF PERIOD OF TIME IF HE HADN'T SMARTED BACK OFF AT HIM, HE'D PROBABLY BE OUT OF HERE TODAY THERE YOU GO

MS JORDAN WE'D ALSO LIKE TO ASK YOUR HONOR FOR THE WITNESSES BE SEQUESTERED, ALL TESTIFYING WITNESSES

THE COURT WE CAN SEQUESTER THEM BUT I DON'T KNOW WHY IT MATTERS IF YOU'VE ALREADY HAD ONE TRIAL ON IT AND THEY'VE

YOU JURORS ARE GOING TO TAKE ALL ADMITTED - ADMITTED DOESN'T MEAN I HAVE AGREED TO IT - JUST EVIDENCE THAT COMES IN OKAY? ALL THE EVIDENCE THAT IS PRESENTED WHERE AN OBJECTION HAS NOT BEEN SUSTAINED DURING THE TRIAL, YOU WILL CONSIDER IT AND WEIGH IT YOU WILL PASS UPON THE BELIEVABILITY OF ALL TESTIMONY GIVEN FROM WITNESSES THERE MAY BE SOME DOCUMENTARY EVIDENCE PRESENTED YOU DECIDE WHETHER YOU ACCEPT THAT OR NOT, AND AT THE END OF THE TRIAL I'LL INSTRUCT YOU IN A LITTLE MORE DETAIL ON THE LAW THIS IS JUST A BRIEF -- IT'S AN OVERVIEW AND THEN ATTORNEYS WILL SUM UP AND I'LL INSTRUCT YOU ON THE LAW, AND YOU'LL GO BACK AND DECIDE WHETHER THE STATE HAS MET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT

SO WITHOUT FURTHER ADO, THE STATE'S GOING TO MAKE A BRIEF OPENING STATEMENT AFTER THE OPENING STATEMENTS, WE'LL START CALLING WITNESSES

MR BANNON THANK YOU, YOUR HONOR MAY IT PLEASE THE COURT?

THE COURT SURE

MR BANNON "YOU GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " THAT'S THE FIRST THING THAT YOU JUST HEARD IN THIS CASE THE REASON WHY IT'S THE FIRST THING THAT YOU HEARD IN THIS CASE IS BECAUSE THAT IS VERY FIRST THING THAT DIAMON FRIPP SAID TO SERGEANT RODRIGUEZ DIAMON FRIPP SAID THAT TO SERGEANT RODRIGUEZ ON JANUARY 1ST, 2009, EARLY IN THE

MORNING IT WAS NEW YEAR'S EVE AND IT HAD JUST TURNED OVER INTO THE NEW YEAR ALL OF THIS HAPPENED AT A NIGHTCLUB CALLED STUDIO SEVEN IT'S AT 44 DONALDSON CAMP ROAD HERE IN BEAUFORT COUNTY "YOU GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " MR FRIPP SAID IT THAT NIGHT WITH CONVICTION

NOW, THE EVENTS THAT YOU'RE GOING TO HEAR ABOUT TODAY, THE EVENTS OF JANUARY 1ST, 2009, HAPPENED SOMETHING LIKE THIS OFFICER RODRIGUEZ WAS ON DUTY HE WAS WORKING THAT NIGHT HE GOT A CALL TO RESPOND TO STUDIO SEVEN HE GOT A CALL THAT THERE WAS SOMEONE DRESSED IN BLUE WHO WAS CAUSING A DISTURBANCE SO OFFICER RODRIGUEZ HEADS OUT TO STUDIO SEVEN HE SEES A PERSON WEARING BLUE STANDING OUT IN FRONT OF THE NIGHTCLUB

AS SOON AS THE PERSON DRESSED IN BLUE SEES HIM, THE PERSON IN BLUE TAKES OFF WALKING, STARTS WALKING AWAY FROM THE OFFICER SERGEANT RODRIGUEZ HASN'T DONE ANYTHING AT THIS POINT HE'S JUST PULLED UP TO THE LOCATION, AND THE PERSON IN BLUE STARTS WALKING AWAY, STARTS WALKING THROUGH THE PARKING LOT

SERGEANT RODRIGUEZ, HE GOES AFTER HIM HE STARTS WALKING AFTER HIM HE CALLS OUT TO HIM HE WHISTLES AT HIM HE SAYS, "COME HERE I'D LIKE TO TALK TO YOU " THE DEFENDANT, DIAMON FRIPP, IS THE PERSON WHO WAS DRESSED IN BLUE THAT NIGHT HE TURNED AROUND AND HE LOOKED AT SERGEANT RODRIGUEZ, AND HE TURNED AROUND AND KEPT WALKING, KEPT

WALKING ACROSS THE PARKING LOT UNTIL HE CAME UP UPON A BLACK TRUCK, AND HE WENT BEHIND THE BLACK TRUCK FOR A BRIEF PERIOD OF TIME THEN HE COMES BACK OUT FROM BEHIND THE BLACK TRUCK, STARTS WALKING BACK TOWARDS SERGEANT RODRIGUEZ, AND HE SAYS "YOU GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " AS SOON AS THE OFFICER PULLS UP, MR FRIPP STARTS WALKING AWAY, GOES BEHIND THE BLACK CAR, THE BLACK TRUCK, TURNS AROUND, COMES BACK, AND THE FIRST THING HE SAYS IS, "YOU DON'T HAVE ANYTHING ON ME I'VE GOT NO DRUGS ON ME "

WELL, SERGEANT RODRIGUEZ HAS HIS WEAPON DRAWN AT THIS POINT FOR OFFICER SAFETY HE TAKES MR FRIPP INTO CUSTODY AND HE SEARCHES HIM AND IN MR FRIPP'S POCKETS HE FINDS A COUPLE OF THINGS HE FINDS $594 IN CASH HE ALSO FINDS SOME BLACK ROCKS IN HIS POCKET AND SERGEANT RODRIGUEZ IS OUT THERE ALL BY HIMSELF AT THIS POINT, CALLS FOR BACKUP BACKUP ARRIVES

DEPUTY MOONEY IS ONE OF THE PEOPLE WHO ARRIVED AS BACKUP DIAMON FRIPP WAS PLACED IN THE BACK OF THE PATROL CAR THAT ARRIVES SERGEANT RODRIGUEZ ASKED DEPUTY MOONEY TO GO AHEAD AND SEARCH THE AREA BEHIND THE BLACK TRUCK THAT THE DEFENDANT WENT BEHIND DEPUTY MOONEY GOES BACK THERE, AND HE FINDS A BAGGY FULL OF WHITE POWDER RIGHT BEHIND THE BLACK TRUCK SO DEPUTY MOONEY TAKES THIS BAG OF COCAINE, AND HE BRINGS IT TO SERGEANT RODRIGUEZ SERGEANT RODRIGUEZ HAS WHAT THEY CALL A NIK KIT, AND BASICALLY IT'S A LITTLE KIT THAT

GIVES YOU -- LETS OFFICERS TEST SOMETHING IN THE FIELD TO SEE IF IT MIGHT BE COCAINE SO HE TESTS IT AND IT TESTS POSITIVE SO HE THINKS IT MIGHT BE COCAINE

SO SERGEANT RODRIGUEZ TELLS MR FRIPP, "I'M GOING TO CHARGE YOU WITH THIS " HE SHOWS HIM THE BAGGY MR FRIPP SAYS "I DON'T KNOW ANYTHING ABOUT THAT COCAINE " NO ONE HAS TOLD MR FRIPP ANYTHING ABOUT COCAINE YET SERGEANT RODRIGUEZ WENT TO STUDIO SEVEN TO INVESTIGATE A DISTURBANCE HE TRIED TO STOP MR FRIPP TO TALK TO HIM ABOUT THE DISTURBANCE MR FRIPP TOOK OFF WALKING HE WALKED RIGHT BEHIND THE BLACK TRUCK CAME OUT AND SAID "YOU GOT NOTHING ON ME I GOT NO DRUGS ON ME " NOW, THAT'S THE FIRST TIME YOU'RE GOING TO HEAR ABOUT DRUGS IN THIS CASE FROM THE DEFENDANT WHEN HE SAYS, "I DON'T HAVE ANY DRUGS ON ME "

THE FIRST TIME YOU'RE GOING TO HEAR ABOUT COCAINE IS WHEN SERGEANT RODRIGUEZ SAYS "I'M GOING TO CHARGE YOU WITH WHAT'S IN THIS BAG," AND THE DEFENDANT SAYS, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE " NOW, SERGEANT RODRIGUEZ TOOK THAT BAGGY OF COCAINE TOOK IT TO EVIDENCE IT WAS LOGGED IN TO EVIDENCE, AND IT WAS SUBMITTED TO BE ANALYZED BY A DRUG ANALYST WHO WORKS AT THE SHERIFF'S OFFICE SHE RAN IT THROUGH A TEST SHE DID A COUPLE OF DIFFERENT TESTS ON IT SHE FOUND THAT IT WAS COCAINE AFTER HER TESTS, SHE WEIGHED IT, AND SHE FOUND THAT IT WAS - I WANT TO GET THIS RIGHT - 34 35 GRAMS OF COCAINE WHICH IS A LITTLE OVER AN OUNCE

FORTY-FOUR DONALDSON CAMP ROAD IS WITHIN A HALF MILE OF A SCHOOL IT ALWAYS HAS BEEN, ALWAYS WILL BE

LADIES AND GENTLEMEN, THOSE ARE THE FACTS OF THE CASE THAT YOU'RE GOING TO HEAR, AND NOW THE JUDGE JUST TOLD YOU AND I'M SURE YOU'RE GOING TO HEAR AGAIN THAT THE DEFENDANT ENTERED THE COURTROOM TODAY AN INNOCENT MAN HE REMAINS AN INNOCENT MAN WHERE HE SITS, BUT THAT'S WHAT WE'RE HERE TO TALK ABOUT TODAY WE'RE HERE TO TALK ABOUT WHETHER OR NOT THE EVIDENCE WILL LET HIM REMAIN A FREE MAN THE EVIDENCE IN THIS CASE WILL PROVE TO YOU BEYOND A REASONABLE DOUBT THAT MR FRIPP IS GUILTY THANK YOU

MS JORDAN GOOD MORNING I'M KIMBERLY JORDAN I'M FROM THE PUBLIC DEFENDER'S OFFICE, AND MY CO-COUNSEL IS IAN DEYSACH WE REPRESENT DIAMON FRIPP ON THIS CHARGE DIAMON FRIPP HAS BEEN CHARGED WITH TRAFFICKING IN COCAINE, AS THE JUDGE TOLD YOU, AND MR BANNON HAS GIVEN YOU A RUNDOWN ON WHAT THE STATE FEELS OCCURRED THAT NIGHT BUT WHAT WE'D LIKE TO ASK YOU IS TO PUT THE PIECES TOGETHER YOURSELF AND SEE IF THIS EVIDENCE GIVEN YOU TODAY REALLY FOLLOWS THAT LINE

MEMBERS OF THE JURY WHAT THIS CASE IS ESSENTIALLY ABOUT IS THAT DIAMON -- IS WHETHER OR NOT DIAMON POSSESSED THE BAG OF COCAINE THAT WAS FOUND UNDER A PINE TREE NOW, MAYBE IN A REGULAR NEIGHBORHOOD FINDING DRUGS UNDER A PINE TREE IS KIND OF ABSURD, BUT WE'RE NOT TALKING ABOUT A REGULAR NEIGHBORHOOD RIGHT NOW WE'RE TALKING ABOUT A NEW YEAR'S EVE PARTY AT A

POPULAR CLUB, STUDIO SEVEN

APPROXIMATELY 2 A M ON A VERY COLD NEW YEAR'S EARLY MORNING, THE BALL HAS ALREADY DROPPED, AND LIKE MANY PLACES AND PLACES AROUND OUR COUNTRY DURING THAT TIME, THE PARTIES ARE STILL GOING ON THOUSANDS OF PEOPLE CELEBRATE NEW YEAR'S, AND THERE'S LARGE PARTIES EVEN THOUGH THIS CLUB IS IN A SECLUDED DARK AREA OFF THE MAIN ROAD, THE PLACE WAS ROCKING THAT NIGHT THE PLACE IS PACKED IT'S A BIG PARTY NIGHT, ONE OF THE BIGGEST PARTIES OF THE YEAR IT IS PACKED THE MUSIC IS STILL PLAYING, PROBABLY TOO LOUD FOR MOST OF US AND THE PARKING LOT IS JAMMED FULL THERE'S CARS PARKED EVERYWHERE

NOW, OUTSIDE THE FRONT ENTRANCE OF THIS CLUB, A SECURITY GUARD STANDS AT THE DOOR A LINE OF PATRONS IS FORMING A LINE TO GET IN THE CLUB, AND THE SECURITY GUARD IS DOING WHAT SECURITY GUARDS DO CHECKING PEOPLE IN THE MUSIC IS EXTREMELY LOUD THERE THE DOORS ARE OPEN LOUD MUSIC IS EMANATING FROM THE DOOR IT'S A PARTY, THE PLACE IS ROCKING

ALSO STANDING OUTSIDE THAT DOOR IS DIAMON FRIPP HE'S STANDING THERE TALKING TO THE SECURITY GUARD NOW, TO THIS CLUB THERE'S LIKE ONE ENTRANCE INTO THE CLUB IT'S A LONG DIRT ROAD THAT DRIVES DOWN INTO THIS CLUB IT'S THE SAME DOWN -- IT COMES TO THE CLUB, TO THE PARKING LOT IT'S ONE ROAD IN AND ONE ROAD OUT, AND WE CAN ASSUME WITH ANYTHING -- ALL THE PARTIES THAT NIGHT THAT PEOPLE ARE COMING AND GOING

THROUGHOUT THE NIGHT IT'S NEW YEAR'S THAT'S WHAT PEOPLE DO ON NEW YEAR'S

ABOUT 2 08 THAT DARK EARLY MORNING, ANOTHER CAR PULLS DOWN THE DRIVE HEADLIGHTS APPROACHING, SHINING TOWARDS THE CLUB ENTRANCE, BUT THIS CAR DOESN'T PULL TOWARDS THE PARKING LOT THIS CAR STOPS ABOUT 40 YARDS FROM THE FRONT DOOR IT STOPS ABOUT THE LENGTH OF A FOOTBALL FIELD THE CAR STOPS LIGHTS SHINING INTO THE PATRONS AT THE DOOR

OFFICER RODRIGUEZ SITS IN THAT CAR HE HAS BEEN CALLED FOR A RESPONSE HE'S CALLED IN RESPONSE TO A CALL FOR A DISTURBANCE I WANT TO STOP RIGHT HERE FOR NOW, BUT KEEP THIS PICTURE IN YOUR MIND AS THE EVIDENCE YOU'RE GIVEN PROGRESSES KEEP THIS PICTURE AND ADD TO IT WHAT YOU HEAR COME FROM THE STAND AT THE END OF THIS -- AT THE END OF THIS, I WILL HAVE THE OPPORTUNITY TO TALK TO YOU AGAIN

THE JUDGE RECENTLY ASKED YOU A QUESTION YESTERDAY DURING QUALIFICATIONS CAN YOU BE A FAIR AND IMPARTIAL JUROR? AND YOUR ANSWER TO THAT QUESTION WAS YES, AND THAT'S WHY YOU'RE HERE TODAY AND TODAY A MAN SITS HERE, A MAN BELIEVING IN THE OATH THAT YOU TOOK, A MAN BELIEVING IN THAT -- IS IT GUILTY UNTIL PROVEN INNOCENT? NOW, THE JUDGE HAS TOLD YOU OTHERWISE THE STATE HAS TOLD YOU OTHERWISE HE SITS THERE AN INNOCENT MAN

NOW, THE LAWS OF OUR LAND PROVIDE THAT ANY PERSON CHARGED WITH A CRIME IS INNOCENT, INNOCENT UNTIL PROVEN

GUILTY BEYOND A REASONABLE DOUBT A REASONABLE DOUBT HAS BEEN THE SUBJECT OF MOVIES, BOOKS WE'VE ALL HEARD THAT, BUT WHAT IS THAT? WHAT DOES REASONABLE DOUBT MEAN? REASONABLE DOUBT MEANS THAT THERE'S ENOUGH DOUBT THAT YOU HESITATE TO ACT

FOR EXAMPLE, SUPPOSE YOU'VE JUST HEARD THAT THE SCHOOL BUS DRIVER WHO DRIVES YOUR KIDS TO SCHOOL -- SOMEONE HAS SAID THAT THERE'S -- THAT THIS MAN TAKES A COUPLE OF SHOTS OF VODKA IN THE MORNING BEFORE HE GETS BEHIND THE WHEEL THE SCHOOL BUS IS OUTSIDE HONKING FOR YOUR KIDS TO GET ON THE BUS, YOU'RE THERE WITH YOUR CHILDREN WOULD YOU HESITATE BEFORE TRUSTING THAT BUS DRIVER TO DRIVE OFF WITH YOUR KIDS? IF YOU WOULD THINK TWICE ABOUT LETTING YOUR CHILD DRIVE OFF WITH THAT GUY BEHIND THE WHEEL, YOU JUST HAD A REASONABLE DOUBT, AND HESITATION MEANS NOT GUILTY

REMEMBER THIS CASE IS ABOUT WHETHER DIAMON KNOWINGLY POSSESSED THAT BAG OF COCAINE, AND THE STATE MUST PROVE IT TO YOU BEYOND A REASONABLE DOUBT ANY HESITATION MEANS THAT YOU'VE LOOKED AT WHAT THE STATE HAS SAID, AND YOU SAY, "I CAN'T BECAUSE IT'S NOT ENOUGH I'M NOT COMFORTABLE WITH THE EVIDENCE YOU HAVE GIVEN ME I'M NOT COMFORTABLE HE'S GUILTY WHEN ALL YOU'VE GIVEN ME IS THIS " AND I'M CONFIDENT THAT THE EVIDENCE TODAY WILL SHOW YOU THIS MAN, DIAMON FRIPP, IS NOT GUILTY

MR BANNON JUDGE, I THINK WE NEED TO SEQUESTER SOME OF

THE WITNESSES

THE COURT IF THERE ARE ANY IN HERE SEQUESTER JUST MEANS SEND THEM OUT OF THE COURTROOM SO THEY CAN'T HEAR WHAT ANYBODY ELSE SAYS

MR BANNON THE STATE WOULD CALL SERGEANT RODRIGUEZ

THE COURT ALL RIGHT SERGEANT RODRIGUEZ, COME AROUND

SCOTT RODRIGUEZ, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS

DIRECT EXAMINATION

BY MR BANNON

Q WOULD YOU PLEASE STATE YOUR NAME, PLEASE?

A SCOTT RODRIGUEZ

Q WHERE DO YOU WORK SIR?

A THE BEAUFORT COUNTY SHERIFF'S OFFICE

Q WERE YOU WORKING ON JANUARY 1ST OF 2009?

A YES, I WAS

Q WHAT WERE YOU DOING THAT EVENING?

A I WAS WORKING ROAD PATROL

Q OKAY WHAT DOES THAT MEAN?

A PATROLLING THE STREETS OF BEAUFORT COUNTY, NORTHERN BEAUFORT COUNTY I'M ALSO THE ROAD SUPERVISOR

Q AND SO YOU SUPERVISE OTHER DEPUTIES?

A YES, I DO

Q AND DID YOU HAVE AN OPPORTUNITY TO GO TO 44 DONALDSON CAMP ROAD THAT EVENING?

A YES
Q AND IS THAT LOCATION IN BEAUFORT COUNTY?
A YES, IT IS
Q WHY DID YOU GO OUT THERE?
A I RECEIVED A CALL FROM DISPATCH IN REFERENCE TO A DISTURBANCE
Q OKAY AND DID THEY DESCRIBE -- DID THEY GIVE YOU ANY DETAIL ABOUT THE DISTURBANCE?
A THE DISTURBANCE WAS A MALE WEARING BLUE IN THE PARKING LOT
Q NOW, I'D JUST LIKE TO TALK TO YOU REAL QUICK ABOUT SOME OF THE GEAR THAT YOU CARRY WITH YOU WHAT IS A NIK KIT?
A A NIK KIT IS LIKE A RESTAURANT WET WIPE THAT YOU CLEAN UP YOUR HANDS AFTER YOU EAT, BUT IT HAS A SWAB INSIDE WITH A CHEMICAL REAGENT ON IT AND WHEN YOU EXPOSE THAT TO COCAINE OR YOU RUB COCAINE ON IT, IT WILL TURN A VIBRANT BLUE
Q OKAY WERE YOU CARRYING SOME NIK KITS WITH YOU THAT EVENING?
A YES, WE HAD SOME
Q AND LET'S TALK ABOUT 44 DONALDSON CAMP ROAD WHAT IS THAT?
A THAT IS THE STUDIO SEVEN NIGHTCLUB
Q AND THIS IS IN THE EARLY HOURS OF JANUARY 1ST, 2009?
A YES
Q SO WAS THE NIGHTCLUB OPEN?

A OH, YEAH
Q AND IS IT BUSY?
A FROM WHAT I COULD TELL, THE PARKING LOT WAS FULL OF VEHICLES, YES
Q COULD YOU HEAR MUSIC PLAYING?
A YES
Q WAS IT LOUD?
A YEAH
Q WERE YOU -- DID YOU GO OUT THERE BY YOURSELF?
A YES I DID
Q AND IF YOU GET A CALL FROM STUDIO SEVEN, DO YOU TYPICALLY GO OUT THERE BY YOURSELF?
A NO NORMALLY IT S TWO OR THREE OTHER VEHICLES WITH YOU
Q AND WHY IS THAT?
A BECAUSE OF THE NATURE OF THE PARKING LOT AND NATURE OF THINGS THAT HAPPEN OUT THERE FIGHTS SHOOTINGS, THINGS OF THAT NATURE
Q OKAY AND YOU SAID THE NATURE OF THE PARKING LOT COULD YOU DESCRIBE TO US WHAT THE PARKING LOT IS LIKE?
A IT'S A -- IT'S BASICALLY DOWN IN A VALLEY, IT LOOKS LIKE THERE'S ONE WAY IN, YOU'VE GOT TO DRIVE IN AND IT'S APPROXIMATELY THE SIZE OF A FOOTBALL FIELD, BUT IT HAS A LEFT PARKING LOT, A CENTER PARKING LOT, AND A RIGHT PARKING LOT WITH A FENCE RIGHT DOWN THE LEFT SIDE
Q OKAY SO WHEN YOU WERE -- WHEN YOU WENT TO STUDIO SEVEN

ON JANUARY 1ST, 2009, WHAT DID YOU SEE?
A I PULLED INTO THE -- I CAME OFF THE DRIVE, AND AT THE ENTRANCE TO THE PARKING LOT I STOPPED MY VEHICLE FROM THERE I HAD A CLEAR VIEW OF THE FRONT DOOR OF THE CLUB I SAW THE SECURITY GUARD STANDING, DEALING WITH A ROW OF FEMALES, AND ONE OTHER MALE WITH HIS BACK TOWARDS ME
Q OKAY WAS THE -- WHERE WAS THE MALE? WAS HE IN LINE WITH THE FEMALES THAT YOU SAID?
A NO, HE WASN'T HE HAD HIS BACK TOWARDS ME HE WAS STANDING IN THE GRAVEL HE WAS NOT ON THE CONCRETE PAD WHICH WOULD BE WHERE PEOPLE LINE UP TO GET INTO THE CLUB
Q OKAY AND HOW WAS THE MAN DRESSED?
A HE HAD ON A BLUISH JACKET/SHIRT ON VERY BAGGY
Q AND SO WHAT HAPPENED NEXT?
A I TOLD MY COMMUNICATION CENTER THAT I WAS THERE, AND I STEPPED OUT OF MY VEHICLE
Q AND WHAT HAPPENED THEN?
A WELL, BEFORE I STEPPED OUT OF MY VEHICLE, THE MALE LOOKED OVER HIS RIGHT SHOULDER AT ME AND HE LOOKED AT MY PATROL CAR, AND HE STARTED WALKING OFF TO THE LEFT
Q OKAY AND WHERE DID HE GO?
A TO THE LEFT PARKING LOT
Q OKAY WHAT HAPPENED THEN?
A I WALKED UP TO THE SECURITY GUARD AT THE FRONT DOOR
Q OKAY

A HE CONTINUED DEALING WITH THE FEMALE CUSTOMERS THAT WERE ALL IN LINE, AND I LOOKED TO THE RIGHT OF HIM AND IN -- THERE'S DOUBLE-DOOR FOYER, AND THERE IS 12-BY-12 WINDOWS, SMALL GLASS WINDOWS, AND THE OWNER OF THE NIGHTCLUB WAS STANDING BEHIND THOSE WINDOWS, AND HE WAS POINTING AT THE MALE IN BLUE THAT WAS WALKING AWAY

MS JORDAN OBJECTION, YOUR HONOR HEARSAY

THE COURT ALL RIGHT GO AHEAD

BY MR BANNON

Q AND WHAT DID YOU DO NEXT?

A I FOLLOWED THE MALE IN BLUE

Q AND WHAT WAS HE DOING WHEN YOU STARTED TO FOLLOW HIM?

A HE WAS WALKING AWAY TOWARDS -- THE PARKING LOT ON THE LEFT SIDE OF THE CLUB IS A U-SHAPE ALMOST IT'S ALMOST A CIRCLE AND CARS ARE PARKED UP AGAINST LOGS THAT ARE LAID IN THE CENTER, NOSE TO NOSE, ALMOST LIKE PARKING SPOTS HE WAS WALKING UP THAT CENTER AISLE OF THOSE PARKING -- OF THOSE PARKED CARS

Q AND HOW FAR FROM HIM WERE YOU AT THIS POINT?

A TWENTY CAR LENGTHS TWENTY FEET

Q OKAY DID YOU CALL TO HIM?

A I CALLED I WHISTLED I YELLED I SAID, "HEY, COME HERE CAN I TALK TO YOU?"

Q NOW, YOU SAID THAT THERE WAS MUSIC PLAYING

A YES

Q WAS HE ABLE TO -- COULD HE HEAR YOU?
A OH, HE HEARD ME HE---
Q HOW DO YOU KNOW THAT HE HEARD YOU?
A HE TURNED AROUND AND LOOKED RIGHT AT ME
Q AND WHAT DID HE DO WHEN HE TURNED AROUND AND HE LOOKED AT YOU?
A HE TURNED BACK AROUND AND KEPT ON BETWEEN THE PARKED CARS, A LITTLE BIT FASTER THOUGH
Q OKAY WERE YOU ABLE TO SEE -- THE PERSON WHO WAS DRESSED IN BLUE WERE YOU ABLE TO SEE HIS FACE?
A YES, WHEN HE TURNED AROUND AND LOOKED AT ME CORRECT
Q AND DO YOU SEE THAT PERSON IN THE COURTROOM TODAY?
A YES, I DO
Q AND COULD YOU PLEASE POINT HIM OUT?
A HE'S SITTING RIGHT OVER HERE WITH THE BLACK-AND-WHITE CHECKERBOARD SHIRT ON
Q WHAT DID YOU DO NEXT?
A I PROCEEDED TO THE SAME GENERAL DIRECTION HE WAS HEADED, BUT I WASN'T WALKING BETWEEN THE CARS I WAS WALKING INTO -- ON THE PORTION OF THE DRIVEWAY WHERE CARS WOULD DRIVE IN PARKING LOT IT IS A DIRT ROAD PARKING LOT THERE'S NO MARKED SPOTS OR ANYTHING
Q OKAY AFTER HE TURNS AROUND AND LOOKS AT YOU, DO YOU CONTINUE TO CALL OUT TO HIM OR DO YOU JUST FOLLOW HIM?
A HE KEPT ON GOING AND I SAID, "SHERIFF'S OFFICE, STOP,"

OR, "STOP SHERIFF'S OFFICE " I DON'T REMEMBER WHAT ORDER I SAID IT IN

Q OKAY AND DID HE STOP THEN?

A NO

Q SO WHAT HAPPENED NEXT?

A HE CUT ACROSS ONE OF THE PARKED CARS, CROSSED THE SECTION WHERE CARS WOULD NORMALLY TRAVEL IN THE PARKING LOT, AND WENT BEHIND A BLACK PICKUP TRUCK THAT WAS TO THE RIGHT OF THE PARKING LOT

Q OKAY AND ABOUT HOW FAR IS THAT BLACK PICKUP TRUCK FROM WHERE YOU FIRST SAW THE DEFENDANT?

A APPROXIMATELY 400 FEET

MR BANNON AND NOW, YOUR HONOR, I'D LIKE PERMISSION FOR SERGEANT RODRIGUEZ TO STEP DOWN FOR JUST A MOMENT

THE COURT HE CAN STEP DOWN

BY MR BANNON

Q NOW, SERGEANT, I WAS HOPING YOU WOULD DRAW FOR US WHAT -- JUST TRY TO GIVE US AN IDEA WHAT THE PARKING LOT IS LIKE WITH SOME OF THESE LANDMARKS THAT YOU'VE BEEN TALKING ABOUT LIKE WHERE IS THE TRUCK AND WHERE IS THIS ROW OF CARS AND WHERE IS THE NIGHTCLUB?

A OKAY I DON'T DRAW WELL, SO THIS WILL BE DONALDSON CAMP ROAD COMING INTO THE NIGHTCLUB THIS WOULD BE THE NIGHTCLUB THIS IS THE DOUBLE DOORS THIS IS THE SECURITY GUARD THERE'S WOMEN STANDING IN LINE DOWN THIS WAY

THERE'S AN OVERHANG RIGHT HERE SO PEOPLE DON'T GET WET

I PARKED MY CAR APPROXIMATELY RIGHT HERE THERE'S A PUMP HOUSE RIGHT HERE, AND THERE'S A FENCE ALONG THIS SIDE OF THE PUMP HOUSE THAT CURVES, AND THERE'S A COUPLE OF LOGS AND STUFF HERE THIS IS WHERE I PARKED MY CAR THIS IS WHERE MR FRIPP WAS STANDING

WHEN I STOPPED MY CAR, MR FRIPP WALKED UNDER THIS UNDER-HANG AND WENT TO THIS LEFT PARKING LOT IN THIS AREA THESE ARE THE LOGS THAT THE CARS WOULD BE PARKED AND THE CARS PARKED ALL ALONG THESE THERE'S ALSO THE DRIVING PATH WHERE THE CARS WOULD COME THROUGH AND LEAD BACK OUT THIS IS A PARKING SECTION RIGHT HERE HERE IS A PATHWAY FOR CARS TO COME AROUND TO CIRCLE RIGHT HERE, AND THERE'S CARS PARKED ALL ALONG THESE SECTIONS AS WELL, INCLUDING UP HERE, OVER ON THE SIDES HERE, THE BACK SECTION OVER HERE AS WELL THIS IS WHERE THE BLACK PICKUP TRUCK WAS ON THIS SIDE OF THE PARKING LOT AND THIS IS A MARSH AND WOODED AREA BACK HERE, AND THERE'S ALSO CARS PARKED ALL ALONG THESE BACK SECTIONS AS WELL, PRETTY MUCH EVERY CONCEIVABLE SPOT

WHEN HE, MR FRIPP, WENT THIS WAY, I WALKED TO THE SECURITY GUARD, AND THEN I FOLLOWED HIM TO THIS PARKING LOT HE WENT BETWEEN THE CARS WHERE THESE LOGS ARE 'TIL HE GOT HERE, AND THERE'S ACTUALLY A TREE RIGHT HERE HE RAN BACK BEHIND THIS PICKUP TRUCK RIGHT HERE, AND THAT'S WHERE I LOST SIGHT OF HIM

Q OKAY NOW, HOW IS THIS PICKUP TRUCK ORIENTED? IS THIS THE FRONT OF IT OR

A I BELIEVE, YES, THAT'S THE FRONT OF IT FACING TOWARDS THE DRIVING SECTION

Q OKAY AND IS THERE -- ARE THERE CARS ON EITHER SIDE OF IT?

A THERE'S CARS ALL ALONG IT ALSO

Q OKAY AND SO WHEN HE WENT BEHIND IT, IS THIS -- IS THIS THE SIDE OF THE CAR? LIKE IT'S NOT TO THE REAR OF THE CAR IT'S JUST BEHIND THE CAR?

A IT'S RIGHT BEHIND THE CAR I'D BE ABLE TO SEE THROUGH WINDOWS---

Q OKAY

A ---LOOKING AT THE PICKUP TRUCK, AND WHEN I FOLLOWED HIM, I WAS APPROXIMATELY HERE WHEN HE MADE IT BEHIND THE PICKUP TRUCK

Q OKAY

A SO THIS IS HERE

Q ALL RIGHT AND YOU SAID HE RAN BEHIND THE PICKUP TRUCK

A YES

Q DID YOU LOSE SIGHT OF HIM?

A YES

Q ABOUT HOW LONG DID YOU LOSE SIGHT OF HIM FOR?

A ABOUT TEN SECONDS

Q DID YOU HAVE A STOPWATCH WITH YOU?

A I HAD MY WATCH, BUT I WASN'T LOOKING AT MY WATCH
Q AND SO ONCE HE GOES BEHIND THE TRUCK, WHAT HAPPENS NEXT?
A HE COMES BACK OUT FROM BEHIND THE TRUCK
Q OKAY
A STARTS WALKING TOWARDS ME LIKE I'M GOING THIS WAY NOW
Q AND NOW IS HE -- COULD YOU DRAW IN HERE WHICH WAY HE'S WALKING TOWARDS YOU?
A HE CAME BACK ON THE SAME SIDE HE WENT, AND HE CAME RIGHT BACK TOWARDS ME, BUT HE LOOKED LIKE HE WANTED TO PASS ME ON MY LEFT
Q OKAY AND SO WHAT DID YOU DO?
A I DREW MY WEAPON
Q AND WHY DID YOU DO THAT?
A I COULDN'T SEE HIS HANDS IT BECOMES AN OFFICER SAFETY ISSUE AT THAT POINT BECAUSE IF I CAN'T SEE HIS HANDS -- IF THERE'S NOTHING IN HIS HANDS, HE CAN'T HURT ME WITH ANYTHING
Q AND SO YOU DREW YOUR GUN AND WHAT HAPPENED NEXT?
A I ORDERED HIM TO THE GROUND
Q AND WHAT HAPPENED THEN?
A HE DIDN'T COMPLY HE SAID, "NO, IT'S COLD NO, YOU GOT NOTHING ON ME," ALL THAT
Q DID HE MENTION ANYTHING ABOUT DRUGS?
A OH, YEAH HE SAID---
MS JORDAN OBJECTION
THE WITNESS ---"I HAVE NO DRUGS "

MS JORDAN LEADING

MR BANNON THAT'S NOT A LEADING QUESTION

THE COURT JUST KEEP GOING IT IS LEADING, BUT HE'S ALREADY ANSWERED

BY MR BANNON

Q HAD YOU MENTIONED ANYTHING ABOUT DRUGS THEN?

A NO, I HADN'T

Q AND SO WHAT HAPPENED THEN?

A THE OWNER OF THE CLUB CAME OUT, AND AS MR FRIPP HEADED BACK TO ME LIKE HE WAS SQUATTING -- HE WOULDN'T GO DOWN ON THE GROUND HE -- CAN I SHOW EVERYBODY? HE WAS SQUATTING LIKE THIS HE WOULDN'T GET ON THE GROUND I'M TELLING HIM, "LET ME SEE YOUR HANDS LET ME SEE YOUR HANDS " HIS HANDS ARE IN FRONT OF HIM STILL THE OWNER OF THE CLUB STARTS YELLING AT HIM, "YOU BETTER DO WHAT THE DEPUTY SAYS YOU BETTER DO WHAT THE DEPUTY SAYS "

HE FINALLY PUT HIS HANDS BEHIND HIS BACK AND I WAS ABLE TO GET ONE HANDCUFF ON HIM I HOLSTERED MY WEAPON, AND I WAS ABLE TO GET THE OTHER HANDCUFF ON HIM AT THAT POINT ANOTHER UNIT IS COMING ON THE WAY YOU COULD SEE HIM COMING DOWN THE ONLY ENTRANCE TO DONALDSON CAMP ROAD

Q OKAY YOU CAN GO AHEAD AND RETAKE THE STAND YOUR HONOR, I WOULD LIKE TO HAVE THIS MARKED AS STATE'S EXHIBIT NUMBER 5, AND I WOULD MOVE FOR IT TO BE ADMITTED INTO EVIDENCE

THE COURT OKAY THEY DON'T OBJECT

(STATE'S EXHIBIT 5 WAS RECEIVED IN EVIDENCE)

BY MR BANNON

Q SO ONCE YOU GOT MR FRIPP INTO HANDCUFFS, WHAT HAPPENED THEN?

A MR FRIPP WAS IN HANDCUFFS THE OWNER OF THE CLUB TURNED AROUND AND HEADED BACK TO THE CLUB ANOTHER UNIT STARTED COMING DOWN THE DRIVEWAY AND PULLED UP BEHIND MY PATROL CAR AT THE ENTRANCE OF THE DRIVEWAY

Q OKAY WHO WAS IN THE PATROL CAR?

A THAT WAS I BELIEVE OFFICER FERGUSON

Q OKAY AND WHAT DID YOU DO WITH MR FRIPP NEXT?

A I TOLD FERGUSON TO BRING HIS CAR AROUND HE HAD TO DRIVE THROUGH THE WHOLE PARKING LOT, AND I PLACED MR FRIPP IN THE BACK OF OFFICER FERGUSON'S CAR

Q OKAY AND COULD YOU DESCRIBE MR FRIPP'S DEMEANOR AT THIS POINT?

A HE WAS SCREAMING, YELLING, CARRYING ON, CURSING, "YOU'RE DIRTY, RODRIGUEZ YOU GOT NOTHING," ALL TYPES OF STUFF LIKE THAT

Q OKAY DID YOU ASK HIM ANY QUESTIONS?

A NO

Q SO WHAT HAPPENED THEN?

A MORE UNITS RESPONDED MOONEY RESPONDED AND DRAISON (PHONETIC) RESPONDED ALSO

Q OKAY AND WHO IS MOONEY?
A HE'S A TRAFFIC TEAM MEMBER HE'S ALSO A CANINE OFFICER
Q OKAY DID YOU EVER SEARCH MR FRIPP?
A WHEN HE WAS AT -- BEFORE WE PLACED HIM IN THE CAR, BY PROCEDURE WE SEARCH SOMEBODY
Q OKAY
A HE WAS UNDER ARREST AT THAT POINT IN MY EYES, SO WE EMPTIED HIS POCKETS
Q AND WHAT DID YOU FIND?
A IN HIS POCKET HE HAD JUST UNDER $600 IN CASH, BUT HE HAD THE BILLS CRUMPLED UP IT WASN'T NEATLY FOLDED IN A BUNDLE IT WAS ALMOST LIKE YOU WERE GOING TO THROW THEM IN A GARBAGE BAG SOME OF THEM WERE MULTIPLES, BUT MOST OF THEM WERE SINGLES
Q WERE THEY ALL -- WERE THEY ALL CRUMPLED INTO ONE BIG WAD?
A BASICALLY THERE WERE ALSO SOME ROCKS IN HIS PANTS POCKET
Q SO WHAT DID YOU DO WITH THESE ITEMS THAT YOU FOUND?
A WELL, WE PLACED THEM ON THE TRUNK OF THE VEHICLE THAT HE WAS IN
Q IS HE INSIDE THE VEHICLE?
A WHEN WE'RE TAKING THE STUFF OUT OF HIS POCKETS? NO
Q OKAY AND SO IF -- IF THIS IS THE VEHICLE, WHAT PART OF THE VEHICLE DID YOU HAVE HIM UP AGAINST?

A WELL, IF YOU OPEN THE BACK DOOR ON THE PASSENGER SIDE, HE'S LEANING AGAINST THAT POST THAT WOULD HOLD UP THE ROOF SO HE'S LEANING AGAINST THAT PORTION, AND THE STUFF IS BEING PLACED RIGHT TO THE TRUNK TO THE LEFT

Q OKAY AND SO IF THIS IS -- IF THIS IS THE TRUNK, IT'S JUST BEING PLACED RIGHT OVER HERE

A YES

Q OKAY YOU SAID HE WAS -- YOU SAID IT WAS NEARLY $600 DO YOU REMEMBER THE EXACT AMOUNT?

A 594, I BELIEVE

Q OKAY AND DO YOU REMEMBER THE DENOMINATIONS?

A NO, I DON'T

Q DO YOU REMEMBER -- WAS IT MORE THAN TEN BILLS?

A DEFINITELY MORE THAN TEN BILLS

Q AND SO WHEN YOU PUT THESE ITEMS ON THE HOOD OF THE PATROL VEHICLE, WHAT HAPPENS THEN?

A WE PLACED THEM ON THE TRUNK OF THE CAR, AND MR FRIPP LEANS OVER AND TRIES TO GATHER THE STONES UP THAT WE TOOK OUT OF HIS POCKET THAT WERE ON THE TRUNK OF THE CAR

Q WASN'T HE IN HANDCUFFS?

A YES, HE WAS

Q WELL, HOW DID HE TRY TO GATHER UP THE STONES?

A HE LEANED HIS ENTIRE BODY OVER TRYING TO GATHER THOSE UP WITH HIS MOUTH

Q AND DID HE GATHER THE STONES INTO HIS MOUTH?

A NO, WE RESTRAINED HIM
Q AND SO AFTER YOU SEARCHED MR FRIPP WHAT DID YOU DO?
A HE WAS PLACED IN THE BACK OF FERGUSON'S VEHICLE, AND I ADVISED MOONEY THAT HE HAD RAN BETWEEN THE CARS AND BEHIND THE BLACK TRUCK AND CAN YOU GUYS SEARCH THE AREA
Q OKAY AND TO YOUR KNOWLEDGE, DID OFFICER MOONEY SEARCH THE AREA?
A YES, HE DID
Q AND TO YOUR KNOWLEDGE, DID HE FIND ANYTHING?
A YES, HE FOUND A BAGGY HE ACTUALLY CALLED OUT TO ME, "SARGE, I FOUND SOMETHING," AND HE HANDED ME A BAGGY OF A WHITE POWDERY SUBSTANCE
Q I'D LIKE TO SHOW YOU WHAT HAS BEEN MARKED AS STATE'S EXHIBIT NUMBER 1 CAN YOU TAKE A LOOK AT THAT FOR ME?
A (THE WITNESS COMPLIES)
Q DO YOU RECOGNIZE IT?
A YES, I DO
Q AND WHAT'S IN STATE'S EXHIBIT NUMBER 1?
A STATE'S EXHIBIT -- THIS BAG IS THE ROCKS AND THE WHITE BAGGY THAT WAS HANDED TO ME
Q AND ARE THOSE TWO ITEMS -- WELL, LET'S TALK ABOUT THE ROCKS FIRST ARE THE ROCKS IN THE SAME OR SUBSTANTIALLY THE SAME CONDITION AS WHEN YOU FOUND THEM ON MR FRIPP?
A YES
Q AND THE BAGGY OF THE WHITE POWDER, IS THAT IN THE SAME

OR SUBSTANTIALLY THE SAME CONDITION AS WHEN DEPUTY MOONEY HANDED IT TO YOU?

A YES

Q AND WHEN DEPUTY MOONEY HANDED YOU THE BAGGY OF THE WHITE POWDER, WHAT DID YOU DO WITH IT?

A I TOOK IT, AND I SAID, "I'M CHARGING YOU WITH THIS "

Q AND DID YOU NIK TEST IT?

A OH, YES

Q AND WAS THAT BEFORE YOU DECIDED TO INFORM MR FRIPP THAT YOU WERE GOING TO CHARGE HIM OR WAS THAT AFTER?

A I BELIEVE IT WAS BEFORE

Q OKAY AND SO WHEN YOU NIK TESTED IT, WHAT WERE THE RESULTS?

A THE SAMPLE THAT WAS PLACED ON THE NIK TEST SWAB TURNED A VIBRANT BLUE

Q AND WHAT DOES THAT MEAN?

A I OPENED THE INITIAL BAGGY THAT WAS FOUND IN THE WOODS I TOOK A SAMPLE OUT WITH THE POINT OF MY KNIFE, AND I APPLIED IT TO THE NIK KIT AND THE NIK KIT IS A WHITE SWAB, LIKE A COTTON-LOOKING SWAB I DO NOT KNOW WHAT THE FIBER IS EXACTLY BUT ONCE COCAINE TOUCHES THAT SWAB, IT TURNS BLUE

Q OKAY AND THE SUBSTANCE THAT YOU PUT ON TO THIS NIK KIT, IT TURNED BLUE?

A YES

Q AND SO AT THAT POINT IS THAT WHEN YOU TOLD MR FRIPP

THAT YOU WERE GOING TO CHARGE HIM WITH THE CONTENTS OF THE BAG?

A I SAID, "YOU'RE GETTING CHARGED WITH THIS "

Q OKAY AND WHERE WAS HE AT THIS TIME?

A IN THE BACK SEAT OF THE PATROL VEHICLE STILL

Q AND WHAT DID HE SAY?

A HE SAID, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE "

Q AT THAT POINT HAD YOU -- HAD YOU MENTIONED COCAINE TO HIM AT ALL?

A NO

Q AND SO MR FRIPP TELLS YOU, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE " SO WHAT DID YOU DO?

A I BELIEVE I TOLD HIM, "WHO SAID ANYTHING ABOUT COCAINE?"

Q AND AT THAT POINT WHAT HAPPENED?

A HE SAID, "I DON'T KNOW ANYTHING ABOUT THAT WHITE POWDER "

Q AND AT THIS POINT COULD YOU DESCRIBE THE DEFENDANT'S DEMEANOR?

A SCREAMING, YELLING, HOLLERING HE WAS ONLY TAKING A BREAK TO PRETTY MUCH CATCH HIS BREATH TO CONTINUE YELLING AND SCREAMING

Q AND NOW THE ROCKS AND THE BAGGY OF THE WHITE POWDER, WHAT DID YOU DO WITH THESE ITEMS?

A WELL, I FIELD-TESTED THE ROCKS ON THE SCENE AS WELL, AND THEY DIDN'T COME UP POSITIVE FOR ANYTHING THE BAGGY WITH

THE WHITE POWDER ALONG WITH THE ROCKS, BECAUSE I DIDN'T KNOW WHAT THEY WERE, WERE TURNED IN FOR ANALYSIS

Q AND WHAT DO YOU DO WHEN YOU TURN ITEMS IN TO BE TESTED?

A FOR DRUGS, THEY GO INTO A BEST BAG WHICH WOULD BE THIS COLORED BAG BACK HERE IT HAS THE ACTUAL SERIAL NUMBER AND A GLUE-TYPE SEAL THAT SEALS THE BAG TOTALLY SHUT

Q OKAY AND SO DID YOU USE A BEST BAG IN THIS CASE?

A YES

Q AND WHAT DID YOU DO WITH THE DRUGS?

A THEY WERE TAKEN TO THE DRUG DROP BOX

Q OKAY AND WERE THEY INSIDE THE BEST BAG?

A YES

Q AND ARE BEST BAGS INDIVIDUALLY NUMBERED?

A YES

Q AND DO YOU KNOW WHAT NUMBER BEST BAG YOU USED IN THIS CASES?

A YES, I DO CHARLIE 001319

Q AND DOES THAT BEST BAG HAVE YOUR HANDWRITING ON IT?

A YES, IT DOES

Q AND NOW THE DRUG DROP BOX, WHAT IS THAT?

A THAT IS A SECURE BOX INSIDE THE EVIDENCE LOCATION

Q OKAY AND DID YOU PUT IT INTO THE BOX PERSONALLY?

A YES

Q OKAY AND HAD -- TO YOUR KNOWLEDGE, ONCE THE -- ONCE THE BAGGY AND THE ROCKS CAME INTO YOUR POSSESSION, DID ANYONE

TAMPER WITH THEM IN ANY WAY?

A NOBODY HAS ACCESS TO IT NOBODY CAN TAMPER WITH IT OTHER THAN IT GOES TO THE LAB THAT'S THE ONLY TIME IT GETS HANDLED

Q OKAY I'D LIKE YOU TO TAKE A LOOK AT WHAT HAS BEEN MARKED AS STATE'S EXHIBIT NUMBER 3 DO YOU RECOGNIZE IT?

A YES

Q AND WHAT IS IT?

A THAT IS AN AERIAL PHOTO OF BEAUFORT COUNTY

Q AND DO YOU KNOW WHAT PART OF BEAUFORT COUNTY?

A I BELIEVE THAT'S BURTON ACTUALLY 44 DONALDSON CAMP ROAD IS IN THE CENTER OF IT

Q AND IS IT A FAIR AND ACCURATE DEPICTION OF THAT AREA?

A YES

Q AND IS THERE A SHADED AREA?

A YES, THERE IS

Q AND DO YOU KNOW ABOUT HOW FAR A HALF MILE IS FROM 44 DONALDSON CAMP ROAD?

A AS PER THE SHADED AREA? YES

Q IS THAT A FAIR AND ACCURATE DEPICTION OF A HALF MILE FROM DONALDSON CAMP ROAD?

A YES

MR BANNON YOUR HONOR, THE STATE WOULD MOVE TO ADMIT STATE'S EXHIBIT NUMBER 3

THE COURT ALL RIGHT

MS JORDAN NO OBJECTION

THE COURT OKAY

MR BANNON PERMISSION TO PUBLISH TO THE JURY?

THE COURT YOU CAN DO IT

(STATE'S EXHIBIT 3 WAS RECEIVED IN EVIDENCE)

BY MR BANNON

Q NOW, SERGEANT RODRIGUEZ, IS THERE A -- IS THERE A BLUE DOT?

A YES, THERE IS

Q AND WHAT LOCATION IS DEPICTED BY THE BLUE DOT?

A THAT IS STUDIO SEVEN NIGHTCLUB

Q AND IS THERE A GREEN DOT?

A YES, THERE IS

Q AND TO YOUR KNOWLEDGE, WHAT DOES THE GREEN DOT REPRESENT?

A THAT IS THE ELEMENTARY SCHOOL, BROAD RIVER ELEMENTARY I BELIEVE IT IS

MR BANNON OKAY NO FURTHER QUESTIONS, YOUR HONOR

CROSS-EXAMINATION

BY MS JORDAN

Q SORRY GIVE ME A SECOND GOOD MORNING

A GOOD MORNING

Q OFFICER RODRIGUEZ, YOU SAID YOU RESPONDED TO A DISPATCH TO STUDIO SEVEN AT ABOUT 2 08 JANUARY 1ST CORRECT?

A I DON'T REMEMBER THE TIME ENTIRELY, BUT, YEAH, ABOUT

2 00 IN THE MORNING

Q BUT YOUR REPORT WOULD GIVE THE ACCURATE TIME, IS THAT CORRECT?

A CORRECT

Q RIGHT AND DO YOU NEED YOUR REPORT TO SEE THE TIME ON THE INCIDENT REPORT?

A NO, I'LL TAKE YOUR WORD FOR IT, MA'AM

Q 2 08

A OKAY

Q AND YOU TESTIFIED HERE THAT YOU GOT A REPORT OF A BLACK MALE WEARING BLUE IS THAT CORRECT?

A CORRECT

Q ISN'T IT TRUE THAT DISPATCH TOLD YOU THAT THE SUBJECT WAS A BLACK MALE WEARING BLUE SWEATS?

A I DON'T RECALL WHAT DISPATCH TOLD ME, MA'AM

Q YOU'RE AWARE THAT DISPATCH DOES KEEP A RECORDED LOG

A YES

Q IF YOU'D SEEN A RECORDED LOG, WOULD THAT REFRESH YOUR MEMORY?

A NO, I HAVEN'T SEEN IT, BUT I'D LIKE TO SEE IT

MS JORDAN PERMISSION TO APPROACH, YOUR HONOR?

MR BANNON CAN I TAKE A LOOK AT IT?

MS JORDAN OH, SORRY

THE WITNESS WHICH ONE ARE YOU TALKING ABOUT?

BY MS JORDAN

Q THE CALL ON THE TOP OR THE TWO -- THE CALL THAT WAS SENT FROM DISPATCH TO YOU TO YOUR CAN YOU READ WHAT THE CALL SAYS?

A "REFERENCE TO A BLACK MALE WEARING BLUE SWEATS THAT IS AT THE FRONT DOOR ACTING VERY BELLIGERENT AND REFUSING TO LEAVE UNKNOWN 32'S "

Q SO THAT WAS THE DISPATCH CALL THEN TO YOU, CORRECT?

A OKAY

Q NOW, YOU DON'T HAVE ANY ARTICLES OF CLOTHING IN EVIDENCE IN THIS CASE DO YOU?

A NO

Q YOU NEVER SECURED THE CLOTHING MR FRIPP WAS WEARING ON THAT JANUARY 1ST NIGHT

A NO

Q YOU TESTIFIED YOU RECEIVED A REPORT OF A DISTURBANCE IN THE PARKING LOT ON STUDIO SEVEN IS THAT CORRECT?

A THAT'S THE REPORT THAT YOU HANDED TO ME, YES

Q AND ISN'T IT TRUE THAT DISPATCH TOLD YOU THAT IT WAS A BLACK MALE WEARING BLUE SWEATS ACTING BELLIGERENT AT THE FRONT DOOR REFUSING TO LEAVE?

A FROM WHAT THAT PRINTOUT SAYS, THAT'S WHAT THEY DISPATCHED, YES

Q WHEN YOU PARKED YOU SAID YOU PARKED ABOUT 40 YARDS AWAY FROM THE FRONT DOOR?

A CORRECT

Q IS THAT RIGHT? AND YOU DIDN'T SEE ANY DISTURBANCE GOING ON AT THAT TIME, DID YOU?
A NO
Q IS THAT CORRECT? AND YOU DON'T SEE ANY FIGHTING RIGHT?
A NO
Q YOU DON'T HEAR ANY YELLING, RIGHT?
A NO
Q AND FROM THAT DISTANCE YOU TESTIFIED THAT YOU -- THAT MR FRIPP LOOKED AT YOU AND WALKED AWAY IS THAT CORRECT?
A YES, HE LOOKED OVER HIS RIGHT SHOULDER AT MY PATROL VEHICLE AND WALKED AWAY TO THE LEFT
Q NOW, AT THAT TIME YOU NEVER TOLD HIM "STOP POLICE " CORRECT?
A CORRECT
Q AND YOU NEVER AT THAT TIME -- YOU NEVER TALKED WITH THE SECURITY GUARD AT THAT TIME CORRECT?
A AT THAT TIME I WAS STILL IN MY VEHICLE, MA'AM NO
Q OKAY WHEN YOU GOT OUT OF YOUR VEHICLE, YOU WENT TO THE FRONT ENTRANCE CORRECT?
A CORRECT
Q AND YOU NEVER TALKED TO A SECURITY GUARD THERE AT THE DOOR, CORRECT?
A NO
Q AND THAT TIME YOU NEVER TALKED TO THE OWNER OF THE CLUB, CORRECT?

A CORRECT
Q NEVER SPOKE TO HIM AND YOU NEVER TALKED TO ANY OF THE PATRONS YOU SAID THERE WAS A LINE OF FEMALES STANDING IN LINE YOU NEVER TALKED TO ANY OF THOSE PEOPLE IN LINE, CORRECT?
A NO, MA'AM
Q ISN'T IT TRUE THAT THE OWNER WAS STANDING INSIDE THE CLUB FOYER BEHIND THE WINDOW?
A YES
Q OFFICER RODRIGUEZ, DIDN'T YOU SAY YOU LOOKED INSIDE THE ENTRYWAY AND THE OWNER POINTED OUT? CORRECT?
A YES
Q NOW, IN FACT, THE OWNER WAS INSIDE THE BUILDING RIGHT?
A HE WAS INSIDE THAT FOYER
Q THAT'S INSIDE THE BUILDING THE FOYER IS INSIDE THE BUILDING, CORRECT?
A YES
Q AND, IN FACT, THE OWNER WAS BEHIND A WINDOW IN THE FOYER? CORRECT?
A YES
Q SO HE WAS NOT OUTSIDE THE BUILDING, CORRECT?
A NO
Q HE WAS INSIDE, CORRECT?
A CORRECT
Q I'D LIKE YOU TO TAKE A LOOK AT WHAT I HAVE MARKED AS A

DEFENSE EXHIBIT FOR IDENTIFICATION PURPOSES ONLY MAY I APPROACH, YOUR HONOR?

THE COURT SURE

MR BANNON CAN I SEE IT?

MS JORDAN I'M SORRY

BY MS JORDAN

Q OFFICER, DO YOU RECOGNIZE THAT PHOTO?

A YES

Q AND IS THIS -- YOU TOOK THAT PHOTO, CORRECT?

A CORRECT

Q AND THIS IS THE WINDOW YOU WERE TALKING ABOUT? IS THAT CORRECT?

A THAT IS THE WINDOW I'M TALKING ABOUT RIGHT HERE

Q OKAY AND THIS PHOTO WAS TAKEN DURING THE DAY THOUGH CORRECT?

A YES

Q AND THIS INCIDENT THAT WE'RE TALKING ABOUT TODAY HAPPENED IN THE DARK NIGHT IS THAT CORRECT?

A CORRECT

Q AND THE CLUB ENTRANCE, YOU'VE TESTIFIED BEFORE THAT THE LIGHT -- IT'S NOT VERY BRIGHT THERE IT'S NOT---

A IN THE PARKING LOT, NO, THERE ISN'T

Q IN FACT, YOU'VE TESTIFIED THAT THE -- THERE WAS ONLY ONE LIGHT IN THE FAR LEFT CORNER OF THE PARKING LOT ISN'T THAT CORRECT?

A TO MY KNOWLEDGE ON THAT NIGHT, YES, MA'AM, IN THE PARKING LOT

Q ALL RIGHT AND THE MUSIC AT THE CLUB THAT NIGHT WAS EXTREMELY LOUD, CORRECT?

A THERE WAS MUSIC PLAYING YES

Q WELL, IT WAS SO LOUD THAT IT WAS HARD TO HEAR OUTSIDE THE BUILDING, CORRECT?

A I WOULDN'T SAY IT WAS HARD TO HEAR OUTSIDE THE BUILDING, BUT IT WAS LOUD

Q WELL, YOU FELT YOU HAD TO YELL TO GET MR FRIPP'S ATTENTION ISN'T THAT CORRECT?

A OH, YEAH

Q AND HE DID STOP WHEN YOU YELLED AT HIM, CORRECT?

A CORRECT

Q AND HE LOOKED AT YOU, CORRECT?

A CORRECT

Q AND HE TURNED AWAY FROM YOU, CORRECT?

A CORRECT

Q YOU NEVER TOLD HIM TO STOP AT THAT POINT, CORRECT?

A NOT AT THAT POINT, NO, MA'AM

Q OKAY YOU SAID, "I WANT TO TALK TO YOU " CORRECT?

A I SAID, "HEY COME HERE CAN I TALK TO YOU?" I EVEN WHISTLED

Q YOU JUST WANTED TO TALK TO HIM, CORRECT?

A YEAH

Q SO YOU NEVER SAID, "STOP POLICE STOP " ISN'T THAT RIGHT?

A NOT AT THAT POINT, MA'AM

Q ALL RIGHT NOW, WHEN MR FRIPP WALKED AWAY, THEN YOU SAID, "SHERIFF'S OFFICE STOP " CORRECT?

A CORRECT

Q SO THIS TIME HE WAS ALREADY FURTHER AWAY FROM YOU? ISN'T THAT RIGHT?

A YES

Q AND I THINK YOU SAID IT WAS 20 CAR LENGTHS? ISN'T THAT CORRECT?

A YES

Q SO THAT WOULD BE ABOUT 150, 200 FEET, MORE THAN HALF A FOOTBALL FIELD MAYBE?

A CLOSE TO IT

Q AND WE TALKED ABOUT THIS ACCORDING TO YOU, THERE WAS ONLY ONE LIGHT IN THE PARKING LOT CORRECT?

A YES

Q IN FACT, THAT'S ALL THE WAY IN THE BACK FAR LEFT CORNER IN THE LEFT PARKING LOT

A FROM WHAT I BELIEVE, YES, MA'AM

Q THAT WOULD BE THAT WAY, RIGHT?

A LEFT

Q AND AT THIS TIME THERE WERE ALREADY CARS BLOCKING YOU FROM HIM ALL THE WAY ACROSS THE PARKING LOT CORRECT?

A THERE WERE CARS ALL OVER THAT PARKING LOT, YES, MA'AM
Q AND MR FRIPP COMES TOWARDS YOU AT ABOUT -- IN ABOUT 10 SECONDS AFTER LOSING HIM CORRECT?
A EXCUSE ME?
Q MR FRIPP COMES TOWARD YOU -- COMES TO YOU IN ABOUT 10 SECONDS? ISN'T THAT CORRECT? ISN'T THAT WHAT YOU TESTIFIED? TEN SECONDS HE TURNED---
A AFTER HE WENT BEHIND THE TRUCK?
Q ABOUT 10 SECONDS?
A APPROXIMATELY 10 SECONDS, MA'AM
Q IT WAS EXTREMELY COLD THAT NIGHT FOR THE LOW COUNTRY IT WAS COLD CORRECT?
A UH-HUH
Q AND YOU PROBABLY AGREE MAYBE IT WAS IN THE THIRTIES, CORRECT?
A I'D SAY IT WAS IN THE THIRTIES, 32, 33
Q MR FRIPP HAD ON A JACKET OR A SHIRT?
A A BAGGY BLUE SHIRT OR JACKET
Q AND YOUR TESTIMONY WAS HE HAD HIS HANDS IN HIS POCKETS AND HE HAD---
A I COULDN'T SEE HIS HANDS THEY WERE EITHER IN HIS PANTS POCKETS OR HIS JACKET POCKET, I COULDN'T TELL
Q OKAY AND THEN YOU'RE TELLING US HE WALKED TOWARDS YOU AT THAT POINT CORRECT?
A AFTER HE EXITED THE BACK OF THE TRUCK, YES, MA'AM

Q HE WALKED TOWARDS YOU
A YES
Q A COP A POLICE OFFICER
A YES
Q HE WALKED TOWARDS YOU WITH HIS HANDS HIDDEN, CORRECT?
A YES
Q AND ARE YOU SURE HE EVEN HEARD YOU TALKING?
A OH, I'M POSITIVE HE HEARD ME TALKING
Q AND ISN'T IT CORRECT YOU THOUGHT HE WAS GOING TO WALK RIGHT PAST YOU?
A YES
Q WAS HE IN THE LIGHT, THAT LIGHT YOU TOLD US ABOUT BEFORE?
A IT WAS SHINING FROM THE LEFT SIDE OF THE PARKING LOT, YES
Q AND ARE YOU SURE YOU SAW HIS HANDS IN HIS POCKETS AT THAT POINT?
A I COULDN'T SEE HIS HANDS AT THAT POINT
Q OKAY
A I COULDN'T TELL YOU WHAT POCKET THEY WERE IN
Q OKAY OKAY YOU DIDN'T HAVE A FLASHLIGHT ON, CORRECT?
A ACTUALLY, I DIDN'T HAVE TIME TO GRAB MY FLASHLIGHT FROM THE CAR
Q HE WAS WALKING BACK TOWARDS YOU FROM THE -- BACK TOWARDS THE CLUB FROM THE DARK IS THAT CORRECT?

A HE WAS WALKING BACK TOWARDS ME FROM THE BACK OF THE TRUCK

Q BACK TOWARDS THE CLUB? THAT DIRECTION?

A BACK TOWARDS THE PATH THE CLUB IS IN THAT DIRECTION, YES, MA'AM

Q AND AFTER HE GOT CLOSER TO YOU, HE DID SHOW YOU HIS HANDS, CORRECT?

A AFTER I DREW MY SERVICE WEAPON, YES, MA'AM

Q AND HE SAID, "YOU GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " CORRECT?

A CORRECT

Q BASICALLY TOLD YOU TO LEAVE HIM ALONE, RIGHT?

A HE BASICALLY TOLD ME I HAD -- "YOU GOT NOTHING ON ME YOU HAVE NO DRUGS ON ME "

Q WELL, BASICALLY LEAVE ME ALONE? YOU GOT NOTHING ON ME, CORRECT?

MR BANNON OBJECTION CALLS FOR SPECULATION

THE COURT WELL, SHE'S JUST -- SHE CAN DO THAT ON CROSS-EXAM ONCE

BY MS JORDAN

Q SO AT THAT POINT YOU START ORDERING HIM TO THE GROUND

A "LET ME SEE YOUR HANDS GET TO THE GROUND " YES

Q SO GET DOWN CORRECT?

A CORRECT

Q AND YOU'RE POINTING YOUR GUN AT HIM AT THIS POINT

A YES, I AM
Q AND YOU TAKE HIM DOWN
A NO---
Q CORRECT?
A ---I DIDN'T TAKE HIM DOWN TO THE GROUND
Q WELL, NOT PHYSICALLY, BUT YOU ORDER HIM DOWN SORRY
A I ORDER HIM DOWN TO THE GROUND, YES
Q AND AT ABOUT 2 11 MR FRIPP IS ARRESTED, CORRECT?
A CORRECT
Q YOU PUT HANDCUFFS ON HIM, CORRECT?
A YES
Q AND YOU ARREST HIM FOR FLEEING TO EVADE ARREST OR DETENTION, CORRECT?
A YES, MA'AM
Q AND YOU WERE THE OFFICER THAT TESTIFIED AT A TRIAL CONCERNING THAT, CORRECT?
A CORRECT
MR BANNON OBJECTION
THE COURT YOU DON'T GET INTO THAT WE SAID YOU DON'T GO INTO IT
MS JORDAN OKAY
THE COURT GO ON TO SOMETHING ELSE THEY HAD SOME MAGISTRATE COURT HEARING I TOLD THEM THEY COULDN'T GO INTO IT, SHE'S GOING INTO IT SO FORGET IT YOU DIDN'T EVEN HEAR THAT GO AHEAD

BY MS JORDAN

Q MR FRIPP IS NOT WEARING GLOVES, IS HE?

A AT THIS POINT I DON'T KNOW, MA'AM

Q WHEN YOU ARREST HIM, DID HE HAVE GLOVES ON? IS THAT CORRECT?

A NO, HE DIDN'T

Q YOU FOUND NO GLOVES ON HIM, CORRECT?

A NO

Q IN FACT, NO ONE FOUND ANY GLOVES ANYWHERE IN THE SEARCHES IN THIS CASE THERE WAS NO GLOVES FOUND

A NOT TO MY KNOWLEDGE MA'AM, NO

Q BUT YOU SEARCH HIM THOROUGHLY, RIGHT?

A YES

Q AND YOU FIND NO GUNS ON HIM, CORRECT?

A NO GUNS EITHER

Q YOU FIND NO KNIVES ON HIM, CORRECT?

A NO KNIVES EITHER

Q AND IS IT TRUE YOU FIND NO ILLEGAL DRUGS ON HIM? CORRECT?

A CORRECT

Q YOU FIND NOTHING THAT'S ILLEGAL ON HIM, CORRECT?

A CORRECT

Q THE ROCKS THAT YOU MENTIONED, YOU SENT THEM FOR DRUG ANALYSIS, CORRECT?

A YES

Q AND HOW MANY WERE THERE? I'M SORRY?
A I DON'T REMEMBER THE EXACT AMOUNT I'LL TELL YOU RIGHT NOW ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT EIGHT OR NINE, MA'AM, FROM WHAT I COULD SEE
Q AND YOU TOOK SOME MONEY FROM MR FRIPP IS THAT CORRECT?
A YES
Q AND YOU GAVE THAT MONEY TO OFFICER MENENDEZ?
A CORRECT
Q YOU NEVER SAW MR FRIPP WITH ANY DRUGS IN HIS HANDS, DID YOU?
A NO, I DIDN'T
Q AND YOU NEVER SAW MR FRIPP WITH ANY PLASTIC BAGGIES IN HIS HANDS, DID YOU?
A NO, I DIDN'T
Q YOU'RE NOT A QUALIFIED -- YOU'RE NOT QUALIFIED AS A FINGERPRINT EXPERT, ARE YOU?
A I AM NOT A FINGERPRINT EXPERT, MA'AM
Q YOU'VE NEVER BEEN TO FINGERPRINT EXPERT SCHOOL, CORRECT?
A I'VE NOT BEEN QUALIFIED AS A FINGERPRINT EXPERT I'VE BEEN TO FINGERPRINTING SCHOOL, YES, MA'AM AND I'M ALSO AN EVIDENCE TECHNICIAN
Q BUT YOU KNOW -- BASICALLY YOU KNOW HOW TO LIFT A PRINT, RIGHT?
A I KNOW HOW TO LIFT A PRINT, YES

Q THEY TEACH YOU THAT AT THE ACADEMY, RIGHT?
A YES, MA'AM
Q SO IF YOU THINK THAT YOU NEED PRINTS FROM A CRIME SCENE, YOU CAN SECURE THEM YOU CAN SECURE THE EVIDENCE WHERE YOU BELIEVE FINGERPRINTS MIGHT BE LOCATED RIGHT?
A IF IT'S FEASIBLE, YES, MA'AM
Q YOU HAD THE PLASTIC BAG SECURED IN EVIDENCE, CORRECT?
A CORRECT
Q AND YOU HANDLED IT CAREFULLY, CORRECT?
A CORRECT
Q BUT DID YOU -- YOU DID NOT SUBMIT THIS PLASTIC BAG FOR FINGERPRINT ANALYSIS IS THAT CORRECT?
A NO, MA'AM, I DID NOT FINGERPRINT THE PLASTIC BAG
Q COURT'S INDULGENCE OFFICER RODRIGUEZ, THE BAG OF DRUGS THAT WAS FOUND, WAS IT -- WAS FOUND IN THE WOODS, NOT RIGHT BEHIND THE BACK OF THE TRUCK CORRECT?
A EXCUSE ME?
Q THE BAG OF DRUGS THAT WAS FOUND WAS NOT FOUND RIGHT BEHIND THE TRUCK IT WAS FOUND IN THE WOODS, CORRECT?
A I BELIEVE IT WAS FOUND RIGHT BEHIND THE TRUCK, MA'AM
Q YOU TESTIFIED THE WOODS EARLIER
A THERE'S WOODS RIGHT BEHIND THE TRUCK, MA'AM
MS JORDAN OKAY THANK YOU THAT'S ALL THANK YOU

REDIRECT EXAMINATION

BY MR BANNON

Q SERGEANT, WHETHER YOU GOT TO STUDIO SEVEN, DID YOU SEE ANYONE ELSE -- ANY OTHER MALES WEARING BLUE OUTSIDE THE CLUB?

A NO

Q AND NOW YOU JUST SAID THAT YOU DIDN'T FINGERPRINT THE BAGGY THAT WAS FOUND

A CORRECT

Q WHY DIDN'T YOU FINGERPRINT THE BAGGY?

A IT'S MY KNOWLEDGE THAT THE ACTIVE INGREDIENTS IN THE COCAINE---

MS JORDAN OBJECTION HE'S ALREADY TESTIFIED TO THIS

THE COURT WELL, HE'S ON REDIRECT HE CAN ASK HIM ABOUT IT SINCE YOU BROUGHT IT UP

MS JORDAN OKAY

THE WITNESS IT'S MY UNDERSTANDING THAT THE ACTIVE INGREDIENTS IN THE COCAINE EAT THE AMINO ACIDS IN ANY FINGERPRINT THAT IS LEFT BEHIND ON A PLASTIC BAG SO IT WOULD HAVE BEEN AN EFFORT IN FUTILITY TO FINGERPRINT THE BAG

BY MR BANNON

Q AND THE EIGHT OR NINE ROCKS THAT YOU FOUND ON MR FRIPP, ARE THOSE -- ARE THEY FOOD?

A NO

Q DO THEY LOOK LIKE FOOD?

A NO, THEY DON'T

THE COURT ALL RIGHT THE ROCKS, FORGET IT

MR BANNON THANK YOU, JUDGE NO FURTHER QUESTIONS

THE COURT WELL, JUST ONE OR TWO THINGS NOTHING TO REALLY DO WITH THE CASE, BUT WE SEE THE DEFENDANT THERE BASED ON THE TESTIMONY, HE'S STILL SITTING IN THE CAR AT THE CLUB THEY TRANSPORTED HIM, I GUESS JUST ASK HIM WHAT HAPPENED TO HIM

MR BANNON ALL RIGHT ALL RIGHT, JUDGE ONCE YOU TOOK---

THE COURT WE'VE JUST GOT TO COMPLETE THE CASE RIGHT NOW HE'S JUST SITTING IN THE CAR

MR BANNON ALL RIGHT THANK YOU, JUDGE

THE COURT OKAY

BY MR BANNON

Q ONCE YOU COLLECTED ALL OF THE EVIDENCE, WHAT DID YOU DO NEXT?

A I ADVISED MR FERGUSON, DEPUTY FERGUSON, TO DRIVE MR FRIPP TO THE DETENTION CENTER TO PROCESS HIM IN

MR BANNON OKAY

THE COURT ALL RIGHT THAT'S ENOUGH

MR BANNON THANK YOU, JUDGE NO FURTHER QUESTIONS

THE COURT ALL RIGHT YOU CAN STEP DOWN

THE WITNESS THANK YOU, YOUR HONOR

MR BANNON THE STATE CALLS DEPUTY MOONEY

THE COURT ALL RIGHT

DANIEL MOONEY, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS

DIRECT EXAMINATION

BY MR BANNON

Q GOOD MORNING

A GOOD MORNING

Q PLEASE STATE YOUR NAME

A DANIEL MOONEY

Q WHERE DO YOU WORK, SIR?

A BEAUFORT COUNTY SHERIFF'S OFFICE

Q HOW LONG HAVE YOU WORKED THERE?

A APPROXIMATELY FOUR AND A HALF YEARS

Q AND WHAT DO YOU DO FOR THE SHERIFF'S OFFICE?

A I'VE GOT A COUPLE OF JOBS NARCOTICS HANDLER AND I ALSO WORK FOR THE JOINT ENFORCEMENT TRAFFIC TEAM

Q OKAY DO YOU USE A CANINE OFFICER?

A YES, I DO

Q AND HAVE YOU BEEN TRAINED TO USE A CANINE OFFICER?

A TRAINED TO USE A NARCOTICS DOG, YES SIR, I DO

Q YES, SIR WERE YOU WORKING ON JANUARY 1ST, 2009?

A YES, SIR, I WAS

Q AND DID YOU HAVE AN OPPORTUNITY TO GO TO 44 DONALDSON CAMP ROAD?

A YES, SIR, I DID

Q AND WHAT'S OUT THERE?

A THAT'S A NIGHTCLUB
Q AND WHY DID YOU GO OUT THERE?
A OFFICER RODRIGUEZ WAS RESPONDING TO A DISTURBANCE SHORTLY AFTERWARDS HE CLEARED THE CHANNEL FOR RADIO TRAFFIC, SO I KNEW THAT SOMETHING WAS WRONG SO I RESPONDED AS HIS BACKUP
Q OKAY AND SO YOU RESPONDED TO THE SCENE AND WHAT DID YOU DO NEXT?
A I CHECKED ON SERGEANT RODRIGUEZ TO MAKE SURE HE WAS OKAY AND AT WHICH POINT HE HAD MR FRIPP DETAINED I ASKED MR RODRIGUEZ IF HE WAS OKAY HE SAID HE HAD EVERYTHING UNDER CONTROL HE SAID THAT MR FRIPP HAD WENT BEHIND THE TRUCK
MR DEYSACH OBJECTION TO THE HEARSAY
THE COURT HE CAN GO AHEAD HE'S DESCRIBING WHY HE WENT BEHIND THE TRUCK IT WAS ALREADY TESTIFIED TO
MR BANNON THANK YOU JUDGE
BY MR BANNON
Q AND SO DID YOU GO AND SEARCH BEHIND THE TRUCK?
A AFTER SERGEANT RODRIGUEZ SAID THAT HE WENT BEHIND THE TRUCK, YES, I DID
Q OKAY AND DID YOU -- DID YOU TAKE THE DOG WITH YOU OR WAS IT JUST YOU?
A I TOOK THE DOG WITH ME
Q OKAY AND IS -- YOU SAID IT WAS A NARCOTIC DOG IS THIS A DOG THAT WAS TRAINED TO SEARCH OUT FOR ILLEGAL DRUGS?

A YES, SIR, IT IS
Q AND WHEN YOU TOOK THE DOG BACK BEHIND THE CAR, DID IT -- WELL, IF A DOG -- WHEN A DOG THINKS IT'S FOUND ILLEGAL DRUGS, WHAT DOES IT DO?
A IT GIVES AN ALERT, AND THEN SHORTLY AFTERWARDS IT GIVES AN INDICATION WHEN IT FINDS THE SOURCE OF NARCOTICS
Q AND SO WHEN YOU TOOK THE DOG BEHIND THE TRUCK, DID IT ALERT?
A SHORTLY BEHIND -- A LITTLE FURTHER AWAY FROM THE TRUCK, YES, SIR, IT DID
Q OKAY
A BY A TREE
Q OKAY ALL RIGHT AND NEAR WHERE THE DOG ALERTED, DID YOU FIND ANYTHING?
A YES, SIR, I DID
Q WHAT DID YOU FIND?
A IN SOME PINE STRAW I LOCATED A CLEAR PLASTIC BAG WITH A WHITE POWDERY SUBSTANCE INSIDE OF IT
Q OKAY AND WHERE WAS THIS BAGGY OF POWDER?
A IT WAS -- THERE'S PINE STRAW NEXT TO IT IS A TREE, AND I COULD TELL THAT IT WAS FRESHLY DISTURBED, AND RIGHT IN THE FRESHLY-DISTURBED PINE STRAW IS WHERE THE COCAINE WAS LOCATED AT
Q OKAY WAS THE COCAINE MIXED IN WITH THE PINE STRAW?
A YES, SIR, IT WAS

Q OKAY
A IT LOOKED LIKE SOMEBODY TRIED TO BURY IT
Q I'D LIKE TO SHOW YOU WHAT HAS PREVIOUSLY BEEN MARKED AS STATE'S EXHIBIT NUMBER 1 COULD YOU TAKE A LOOK AT THAT? AND NOW INSIDE THERE IS THERE A BAGGY OF WHITE POWDER?
A YES, SIR, THERE IS
Q AND DOES THAT APPEAR TO BE THE SAME OR SUBSTANTIALLY THE SAME BAGGY OF WHITE POWDER THAT YOU FOUND THAT EVENING IN THE PINE STRAW?
A YES, SIR, IT IS
Q AND NOW WAS IT COLD OUT THAT EVENING?
A YES, SIR, IT WAS
Q WAS IT FREEZING COLD?
A ABOUT 10 DEGREES OR A LITTLE BIT ABOVE FREEZING
Q OKAY AND SO COULD YOU -- COULD YOU DESCRIBE FOR US THE CONDITION OF THE BAG WHEN YOU FOUND IT?
A IT WAS DRY IT DIDN'T HAVE ANY DIRT ON IT IT WAS -- I WOULD SAY THAT IT LOOKED LIKE IT WAS JUST -- JUST PUT THERE
MR DEYSACH I WOULD -- I WOULD OBJECT TO THAT OPINION TESTIMONY I DON'T THINK HE'S QUALIFIED TO---
THE COURT YOU CAN QUESTION HIM ABOUT IT OBVIOUSLY THAT'S JUST HIS OPINION GO AHEAD HE'S JUST OBSERVING, AS I UNDERSTAND IT, WHAT HE OBSERVED
BY MR BANNON
Q AND NOW YOU SAID THAT IT WAS DRY AND DIDN'T HAVE ANY

DIRT ON IT WHY IS THAT SIGNIFICANT TO YOU?

A IN MY PAST EXPERIENCE, BECAUSE I ALSO DO TRACKING FOR HUMANS, IF SOMETHING IS FRESHLY PUT THERE, ESPECIALLY ON A FRESHLY-DISTURBED PINE STRAW AREA AND BEING THE TEMPERATURE THAT IT WAS OUTSIDE, CONDENSATION WOULD HAVE PROBABLY BUILT UP ON THE BAG IF IT HAD BEEN THERE FOR A GOOD -- GOOD AMOUNT OF TIME

Q OKAY SO YOU SAID -- YOU SAID YOU'VE BEEN TRAINED TO TRACK A HUMAN BEING

A YES, SIR, I HAVE

Q AND AS PART OF THAT TRAINING, ARE YOU TRAINED TO LOOK FOR INDICATORS ABOUT, YOU KNOW, HOW FRESH OR HOW LONG SOMETHING HAS BEEN THERE?

A YES, SIR, WE HAVE

Q OKAY AND BASED ON THAT TRAINING, WHAT IS YOUR OPINION ABOUT THIS BAGGY OF COCAINE?

MR DEYSACH I MEAN, THAT'S ASKING FOR AN EXPERT---

THE COURT YEAH, THAT -- HE CAN JUST SAY WHAT HE'S---

MR DEYSACH ---OPINION

THE COURT ---WHAT HE'S HE'S DONE THAT SO MOVE ON BY MR BANNON

Q OKAY AND NOW WAS THE BAGGY RIGHT NEXT TO THE TRUCK?

A THERE WAS A DISTANCE BETWEEN WHERE THE TRUCK WAS LOCATED AT AND WHERE I FOUND IT AT

Q OKAY WHAT I'D LIKE TO DO IS IMAGINE THAT THIS BENCH IS

THE END OF THE TRUCK NOW, I'M JUST GOING TO START BACKING UP AND YOU TELL ME WHEN I GET TO THE POINT THAT WAS THE DISTANCE BETWEEN THE TRUCK AND WHERE YOU FOUND THE BAGGY

A OKAY, SIR

Q (MR BANNON WALKS BACKWARDS)

A RIGHT ABOUT THERE

Q RIGHT ABOUT HERE ALL RIGHT SO RIGHT ABOUT THERE?

A YES, SIR THAT WOULD BE CORRECT

Q OKAY AND NOW WHAT DID YOU DO WITH THE BAGGY OF POWDER ONCE YOU FOUND IT?

A I PICKED IT UP AND BROUGHT IT OVER TO SERGEANT RODRIGUEZ

Q NOW, FROM THE TIME THAT YOU FOUND IT, DID YOU OR ANYONE ELSE TAMPER WITH IT IN ANY WAY?

A NO SIR

Q OKAY AND SO WHEN YOU HANDED IT TO OFFICER RODRIGUEZ, WAS IT IN THE SAME CONDITION AS WHEN YOU FOUND IT?

A YES, SIR, IT WAS

Q AND DOES IT APPEAR TO BE IN THE SAME CONDITION NOW AS IT WAS WHEN YOU FOUND IT?

A OTHER THAN IT BEING IN AN EVIDENCE BAG, YES SIR

MR BANNON OKAY NO FURTHER QUESTIONS

THE COURT OKAY

MR DEYSACH MAY IT PLEASE THE COURT, YOUR HONOR?

THE COURT SURE

CROSS-EXAMINATION

BY MR DEYSACH

Q GOOD MORNING, LANCE CORPORAL MOONEY?

A YES, SIR

Q WE'RE HERE TO TALK ABOUT WHAT HAPPENED AT STUDIO SEVEN ON THE EARLY MORNING HOURS OF NEW YEAR'S THIS YEAR, CORRECT?

A YES, SIR

Q ALL RIGHT WHEN YOU ARRIVED AT THE STUDIO SEVEN, THE PARTY WAS GOING ON, WASN'T IT?

A YES, SIR, THERE WAS A PARTY GOING ON

Q IT WAS A BIG PARTY GOING ON, CORRECT?

A THERE WAS A QUITE A FEW PEOPLE INSIDE THE CLUB FROM WHAT I HEARD, YES

Q THE PARKING LOT WAS FULL OF CARS, CORRECT?

A YES, IT WAS

Q AND THERE WAS A LOT OF NOISE COMING OUT OF THE -- OUT OF THE STUDIO SEVEN -- OUT OF THE BUILDING, CORRECT?

A CORRECT

Q OKAY THERE WERE PEOPLE LINED UP TO GET INSIDE THE BUILDING CORRECT?

A THAT I CAN'T SAY THAT THERE WAS BECAUSE WHERE I WAS LOCATED, I WAS IN THE VERY BACK OF THE PARKING LOT

Q SO YOU DIDN'T -- YOU DIDN'T TAKE NOTE OF WHETHER OR NOT THERE WAS STILL PEOPLE LINED UP TO GET INTO THE PARTY

A NO, SIR AT THAT POINT I WAS ACTUALLY LOOKING FOR

SERGEANT RODRIGUEZ WHEN I WAS PULLING IN THE PARKING LOT
Q FAIR ENOUGH ALL RIGHT NOW, YOU TESTIFIED THAT YOU WEREN'T RESPONDING TO THE ORIGINAL CALL, CORRECT?
A CORRECT
Q THAT WHEN THE RADIO CHANNEL WAS CLEARED, YOU TOOK THAT AS A SIGNAL THAT YOU MIGHT BE OF SOME HELP TO SHOW UP AT STUDIO SEVEN, CORRECT?
A CORRECT
Q OKAY SO HOW LONG DID IT TAKE YOU BETWEEN THE CHANNEL BEING CLEARED AND YOU ARRIVING AT STUDIO SEVEN?
A I COULDN'T TELL YOU I KNOW I WAS IN A HURRY
Q DID IT TAKE YOU A HALF AN HOUR?
A NO, SIR, IT DIDN'T
Q IT TOOK YOU A COUPLE OF MINUTES?
A I'M ASSUMING
Q OKAY SO AT THE TIME WHEN THE CHANNEL WAS CLEARED, YOU'RE SITTING IN YOUR CAR SOMEWHERE IN BEAUFORT COUNTY, CORRECT?
A I WAS LOCATED AT THE BROAD RIVER BRIDGE WHICH IS NOT VERY FAR
Q SO YOU'RE IN THE AREA, CORRECT?
A YES, SIR, I WAS
Q WITH LEIA, CORRECT?
A YES, SIR
Q AND LEIA IS -- LEIA IS THE CANINE OFFICER, CORRECT?

YOU'RE NOT THE CANINE LEIA IS THE OFFICER, CORRECT?
A LEIA IS THE CANINE DOG
Q OKAY
A AND I'M THE CANINE OFFICER BECAUSE I HANDLE LEIA
Q I GOT YOU SO LEIA IS NOT AN OFFICER ALL RIGHT I'M SORRY
A WELL, I BELIEVE SHE IS
Q OKAY
A I DON'T KNOW IF THEY COULD SWEAR LEIA IN, SO I COULDN'T TELL YOU, SIR
Q OKAY VERY GOOD SO WITHIN MINUTES OF THE CHANNEL BEING CLEARED, YOU'RE AT STUDIO SEVEN WITH THE NARCOTICS DOG, CORRECT?
A YES, SIR
Q AND YOU OFFER -- WAS IT LIEUTENANT RODRIGUEZ?
A SERGEANT
Q SERGEANT RODRIGUEZ ASSISTANCE WHEN YOU ARRIVE CORRECT?
A CORRECT
Q AND YOU OFFER HIM LEIA'S ASSISTANCE, CORRECT?
A YES, SIR
Q AND YOU OFFER TO LET LEIA SNIFF THE PARKING LOT, CORRECT?
A THE AREA WHERE HE HAD POINTED TO WHICH IS BEHIND THE TRUCK
Q SO -- SO YOU WERE LOOKING FOR A HINT OR AT LEAST

DIRECTION AS TO WHERE SERGEANT RODRIGUEZ HAD LAST SEEN THE DEFENDANT, THE SUBJECT, CORRECT?

A I WOULDN'T NECESSARILY SAY A HINT, BUT HE TOLD ME WHERE HE WAS AT

Q HE TELLS YOU WHERE HE WAS, AND THEN THAT'S WHERE YOU SHOULD DIRECT LEIA TO SNIFF, CORRECT?

A CORRECT

Q ALL RIGHT AND SO HE DIRECTS YOU TO BEHIND THE BLACK TRUCK, CORRECT?

A YES, SIR

Q ALL RIGHT AND LEIA SNIFFS BEHIND THE BLACK TRUCK, CORRECT?

A YES, SIR

Q BUT SHE FINDS NO DRUGS BEHIND THE BLACK TRUCK, DOES SHE?

A WELL, THERE WAS AN AREA BEHIND THE BLACK TRUCK, SO I WOULD CONSIDER THAT BEHIND THE BLACK TRUCK

Q SO I GUESS ANYWHERE -- I GUESS IN -- OKAY SO IT'S NOT RIGHT BEHIND THE BLACK TRUCK, LET'S SAY THAT

A YES, SIR

Q SO YOU'RE AGREEING WITH ME THAT IT'S NOT RIGHT BEHIND THE BLACK TRUCK

A NOT RIGHT BEHIND THE BLACK TRUCK

Q YOU SAID IT'S SOME DISTANCE BEHIND THE BLACK TRUCK

A YES SIR CORRECT

Q ALL RIGHT NOW, YOU SAID THAT YOU'D BEEN AN OFFICER FOR

ABOUT FOUR AND A HALF YEARS, CORRECT?

A YES, SIR

Q AND THAT WHEN YOU'RE AN OFFICER, ONE OF THE THINGS THAT THEY TRAIN YOU TO DO IS TO WRITE REPORTS

A YES, SIR

Q OKAY AND THERE'S REASONS FOR THAT THE REASON THAT YOU WRITE REPORTS -- OR I'LL SAY THIS THAT YOU WRITE THE REPORT SHORTLY AFTER THE EVENT THAT YOU'RE REPORTING TAKES PLACE CORRECT?

A YES, SIR

Q AND THE REASON FOR THAT IS SO THAT YOU DON'T FORGET WHAT IT IS THAT HAPPENED DURING THE EVENT THAT YOU'RE REPORTING, CORRECT?

A CORRECT

Q THAT AS TIME PASSES, MEMORIES COULD FADE, CORRECT?

A CORRECT

Q AND YOU GO ON MANY CALLS CORRECT?

A CORRECT

Q AND YOU WOULDN'T WANT TO CONFUSE DIFFERENT EVENTS THAT YOU HAD REPORTED, CORRECT?

A YES

Q AND SO THAT'S WHY SHORTLY AFTER YOU RESPOND YOU WRITE A REPORT, CORRECT?

A YES, SIR

Q AND YOU DID THAT IN THIS CASE, RIGHT?

A YES, SIR
Q ALL RIGHT AND YOU KNOW THAT WHEN YOU'RE WRITING THOSE REPORTS THAT YOU NEED TO BE ACCURATE, RIGHT?
A YES, SIR
Q BECAUSE YOU KNOW THAT LOTS OF PEOPLE RELY ON THIS REPORT, CORRECT?
A CORRECT
Q SO YOU WOULDN'T WANT TO PUT SOMETHING IN THERE THAT WASN'T ACCURATE, CORRECT?
A YES SIR
Q AND YOU WOULDN'T WANT TO LEAVE SOMETHING OUT THAT YOU THOUGHT MIGHT BE IMPORTANT, CORRECT?
A YES, SIR
Q SO THAT'S THE REASON -- AND YOU -- THAT'S THE REASON YOU WRITE THE REPORTS OKAY ALL RIGHT NOW, YOU WROTE A REPORT ABOUT THE SNIFF THAT YOU AND LEIA CONDUCTED CORRECT?
A YES, SIR
Q I THINK I MIGHT HAVE SEEN IT IN YOUR HAND WHEN YOU WALKED UP HERE DO YOU HAVE A COPY OF IT?
A NO, SIR
Q OKAY ALL RIGHT I'M GOING TO LET YOU HAVE A COPY OF YOUR REPORT
A OKAY
Q YOU WROTE IN YOUR REPORT THAT LEIA CIRCLED AROUND THE BACK OF TWO VEHICLES, CORRECT?

A YES, SIR
Q AND AT THAT TIME SHE STARTED HEADING TOWARDS THE TREE, CORRECT?
A YES, SIR
Q YOU WROTE THAT YOU NOTICED AN EMPTY BEER BOTTLE LYING ON THE GROUND
A YES, SIR
Q DID YOU TAKE THAT BEER BOTTLE INTO EVIDENCE?
A NO, SIR
Q DID YOU PROCESS THAT BEER BOTTLE FOR FINGERPRINTS?
A NO, SIR
Q DID YOU SWAB IT FOR ANY D N A THAT MIGHT BE ON THE PART WHERE YOU DRINK OUT OF?
A NO, SIR
Q AND THAT BOTTLE WAS NEAR THE BASE OF A TREE
A YES, SIR
Q AND THAT TREE AND THAT BOTTLE WERE TEN YARDS FROM THE BACK OF THE TRUCK, CORRECT?
A I SAID APPROXIMATELY TEN YARDS
Q YOU SAID -- SO IT COULD HAVE BEEN MORE THAN TEN YARDS, CORRECT?
A I DON'T THINK IT WAS MORE THAN TEN YARDS
Q OKAY SO YOU PUT TEN YARDS AND -- OKAY NOW, YOU WROTE APPROXIMATELY TEN YARDS, CORRECT?
A YES, SIR

Q YOU DIDN'T PUT AT A MAXIMUM OF TEN YARDS DID YOU?
A NO, SIR
Q OKAY AND HOW MANY FEET IS TEN YARDS?
A I'M NOT GREAT AT MATH BUT WHAT? THIRTY FEET MAYBE?
Q THIRTY FEET BECAUSE THERE'S THREE FEET IN A YARD, CORRECT?
A OKAY
Q YOU MULTIPLY IT BY TEN?
A YES
Q AND THAT'S 30 FEET, CORRECT
A YES SIR
THE COURT IT WAS THIS MORNING, I GUESS IT STILL IS
BY MR DEYSACH
Q NOW, LEIA ALERTED TO AN AREA OF PINE STRAW CORRECT?
A CORRECT
Q AND IN ORDER TO FIND THE BAGGY IN THE PINE STRAW, YOU HAD TO SIFT THROUGH THE PINE STRAW, CORRECT?
A CORRECT
Q AND THIS AREA WAS APPROXIMATELY TEN YARDS FROM THE BACK OF THE TRUCK
A YES, SIR
Q IN A WOOD LINE, CORRECT?
A WELL, I CALL IT A WOOD LINE BECAUSE THERE WAS A TREE THERE
Q AND IT WAS -- OKAY I MEAN, YOU CALLED IT A WOOD LINE

BECAUSE THERE WAS JUST ONE TREE THERE?

A WELL, BEHIND THAT THERE'S SOME OTHER TREES NEAR THE MARSH

MR DEYSACH BEGGING THE COURT'S INDULGENCE I DON'T HAVE ANYTHING FURTHER

THE COURT ALL RIGHT

REDIRECT EXAMINATION

BY MR BANNON

Q DEPUTY, WHEN YOU SEARCHED THE AREA BEHIND THE TRUCK, WAS THE LOCATION SECURE?

A YES, SIR, IT WAS

Q SO I THINK YOU TESTIFIED PREVIOUSLY THAT THE CLUB WAS CROWDED

A YES, SIR, IT WAS

Q BUT WERE THERE PEOPLE FROM THE CLUB JUST GOING BACK BEHIND THE -- BEHIND THE TRUCK AS YOU'RE TRYING TO SEARCH IT?

A NO, SIR THERE WASN'T IT WAS ALL SECURED WHEN I GOT THERE

Q AND NOW WE HEARD YOU TESTIFY THAT YOU WROTE IN YOUR REPORT THAT IT WAS APPROXIMATELY TEN YARDS FROM THE TRUCK TO WHERE YOU FOUND THE BAGGY

A YES, SIR

Q CORRECT? WOULD YOU SAY THAT THIS IS APPROXIMATELY TEN YARDS?

A TO GUESSTIMATE, YEAH, A VISUAL ESTIMATE

MR BANNON NO FURTHER QUESTIONS

MR DEYSACH NOTHING FURTHER, YOUR HONOR

THE COURT YOU CAN STEP DOWN ALL RIGHT JURORS, DON'T PANIC, WE'RE GOING TO TAKE A BREAK OKAY? DON'T TALK ABOUT THE CASE BE ABOUT 12 MINUTES

(WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 11 08 A M)

THE COURT ALL RIGHT HOW MUCH MORE DO YOU HAVE?

MR BANNON JUDGE, I HAVE TWO MORE WITNESSES THE NEXT ONE IS OFFICER MENENDEZ AND THEN OUR EXPERT, MS BERRY

THE COURT OKAY WE'RE AT EASE

MR BANNON JUDGE I WAS PLANNING ON USING SOME DEMONSTRATIVE AIDS WITH OFFICER MENENDEZ, AND SO I JUST WANT TO ALERT THE COURT TO IT SO IF THERE'S ANY MOTIONS WE'LL LIKE TO TAKE UP NOW, WE'LL JUST HEAR THEM RIGHT NOW BEFORE WE

MS JORDAN WE DO OBJECT YOUR HONOR UNDER THE RULE -- UNDER -- WE DON'T FEEL WHAT HE'S PLANNING TO PRESENT IS RELEVANT TO THIS CASE

THE COURT WHAT ARE YOU GOING TO DO? SEE, I DON'T KNOW WHAT YOU'RE TALKING ABOUT

MR BANNON YES, JUDGE WELL, WHAT WE HAVE HERE IS WE HAVE THREE ITEMS THAT HAVE BEEN MARKED AS STATE'S EXHIBIT 9 THESE ARE ITEMS WHICH OFFICER MENENDEZ USES AS PART OF HIS EMPLOYMENT AT THE DRUG TASK FORCE AS EDUCATIONAL TOOLS FOR PEOPLE ONE IS A BINDLE OF WHITE POWDER WHICH HAS BEEN

MARKED AS 28 GRAMS IT'S BEEN PREVIOUSLY WEIGHED AND FOUND TO BE 28 GRAMS ONE IS ONE GRAM AND ONE IS A PACKET OF EQUAL AND SO, JUDGE, I'M GOING TO USE THIS AS DEMONSTRATIVE EVIDENCE TO TRY TO SHOW THE JURY HOW MUCH AN OUNCE OF COCAINE---

THE COURT YOU CAN DO THAT

MR BANNON THANK YOU, JUDGE

THE COURT ALL RIGHT

MS JORDAN YOUR HONOR, WE JUST FEEL THAT UNDER 403 THAT EVEN THOUGH IT MAY HAVE SOME KIND OF VALUE TO IT THAT IT COULD CAUSE -- IT CAN CONFUSE THE ISSUE BEFORE THE JURY---

THE COURT HOW?

MS JORDAN ---IN THAT IT WASN'T FOUND IN PACKAGING AMOUNTS IT WAS FOUND IN---

THE COURT IT JUST DEMONSTRATES HOW MUCH 28 OUNCES WEIGHS

MR BANNON AND THAT'S ALL---

THE COURT IT LOOKS LIKE -- LOOKS LIKE EQUAL THAT'S WHY HE HAS TO TEST IT HE CAN DO IT

MR BANNON THANK YOU, JUDGE

THE COURT HE'S NOT GOING TO BE UP THERE TEN MINUTES ANYWAY HE CAN'T TESTIFY LONG ALL RIGHT ALL RIGHT Y'ALL CAN TAKE A BREAK, TOO

(WHEREUPON, A SHORT BREAK WAS TAKEN)

THE COURT ALL RIGHT OKAY MR BANNON, ARE YOU

READY?

MR BANNON YES, SIR, YOUR HONOR THE STATE IS READY

THE COURT YOU CAN GO AHEAD AND BE BRINGING YOUR WITNESS IN---

MR BANNON OH, OKAY

THE COURT ---WHILE WE BRING THE JURY IN

MR BANNON OFFICER MENENDEZ

THE COURT BRING THE JURY IN

(WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AT 11 28 A M)

THE COURT OKAY

MR BANNON HAS THE WITNESS BEEN SWORN, YOUR HONOR?

THE COURT NO WE JUST TOLD YOU TO BRING HIM IN TO SPEED THINGS UP WE'LL SWEAR HIM

RICHARD MENENDEZ, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS

DIRECT EXAMINATION

BY MR BANNON

Q GOOD MORNING

A GOOD MORNING

Q COULD YOU STATE YOUR NAME, PLEASE?

A RICHARD MENENDEZ

Q WHERE DO YOU WORK?

A BEAUFORT COUNTY SHERIFF'S OFFICE

Q HOW LONG HAVE YOU WORKED THERE?

A SINCE 2006, SEPTEMBER
Q WHAT DO YOU DO FOR THE SHERIFF'S OFFICE?
A I WORK FOR THE DRUG TASK FORCE
Q AND WHAT ARE YOUR RESPONSIBILITIES AT THE DRUG TASK FORCE?
A INVESTIGATE NARCOTICS, SALE AND DISTRIBUTION AND USAGE IN THE COUNTY
Q AND IN YOUR -- IN YOUR JOB DO YOU DEAL WITH COCAINE?
A YES
Q HAVE YOU BEEN TRAINED ON HOW TO DEAL WITH COCAINE?
A YES
Q COULD YOU TELL US A LITTLE BIT ABOUT THAT TRAINING?
A I'VE OVER A PERIOD OF TIME EVEN PRIOR TO BEING EMPLOYED BY BEAUFORT COUNTY SHERIFF'S OFFICE, I'VE BEEN TO NUMEROUS SCHOOLS REGARDING NARCOTICS AND NARCOTICS INVESTIGATIONS WHEN I WAS ASSIGNED TO N C I S AS A SPECIAL AGENT SINCE I'VE BEEN WITH BEAUFORT COUNTY, I'VE BEEN TO A NUMBER OF SCHOOLS INVOLVING TRAINING REGARDING THE INVESTIGATION OF NARCOTICS OVER A PERIOD OF APPROXIMATELY 15 YEARS TO INCLUDE THE TIME PERIOD THAT I'VE BEEN EMPLOYED BY THE SHERIFF'S OFFICE I'VE CONDUCTED NUMEROUS INVESTIGATIONS REGARDING NARCOTICS
Q AND WHEN YOU DEAL WITH COCAINE, WHAT ARE THE AMOUNTS OF COCAINE THAT YOU TYPICALLY SEE?
A AS IN USUAL AMOUNTS OR
Q YEAH LET ME BE MORE SPECIFIC FOR EXAMPLE, IF THERE

WAS A SINGLE DOSAGE AMOUNT, IN YOUR EXPERIENCE IN THE AREA HOW MUCH WOULD THAT AMOUNT BE?

A TYPICALLY WE FIND BETWEEN HALF A GRAM TO A GRAM ON A PERSON

Q OKAY AND ABOUT HOW -- HOW BIG IS ABOUT A GRAM? HOW MUCH IS A GRAM?

A A GRAM IS APPROXIMATELY THE CONTENTS OF SWEET'N LOW PACK THAT WOULD BE APPROXIMATELY A GRAM

Q SO ABOUT -- NOW, IS THAT THE ENTIRE BAG OR JUST WHAT'S INSIDE THE BAG?

A THAT'S WHAT'S INSIDE THE BAG

Q OKAY AND HOW MUCH WOULD A HALF GRAM TO A GRAM OF COCAINE -- OR HOW MUCH WOULD THAT BE WORTH?

A THE VALUE -- THE VALUE IS DEPENDENT UPON THE PURITY, DEPENDENT UPON THE DEALER WHO KNOWS WHO THE BUYER IS, AND IT'S A NEGOTIABLE PRICE BETWEEN THE DEALER TYPICALLY, THOUGH, A HALF GRAM WE'VE BEEN ABLE TO BUY IT FROM ANYWHERE BETWEEN 40 TO $60 FOR HALF AN OUNCE

Q OKAY SO ABOUT A HALF A GRAM OF COCAINE IS WORTH -- IS WORTH GENERALLY AROUND 40 TO $60

A (WITNESS NODDED HEAD UP AND DOWN)

Q AND NOW YOU SAID THAT'S -- THAT'S I GUESS A SINGLE SERVING IS THE BEST WAY TO PUT IT OF COCAINE NOW LET'S TALK ABOUT LARGER AMOUNTS OF COCAINE WHEN YOU INVESTIGATE CASES OR INVESTIGATIONS OF COCAINE WHERE THERE'S, SAY, 28 OR

MORE GRAMS, WHAT DO YOU TYPICALLY SEE WHEN YOU INVESTIGATE THESE KINDS OF CASES? WHAT DO YOU FIND?

A TWENTY-EIGHT OR MORE GRAMS -- AN OUNCE OR MORE OF COCAINE IS TYPICALLY A DEALER THOSE WEIGHTS BY STATUTE ARE TRAFFICKING WEIGHTS SOME OF THE OTHER THINGS THAT WE RUN INTO WHEN WE'RE DEALING WITH THAT IS PACKAGING MATERIAL, SCALES TO BREAK IT DOWN, LARGE AMOUNTS OF CURRENCY

Q BY CURRENCY YOU MEAN MONEY?

A YES

Q OKAY AND ASSOCIATED WITH THOSE TYPES OF CASES YOU ALSO SEE LARGE AMOUNTS OF DRUGS?

A YES WELL, AN OUNCE IS A SIGNIFICANT AMOUNT OF COCAINE

Q OKAY I'D LIKE YOU TO TAKE A LOOK AT WHAT HAS BEEN MARKED AS -- FOR IDENTIFICATION PURPOSES ONLY STATE'S EXHIBIT NUMBER 9, AND HOW MANY ITEMS ARE IN STATE'S EXHIBIT NUMBER 9?

A THERE ARE THREE ITEMS

Q AND WHAT ARE THEY?

A ONE IS AN EQUAL/SWEET'N LOW PACK THE OTHER IS A TRAINING AID, A SIMULATED ONE GRAM OF COCAINE, AND THE OTHER IS ANOTHER TRAINING AID WHICH SIMULATES ONE OUNCE OR 28 GRAMS OF COCAINE

Q AND SO THESE HAVE BEEN WEIGHED PREVIOUSLY, AND ONE WEIGHS 28 GRAMS AND ONE WEIGHS ONE GRAM?

A AS THEY'RE MARKED, YES, SIR

Q OKAY AND THOSE ITEMS AREN'T ACTUALLY COCAINE

A NO, THEY'RE NOT THEY'RE TRAINING AIDS
Q NOW, THIS IS A -- THIS IS A PACKET OF EQUAL, BUT IS THIS -- IS THIS AMOUNT STILL ABOUT APPROXIMATELY ONE GRAM?
A APPROXIMATELY A GRAM
Q OKAY SO IF THIS WERE COCAINE, IT WOULD BE ABOUT ONE GRAM OF COCAINE?
A APPROXIMATELY YES
Q AND YOU SAID THAT THIS SMALLER BINDLE IS ONE GRAM OF COCAINE
A THAT IS SIMULATED ONE GRAM OF COCAINE
Q SO THIS IS WHAT ONE GRAM OF COCAINE LOOKS LIKE?
A YES
Q YOU SAID THAT ONE GRAM OF COCAINE IS LARGE OR SMALL IN SIZE?
A I WOULD SAY IT'S SMALL TYPICALLY THAT WOULD BE TWO DOSES
Q NOW, YOU SAID THIS IS -- THIS IS 28 GRAMS?
A TWENTY-EIGHT GRAMS, ONE OUNCE
Q AND HOW MANY GRAMS ARE IN AN OUNCE?
A TWENTY-EIGHT GRAMS IN AN OUNCE
Q SO THIS WOULD BE ABOUT HOW BIG 28 GRAMS OR ONE OUNCE OF COCAINE WOULD LOOK LIKE SO NOW YOU SAID YOU CAN BUY ONE GRAM OF COCAINE FOR ANYWHERE FROM 40 TO $60 HOW MUCH IN YOUR EXPERIENCE IS ONE OUNCE OR 28 GRAMS OF COCAINE WORTH?
A HALF A GRAM WOULD BE BETWEEN 40 TO $60

Q OH, EXCUSE ME HALF A GRAM
A ONE-EIGHTH -- I KNOW WE HAVE -- WE HAVE BOUGHT ONE-EIGHTH OF AN OUNCE OF COCAINE ANYWHERE FROM 120 TO $150 WHICH IS ONE -- ONE-EIGHTH OF AN OUNCE, SEVEN GRAMS
Q OKAY BUT SO I GUESS AS A STREET VALUE IT WOULD BE $40 TIMES HOW EVER MANY HALF OUNCES OR HALF GRAMS THERE ARE
A AGAIN, THOSE VALUES ARE NEGOTIABLE IF YOU BROKE IT EACH UP INTO A HALF A GRAM AND YOU SOLD THEM FOR HALF GRAMS AT 40, IT WOULD BE 40 HALF GRAMS TO WHATEVER YOU BROKE IT UP SOME OF THE DEALERS ALSO -- IF YOU BUY MORE, THEY -- THE PRICES IS HAGGLEABLE (PHONETIC) THEY REDUCE THE PRICE---
Q YOU CAN BUY IN BULK
A YOU CAN BUY---
Q IT'S LIKE SAM'S CLUB
A EXACTLY
Q AND SO THIS 28 GRAMS OF COCAINE IS THIS -- IS THIS VALUABLE?
A IF YOU PUT A MONEY VALUE TO IT, YES, SIR, IT POTENTIALLY COULD BE VALUABLE
Q ON THE STREET?
A YES, SIR
Q WOULD YOU SAY IT'S WORTH HUNDREDS OF DOLLARS?
A PROBABLY CLOSE TO A THOUSAND, IF NOT MORE
Q SO ABOUT A THOUSAND DOLLARS WORTH? AND THAT'S IF YOU BOUGHT IT IS THAT IF YOU BROKE IT DOWN AND SOLD IT OR IS

THAT JUST AS A UNIT, A ONE-OUNCE UNIT?
A THE RIGHT PERSON COULD PROBABLY GET THAT UNIT FOR A THOUSAND BROKE DOWN, YOU COULD PROBABLY MAKE MORE
Q I GUESS IS -- IS THIS KIND OF PACKAGING TYPICAL OF HOW YOU SEE COCAINE PACKAGED IN THIS AREA?
A TYPICALLY YOU'LL SEE IT BROKEN DOWN GOING FROM AN OUNCE DOWN TO AN EIGHTH OUNCE, HALF OUNCE TO GRAMS
Q OKAY I GUESS I MEAN THE -- I GUESS WHAT IS THE -- WHAT IS THE POWDER SUBSTANCE WRAPPED IN HERE?
A A CORNER BAGGY, A PLASTIC BAG WHICH THEY'LL TIE DOWN -- I'VE SEEN WITH TWIST TIES OR KNOTTED IN SUCH A MANNER
Q OKAY AND IS THIS A TYPICAL WAY TO PACKAGE COCAINE?
A YES
Q OKAY SO IS 28 -- SO 28 GRAMS OF COCAINE IS WORTH ABOUT A THOUSAND DOLLARS THAT'S SOMETHING YOU WOULD WANT TO KEEP YOUR HANDS ON, ISN'T IT?
A A THOUSAND DOLLARS I WOULD WANT TO KEEP MY HANDS ON
Q THAT ISN'T SOMETHING YOU JUST FLING UNDERNEATH A BUSH, IS IT?
MS JORDAN OBJECTION, YOUR HONOR
THE COURT ALL RIGHT YOU PUT HIM UP FOR DEMONSTRATIVE PURPOSES
MR BANNON THANK YOU, YOUR HONOR
THE COURT THAT'S AS FAR AS YOU CAN GO WITH HIM
MR BANNON NO FURTHER QUESTIONS

MS JORDAN WE HAVE NOTHING FOR THIS WITNESS

THE COURT YOU CAN STEP DOWN HE CAN GO BACK TO WORK I GUESS

MR BANNON YES, SIR

THE COURT ALL RIGHT

THE WITNESS THANK YOU

MR BANNON THE STATE WOULD CALL RENITA BERRY

THE COURT OKAY

RENITA L BERRY, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS

DIRECT EXAMINATION

BY MR BANNON

Q GOOD MORNING

A GOOD MORNING

Q COULD YOU PLEASE STATE YOUR NAME?

A RENITA L BERRY

Q WHERE DO YOU WORK MA'AM?

A BEAUFORT COUNTY SHERIFF'S OFFICE

Q HOW LONG HAVE YOU WORKED THERE?

A I'VE BEEN WITH THE SHERIFF'S OFFICE ALMOST EIGHT YEARS

Q WHAT DO YOU DO THERE AT THE SHERIFF'S OFFICE?

A I AM THE FORENSIC DRUG CHEMIST

Q AND NOW WHAT DOES A FORENSIC DRUG CHEMIST DO?

A WELL, MY PRIMARY RESPONSIBILITY IS TO ANALYZE ANY SUBSTANCE, ANY SUSPECTED DRUG EVIDENCE, THAT IS SUBMITTED TO

THE LAB I ANALYZE IT, DETERMINE WHETHER OR NOT IT IS A CONTROLLED OR NON-CONTROLLED SUBSTANCE, AND THEN PROVIDE THOSE RESULTS TO THE NECESSARY PARTIES

Q OKAY AND HOW DO YOU GET THE SUSPECTED NARCOTICS TO ANALYZE?

A USUALLY THEY'RE PLACED IN WHAT WE CONSIDER TO BE A DRUG DROP BOX, AND A DRUG DROP BOX IS NO MORE THAN A MAILBOX THAT YOU MIGHT FIND AT YOUR LOCAL POST OFFICE FOR INSTANCE, WHEN YOU'RE DROPPING OFF YOUR MAIL AT NIGHT AND YOU PUT IT IN THAT BOX, WELL, OUR BOX IS VERY SIMILAR TO THAT, WHEREAS YOU CAN PUT THINGS IN BUT NO ONE CAN GET ANYTHING OUT, AND SO WE HAVE A BOX LIKE THAT

Q OKAY AND IS IT LOCKED?

A IT IS

Q AND SO ONCE YOU GET -- ONCE YOU PICK UP AN ITEM TO BE ANALYZED, WHAT DO YOU DO WITH IT?

A ONCE I RECEIVE THAT ITEM, I SECURE IT INTO OUR LAB UNTIL I'M READY TO ANALYZE IT ONCE I'M READY TO ANALYZE IT, THEN I TAKE IT OUT AND I PERFORM A SERIES OF PRESUMPTIVE AND CONFIRMATORY TESTS TO DETERMINE WHAT IT IS

Q OKAY YOU SAID YOU DO PRESUMPTIVE TESTS AND CONFIRMATORY TESTS?

A YES

Q LET'S TALK ABOUT THE PRESUMPTIVE TESTS FIRST WHAT KIND OF TEST DO YOU DO TO GET A PRESUMPTIVE -- WHAT TESTS MAKE UP

PRESUMPTIVE TESTS?
A YOUR PRESUMPTIVE TESTS MAY BE NO MORE THAN YOUR CHEMICAL TESTS WHEREAS YOU'RE USING -- YOU HAVE SEVERAL DIFFERENT REAGENTS, AND THOSE REAGENTS REACT TO CERTAIN THINGS OR SUBSTANCES WITHIN A FAMILY OF SUBSTANCES AND SO YOU ADD CERTAIN CHEMICALS TO A CERTAIN SUBSTANCE, AND YOU WAIT FOR A REACTION, AND BASED ON THAT REACTION, YOU HAVE AN IDEA OF WHAT YOU HAVE YOU CAN ALSO DO WHAT WE CALL MELTING-POINT TESTS, AND YOU CAN ALSO -- JUST LOOKING AT THE ITEMS SOMETIMES GIVES YOU AN IDEA WHAT YOU MAY HAVE, BUT THOSE, OF COURSE ARE JUST PRESUMPTIVE TESTS?
Q OKAY AND WHAT WOULD YOU SEE IF YOU WERE DOING PRESUMPTIVE TESTS ON A SUBSTANCE -- ON COCAINE?
A WELL, IF I'M USING THE STANDARD REAGENTS THAT WE USE TO TEST FOR COCAINE FOR PRESUMPTIVE TESTS, THEN WHEN I ADD MY FIRST REAGENT WHICH IS A STANNOUS CHLORIDE I'M GOING TO SEE AN IMMEDIATE BLUE IF IT'S COCAINE HYDROCHLORIDE OR COCAINE, WHAT MOST PEOPLE CONSIDER TO BE COCAINE POWDER, AND THEN WHEN I ADD THE SECOND AGENT OF COBALT THIOCYANATE, THEN I'M GOING TO SEE A CONTINUED BLUE IT DOESN'T FADE OR ANYTHING, IT JUST INTENSIFIES SOMEWHAT
Q OKAY SO BLUE MEANS COCAINE
A BLUE MEANS THAT IT'S A PRESUMPTIVE TEST AND IT'S POSITIVE BASED ON THAT PRESUMPTIVE TEST FOR COCAINE OR THAT IT'S IN THAT PARTICULAR FAMILY OF DRUGS

Q OKAY AND THEN LET'S TALK ABOUT THE CONFIRMATORY TESTS WHAT DO YOU DO THERE?
A WITH THE CONFIRMATORY TESTS WE USE INSTRUMENTATION AGAIN, WE TAKE A SMALL AMOUNT OF THAT SUBSTANCE ADD DIFFERENT SOLVENTS TO IT SO THAT WE CAN DO WHAT WE CALL AN EXTRACTION ONCE WE DO THAT, WE INTRODUCE IT TO THE INSTRUMENT, AND WHAT WE USE AS INSTRUMENTATION IS A GAS CHROMATOGRAPH MASS SPECTROMETER COMMONLY REFERRED TO THE G C MASS SPEC AND WITH THAT G C MASS SPEC, WE'RE ABLE TO INTRODUCE THE SUBSTANCE INTO THE INSTRUMENT, AND THE INSTRUMENT ACTUALLY DOES ANALYSIS ON IT, BREAKS IT DOWN AND GIVES US AN IDEA WHAT IT IS AND SO IT PRINTS OUT FROM A PARTICULAR LIBRARY THAT WE'VE CREATED WHAT THE SUBSTANCE IS, AND THEN ONCE WE RECEIVE THAT DATA, THEN WE THEN CONFIRM WHAT IT IS AGAIN WE DO ADDITIONAL CONFIRMATION TO MAKE SURE THAT THE INSTRUMENT IS ACTUALLY REPORTING THE SUBSTANCE CORRECTLY
Q OKAY AND WHAT SORT OF SAFEGUARDS DO YOU TAKE TO MAKE SURE THAT THE INSTRUMENTS ARE WORKING PROPERLY?
A THERE ARE SEVERAL THINGS THAT WE DO WE HAVE DIFFERENT QUALITY AND CONTROL MEASURES IN PLACE WE USE WHAT WE CALL POSITIVE STANDARDS OR POSITIVE TESTS, AND WE RUN A SERIES OF STANDARDS ALWAYS TO MAKE SURE THAT THE INSTRUMENT IS WORKING CORRECTLY PLUS THERE ARE DIFFERENT MAINTENANCE THINGS THAT YOU HAVE TO DO WITH THE INSTRUMENT WE MAKE SURE THAT IT'S MAINTAINED PROPERLY AT ALL TIMES, AND WE CONDUCT WHAT WE CALL

A CALIBRATION OR WHAT SOME PEOPLE CALL AN AUTO-TUNE TO MAKE SURE THAT EVERYTHING IS WORKING PROPERLY BEFORE WE EVEN START THE TESTING

Q OKAY AND NOW HOW DID YOU LEARN HOW TO DO ALL THIS?

A WELL, I -- THE MAJORITY OF MY TRAINING COMES FROM WORKING WITH THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION I DO HAVE A DEGREE IN CHEMISTRY FROM THE UNIVERSITY OF SOUTH CAROLINA, AND I'VE WORKED IN A LAB PRETTY MUCH RIGHT AFTER COLLEGE AND EVEN SOME DURING COLLEGE BUT IT WAS WHEN I STARTED WORKING FOR THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, AGAIN COMMONLY KNOWN AS S L E D IS WHEN I RECEIVED THE MAJORITY OF MY TRAINING AS A FORENSIC CHEMIST

AND WHILE I WAS THERE, I WAS TRAINED BY THE FORENSIC CHEMISTS THERE, AND THEY HAD A VERY INTENSIVE PROGRAM COMPLETED THAT TRAINING, BECAME CERTIFIED THERE I ALSO BECAME CERTIFIED BY THE D E A , AND THEN THROUGHOUT THE YEARS YOU COMPLETE A VARIETY OF PROFICIENCY TESTS YOU ATTEND DIFFERENT SEMINARS AND DIFFERENT CONFERENCES TO MAKE SURE THAT YOUR TRAINING IS STILL UPDATED

MR BANNON YOUR HONOR, I WOULD ASK THAT MS BERRY BE QUALIFIED AS AN EXPERT IN FORENSIC CHEMISTRY

MR DEYSACH NO OBJECTION YOUR HONOR

THE COURT JURORS, ANY TIME SOMEBODY IS QUALIFIED AS AN EXPERT, I DON'T VOUCH FOR THEM THEY JUST DEMONSTRATE THAT THROUGH EDUCATION, TRAINING, WORK EXPERIENCE OR A COMBINATION

OF THOSE FACTORS AN INDIVIDUAL HAS ACQUIRED MORE KNOWLEDGE IN A PARTICULAR FIELD THAN YOU OR I HAVE ONCE THAT'S DONE, THEN THEY'RE ENTITLED TO GIVE OPINIONS WITHIN THEIR FIELD OF EXPERTISE YOU'RE NOT BOUND TO ACCEPT IT, BUT I'M NOT SAYING YOU SHOULD REJECT IT

MR BANNON THANK YOU, YOUR HONOR

BY MR BANNON

Q NOW, MS BERRY, DID YOU HAVE AN OPPORTUNITY TO ANALYZE DRUGS THAT WERE SUBMITTED IN RELATION TO MR FRIPP?

A YES

Q OKAY I'D LIKE TO HAND YOU WHAT HAS BEEN MARKED AS STATE'S EXHIBIT NUMBER 1 I D LIKE FOR YOU TO TAKE A LOOK AT IT, OPEN IT UP IF YOU WANT TO DO YOU NEED A PAIR OF GLOVES, MA'AM?

A YES

Q (MR BANNON GIVES THE WITNESS GLOVES)

A THANK YOU OKAY

Q AND DO YOU RECOGNIZE WHAT'S INSIDE THE BAG?

A YES, I DO

Q AND COULD YOU TELL US WHAT'S IN THE BAG?

A OKAY THE FIRST THING THAT YOU SEE IN HERE IS WHAT WE CALL A CONTROL BAG, AND THIS IS A BLUE-AND-WHITE BAG, AND THIS IS THE BAG THAT THE EVIDENCE WAS INITIALLY SUBMITTED IN THE BAG WAS SEALED ALONG THIS LINE, AND I OPENED IT MYSELF TO PULL OUT THE EVIDENCE THIS IS WHAT WE CALL A TAMPER-

EVIDENCE BAG, WHEREAS IF SOMEONE WERE TO TRY TO OPEN IT, YOU COULD SEE THAT THE LINES WERE DISTORTED AND THIS RED GLUE UP HERE GETS OVER EVERYTHING IF ANYONE EVER TRIES TO OPEN IT SO IF YOU NOTICE, YOU'LL SEE MY INITIALS ON THE BAG, AND THIS BAG ALSO HAS WHAT WE CALL A CONTROLLED NUMBER SO THAT CONTROL NUMBER ALSO CORRESPONDS TO MY PAPERWORK

Q OKAY

A ALSO IN THE BAG WAS TWO DIFFERENT PIECES OF EVIDENCE, AND FOR ITEM ONE -- WHAT I CONSIDERED TO BE ITEM ONE WAS A PLASTIC BAG WITH POWDER SUBSTANCE IN IT I ADDED THE OUTER BAG AND WITH THIS WAS AN EVIDENCE BAG WITH A HARD SUBSTANCE INSIDE OF IT, AND ON EACH BAG YOU'LL NOTE THAT I HAVE ON THERE A LAB NUMBER AND MY INITIALS

Q OKAY SO THE WHITE POWDER SUBSTANCE AND THE SMALL ROCK-LIKE SUBSTANCE, WHERE WERE THEY WHEN YOU FIRST CAME INTO POSSESSION OF THESE ITEMS?

A I RETRIEVED THE EVIDENCE FROM THE DRUG DROP BOX THAT I MENTIONED EARLIER

Q OKAY AND WHEN YOU RECOVERED THEM WERE THEY SEALED?

A YES, THEY WERE

Q AND DID THEY APPEAR TO HAVE BEEN TAMPERED WITH IN ANY WAY?

A NO THEY HAD NOT BEEN TAMPERED WITH

Q OKAY HOW WERE THE ITEMS PACKAGED WHEN YOU GOT THEM?

A THE PLASTIC BAG ON THE INSIDE WITH THE WHITE POWDER

SUBSTANCE WAS INSIDE OF HERE ALONG WITH THIS BAG HERE WITH THE HARD SUBSTANCE -- WAS OVER INSIDE OF THIS PLASTIC BAG

Q OKAY AND SO ONCE YOU PICKED IT UP, WHAT DID YOU DO WITH IT?

A SECURED THE EVIDENCE AND THEN WHEN IT WAS TIME, I CONDUCTED THE VARIOUS ANALYSES THE CONFIRMATORY AND THE PRESUMPTIVE TESTING THAT I MENTIONED EARLIER

Q OKAY AND LET'S TALK ABOUT THE BAGGY OF WHITE POWDER FIRST WHAT DID YOUR PRESUMPTIVE TEST SHOW?

A IT INDICATED THAT IT WAS POSITIVE FOR COCAINE

Q OKAY AND DID YOU RUN ANY CONFIRMATORY TESTS ON IT?

A YES

Q AND WHAT DID THE CONFIRMATORY TESTS TELL YOU?

A THE CONFIRMATORY TEST, OF COURSE, CONFIRMED THAT IT WAS COCAINE

Q OKAY AND NOW DID YOU EVER WEIGH THE WHITE SUBSTANCE THAT WAS IN THE BAGGY?

A YES, I DID

Q AND DID YOU WEIGH IT INSIDE THE BAGGY OR OUTSIDE OF THE BAGGY?

A NO, I ONLY WEIGHED THE SUBSTANCE ITSELF

Q OKAY AND DID YOU WEIGH IT BEFORE YOU TESTED IT OR AFTER YOU TESTED IT?

A AFTER I TESTED IT

Q AND WHEN YOU WEIGHED IT, HOW MUCH DID IT WEIGH?

A THE WEIGHT WAS 34 35 GRAMS
Q SO -- SO, IN YOUR OPINION, WHAT -- AND HOW MUCH OF THE WHITE POWDER SUBSTANCE IS IN THAT BAG?
A 34 35 GRAMS
Q AND WHAT IS IT?
A COCAINE
MR BANNON YOUR HONOR, I'D LIKE TO HAVE THE WHITE POWDER -- THE BAGGY OF WHITE POWDER MARKED AS STATE'S EXHIBIT 1-B, AND THEN I WOULD MOVE FOR IT TO BE ADMITTED INTO EVIDENCE
MR DEYSACH MAY I LOOK AT IT REAL QUICK?
THE COURT YOU CAN
MR DEYSACH NO OBJECTION, YOUR HONOR
THE COURT OKAY
(STATE'S EXHIBIT 1-B WAS RECEIVED IN EVIDENCE)
BY MR BANNON
Q AND NEXT I'D LIKE TO TALK ABOUT THE ROCK-LIKE SUBSTANCE WHICH WAS INSIDE THE BAG DID YOU PERFORM ANY PRESUMPTIVE TESTS ON THE ROCKS?
A YES, I DID
Q AND WHAT DID THAT TELL YOU?
A THAT IT WAS NEGATIVE
Q SO -- SO, IN YOUR OPINION, ARE THOSE ROCKS NARCOTICS OR DRUGS OF ANY KIND?
A WELL, BASED ON THE CONFIRMATORY TEST -- BECAUSE EVEN IF

MY PRESUMPTIVE TEST COMES OUT NEGATIVE, I STILL ALWAYS ANALYZE IT USING A CONFIRMATORY TEST SO BASED ON THE CONFIRMATORY TEST, I AM ABLE TO SAY THAT IT'S NEGATIVE FOR ANY CONTROLLED SUBSTANCE

MR BANNON YOUR HONOR, AT THIS TIME THE STATE WOULD MOVE TO HAVE THE BAGGY OF ROCKS MARKED AS STATE'S EXHIBIT 1-A AND MOVED INTO EVIDENCE, AND THEN THE STATE WOULD MOVE THAT THE BEST BAG BE MARKED AS EXHIBIT 1-C AND MOVED INTO EVIDENCE

MR DEYSACH NO OBJECTION, YOUR HONOR

THE COURT ALL RIGHT

(STATE'S EXHIBITS 1-A AND 1-C WERE RECEIVED IN EVIDENCE)

MR BANNON NO FURTHER QUESTIONS

MR DEYSACH JUST BRIEFLY, YOUR HONOR

CROSS-EXAMINATION

BY MR DEYSACH

Q MS BERRY?

A YES

Q YOU'RE A CHEMIST

A YES, I AM

Q A FORENSIC DRUG CHEMIST, CORRECT?

A YES, I AM

Q IN ALL OF YOUR TRAINING, YOU HAVE NEVER LEARNED THAT COCAINE EATS THE AMINO ACIDS OF FINGERPRINTS, HAVE YOU?

MR BANNON OBJECTION

THE COURT WELL, HE CAN ASK HER THAT SHE CAN SAY I DON'T KNOW OR I KNOW OR WHATEVER

BY MR DEYSACH

Q ALL RIGHT I'LL REPEAT IT IN ALL OF YOUR TRAINING YOU HAVE NEVER LEARNED THAT COCAINE EATS UP THE AMINO ACIDS THAT LEAVE FINGERPRINTS, HAVE YOU?

A NO THAT HAS NOT BEEN A PART OF MY TRAINING

MR DEYSACH THANK YOU, YOUR HONOR

REDIRECT EXAMINATION

BY MR BANNON

Q HAVE YOU RECEIVED ANY TRAINING WITH REGARDS TO FINGERPRINTS?

A NO, I HAVEN'T

Q DO YOU KNOW HOW TO COLLECT FINGERPRINTS?

A NO, I DON'T

Q DO YOU KNOW WHAT, IF ANY, EFFECT COCAINE HAS ON FINGERPRINTS?

A NO, I'VE NEVER STUDIED THAT

MR BANNON NO FURTHER QUESTIONS

THE COURT YOU CAN STEP DOWN

THE WITNESS THANK YOU, YOUR HONOR

MR BANNON YOUR HONOR, THE STATE RESTS

THE COURT OKAY WELL, THE STATE RESTS THAT MEANS THEY'RE NOT GOING TO PUT ANY OTHER EVIDENCE IN JURORS,

CONSIDER THAT ON THE ISSUE OF WHETHER YOU COMMITTED THE CRIME BUT ON THE ISSUE OF YOUR BELIEVABILITY, BUT THAT'S IT ASSUMING HE DOES NOT TESTIFY THE FORMS OF VERDICT ARE JUST GUILTY OR NOT GUILTY?

MR BANNON YES, JUDGE THE STATE DOESN'T WANT ANY OTHER CHARGES

THE COURT AND THE CHARGES YOU -- YOU KNOW, CONSTRUCTIVE POSSESSION, MERE PRESENCE

MR BANNON I THINK THAT PROBABLY BOTH CONSTRUCTIVE POSSESSION AND MERE PRESENCE WOULD BE AN APPROPRIATE CHARGE

THE COURT MERE PRESENCE? I DON'T KNOW OF ANYTHING ELSE OUT OF THE ORDINARY

MR DEYSACH I WOULD -- YOU KNOW, WE'RE TALKING ABOUT -- I DON'T KNOW IF IT'S A CONSTRUCTIVE POSSESSION THEORY WHERE THEY HAVE THE DRUGS IS 30 FEET AWAY FROM WHERE THEY HAVE THE MAN, AND I DON'T KNOW THAT THAT'S ANY EVIDENCE OF DOMINION AND CONTROL

THE COURT WELL, IT'S A JURY ARGUMENT THAT HE HAD IT, RAN IN AND DROPPED IT AND RAN BACK, AND HE KNEW IT WAS COCAINE HE WOULDN'T HAVE KNOWN IT, UNLESS IT WAS HIS, THAT HE HAD DOMINION AND CONTROL OVER IT THAT'S JURY ARGUMENT

MR DEYSACH I'LL JUST SAY THIS THAT IF THE THEORY IS THAT HE HAS IT IN HIS POCKET AND THEN DROPS IT THAT WHAT THEY'RE SAYING IS IT'S AN ACTUAL POSSESSION WHEN IT'S IN HIS POCKET

THE COURT RIGHT IT HID IT IN THE TREES IS HIS CASE ON IT WHICH IS -- HE DIDN'T HAVE IT IN ACTUAL POSSESSION WHEN OFFICER RODRIGUEZ STOPPED HIM SO IT HAS TO BE CONSTRUCTIVE, I THINK SO ACTUAL AND CONSTRUCTIVE IS ALL I CHARGE THEM IT'S UP TO Y'ALL TO SORT IT OUT

MR DEYSACH OKAY WELL, I THINK I'M JUST PLACING ON THE RECORD AN OBJECTION TO A CONSTRUCTIVE POSSESSION CHARGE BASED ON WHAT I JUST SAID AND I THINK---

THE COURT RIGHT

MR DEYSACH ---I CAN LEAVE IT AT THAT, YOUR HONOR

THE COURT SURE BUT I CHARGE ACTUAL AND CONSTRUCTIVE

MR BANNON THANK YOU, JUDGE

MR DEYSACH AND MERE PRESENCE RIGHT?

THE COURT AND MERE PRESENCE

MR BANNON YEAH THERE'S NO OBJECTION TO MERE PRESENCE

THE COURT OF COURSE, A MERE PRESENCE CHARGE GOES FURTHER IN DRUG CASES IT SAYS, "MERE PRESENCE IS NOT IN AND OF ITSELF SUFFICIENT EVIDENCE TO GET A CONVICTION " THAT'S JUST---

MR BANNON YES, JUDGE

THE COURT I'M JUST TELLING YOU WHAT IT SAYS ALL RIGHT THEN WE ARE AT EASE

(WHEREUPON, A LUNCH BREAK WAS TAKEN)

THE COURT OKAY AT EASE

THE COURT OKAY JURORS, WE'RE COMING INTO THE FINAL PHASE OF THE TRIAL MR FRIPP HAS ELECTED NOT TO TESTIFY REMEMBER, HE'S PRESUMED INNOCENT HE IS NOT REQUIRED TO PROVE HE'S NOT GUILTY AT ALL THE STATE HAS THE BURDEN OF PROOF THROUGHOUT THERE ARE GOOD REASONS TO TESTIFY AND GOOD REASONS NOT TO TESTIFY ONE OF THE REASONS IS IF YOU DON'T TESTIFY, YOU GET TO ARGUE LAST SO DON'T SPECULATE ON WHY HE DIDN'T TESTIFY DON'T EVEN DISCUSS THAT ON THE ISSUE OF WHETHER THE STATE'S MET ITS BURDEN OF PROOF IT'S IRRELEVANT THE STATE HAS THE BURDEN THROUGHOUT RIGHT NOW THE STATE'S GOING TO MAKE THEIR ONLY ARGUMENT NORMALLY THEY GET TO MAKE TWO

MR BANNON THANK YOU, YOUR HONOR "I DON'T HAVE ANY DRUGS ON ME YOU'VE GOT NOTHING ON ME " THAT'S ESSENTIALLY WHAT THIS CASE IS ABOUT ON JANUARY 1ST, 2009, MR FRIPP SUMMED IT UP "YOU'VE GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " WELL, WHEN THE OFFICER SEARCHED HIM HE DIDN'T HAVE ANY DRUGS ON HIM THAT'S WHAT THEY TESTIFIED TO AND WHEN THEY SEARCHED HIM, HE HAD $594 IN CRUMPLED-UP BILLS AND SOME ROCKS

THEY DID FIND DRUGS THOUGH BEHIND THE CAR THAT MR FRIPP MADE A BEELINE TOWARDS, THAT HE DUCKED BEHIND FOR TEN SECONDS, AND AS SOON AS HE CAME BACK OUT FROM BEHIND THE CAR "YOU GOT NOTHING ON ME I DON'T HAVE ANY DRUGS ON ME " AND SURE ENOUGH, MR FRIPP WAS RIGHT THERE WEREN'T ANY DRUGS ON

HIM, I'LL READILY CONCEDE THAT BUT THAT'S NOT THE ENTIRE CASE, LADIES AND GENTLEMEN

WHEN SERGEANT RODRIGUEZ SHOWS UP AT STUDIO SEVEN, MR FRIPP IS STANDING OUTSIDE AS SOON AS SERGEANT RODRIGUEZ SHOWS UP, MR FRIPP SEES A MARKED PATROL CAR AND HE TAKES OFF WALKING SERGEANT RODRIGUEZ GOES AFTER HIM MR FRIPP KEEPS ON GOING SERGEANT RODRIGUEZ CALLS OUT TO HIM, WHISTLES TO HIM MR FRIPP MUST HAVE HEARD HIM HE TURNED AROUND HE LOOKED RIGHT AT HIM SAW A POLICE OFFICER WEARING POLICE CLOTHES, JUST GOT OUT OF A POLICE CAR, COMING TOWARDS HIM

MR FRIPP CHOOSES NOT TO STOP MR FRIPP KEEPS GOING I'D LIKE YOU TO THINK ABOUT WHY HE KEPT GOING MR FRIPP CONTINUES ON AT THAT POINT SERGEANT RODRIGUEZ CALLS OUT "SHERIFF'S OFFICE STOP " MR FRIPP KEEPS GOING

I WONDER WHY THAT IS WHY DOES MR FRIPP, AS SOON AS THE POLICE SHOW UP TAKE OFF WALKING? WHY DOES HE KEEP WALKING WHEN ALL OFFICER -- WHEN ALL SERGEANT RODRIGUEZ WANTS TO DO IS TALK TO HIM? WHY DOES HE KEEP WALKING? WHY, WHEN HE COMMANDS HIM TO STOP, DOES HE KEEP WALKING? WHY DOES HE MAKE FOR THE BLACK TRUCK, DUCK BEHIND IT FOR TEN SECONDS, AND THEN AS SOON AS HE COMES BACK OUT FROM BEHIND THAT TRUCK THINGS HAVE CHANGED? HE STARTS WALKING RIGHT TOWARDS SERGEANT RODRIGUEZ, AND HE SAYS, "YOU DON'T HAVE ANYTHING ON ME I'VE GOT NO DRUGS ON ME " WHAT CHANGED?

WHY DOES MR FRIPP FEEL SO CONFIDENT TO TURN RIGHT BACK

AROUND AND ALL OF A SUDDEN HEAD TOWARDS THAT OFFICER? WHY DOES HE FEEL SO CONFIDENT TO SAY, "YOU GOT NOTHING ON ME I'VE GOT NO DRUGS ON ME," WHEN BEFORE HE WOULDN'T STOP AT ALL? WHY IS THAT? THEN THEY ARREST HIM AND THEY SEARCH HIM, AND THEY FIND $600 IN CRUMPLED-UP BILLS IN HIS POCKET, $600 IN CASH YOU HEARD OFFICER MENENDEZ TESTIFY THAT A LOT OF TIMES WHEN PEOPLE ARE TRAFFICKING IN COCAINE THEY HAVE LARGE AMOUNTS OF CASH ON THEM HE HAD $694 (SIC) IN CRUMBLED-UP BILLS IN HIS POCKET

THEN DEPUTY MOONEY, HE FINDS -- HE FINDS WHAT ULTIMATELY WE KNOW AS THE COCAINE AND TURNS IT OVER TO DEPUTY RODRIGUEZ RODRIGUEZ SAYS, "I'M GOING TO CHARGE YOU WITH THIS " MR FRIPP SAYS, "I DON'T KNOW ANYTHING ABOUT THAT COCAINE " NOBODY SAID ANYTHING ABOUT COCAINE TO MR FRIPP AT THAT POINT IN TIME HOW DID HE KNOW IT WAS COCAINE?

THEN WHEN THE SERGEANT POINTS IT OUT TO HIM, WHY DOES HE CHANGE HIS STORY? "I DON'T KNOW ANYTHING ABOUT THAT WHITE POWDER " THOSE ARE THE FACTS OF THE CASE THAT'S WHAT YOU SAT ALL HERE ALL MORNING -- THAT'S WHAT YOU HEARD

NOW, THE JUDGE IS GOING TO GIVE YOU INSTRUCTIONS ON THE LAW, AND I'M SURE MS JORDAN IS GOING TO TALK TO YOU ABOUT THE LAW, TOO SO I'M GOING TO TALK TO YOU A LITTLE BIT ABOUT IT THE JUDGE IS GOING TO CHARGE YOU TO GO BACK IN THE JURY (SIC) AND FIND MR FRIPP -- THAT YOU HAVE TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT THOSE ARE VERY FAMOUS WORDS IN

OUR LINE OF WORK WHAT DO THEY MEAN - BEYOND A REASONABLE DOUBT? WELL, THE JUDGE IS GOING TO GIVE YOU SOME INSTRUCTIONS ON WHAT THAT MEANS, AND I'D LIKE TO TALK TO YOU ABOUT IT NOW WHAT HE'S GOING TO TELL YOU IS THAT IT IS EVIDENCE THAT LEAVES YOU FIRMLY CONVINCED AND ALSO THAT IT IS THE KIND OF EVIDENCE THAT WOULD MAKE YOU NOT HESITATE TO ACT

NOW, AT THE START OF THE TRIAL MS JORDAN BROUGHT IT UP A LITTLE BIT SHE SAID -- SHE PROPOSED TO YOU A SITUATION WHERE YOU'RE WAITING WITH YOUR CHILD AT THE SCHOOL BUS, AND YOU HAD BEEN HEARING RUMORS THAT THE DRIVER HAD BEEN DRINKING WOULD YOU PUT YOUR CHILD ON THE BUS? NO, I DON'T THINK ANY -- I THINK ALL OF US WOULD HESITATE TO ACT I THINK ANY REASONABLE PERSON WOULD

LET'S TALK ABOUT ANOTHER SITUATION YOU COME HOME AFTER WORK AND YOUR KIDS ARE AT HOME THEY'VE GOTTEN HOME FROM SCHOOL, AND YOU TELL THEM, "YOU'RE NOT ALLOWED TO HAVE ANY OF THE COOKIES FROM THE COOKIE JAR YOU CAN'T DO IT YOU'VE GOT TO WAIT UNTIL DINNER, AND MAYBE AFTER DINNER YOU CAN " WELL, AS SOON AS YOU SHOW UP AT THE HOUSE YOU FIND ONE OF YOUR CHILDREN STANDING RIGHT THERE WHEN YOU WALK IN THE DOOR AS SOON AS YOU WALK IN THAT KID TAKES OFF FOR THE OTHER ROOM NO, "HI HOW ARE YOU DOING? HOW'S IT GOING?" TAKES OFF TO THE OTHER ROOM

YOU THINK THAT'S ODD, SO YOU GO AFTER HIM YOU SAY "COME HERE WHAT'S GOING ON?" THEY KEEP ON GOING YOU SAY,

"NO, NO, NO, NO COME OVER HERE WHAT'S UP? WHAT'S GOING ON? YOU NEED TO COME OVER HERE RIGHT NOW " THE KID KEEPS GOING THE KID RUNS INTO A ROOM WHICH HE SHARES WITH HIS BROTHERS AND SISTERS YOU LOSE SIGHT OF HIM FOR ABOUT TEN SECONDS

HE COMES BACK OUT AND THE FIRST THING HE SAYS TO YOU IS, "I DIDN'T TAKE THE COOKIE FROM THE COOKIE JAR YOU GOT NOTHING ON ME " AND THEN YOU GO INTO THAT ROOM WHICH IS SHARED WITH THE OTHER CHILDREN, AND YOU FIND A BIG STACK OF COOKIES WOULD YOU HESITATE? YOU KNOW THAT CHILD WAS RESPONSIBLE

COMMON SENSE, WHICH YOU'RE FREE TO USE HERE LADIES AND GENTLEMEN TELLS YOU THAT'S WHAT THE CHILD DID WHY ELSE WOULD THEY TAKE OFF AS SOON AS YOU GOT HOME? WHY ELSE WHEN YOU SAID, "HEY WHAT'S GOING ON?" -- WHY ELSE WOULD THEY KEEP GOING? WHY ELSE WHEN YOU SAID, "NO YOU COME HERE A MINUTE LET'S TALK," AND THEN THEY DISAPPEAR? THE CHILD DISAPPEARED SO THAT THEY COULD GET RID OF THE COOKIES AND NOT HAVE ANY ON THEM THAT'S WHY MR FRIPP DISAPPEARED IN THIS CASE, TO MAKE SURE THAT HE GOT RID OF HIS BAGGY OF COCAINE BEFORE HE TALKED TO SERGEANT RODRIGUEZ WHY ELSE?

NOW, LADIES AND GENTLEMEN, THERE'S ANOTHER CHARGE IN THIS CASE, AND THAT'S POSSESSION WITH INTENT TO DISTRIBUTE WITHIN A HALF MILE OF A SCHOOL OR PARK WELL, THE FIRST PART IS VERY EASY JUST TAKE A LOOK AT THIS MAP THIS IS 44

DONALDSON CAMP ROAD, AND THAT'S THE SCHOOL THE STATUTE DOESN'T READ THAT YOU HAVE TO BE AT THE SCHOOL, IN THE SCHOOL YOU NEED TO BE ONE-HALF OF A MILE WITH COCAINE WITH THE INTENT TO DISTRIBUTE IT WELL, 44 DONALDSON CAMP ROAD IS WITHIN A HALF MILE OF A SCHOOL OR PARK

YOU MIGHT ASK YOURSELVES WELL, HOW DO WE KNOW IT WAS FOR DISTRIBUTION? WELL, LET'S THINK ABOUT THE TESTIMONY THAT WE'VE HEARD HERE TODAY SERGEANT MENENDEZ TOLD US THAT ABOUT A SINGLE SERVING OF COCAINE IS ABOUT A HALF A GRAM WHAT WAS FOUND IN THE BAGGY IS 34 35 GRAMS OF COCAINE WHICH MEANS THAT THERE'S ABOUT 68 SERVINGS OF COCAINE IN THAT BAG THAT'S NOT FOR ONE PERSON THAT'S FOR A BUNCH OF PEOPLE MIGHT BE ALL IN ONE PLACE, BUT IT'S GOING TO A BUNCH OF PEOPLE THAT'S THE COCAINE THAT WAS -- THAT'S READY TO BE DISTRIBUTED BY A MAN WHO HAS A POCKET FULL OF BALLED-UP MONEY

NOW, LADIES AND GENTLEMEN A COUPLE OF THINGS THAT HAVE BEEN BROUGHT UP HERE IN CROSS-EXAMINATION IS HOW FAR THINGS ARE AND HOW LONG THINGS TOOK, AND DEPUTY MOONEY WROTE IN HIS REPORT THAT HE THOUGHT IT WAS APPROXIMATELY TEN YARDS FROM THE BLACK TRUCK TO WHERE HE FOUND THE BAGGY OF COCAINE NOW, HERE TODAY I ASKED HIM, WELL, JUST TELL ME -- JUST TELL ME HOW FAR IT WAS I DON'T CARE ABOUT YARDS OR FEET JUST TELL ME HOW FAR IT WAS

I SAID IF THIS WAS THE TRUCK, WHERE DID YOU FIND THE COCAINE? IT WAS RIGHT HERE TEN SECONDS THAT DOESN'T SEEM

LIKE A TON OF TIME BUT, LADIES AND GENTLEMEN, IT IS MORE THAN ENOUGH TIME TO GET FROM BEHIND THE TRUCK OVER THERE YOU'D HAVE TO BE MOVING PRETTY SLOW TO NOT BE ABLE TO DO IT IN TEN SECONDS JUST WATCH I GUARANTEE YOU THAT WAS LESS THAN TEN SECONDS LET'S SEE IT'S ABOUT TO TURN AND NOW HOW FAR CAN I GET IN TEN SECONDS? I'M MOVING PRETTY FAST TEN SECONDS I WASN'T MOVING FAST I DIDN'T EVEN BREAK A SWEAT

I'M KIND OF A BIG GUY I DON'T MOVE AS FAST AS I USED TO, BUT YOU CAN GET THERE YOU CAN GET YOUR BAGGY OF COCAINE WHICH YOU'VE BEEN CARRYING WITH YOU THE WHOLE TIME AND THEN RUN BACK OUT TO MEET SERGEANT RODRIGUEZ, KNOWING THAT YOU DON'T HAVE ANYTHING ON YOU BECAUSE YOU JUST DITCHED IT UNDERNEATH A PILE OF PINE STRAW, PINE STRAW THAT DEPUTY MOONEY SAID WAS RECENTLY DISTURBED I'M SURE WE'VE ALL SEEN PINE STRAW YOU CAN TELL WHEN IT'S RECENTLY DISTURBED AND WHEN IT'S JUST BEEN LAYING THERE AND THERE IN A BIG PILE OF PINE STRAW IS A BAGGY OF COCAINE

NOW, LADIES AND GENTLEMEN I WANT TO LEAVE YOU WITH A COUPLE OF DIFFERENT THINGS FOR YOU TO THINK ABOUT WHEN YOU'RE IN THE JURY ROOM WHEN YOU ARE DECIDING THIS CASE I WANT YOU TO THINK ABOUT THIS I WANT YOU TO IMAGINE THIS LINE NOW, IMAGINE ALL THE POINTS ON THIS LINE ARE THE POSSIBLE REASONS WHY MR FRIPP TOOK OFF AS SOON AS SERGEANT RODRIGUEZ PULLED IN AT STUDIO SEVEN, ALL THE DIFFERENT REASONS WHY MAYBE IT

WAS TIME TO GO MAYBE HE'D HAD ENOUGH, IT WAS LATE OR MAYBE IT WAS BECAUSE HE HAD OVER 30 GRAMS OF COCAINE IN HIS POCKET

AND NOW IMAGINE THIS LINE, ALL THE REASONS WHY MR FRIPP KEPT WALKING WHEN SERGEANT RODRIGUEZ SAID, "HEY COME HERE I WANT TO TALK TO YOU " MAYBE HE JUST DIDN'T WANT TO MAYBE IT WAS TIME TO GO MAYBE IT WAS BECAUSE HE HAD 34 GRAMS OF COCAINE IN HIS POCKET

NOW, IMAGINE THIS LINE ALL THE REASONS WHY WHEN SERGEANT RODRIGUEZ COMMANDED HIM TO STOP HE KEPT GOING MAYBE IT WAS TIME TO GO MAYBE HE DIDN'T FEEL WELL MAYBE HE WAS HUNGRY MAYBE IT WAS BECAUSE HE HAD 34 GRAMS OF COCAINE IN HIS POCKET THIS IS ALL THE REASONS WHY MR FRIPP WALKED ALL THE WAY ACROSS THE PARKING LOT IT'S NOT THE WAY OUT MAYBE IT WAS BECAUSE HE HAD 34 GRAMS OF COCAINE IN HIS POCKET

THIS IS WHY MR FRIPP GOES BEHIND THE TRUCK, ALL OF THE DIFFERENT REASONS IT'S BECAUSE HE HAS 34 GRAMS OF COCAINE IN HIS POCKET THAT HE NEEDS TO GET RID OF ALL THE REASONS WHY MR FRIPP SUDDENLY DECIDES TO TURN AROUND AND COME AND TALK TO SERGEANT RODRIGUEZ MAYBE HE SUDDENLY DECIDED ONCE HE WENT BEHIND THAT BLACK TRUCK THAT HE HAD FOUND THE MEANING OF LIFE OR MAYBE IT WAS BECAUSE HE CAME AROUND -- HE WENT TO TALK TO SERGEANT RODRIGUEZ BECAUSE HE HAD JUST GOTTEN RID OF THE 34 GRAMS OF COCAINE THAT WAS IN HIS POCKET THAT'S WHERE

THIS WHOLE CASE CHANGES HE DOESN'T WANT TO TALK TO HIM, DOESN'T WANT TO TALK TO HIM DOESN'T WANT TO SEE HIM HE'S MAKING HIS WAY ACROSS THE PARKING LOT ALL OF A SUDDEN, WHEN HE GOES BEHIND THAT PICKUP TRUCK, THINGS CHANGE

WHEN HE COMES BACK OUT FROM BEHIND THE PICKUP TRUCK, HE SAYS, "I DON'T HAVE ANY DRUGS ON ME," AND MAYBE THAT'S BECAUSE HE JUST DITCHED THE 34 GRAMS OF COCAINE BEHIND THE PICKUP TRUCK LADIES AND GENTLEMEN, 34 GRAMS OF COCAINE WERE FOUND BEHIND THE PICKUP TRUCK, ALL THE REASONS WHY IT COULD HAVE GOTTEN THERE

WHAT THE DEFENSE IS GOING TO ARGUE IS THAT IT'S SOMEBODY ELSE'S SO, I MEAN, THAT'S A POSSIBLE LINE BUT WHAT MAKES THE MOST SENSE? WHAT MAKES THE MOST SENSE IS THAT THE COCAINE THAT WAS FOUND BEHIND THE PICKUP TRUCK -- IT'S BECAUSE MR FRIPP DROPPED IT THERE THAT'S WHERE HE HID IT HE SAID HE TALKED TO THE POLICE WITH CONFIDENCE BECAUSE HE DIDN'T HAVE ANYTHING ON HIM SO HE COULD GET BY, MAYBE GO BACK AND GET IT LATER MR FRIPP SAYS "I DON'T KNOW ANYTHING ABOUT THAT COCAINE " HOW DOES HE KNOW IT'S COCAINE? MAYBE IT'S BECAUSE HE KNOWS IT'S COCAINE BECAUSE HE'S HAD IT THE WHOLE NIGHT AND HE JUST DROPPED IT BEHIND THAT PICKUP TRUCK

LADIES AND GENTLEMEN THERE'S ONLY ONE THING IN THIS CASE THAT MAKES SENSE, ONLY ONE THING IN THIS CASE THAT PULLS IT ALL TOGETHER THAT MR FRIPP KNEW -- HE KNEW HE WAS GUILTY BECAUSE HE HAD COCAINE IN HIS -- ON HIM HE HAD TO

TAKE OFF, HE HAD NO OTHER CHOICE THAT WAS ALL HE COULD DO, SO HE TOOK OFF HE DIDN'T STOP, NOT FOR A REQUEST HE DIDN'T STOP FOR A COMMAND DUCKS BEHIND THIS PICKUP TRUCK THERE'S NO REASON TO GO BEHIND THE PICKUP TRUCK

THE TESTIMONY WASN'T THAT HE GOT INTO THE TRUCK OR THAT HE WENT INTO A CAR HE WENT BEHIND THE TRUCK FOR TEN SECONDS AND THEN HE COMES BACK OUT, THE TRUCK THAT BORDERS A MARSH AND SOME TREES THERE'S NO REASON TO GO BEHIND THAT TRUCK, BUT IT'S A SECLUDED SPOT AND YOU CAN DITCH YOUR COCAINE THAT'S WORTH AT LEAST A THOUSAND DOLLARS, KEEP YOU OUT OF TROUBLE, AND MAYBE YOU CAN COME BACK FOR IT LATER THAT'S A PRETTY GOOD REASON TO GO BACK BEHIND THAT TRUCK

LADIES AND GENTLEMEN WHEN WE STARTED THIS CASE I TOLD YOU THAT THE DEFENDANT SAT THERE AN INNOCENT MAN WELL, NOW WE'VE GOTTEN THROUGH TO THE END NOW IT'S TIME FOR YOU TO DECIDE IF HE SHOULD STAY THAT WAY BECAUSE THE SIMPLE FACT OF THE MATTER IS IS THAT HE HAD THE COCAINE IN HIS POCKET WHEN SERGEANT RODRIGUEZ PULLED UP HE HAD THE COCAINE IN HIS POCKET WHEN HE WALKED AWAY FROM SERGEANT RODRIGUEZ, AND HE HAD THE COCAINE IN HIS POCKET WHEN SERGEANT RODRIGUEZ CALLED OUT TO HIM HE HAD THE COCAINE IN HIS POCKET WHEN SERGEANT RODRIGUEZ COMMANDED HIM TO STOP HE HAD THE COCAINE IN HIS POCKET WHEN HE WENT BEHIND THE PICKUP TRUCK HE HAD THE COCAINE ON HIM WHEN HE HID IT BEFORE HE CAME BACK OUT FROM BEHIND THE CAR THAT'S WHAT THIS CASE IS REALLY ABOUT, AND

THAT IS WHAT THIS TELLS YOU, AND THIS DEMANDS THAT YOU GO BACK INTO THE JURY ROOM AND YOU FIND DIAMON FRIPP GUILTY OF BOTH OF THESE CHARGES THANK YOU

MS JORDAN MAY IT PLEASE THE COURT, YOUR HONOR?

THE COURT SURE

MS JORDAN REMEMBER THE PICTURE I LEFT YOU THE LAST TIME I SPOKE TO YOU WE WERE AT THE POINT WHERE OFFICER RODRIGUEZ HAD JUST DROVE INTO THE PARKING LOT HIS LIGHTS WERE SHINING IN FROM THE DARK 40 YARDS AWAY TO THE FRONT ENTRANCE WHERE HE SEES PEOPLE STANDING THERE IT'S NOT QUITE 2 09 P M (SIC) IT WAS EARLY NEW YEAR'S MORNING AND OFFICER RODRIGUEZ TESTIFIED THAT HE WAS CALLED TO A DISTURBANCE, BUT THERE WAS NO DISTURBANCE

HE SEES SECURITY IS STILL THERE CHECKING PATRONS IN PATRONS THAT ARE ARRIVING TO THE CLUB, THEY'RE IN LINE, GETTING READY TO COME INTO THE CLUB AND HE SEES A BLACK MALE THERE AND HE'S STANDING NEAR THE SECURITY GUARD, AND THEN WHEN -- WHEN THAT BLACK MALE DECIDES TO LEAVE, OFFICER RODRIGUEZ SAID HE GOT OUT OF HIS CAR AND STARTED WALKING TOWARDS THE FRONT HE WALKS TOWARDS THE CLUB NOW TO INVESTIGATE THIS CALL HE GETS TO THE DOOR AND WHAT DOES HE SAY HE DOES? HE APPROACHES THE FRONT ENTRANCE AGAIN, THERE WAS NO DISTURBANCE GOING ON

THE DISPATCHED CALL THAT HE RESPONDED TO SAID A BLACK MALE WEARING BLUE SWEATS WAS ACTING BELLIGERENT AT THE FRONT

DOOR AND REFUSING TO LEAVE WELL, THE SECURITY GUARD WAS RIGHT THERE AT THE FRONT ENTRANCE THE SECURITY GUARD SURELY KNOWS SOMETHING WAS GOING ON AT THE FRONT ENTRANCE, BUT HE DOESN'T ASK HIM HE DOESN'T EVEN TALK TO HIM PATRONS THAT ARE TRYING TO GET IN THE CLUB, THEY'RE GETTING READY THEY'RE LINED UP CHECKING TO GET IN COULD THEY HAVE HEARD SOMETHING? POSSIBLY BUT HE DOESN'T ASK THEM HE DOESN'T TALK TO THEM, ANY OF THEM

HE SAID HE LOOKED UP AND THERE'S A SMALL GLASS WINDOW INTO THE FOYER, THE ENTRANCE OF THE CLUB AND HE SPOTTED THE OWNER SURELY THE OWNER WOULD KNOW WHAT WAS GOING ON IN THIS CLUB, BUT OFFICER RODRIGUEZ CHOOSES NOT TO TALK TO HIM EITHER THE ONLY PERSON THAT IS NO LONGER THERE AT THE FRONT ENTRANCE IS DIAMON WHO IS LEAVING, ALREADY WALKING IN THE PARKING LOT NOW HE'S THE ONE OFFICER RODRIGUEZ WANTS TO TALK TO

NOW, AS WE SAID EARLIER, THE MUSIC IS STILL BLARING ON REMEMBER, THIS IS A ROCKING NEW YEAR'S AND IT'S A CLUB AND IT'S PACKED AND OFFICER RODRIGUEZ CALLS OUT TO DIAMON AND SAYS, "HEY I WANT TO TALK TO YOU " AND HE TESTIFIED HE REALIZED THAT THE MUSIC WAS LOUD, AND HE HAD TO KIND OF YELL A LITTLE BIT TO TRY TO BE HEARD ABOVE THE MUSIC AND HE ATTEMPTS TO YELL ABOVE IT AT THIS POINT HE SAYS DIAMON IS ABOUT 20 CAR LENGTHS AWAY TWENTY CAR LENGTHS THAT WOULD BE ABOUT A FOOTBALL FIELD IS WHAT WE CAME TO AND HE'S

WALKING -- DIAMON IS WALKING, WALKING THROUGH THE CARS

REMEMBER, IT WAS OFFICER RODRIGUEZ'S TESTIMONY THAT THERE WAS A CAR PARKED AT EVERY CONCEIVABLE PLACE IT WAS PACKED WELL, DIAMON AT ONE POINT STOPS AND TURNS NOW, REMEMBER, TOO, THERE WAS ONLY ONE LIGHT THAT'S IN THE PARKING LOT, AND IT'S IN THE FAR BACK CORNER, AND THIS PARKING LOT WAS THE SIZE OF A FOOTBALL FIELD CAN HE SEE ANYTHING? CAN HE HEAR?

OFFICER RODRIGUEZ FINISHED FOLLOWING HE SAYS AT THIS POINT "SHERIFF'S OFFICE STOP " OR, "STOP OFFICER," AND DIAMON CONTINUES WALKING OFFICER RODRIGUEZ IS FOLLOWING ALONGSIDE HE SAID DIAMON CONTINUES TO WALK BY THE CARS AT THIS POINT I BELIEVE OFFICER RODRIGUEZ SAYS HE LOSES SIGHT OF DIAMON FOR ABOUT TEN SECONDS, AND AFTER THAT MERE TEN SECONDS OFFICER RODRIGUEZ SEES DIAMON WALKING AGAIN COMING TOWARDS HIM HE THINKS DIAMON'S HANDS ARE CONCEALED IT'S DARK HE DOESN'T HAVE A FLASHLIGHT

DIAMON -- HE SAYS DIAMON ATTEMPTS TO WALK PAST OFFICER RODRIGUEZ AT THAT POINT OFFICER RODRIGUEZ PULLS HIS GUN, NOT SURE WHERE HIS HANDS ARE, AND ORDERS DIAMON TO THE GROUND DIAMON WAS CONFUSED, STARTLED, AND HE SHOUTED, "I DON'T HAVE ANYTHING ON ME " HE HAS HIS GUN DRAWN OFFICER RODRIGUEZ HAD HIS GUN DRAWN, AND HE ORDERED HIM TO THE GROUND

AT THAT POINT HE HANDCUFFS HIM THE TIME NOW IS 2 11,

2 11, LESS THAN THREE MINUTES WHEN OFFICER RODRIGUEZ ARRIVED AND DIAMON WAS ARRESTED DIAMON SITS CUFFED IN THE PATROL CAR HE'S TOLD HIM THE TRUTH THERE WAS NOTHING ON HIM, NO GUNS, NO KNIVES, NO DRUG-PACKAGING MATERIAL, NO SCALES NOTHING ILLEGAL WAS IN HIS POCKETS, NOTHING IN HIS POCKETS THAT WAS ILLEGAL HE SITS THERE, ARRESTED IN THE BACK OF THE CAR

I THINK AT THIS POINT THE OTHER CAR -- THE OTHER OFFICER ARRIVES OFFICER MOONEY ARRIVES WITH THE DRUG DOG, LEIA, AND HE IS GIVEN DIRECTIONS AND HE GOES IN THE PARKING LOT AT OFFICER RODRIGUEZ'S DIRECTION TO TRACE THE PATH WHERE DIAMON WALKED, BUT THERE'S NO DRUGS FOUND ON THE PATH DIAMON TOOK REMEMBER, HE'S WALKING BETWEEN THESE CARS THERE'S NO DRUGS FOUND THERE

HOWEVER OFF THE PATH OFFICER ROD -- OFFICER MOONEY, EXCUSE ME PROCEEDS AND GETS A BEER BOTTLE THEN HE NOTICES SOME DISTURBED PINE STRAW HE GOES THERE WITH THE DOG THE DOG SNIFFS THROUGH THE PINE STRAW, UNDERNEATH THAT BOTTLE FINDS A PLASTIC BAG OF COCAINE AND HE MADE THE COMMENT -- HE SAID IT LOOKED LIKE SOMEBODY HAD BURIED IT THERE SO HE SNIFFED THROUGH AND DUG UP THE PINE STRAW SO OFF THE PATH, 30 FEET PAST THE TRUCK BEHIND A TREE UNDER A BEER BOTTLE AND BURIED IN SOME PINE STRAW

THE BEER BOTTLE, WE DIDN'T SEE THAT IT WAS LEFT BEHIND NOT TAKEN INTO EVIDENCE, THE SAME BOTTLE THAT CAUGHT

THE OFFICER'S ATTENTION YET IT WAS LEFT BEHIND NO EVIDENCE SENT FOR ANALYSIS, NO FINGERPRINTS THE BAGGY CONTAINING COCAINE, THAT WAS TAKEN INTO EVIDENCE, YET THERE'S NO ATTEMPT BY OFFICER MOONEY TO GET FINGERPRINTS OFF THAT THERE WAS NO ATTEMPT FOR OFFICER RODRIGUEZ TO GET FINGERPRINTS OFF THAT IT WAS NOT SENT TO THE LAB TO SEE IF THEY COULD GET FINGERPRINTS OFF IT NOTHING

WELL, AT THIS POINT HE MOVES TOWARDS THE CAR DIAMON IS PLACED IN THE BACK OF THE CAR, AND HE'S SITTING THERE ARRESTED WELL, BACK UP HE SAYS HE WAS BY THE CAR FIRST, AND AT THAT TIME THAT'S WHEN OFFICER RODRIGUEZ SEARCHED HIS POCKET HE SAID HE FOUND SOME ROCKS HE PUT SOME ROCKS ON THE HOOD OF THE CAR, I BELIEVE IT WAS THE HOOD OF THE CAR THERE'S BEEN TESTIMONY HE WAS TRYING TO EAT THESE ROCKS

WELL, OFFICER RODRIGUEZ OBVIOUSLY THOUGHT THEY WERE SOME KIND OF DRUGS BECAUSE HE TESTED THEM FOR DRUGS, TOOK THEM INTO EVIDENCE, AND MAYBE DIAMON THOUGHT THEY WERE DRUGS, TOO MAYBE THAT'S WHY HE WAS TRYING TO GET THESE ROCKS, BUT DOES IT MAKE SENSE THAT HE WOULD KEEP THESE ROCKS IN HIS POCKET IF HE GOT RID OF THE COCAINE? WHY WOULDN'T HE GET RID OF ALL OF THEM IF HE THOUGHT THEY WERE DRUGS?

WELL, OFFICER RODRIGUEZ THEN TESTS THIS BAGGY, THE CONTENTS OF BAGGY, RIGHT NEARBY ON THE HOOD OF THE CAR OR THE TRUNK OF THE CAR I'M SORRY I CAN'T REMEMBER WHICH ONE, BUT YOUR RECOLLECTION IS MORE CLEAR AND DIAMON'S IN THE

BACK SEAT THEN THROUGH THE WINDOW OFFICER RODRIGUEZ HOLDS THE BAG, DANGLING IT IN FRONT OF DIAMON TELLING HIM HE'S GOING TO CHARGE HIM HE'S GOING TO CHARGE HIM WITH THIS WHITE POWDERY SUBSTANCE DIAMON HEARS HIM SAY HE'S GOING TO CHARGE HIM WITH IT, AND HE SAID, "THAT'S NOT MINE I DON'T KNOW ANYTHING ABOUT THAT COCAINE "

WELL, WHAT ELSE WOULD HE CHARGE HIM WITH? IT'S A WHITE POWDERY SUBSTANCE BUT RIGHT AWAY HE DENIED IT THAT'S NOT MINE, I DON'T KNOW WHAT IT IS I DON'T KNOW WHERE IT CAME FROM HE KNOWS NOTHING ABOUT IT

WHEN WE THINK ABOUT IT, HAS ANYONE TESTIFIED THAT THEY SAW THE COCAINE IN DIAMON'S HANDS? NO HAS ANYONE TESTIFIED THAT THEY SAW HIM THROW IT? NO HAS ANYONE TESTIFIED THAT THEY SAW HIM DROP IT? NO HAS ANYONE TESTIFIED THEY SAW HIM GO BEHIND A TREE? NO HAS ANYONE TESTIFIED THEY ACTUALLY SAW HIM BURY IT? NO NO DRUGS WERE NEVER AT ANY TIME SEEN IN THE POSSESSION OF DIAMON

MR BANNON DEMONSTRATED WITH WALKING THIS TEN SECONDS TO SEE HOW FAR HE COULD GO, BUT THINK MORE EXACTLY WHAT HAPPENED IN THAT TEN SECONDS THE DRUGS WERE FOUND MORE THAN 30 FEET ACTUALLY WHEN YOU THINK ABOUT IT BECAUSE IN THAT TEN SECONDS NOT ONLY DID HE WALK PAST THE TRUCK BUT OFFICER MOONEY TESTIFIED THEY WERE 30 FEET BEYOND THE BACK OF THE TRUCK THAT'S WHERE HE LOST SIGHT OF HIM SO OFF THE DRIVEWAY, BEHIND A PICKUP TRUCK, THEN 30 FEET, DIG UP PINE STRAW, PUT

THE DRUGS DOWN, COVER THEM UP WITH PINE STRAW, LOOK FOR A BEER BOTTLE, PUT THE BEER BOTTLE THERE, AND WALK BACK OUT 30 FEET PAST THE TRUCK WHERE OFFICER RODRIGUEZ IS STANDING TEN SECONDS?

UNDER THIS BEER BOTTLE, WHICH NO ONE EVER SEEN IN HIS HAND -- SO WHERE DID IT COME FROM? UNDER SOME DISTURBED PINE STRAW BEHIND A TREE WHERE NO ONE IS GOING TO GO THE DRUGS WERE FOUND AT THE STUDIO SEVEN PARKING LOT ON NEW YEAR'S EVE IT'S AN EXTREMELY CROWDED PARKING LOT, ROCKING, HAPPENING IT'S THE PLACE TO BE ON NEW YEAR'S A NEW YEAR'S CELEBRATION AT A POPULAR CLUB, AND THAT'S WHAT BRINGS US HERE TODAY

AND NOW THE EVIDENCE MUST BE CONSIDERED TO DETERMINE IF THE STATE HAS MET ITS BURDEN REMEMBER NO MAN MUST PROVE HIS INNOCENCE IT'S THE STATE WHO MUST PROVE TO EACH ONE OF YOU, EACH ONE OF YOU INDIVIDUALLY THAT THIS MAN IS GUILTY BEYOND A REASONABLE DOUBT

THE JUDGE WILL FURTHER INSTRUCT YOU ON THE LAW I'D LIKE TO GO INTO SOME OF THE THINGS YOU MUST CONSIDER THE TERM MERE PRESENCE, WHAT THAT MEANS IS THAT THE STATE NEEDS EVIDENCE MORE THAN JUST DIAMON'S MERE PRESENCE IN AN AREA WHERE DRUGS WERE FOUND MERE PRESENCE IS NOT ENOUGH TO PROVE SOMEONE GUILTY OF A CRIME REMEMBER, IT'S THE BURDEN OF THE STATE TO PROVE EVERY ELEMENT OF THE CRIME IF YOU FIND THE STATE HAS ONLY SHOWN THAT DIAMON WAS ONLY PRESENT AT A SCENE WHERE DRUGS WERE FOUND, YOU MUST FIND HIM NOT GUILTY

POSSESSION -- POSSESSION IS A KEY ELEMENT TO WHAT THIS TRIAL ABOUT DID DIAMON POSSESS THE BAG OF COCAINE FOUND IN THE PINE STRAW UNDER THE TREE? AND THERE SHOULD BE NO GUESSWORK INVOLVED, NOTHING TO GUESS ABOUT IT IS -- IT'S NOT -- IT'S NOT HE MAY HAVE HAD IT, AND IT'S NOT HE COULD POSSIBLY HAVE IT THE EVIDENCE MUST PROVE TO YOU THAT THERE'S NO REASONABLE DOUBT THAT DIAMON POSSESSED THAT DRUG IT MUST BE BEYOND A REASONABLE DOUBT

NOW, THE JUDGE IS GOING TO TELL YOU ABOUT TWO DIFFERENT TYPES OF POSSESSION, SO JUST BRIEFLY THERE'S POSSESSION CALLED ACTUAL POSSESSION DRUGS FOUND OR SEEN IN THE ACTUAL PHYSICAL CUSTODY OF THE PERSON CHARGED WHAT DOES THE EVIDENCE SHOW IN THIS REGARD? NO TESTIMONY THAT THEY SAW DIAMON IN A DRUG TRANSACTION NO TESTIMONY THAT ANYONE HAS EVER SEEN DIAMON PUT SOMETHING IN NO TESTIMONY AS TO WHETHER DIAMON THREW ANYTHING NO TESTIMONY AS TO SEEING DIAMON BURY ANYTHING NO ONE SAW HIM BY THE TREE, NO FINGERPRINTS ON THE BOTTLE NO FINGERPRINTS ON THE BAGGY, NO D N A

THEN THERE'S CONSTRUCTIVE POSSESSION IN THAT -- THE JUDGE GAVE YOU A BRIEF DESCRIPTION IN THE BEGINNING, AND HE'LL TELL YOU SOME MORE ABOUT THAT LATER BUT BASICALLY DIAMON WOULD HAVE TO HAVE THE RIGHT TO CONTROL THE PREMISES, HAVE CONTROL OVER THAT AREA, THE AREA WE'RE TALKING ABOUT WHERE THE DRUGS WERE FOUND NOW, REMEMBER, IT'S A PACKED

PARKING LOT A PUBLIC PARKING LOT AT A CLUB DURING ONE OF THE BIGGEST PARTIES OF THE YEAR CARS PARKED EVERYWHERE, EVERY CONCEIVABLE PLACE

DIAMON DOESN'T OWN THE PARKING LOT IT'S NOT HIS RESIDENCE HE ONLY HAS THE RIGHT TO ACCESS THE PARKING LOT, NOT ACTUAL DOMINION AND CONTROL OVER IT IN OTHER WORDS, THE PARKING LOT DOESN'T BELONG TO HIM HE HAS ABSOLUTELY NO CONTROL OVER WHO CAME AND WENT FROM THE PARKING LOT

WELL, THE STATE WOULD LIKE YOU TO DEMISE FROM THE CIRCUMSTANCES THAT DIAMON HAD SOME KIND OF CONSTRUCTIVE POSSESSION OF THE COCAINE BUT THIS COULD ONLY BE POSSIBLE IF YOU CAN FIND NO OTHER POSSIBLE EXPLANATION OF HOW THE DRUGS GOT THERE OTHER THAN THE ONE THE STATE HAD GIVEN YOU IF THERE'S POSSIBLY EVEN TWO EXPLANATIONS AS TO HOW THE DRUGS GOT THERE, THE STATE CANNOT ASK YOU TO CONVICT

FOR EXAMPLE, IF YOU WAKE UP IN THE MORNING AND THERE'S SNOW OUTSIDE, YOU COME TO THE CONCLUSION THAT IT HAD TO SNOW OVERNIGHT BUT IF YOU WAKE UP AND YOU GO OUTSIDE AND THE GROUND IS WET CAN THERE BE MORE THAN ONE EXPLANATION OF WHY THE GROUND IS WET? YOU MAY FIRST THINK THAT, WELL IT COULD HAVE RAINED, BUT THAT'S NOT NECESSARILY WHY THE GROUND IS WET A PIPE COULD HAVE BURST SPRINKLERS COULD HAVE GONE OFF SO THERE'S MORE THAN ONE REASONABLE EXPLANATION WHY THE GROUND WAS WET

DRUGS WERE FOUND IN A CROWDED PUBLIC PARKING LOT AT

STUDIO SEVEN DURING NEW YEAR'S EVE IS THERE ANY OTHER REASONABLE EXPLANATION OF HOW THE DRUGS GOT THERE? CAN THERE BE ANOTHER EXPLANATION OTHER THAN WHAT THE STATE HAS GIVEN YOU? IF YOU HAVE A HESITATION, REMEMBER A REASONABLE DOUBT IS A HESITATION TO ACT THAT MEANS -- ANY HESITATION MEANS YOU HAVE LOOKED AT WHAT THE STATE HAS GIVEN YOU AND YOU SAY, "I CAN'T IT'S NOT ENOUGH I'M NOT COMFORTABLE WITH SAYING GUILTY WHEN ALL YOU ~~GA~~VE ME WAS THIS," AND THAT HESITATION MEANS NOT GUILTY

WE ALL HAVE OUR OWN OPINIONS, AND EACH OF YOU NOW HAVE YOUR OWN VOTE HOLD ON TO IT CAREFULLY, CONSCIENTIOUSLY WE ALL ARE EQUAL ALL DESERVING THE SAME JUSTICE AND DESERVING THE SAME FREEDOM, ALL DESERVING OF THE SAME RIGHTS THAT NO MAN CAN BE FOUND GUILTY WITHOUT PROOF BEYOND A REASONABLE DOUBT THE QUESTION NOW BEFORE YOU HAS THE STATE REMOVED ALL REASONABLE DOUBT THAT THE BAG OF COCAINE WAS POSSESSED BY DIAMON? I'M CONFIDENT THAT WHEN YOU REVIEW THE EVIDENCE PUT BEFORE YOU TODAY THAT YOU'LL COME TO THE DECISION THE STATE HAS NOT MET ITS BURDEN AND FIND DIAMON FRIPP NOT GUILTY

THE COURT OKAY JURORS, FINAL PHASE OF THE TRIAL I'M GOING TO INSTRUCT Y'ALL ON THE LAW, AND THEN YOU'RE GOING TO GO BACK AND REACH VERDICTS - EITHER NOT GUILTY OR GUILTY, GUILTY OR NOT GUILTY - ON THE TWO CHARGES OBVIOUSLY THE ORDER THAT I SAID THAT HAS NO BEARING, THERE ARE ONLY TWO WAYS I CAN SAY IT

NOW, I'M NOT A FACT FINDER SO I'M INSTRUCTING YOU ON THE LAW, BUT THE LAW IS IN THE ABSTRACT OKAY? I'M GOING TO TELL YOU ABOUT DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE I'M NOT GOING TO TELL YOU WHAT WAS WHAT IN THIS PARTICULAR TRIAL OR WHAT YOU SHOULD BELIEVE OR WHAT YOU SHOULDN'T BELIEVE THAT'S GOING TO BE UP TO YOU JURORS YOU WILL NOT HAVE WITH YOU THE INDICTMENTS OKAY? THE INDICTMENTS CHARGE, AND THAT'S ALL THAT THEY DO, CHARGE DIAMON FRIPP WITH COMMITTING TWO CRIMES ONE IS AN ADD-ON BUT IT'S A LITTLE MORE -- ANOTHER ELEMENT TO IT OTHER THAN JUST AN ADD-ON THAT THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT, AS I WILL EXPLAIN TO YOU

THE INDICTMENTS RUN THROUGH EVERYTHING THAT COULD POSSIBLY CONSTITUTE TRAFFICKING ON THE CHARGE OF TRAFFICKING, AND I'LL -- I'LL READ MOST OF IT TO YOU THE INDICTMENT ON DISTRIBUTION, INTENT TO DISTRIBUTE AND SO FORTH WITHIN A HALF MILE OF A SCHOOL, I'LL READ THAT TO YOU BUT THE VERDICT -- THE FORM THAT'S GOING TO COME BACK IS SIMPLY GOING TO SAY WE, THE JURORS, BY UNANIMOUS CONSENT - AND 12 JURORS HAVE TO AGREE BUT ONLY THE FOREPERSON WILL SIGN - FIND THE DEFENDANT ON THE CHARGE OF POSSESSION WITH INTENT TO DISTRIBUTE COCAINE WITHIN A HALF MILE OF A SCHOOL IT'S NOT GOING TO SAY EVERYTHING ELSE EITHER NOT GUILTY OR GUILTY AND THE SECOND WILL SAY WE, THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT ON THE CHARGE OF TRAFFICKING IN COCAINE THREE GRAMS

OR MORE NOT GUILTY OR GUILTY, GUILTY OR NOT GUILTY IT'S NOT GOING TO HAVE ALL THE OTHER LANGUAGE IN THERE

MR FRIPP IS PRESUMED INNOCENT OF ALL CHARGES I EXPLAINED THAT TO YOU WHEN WE STARTED THAT PRESUMPTION IS STILL WITH HIM IT'S ONLY REMOVED IF THE STATE CONVINCES YOU 12 JURORS UNANIMOUSLY BEYOND A REASONABLE DOUBT THAT HE COMMITTED A CRIME OR TWO CRIMES BEYOND A REASONABLE DOUBT IS SIMPLY SUCH A DOUBT IT WOULD CAUSE AN ORDINARY PERSON TO HESITATE TO ACT IN HIS DAILY AFFAIRS IT'S EVIDENCE THAT WOULD LEAVE YOU JURORS FIRMLY CONVINCED THAT A PERSON'S GUILTY AS CHARGED

MR FRIPP DID NOT TESTIFY I EXPLAINED TO YOU HE HAS NO BURDEN TO PROVE THAT HE'S NOT GUILTY YOU SHOULDN'T EVEN TALK ABOUT WHETHER HE TESTIFIED OR DIDN T TESTIFY ON THE ISSUE OF WHETHER THE STATE HAS MET ITS BURDEN OF PROOF

ALL RIGHT THE FIRST INDICTMENT THAT CHARGES TRAFFICKING READS AS FOLLOWS IF YOU ACTUALLY WANTED TO READ, WE COULD XEROX IT AND SEND IT BACK, BUT IT'S JUST THE ALLEGATIONS OKAY? THAT IN BEAUFORT COUNTY ON JANUARY THE 1ST, 2009, THE DEFENDANT, DIAMON D FRIPP, UNLAWFULLY AND KNOWINGLY DID SELL, MANUFACTURE, CULTIVATE, DELIVER, PURCHASE, OR BRING INTO THE STATE OR DID PROVIDE FINANCIAL ASSISTANCE OR OTHERWISE AID, ABET, ATTEMPT, OR CONSPIRE TO SELL, MANUFACTURE CULTIVATE, DELIVER, PURCHASE OR BRING INTO THE STATE THAT'S WHAT THE STATUTE SAYS OR DID POSSESS A

CONTROLLED SUBSTANCE, TO WIT, COCAINE IN EXCESS OF 28 GRAMS THAT'S WHAT THE CASE IS

IN ORDER TO OBTAIN A CONVICTION, THE STATE MUST CONVINCE YOU 12 JURORS UNANIMOUSLY BEYOND A REASONABLE DOUBT THAT ON JANUARY THE 1ST OF '09 IN BEAUFORT COUNTY DIAMON FRIPP POSSESSED IN EXCESS OF 28 GRAMS OF COCAINE TRAFFICKING IS A POSSESSION-BY-WEIGHT STATUTE SIMPLE POSSESSION WOULD BE -- YOU KNOW, IF YOU JUST HAD A GRAIN OR A GRAM OR SOMETHING, THAT WOULD BE SIMPLE POSSESSION, BUT THE PENALTIES INCREASE AS IT GOES UP AND THEY JUST CALL POSSESSION OF MORE THAN 28 GRAMS TRAFFICKING SO OBVIOUSLY THE STATE WOULD HAVE TO PROVE POSSESSION AND THEN THE WEIGHT, THAT HE HAD IT IN BEAUFORT COUNTY AS I WILL COME TO

THE SECOND INDICTMENT COPIES THE STATUTE AGAIN MORE OR LESS AND ALLEGES THAT IN BEAUFORT COUNTY ON JANUARY THE 1ST ON OR ABOUT THIS YEAR THE DEFENDANT, DIAMON FRIPP, UNLAWFULLY DID POSSESS WITH INTENT TO DISTRIBUTE, DISTRIBUTE, DISPENSE, SELL, PURCHASE, OR MANUFACTURE A QUANTITY OF COCAINE WITHIN A ONE-HALF-MILE RADIUS OF BROAD RIVER ELEMENTARY SCHOOL YOU GET EVERYTHING IN THERE EXCEPT POSSESSION WITH INTENT TO DISTRIBUTE, AND THAT'S WHAT THE STATE HAS TO PROVE THEY HAVE TO -- IT'S AN ADD-ON PENALTY IF YOU FIND HIM GUILTY OF TRAFFICKING IF YOU FIND THAT NOT ONLY DID HE HAVE COCAINE IN HIS POSSESSION WITHIN A HALF MILE OF THE SCHOOL BUT THAT HE INTENDED TO DISTRIBUTE IT, SELL IT, TRANSFER IT, GIVE IT

AWAY

THERE'S OBVIOUSLY NO EVIDENCE THAT HE SOLD ANY AND SO FORTH WITHIN THERE SO THE LANGUAGE THAT CHARGES HIM WITH THE CRIME JUST COPIES ALL -- IT'S INCLUDED WITHIN THE PENALTY FOR DOING CERTAIN THINGS WITH DRUGS WITHIN A HALF MILE OF A SCHOOL, BUT ALL WE'RE TALKING ABOUT IN THIS CASE IS POSSESSING DRUGS WITH INTENT TO DISTRIBUTE THAT'S WHAT THE STATE HAS THE BURDEN OF PROOF ON

NOW, ALTERNATE JUROR, YOU STILL PAY ATTENTION A CALL MIGHT COME ANY MINUTE SAYING A CHILD HAS HIT ANOTHER CHILD AT SCHOOL OR VICE VERSA AND YOU'D HAVE TO TAKE THEIR PLACE MR FOREMAN, YOUR VOTE COUNTS NO MORE THAN ANYBODY'S, BUT SOMEBODY HAS TO PRESIDE OVER DELIBERATIONS AND ACT AS SPOKESPERSON FOR THE JURY IF QUESTIONS OCCUR DURING DELIBERATION, MR FOREMAN, IF YOU WOULD WRITE THEM DOWN I WILL CONFER WITH THE ATTORNEYS AND SEE IF I CAN ANSWER THE QUESTION

AS I TOLD YOU, I'M THE LONGEST-SERVING JUDGE TO FORESTALL THE QUESTIONS THAT GENERALLY COME BACK I CAN'T ADD ANYTHING TO THE CASE OKAY? DON'T SEND ME BACK A QUESTION WHERE IS THE VIDEO CAMERA? HEY, WE DIDN'T HAVE ONE ALL RIGHT? OR Y'ALL -- Y'ALL WATCH A LOT OF T V PROBABLY IF YOU WOULD LIKE TO HAVE ASKED A WITNESS ANOTHER QUESTION, YOU CAN'T DO IT YOU HAVE TO DECIDE THE CASE BASED UPON THE TESTIMONY AND EVIDENCE THAT WAS PRESENTED SO I

CAN'T DO THAT

IF YOU SAW SOMETHING DURING THE TRIAL THAT WAS NOT INTRODUCED INTO EVIDENCE, IT WILL NOT COME BACK THERE WAS CERTAIN DEMONSTRATIVE EVIDENCE THAT WAS JUST SHOWN TO YOU THAT WILL NOT COME BACK IT WAS NOT INTRODUCED INTO EVIDENCE OR IF A CHART WAS USED OR A DIAGRAM WAS USED IN SUMMATIONS WHICH ARE NOT EVIDENCE, THEY CAN'T COME BACK YOU CAN CONSIDER WHAT YOU SAW, BUT WHAT WILL COME BACK IS EVERYTHING THAT WAS INTRODUCED INTO EVIDENCE I WOULD SUGGEST YOU NOT OPEN THE COCAINE BAG, BUT I MEAN YOU CAN AND IT WILL BE BACK THERE ALL RIGHT? IT'S INTRODUCED FORMALLY, INTRODUCED INTO EVIDENCE SO I CANNOT ADD ANY TESTIMONY OR ANY OTHER EVIDENCE TO THE CASE THE STATE HAS THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT BASED UPON WHAT HAS BEEN PRESENTED DURING THIS TRIAL AND SO FORTH

NOW, YOU JURORS AND YOU ALONE PASS UPON THE CREDIBILITY WHICH IS ANOTHER WAY OF SAYING THE BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED YOU JUST USE YOUR COMMON SENSE WHEN YOU'RE EVALUATING TESTIMONY I'M NOT DIRECTING THESE COMMENTS TO ANY PARTICULAR WITNESS THEY APPLY TO ALL OF THEM AMONG THE FACTORS THAT YOU WOULD TAKE INTO ACCOUNT CERTAINLY WOULD BE THE DEMEANOR OR THE APPEARANCE OF A WITNESS YOU WOULD CONSIDER WHETHER WITNESSES ARE HESITANT OR FORTHRIGHT IN ANSWERING QUESTIONS CERTAINLY IF A WITNESS'S TESTIMONY IS CONSISTENT OR INCONSISTENT SHOULD BE

CONSIDERED BY YOU YOU CAN CONSIDER ANY INTEREST OR BIAS THAT A WITNESS HAS IN THE OUTCOME OF THE PROCEEDINGS THE OPPORTUNITY THAT THE WITNESS HAD TO SEE, HEAR, OR OBSERVE WHAT THE WITNESS TESTIFIED TO SHOULD BE CONSIDERED BY YOU

JURORS, WE DON'T COUNT WITNESSES, OF COURSE, IN PROSECUTIONS WHATEVER SIDE THAT PUTS UP THE MOST WITNESSES DOESN'T NECESSARILY WIN THE DEFENDANT DOES NOT HAVE TO PUT UP ANY AS I EXPLAINED TO YOU, AND YOU CAN'T EVEN DISCUSS OR DEBATE THAT WHILE YOU'RE DECIDING WHETHER THE STATE HAS MET ITS BURDEN OF PROOF ON THE TWO INDICTMENTS ON WHICH HE'S CHARGED

NOW, JURORS, YOU'RE NOT BOUND TO ACCEPT IN ITS ENTIRETY THE TESTIMONY OF ANY PARTICULAR WITNESS YOU HAVE THE ABSOLUTE RIGHT TO PICK AND CHOOSE PORTIONS OF TESTIMONY THAT YOU FEEL ARE BELIEVABLE AFTER YOU HAVE DECIDED WHICH TESTIMONY IS BELIEVABLE, THE RELATIVE WEIGHT THAT YOU ATTRIBUTE TO BELIEVABLE TESTIMONY IS ENTIRELY UP TO YOU JURORS SO, AGAIN, MR FOREMAN, DON'T SEND BACK A QUESTION HOW MUCH OF SO-AND-SO'S TESTIMONY SHOULD WE BELIEVE? THAT'S UP TO YOU, AFTER YOU DECIDE WHICH TESTIMONY IS BELIEVABLE AND THE WEIGHT THAT YOU ATTRIBUTE TO IT IT'S UP TO YOU JURORS

DURING THE TRIAL, ONE WITNESS WAS QUALIFIED AS AN EXPERT YOU USE YOUR STANDARD TEST IN EVALUATING THE TESTIMONY FROM AN EXPERT IN ADDITION, YOU WOULD CONSIDER THE EDUCATION, BACKGROUND, AND TRAINING THAT AN EXPERT HAD

ONCE A WITNESS IS QUALIFIED AS AN EXPERT, HE OR SHE IS ENTITLED TO GIVE OPINIONS WITHIN THEIR FIELD OF EXPERTISE IN THIS CASE IT'S JUST WAS THIS A DRUG, HOW MUCH DOES IT WEIGH AND SO FORTH? YOU'RE NOT BOUND TO ACCEPT WHAT THE WITNESS TESTIFIED TO, BUT THERE WAS SUFFICIENT EVIDENCE TO ALLOW THAT PERSON TO TESTIFY AS AN EXPERT IN THAT IF THEY HANDED US A BAG OF WHITE POWDER, YOU KNOW, WE MIGHT BE ABLE TO TASTE IT AND SEE WHETHER IT WAS SUGAR OR SWEET'N LOW OR BAKING SODA, BUT I DOUBT WE COULD TELL YOU WHETHER IT WAS A DRUG OR NOT, YOU KNOW YOU HAVE TO HAVE TRAINING THAT'S ALL

NOW JURORS EVIDENCE IS BROKEN DOWN INTO TWO TYPES DIRECT EVIDENCE AND INDIRECT OR CIRCUMSTANTIAL EVIDENCE THOSE EVIDENCES STAND ON THE SAME FOOTING AS FAR AS TRIALS ARE CONCERNED IN OTHER WORDS, THE STATE CAN RELY ON DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE IN OBTAINING A CONVICTION DIRECT EVIDENCE IS WHERE AN INDIVIDUAL TESTIFIES TO SOMETHING HE OR SHE HAS OBSERVED THROUGH THE SENSES IT MIGHT NOT BE TRUE, BUT THAT'S DIRECT EVIDENCE JUST LIKE SOMEBODY CAME IN AND SAID IT'S RAINING OUTSIDE I DON'T KNOW WHETHER THAT'S AIR CONDITIONING OR RAIN HITTING THE ROOF YOU KNOW, THEY SAID IT WAS RAINING OUTSIDE THAT'S EVIDENCE THAT IT'S RAINING OUTSIDE AND IT MIGHT NOT BE

IF SOMEBODY CAME IN AND TOOK AN UMBRELLA OFF AND SHOOK IT, YOU KNOW, TOOK A COAT OFF AND SHOOK WATER OFF OF IT,

DIDN'T SAY A WORD, YOU COULD SAY IT MUST BE RAINING OUTSIDE MIGHT NOT BE THEY JUST STEPPED UNDER THE SHOWER OR SOMETHING ANYWAY, DIRECT EVIDENCE IS WHERE YOU TAKE A PROVEN FACT OR FACTS AND FROM THAT YOU MAKE A REASONABLE CONNECTION TO DRAW AN INFERENCE AS TO THE EXISTENCE OF ANOTHER FACT INFERENCES, OF COURSE, MUST BE REASONABLE YOU CAN'T MAKE A WILD FETCH OF SOMETHING OR ANOTHER SO THAT'S IT DIRECT EVIDENCE IS THROUGH THE SENSES INDIRECT EVIDENCE IS WHERE FROM A PROVEN FACT YOU INFER THE EXISTENCE OF ANOTHER FACT, THE SAME FOOTING AS FAR AS THE TRIAL IS CONCERNED

I EXPLAINED TO YOU AT THE START THE LEGISLATURE CLASSIFIES VARIOUS SUBSTANCES AS CONTROLLED SUBSTANCES AMONG THE SUBSTANCES THAT ARE CLASSIFIED AS A CONTROLLED SUBSTANCE IS COCAINE SO IT'S UNLAWFUL FOR AN INDIVIDUAL TO POSSESS A CONTROLLED SUBSTANCE UNLESS YOU ARE OTHERWISE AUTHORIZED BY LAW TO POSSESS IT, SUCH AS YOU HAVE A VALID PRESCRIPTION THAT'S BEEN HANDED OR BEEN HANDED TO YOU BY A PHYSICIAN OR A PHARMACIST OR YOU ARE A PERSON AUTHORIZED TO TRANSPORT A DRUG FROM POINT A TO POINT B

IF YOU HAVE A DRUG IN YOUR POSSESSION OTHERWISE, YOU ARE GUILTY OF POSSESSION OF A CONTROLLED SUBSTANCE, AND THAT'S EVEN -- YOU KNOW, IF YOUR MOTHER HAS A PRESCRIPTION FOR TYLENOL II AND YOU HAVE A HEADACHE AND GIVES IT TO YOU AND YOU GET STOPPED, I'M SORRY YOU DIDN'T HAVE IT -- THAT'S A

CONTROLLED SUBSTANCE THAT YOU DIDN'T HAVE A PRESCRIPTION FOR, AND YOU WOULD ACTUALLY BE GUILTY OF POSSESSION OF A CONTROLLED SUBSTANCE THE LEGISLATURE CLASSIFIED MANY SUBSTANCES AS CONTROLLED, AND AMONG THOSE ARE COCAINE

NOW, I EXPLAINED TO YOU THAT THE TRAFFICKING IN THIS CASE - IT COULD BE DIFFERENT IN OTHER CASES - IS BASED SOLELY ON THE WEIGHT OF THE COCAINE BUT BEFORE A WEIGHT CAN EVEN BE CONSIDERED, IT'S INCUMBENT ON THE STATE TO PROVE THAT THE DEFENDANT HAD POSSESSION OF THE CONTROLLED SUBSTANCE FIRST, THE STATE MUST PROVE, IN ORDER TO GET A CONVICTION BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT HAD COCAINE IN HIS POSSESSION THAT THE SUBSTANCE WAS IN FACT, COCAINE, AND THAT HE KNEW IT WAS COCAINE ALL RIGHT

POSSESSION CAN BE PROVED AS ACTUAL POSSESSION OR CONSTRUCTIVE ACTUAL POSSESSION, JURORS, IS WHERE A PERSON HAS REAL PHYSICAL CUSTODY OF THE OBJECT IN QUESTION IN OTHER WORDS IT'S ON HIS PERSON OR WITHIN HIS OR HER GRASP AT THAT POINT CONSTRUCTIVE POSSESSION MEANS THAT A DEFENDANT HAS THE RIGHT TO EXERCISE DOMINION AND CONTROL OVER THE SUBSTANCE OR HAS THE RIGHT TO EXERCISE DOMINION AND CONTROL OVER THE AREA IN WHICH THE CONTROLLED SUBSTANCES WERE FOUND

PROOF OF POSSESSION, JURORS, REQUIRES MORE THAN PROOF OF MERE PRESENCE AT A PLACE WHERE DRUGS ARE FOUND THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD BOTH THE POWER, THAT IS, ACTUAL OR CONSTRUCTIVE CONTROL, AND

THE INTENT TO CONTROL THE SUBSTANCE AND ITS DISPOSITION OR USE AS I STATED, ACTUAL OR CONTROLLED OCCURS WHEN THE CONTROLLED SUBSTANCE IS FOUND IN THE ACTUAL PHYSICAL CUSTODY OF THE PERSON CHARGED CONSTRUCTIVE CONTROL OCCURS WHEN THE PERSON CHARGED WITH POSSESSION HAS DOMINION AND CONTROL OVER THE CONTROLLED SUBSTANCE OR DOMINION AND CONTROL OVER THE AREA IN WHICH THE DRUGS HAVE BEEN FOUND

MERE PRESENCE, AS I EARLIER STATED, OF A PERSON IN AN AREA WHERE AN OBJECT IS FOUND IS NOT ENOUGH IN AND OF ITSELF TO GIVE RISE TO THE NECESSARY INFERENCES, BUT IN CONSIDERING WHETHER THE STATE HAS MET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT, YOU CAN CONSIDER ALL EVIDENCE, DIRECT AND INDIRECT, BEARING ON THAT ISSUE NOW DON'T SEND BACK A QUESTION TO ME AND SAY WHAT DIRECT EVIDENCE IS THERE? THAT'S JUST EVIDENCE IN THE CASE ALL RIGHT

NOW, IN ADDITION TO PROVING -- IN ORDER TO OBTAIN A CONVICTION OF TRAFFICKING, THE STATE MUST GO FURTHER AND SHOW THAT THE WEIGHT OF THE SUBSTANCE, IN THIS CASE COCAINE, WAS IN EXCESS OF 28 GRAMS ALL RIGHT? NOW, THAT'S WHAT THE STATE HAS TO PROVE ON THE FIRST CHARGE OF TRAFFICKING IN COCAINE THE SECOND CHARGE WHICH IS -- IT'S CALLED DISTRIBUTING, SELLING, PURCHASING, MANUFACTURING DRUGS WITHIN A HALF MILE OF A SCHOOL OR A PARK, BUT I JUST WROTE ON HERE WHAT THE STATE ACTUALLY HAS TO PROVE I'M NOT SUGGESTING THAT THEY HAVE

THEY HAVE TO PROVE THAT THE DEFENDANT HAD IN HIS POSSESSION COCAINE AND THAT HE DIDN'T JUST HAVE IT IN HIS POSSESSION BUT THAT HE INTENDED TO DISTRIBUTE IT WITHIN ONE-HALF MILE OF A SCHOOL THE SCHOOL IN QUESTION IS BROAD RIVER ELEMENTARY SCHOOL ALL RIGHT SO TO OBTAIN A CONVICTION ON THIS CHARGE - AND I'M NOT SUGGESTING THAT THE STATE DOES - YOU WOULD FIRST HAVE TO FIND THE DEFENDANT GUILTY ON THE TRAFFICKING CHARGE WHICH ENCOMPASSES POSSESSION IF YOU DON'T FIND THAT HE HAD POSSESSION OF THE DRUGS, THEN YOU DON'T EVEN CONSIDER THE NEXT IF YOU FIND THAT HE HAS POSSESSION OF THE DRUGS, YOU'D HAVE TO MAKE A COUPLE OF DETERMINATIONS IN ORDER TO FIND A CONVICTION, AND THE STATE HAS TO PROVE EACH OF THOSE BEYOND A REASONABLE DOUBT

THEY MUST PROVE, THEY BEING THE STATE THAT THE DEFENDANT HAD POSSESSION OF COCAINE WITHIN A HALF MILE OF THE BROAD RIVER ELEMENTARY SCHOOL, BUT NOT ONLY DID HE HAVE POSSESSION OF IT IN BEAUFORT COUNTY, SOUTH CAROLINA, BUT THAT HE INTENDED TO DISTRIBUTE IT GOT TO GO FURTHER THEY CAN'T JUST PROVE THAT HE HAD IT IN HIS POSSESSION THEY'VE GOT TO PROVE BEYOND A REASONABLE DOUBT THAT HE INTENDED TO DISTRIBUTE IT

DISTRIBUTE SIMPLY MEANS DELIVER OTHER THAN BY ADMINISTERING A DRUG TO ANOTHER PERSON IT'S SELLING, TRANSFERRING, GIVING TO ANOTHER PERSON A CONTROLLED

SUBSTANCE IT'S SOMETIMES EASIER TO PROVE THAT A PERSON DISTRIBUTED SOMETHING THAN IT IS TO PROVE THAT THEY INTENDED TO DISTRIBUTE IT YOU CAN CONSIDER A CIRCUMSTANTIAL ISSUE ON THAT BURDEN OF PROOF THAT THE STATE HAS

IN ORDER TO PROVE THAT THE DEFENDANT INTENDED TO DISTRIBUTE THE CONTROLLED SUBSTANCE, THE STATE MUST FIRST PROVE THAT THE DEFENDANT POSSESSED A CONTROLLED SUBSTANCE SECOND, THAT THE DEFENDANT'S POSSESSION OF THE CONTROLLED SUBSTANCE WAS KNOWING OR INTENTIONAL AND, THIRD, THAT THE DEFENDANT POSSESSED IT WITH AN INTENT TO DISTRIBUTE THE CONTROLLED SUBSTANCE IT'S REAL EASY, JURORS YOU KNOW, IF LAW ENFORCEMENT COMES UP AND SOMEBODY SAYS, "OH, NO YOU'VE GOT THESE DRUGS YOU'RE GOING TO TAKE THESE DRUGS FROM ME THAT I WAS GOING TO SELL TO SO-AND-SO DOWN THE STREET," YOU KNOW THEN WE DON'T HAVE THOSE TRIALS ALL RIGHT? WE DON'T HAVE THOSE TRIALS THAT WOULD BE DIRECT EVIDENCE OF THAT

BUT WHEN YOU GET INTO THE AREA OF CIRCUMSTANTIAL EVIDENCE, THE LEGISLATURE SAID THAT WHERE AN INDIVIDUAL POSSESSED MORE THAN 10 GRAINS OF COCAINE, AN INFERENCE COULD ARISE THAT THE PERSON WHO HAD THE COCAINE INTENDED TO DISTRIBUTE IT, BUT THAT'S A PERMISSIBLE INFERENCE IT'S JUST EVIDENCE IN THE CASE IT DOES NOT REQUIRE YOU JURORS TO INFER THAT THE INDIVIDUAL, EVEN IF THEY HAD POSSESSION OF THAT MORE THAN 10 GRAINS OF COCAINE, WOULD ACTUALLY BE PLANNING TO SELL IT OR DISTRIBUTE IT

NOW, I KNOW Y'ALL ALL HAVE BEEN TO SCHOOL A GRAIN, AS YOU RECALL, IS ONE-FIFTEENTH OF A GRAM THEREFORE 10 GRAINS OF COCAINE WOULD EQUAL TWO-THIRDS GRAMS OF COCAINE SO IF A PERSON HAS 10 GRAINS WHICH IS TWO-THIRD GRAMS OF COCAINE, THE INFERENCE COULD ARISE THAT THEY INTENDED TO SELL IT AND DISTRIBUTE IT GIVEN THE WEIGHT, BUT IT'S JUST A PERMISSIBLE INFERENCE IT'S NOT SOMETHING THAT YOU ARE BOUND TO ACCEPT

SO BOTTOM LINE IN ORDER TO OBTAIN CONVICTIONS ON THE TRAFFICKING CHARGE, THE STATE MUST CONVINCE YOU BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD 28 GRAMS OF COCAINE IN HIS POSSESSION IN BEAUFORT COUNTY, POSSESSION BEING ACTUAL OR CONSTRUCTIVE REMEMBER THAT MERE PRESENCE AT A SCENE WHERE DRUGS ARE FOUND STANDING ALONE CAN NEVER SUPPORT A CONVICTION

IF YOU FIND THE DEFENDANT GUILTY, AND I'M NOT SUGGESTING THAT YOU DO, THEN YOU CAN CONSIDER THE SECOND CHARGE OF POSSESSION WITH INTENT TO DISTRIBUTE WITHIN A HALF MILE OF THE SCHOOL IN QUESTION YOU COULD FIND THE DEFENDANT GUILTY OF POSSESSION OF TRAFFICKING AND STILL NOT FIND HIM GUILTY OF POSSESSION WITH INTENT TO DISTRIBUTE WITHIN A HALF MILE OF A SCHOOL IF YOU FIND THE STATE HAS NOT CONVINCED YOU THAT HE INTENDED TO DISTRIBUTE THE DRUGS WITHIN A HALF MILE OF A SCHOOL

OF COURSE, I'M JUST GIVING YOU SOME THINGS ON THAT JUST BECAUSE YOU FIND HIM GUILTY OF ONE DOES NOT MEAN YOU

NEED TO FIND HIM GUILTY OF THE OTHER HOWEVER, IF YOU FIND HIM NOT GUILTY OF TRAFFICKING, YOU CANNOT FIND HIM GUILTY OF POSSESSION WITH INTENT TO DISTRIBUTE UNDER THE FACTS OF THIS PARTICULAR CASE AS HAVE BEEN PRESENTED

SO BEYOND THAT, JURORS, WHILE YOU DELIBERATE, YOU'LL HAVE WITH YOU THE VERDICT FORMS THE ORDER IN WHICH THE VERDICT IS TYPED HAS NO BEARING THERE ARE ONLY TWO WAYS TO SAY IT NOT GUILTY OR GUILTY, GUILTY OR NOT GUILTY THAT'S FOR Y'ALL TO DECIDE IF YOU FIND HIM NOT GUILTY, YOU WOULD CIRCLE OR UNDERLINE THAT, MR FOREMAN IF YOU FIND HIM GUILTY, THE SAME, JUST SO WE WOULD UNDERSTAND YOU DON'T PUT A CHECK RIGHT BETWEEN THEM, WE WOULDN'T KNOW YOU UNDERLINE OR CIRCLE WHATEVER YOU FIND, AND 12 JURORS HAVE TO AGREE UNANIMOUSLY, BUT I DO NOT NEED 12 SIGNATURES ONLY THE FOREPERSON SIGNS

WE WILL SEND BACK ANYTHING THAT HAS BEEN OFFICIALLY INTRODUCED INTO EVIDENCE AND DON'T START DELIBERATING QUITE YET I HAVE TO CONFER WITH THE ATTORNEYS I KEPT IT PRETTY SHORT THEY MIGHT WANT ME TO AMPLIFY SOMETHING OR, I MEAN, I COULD HAVE MISSPOKE IT MIGHT NOT BE THE FIRST TIME ALTERNATE JUROR, HANG IN HERE THE REST OF Y'ALL STEP OUT

(WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 2 29 P M , AND THE ALTERNATE WAS EXCUSED FROM THE TRIAL)

THE COURT ALL RIGHT DO YOU NEED ANYTHING ELSE?

MR BANNON NO, YOUR HONOR

MR DEYSACH NO, YOUR HONOR I JUST I GUESS RENEW THE OBJECTION I HAD TO THE CONSTRUCTIVE POSSESSION CHARGE, AND ANY AND ALL MOTIONS AND OBJECTIONS THAT WERE MADE DURING THE TRIAL I WANT TO RENEW THOSE RIGHT NOW

THE COURT ALL RIGHT YOU'VE RENEWED THEM, AND EVEN AFTER CAREFUL CONSIDERATION I OVERRULE THEM

MR DEYSACH THANK YOU

THE COURT OR DENY THEM THE EVIDENCE HE WANTS TO TAKE IT BACK TELL THEM START DELIBERATING

BAILIFF YES, SIR

(WHEREUPON THE JURY BEGAN DELIBERATING AT 2 32 P M)

THE COURT OKAY BRING THEM IN

(WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AT 3 19 P M)

THE COURT OKAY JURORS, I DIDN'T SEND THE INDICTMENTS BACK TO TRY NOT TO CONFUSE YOU BECAUSE OF ALL THE LANGUAGE IN THERE YOU SAY, "WHAT'S THE DIFFERENCE BETWEEN TRAFFICKING AND THE INTENT TO DISTRIBUTE?" IF YOU'VE GOT 28 OR MORE GRAMS OF CRACK COCAINE IN YOUR POSSESSION, YOU COULD -- YOU COULD INFER, BUT YOU DON'T HAVE TO, THAT THE PERSON THAT HAD THAT MUCH INTENDED TO DISTRIBUTE IT DISTRIBUTE MEANS TO SELL GIVE AWAY, OR TRANSFER, BUT THAT'S JUST AN INFERENCE ONE CAN DRAW

INFERENCE STARTS WHEN A PERSON HAS 10 GRAINS OF COCAINE OR MORE, AND 28 GRAMS IS OBVIOUSLY MORE THAN 10 GRAINS, BUT

STATE OF SOUTH CAROLINA) FOURTEENTH JUDICIAL CIRCUIT
) IN THE GENERAL SESSIONS COURT
COUNTY OF BEAUFORT)

J311263

Case No 09 GS-07-0196

State of South Carolina,

v

Diamon D Tripp

Defendant

POST-TRIAL MOTION FOR NEW TRIAL

2009 OCT 29 AM 11 06
BEAUFORT COUNTY S.C.
CLERK OF COURT

This matter comes before the Court on Defendant s Post-Trial Motion for New Trial The Defendant was originally tried by jury, said trial beginning on October 26, 2009 That trial lasted until October 27, 2009 at which time the jury returned a verdict finding the Defendant guilty of one count of Trafficking Cocaine 44 53 370(e)(2)(b)(1) Subsequent to the jury s verdict and before sentencing Defense counsel renewed its motion for directed verdict and its objection to the jury charge of constructive possession After hearing from the parties the Court sentenced the Defendant to a twelve (12) year sentence for Trafficking Cocaine

The Defendant files this post-trial motion pursuant to Rule 29 of the S C Rules of Criminal Procedure The Defendant respectfully moves that the Court grant the Defendant a New Trial based on the following grounds

Motion for New Trial

During trial, following the denial of Defendant s request for a directed verdict the Defendant objected to the offering the charge of constructive possession to the jury The Defendant argued that the State failed to establish constructive possession and therefore the

charge should not have been given to the jury The Defendant resubmits this argument for consideration in this post trial motion for new trial

The Defendant believes the charge of constructive possession should not have been given to the jury in that 1) the State made the statements before this court that their case was proceeding as a "drop case which insinuates actual possession and 2) the charge of constructive possession is only appropriate when the State provides evidence that Defendant can "exercise dominion and control" over the area where the illegal substance is found

Relevant case law shows that '[t]he trial judge should charge only the law applicable to the case State v Tan, 209 S C 439, 40 S E 2d 634, 637 (1946) The Court further warned that [p]roviding instructions to the jury which do not fit the facts of the case may tend to confuse the jury Id

The Defendant is speaking specifically not only of the failure of the Court to grant Defendant's motion for a directed verdict but on over ruling Defendant s objection to allowing the jury to consider the charge of constructive possession

The State alleges that the Defendant violated South Carolina Code section 44-53-370(e)(2)(b)(1) a "person who knowingly in actual or constructive possession of 28 grams or more of cocaine is known as trafficking in cocaine

The record reflects that grams of cocaine were found in the parking lot of Studio 7 nightclub The State contends that the Defendant was in actual possession of the cocaine and at one point in time "tossed it" Therefore the charge put to the jury should be that of 'actual possession' and not that of ' constructive possession'

The State did not prove actual possession" of cocaine by the defendant for the purposes of conviction for Trafficking Cocaine, where the evidence established that drugs were found in a bag on the ground near where Defendant was arrested but none of the officers saw Defendant take anything from his pocket and drop it, nor did any officer see anything fall from his pocket

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Similarly in State v Ballenger, 317 S C 364, 454 S E 2d 355, 367, the Court held these similar facts ' failed to prove actual possession and therefore the state was required to prove constructive possession "

The Ballenger court addressed the issue of constructive possession holding that constructive possession requires a showing that the accused had *dominion and control over either the drugs of the premises upon which the drugs were found as well as knowledge of the presence of the drugs* Mere presence in the area where drugs are found does not constitute constructive possession ' 317 S C at 367

Applying these standards the record does not contain evidence of constructive possession the State failed to prove constructive possession Therefore the charge was not applicable to the case

The Defendant would note that the closest case on point to the current situation is State v. Heath 370 S C 326, 635 S E 2d 18 (2006) In Heath, the appellant and his mother lived in a house owned by his mother When the police arrived to execute a search warrant the appellant was outside the house appearing to have just finished washing his car A police dog discovered a car-washing mitt in a recycling bin near the back door of the house containing 43 48 grams of crack cocaine

The Court held that the trial court erred in failing to direct verdict in favor of Appellant because the State failed to establish an essential element of the crime To ' **establish constructive possession by either circumstantial or direct evidence knowledge and possession may be inferred** ***if the substance was found on premises under his control*** (emphasis added) Heath, 370 S C at 329 In Heath, the State presented no direct or circumstantial evidence linking Appellant to the 43 48 grams of crack in that it failed to "demonstrate Appellant could exercise dominion and control over the area where the crack was found " Id

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In Heath, the Appellant *lived in the home* owned by his mother, the crack was found in a car-wash mitt and he was observed having just finished washing his car Despite those facts, the Court held that the Appellant "**merely had a right to access the area where the crack was found and not actual dominion and control of the property**" (emphasis added) 370 S C at 330

In the present case, the Defendant, did not live where the cocaine was found, it was in a public parking lot and the State failed to prove that the Defendant could exercise dominion and control over the area where the cocaine was found Defendant even more so than in Heath, **merely had a right to access the area where the cocaine was found and not actual dominion and control of the property**

The Defendant believes that the denial of the directed verdict followed by allowing the jury to consider the charge of 'constructive possession' have affected the fundamental fairness of the Defendant's trial in that the law to be charged to the jury is determined by the evidence at trial ' State v Knotts, 347 S C 296, 302 555 S L 2d 391, 394 (2001)

By providing instructions to the jury which do not fit the facts and evidence presented can only tend to confuse the jury In reviewing a jury charge for alleged error "[a]n appellate court must consider the charge as a whole in light of the evidence and issues presented at trial Wells v Halvard 341 S C 234 533 S E 2d 341 (Ct App 2000) 'Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence" Id Fernandez v. Marks Constr Of S C , Inc 330 S C 470 (Ct App 1998) In Burns v South Carolina Commission for the Blind, 323 S C 77 (Ct App 1994), the Court of Appeals for South Carolina held

> If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error

The Defendant would argue that the converse principle would also be correct in that if jury instructions given are "insufficient to enable the jury to understand fully the law of the case and issues involved" then they should not be provided for the jury to consider

To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice Cole v Ruat, 378 S C 398 (2008) The Defendant believes the charging of "constructive possession" was in error as it was not applicable to the case to enable the jury to understand fully the law of the case but that it also demonstrates prejudice in that clearly the Defendant could not have been found guilty as having "possession of the of cocaine

As such the Defendant believes it was reversible error for the Court to charge the jury with "constructive possession" over the Defendant's objection and the Defendant requests a new trial

Based on the arguments above, the Defendant respectfully requests the Court order a new trial in this case

Respectfully submitted

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October 29, 2009

WITNESSES

Certified A True Copy
Beaufort County SC Clerk of Court
Rodriguez/BCSO

ARREST WARRANT NUMBER

J347263

ACTION OF GRAND JURY

True Bill

Angela Courtney
Foreperson of Grand Jury

Date 10/22/09

VERDICT

Foreperson of Petit Jury

Date

INDICT

146

DOCKET NO 2009GS0700196

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

October Term 2009

THE STATE

vs

Diamon D Fripp

Indictment for

Drugs / Trafficking in Cocaine 28 g or more,

SC Code 44 53-0370(e)(2)(b)(1)
CDR Code 2359

After being fully advised as to my legal rights I hereby waive presentment to the Grand Jury

Defendant

I

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness

C C C PLS and G S

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2009GS0700196

At a Court of General Sessions, convened on October 22, 2009, the Grand Jurors of Beaufort County present upon their oath

Drugs / Trafficking in Cocaine - 28 g or more,

That in Beaufort County South Carolina on or about January 1 2009 the Defendant Diamon D Fripp unlawfully and knowingly did sell manufacture cultivate deliver purchase or bring into this State or did provide financial assistance or otherwise aid abet attempt or conspire to sell manufacture cultivate deliver purchase or bring into this State or did possess or attempt to possess a controlled substance or a controlled substance analogue to wit Cocaine in excess of 28 grams in violation of 44 53 370 of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State and contrary to the statue in such case made and provided

True Bill

Solicitor

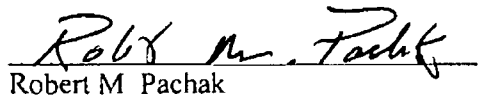
Certified - A True Copy

[redacted] Clerk of Court
Beaufort County SC

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the August 13, 2007, order from the South Carolina Supreme Court entitled 'Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings"

January 21st, 2011



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DIAMOND TRIPP,

APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I Whether appellant's statement made after he was arrested and was shown a bag of white powdery substance by Officer Rodriguez and before Miranda rights had been given, should have been suppressed because showing appellant the powder was likely to elicit a response and was the functional equivalent of interrogation?

II Whether the trial court erred in refusing to suppress $600 and rocks seized after appellant was arrested for fleeing to evade arrest because appellant was acquitted of that charge in magistrate's court?

III Whether the trial court erred in charging the jury on actual and constructive possession when the case was an actual possession case?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in cocaine after a jury trial held before the Honorable J. Ernest Kinard on October 26-27, 2009, in Beaufort County. A sentence of twelve (12) years and a fine of $50,000 was imposed.

This appeal follows.

FACTS RELATING TO SUPPRESSION MOTION ISSUES

At the suppression hearing, Sgt Rodriguez with the Beaufort County Sheriff's Office testified that on January 1 2009 he received a call around 2 00 AM while on patrol about a disturbance in the parking lot of the Studio Seven nightclub There was a man wearing blue causing some form of disturbance (ROA p 2, lines 3 24) When he arrived at the nightclub parking lot, he saw a male with a blue shirt with his back to the patrol vehicle The male looked over his shoulder at the patrol vehicle and started walking away (ROA p 3, lines 5-19) Sgt Rodriguez proceeded after him, whistled, and told the man "Hey, come here Can I talk to you?" The man turned around and looked at the officer He turned back around and started walking away at a faster pace between parked cars Sgt Rodriguez followed in the same general direction and called out, "Sheriff's office Stop" or "Stop, Sheriff's office (ROA 4 lines 3 24) The man did not stop and continued on his way Sgt Rodriguez indentified the man as appellant He said he observed appellant cut across a row of parked cars, cut across a pathway and run behind a black pickup truck (ROA p 5 lines 2-17)

Appellant then started coming back towards Rodriguez The officer could not see appellant's hands so he drew his service revolver and ordered appellant to show his hands Appellant said "You got nothing on me I don't got any drugs" Eventually he showed his hands Rodriguez took him into custody and put him in handcuffs (ROA p 5 line 22 – p 7 line 3) Appellant was searched and he had around $600 in his pocket and some stones The stones were placed on the trunk of the patrol car and appellant tried to scoop them in his mouth Rodriguez tested the stones and they did not react to his cocaine analysis kit Appellant was placed in another patrol car A search of the area was performed and Officer

Moody found a bag of white powdery substance that field tested positive for cocaine (ROA p 7 line 7 – p 9 line 2) When appellant was initially arrested he asked, 'What are you arresting me for?' The sergeant told him, 'For fleeing to evade arrest' He then showed him the bag of cocaine and appellant said, 'I don't know anything about that cocaine' (ROA p 9 lines 14-25) Rodriguez called the area a high crime area but agreed that he did not Mirandize appellant (ROA p 10, lines 1 12)

ARGUMENT I

Appellant's statement made after he was arrested and was shown a bag of white powdery substance by Officer Rodriguez and before Miranda rights had been given, should have been suppressed because showing the appellant the powder was likely to elicit a response and was the functional equivalent of interrogation

When appellant was arrested he asked for what and Sgt Rodriguez told him for fleeing to evade arrest ' The Sgt Rodriguez showed him the bag of white powder and told him, You're being charged with this Appellant then replied, I don't know anything about that cocaine (ROA p 9 lines 14 22) The solicitor brought up this statement later twice in his opening argument three times on direct examination of Sgt Rodriguez and twice in closing argument (ROA p 25 lines 6 17 ROA p 46 lines 7 16 ROA p 105, lines 13-18)

Defense counsel moved to suppress this statement by appellant Appellant was already arrested and placed in a patrol car He was not Mirandized Sgt Rodriguez showed him a white bag of powder and told appellant he was being charged with it (ROA p 12, line 21 – p 13 line 2) The trial court ruled that the statement could come in Apparently if appellant had mentioned a specific amount of cocaine it would not have been admissible in the trial court's understanding! (ROA p 13, lines 3-6) That ruling was in error

To interrogate someone in custody without warning them of their constitutional rights is a violation of the Fifth and Fourteenth Amendments Miranda v Arizona 384 U S 436 86 S Ct 1602 (1966) In Rhode Island v Innis 446 U S 291 100 S Ct 1682 (1980) the Court held that the term interrogation under Miranda refers not to express questioning but also to any words or actions on the part of the police that the police should know are

reasonably likely to elicit an incriminating response from the suspect[1] The latter portion of this definition focuses primarily upon the perceptions of the suspect rather than the intent of the police 446 U S at 301 100 S Ct at 1689 – 1690 When Sgt Rodriguez showed the bag of white powder to appellant and at the same time told him he was going to be charged with it he expected a reaction Appellant s statement was a normal response The fact that appellant s statement may be viewed as exculpatory does not protect the State because the prosecution loves to turn such statements around to impeach a defendant's testimony or to show untruths in the statement Rhode Island v Innis, 446 U S at 302, 100 S Ct at 1682 (footnote 5) Appellant s statement should not have been admitted

[1] The Court noted on this point that By incriminating response we refer to any response whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial 466 U S at 302 100 S Ct at 1690

ARGUMENT II

The trial court erred in refusing to suppress $600 and rocks seized after appellant was arrested for fleeing to evade arrest because appellant was acquitted of that charge in magistrate's court

Defense counsel sought to suppress the cash and rocks seized after appellant was arrested for fleeing to evade arrest because the magistrate court directed a verdict of not guilty on that charge Because there was no probable cause for the arrest, the search was illegal (ROA p 14 line 12 – p 21 line 17) The trial court said, Maybe it should be (suppressed) but I'm not going to rule that way (ROA p 19, lines 15-16) The solicitor brought up the cash and rocks in his opening argument, on his direct examination of Sgt Rodriguez, and in his closing argument (ROA p 24 lines 13-14 ROA p 42 lines 10-18, ROA p 103 lines 19-20 ROA p 105, lines 4 9) The trial court's decision to let the cash and rocks into evidence was error

The exclusion of evidence obtained by an illegal arrest, search, or seizure in violation of the Fourth Amendment is a proper remedy and such evidence may not be used to prove guilt Wong Sun v United States, 371 U S 471 83 S Ct 407 (1963)

ARGUMENT III

The trial court erred in charging the jury on both actual and constructive possession because the case was an actual possession case

The State's theory of this case was that appellant had drugs on his person and then dropped the drugs near a pickup truck No one actually saw appellant with drugs or drop the drugs In State v Ballenger, 322 S C 196, 470 S E 2d 851 (1996) the Court ruled that this type of case would be one of actual possession provable by circumstantial evidence The Court went on to state that constructive possession was not applicable The trial court announced in this case that it was going to charge on both actual and constructive possession Defense counsel objected to constructive possession being charged prior to the charge (ROA p 101, line 7 – p 102 line 8) after the charge (ROA p 137 lines 1-4) and in a post trial motion for a new trial

In State v Rivers 186 S C 221, 196 S E 6 7 (1938) the Court said In charging a jury, the circuit judge should be cautious to charge only the law which is applicable to the case as made by the facts, for under some circumstances a mass of inapplicable law burdened upon the juror's mind may lead to great confusion ' The facts in appellant's case did not support a charge on constructive possession and the jury could therefore have assessed guilt on an improper basis

CONCLUSION

Appellant's conviction should be reversed and a new trial ordered.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of February, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b) SCACR and the August 13 2007 order from the South Carolina Supreme Court entitled Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

February 10th 2011

Robert M Pachak
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

J Ernest Kinard Jr Circuit Court Judge

THE STATE,

RESPONDENT,

V

DIAMOND TRIPP

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold M Coombs Jr Esquire at Rembert Dennis Building, 1000 Assembly Street Room 519 Columbia, SC 29201 this 10th day of February 2011

Robert M Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of February 2011

Felicia K Berry (L S)
Notary Public for South Carolina
My Commission Expires June 21 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
Honorable J Ernest Kinard Circuit Court Judge

THE STATE

Respondent

vs

DIAMOND FRIPP,

Appellant

FINAL BRIEF OF RESPONDENT

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State v Franklin 299 S C 133 382 S E 2d 911 (1989) 6

State v Winestock 271 S C 473 248 S E 2d 307 (1978) 8

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STATEMENT OF ISSUES ON APPEAL

1 The defendant says that police arresting him and showing him a bag of white substance was likely to elicit a response and was the functional equivalent of interrogation The defendant concludes that his statement before Miranda warnings should have been suppressed (Defendant's Statement of Issues on Appeal I)

2 The defendant says he was acquitted of fleeing to evade arrest and asks whether the court erred by declining to suppress six hundred dollars and rocks that were seized after his arrest for that offense (Defendant s Statement of Issues on Appeal II)

3 The defendant says his case was one of actual possession and asks whether the court erred in charging actual and constructive possession (Defendant's Statement of Issues on Appeal III)

STATEMENT OF THE CASE

The Grand Jury of Beaufort County charged the defendant with trafficking cocaine (2009 GS-07-0196) The defendant and his counsel came to trial October 26-27 2009 before the Honorable J Ernest Kinard Jr Judge and a jury The jury found the defendant guilty and the court imposed a sentence of twelve years imprisonment and a fine of fifty thousand dollars The defendant served opposing counsel a timely notice of appeal

STATEMENT OF FACTS

Officer Rodriguez responded to Studio Seven nightclub in the early hours of January 1 2009 and its reported disturbance involving a very belligerent black male dressed in blue who was refusing to leave On arriving at the scene the owner of the club pointed at the defendant and the officer attempted to approach and to investigate The officer called out The defendant turned and looked at him and attempted to get away The officer identified himself but the defendant continued to flee some four hundred feet and ran behind a black pickup truck The defendant came from the back of the truck toward the officer and looked like he wanted to pass by the officer The officer could not see the defendant s hands and as an officer safety issue drew his weapon Although nothing had been said about drugs the defendant declared 'I have no drugs ' The owner of the club came out and tried to encourage the defendant to cooperate The defendant did not cooperate Finally the officer handcuffed the defendant Officers searched and found about $594 crumpled cash and eight or nine rocks and placed the items on the trunk of the car The handcuffed defendant attempted to recover possession of the rocks by gathering them with his mouth The defendant was put into the back of an officer s car The defendant continued acting out including unnecessary verbal statements At Rodriguez s direction Officer Mooney and a drug dog found a bag of white powdery substance among freshly disturbed pine straw - like somebody had tried to bury it - right behind the truck where Officer Rodriguez had seen the defendant A field test showed it was positive for cocaine but nothing was said to the defendant Officer Rodriguez showed the bag of white substance to the defendant and stated, I m charging you with this ' The defendant said, 'I don t know anything about that cocaine ' A field test of the rocks was consistent with their being rocks (ROA pp 31-51

57 58, 62-63 67-69 The white substance was a valuable quantity (34 35 grams) of cocaine (ROA pp 88-89 97 98)

ARGUMENT

I

The defendant does not show any contemporaneous trial objection to the statement that he raises on appeal

In limine the defendant thought the court might consider the defendant's mention of cocaine not voluntary since it was elicited by showing him the substance The court did not agree and found the statement admissible (ROA p 12 line 14-p 13 line 14)

On appeal the defendant says that his statement about cocaine was improperly admitted into evidence since it was the product of the functional equivalent of interrogation and there had been no Miranda warnings The defendant does not show where he raised a contemporaneous objection to the testimony at trial, and the matter should not be considered further A brief must reference the Record on Appeal to support the facts alleged and 'where relevant objections and rulings occurred in the transcript " Rule 207(b)(4), SCACR In limine motion hearings are for the purpose of preventing prejudicial matter coming before the jury but they are not final rulings on the admissibility of evidence State v Floyd, 295 S C 518 369 S E 2d 842 (1988)(Chandler J , observing peril of treating an in limine ruling as final), State v Forrester 343 S C 637, 541 S E 2d 837 (2001)(motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination)

Assume for argument the appellate court may consider the substance of the assignment of error The in limine hearing demonstrated that showing the defendant the substance was responsive to the defendant's asking to be apprised of the charges (ROA pp 8-9, 11 12) The officer's response was not of such nature that the officer should have

known that it would elicit a response that a prosecutor would want to use at trial The trial court s ruling is supported by the record and there was no error State v Franklin 299 S C 133 382 S E 2d 911 (1989) Rhode Island v Innis, 446 U S 291 100 S Ct 1682 64 L Ed 2d 297 (1980)

II

The defendant identifies no contemporaneous trial objection to the introduction of the rocks and money

The defendant says the court should not have admitted a quantity of cash and rocks found during a search when there was supposedly no probable cause for the arrest after a summary court had directed a verdict of not guilty for the offense of fleeing to evade arrest (IBOA p 9)

Officer Rodriguez testified at trial to making a search incident to arrest and finding cash and rocks on the defendant s person (ROA pp 42-44) Again the defendant does not identify on appeal where at trial he raised a contemporaneous trial objection and the matter should not be considered further by the appellate court

Assume for argument that the appellate court may consider the substance of the assignment of error

In limine the defendant moved to exclude any reference to his fleeing or suspicious behavior that related to the offense of fleeing to evade arrest and detention since a summary court judge [after the case had gone to the jury and the jury had not agreed on a verdict] had supposedly granted a directed verdict, and collateral estoppel barred testimony which could support the summary court charge The defendant thought there was no probable cause The defendant alleged that in ruling on a motion for directed verdict the summary court judge had found no probable cause for arrest and did not want "anything that would relate to the charge that the judge found no probable cause for The judge declined to exclude testimony about the facts and circumstances that the officer observed (ROA p 14 line 12-p 18 line 22) Also the defendant moved to prevent Officer Menendez from making a statement about drug

money - apparently on the basis that the rocks were not drugs and it would be prejudicial to insinuate that he was taking them for drug money ' The court denied the motion (ROA p 18 line 23 p 19)

First defense counsel s verbal account of the summary court proceeding apparently without presenting the trial judge with any summary court order or summary court record leaves the appellate court with nothing to review State v Winestock 271 S C 473, 248 S E 2d 307 (1978)(appellant has the burden of presenting a sufficient record for appellate review) Further reviewing counsel s account the summary court supposedly found a want of probable cause for arrest and supposedly granted a directed verdict after apparently finding direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused and submitting the case to the finder of fact The account may raise questions about the summary court s view of the arrest testimony which might have been reconsidered as ground for possible suppression of other evidence, the possible effect of the summary court jury's inability to agree on a verdict the summary court s view of the charged offense in light of the evidence adduced at trial, and whether the purported directed verdict after the jury's consideration of the evidence was a weighing of the evidence The account is difficult to understand

Assume that the defendant was acquitted of a summary court offense - supposedly fleeing to evade arrest based upon the police responding to the nightclub owner s request for assistance with a disturbance involving a very belligerent man who refused to leave the premises The owner identified the problematic man at the scene and the police investigated During their brief investigation the defendant went where he wanted to go freely articulated his view of the law thoughts about the status of the police investigation and odd

concern for drugs and the police articulated reasonable suspicion to concern themselves with the safety of the suspect and their own safety and continued to address the club owner's concern with a belligerent man who had refused to leave Meanwhile the police and their dog found a quantity of apparent contraband near where the defendant had been

The state did not re-litigate or rely upon the purported summary court fleeing to evade arrest issue in the court of general trial jurisdiction Facts and circumstances supported both reasonable suspicion to temporarily seize and to investigate and facts and circumstances supported probable cause to arrest for other offenses

III

The court soundly instructed the jury

The defendant objected to a charge on constructive possession since the drugs were found 30 feet away from him, and there was no evidence of dominion and control The court declined to adopt his reasoning (ROA pp 101-102 137 lines 1-7) The court instructed the jury on constructive (and actual) possession (ROA p 130 line 21- p 132, line 15)

Possession of contraband may be actual or constructive Actual possession of contraband is the actual physical custody of the substance, constructive possession of contraband is the exercising of dominion and control over either the substance or the premises where the substance is kept State v Ballenger, 322 S C 196, 470 S E 2d 851 and n 3 (1996)(where according to evidence and state s theory of its case the evidence reasonably tended to show actual possession in that the police saw the defendant apparently engaged in a drug transaction pursued him on foot, and found twenty-nine units of crack laying on the ground out in the open, near where defendant fell)

In the present case, the evidence could reasonably be understood to establish that before and while he attempted to hide them, the defendant had the drugs in his actual possession the jury charge on actual possession is not contested The evidence also tended to establish constructive possession The defendant exercised dominion and control of the contraband by hiding his valuable quantity of cocaine, convincing the officers through his theatrics that the benign rocks on the trunk of the patrol car were the contraband, and hoping to recover his hidden treasure at an opportune time

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment and conviction of the lower court be affirmed

Respectfully submitted

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January 26 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
Honorable J Ernest Kinard Circuit Court Judge

THE STATE

Respondent

vs

DIAMON D FRIPP

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR

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ATTORNEYS FOR RESPONDENT

177

January 26 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
Honorable J Ernest Kinard Circuit Court Judge

THE STATE,

Respondent

vs

DIAMOND FRIPP

Appellant

PROOF OF SERVICE

I, Harold M Coombs Jr, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail postage prepaid addressed to his attorney of record, Robert M Pachak Esquire South Carolina Commission of Indigent Defense Division of Appellate Defense P O Box 11589 Columbia SC 29211

I further certify that all parties required by Rule to be served have been served

This 26th day of January 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v

Diamon D Tripp, Appellant

Appeal From Beaufort County
J Ernest Kinard, Jr , Circuit Court Judge

Opinion No 4956
Heard February 15, 2012 – Filed March 21, 2012

REVERSED AND REMANDED

Robert M Pachak, of Columbia and Jared Sullivan Newman, of Port Royal, for Appellant

Attorney General Alan Wilson, Chief Deputy Attorney General John W McIntosh, Assistant Deputy Attorney General Salley W Elliott, and Senior Assistant Attorney General Harold M Coombs, Jr , all of Columbia, and Solicitor J McDuffie Stone, III, of Beaufort, for Respondent

KONDUROS, J Diamon Fripp appeals his conviction for trafficking in cocaine He maintains the trial court erred in admitting a statement he made to police and evidence of money and stones discovered during the search incident to his arrest for evading arrest He also argues the trial court erred in charging the jury on both actual possession of drugs and constructive possession We reverse and remand

FACTS

Beaufort County Sheriff's officer Sergeant Scott Rodriguez received a call to investigate a disturbance involving a male in a blue shirt in the parking lot of the Studio Seven Nightclub around 2 a m on January 1, 2009 Sergeant Rodriguez testified he observed a male in a blue shirt near the entrance to the club and saw the club's owner gesture toward the man in the blue shirt Sergeant Rodriguez called to the man, Fripp, asking if he could talk to him Fripp walked in the opposite direction of Sergeant Rodriguez, weaving through vehicles in the parking lot Sergeant Rodriguez then called to Fripp "Stop Sheriff's Office" or "Sheriff's Office Stop " According to Sergeant Rodriguez, Fripp continued moving away from him and disappeared behind a black pick-up truck and was out of sight for approximately ten seconds Fripp reappeared and then began walking in Sergeant Rodriguez's direction "as though he was going to pass by" him Sergeant Rodriguez could not see Fripp's hands and drew his weapon and ordered Fripp to the ground Fripp refused and stated "No, it's cold No, you got nothing on me I have no drugs " Sergeant Rodriguez was able to handcuff Fripp, and he searched him finding approximately $600 of crumpled bills in different denominations and some stones in his pockets When the stones were placed on the trunk of the patrol vehicle, Fripp attempted to gather the stones into his mouth Fripp was placed in the back of a second patrol vehicle that had arrived on the scene Another officer searched the area behind the black pick-up truck and found a baggie containing a white powdery substance that subsequently tested positive for cocaine Sergeant Rodriguez showed the baggy to Fripp and said, "You're getting charged with this " Fripp then stated, "I don't know anything about that cocaine "

At trial, Fripp sought to suppress evidence of the statement he made regarding cocaine arguing the statements were made without him having

received Miranda[1] warnings He also sought to suppress the money and stones discovered during the search, contending that because the resisting arrest charge had been dismissed in magistrate's court, any evidence found incident to his arrest on the charge was the result an unlawful search The trial court denied the motions Also, over Fripp's objection the trial court charged the jury on both actual and constructive possession of cocaine Fripp argued the evidence the State presented only supported a theory of actual possession Fripp was convicted and sentenced to twelve years' imprisonment This appeal followed

LAW/ANALYSIS

Fripp contends the trial court erred in charging constructive possession to the jury when the facts presented by the State could not have supported such an instruction We agree

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion " Cole v Raut, 378 S C 398, 404, 663 S E 2d 30, 33 (2008) "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence " Id "The law to be charged to the jury must be determined by the evidence presented at trial " State v Harris, 382 S C 107, 113, 674 S E 2d 532, 535 (Ct App 2009), see also Clark v Cantrell, 339 S C 369, 390, 529 S E 2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues ")

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found " State v Ballenger, 322 S C 196, 199, 470 S E 2d 851, 854 (1996) (citation omitted)

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[1] Miranda v Arizona, 384 U S 436 (1966)

The facts of this case present no basis for a jury charge of constructive possession Ballenger is the most instructive case regarding the distinction between actual and constructive possession In Ballenger, police received complaints that a male fitting Ballenger's description was selling drugs on a particular street corner in a high crime area Id at 197, 470 S E 2d at 852 When police arrived, they saw Ballenger, who fit the description provided, and observed him in what appeared to be a drug transaction Id at 197, 470 S E 2d at 853 When the authorities approached, they observed him put something in his pocket and run away Id He eventually fell after scaling a fence and was apprehended when he became entangled in barbed wire Id at 198, 470 S E 2d at 853 Crack rocks were found wrapped in newspaper about five feet from where he had fallen Id It appears the jury was charged as to both actual and constructive possession Id at 199-200, 470 S E 2d at 854 On appeal, Ballenger argued no evidence supported either theory and the court of appeals agreed [2] The South Carolina Supreme Court reversed the court of appeals finding the record contained sufficient evidence of actual possession to submit the case to the jury and upheld Ballenger's conviction Ballenger, 322 S C at 200, 470 S E 2d at 854 The court noted the State's case "hinged on proving actual possession" and specifically commented on the constructive possession theory in a footnote Id at 199-200, 470 S E 2d at 854 "Apparently Ballenger focused his argument to the [c]ourt of [a]ppeals on lack of constructive possession, although that court addressed both types of possession in its opinion However, the constructive possession theory is not applicable here, a fact which the solicitor admitted at trial " Id at 200 n 3, 470 S E 2d at 854 n 3

The facts in this case are similar to those in Ballenger in that the contraband was discovered in a public area over which Fripp had no dominion or control The State's theory, as in Ballenger, was that Fripp had actual possession of the drugs and tossed them when he disappeared behind the black pick-up truck Such a scenario means the constructive possession theory is not applicable and the giving of the constructive possession charge was erroneous

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[2] See State v Ballenger, 317 S C 364, 454 S E 2d 355 (Ct App 1995) (discussing the lack of proof as to Ballenger's actual or constructive possession of drugs) rev'd, 322 S C 196, 470 S E 2d 851 (1996))

However, in order to warrant reversal of Fripp's conviction, the giving of the instruction must have also been prejudicial[3] "Prejudice to the appellant's case is a prerequisite to reversal of a verdict due to an erroneous jury charge " State v Lee-Grigg, 374 S C 388, 415, 649 S E 2d 41, 55 (Ct App 2007) "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party " Berberich v Jack, 392 S C 278, 285, 709 S E 2d 607, 611 (2011) "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial " Cole, 378 S C at 404, 663 S E 2d at 33 "No definite rule of law governs finding an error harmless, rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case " Lee-Grigg, 374 S C at 414, 649 S E 2d at 55

In this case, the evidence upon which the State could rely in proving actual possession is entirely circumstantial Sergeant Rodriguez did not testify he observed Fripp in a drug transaction, saw him put anything in his pocket, or witnessed him drop anything while he was in the parking lot The dearth of direct evidence as to actual possession leaves us unable to discern on what basis the jury may have reached its verdict The jury charge as to constructive possession was irrelevant and inapplicable, had the potential to confuse the jury, and may well have affected the outcome of the trial Therefore, we conclude Fripp's conviction should be reversed and his case remanded for a new trial

Because the determination of this issue is dispositive, we decline to address Fripp's arguments as to the admission of his statement to Sergeant Rodriguez while in the rear of the patrol car and the admission of the cash and rocks found during the search incident to his arrest for evading arrest See Whiteside v Cherokee Cnty Sch Dist No One, 311 S C 335, 340, 428 S E 2d 886, 889 (1993) (the appellate court need not address remaining issues when previous issue is dispositive of appeal)

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[3] Any prejudice in the giving of the constructive possession charge does not appear to have been raised as an issue in Ballenger

Based on all of the foregoing, Fripp's conviction is

REVERSED AND REMANDED

PIEPER and GEATHERS, JJ , concur

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
Honorable J Ernest Kinard Jr , Circuit Court Judge

THE STATE

Respondent

vs

DIAMON D FRIPP

Appellant

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Petitioner submits with particularity points the Court may have overlooked or misapprehended in State v Fripp, Opinion No 4956 (S C Ct App filed March 21, 2012) and asks this Court to rehear the case

1 Police responded to a nightclub's request for service involving a disturbance and a person refusing to leave the premises At the club owner s instance, the police attempted to approach and to investigate the defendant, but the defendant fled with marked persistence and, at one point went behind a truck (FBOR pp 3-4)

2 Officers apprehended the defendant and he assured them with screams and curses that they had no evidence Searching the defendant police found just under $600 in crumpled cash and some eight or nine rocks" or stones ' in his pocket (FBOR pp 3-4, ROA pp 39-43, p 62 lines 1-5)

3 While handcuffed the defendant theatrically attempted to retrieve - with his mouth - the stones or rocks (FBOR pp 3 4)

4 Continuing the investigation at the scene a drug dog found a bag of white powdery substance (34 35 grams of cocaine) The cocaine was within freshly disturbed pine straw - like somebody had tried to bury it - right behind the truck where the defendant had gone (FBOR pp 3-4)

5 The rocks or stones from the defendant s pocket [which he apparently had attempted to eat], were field tested and tested by a forensic chemist They were not a controlled substance (FBOR pp 3 4 ROA p 46, line 24 p 47, line 2, 98 line 17 p 99, line 4)

6 The defendant did not assign error to the court's jury instruction on actual possession The defendant claimed that the facts did not support a charge on constructive possession (FBOA p 10, Appellant s Statement of Issues on Appeal III)

7 The trial judge determines the jury instructions based upon the evidence adduced at trial The appellate court should not reverse the trial judge's determination without a showing of both error and prejudice State v Burkhart 350 S C 252, 565 S E 2d 298 (2002)

8 State v Ballenger 322 S C 196 470 S E 2d 851 and n 3 (1996) supported a jury charge on actual possession in that the police saw the defendant apparently engaged in a drug transaction, pursued him on foot, and found twenty nine units of crack laying on the ground out in the open, near where defendant fell Ballenger did not support a jury charge on constructive possession since the only reasonable inference was that the defendant had either discarded and abandoned the crack or

simply lost the crack Ballenger wanted evidence supporting an inference that the defendant secreted the crack and later intended to retrieve it

9 In the present case circumstantial evidence supports a reasonable inference that the defendant had the cocaine in his actual possession During the defendant's fleeing from the police he went behind the truck The drug dog subsequently found the bag of white powdery substance within freshly disturbed pine straw behind that truck (FBOR p 10)

10 In the present case circumstantial evidence also supports a reasonable inference that the defendant had the cocaine in his constructive possession During the defendant's fleeing from the police, he went behind the truck When apprehended, the defendant emphatically assured the police that they lacked evidence Upon the police finding the crumpled cash in his pocket and the evidence [the eight or nine rocks], the defendant theatrically attempted to consume that benign evidence The police, having supposedly found the evidence, would have no reason to retrace the route he took while attempting to flee and no reason to suspect that he had secreted any contraband while fleeing The defendant, or a confederate could then recover the hidden treasure [34 35 grams of cocaine] at an opportune time Fleeing secreting the cocaine within the freshly disturbed pine straw behind the truck and attempting to mislead the police into believing that they had found incriminating evidence, demonstrate that the defendant exercised dominion and control over the cocaine and support the trial court's jury instruction on constructive possession of drugs (FBOR p 10)

Wherefore Petitioner asks that the Court may rehear the case

Respectfully submitted

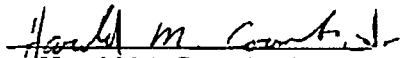
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March 22 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Beaufort County
Honorable J Ernest Kinard Jr , Circuit Court Judge

THE STATE

Respondent,

vs

DIAMON D FRIPP

Appellant

PROOF OF SERVICE

I Harold M Coombs, Jr , certify that I have served the within Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Jared S Newman, Esquire, P O Box 515, Port Royal, SC 28835

I further certify that all parties required by Rule to be served have been served

This 22nd day of March, 2012

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The South Carolina Court of Appeals

The State, Respondent,

v

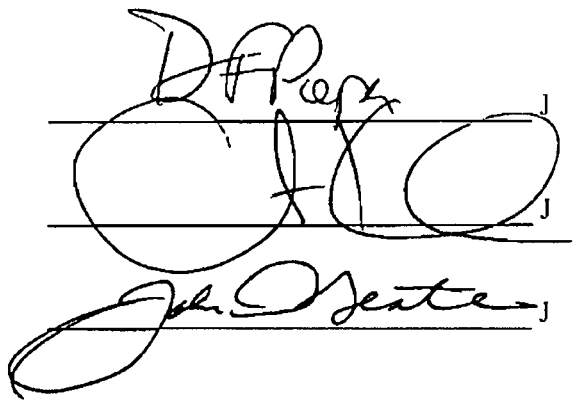
Diamon D Fripp, Appellant

The Honorable J Ernest Kinard, Jr
Beaufort County
Trial Court Case No 2009-GS 07 00196

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing

It is, therefore, ordered that the Petition for Rehearing be denied



J

J

J

Columbia, South Carolina

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