21319

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2013-001430

THE STATE,

Appellant,

vs.

WALTER M. BASH

Respondent.

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STATE OF SOUTH CAROLINA	)	GENERAL SESSIONS COURT
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	
vs.	)	Case No.: 2012-GS-08-1823
	)	2012-GS-08-1824
WALTER M. BASH,	)	
Defendant.	)	

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE JUDGE STEPHANIE McDONALD
ON JUNE 11, 2013

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Court Reporter for the State of South Carolina at Large
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R. 1

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The above-styled cause came on for hearing on the 11th day of June, 2013, at 3:00 p.m., before Judge Stephanie McDonald, Circuit Judge for the Ninth Judicial Circuit, presiding over the General Sessions Court for the County of Berkeley, when the following proceedings were had and entered of record, to wit:

PROCEEDINGS

THE COURT: I want you to give your names to my court reporter first, and I'm going to get a copy of that -- of the Indictment so I can take a look at it.

MS. GAY: Okay. My name is Melisa Gay. My client's name is Walter Bash.

THE COURT: All right.

MR. PATTERSON: For the State, Michael Patterson, and assisting me is Colleen Dixon.

THE COURT: Wow, they've got you busy this week.

Do you have the Indictment, or we pulling it? Or however many there are?

MR. PATTERSON: They should have a --

THE COURT: All right. I just don't have any information about the case yet, so. . .

MR. PATTERSON: I have a copy of the Indictment.

THE COURT: All right.

THE DEPUTY CLERK OF COURT: Those are the ones that --

THE COURT: Oh, great. Here's one of them.

(The Judge speaks with the Deputy Clerk of Court off the record.)

THE COURT: All right. I just need to know what we're going -- I've got four Indictments here. Are we going forward on all of them?

MR. PATTERSON: It should be -- there should be a trafficking cocaine base from November 10th, 2011, and trafficking cocaine from November 10th, 2011.

THE COURT: Okay. I've got those. And then --

MR. PATTERSON: The other two should be 2009; those are not what the State is proceeding with.

THE COURT: Okay. Are they still --

MR. PATTERSON: They have not been disposed of.

THE COURT: They have not been disposed of. Okay. Great.

So just for the record, 2009-1403 and 2009-1404 are two Indictments that have not been disposed of yet, but we are not going forward on those at this time. The Indictments that we are going forward on are 2012-1823 for trafficking cocaine and 2012-1824 for trafficking cocaine base.

And now that we've got Mr. Bash with us, I am

ready to proceed whenever the lawyers are.

MS. GAY: Your Honor, going to pull a few copies of some cases that I have --

THE COURT: Oh, great. Okay.

MS. GAY: -- that I sort of looked at and talked about. And I'm going to give you some copies and the Solicitor a copy and, of course --

May I approach, your Honor?

THE COURT: Yeah. Come on up.

MS. GAY: Thank you.

(Documents are handed to the Judge.)

THE COURT: Thank you.

MS. GAY: As an introductory statement, your Honor, not to be argumentative in any way, but, obviously, my client is charged with a large amount of drugs that were seized by the Berkeley County Sheriff's Department, and they are -- or Berkeley County, and he is moving to suppress those drugs in this hearing and at this trial, your Honor. So I had notified the Solicitor that I was doing a Motion to Suppress. I have a written copy of it, but I'll get it in the record.

THE COURT: Okay. Unless I need it for --

MS. GAY: It's simple. It just says we want to suppress, and we want a hearing.

THE COURT: Great.

MS. GAY: Nothing complicated.

THE COURT: No. And I appreciate you handing up the cases.

MS. GAY: I have a number of pictures which I'd like to provide to the court reporter for marking.

THE COURT: Certainly.

MS. GAY: The Solicitor and I have discussed these pictures; he's not opposed to my introduction of these pictures. So he's not requiring me to lay a foundation as to who took them or anything. He's stipulating or acknowledging that they are, in fact, pictures of this yard that we're here about, so if you want to --

THE COURT: Are we just going to mark them Defendant's 1 through however many?

MS. GAY: Yes, ma'am.

THE COURT: All right.

MS. GAY: And, initially, your Honor, I'll just do a little overview of what this case is about. My client --

THE COURT: Hang on one second, if you would, because I'm going to need -- we're going to put stickers on them and get them marked.

It will be Defendant's 1 through 9 admitted for the purposes of this hearing.

(Defendant's Exhibit Numbers 1 through 9 are admitted into evidence.)

MS. GAY: Additionally, your Honor, I have a made a -- I have a few other motions, one of which is a Motion to Sequester Witnesses. I believe there is multiple witnesses in the State's presentation today, and I would ask them to be -- to not hear each other testify, basically.

THE COURT: All right.

MR. PATTERSON: State has no objection to sequestration.

THE COURT: Granted without objection.

If we could just get everybody to excuse themselves that needs to be excused.

MR. PATTERSON: Can -- your Honor, can my case agent stay in --

MS. GAY: I have no objection to that.

THE COURT: Sure. Sure.

MS. GAY: This, your Honor -- this is being -- what I'm filing with the Court. But it's a -- it will be *voir dire* for when we pick the jury and several notes, standard stuff: prior convictions, bad acts, admissibility of statements, things that -- Motion to Suppress -- you know, things that are just housekeeping matters in terms of this trial.

THE COURT: Well, anything y'all want to hand up, and if the State's got any *voir dire* or witness list, anything like that.

(Documents are handed to the Judge from the State and from Ms. Gay.)

MR. PATTERSON: Your Honor, I'm handing up copies of case law.

THE COURT: Wonderful. Thank you.

MS. GAY: And one of the things I was asked, your Honor, since this is going to -- I believe to be a pretty complicated issue, is that we be -- I be allowed to sort of make my final argument in the morning so I can go over what he gave me. And, I mean, I think you're going to also want to go over some things about this case.

THE COURT: Is it a Fourth Amendment issue?

MS. GAY: Yes.

THE COURT: All right.

MS. GAY: It is.

THE COURT: We'll see if we decide today or tomorrow.

MS. GAY: Okay. So, your Honor, as I said, just to give a real brief overview of what was going on in this case, my client was at a barbecue, and he went -- he was parked -- he was sitting in a pickup

truck in the backyard of a place, a home, with some friends -- at a friend's house. And without a warrant, for his either arrest or a search warrant, he was arrested and charged with a large quantity of drugs. It's like 400-something grams of drugs.

THE COURT: Let me stop you real quick. Sitting in a car in a backyard? The car is not moving?

MS. GAY: Right.

THE COURT: And I assume we're going to hear some witness testimony about why the car was approached at all?

MS. GAY: Right.

THE COURT: Okay.

MS. GAY: And I think that, your Honor, what I am saying and what my argument is and after we hear all this -- I believe you'll agree with me -- is that this search was a violation of his Fourth Amendment Right; that -- well, for one, that it is a search under the Constitution; for two, it's in violation and -- and, therefore, the drugs as -- should be, you know, suppressed and any other things that he may have been charged with pursuant to this arrest or such, would be also dismissed as fruit of the poisonous tree. This case really is about curtilage. And curtilage is a hot word, your Honor, that's recently in a good bit of case

law, both state and, you know, like --

THE COURT: Yep.

MS. GAY: -- nationwide.

THE COURT: I'm aware.

MS. GAY: And it is a curtilage case. And so I have -- I have several cases that I've provided to you, and he's also provided me some. But the primary case is Florida versus Jardines, that came out in March of 2013. And, fortunately, for us, your Honor, we have this case, which, I believe, is very defendant friendly and -- or Constitution friendly, and it is here, and it's available now to look at these curtilage situations.

If you follow the reasoning of -- of Jardines, your Honor, they basically find that a search of an area around a home, whether it be the front porch or the area around the home, is, in fact, a search. They find that -- defining the word as curtilage is that space around a home that people enjoy their privacy. There is a point where it says that, you know, no man can set his foot upon his neighbor's close without his leave. That's a quote from an old English case in Jardines. And in this case the police have reasons -- which I know that's what we're here to talk about -- why they believe that they were able to see these drugs in plain view in my client's car after they believe that they entered the

premises lawfully, which I just don't agree with.

And flipping to that issue, your Honor, they --

THE COURT: Pretty interesting crew in Jardines that got together and decided that one.

MS. GAY: Yeah. Well, it came from the Supreme Court, your Honor.

THE COURT: Yeah. I mean, it's just you don't normally see Scalia lining up with Ginsburg, Kagan, and Sotomayor.

MS. GAY: Well, your Honor, in --

THE COURT: Pretty persuasive.

MS. GAY: -- in South Carolina, just flipping to our State before Jardines, there was a case that is the case of Leon Wright -- State versus Gregory Leon Wright, and that's a case where it had to do with a plain view-type arrest, and something where -- all this is warrantless -- you know, search warrantless, arrest warrantless, all this. And in this particular case, your Honor, they defined what is "plain view," and they make it the initial intrusion, which afforded the authorities the plain view was lawful and incriminating nature of the evidence was immediately apparent to the seizing authorities. And that's what is required. And they go back to a case called Horton. And Horton is a case, that I also provided the Court with, that talks

about whether or not inadvertence is important or not and, of course, Wright says, no, it's not. We don't need any inadvertence; we just need something that's lawful.

And so as we move forward in this hearing, your Honor, it is my position and my client's position that this entry on to this private property, curtilage was not lawful. And so we have -- he has his position and I have my position and --

THE COURT: And there was no warrant ever involved in any way, shape, or form?

MS. GAY: There was no warrant until after -- what happened is, is that -- and I'm just kind of jumping the gun here. But he --

THE COURT: I just want to know why they were at the property in the first place.

MS. GAY: They had an anonymous tip, which is also what is mentioned in Jardines, and that is it. I've discussed with him specifically. I sent E-mails back and forth with him whether or not the tipster could be identified. There is no identification on it. If they provide it to me now, it's a violation of Rule 5 because I've asked specifically for it. I'm told that they had an anonymous tip, and they put themselves into this area. Narcotics officers were in this area, your

Honor. In my opinion, it's very similar to Jardines because -- it's not a front porch, and it's not a dog. But narcotics officers were in this area to do an investigation that they didn't have any probable cause and/or exigent circumstances to do.

THE COURT: But what's the police agency, just out of curiosity?

MR. PATTERSON: Berkeley County Sheriff's Office, your Honor.

MS. GAY: The Sheriff's Office.

THE COURT: Okay.

MS. GAY: And so they -- as it happens, your Honor, they claim they see a codefendant person -- we won't even call him a codefendant -- another guy drop a bag of drugs from a long distance away. And I believe that's what they say is their exigent circumstances to come on the property, which I also dispute --

THE COURT: After they got an anonymous tip?

MS. GAY: Right. And so -- and then they eventually get a search warrant, which is written -- it's a written search warrant, your Honor -- establishing probable cause for going inside the house, which --

THE COURT: Okay.

MS. GAY: -- there's -- they didn't find

anything inside the house that they charged my client with. They charged a different person. But that is actually written down a lot of what -- I guess we should ask to have that as an exhibit at this hearing, but we can bring that in with one of the officers. But it's written down what they believe to be the probable cause to get in the house.

THE COURT: Uh-huh.

MS. GAY: And, your Honor, a lot of this case law talks about the need for a warrant, and that there is places where, if you believed you had a problem, you should have gone to get a warrant. If you believed certain things had occurred, you -- you know, because it's a house, because it's a curtilage, because it's surrounding property, you should have gone to go get a warrant. So that's the basis of what we're talking about here today, your Honor.

And so I would -- he's obviously going to have evidence, and this I have not seen. He may want to address this right now. But, obviously, he has case law that he believes that they did -- that they did a correct warrant or correct arrest; I have case law that I believe they didn't. But there's no doubt --

THE COURT: Well, the case law is often case-by-case in these Fourth Amendment situations.

MS. GAY: Right. And also in Wright, your Honor, it says specifically -- just to let you know how important you are in this process, it says specifically that the Trial Court is the one who weighs the weight and discretion to make the decision. And so, you know, on the heels of Jardines, there's -- we've looked for case law in America, you know, using this case, citing it, anything, and so far I have not been able to find anything that talks about -- that takes this into state case law. But that's what this case does.

THE COURT: Okay. Well, that's very interesting.

MR. PATTERSON: Your Honor, the State may be able to shed some light on the issue of whether or not Jardines has been considered since it came out. The Tenth Circuit has heard a case that distinguishes Jardines.

THE COURT: What's the cite for it? Do you have it -- oh, if you have a copy, that'd be great. Or I can just pull up -- I've got Westlaw up, so. . .

MR. PATTERSON: I didn't know that would be an issue.

THE COURT: Let's go off the record for a minute, Rolayne.

(A discussion is held off the record.)

MS. GAY: This case he just handed me, it talks about knock and talks, privilege, and things like that. So, as I said, your Honor, this is one of the reasons why I really don't want this all decided until tomorrow, because, I mean, I just got handed this in the process. I was --

THE COURT: So you want to be able to read everything again and argue tomorrow morning if necessary?

MS. GAY: Yes.

THE COURT: Okay. Well, I mean, I'm happy to do that. That's fine. We can do that.

MS. GAY: I told my client that today was the day to put all this into evidence --

THE COURT: Sure.

MS. GAY: -- on the record. And then, you know, we were going to try to -- you know, we don't -- he's the only one here. We don't have any other people that were at the party. Two of them are arrested. So they're defendants. One belongs to the Public Defender's Office. And, you know, if we choose, after there's some evidence presented today, to bring one of those people in, we might could or should, but I'm -- it was just -- you know, I'm telling these people at noon, Get up here at two o'clock.

THE COURT: Oh, no, no. And I understand that. Our case unexpectedly pled this morning. I mean, not to telegraph anything that I'm going to do, but, you know, I may toss this before y'all leave today based on what the officers have to say about the anonymous tipster, because, normally, you need a little bit more than that.

But, you know, again, it's all very case specific, and I want to hear what the officers have to say and how credible they are to me. All right? So y'all want to go ahead and put him up, or do you want to argue anything further before we start hearing from them?

MR. PATTERSON: No, nothing from the State, your Honor.

THE COURT: All right. Let's start putting them up.

MR. PATTERSON: State calls Lee Holbrook.

THE COURT: Officer, if you will come on up, we'll swear you in.

THE DEPUTY CLERK OF COURT: Please raise your right hand, place your left hand on the Bible.

(The oath is administered by the Deputy Clerk of Court, and the witness answers as follows:)

THE WITNESS: Yes, ma'am.

THE DEPUTY CLERK OF COURT: Please be seated.

State your full name; spell your last name for the record.

THE WITNESS: Lee Holbrook, H-o-l-b-r-o-o-k.

THE COURT: Okay. Happy to hear from you.

Ms. PATTERSON: Thank you, your Honor. May it please the Court?

THE COURT: Yes, sir.

LEE HOLBROOK,

having been first duly sworn by the Deputy Clerk of Court to tell the truth, the whole truth, and nothing but the truth, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q Sergeant Holbrook, where do you currently work?

A Berkeley County Sheriff's Office.

Q And how long have you worked for the Sheriff's Office?

A Approximately nine years, give or take.

Q And in what position do you currently work for the Sheriff's Office?

A In the drug enforcement unit.

Q How long have you been with the drug enforcement unit?

A Right around seven years.

Q And what unit were you working for when this incident occurred?

A In the drug unit.

Q And what -- what are your -- if you could briefly describe your duties as a member of the drug enforcement unit?

A We specifically handle any drug complaints and handle any of the drug buys. Any drug problems that we have throughout the county, we generally take care of.

Q With this particular case, how did you become involved with this case?

A We were in the Moncks Corner area of Berkeley County, and one of the agents -- I don't know exactly who it was at the time -- received a -- a phone call stating that there was drug activity at a particular residence, and we just happened to be in Moncks Corner and drove over there and handled it.

Q What was the -- what address was this?

A I believe it was the -- was [redacted] Nelson Ferry Road.

Q Would it be helpful if I showed you a copy of the report?

A Certainly.

THE COURT: Sergeant, when you said "one of the agents," one of the narcotics agents got an anonymous

tip?

THE WITNESS: That's correct.

THE COURT: Okay.

(Document is shown to Ms. Gay.)

MR. PATTERSON: Your Honor, may it please the Court?

THE COURT: You may.

(Document is handed to the witness.)

Q (By Mr. Patterson) Does this refresh your recollection?

A It does. It was -- the incident location was at [redacted] Nelson Ferry Road, Moncks Corner.

Q And what was the time frame for when you received the tip and when -- when you went to investigate this?

A I'd say within ten minutes or so.

Q And what did the tip involve? How was it relayed to you?

A The -- the tip was actually, if I'm not mistaken, that there was drug activity occurring at that exact time, and it was at [redacted] Nelson Ferry Road. And it -- just specifically, that there was drug activity occurring at that incident. So we happened to be in Moncks Corner and were right around the corner and attempted to go handle that complaint.

Q Did the tip indicate where this drug activity was taking place?

A It did. It was on the property of [redacted] or on it.

Q So what did you do when you went by there? How many people were there?

A Excuse me?

Q What did you do?

A We actually located the house and noticed that there were some males behind the house in a grassy area. So instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the backyard where the individuals were -- there were several individuals back there -- and simply got out of the vehicle to meet with those folks.

Q For purposes of describing this -- this address, would it assist your testimony to use a map for demonstrative purposes?

A Sure.

MR. PATTERSON: Your Honor, if I might?

THE COURT: You may. Sure.

(Mr. Patterson is setting up the easel.)

MS. GAY: Yeah, I've seen it.

MR. PATTERSON: Okay.

Q (By Mr. Patterson) Do you need this --

MR. PATTERSON: I just want to make sure everybody can see it. Would it be helpful to move it closer to him?

THE COURT: I can see it.

Can you see it, Sergeant?

THE WITNESS: I can see it.

THE COURT: All right. Lisa, if you want to come around.

Thank you, though.

MR. PATTERSON: May I stand up here, your Honor?

THE COURT: You may.

Q (By Mr. Patterson) Sergeant Holbrook, where did -- when you received this tip, where did y'all drive in from?

MR. PATTERSON: Is it all right if he steps down?

THE COURT: Yeah.

Sir, if you want to step down, you can point to what he is showing you.

(The witness steps down from the witness stand.)

THE WITNESS: When we received the tip, we were, again, in the Moncks Corner area. We were on the

Highway 52 side of Nelson Ferry Road. When he -- actually came down Nelson Ferry, right at the corner of Nelson Ferry and the Shine Bash Lane area, which would be approximately right here on this dirt road where it meets the pavement. At that particular time, somewhere in this vicinity, you could actually look back behind this house at [redacted] Nelson Ferry and see occupants inside this grassy area here behind the house.

THE COURT: Let me ask you -- I just want to make sure I can understand. So you came around and turned down that -- what looks like a dirt road?

THE WITNESS: Correct. Made a right-hand turn on Shine Bash.

THE COURT: And then you could see people in the backyard?

THE WITNESS: That's correct.

THE COURT: Okay. Thanks.

Q (By Mr. Patterson) And, to your knowledge, is Shine Bash Lane a public road?

A Yes, I believe so.

MR. PATTERSON: Your Honor, may I approach again?

THE COURT: You may.

MS. GAY: It's the same picture. As a matter of fact, those are my pictures.

THE COURT: Oh, okay. Do we have that marked as --

MR. PATTERSON: I have not marked it. I wasn't sure if you wanted those marked as State's Exhibits or Court's Exhibits.

THE COURT: It doesn't matter to me. We pre-marked -- we can make it State's 1 if you want or Defendant's 3 is the map.

Are we marking the map?

MR. PATTERSON: It's simply a photo of the road sign, indicating that it's a public road.

THE COURT: All right. That'll either be State's 1 or 2, whatever you want to call it. Or we can call them Court's Exhibits for purposes of today. Doesn't matter.

Q (By Mr. Patterson) And can you tell me what that is --

THE COURT REPORTER: Court's Exhibit 1?

THE COURT: How do you want it marked? Is it --

MR. PATTERSON: I'll mark it State's Exhibit 1.

THE COURT: State's 1. Okay. Thank you.

(State's Exhibit Number 1 is marked for identification.)

Q (By Mr. Patterson) Do you recognize that?

A Yes, I do. That's the -- that's the sign at the corner of Nelson Ferry and Shine Bash Lane.

Q And what is it?

A A green sign at the corner of Shine Bash and Nelson Ferry.

Q And is that a fair and accurate representation of the sign as it was that day?

A Yes, I believe it is.

MR. PATTERSON: Your Honor, we move to admit State's 1 at this time.

MS. GAY: Without objection.

THE COURT: State's 1 is admitted without objection.

(State's Exhibit Number 1 is admitted into evidence.)

MS. GAY: Is he going to continue to talk about the map?

MR. PATTERSON: Yes.

Q (By Mr. Patterson) So when you went down Shine Bash Lane, what did you see?

A As we travelled down the dirt section here of Shine Bash, there were several black males standing right here by this little shed, and there was a pickup truck pulled in on to the grass area.

Q Now, before we get into what happened then, can

you describe the residence as you saw it? Was there a fence around the house?

A To the best of my knowledge, [redacted] has -- is entirely fenced in, the front and the back; and I believe it has a walk-through gate somewhere in this area, if I'm not mistaken; and then there's some type of small utility shed there on the -- on the other side of the fence.

Q So is the shed fenced in?

A No.

Q Is this area here fenced in?

A No, it was not.

THE COURT: I'm sorry, "this area" where?

THE WITNESS: Here.

THE COURT: Where you said what was, or wasn't fenced in.

Q (By Mr. Patterson) Is this general area here fenced in?

A No, it was not.

Q Now, when you -- you see these individuals, what happens next?

A We see the individuals standing here, and I simply pull up to them to make contact -- casual contact with those individuals.

MR. PATTERSON: Your Honor, I don't believe we

would need this again. Would you like me to leave this up?

THE COURT: Well, it just depends on what your follow-up question is going to be. I need to know where they were.

Did he pull up into the yard to make contact with them? How did that work?

THE WITNESS: Yes, ma'am. The fence line is about right here, all of this open grass --

THE COURT: Uh-huh.

THE WITNESS: -- and then there's a little shed here that's not inside the fence. And there was a vehicle parked about right here with several individuals standing around the vehicle.

THE COURT: Okay. Thank you.

THE WITNESS: So as I travelled down the dirt road, I just simply turned in behind where the truck was parked in the grass.

THE COURT: In the middle of all that grassy area?

THE WITNESS: Yes, ma'am. It's a -- somewhat distorted, I guess, but, you know, I did pull on to the grass.

THE COURT: Okay. Thank you.

Q (By Mr. Patterson) What was your reason for

pulling on to the grass?

A My reason for that was because I was -- received a tip that there was some type of active drug activity going on at that time. As I approached the house, I didn't see anybody around it, and that just caught my attention. So I just simply drove back there, and that activity was supposed to be happening in the -- in the rear of the property; so that was my reasoning for -- when I saw those individuals back there, it -- I just didn't feel the need to actually make contact with the actual house. I just went down the Shine Bash Lane.

MR. PATTERSON: Is it okay if he --

Do you have any further questions?

THE COURT: You may sit down. Thank you so much.

(The witness returns to the witness stand.)

Q (By Mr. Patterson) What were you going to ask them?

MS. GAY: Your Honor, that's speculative at this point. I think we understand what he was doing there.

THE COURT: Overruled.

THE WITNESS: Typically, when we have complaints of drug activity and there's folks on the

property, when I actually make contact with them, I explain the nature of my business being there, that they're -- I'm here on the -- on the -- reason that there's suspicious drug activity occurring at the residence, and we go from there as far as, you know -- and just general conversation is what typically takes place.

Q And what happened in this particular instance?

A That particular incident, when I actually pulled on to the grass and exited my vehicle, one individual that was standing in the grass threw down a plastic bag containing a white powder substance that appeared to be cocaine.

Q Now, when you say you "pulled on to the grass," how close were you to the truck?

A I pulled up behind the truck, so I may have been 20 feet or so, at least.

Q And when you say you observed one of the individuals throw something on the ground, how close were you to him?

A At the point that -- that that item was thrown to the ground, I was within eight or nine feet, I'd say, close to ten feet, maybe.

Q And how did you know what it was?

A Just through my time in the drug unit through

experiences.

Q What did it look like?

A A plastic bag containing a white power substance.

Q So what happens after you see this?

A At that time, when I pulled up and got out of the truck, my truck, everything happened relatively quick. I see the truck that's parked in front of me, but I'm more interested at that point of the people outside the vehicle because that's who I see initially. As I get out and start to approach these folks, I see one individual throw down the -- what appeared to be cocaine. Almost instantly an individual opened the door -- the passenger door of the truck that was parked in front of me, and he took off running and -- instantly, he just ran into the woods. And quite a few of our agents, everybody except me, took off after that individual.

Q When you stepped out of your vehicle, how many people were standing around?

A I think it -- I think it may have been three. I -- I -- I think it was three people standing outside the vehicle when I got out.

Q Including the person you saw -- or you say saw threw down?

A Correct.

Q When did you realize there was -- there were people in the truck?

A Within seconds later. I'm keeping an eye on the individual that threw down what appeared to be the cocaine, and within seconds, one -- at the passenger side of the truck, he took off running. And then an individual got out of the driver's side of the truck and asked what was going on.

Q And what -- what did you tell the person who got out of the driver's side?

A I asked him to step to the rear of his vehicle, where I had everybody kind of with me, and I began explaining the nature of my business being there to those individuals. Again, keeping an eye on the cocaine that was thrown to the ground. I'm by myself at this point. So instead of approaching and trying to cuff an individual, I was outnumbered, so I just decided it would be safer for me just to continue on with the investigation until I could get another individual -- an agent there to help me.

Q And what were the other agents doing at this time?

A They were chasing the individual that fled from the passenger side of the vehicle.

Q And what are you -- while you're there by yourself, what are you talking about with these guys?

A Explaining the nature of the -- the confrontation -- or nature of my business being on -- on the property. The nature of the call of why I was there.

Q Did they say anything?

A Not about what I was trying to talk about. Again, I kept my eye on the -- on the cocaine, but didn't bring that up until I had another individual get there with me.

Q When -- what happens between then and when you get somebody else on the scene?

A At that point, I'm just keeping everybody kind of somewhat calm, explaining why I was there, and that, you know, why did an individual flee. The general conversation, until -- I think it was Dale Burst (phonetic). I called for him; that's the closest agent to me. And I called him to come over to assist myself.

Q And what did you do when he got there?

A I actually began to cuff the individual that threw the -- what appeared to be cocaine to the ground. And then we detained the other individuals on that property due to the fact that the complaint was narcotic activity and the fact that there was narcotics thrown to

the ground. And everybody was detained at that point for safety reasons.

Q When did you decide to look in the truck?

A It was after some of the other agents began to kind of filter back towards me. It was -- at that time, it was just a matter of a few minutes. I did peer into the truck through the window -- the door was closed -- due to the fact that we had dope on the ground -- narcotics on the ground and the fact that someone did flee from that vehicle. It all happened right there together, and I just happened to look in the window. I don't know if there's other individuals in that truck hiding. And at that time, you could see in plain view what appeared to be cocaine weighing scales. I think there may have been even some cocaine base right there in the console area also.

Q Was the window tinted?

A That, I don't recall. If it did have tint, it was ever so light tint. I mean, you didn't have to use your hands to peer into the window to shade anything. It was -- you could definitely see through the window.

Q And the door was closed?

A I believe so, at that time.

MR. PATTERSON: Court's indulgence?

THE COURT: Certainly.

(Mr. Patterson speaks with Ms. Dixon off the record.)

Q (By Mr. Patterson) Which individual was the Defendant?

A He exited the driver's side of the -- I think it was a black Chevrolet truck.

Q And is that individual in the courtroom?

A He is.

Q Can you point him out?

A (Witness complies.)

Q Let the record reflect the Officer identified this Defendant.

THE COURT: Okay. It will so reflect.

Q (By Mr. Patterson) Did you -- were you able to identify the license plate on the truck?

A Yes, sir.

Q And who did the truck belong to?

A The Defendant, Curtis Shine (phonetic).

Q Would the -- if you took another look at your report, would that help you refresh your recollection as to who the truck belonged to?

MS. GAY: I'm not opposed to him admitting that -- I think the truck belongs to my client; right?

THE DEFENDANT: (Moves head up and down.)

MS. GAY: I mean, I know that.

THE COURT: Okay. The truck belongs to the Defendant.

Q (By Mr. Patterson) When you approached the property initially, going back, what was the conversation like?

A When I actually approached the individuals?

Q Yeah. When you got out of the car the very first time.

A It was, initially, just going to be a casual encounter, casual contact, explain the reason that --

Q What did you say when you got out of the car?

A I asked who the individuals were. The property owner, I believe, was there. At that point, I mean, I've already had what appeared to be cocaine thrown to the ground --

Q Well, before that, as you're getting out of the car, what are --

A I mean, that was -- when I got out, I mean, I don't know exactly what was said other than, Hey, guys, what's going on, before everything just broke loose.

Q Did anyone ever ask you to leave the property?

A No.

MR. PATTERSON: Court's indulgence?

THE COURT: Certainly.

MR. PATTERSON: Nothing further at this time.

THE COURT: Okay. Cross-examination?

MS. GAY: I'd also like to mark --

(Ms. Gay speaks with Mr. Patterson off the record.)

MS. GAY: I have a few other things that I would like to mark, your Honor.

THE COURT: Okay. Certainly.

MS. GAY: I'm going to use this map. Do you want to look, because I'm going to use your map?

MR. PATTERSON: I'm sorry?

MS. GAY: I'm going to use your map.

Could you mark this for me?

(Defendant's Exhibit Numbers 10 and 11 are marked for identification.)

CROSS-EXAMINATION

BY MS. GAY:

Q Officer, first, I want to identify some of these exhibits that we are going to talk about. And I'm going to hand you -- I think there's nine of them. And if you could take a look at these for me. I don't believe the Solicitor has any objection to these. These are pictures that were taken, and let me start with 7. Is that similar to the house that we're dealing with here in this -- if I tell you that it is, is this the address?

A It appears to be.
Q Okay. And then another one of the front of the house is Number 8?
A Appears to be.
Q And Number 9?
A Appears to be.
Q And then I'm going to -- this is Number 3. And if you can see on Number 3, there's a fenced-in area, which would have been the house, and this is that road that you're referring to.
A I see.
Q Do you see that road right there?
A Yes.
Q Okay. Is it fair to say that this picture of this road -- this is the main road -- is right here, this corner that you referred to?
A If you're --
Q Would you like to look closer?
A If you're coming down Shine Bash towards Nelson Ferry --
Q So it'd be like this?
A Appears to be, yes.
Q Okay. So Number 3 is a picture of the road that y'all drove down that's not in the fenced-in area but on this little road right here?

A Appears to be.

Q Okay. And then I have several pictures. Here's Number 2, which is -- appears to be the back of the house, and I think there's a broken-down car right here and a shed?

A Yes.

Q So this is a red car. So it would be this -- there's the shed; there's the red car right there. Does it appear to be similar?

A It does.

Q Okay. That's Number 2.

And here's a picture of the shed, which is Number 4. This is the shed, Number 4.

And then I think there's that same broken-down car and the shed, which this is Number 5.

So can we agree that this is the same area right in here?

A Appears to be.

Q Okay. And then Number 6 is just sort of the main road. I believe you said that y'all came in from the other end; and then these are the, like, signs of the roads of what we were talking about here, these two roads right here --

A Correct.

Q -- coming from this way?

This is Number 6?

A Correct.

Q Okay. And then this is another picture of the yard, Number 1? General picture of the yard?

A Appears to be.

Q So at this point, I'm going to refer to the map, and then we're just going to maybe refer to smaller pictures of it. But these are smaller pictures of what's on that map.

Okay. This is something that was provided to me in discovery, Defendant's Exhibit 10, and this says: Berkeley County EGS Mapping. Are you familiar with what something like this would be? It'd be like a plat?

A Yes.

Q Okay. Do you -- this particular grayed-off area that was provided to me in discovery from the Solicitor. This particular grayed-off area is, in fact, this plat of this piece of property that we're talking about, which goes, like, all the way up in here. This is Defendant's 10. It's a grayed-in area that was provided to me by the Prosecutor as being the plat of this property.

A Okay.

Q Okay. And I asked the Prosecutor if you were involved in this search warrant that was obtained

to -- before they went in the house, and he told me that you weren't; but you are familiar that there was, in fact, a search warrant done after all this stuff was found and then eventually got in the house on this search warrant?

A There was a search warrant executed on the property.

Q I understand --

MR. PATTERSON: Your Honor, the State would object to relevance --

THE COURT: Wait a minute. Is there an objection?

MR. PATTERSON: Objection to the relevance of the search warrant. The search warrant is for the house, and --

MS. GAY: I understand.

MR. PATTERSON: -- we don't believe that this case revolves around anything located in the house.

MS. GAY: I understand that, but I just wanted to make sure he was familiar with this document, and that they did, in fact, at some point go get one.

THE COURT: Okay. Objection's overruled. I think for my purposes, there may be something relevant based on the language in the warrant. But I'm concerned about the initial entry into the backyard, quite

frankly.

MS. GAY: I understand.

Q (By Ms. Gay) But this is a warrant that was obtained before you went into the house? That is what happened, right, factually?

A There was a search warrant conducted there.

Q Yes. Okay. Now, based on your testimony, you said that one narcotics agent got an anonymous tip.

And that was actually your testimony, because I wrote it down.

And you -- just let's be clear what anonymous tips are. You have no idea who the person is that called it in? As part of your case file, obviously --

A Correct.

Q Correct.

And you have no phone number to call this person back to determine who this person was, even if, like, caller I.D. or anything like that. You have no identifying information to be able to contact this individual?

A I don't.

Q So is it fair -- is it true that -- I mean, obviously, you're a narcotics agent. You have times when you use confidential sources and other things like that. I understand that. That is part of the process.

This particular tip was not from a confidential source?

A Not to my knowledge.

Q And it was not from anybody that you had any prior dealings with?

A Not to my knowledge.

Q And you -- and not from anybody that you had any -- any possible information about their credibility?

A I believe that the tip just came from someone at the sheriff's office, stating that they received the information and passed it on to us that that activity was happening at that time.

Q And to your knowledge here today, you're testifying that you have no way to find out who this person is, you have no way to find out whether or not they had provided any credible information in the past or -- nothing?

A No. I received a tip that there was activity going on at that incident.

Q I'm not talking about the tip itself. I understand what you say the tip says. I understand what your testimony is. I understand why you believe you did what you did. What I'm trying to determine is what you knew about the person who called the tip in. And it's my understanding, because I've been obviously dealing with the Prosecutor on this case for quite some time,

that there's no identifying information about the credibility of that person or that -- the identity of that person?

A I didn't take the tip.

Q Okay. But in this case file, in anything having to do with Walter Bash's case, there's no information that's ever been provided to me, his attorney, or to him, or to the prosecutor about the identity of the tipster and/or the credibility of the tipster; right?

A I don't know if you've ever received anything or not.

THE COURT: Okay. Hold on. Do you know the identity of the tipster?

THE WITNESS: No, I don't.

THE COURT: Okay. Who gave you the tip?

THE WITNESS: I believe someone at the Sheriff's Office.

THE COURT: Okay. And someone else at the Sheriff's Office took the tip?

THE WITNESS: That's correct.

THE COURT: Do you know who took the tip at the Sheriff's Office?

THE WITNESS: No, I don't.

THE COURT: Okay. Thank you.

MS. GAY: Just, other than that, your Honor, I think that what his testimony --

Q (By Ms. Gay) I just want to confirm. You testified that you drove up on this -- and it is a public road, on to a piece -- and then you turned in to what is a private road -- private property, if you want to call it, or house, yard, that's actually, if you look at this map and this map, this back area, you kept trying to distinguish it because it doesn't have part of a fence -- chain link fence around it, but pursuant to this plat, it's still part of this lady -- or this person's property?

A I would think so.

Q So your testimony is you came up on the public road and you turned your car -- which I believe was like a brown Expedition or something like that, not a marked police officer's car?

A It's not a marked car.

Q -- into this property behind the -- right up into this property, parked -- I think you stopped behind the black truck where a bunch of black individuals were involved with conversation going on? Like, you admit you drove up into their yard in an unmarked police vehicle behind the black truck. That was your testimony; correct?

A I pulled into the yard, yes.

Q And you said that -- okay. When you first got there, I believe the Solicitor kept asking you what were you going to ask them? what was your intent? Okay. How many people were in your car?

A Myself and one other individual, I believe.

Q Okay. And you said a bunch of other officers chased after the guy who ran. What, did they come up in cars behind you?

A Yes, they did.

Q Okay. Were they all -- so -- all right. So you, obviously, are a white individual, and you hadn't been invited to the party. So you come up in your car and you're opening the door to get out when the people are scrambling, basically, and you see the bag? Or did you speak before the bag got thrown?

A People weren't running. It was just one individual, and then one individual threw the coke to the ground.

Q Okay. But had you gotten out of your vehicle and said anything before that occurred?

A Sure. I got out and I, basically, What's going on fellows? And then everything took place at that time.

Q Okay. And I believe your testimony was that

you didn't see any -- any activity or people in the front yard, so you didn't stop to knock and identify yourself in the front part of the house because there was nobody there?

A Well, that, and I believe the tip said it was behind the residence.

Q I know, but -- I know that. But you didn't stop here and try to get into any kind of communication at the front of the house, which is the part that's on the public road?

A No, I didn't. Everybody seemed to be in the backyard.

Q Right. And so your testimony was that at the time that you got out, said something, and somebody threw the drugs down -- and I wrote this down -- that you then -- everybody that ran after the guy that ran out of the passenger car -- door, and that you felt like you were outnumbered, so you just chose to gather everybody up and wait for some other people to come. At that point, were those people free to leave?

A At least --

Q If they had run, would you have chased them or called somebody to chase them?

A The one that threw the coke to the ground, he wasn't going to be free to leave as soon as I had enough

people to take control of the situation.

Q So -- so is it your testimony that Mr. Bash wasn't detained at that point even though you were holding him there until the other officers came back to figure out what was going on?

A No, he wasn't detained.

Q Okay. So, as part of this process, I believe you said that you -- that you didn't even talk about the cocaine or bring up the cocaine that you saw on the ground until somebody came back to help you, and then you said that you detained everybody for safety reasons?

A Yes.

Q Right?

A That's correct.

Q At this time, you've not found any drugs at all in Mr. Bash's car at that point, have you?

A No, I haven't.

Q So you detained him for safety reasons, and then you said, I believe the officer was very clear, that the windows were closed, whether or not there was tint or not. At some point, after my client was detained for safety reasons, you went and looked in the window of his car?

A Correct. Someone fled from it.

Q I understand. And at the time that you went to

look through the windows of the car, it's your position that you saw something that was in plain view, I believe you referred to it, that was -- that was drug related; and at that point, I guess, you placed him under arrest?

A He was detained at that time and then eventually placed under arrest.

Q And I believe that your testimony was that you -- you had not -- you specifically said -- because I was kind of confused -- that you didn't even see -- you didn't even figure out what -- that there were drugs in the car until after several officers had come back and were assisting in the arresting process of the other gentleman who threw the drugs down and the other people -- and you're, I guess, interrogating, or whatever, the people that were out there. What was that; like, ten minutes?

A The whole process between when we got there and the agents then approached and then returned back to where I was?

Q (Moves head up and down.)

A It may have been close to ten minutes.

Q Okay. So for at least ten minutes or more there was no drugs that had been discovered in the pickup truck that Mr. Bash owned?

A Not at that point.

MS. GAY: Okay. I have no further questions, I don't think. I just want to ask Mr. Bash something.

THE COURT: Okay.

(Ms. Gay speaks with her client off the record.)

MS. GAY: One moment, your Honor.

THE COURT: Sure.

(Ms. Gay speaks with Mr. Schwacke, Mr. Shelton, Ms. White, and Ms. Littlejohn off the record.)

Q (By Ms. Gay) There is one line of question I want to ask you. Now, your testimony was that when the individual ran from the passenger side -- or passenger seat of my client's car, deputies chased him?

A Correct.

Q Okay. And so your testimony was that my client, Mr. Bash, would have been free to leave. That was your testimony?

A Well --

Q That was your testimony? That he would have been free to leave?

A But he wasn't detained at that time.

Q Well, if he'd run into the bushes, would you have chased him?

A Most likely.

MS. GAY: All right. I have no further

questions, your Honor.

THE COURT: Okay. Any Redirect?

MR. PATTERSON: Briefly.

THE COURT: Okay.

(Documents are shown to Ms. Gay.)

REDIRECT EXAMINATION

BY MR. PATTERSON:

Q Sergeant Holbrook, I'm going to show you two photos.

MR. PATTERSON: Your Honor, may I approach?

THE COURT: You may.

(Documents are handed to the witness.)

Q (By Mr. Patterson) Do you recognize these?

A Yes, I do.

Q What are they photographs of?

A Appears to be cocaine and a scale.

Q Is there anything else?

A Open beer, some Baggies, possibly some cocaine base.

Q Is that a fair and accurate representation of what you would have seen looking through the driver's side window?

A It appears to be.

MR. PATTERSON: Your Honor, we would move to introduce these as State's 2 and State's 3 at this time.

MS. GAY: I have no objection.

THE COURT: All right. Admitted without objection.

(State's Exhibit Numbers 2 and 3 are admitted into evidence.)

Q (By Mr. Patterson) Sergeant Holbrook, after seeing those, can you describe where those were located, where you saw those?

A The scale and the one bag, of what appears to be cocaine, was located actually on the console in between the two seats, if I'm not mistaken. And then there was another bag that was underneath, like, the radio section where you would maybe put pens or your wallet in a little cubbyhole and kind of between the console and the radio section, maybe?

MR. PATTERSON: Court's indulgence?

THE COURT: Certainly.

(Mr. Patterson speaks with Ms. Dixon off the record.)

MR. PATTERSON: Nothing further at this time.

THE COURT: All right. Sir, you may step down. Thank you.

Call your next witness.

MR. PATTERSON: Sergeant Milks.

THE COURT: Is she your case agent?

MR. PATTERSON: She is my case agent.

THE DEPUTY CLERK OF COURT: Please raise your right hand; place your left hand on the Bible.

(The oath is administered by the Deputy Clerk of Court, and the witness answers as follows:)

THE WITNESS: I do.

THE DEPUTY CLERK OF COURT: Please be seated and state your full name; spell your last name for the record.

THE WITNESS: My name is Kimberly Milks. My last name is spelled M-i-l-k-s.

KIMBERLY MILKS,

having been first duly sworn by the Clerk of the Court to tell the truth, the whole truth, and nothing but the truth, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q Sergeant Milks, where do you currently work?

A I work for the Berkeley County Sheriff's Office.

Q How long have you worked there?

A I've worked for the Sheriff's Office approximately seven years.

Q And what's your current position?

A I am currently in the crime and -- I'm sorry, crime and personal division, investigations -- persons and crimes.

Q And what unit were you working for when this incident occurred?

A 2011, I was working in the narcotics division.

Q And what were your duties as a member of the drug enforcement unit?

A I was an active drug agent.

Q And how did you become involved with this case?

A Myself and Sergeant Holbrook were working together on the 10th of November, and we were in the Moncks Corner area. We were in his vehicle, so I was the passenger of his vehicle. And he received a phone call about a tip of drug activity, and he says, Hey, let's just go over to -- somewhere over off of Mitton, and we need to check out this drug tip that we got.

So as we drove to Nelson Ferry, we let the other agents know, on the radio, what address that we were going to. We put on our vests, our hat -- we have a hat that we wear that says "sheriff" on it; a vest that says "sheriff" on it. And as we approached the house, we noticed that -- the house faces the roadway. And the house is dark; there's no lights on. And the tip had said that it was going to be black males in the

yard -- I believe the tip was rear yard, is what Sergeant Holbrook had explained. So because the house was dark -- there is a yard -- a yard area. As the house faces Nelson Ferry, there's a yard area. There's no one in the front yard, so we go down Shine Bash Lane. And as we go down Shine Bash Lane, there's a tree that you can see through the yard; there's a black truck; there's three individuals in the yard.

So as we're -- we approach Shine Bash; we get out of the vehicle. I get out of the passenger side vehicle and approach the men in the yard.

Q Did you say anything when you got out of the car?

A Generally, I say: Hello, I'm Detective Milks.

Q And what happened when you got out of the car? What'd you see?

A I saw the two black males over by the grill. I immediately noticed -- I recognized one of the individuals. I saw the third male at the back of the truck, I would say, leaning on the tailgate of the truck. I --

I'm in the passenger seat. So Sergeant Holbrook and I have worked together a long time; so we have kind of a routine. And that routine is, is he -- he drives, and I -- I am watching the scene. And

when we pull up, I immediately notice that, you know, there are two people at the grill, one person in the drive -- I'm sorry, one at the tailgate, and that the brake lights are on on the vehicle. And so I know at that time there's someone in the vehicle. Or that's my impression.

Q Did you witness the individual jump out of the car?

A Yes. My position was, I approached the truck from the passenger side. And as I approached the truck from the passenger side, I got somewhere between, I would say, the gas tank area. Where you would think -- the wheel, I guess I would say. At that time, I began -- I recognized the smell of marijuana coming from the truck, and then the passenger door opened and a black male jumped from the truck and ran towards the wood line.

Q Did you chase him?

A I did.

Q And how long was it --

Did you catch him?

A No, I did not.

Q How long was it before you came back to the truck?

A Probably ten minutes.

Q And were you in charge of collecting the evidence?

A I was.

MR. PATTERSON: Your Honor, may I approach the witness?

THE COURT: You may.

(Document is shown to Ms. Gay.)

THE COURT: Is that the evidence list?

MS. GAY: Which -- wait. Let me see that a minute. What is that? Is that something that was thrown, or is that something that --

(Ms. Gay speaks with Mr. Patterson off the record.)

MR. PATTERSON: May I approach?

THE COURT: You may.

Did y'all find any marijuana, or just cocaine?

THE WITNESS: I'd have to look at the evidence sheets.

THE COURT: Okay.

THE WITNESS: But the smell of marijuana was evident. That would be my reason to chase him.

Lee -- I'm sorry, Sergeant Holbrook was alone, and so I probably would not have given chase if I didn't -- I didn't think that there was any crime going on. I would have stayed with him.

Q (By Mr. Patterson) I'm going to show you what is going to be State's 4 and 5. Do you recognize those?

(Documents are handed to witness.)

A I do.

Q What are those pictures of?

A This -- this particular photo is a photograph of a plastic bag containing white material, which is packaged -- that reminds me, from my experience, of cocaine. It was in the floorboard. And I believe this photo's the one on the passenger side.

This photo is a clear -- is a white bag with white material that is -- would -- my experience, would say cocaine, when I looked at it, and I spied that in the floorboard of the driver's side.

Q And was this all collected from the truck?

A This is all collected from the truck, yes.

Q Are those fair and accurate representations of what you collected from the truck?

A Yes.

MR. PATTERSON: Your Honor, move to admit these as 4 and 5.

THE COURT: Okay.

MS. GAY: No objection.

THE COURT: State's 4 and 5 are admitted without objection.

(State's Exhibit Numbers 4 and 5 are admitted into evidence.)

MR. PATTERSON: Court's indulgence?

THE COURT: Certainly.

MR. PATTERSON: Nothing further at this time.

THE COURT: All right.

MS. GAY: I need to check something, so if you'll just bear with me, your Honor. Court's indulgence?

THE COURT: Certainly.

CROSS-EXAMINATION

BY MS. GAY:

Q I have reviewed this stuff, extensive amount of rule -- of, you know, chain evidence and -- and such. If you need to confer with the Solicitor, you can. There is no mention of marijuana -- having found marijuana at all in this case file?

A From the vehicle?

Q From anywhere. From the vehicle, from the ground, from anywhere. I mean, I'm looking. Like I said, maybe you need to confer with the Solicitor. But there's nothing that's been provided to me that even mentions anything about marijuana.

A No. I -- I don't recall there being any marijuana. I just remember the smell of marijuana

giving me the reason to go to the door before the gentleman fled from the passenger's side.

Q And with regard to the police report, I believe you are one of the people, Kim Milks, that prepared this police report that -- in this case file?

A Yes.

Q There's also nothing in this police report whatsoever about any smell of marijuana coming in -- exuding or coming out from the truck in your police report that you made.

A Okay.

Q Would you like to review it to refresh?

A No.

Q Okay. The -- so your testimony today is that you were in the car with Holbrook, and that the call came to him, not to you?

A Yes. And that came through his cellular phone, not through the radio.

Q So whatever was being said actually on the phone or who was talking, you would have no testimony that you can add today about the identity of that tipster?

A Right. I can only repeat what he advised me of.

MS. GAY: Which we're not going to do today.

But thank you.

I don't believe I have any other questions for this witness, your Honor.

THE COURT: Okay. Any Redirect?

MR. PATTERSON: Briefly.

REDIRECT EXAMINATION

BY MR. PATTERSON:

Q Sergeant Milks, were you involved in the search warrant?

A Yes, I was.

Q Was any marijuana located in the house?

A Yes.

MR. PATTERSON: Nothing further.

THE COURT: Okay. Thank you.

RECROSS-EXAMINATION

BY MS. GAY:

Q That brings up this last place.

I would like to show you Defendant's Exhibit 11 and ask you to identify Defendant's Exhibit 11.

(Document is handed to the witness.)

A This would be the certain case file search warrant.

MS. GAY: I would like to move this into evidence, your Honor. I do believe it's relevant based on what it says as to the probable cause for why they

got into the house.

THE COURT: Okay.

(Defendant's Exhibit Number 11 is admitted into evidence.)

Q (By Ms. Gay) Now, did you prepare this or somebody else?

A I believe I prepared it.

Q So you're the one who specifically chose the words to use in this search warrant?

A Yes.

Q So when the search warrant, whatever it says -- it -- just to make this clear, it says: Members of the Berkeley County Drug Enforcement Unit were investigating a suspicious complaint.

A Yes.

Q Okay. And there's nothing else in here at all about who that suspicious complaint -- complainer's identity was or their credibility or anything?

A Yeah. It's never known.

Q Yeah. And certainly, pursuant to this search warrant, you were then able to say that somebody had thrown down drugs, and that, you know, some other drugs had been in plain view, that's also in this search warrant that you put the words in there for?

A Yes. I mean --

Q And so -- and, you know, we would agree that a magistrate has to sign the search warrant in order for there to be -- to enter into the house, and I believe the Solicitor specifically said that, Are you -- you know, are you involved in the search warrant. You know that marijuana was found inside the house.

But so -- so that the magistrate did sign the search warrant based on what you said about all the drugs that were dropped and the fact that they found drugs in my client's car?

A Can you repeat the question? I'm not sure what the question is.

Q Well, I think what I'm testifying to is the magistrate signed it after you --

A Yes.

Q -- made the list of probable cause?

A Yes.

Q It had to do with this -- the dropping of the drugs and the finding of the drugs in my client's car. That's in this search warrant for probable cause?

A I believe it is, yes.

Q And as we agreed, it says "suspicious complaint," with no identifying information in this search warrant?

A Yes.

THE COURT: Okay. Anything further?
MS. GAY: I don't think so.
THE COURT: All right.
MR. PATTERSON: Nothing further.
THE COURT: Ma'am, you may step down.
MS. GAY: I have to confer with my little crew over here at the corner.
THE COURT REPORTER: Judge, 11 will be in -- admitted?
THE COURT: Yes. It's admitted. And I need to look at it. Then we're going to take a quick break.
MS. GAY: I have no further questions for the witness, your Honor.
THE COURT: All right. You may step down.
Will you hand up 11 --
MS. GAY: Yes.
THE COURT: -- so I can read it?
And then let's take ten minutes because we have been going since we started the --
MR. PATTERSON: Your Honor, the State has no more witnesses.
THE COURT: Oh, that's it?
MR. PATTERSON: Yes, your Honor.
THE COURT: Okay.
MS. GAY: May I use the restroom, your Honor?

THE COURT: Yeah. We'll be at ease for ten minutes.

(A break is taken from 4:13 p.m. until 4:19 p.m.; at which time, the proceedings continue as follows:)

THE COURT: Okay. There are no more witnesses from the State?

MR. PATTERSON: That's correct, your Honor.

THE COURT: All right.

MS. GAY: Would you like me to talk some more, your Honor, about my thoughts on this or. . .

THE COURT: Well, I'm happy to hear from you, and I'm happy to -- I've read everything that the State gave me, and I've read most of the cases that you've given me, including Jardines, and I've been running my own searches in Fed for all -- and all the South Carolina cases and the federal cases in the Fourth Circuit that deal with the anonymous -- an anonymous tip in the context of the curtilage. And, respectfully, to me, this one's not even close. An anonymous tip is not enough to allow you to roll up in somebody's backyard when your sole purpose for going there is to search it. If you're going there to respond to a noise complaint of teenagers in the backyard and you're worried about drunk driving or you're going -- which is, I still think,

iffy, but that's what Alvarez was about -- or if you're going up to investigate a dogfighting ring based on an anonymous tip and you see people and dogs running from the property, that allows you to go on the property, as in State v. Wright, which our Supreme Court rightfully said.

If you take a look at State v. Taylor, 401 S.C. 104 -- granted that's in the context of approaching people more in the street: bicyclists, somebody riding their bike -- that case was extremely hard fought. The Court of Appeals got reversed by a sharply divided South Carolina Supreme Court in which Judge Beatty's dissent, quite frankly, has the best language.

And what he says in State v. Taylor: I dissent. I would affirm the well-reasoned opinion of Judge Short -- the Court of Appeals opinion. In my view, the majorities' opinion eviscerates the constitutional protection of the Fourth Amendment to the United States Constitution and Article 1, section 10 of the South Carolina Constitution. The record is totally devoid of any facts that would legally justify the stop, let alone the search.

Well, in that particular case, the police received an anonymous tip that a black male on a bicycle was possibly selling dope on an unpaved portion of a

public street known to be a high crime area and to having high incidents of drug traffic. Eleven o'clock at night, they're huddled up, a lot of times looking down, like happens with drug deals in the street, when they rolled up on the behavior. The record doesn't reflect that the police were unable to observe the respondent's hands and nothing contradicted their suspicion that illegal activity was taking place. Then, as the officers approached them, the respondent pedaled toward them in an undisputed attempt to avoid them. Evasive conduct may inform an officer's appraisal of a street corner encounter.

So here we've got an anonymous tip relating to a street corner encounter that has still sharply divided the Circuit Court, the Court of Appeals, and the Supreme Court. This is much more intrusive than a street corner encounter, and they don't even have the additional indicia to support reasonable suspicion that they had in State v. Taylor.

So all that being said, argue something to me, but especially under Jardines, which had not even come down when State v. Taylor came down --

I think it came down in March, but I could be wrong.

-- which further solidified the sanctity of

the curtilage in our Fourth Amendment jurisprudence. I just don't see how you don't suppress the drugs here. But convince me otherwise, if you would like to try.

MR. PATTERSON: Your Honor, respectfully, the State, I think, would argue that, one, this isn't going to be considered part of the curtilage; it would be considered open fields. However, even if under a curtilage theory, we think this is analogous to a knock and talk, which is clearly allowable under multiple Supreme Court cases as well as State Supreme Court cases.

THE COURT: Okay. All right. Well, was it a knock and talk? Were they going to talk to somebody, or were they going to hunt for the drugs that the anonymous tipster allegedly told them about?

MR. PATTERSON: I think the testimony was clear that what they were there for was to find out what was going on. And so it's exactly the analogous, because that's what a knock and talk is. It's walking up to a door or walking up to people to find out, Hey, what's going on? We don't know what's going on, but we're here to ask.

THE COURT: So a knock and talk isn't a pretext to get on the porch and be able to have the drug dog sniff marijuana or to hope somebody opens the door

enough that you can plain view see something laying around in the living room, like scales and some cocaine?

MR. PATTERSON: I don't believe --

THE COURT: Do you have a case that talks about a knock and talk in the context of going there not for investigative information, but just to hunt for drugs?

MR. PATTERSON: Well, I think they were there for investigative purposes. They were there to find out what was going on because the tip was for drugs. I don't think the nature of the tip matters so much as why they were there. They were there to simply ask about the tip, which is what any knock and talk is.

And I handed up case law regarding Alvarez v. Montgomery County. And in this case, they had received reports of underage drinking, and nobody was at the front door; so they went around to the backyard. And the Fourth Circuit said that it's fine for them to go around to the backyard. And in the Tenth Circuit Court of Appeals case, which I handed up, Shuck --

THE COURT: I read it.

MR. PATTERSON: -- officers, again, approached the backyard. And in this case, he actually sniffed a PVC pipe. And how that's distinguished from Jardines is, what they're saying is, is that anybody can smell stuff, but the drug dog is what made the difference.

THE COURT: Oh, sure, I understand that.

What Alvarez actually says is the officers' entry into the backyard satisfied the Fourth Amendment reasonableness requirement. They're responding to a 911 call about an underage drinking party and based on the alcohol containers and awkwardly parked cars, believed they had found the party. They enter the Alvarez' party -- property simply to notify the homeowner or the host about the complaint and to ask that no one drive while intoxicated.

That's like the agents in Bradshaw. The officers in this case had a legitimate reason for entering the Alvarez' property unconnected with a search of the premises. Okay?

So are you telling me that these officers from the narcotics unit of the Berkeley County Sheriff's Office wanted to go through the backyard to see who was back there and to hunt for the owner of the house so they could ask whether people were selling dope out of the backyard?

MR. PATTERSON: I --

THE COURT: Or were they going there to see what was going on and search?

MR. PATTERSON: Their testimony was to find out what was going on.

THE COURT: Okay.

MR. PATTERSON: Were -- were simply there to investigate the tip.

THE COURT: Anything else other than the anonymous tip?

MR. PATTERSON: As --

THE COURT: I didn't hear any.

MR. PATTERSON: As to why they would have gone to that particular location?

THE COURT: To that particular address ever.

MR. PATTERSON: No, they were there --

I think the case law is clear is that anywhere a private citizen might go to create a consensual encounter is lawful on curtilage and any -- and the public road, which is what -- they didn't drive into the backyard until they observed what was clearly observable from anybody who drove down the public road, which is analogous to State v. Wright, the dogfighting case.

In that case, they drove past the house from a public road, and all they observed were a lot of cars and some spotlights. And it wasn't until they were on the private property that they observed the dogfighting stuff: the people running, the dogs. So they had already intruded on the private property at that

point.

THE COURT: Well, let's look at that real quick. I think the section of the case is called "initial intrusion was lawful."

From the road deputies observed a large number of vehicles at the mobile home and saw spotlights shining next to the mobile home. These observations were not subject to any Fourth Amendment protection because they were knowingly exposed to the public. Moreover, these observations would give a reasonable police officer in the deputies' position cause to go forward. Meaning, go forward, say, into the yard. However, even absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip.

Respondent Coulette's defense counsel admitted that the police may lawfully knock on the door after receiving a complaint. If the deputies could properly drive up the dirt driveway to the front door, then their observations of the dogfighting pit and fleeing people and dogs did not exceed their investigative authority. What they observed as they drove down the dirt road corroborated the anonymous tip and gave them ample reason to believe dogfighting was in progress. Exigent

circumstances developed when the suspects starting fleeing.

We didn't have any exigency here. And you can't drive into the backyard and approach what doesn't look suspicious from the street. And there wasn't anything suspicious from the street. They didn't see anything.

Curtilage includes outbuildings, the yard around a dwelling, a garden of the dwelling, or the parking lot of a business. That's from State v. Dickey, 716 S.E.2d 97, 2011 case from South Carolina.

I think you've made an excellent argument, but the tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any. And they should have gotten a warrant, although you can't get a warrant based on an anonymous tip, generally. You've got to have more.

Yeah?

MS. GAY: Your Honor, I just want to -- as we're fleshing out this record, I want to say that, with regard to what you said that there weren't exigent

circumstances, all of the testimony from both of these officers was they saw three black males standing in the yard, and that they suited up, as she said. They got their hat on, they got their SWAT team vests on, so every intention that they had were to be narcotics officers driving into that yard. Not -- I mean, though they weren't in a marked vehicle, they were there -- as she said, We were riding around, and we decided to go check this out; and they get all their suits on, and they go up in there, and they don't -- he specifically said that they didn't -- they both said that they did not see anything drop from that guy's hand that led to any type of, you know, suspicious behavior --

THE COURT: Until they were in the yard.

MS. GAY: -- until after they got out of the car, started talking to them, and said something. And they didn't go anywhere near the truck until they saw somebody run from it, who they chased, who was -- you know, they detained my client, he was unlawfully searched, and I believe that we would ask you to please suppress.

Now, he wasn't charged with anything in the house. Just the stuff in the car that he was charged with.

THE COURT: What else? Anything further, just

so y'all can protect your record?

MR. PATTERSON: Well, again, I believe that -- even if we're to consider this curtilage, that there's nothing that precludes a member of law enforcement from intruding on private property where a private citizen could have intruded. So them wanting to go talk to an individual is not precluded based on my reading of the case law.

However, I think that analogous to Wright, they're on a public road, they have a tip of people in the backyard selling drugs, they see people in the backyard selling drugs --

THE COURT: No, they didn't. Not from the road.

MR. PATTERSON: Excuse me. I misspoke. I apologize.

THE COURT: That's okay. No problem.

MR. PATTERSON: They see people in the backyard, which would corroborate that there are -- I mean, that these might be people that we can go talk to.

However, I think -- I don't think that this can be considered curtilage. There is a fence around the house, and this particular property is beyond the fence. It's outside the fence. It's open to two public roads,

and it's open to houses that anybody from the public could have seen. And in U.S. v. Dunn, which I can provide, your Honor --

THE COURT: I have it.

MR. PATTERSON: -- it sets out extent of curtilage factors that would place -- factors that place specific points of property within the umbrella of the curtilage: The proximity of the area to the home, whether the area is within an enclosure surrounding the home, the nature and uses to which the area is put, and the steps taken by the resident to protect the area from observation by passersby. There's no indication that there's any attempt to protect the area from observation from people using the road or people living in the houses.

THE COURT: Well, was there in Jardines?

MR. PATTERSON: I'm sorry?

THE COURT: Was there any such attempt to protect the front porch in Jardines?

MR. PATTERSON: Well, Jardines doesn't rely on an open field's question.

THE COURT: This isn't an open field's question. But it talks about what the curtilage is, and whether the curtilage is protected or not.

MR. PATTERSON: Well, in that particular

situation, the porch was considered the curtilage. This is an area of yard that's beyond a fenced-in area.

MS. GAY: Your Honor, this is an area of yard, as we can see in this map, that has a car that they put there, that has a shed that they put there, that is -- I mean, I've got pictures that I showed you. But all of this -- okay. There's even an outback building right here. This alleged public road curves in to her private property right here. This is this lady's yard. All of it is this lady's yard. They're having their barbecue right here.

THE COURT: Yeah. I mean, I'm looking at the map that the State put up to ask the officers about. You know, I'm with Beatty, Kittredge, and Short in State v. Taylor. I realize there's a split; however, I'm feeling pretty comfortable about this one. The motion to suppress is granted.

What else do we need to go over? Anything else?

MR. PATTERSON: Just one more thing. We'd like to raise one issue of standing where this -- in Minnesota v. Carter, this particular defendant was not the homeowner; he's not the property owner. He's merely present on the scene. And in this particular case, it says, One who is merely present with the consent of the

house owner may not have standing in terms of Fourth Amendment issues.

THE COURT: Okay. Well, I didn't hear --

MS. GAY: Your Honor, my client was in his -- had a truck that he owned that was on that property, and these drugs were actually found in his truck. So pursuant to all the law that I've seen about how to -- how the search happened of his vehicle on that, I don't -- he may not have standing to what they found in the house. That's something totally different. But at this point, he has total standing to what they found in his car. And, you know, which they're alleging is -- you know, he had dominion and control of.

Now, with regard to what's going on, your Honor, Mr. Bash has another charge that's an older charge, that's a -- not nearly as significant as this charge. And at one point in time, he -- he had a bond hearing or some kind of bond revocation hearing in front of your Honor, and his bonds were revoked. And so I don't know -- I wasn't his attorney at the time. I'd like to show you this. I've already talked to Mr. Patterson about it. And it says -- you have the box checked, committed. I don't know why I wasn't a part of the case at that point. But what I would ask you to do --

This case is a couple of years old. Even older than this 2011 case. And I don't know if we need to -- I assume he's going to appeal it. I don't know if that means my client goes out on bond or what or, you know, we ask for a bond.

THE COURT: Well, what about these other charges? Because those don't have anything to do with this; right?

MS. GAY: No.

MR. PATTERSON: Right.

THE COURT: I mean, we need to, I guess, get that set for trial, or however y'all want to handle it.

MS. GAY: Well, it might not be something he does this week. I don't know. But I'm really just trying to figure out if there's a way that he could be out on bond for those other charges that -- that we can figure it out, because you specifically signed this Order and specifically checked the committed box. And I wasn't a part of the case then.

THE COURT: Right. Because he violated one of the terms and conditions of that bond.

MS. GAY: Okay. So -- he's just -- it's your position -- and he wants me to ask you, and his family wants me to ask you. So it's your position he needs to

sit in jail until we work out this other --

THE COURT: Until you figure this out --

MS. GAY: Okay. I understand.

THE COURT: -- or he can post bond on the other case or we have a hearing on, you know, why it should be reinstated.

MS. GAY: Well --

THE COURT: But without information, I'm not going to do that.

MS. GAY: I understand.

So the other question is --

I'm coming back on Thursday afternoon. Maybe we could have this discussion about asking for it to be reinstated.

THE COURT: Y'all talk about it and see if you want to move. We'll get something up. I -- you know, if y'all want to talk to me about standing, I'm happy to look at any law y'all send me tonight. I think the argument is that they shouldn't have been on the property in the first place. And then, if for some reason he doesn't have standing to assert that -- and that would depend, quite frankly, on what his status as a guest on the property was. Nobody put any evidence about that in the record just now. And so it's really not even before me. You know, if that was going to be

the argument, somebody should have put in some evidence in that regard.

MS. GAY: You mean against standing?

THE COURT: Well, yeah. I mean, you know, I don't know if he's related to the people, if he lives there part of the time, if the car stays there all of the time. I mean, this is just a screw-up. That's all. I mean, nobody acted in bad faith, or, you know, I don't think, did it on purpose. But, you know, they suited up and went into the curtilage of this lady's house based on an anonymous tip alone.

MS. GAY: Is this one -- are you talking about going tomorrow?

THE COURT: Yeah. I mean, if I need to look at it tonight, send me whatever you want.

MR. PATTERSON: Will we be able to recall witnesses to discuss standing?

THE COURT: Nope.

MS. GAY: I don't think so.

THE COURT: We're done. I mean, y'all said y'all were resting.

(Ms. Gay is speaking to Mr. Patterson off the record.)

THE COURT: Well, but what I think he's trying to argue is, is he doesn't have standing to assert the

argument that I just granted as the basis for my ruling. However, there's no evidence put in that he doesn't have standing.

MS. GAY: That would be my position.

THE COURT: So the question then becomes: Do you need to put in standing that he does? And that's what I'm willing to look at tonight, if that's even a valid --

MS. GAY: Your Honor, if you -- if it makes a difference, my client would be willing to testify that he was invited to the party, if that's something that you wanted to have in the record.

THE COURT: From what I recall, it depends on what his status as a guest was. You know, quite frankly, I'd be more concerned about wanting to fight about something that is so obviously violative of the Fourth Amendment.

But you go talk to Brian and the folks in your office, and if we want to argue about standing, I'm happy for you to send me some case law. But this one, to me, is not close.

MR. PATTERSON: Thank you, your Honor.

THE COURT: Okay? Thank you.

MS. GAY: Thank you.

THE COURT: So E-mail me whatever y'all want.

Y'all talk, and, you know, I'll read anything you send me.

WHICH WAS ALL THE EVIDENCE ADDUCED AT THIS CAUSE.

(The hearing of this cause concluded at 4:40 p.m., on June 11, 2013.)

REPORTER'S CERTIFICATE

STATE OF SOUTH CAROLINA)
) **ss.**
COUNTY OF BERKELEY)

I, **ROLAYNE M. VOLPE**, Certified Court Reporter, CCR, and Registered Professional Reporter, RPR, do hereby certify that the transcript of the foregoing proceedings accurately reflects the events that occurred before me to the best of my ability at the time and place set out on the caption hereto, the witnesses having been duly cautioned and sworn, or affirmed, to tell the truth, the whole truth, and nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken or to any attorney or counsel employed by the parties hereto, nor financially interested, directly or indirectly, in the outcome of this action.

CERTIFIED AND SIGNED on this 29th day of August, 2013.

ORIGINAL

ROLAYNE M VOLPE NOTARY PUBLIC SOUTH CAROLINA

ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 9/30/2021

2011-11-01619

WITNESSES

keley County Sheriff's Office

G. Bore

AGENCY CASE NUMBER

111048232

ARREST WARRANT NUMBER

5936

DATE OF ARREST

ember 11, 2011

ON OF GRAND JURY

True Bill

erson of Grand Jury

10/12/12

ICT

rson of Petit Jury Date:

DOCKET NO. 2012GS0801823

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

October Term

THE STATE

vs.

WALTER MAURICE BASH
DOB: [redacted]
B/M

Indictment for

Trafficking Cocaine

§44-53-370(e)(2)(e)
CDR: 0281

FILED
12 OCT 17 PM 3:10
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

LFH

R. 85

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on October 17, 2012 the Grand Jurors of Berkeley County present upon their oath:

Trafficking Cocaine

That WALTER MAURICE BASH did in Berkeley County, South Carolina, on or about November 10, 2011, unlawfully and knowingly sell, deliver, or purchase, or bring into this State; or aid, abet, attempt, or conspire to sell, deliver, or purchase, or bring into this State; or was in actual or constructive possession, or attempted to become in actual or constructive possession of a controlled substance or a controlled substance analogue, to wit: Cocaine, in an amount of more than four hundred (400) grams, such possession not having been authorized by law, in violation of §44-53-370(e)(2)(e) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JENNIFER KINZELER WILLIAMS
ASSISTANT SOLICITOR

R2011-11-01619

WITNESSES

keley County Sheriff's Office

D. Sra

AGENCY CASE NUMBER

111048232

ARREST WARRANT NUMBER

25928

DATE OF ARREST

ember 11, 2011

ON OF GRAND JURY

True Bill

rson of Grand Jury

10/17/12

DICT

rson of Petit Jury *Date:*

T

DOCKET NO. 2012GS0801824

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

October Term

THE STATE

vs.

WALTER MAURICE BASH
DOB: [redacted]
B/M

Indictment for

Trafficking Cocaine Base

§44-53-0375(C)(1)
CDR: 0450

FILED
12 OCT 17 PM 3:10
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

LFH

R. 87

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

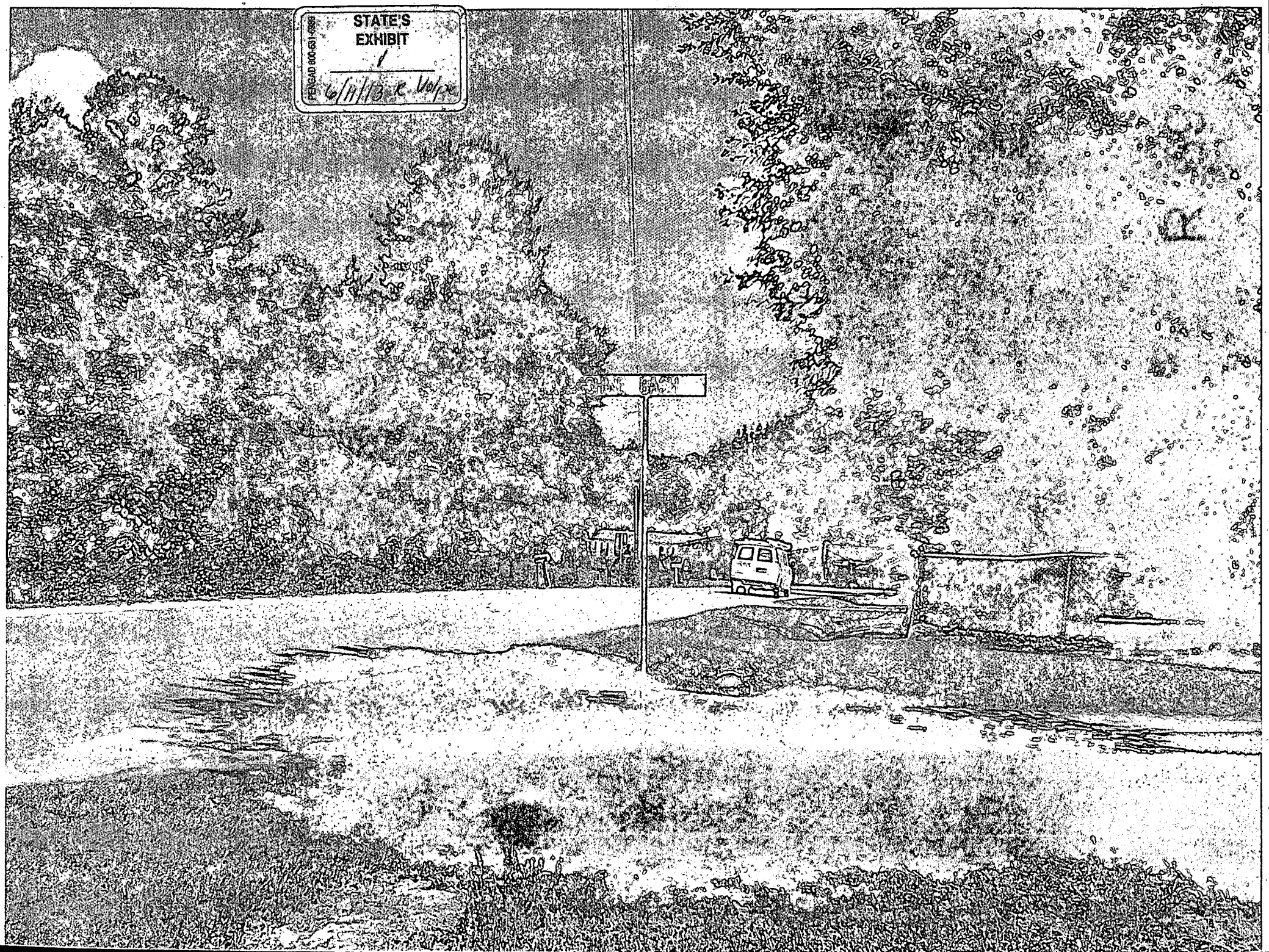
At a Court of General Sessions, convened on October 17, 2012 the Grand Jurors of Berkeley County present upon their oath:

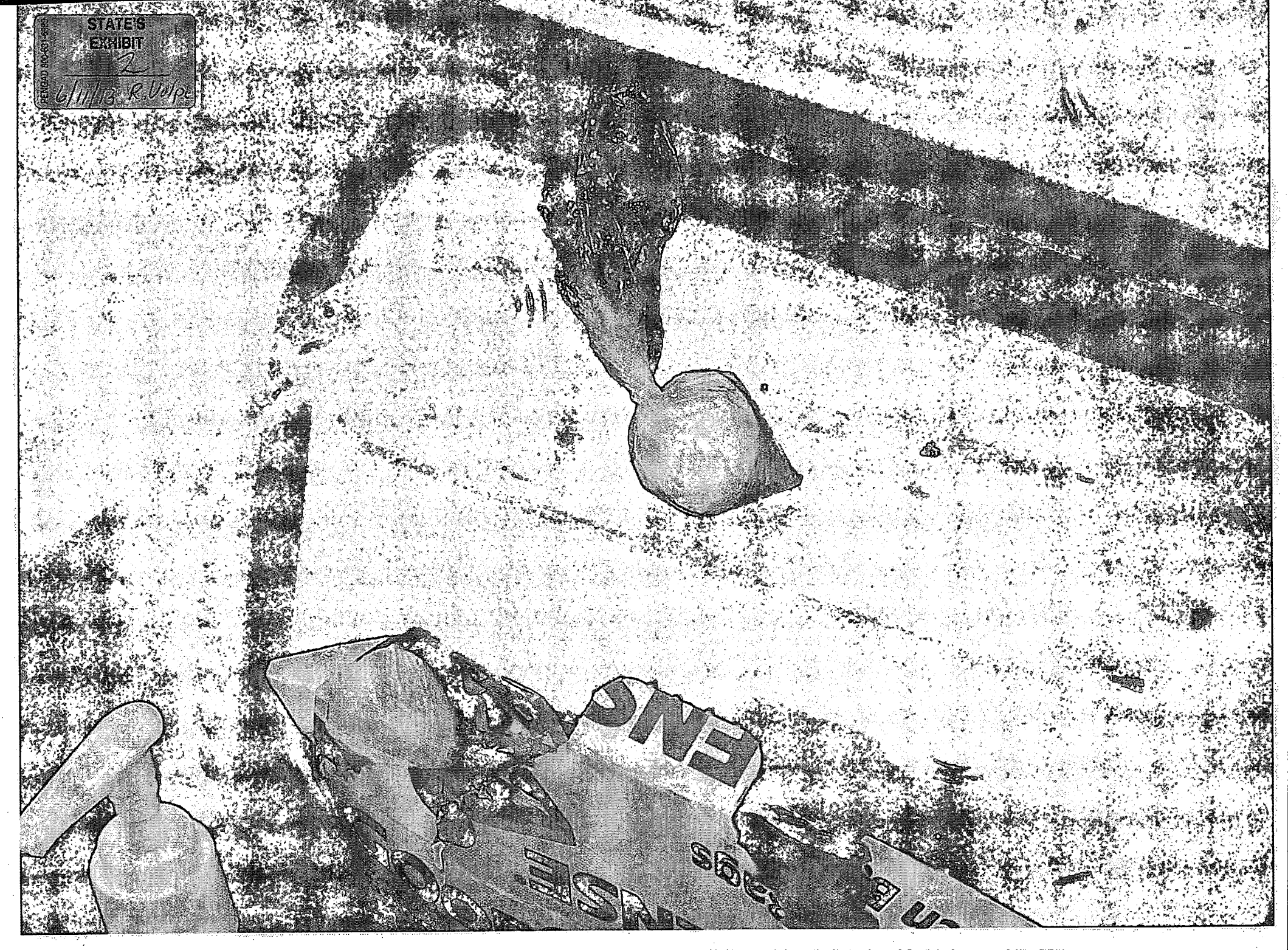
Trafficking Cocaine Base

That WALTER MAURICE BASH did in Berkeley County on or about November 10, 2011, knowingly, sell deliver, purchase, or bring into this state, or did aid, abet, attempt or conspire to sell, deliver, purchase or bring into this state, or was in actual or constructive possession or attempted to become in actual or constructive possession of a controlled substance, or a controlled substance analogue to wit: Cocaine Base, such possession not having been authorized by law, in violation of §44-53-0375(C)(1) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JENNIFER KINZELER WILLIAMS
ASSISTANT SOLICITOR


STATE'S
EXHIBIT
1
6/11/13 R. Volpe
PENGAD 800-631-6989

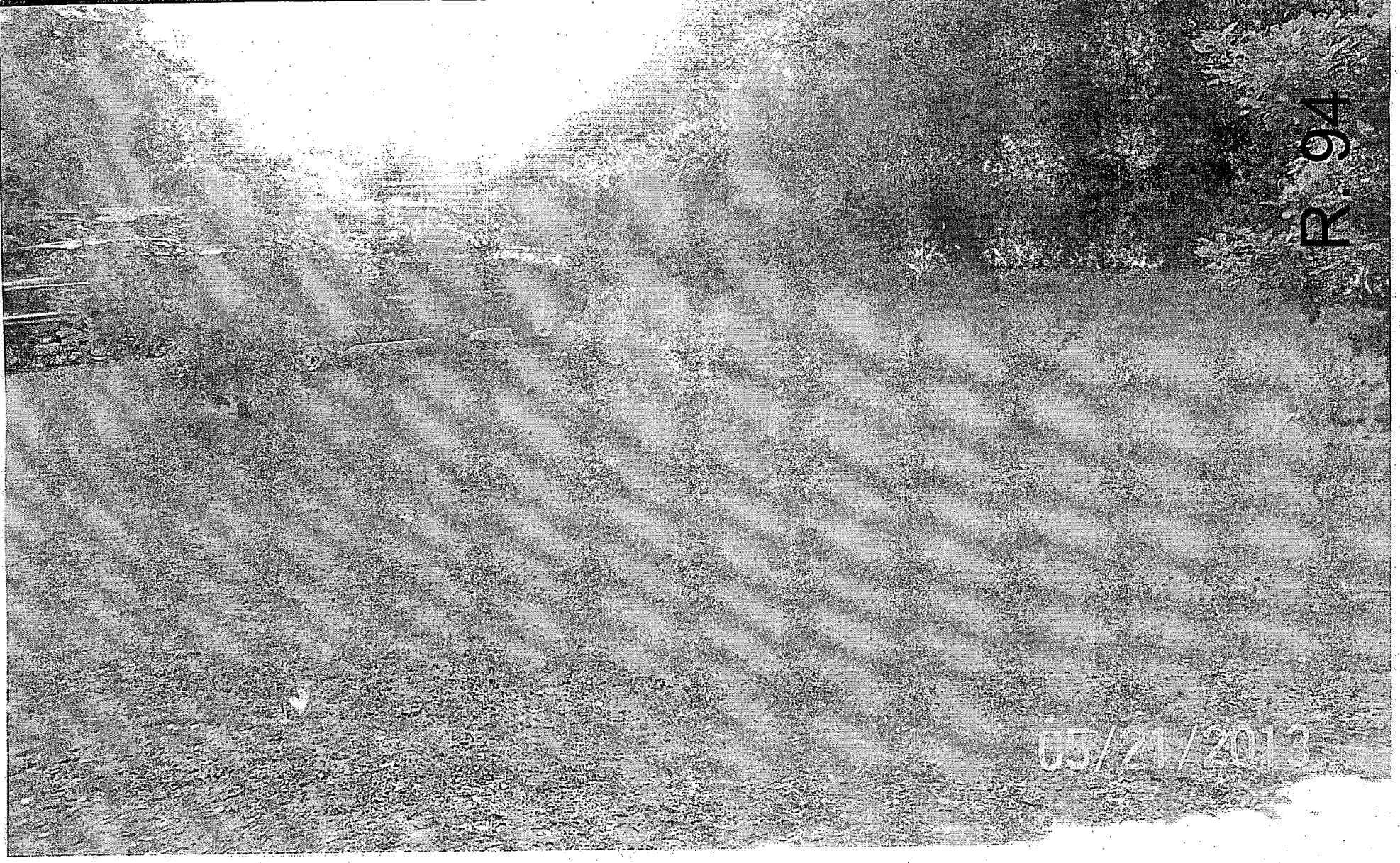

STATE'S
EXHIBIT
2
6/11/13 R. Volpe
PERCAD 800-851-8383

STATE'S EXHIBIT
3
R. Volpe 6/11/12

PENGAD 800-631-6989

STATE'S
EXHIBIT
4
R


STATE'S
EXHIBIT
5
6/11/13 R.V.
PENGAD 800-631-6989



DEFENDANT'S
EXHIBIT
1
R.V.P. 6/11/13
PENGAD 800-631-6989

PENGAD 800-631-6989
DEFENDANT'S
EXHIBIT
2
6/11/13 R. Vi/pc



PENGAD 800-631-6989
DEFENDANT'S EXHIBIT
3
R.V. 6/11/13

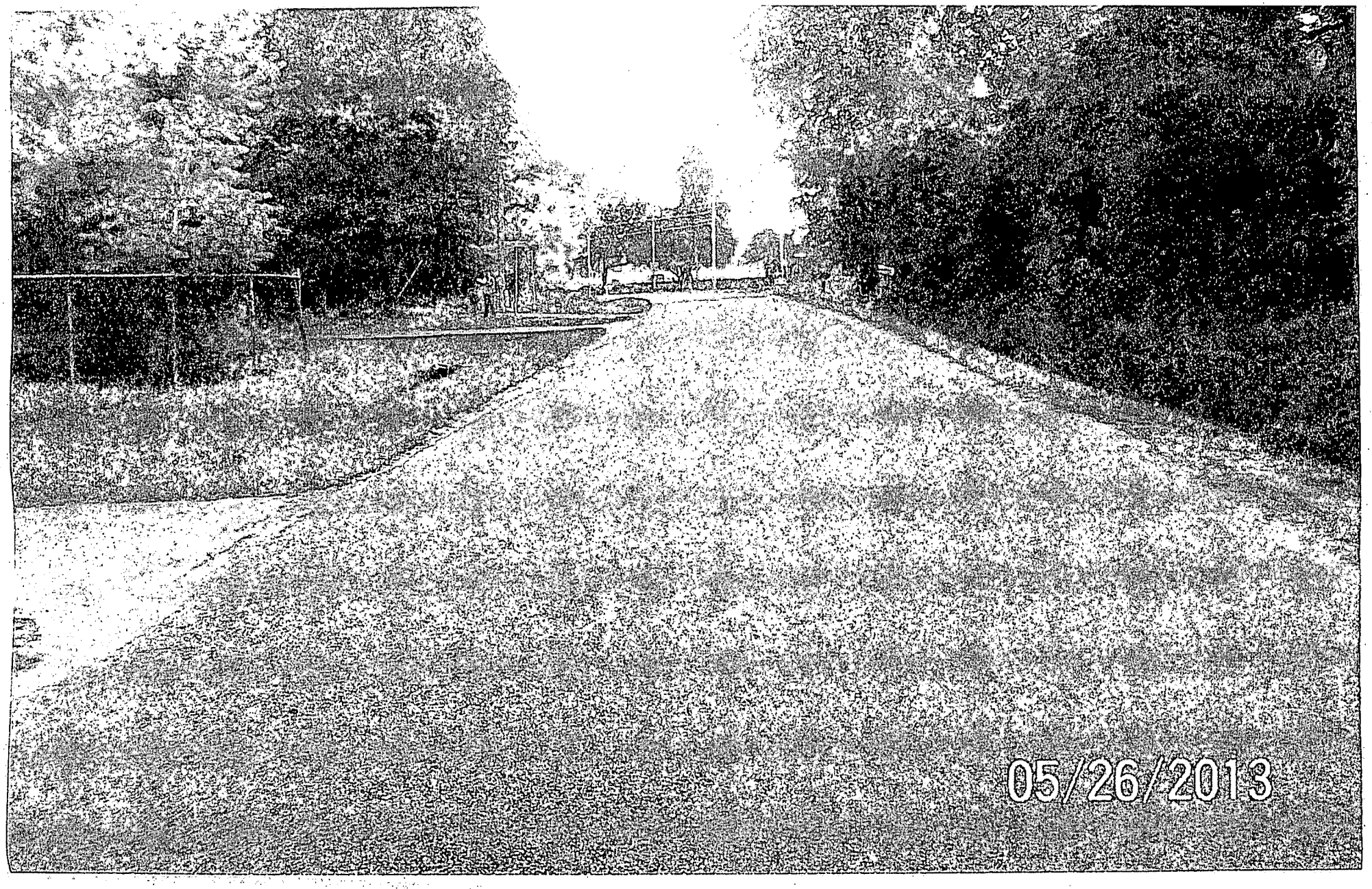
R. 97

DEFENDANT'S
EXHIBIT
4
6/11/13 RLolpe
PENGAD 800-631-6989

05/21/2013

R. 98

PENGAD 800-631-6989
DEFENDANT'S
EXHIBIT
R. Volpe 6/11/13



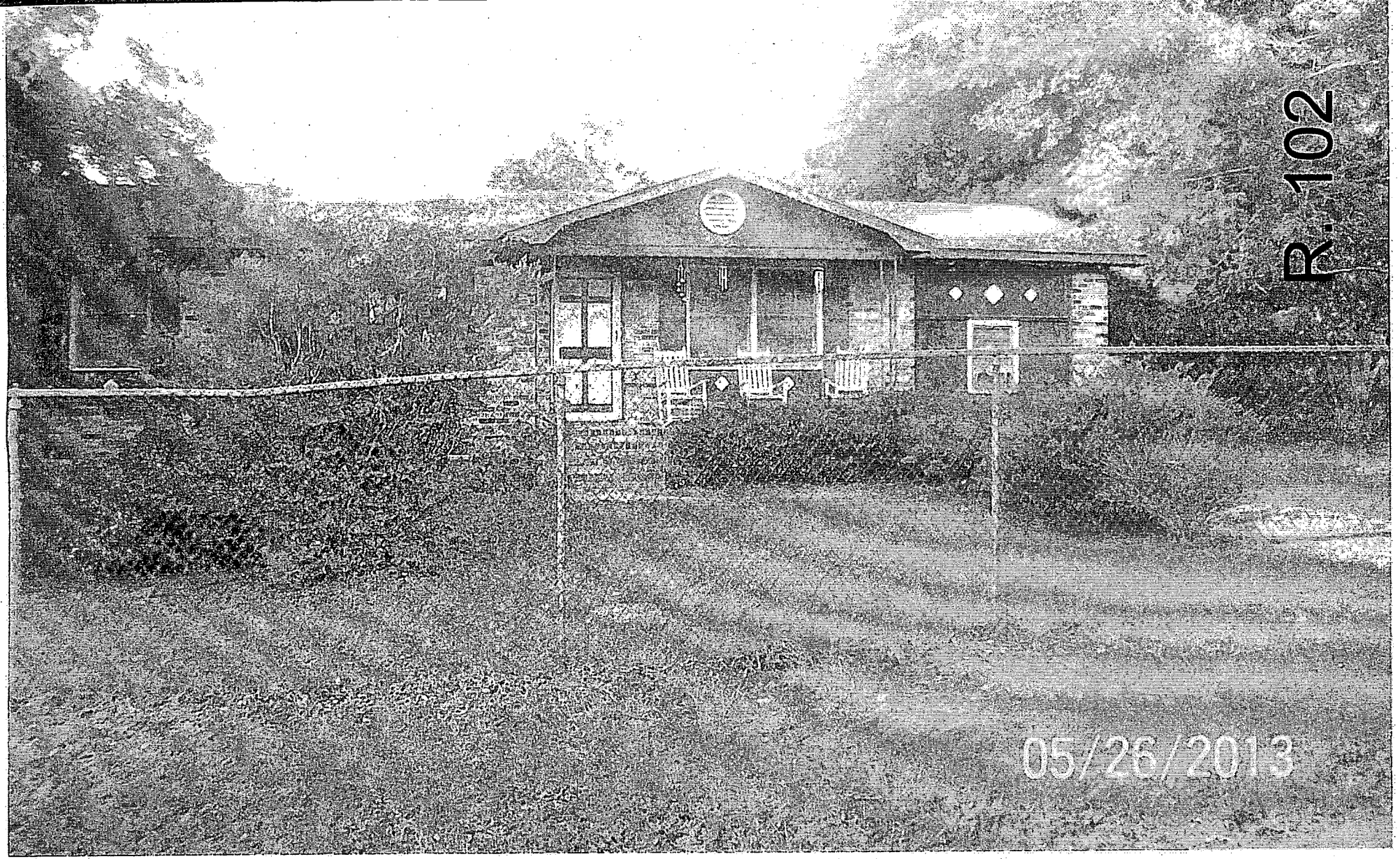
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DEFENDANT'S EXHIBIT
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6/11/13 R.Volpe

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R. Volpe 6/4/13
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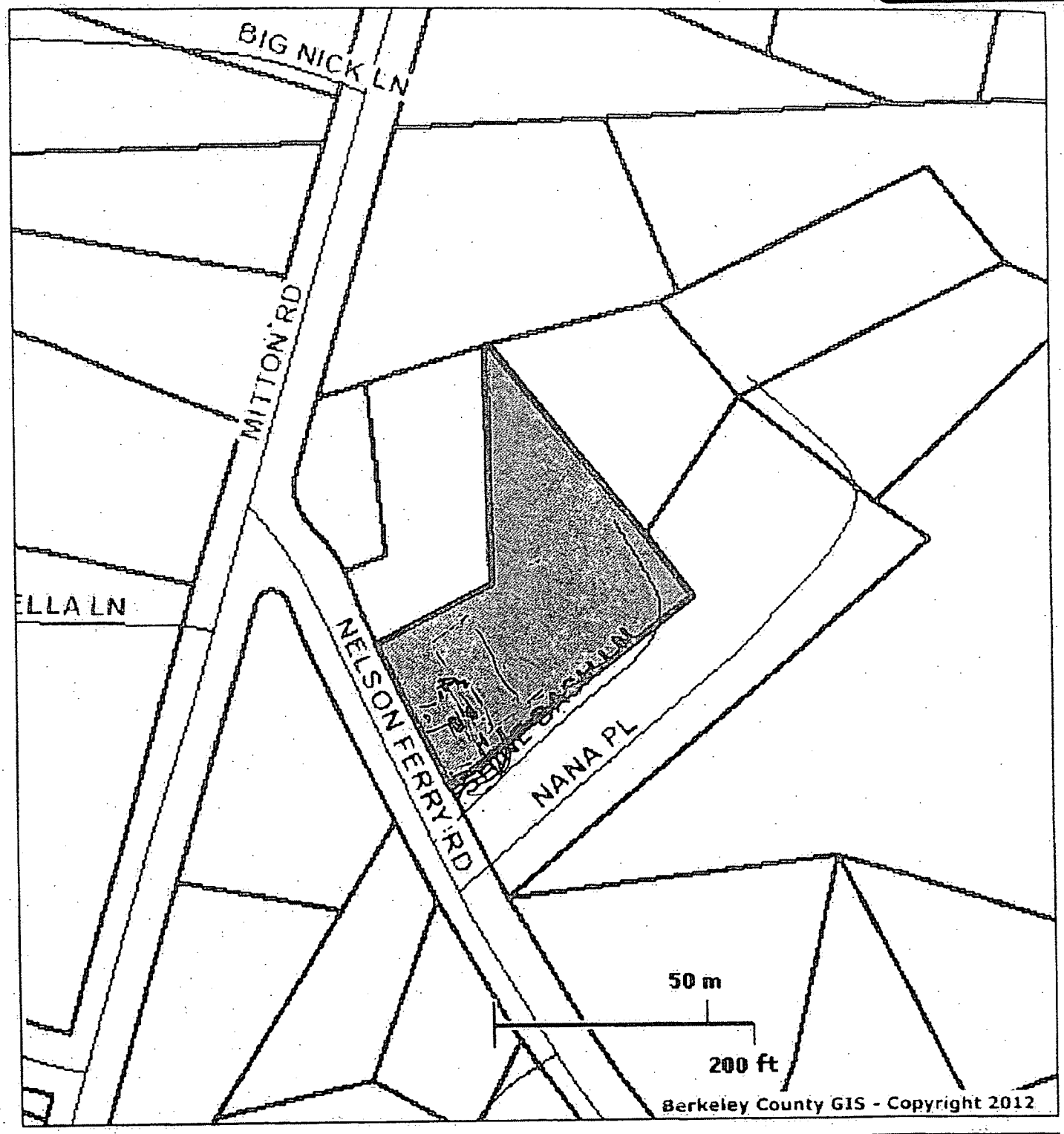
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DEFENDANT'S EXHIBIT
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DEFENDANT'S EXHIBIT 10
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BERKELEY COUNTY GEOGRAPHIC INFORMATION SYSTEM

Berkeley County EGS Mapping

The county of Berkeley and its GIS Department disclaims accountability for this product and makes no warranty express or implied concerning the accuracy thereof. Responsibility for interpretation and application of this product lies with the user.

Thursday, September 20, 2012

R. 103

VCD0068

OCA: 2011-11048232

Form Approved by: S.C. Attorney General Section 17-13-160
March 15, 1978

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

SEARCH WARRANT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF BERKELEY:

It is appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provision of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

(SEE SECTION "A")

Now, therefore, you are hereby authorized to search the subject premises for the property described as below, and to seize such property if found:

DESCRIPTION OF PROPERTY

(SEE EXHIBIT "A")

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Issuing MAGISTRATE

Within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable, in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person. A copy shall be attached to a prominent place on such premises

Moncks Corner, S.C.

10 Nov, 2011

Signature of Judge

DEFENDANT'S EXHIBIT 11 6/11/13 C. Volpe

R. 104

VCD0035

OCA: 2011-11048232

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

AFFIDAVIT

Personally appeared before me, DET. CPL. K. MILKS who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County.

DESCRIPTION OF PROPERTY SOUGHT
(SECTION "B")

ANY AND ALL ILLEGAL DRUGS, NAMELY SCHEDULE I, (NAMELY COCAINE BASE) II, III, IV AND V CONTROLLED SUBSTANCES AS WELL AS PARAPHERNALIA INCLUDING BUT NOT LIMITED TO ITEMS OF VARIOUS TYPES COMMONLY ASSOCIATED WITH STORAGE, DISTRIBUTION, PURCHASING, MANUFACTURING AND TRAFFICKING OF ILLEGAL DRUGS. ANY COMPUTERS, ELECTRONIC STORAGE MEDIA, DOCUMENTS, PHONE TOLLS, PERSONAL RECORDERS OR ANY OTHER ITEMS ASSOCIATED WITH THE RECORDINGS OF USE OR TRADE OF ANY ILLEGAL DRUGS OR ITEMS OF PERSONAL PROPERTY TENDING TO ESTABLISH THE IDENTITY OF PERSONS IN CONTROL OF THE AREA TO BE SEARCHED.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED
(SECTION "A")

WHILE TRAVELING ON HIGHWAY 17 THROUGH MONCKS CORNER, TRAVEL 0.5 MILES AND TURN LEFT ONTO MITTON ROAD. TRAVEL APPROXIMATLEY 0.6 MILES WEST BOUND UNTIL REACHING NELSON FERRY ROAD. TURN RIGHT ONTO NELSON FERRY ROAD. THE RESIDENCE IS DESCRIBED ON THE LEFT SIDE OF THE ROADWAY. THE RESIDENCE IS DESCRIBED AS A TAN IN COLOR BRICK RESIDENCE WITH BLACK TRIM TO INCLUDE RAISED WHITE PANELS ON THE FRONT OF THE BUILDING. THE FRONT DOOR IS BLACK IN COLOR WITH THE NUMBERS [redacted]. THAT IS POSTED ABOVE THE FRONT DOOR IN BLACK COLOR. TO INCLUDE A CHAIN LINK FENCE THAT SURROUNDS THE FRONT OF THE RESIDENCE; THE ADDRESS IS INDICATED AS [redacted] **NELSON FERRY ROAD**. THIS SEARCH WARRANT IS TO INCLUDE ALL OUTBUILDINGS, APPERTUENCES, VEHICLES AND PERSONS PRESENT AT THE TIME THE SEARCH WARRANT IS EXECUTED.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

MEMBERS OF THE BERKELEY COUNTY DRUG ENFORCEMENT UNIT WERE INVESTIGATING A SUSPICIOUS COMPLAINT AT [redacted] NELSON FERRY ROAD THAT IS LOCATED IN THE MONCKS CORNER AREA OF BERKELEY COUNTY. AGENTS APPROACHED TWO BLACK MALES; LATER IDENTIFIED AS ESAU BRANCH AND CURTIS SHINE WHO IS THE PROPERTY OWNER. BOTH SUSPECTS WERE STANDING IN THE REAR OF THE RESIDENCE, ADJACENT TO A BLACK IN

COLOR TRUCK THAT WAS PARKED, AND DID BEAR THE SC TAG [redacted] AS AGENTS BEGAN TO EXPLAIN THE REASON FOR OUR PRESENCE, THE BLACK MALE THAT WAS STANDING AT THE REAR OF THE TRUCK, ESAU BRANCH, WAS OBSERVED THROWING DOWN A CLEAR IN COLOR WHITE POWDERY SUBSTANCE THAT DID WEIGH APPROXIMATELY 1.5 GROSS GRAMS THAT DID TEST POSITIVE FOR COCAINE. THIS AGENT APPROACHED THE TRUCK AND ONE BLACK MALE EXITED THE PASSENGER SIDE DOOR OF THE TRUCK AND ABSCOUNDED FOR AGENTS. IT WAS AT THAT TIME, A BLACK MALE, IDENTIFIED AS WALTER BASH DID STEP OUT OF THE DRIVERS SIDE OF THE VEHICLE, IN PLAIN VIEW ON TOP OF THE CONSOLE ON THE INTEROIR OF THE TRUCK, WAS ONE GRAY IN COLOR DIGITAL SCALE AND A CLEAR BAGGIE CONTAINING A WHITE IN COLOR SUBSTANCE. A SEARCH OF THE VEHICLE WAS CONDUCTED AND YIELDED FOUR CLEAR BAGGIES OF APPROXIMATELY 671.0 GROSS GRAMS OF A WHITE IN COLOR POWDER SUBSTANCE THAT DID TEST POSTIVE FOR COCAINE. THEREFORE, THIS AFFIANT STATES THERE IS PROBABLE CAUSE TO BELIEVE THAT A CRIME HAS BEEN COMMITTED, TRAFFICKING IN COCAINE BASE, THAT ADDITIONAL EVIDENCE AND/OR CONTRABAND WILL BE FOUND UPON THE PREMISES TO BE SEARCHED UPON EXECUTION OF THIS SEARCH WARRANT.

Sworn to and Subscribed before me
This 10th day of NOVEMEBER, 2011

_____ (L.S.)
Signature of Judge

1835

_____
Affiant

R. 106

VCD003

OCA: 2011-11048232

RETURN

I received the attached Search Warrant 11-10-11, 2011, and have executed it as follows:

On 11-10-11, 2011 at 1850 o'clock P M, I searched (the person) described in the warrant and (the preinises).

I left a copy of the warrant with Residence Name of person searched or "at the place of search" with. Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Item 1) metal grinder located in Shed behind residence by Det. Mcdowell

Item 2) Quantity of BURNT marijuana cigarettes Located under couch cushion, N Dem by Milks

Item 3) green digital scale located in kitchen ON COUNTER by Det. Milks

Item 4) Quantity of White Powder substance Located ON Kitchen counter by Det. Milks/Ashe,

Item 5) Quantity of US currency Located On top of Refridgerator by Ashe.

Item 6) Quantity of US currency Located on washer in Utility room by Det Boerst

Item 7) Misc paperwork Located inside residence by Milks

Item 8) Quantity of green plant material located inside kitchen by Ashe

ALL Items Retrieved by Det. Milks

nothing else follows

This inventory was made in the presence of: Sgt. Holbrook, Sgt Ashe, Sgt Vaughn, SSt. Ham Cpl Milks, Cpl Mcdowell, Det. Boerst

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 19th Day of November, 2011

(L.S.)

(Signature of Officer Executing Warrant)

R. 107

VCD0038

Site Map


R-108
HILTON RD
NELSON FERRY RD
SHINE BASH LN
BASH LN
0 12.5 25 50 75 Feet

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

August 12, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2013-001430

THE STATE,

Appellant,

vs.

WALTER MAURICE BASH,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of August, 2014.

Ellen R DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2013-001430

THE STATE,

Appellant,

vs.

WALTER M. BASH

Respondent.

FINAL BRIEF OF APPELLANT

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Attorney General

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Assistant Attorney General

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court judge err in granting Bash's motion to suppress his narcotics based on an alleged violation of his Fourth Amendment rights when law enforcement officers approached Bash in a reasonable manner in an open grassy area visible from multiple public roadways and situated outside of the curtilage of a residence located on the same parcel of property before observing Bash's narcotics in plain view through the window of his truck?

II.

Even assuming the circuit court judge correctly concluded that the open grassy area constituted part of the residence's curtilage, did the circuit court judge err in granting Bash's motion to suppress his narcotics based on an alleged violation of his Fourth Amendment rights when the officers entered the grassy area in a constitutionally-permissible and reasonable manner pursuant to the implied license that permits entry onto private property to speak with an occupant of the property before observing Bash's narcotics in plain view through the window of his truck after exigent circumstances developed?

STATEMENT OF THE CASE

In February of 2011, Respondent Walter Maurice Bash was arrested after officers located narcotics in Bash's vehicle while conducting an investigation into an anonymous tip about drug activity taking place behind a residence in Moncks Corner, South Carolina. In October of 2012, the Berkeley County grand jury indicted Bash for one count of trafficking in cocaine in an amount greater than 400 grams and one count of trafficking in cocaine base. Prior to trial, Bash filed a motion seeking the suppression of the narcotics discovered during the investigation. On June 11, 2013, a hearing was conducted on Bash's motion in the Berkeley County court of general sessions before the Honorable Stephanie P. McDonald, circuit court judge. At the conclusion of the hearing, the circuit court judge granted Bash's suppression motion. The State then timely filed a notice of appeal.

STATEMENT OF FACTS

On November 10, 2011, the drug enforcement unit of the Berkeley County Sheriff's Office received an anonymous tip that several men were engaged in drug activity at that time behind a residence located on Nelson Ferry Road in Moncks Corner, South Carolina. (R. pp. 20-21; p. 47; p. 54). In response, Sergeant Lee Holbrook and several other officers with the Berkeley County Sheriff's Office traveled to Nelson Ferry Road to follow-up on the tip and investigate whether drug activity was taking place, and they arrived at the residence identified in the tip within ten minutes. (R. pp. 20-21; pp. 45-46; p. 54).

After arriving at the residence, Sergeant Holbrook and the other officers noticed that Shine Bash Lane, a public road adjoining Nelson Ferry Road, ran along the side of the specified residence and ended towards the rear of the parcel of property on which the residence was located. (R. pp. 21-22; p. 89; p. 103). Based on the fact that the tip indicated the drug activity was occurring behind the residence, the officers drove down Shine Bash Lane, and, when they did so, Sergeant Holbrook observed three men standing in an open grassy area outside of the fenced-in backyard of the residence near a small utility shed, a broken-down car, and a parked black truck.[1] (R. p. 24; pp. 26-27; p. 31; p. 39). The officer then pulled his vehicle into the grassy area from the public road, parked approximately twenty feet behind the truck, exited his vehicle, approached the men, and asked them what was going on.[2] (R. pp. 27-30; p. 36; pp. 45-46; p. 55).

[1] Notably, the grassy area could be seen unobstructed from at least two public roadways and several residences other than the one identified in the anonymous tip. (R. p. 108).

[2] At the time he approached the men, Sergeant Holbrook and the other officers were wearing law enforcement attire. (R. p. 54).

Upon seeing Sergeant Holbrook approaching and only moments after the officer had exited his vehicle, one of the men standing in the grassy area threw down a bag containing a white powdery substance that the officer recognized to be cocaine while another man rapidly exited the passenger's side door of the truck and fled into a nearby wooded area. (R. pp. 30-31; p. 36; p. 46). In response, the officers with Sergeant Holbrook pursued the fleeing man while Sergeant Holbrook stayed with the other men in the grassy area to keep an eye on the bag of cocaine that had been thrown to the ground. (R. pp. 31-32; pp. 56-57).

As Sergeant Holbrook waited with the men, Respondent Walter Maurice Bash exited the driver's side door of the truck parked in the grassy area and asked the officer what was going on. (R. p. 32; p. 35). When Bash did so, Sergeant Holbrook asked him to step to the rear of the truck with the other individuals who remained in the grassy area, discussed the anonymous tip with them, and asked another officer to come and assist him. (R. pp. 32-33). When the other officer arrived, Sergeant Holbrook arrested the man who had thrown the bag of cocaine onto the ground, temporarily detained Bash and the others, and looked through the driver's side window of the truck to see if anyone else was in the vehicle. (R. pp. 32-34; p. 48). Inside, he saw a digital scale, plastic bags, cocaine, crack cocaine, and an open beer can in plain view. (R. p. 34; p. 51; pp. 90-93). Sergeant Holbrook then verified that the truck belonged to Bash and arrested him for possessing the narcotics found inside.[3] Subsequently, Bash was indicted for one count of trafficking

[3] The entire encounter between Bash and the law enforcement officers lasted approximately ten minutes. (R. p. 49).

in cocaine in an amount greater than 400 grams and one count of trafficking in cocaine base.[4] (R. pp. 35-36; pp. 48-49; pp. 85-88).

Thereafter, prior to trial, Bash filed a motion seeking the suppression of the narcotics discovered in his truck, and a hearing was conducted on the motion. (R. pp. 6-7). At the outset of the hearing, defense counsel argued for the narcotics to be suppressed based on an alleged violation of Bash's Fourth Amendment rights, contending that Bash's narcotics were discovered after officers unlawfully entered the curtilage of private property without a warrant before they observed the cocaine and crack cocaine in Bash's vehicle. (R. pp. 9-16). In response, the circuit court judge requested that the testimony of the officers involved in Bash's case be introduced so she could evaluate the officers' credibility, and Sergeant Holbrook and Sergeant Kimberly Milks of the Berkeley County Sheriff's Office testified about their investigation into the anonymous tip and their subsequent discovery of the cocaine and crack cocaine in Bash's truck.[5] (R. pp. 18-64).

Following the presentation of the officers' testimony, the circuit court judge indicated that she had reviewed both state and federal case law regarding anonymous tips and curtilage, including the United States Supreme Court's decision in Florida v. Jardines, ___ U.S. ___, 133 S. Ct. 1409 (2013), and concluded that "this one's not even close." (R. p. 65). In reaching that conclusion, the circuit court judge found that an anonymous tip was not sufficient to permit an officer to enter the backyard area of a

[4] Following Bash's arrest, officers obtained a search warrant for the residence based on the discovery of the cocaine and crack cocaine in the truck and in the bag thrown onto the ground, and the search warrant was executed at 6:50 p.m. later that day. (R. p. 41; pp. 104-107). Inside the residence, officers located quantities of cash, another digital scale, marijuana, and a white powdery substance. (R. p. 61; pp. 104-107).

[5] During Sergeant Holbrook's testimony, the officer confirmed that his intentions in traveling to the residence identified in the tip were to approach the individuals who were there and speak with them about the anonymous tip he had received. (R. pp. 29-30). He further noted that no one ever directed him to leave at any point after he ventured into the grassy area located behind the residence. (R. p. 36).

residence "when your sole purpose for going there is to search it." (R. p. 65). The circuit court judge further noted that she found the dissent from the South Carolina Supreme Court's opinion in State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), to be significant and noted that she believed the officers' actions in Bash's case were much more intrusive than the officers' actions in Taylor. (R. pp. 66-67). The circuit court judge then indicated that she intended to suppress the narcotics but invited the solicitor to attempt to convince her not to do so. (R. pp. 67-68).

Thereafter, the solicitor argued that the officers' actions were entirely proper because the grassy area where the officers approached Bash and his associates was not part of the curtilage of the residence and, instead, was an open field. (R. p. 68). Furthermore, even assuming the grassy area had been part of the curtilage of the home, the solicitor asserted that the officers' actions were still proper because they were permitted to approach the individuals standing in the grassy area to make contact with them in a reasonable manner just as they were permitted to approach the door of the residence to conduct a "knock and talk." (R. p. 68).

After listening to the solicitor's contentions, the circuit court judge inquired if the officers were going onto the property to speak with someone or were going there to hunt for drugs. (R. p. 68). The solicitor responded that the testimony of the officers established that the officers entered onto the property for investigative purposes and to speak with the individuals located there about the anonymous tip. (R. pp. 68-69). Furthermore, the solicitor noted that law enforcement officers in general are permitted to go anywhere a private citizen might go to engage in a consensual encounter and compared Bash's case to the facts and circumstances from the South Carolina Supreme Court's decision in State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). (R. pp. 71-72).

However, after acknowledging the decision in Wright, the circuit court judge found that no exigent circumstances existed in Bash's case and that the officers in Bash's case could not approach Bash and the others in the backyard area of the residence, which she found to be part of the residence's curtilage, due to the fact that the officers had not observed anything suspicious from the street before approaching the men. (R. pp. 72-73). In rejecting the solicitor's contentions, the circuit court judge further explained:

> I think you've made an excellent argument, but the tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey are you selling drugs out of your house? They were there to see if they could find any. And they should have gotten a warrant, although you can't get a warrant based on an anonymous tip, generally. You've got to have more.

(R. p. 73).

Thereafter, the solicitor again argued that the officers were not precluded from entering private property to the same extent as a private citizen would have been able to enter the property in attempting to speak with the individuals located there. (R. pp. 75-77). Furthermore, the solicitor again contended that the area where the officers located Bash and his confederates was not within the residence's curtilage and noted that it was outside of the residence's fence, it could be seen openly and unobstructed from two different public roads and other surrounding residences, and no attempt had been made to shield the area from observation by others. (R. pp. 75-77). However, the circuit court judge once again rejected the solicitor's arguments, indicated that she agreed with the dissenting justices in the Taylor case, and reaffirmed her decision to grant Bash's suppression motion. (R. p. 77). The State then timely appealed the circuit court judge's ruling.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court reviews the circuit court judge's determinations under a clear error standard and will affirm the circuit court judge's determinations if they are supported by any evidence. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). However, the appellate court is **not** barred from conducting its own review of the record to determine whether the circuit court judge's decision in a search and seizure case is supported by the evidence. State v. Cheeks, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App. 2012); see Narcisco v. State, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

ARGUMENT

I.

Did the circuit court judge err in granting Bash's motion to suppress his narcotics based on an alleged violation of his Fourth Amendment rights when law enforcement officers approached Bash in a reasonable manner in an open grassy area visible from multiple public roadways and situated outside of the curtilage of a residence located on the same parcel of property before observing Bash's narcotics in plain view through the window of his truck?

Following a suppression hearing, the circuit court judge ruled that the narcotics discovered in Bash's truck should be excluded from trial after finding that Bash's Fourth Amendment rights were violated when the law enforcement officers in Bash's case allegedly impermissibly entered the curtilage of a residence to conduct a search. Contrary to the circuit court judge's ruling, the evidence and testimony presented during the suppression hearing established that the grassy area where the officers approached Bash, which was an open area visible from multiple public roadways and located outside of a fence surrounding a residence located on the same parcel of property, was not so intimately connected to the residence to be considered a part of the residence's curtilage and, thus, be entitled to the same constitutional protections as the home itself. As the grassy area was not part of the residence's curtilage, the officers' entry into the grassy area did not violate Bash's constitutional rights. Therefore, the officers' subsequent discovery of Bash's narcotics in plain view inside of his truck was not the product of a violation of his Fourth Amendment rights. Accordingly, the circuit court judge erred in granting Bash's suppression motion based on her conclusion that the officers unconstitutionally entered the curtilage of a residence, and her ruling was clearly erroneous and unsupported by the evidence. The circuit court judge's ruling should be reversed, and Bash's case should be remanded for trial.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). As a result, **only** unreasonable searches and seizures are constitutionally prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an individual's possessory interest in property or with the individual's freedom of movement. Id.; see Terry v. Ohio, 392 U.S. 1, 16, n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

In cases involving Fourth Amendment issues, the critical inquiry is "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." Rakas v. Illinois, 439 U.S. 128, 140 (1978). "That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Id.

Through its express language, the Fourth Amendment specifically delineates persons, houses, papers, and effects as constitutionally-protected areas. Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1414 (2013). Thus, the Fourth Amendment unquestionably protects an individual's home from unreasonable governmental intrusion,

and those protections extend to the home's curtilage. Id. at 1414-1415. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life[.]' " Oliver v. United States, 466 U.S. 170, 180 (1980) (citation omitted). In determining whether a particular area is part of the curtilage of a home, the following four factors are highly relevant: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. United States v. Dunn, 480 U.S. 294, 301 (1987). However, "th[o]se factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id.

Significantly though, outside of a home and the home's curtilage, the Fourth Amendment does **not** prohibit law enforcement officers from conducting investigations on private property. Jardines, 133 S. Ct. at 1414. Even if a particular area intruded upon is located on private property, governmental intrusion upon that area does not constitute an unreasonable search and is not constitutionally prohibited if the area is an open field. Id.; see Hester v. United States, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."). The term "open field" can include "any unoccupied or undeveloped area outside of the curtilage[,]" and an area can be considered an open field even if it is not open and not a field. Oliver, 466 U.S. at 177. Critically,

"open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." Id. at 179. Accordingly, "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Id. at 181.

In the case sub judice, the circuit court judge concluded that the grassy area where the officers approached Bash and the other men was part of the curtilage of the residence and based her decision to grant Bash's suppression motion on that conclusion. However, contrary to the circuit court judge's determination, the evidence and testimony presented during the suppression hearing established that the grassy area was **not** so intimately connected to the residence to be considered a part of the residence's curtilage and, instead, was an open field. Because the grassy area was not part of the residence's curtilage, the officers did not impermissibly intrude upon a constitutionally-protected area when they approached Bash in the grassy area and, thus, did not violate Bash's constitutional rights prior to discovering Bash's narcotics.

Turning to the relevant factors identified by the United States Supreme Court in Dunn, one of the key factors to be considered in determining if the grassy area was part of the residence's curtilage was the proximity of the grassy area to the residence. Although no precise testimony was presented during the suppression hearing in regard to the grassy area's exact distance from the home, the grassy area was not immediately adjacent to the residence and, instead, was far enough removed from the home that it was separated from the home by a fence and the home's fenced-in backyard. (R. pp. 94-98). Significantly, that distance and clear separation from the residence demonstrated that the grassy area was not an area intimately associated with the sanctities of the residence itself and was, thus, not part of the residence's curtilage.

Another key factor to be considered in the analysis was whether the grassy area was included in an enclosure surrounding the home. Critically and tellingly, it was not. Instead, the grassy area was entirely outside of a chain-link fence erected around all sides of the residence. Although the presence of a fence is not always alone dispositive, the fencing surrounding the front yard, side yards, and backyard of the residence served as a clear demarcation of the areas considered by the homeowner to be part and parcel of the residence. See Dunn, 480 U.S. at 301, n. 4 ("Fencing configurations are important factors in defining the curtilage, but, as we emphasize above, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home." (citation omitted)); see also Oliver, 466 U.S. at 182, n. 12 ("[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage – as the area around the home to which the activity of home life extends – is a familiar one easily understood from our daily experience."). The fact that the grassy area was undeniably separated from the residence by fencing strongly demonstrated that the grassy area was not intimately connected to the residence such that it could be considered a part of it and, instead, showed that the grassy area was a separate and distinct part of the parcel of property not associated with the private activities of the home. See United States v. Reilly, 76 F.3d 1271, 1278 (2nd Cir. 1996) ("Typically, the enclosure factor weighs against those who claim infringement of the curtilage when their land is divided into separate parts by internal fencing. In such situations, courts may well view the internal fencing as a boundary that sets the curtilage apart from the open fields."); cf. Dunn, 480 U.S. at 302 ("[I]t is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the home that is readily identifiable as part and parcel of the house. Conversely, the barn – the front portion itself

enclosed by a fence – and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence."). Therefore, the grassy area's location outside of the enclosure surrounding the residence established that the grassy area was not part of the residence's curtilage.

One of the other important factors to be considered was the steps taken by the resident to protect the grassy area from observation by people passing by. Critically, the evidence and testimony presented during the suppression hearing established that **no** steps had been taken by the homeowner to shield that area from outside observation in any way. Specifically, the grassy area itself was situated directly next to a public roadway that ran adjacent to the parcel of property on which the residence was located, and no barrier had been erected or effort made to shield or protect the grassy area from observation by those standing outside of the property, those residing in neighboring homes, or those traveling along at two least nearby public roadways. See California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."); see, e.g., Vidos v. State, 367 Ark. 296, 311, 239 S.W.3d 467, 479 (Ark. 2006) ("[T]he land was on an open road in which there is no legitimate expectation of privacy."). As nothing protected the grassy area from outside observation, a person standing in the grassy area could not have reasonably harbored any meaningful expectation that their actions in the grassy area were private or unobservable to others. See Oliver, 466 U.S. at 178 ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."); see also Ciraolo, 476 U.S. at 212-213 ("The protection afforded the curtilage is essentially a protection of families and personal

privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."). Accordingly, the fact that the homeowner of the residence specifically chose to erect fencing around the front yard, side yard, and backyard of the residence while making no effort to protect the grassy area outside of the fencing in any way confirmed that the grassy area was not part of the curtilage of the home.

Finally, the last factor to be considered was the nature of the uses to which the grassy area was put. The grassy area itself contained a small utility shed and a broken-down vehicle and was being used at the time of the officers' arrival by several individuals who were congregating around Bash's truck. While use of the area to congregate or socialize with others could be considered an activity associated with the private and domestic activities of a home, an open field could likewise be used as an area for people to congregate and socialize. Cf. Patler v. Slayton, 503 F.2d 472, 477-478 (4th Cir. 1974) (finding a pasture that was used as a play area, picnic area, and shooting range and was located outside of a fence surrounding a home constituted an open field and was not entitled to the same Fourth Amendment protections as the home and its curtilage). As a result, the use for which the grassy area was being put at the time of the officers' arrival did not establish that the grassy area was part of the curtilage of the home, particularly when the other factors taken together strongly showed that the grassy area was not "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Dunn, 480 U.S. at 301; see, e.g., United States v. Cousins, 455 F.3d 1116, 1123 (10th Cir. 2006) ("As Dunn makes clear, the area in question must be used for the 'intimate activities of the home.' " (citation omitted)).

In finding that the grassy area was part of the curtilage of the residence, the circuit court judge did not appear to have considered any of the factors identified by the United States Supreme Court as relevant to a determination of whether an area can be considered an open field or part of a residence's curtilage and, instead, simply noted that "[c]urtilage includes outbuildings, the yard around a dwelling, a garden of the dwelling, or the parking lot of a business." (R. p. 73). However, based on the evidence and testimony presented during the suppression hearing, including the critical evidence establishing that the grassy area was an unshielded area next to a public roadway and outside of the fencing surrounding the residence and its yard, the grassy area was **not** an outbuilding, a yard around a dwelling, a garden of a dwelling, or a business' parking lot. Instead, it was an open field outside of the residence's curtilage. Because the grassy area where the officers approached Bash and the others was an open field, it was not entitled to the same constitutional protections as the residence, and the officers were not constitutionally prohibited from entering it. See, e.g., Jardines, 133 S. Ct. at 1414 ("[A]n officer may (subject to Katz[v. United States, 389 U.S. 347 (1967)]) gather information in what we have called 'open fields' – even if those fields are privately owned – because such fields are not enumerated in the [Fourth] Amendment's text."). As a result, the officers' entry into the grassy area to speak with Bash and the others was not unreasonable under the circumstances, and their subsequent discovery of Bash's narcotics, which were plainly visible through the window of Bash's truck, did not violate Bash's constitutional rights. See Jimeno, 500 U.S. at 250 ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."); see also State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth

Amendment permits police to search the vehicle without more."); State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). Both the circuit court judge's conclusion that the grassy area was part of the residence's curtilage and her decision to suppress Bash's narcotics on that basis were clearly erroneous and unsupported by any of the evidence presented during the suppression hearing. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard."). Accordingly, the circuit court judge's ruling granting Bash's suppression motion should be reversed, and Bash's case should be remanded for trial.

II.

Even assuming the circuit court judge correctly concluded that the open grassy area constituted part of the residence's curtilage, did the circuit court judge err in granting Bash's motion to suppress his narcotics based on an alleged violation of his Fourth Amendment rights when the officers entered the grassy area in a constitutionally-permissible and reasonable manner pursuant to the implied license that permits entry onto private property to speak with an occupant of the property before observing Bash's narcotics in plain view through the window of his truck after exigent circumstances developed?

In granting Bash's motion to suppress the narcotics discovered in Bash's truck, the circuit court judge ruled that the law enforcement officers in Bash's case violated Bash's Fourth Amendment rights after concluding that the officers were not permitted to enter the backyard of the residence to conduct a search. Notwithstanding the fact that the evidence and testimony presented during the suppression hearing established that the officers approached Bash and the others in an open grassy area located **outside** of a fence enclosing the residence and its backyard, the circuit court judge's ruling was clearly erroneous and unsupported by the evidence even assuming the open grassy area could somehow be considered a part of the residence's curtilage. That is true because the officers were permitted to enter the curtilage of the property identified in the anonymous tip pursuant to the implied license that allows individuals in the United States, including law enforcement officers, to enter the private property of others when attempting to speak with an occupant of the property. Critically, when the officers in Bash's case observed the men congregating in the open grassy area, they approached the men in an attempt to speak with an occupant of the residence about the anonymous tip using the same route that Bash had used to drive his truck onto the property in the same manner that any private citizen could have approached the men. Under those circumstances, the officers' entry into the open grassy area was objectively reasonable, did not constitute a search,

and did not violate Bash's Fourth Amendment rights. Thereafter, the officers were constitutionally permitted to act without a warrant **after** they entered the grassy area because, once they did so, they observed a crime being committed when one of the men threw a bag of cocaine to the ground and saw another of the men flee from Bash's truck and attempt to escape. Based on those observations, the officers had a probable cause basis to arrest the man who had been in possession of the cocaine, could lawfully seize the cocaine and conduct a search incident to the man's arrest, and could conduct a brief protective sweep of the area based on the exigent circumstances that had developed. When they undertook those constitutionally-permitted actions, they discovered Bash's narcotics in plain view inside of his truck. Accordingly, the officers did not violate Bash's Fourth Amendment rights by entering the open grassy area or in discovering Bash's narcotics, and the circuit court judge's ruling to the contrary was clearly erroneous and unsupported by the evidence. The circuit court judge's ruling should be reversed, and Bash's case should be remanded for trial.

A. Propriety of the Officers' Entry Into the Grassy Area

The Fourth Amendment is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976). However, it is **not** designed "to eliminate all contact between the police and the citizenry[.]" United States v. Mendenhall, 446 U.S. 544, 553-554 (1980). As a result, a law enforcement officer generally may approach a citizen in an effort to speak with or question that person without implicating the Fourth Amendment so long as a reasonable person under the same circumstances would feel free to disregard the officer and leave if he or she chose to do so. Florida v. Bostick, 501 U.S. 429, 434 (1991). Critically, "a seizure does not occur

simply because a police officer approaches an individual and asks a few questions." Id. at 434.

In the context of a residence, a person is not generally permitted to enter the private property of another. Jardines, 133 S. Ct. at 1415. However, based on the implicit license customary in the United States permitting visitors to approach another person's home, an officer is constitutionally permitted to approach a home in an attempt to speak with or question an occupant if the officer approaches the home in a reasonable manner consistent with the manner any private citizen might approach the home. Id. at 1415-1416; see Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849, 1862 (2011) ("[W]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). Importantly, the act of approaching a home pursuant to the implicit license does **not** constitute a search for Fourth Amendment purposes. See Jardines, 133 S. Ct. at 1417, n. 4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*." (italics in original)).

Pursuant to the implicit license, a law enforcement officer or other person is "**typically**" permitted "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 1415 (emphasis added). However, if reasonable under the circumstances, officers may also attempt to make contact with a resident at a location other than the front door so long as they do so in a reasonable manner. See United States v. Raines, 243 F.3d 419, 421 (8th Cir. 2001) ("[L]aw enforcement officers must sometimes move away from the front door when attempting to contact the occupants of the residence."); United States v. Garcia, 997 F.2d 1273, 1279 (9th Cir. 1993) ("This circuit and other circuits have . . . recognized that

officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence."); see, e.g., Carroll v. United States, 267 U.S. 132, 147 (1925) ("The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.").

Notably, in Alvarez v. Montgomery County, 147 F.3d 354, 356 (4th Cir. 1998), the Fourth Circuit Court of Appeals considered whether law enforcement officers violated the Fourth Amendment by entering the backyard of a residence to make contact with the homeowners of the residence without first knocking at the front door. In that case, officers received a report of an underage drinking party in Alvarez's neighborhood, responded to the area, and noticed multiple alcoholic containers in front of Alvarez's home. Id. In response, one of the officers approached the front door of the residence to attempt to speak with the homeowners and notify them of the complaint. Id. at 357. However, before the officer knocked at the door, another of the officers noticed a sign indicating that the party was in the back, and the officers entered the backyard to attempt to make contact with the homeowners there without first knocking. Id. When they did so, the officers discovered evidence of underage drinking, and Alvarez was charged with furnishing an alcoholic beverage to a person under twenty-one years of age as a result. Id. Subsequently, Alvarez and his family filed a civil suit against the officers on the basis that the officers violated their constitutional rights by entering the backyard of their residence without a warrant, and the district court dismissed the suit. Id. Thereafter, Alvarez and his family appealed the dismissal, and the Fourth Circuit Court of Appeals affirmed on appeal, finding that the officers did not violate the Fourth Amendment rights of Alvarez and his family by entering the backyard. Id. at 358. In reaching that conclusion, the Court of Appeals noted that the touchtone of the Fourth Amendment was

a standard of reasonableness. Id. With that standard in mind, the Court of Appeals concluded that "[i]t was not unreasonable . . . for officers responding to a 911 call to enter the backyard when circumstances indicated they might find the homeowners there." Id. at 359.

In the case at bar, the circuit court judge concluded that the officers violated Bash's Fourth Amendment rights because they unconstitutionally entered the backyard of a private residence for the purpose of conducting a search without a warrant. Even assuming the circuit court judge was somehow correct in concluding that the open grassy area was the residence's backyard or part of the residence's curtilage, the circuit court judge's conclusion that the officers violated Bash's Fourth Amendment rights by entering the grassy area was clearly erroneous and unsupported by the evidence. Critically, contrary to her ruling, the officers' actions in entering the open grassy area were entirely reasonable and did not violate Bash's Fourth Amendment rights in any way.

Looking to the officers' actions in Bash's case, the officers received an anonymous tip indicating that drug activity was taking place in an area behind a residence. Without something more than just the anonymous tip, the officers could not have obtained a search warrant for the location identified in the tip or an arrest warrant for any particular individual. See Alabama v. White, 496 U.S. 325, 329 (1990) (recognizing that an anonymous tip will seldom be sufficient to establish even reasonable suspicion). However, the officers were **not** required to abandon any efforts to investigate the anonymous tip and to simply allow criminal activity to take place unimpeded merely because they had not yet developed sufficient probable cause for a warrant.[6] See, e.g.,

[6] Notably, abandoning the investigation appears to be exactly what the circuit court judge believed the officers should have done in Bash's case as the circuit court judge concluded that the officers should have

Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). As a result, the officers decided to drive to the residence in an effort to speak with the homeowner about the tip, and their decision to do so was unquestionably reasonable and constitutionally permissible under the circumstances. See King, 131 S. Ct. at 1862 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.").

Beyond the reasonableness of their decision to go to the residence to investigate the anonymous tip, the officers' actions remained entirely reasonable once they arrived at their destination due to the fact that they observed Bash and the others congregating in the open grassy area behind the residence from a public roadway. Even more so than in Alvarez, it was objectively reasonable for the officers to believe under the circumstances that they would be able to make contact with an occupant of the home in the open grassy area instead of at the residence's front door since they actually saw individuals congregating there. See Alvarez, 147 F.3d at 356 ("The Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard **when circumstances indicate they might find him there[.]**" (emphasis added)); see also In re Bazen, 275 S.C. 436, 437-438, 272 S.E.2d 178, 178 (1980) (holding that a law enforcement officer did not violate Bazen's Fourth Amendment rights when he responded to Bazen's home in response to a noise complaint, walked to the rear of the

obtained a warrant before they entered the grassy area but readily acknowledged that they could not have done so based on the information known to them prior to their entry into the grassy area. (R. p. 73).

house, saw Bazen enter an open garage, followed him into it, and subsequently arrested Bazen for possession of marijuana after smelling marijuana in the garage); see, e.g., Raines, 243 F.3d at 421 (holding that a law enforcement officer did not violate a homeowner's Fourth Amendment rights by obtaining a warrant to seize marijuana plants that the officer observed growing in plain view in the backyard of the homeowner's residence when the officer legitimately went to the residence to make contact with the homeowner and proceeded into the backyard based upon a reasonable belief that he would find the homeowner there). Thus, it was reasonable for the officers to approach the men standing in the open grassy area instead of knocking on the door of the residence, and, in fact, the officers' interactions with the men in the grassy area were less intrusive under the circumstances than if they had occurred at the doorway of the residence since the grassy area was located significantly farther away from the residence itself. See Alvarez, 147 F.3d at 358 ("[O]fficers who seek to talk to the occupant of a home do not necessarily violate the Fourth Amendment by entering the backyard of a dwelling although they have failed to knock at the front door."); cf. State v. Rivens, 198 N.C. App. 130, 134, 679 S.E.2d 145, 148 (N.C. Ct. App. 2009) ("In this case, Officers Correa and Lowe entered the yard – a lesser intrusion than entering the house or doorway – for the purpose of a general inquiry regarding a report that shots had been fired. Officer Correa approached defendant to conduct his inquiry, and defendant did not request that Officer Correa leave the premises. Notwithstanding defendant's house arrest and ankle bracelet, defendant was free to enter his home to avoid dealing with Officers Correa and Lowe. We hold the Officer's presence in the yard was lawful.").

Likewise, not only was their decision to enter the property entirely reasonable, the officers' manner of entry into the grassy area was objectively reasonable and wholly

consistent with the manner of entry that any private citizen was impliedly permitted to use in approaching the men congregating there. Specifically, the officers approached Bash and the others, who had made no efforts to conceal their presence in the grassy area, in a place that was entirely open, was adjacent to a public road, was fully visible from several roadways and residences, had no obstructions or impediments preventing entry into it, and had no signs warning trespassers not to intrude upon it. As they approached, the officers did not undertake any furtive or stealthy actions and did not make any attempts to conceal their identities as law enforcement officers from the men. Furthermore, they followed the same open path of approach that Bash used to drive his truck into the grassy area when they entered the property directly from the public road, and they parked their vehicles approximately twenty feet behind the location where Bash parked his truck. Cf. State v. Dunn, 340 Mont. 31, 36, 172 P.3d 110, 114 (Mont. 2007) ("The officers here did not 'ignore posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view.' Rather, the officers acted in a manner consistent with investigating an ongoing noise complaint and remained on an open and obstructed path to the backyard. Thus, the nature of the intrusion here was reasonable." (citation omitted)). Under those circumstances, the manner of the officers' entry into the open grassy area was not inconsistent with the manner of entry that any private citizen could have used and, thus, was not unreasonable. See King, 131 S. Ct. at 1862 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

In finding that the officers' entry into the grassy area was unreasonable and violative of Bash's Fourth Amendment rights, the circuit court judge concluded that the officers were not permitted to enter the grassy area to conduct a search without a warrant

and that "there's no reasonable interpretation of the officers' testimony other than that's why they were there."[7] (R. p. 73). However, the officers specifically testified that they entered the grassy area to speak with the people that they observed congregating in that area about the anonymous tip, and their entry was conducted in an objectively reasonable manner. See Brighton City, Utah v. Stuart, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.' The officer's subjective motivation is irrelevant." (citations omitted, italics in original, and brackets in original)); Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." (italics in original)); Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objection standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."). Because the officers entered the grassy area for a legitimate purpose in an objectively reasonable manner, the officers' entry did not constitute a search and did not violate Bash's Fourth Amendment rights. See Jardines, 133 S. Ct. at 1417, n. 4 ("[I]t is **not a Fourth Amendment search** to approach the home in order to speak with the occupant, *because all are invited to do that.*" (emphasis added and italics in original)); see also Foster, 269 S.C. at 378, 237 S.E.2d at 591 ("It is only unreasonable searches and seizures that are prohibited."); cf. Alvarez, 147 F.3d at 359

[7] In reaching that conclusion, the circuit court judge relied heavily on the dissent in the Taylor case. (R. pp. 66-68; p. 77). Notwithstanding the fact that a dissent in an appellate court decision is **not** the controlling portion of the decision, the issue addressed in the Taylor case involved the propriety of an investigatory seizure conducted on a public street and was, therefore, very different from and unrelated to the issue involved in Bash's case. See State v. Taylor, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013) (holding that the Court of Appeals erred in reversing Taylor's conviction after finding that the officers in Taylor's case had reasonable suspicion to conduct an investigatory stop of Taylor on a public street under the totality of the circumstances of Taylor's case); see also Mr. T. v. Ms. T., 378 S.C. 127, 136, n. 6, 662 S.E.2d 413, 418 (Ct. App. 2008) (recognizing that the dissent in an opinion is not controlling).

(holding that law enforcement officers did not violate Alvarez's Fourth Amendment rights by entering the backyard of his residence to speak with him about a report of underage drinking when it was reasonable for the officers to believe they would find the homeowner in the backyard under the circumstances). Accordingly, the circuit court judge's conclusion that the officers' entry into the open grassy area violated Bash's Fourth Amendment rights was clearly erroneous and unsupported by the evidence. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard."). The circuit court judge's ruling granting Bash's suppression motion should be reversed, and Bash's case should be remanded for trial.

B. Propriety of the Officers' Actions After Entering the Grassy Area

In general, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. Weaver, 374 S.C. at 319, 649 S.E.2d at 482. The well-settled rule is that warrantless searches and seizures are unreasonable per se. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, "warrantless searches [and seizures] are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." King, 131 S. Ct. at 1858.

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; (7) the abandonment exception; and (8) the exigent circumstances doctrine. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012); see State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) ("The exigent

circumstances doctrine is an exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate."). Pursuant to the various exceptions to the warrant requirement, a warrantless search or seizure will withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Looking to the particular exceptions to the warrant requirement, the exigent circumstances exception permits law enforcement officers to act without a warrant where the exigencies of the situation make the officers' course of action immediately and objectively imperative and there is no time for the officers to obtain a warrant.[8] State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004); see State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement."). Similarly, the plain view exception permits officers to seize evidence in plain view without a warrant so long as the officers did not violate the Fourth Amendment in arriving at the spot from which they made their observations. King, 131 S. Ct. at 1858. Likewise, the search incident to arrest exception permits officers to conduct a search incident to a lawful arrest so long as the search is conducted substantially contemporaneous with the arrest and confined to the immediate vicinity of

[8] Recognized exigencies justifying warrantless searches and seizures include: (1) an imminent risk that a suspect will flee; (2) a risk of danger to the officers or to others; and (3) an imminent risk that evidence will be destroyed or removed. See Herring, 387 S.C. at 210, 692 S.E.2d at 494-495 ("The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. Protecting the safety of police officers has also been held an exigent circumstance. A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. In such circumstances, a protective sweep of the premises may be permitted." (citations omitted)); State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Ct. App. 2009) (recognizing that the imminent destruction of evidence constitutes an exigency justifying immediate warrantless action).

the arrest. State v. Freiburger, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005). Furthermore, the automobile exception permits law enforcement officers to conduct a warrantless search of an automobile if they have probable cause to believe the vehicle contains contraband. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see Weaver, 374 S.C. at 320, 649 S.E.2d at 482 ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.").

Notably, in State v. Wright, 391 S.C. 436, 339-440, 706 S.E.2d 324, 325 (2011), the South Carolina Supreme Court considered whether any of the various exceptions to the warrant requirement applied to evidence seized without a warrant from a residence linked to an anonymous tip of illegal activity. In that case, law enforcement officers received an anonymous tip that dogfighting was taking place at a mobile home, drove past the residence on a public road to investigate the tip, and observed a large number of vehicles and shining spotlights at the residence. Id. at 440, 706 S.E.2d at 325. Based on their observations, the officers approached the home in multiple vehicles by driving down a private dirt road and activated their headlights when they neared the home. Id. at 440, 706 S.E.2d at 326. When they did so, the officers saw people and dogs running away and a portable dogfighting pit that people were trying to dismantle. Id. In response, the officers detained the people who attempted to flee, arrested Wright and his co-defendants, captured as many dogs as they could, and seized numerous items of evidence related to dogfighting that were found in plain view. Id. at 440-441, 706 S.E.2d at 326. Following their arrests, Wright and the others moved prior to trial to suppress the evidence due to the fact that the officers seized the evidence after making a warrantless entry onto private property, and the circuit court judge granted their suppression motions. Id. at 441, 706

S.E.2d at 326. Subsequently, the State appealed the circuit court judge's ruling, and the Supreme Court reversed. Id. at 446, 706 S.E.2d at 329. In reversing the circuit court judge's ruling, the Supreme Court first found that the officers' entry onto the private road and approach of the mobile home were constitutionally proper because: (1) the officers had investigative authority to enter the property; and (2) exigent circumstances developed when the suspects attempted to flee from the officers, which permitted the officers to conduct a protective sweep of the premises. Id. at 444-445, 706 S.E.2d at 328. Because the officers' entry onto the property was constitutionally permissible, the Supreme Court next considered the requirements of the plain view exception and found that the exception was applicable since the officers were lawfully in a place that they had a right to be and the evidence's incriminating nature was immediately apparent. Id. at 445-446, 706 S.E.2d at 328-329. For those reasons, the Supreme Court found that the officers did not violate Wright and the others' constitutional rights when they entered the private property upon which the residence was located and seized the evidence they found there in plain view. Id.

In Bash's case, the circuit court judge concluded that the officers violated Bash's Fourth Amendment rights by entering the backyard of a private residence for the purpose of conducting a warrantless search. However, as previously discussed, the officers' entry into the grassy area was constitutionally permissible and reasonable under the circumstances. As a result, the officers' entry into the grassy area did not violate Bash's Fourth Amendment rights and did not itself warrant the suppression of the evidence discovered following that entry. For that reason, the circuit court judge erred in finding that the officers' warrantless entry into the grassy area required the suppression of the evidence recovered in Bash's case. However, notwithstanding the erroneous nature of

the circuit court judge's ruling, the evidence still could only properly be admitted at trial if it was seized pursuant to one of the recognized exceptions to the warrant requirement. Critically, the evidence that the officers seized was, in fact, gathered pursuant to several recognized exceptions to the warrant requirement, and their actions **after** entering the grassy area remained entirely reasonable.

Specifically, once the officers entered the grassy area and began approaching the men, one of the men responded by throwing down a bag of cocaine while another of the men responded by fleeing from the officers. Significantly, at that moment, the officers had a probable cause basis to believe that the crime of possession of cocaine had been committed and were justified in immediately acting without a warrant to seize the bag of cocaine, which was readily apparent to be criminal in nature and was visible in plain view in an area that the officers had lawfully entered, and to arrest the individual who had been in possession of the narcotics. See Foster, 269 S.C. at 379, 237 S.E.2d at 592 ("[The officer] immediately spotted what looked to be heroin, which gave him probable cause for arrest."); see also Bultron, 318 S.C. at 332, 457 S.E.2d at 621 ("The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. That is, a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved."). Moreover, the bag of narcotics being thrown down and the flight of one of the men constituted exigent circumstances that required an immediate response and made it objectively reasonable for the officers to act without first obtaining a warrant. See Wright, 391 S.C. at 445, 706 S.E.2d at 328 ("Exigent circumstances developed when the suspects started

fleeing."). Otherwise, the men could have had time to abscond and remove or destroy the evidence. See King, 131 S. Ct. at 1856 ("[T]he need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search." (citations omitted)). Accordingly, the officers were justified in acting immediately without first obtaining a warrant, and their decisions to detain the man who had thrown down the bag of cocaine and chase the fleeing suspect were reasonable under the circumstances. See Abdullah, 357 S.C. at 351, 592 S.E.2d at 348 ("Law enforcement officials have long been permitted to act without the permission of a magistrate when the 'exigencies of the situation [have] made that course imperative.' " (brackets in original)).

Thereafter, upon arresting the man who had thrown down the bag of cocaine, the officers were constitutionally permitted to perform a quick sweep of the area immediately around where the arrest was made and, as a part of that sweep, look through the window of Bash's nearby truck. See Buie, 494 U.S. at 334 ("We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."). Furthermore, due to the flight of one of the men from Bash's truck coupled with the possibility that another person could have been hiding inside of the truck and could have posed a risk to the officers' safety while they were effectuating the arrest of the individual who threw down the bag of narcotics, it was reasonable for the officers to conduct a broader protective sweep of the area for their own safety, which also permitted the officers to look through the window of Bash's truck. See id. ("Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors

an individual posing a danger to those on the arrest scene."). When Sergeant Holbrook conducted his brief sweep incident to the arrest of the man who threw down the bag of cocaine, he observed cocaine, crack cocaine, and other incriminating evidence in plain view through the window of Bash's truck. See Beckham, 334 S.C. at 317, 513 S.E.2d at 613 ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). Under those circumstances, the officer had a probable cause basis to search Bash's vehicle and arrest Bash, and it was entirely reasonable for him to do so. See Weaver, 374 S.C. at 320, 649 S.E.2d at 482 ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.").

Because the officers' actions **after** entering the open grassy area were entirely proper and reasonable under the circumstances, those actions did not violate Bash's Fourth Amendment rights. See Buie, 494 U.S. at 331 ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures."). As a result, Bash's narcotics, which were observed in plain view through the window of his truck, were admissible at trial and should not have been suppressed. Accordingly, assuming the circuit court judge was somehow correct in concluding the open grassy area was part of the residence's curtilage, the circuit court judge's decision to grant Bash's suppression motion was nonetheless clearly erroneous and unsupported by the evidence. For the foregoing reasons, the circuit court judge's ruling should be reversed, and Bash's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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August 13, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2013-001430

THE STATE,

Appellant,

vs.

WALTER MAURICE BASH,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 13th day of August, 2014.

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STATE OF SOUTH CAROLINA

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Appellate Case No. 2013-001430

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STATEMENT OF ISSUE ON APPEAL

Did the lower court correctly suppress evidence where the police, acting on an anonymous tip and with the intent to search, entered the backyard of a residence without a warrant because the backyard was curtilage and therefore, protected by the Fourth Amendment to the United States Constitution and the officers exceeded any implied license by approaching the backyard?

STATEMENT OF THE CASE

On October 17, 2012, a Berkeley County grand jury indicted Respondent for trafficking cocaine (2012-GS-08-1823) and trafficking cocaine base (2012-GS-08-1824). R. 85 (indictments). On June 11, 2013, the Honorable Stephanie McDonald presided over a hearing on Respondent's motion to suppress the drugs. R. 1. Michael E. Patterson, Jr., and Colleen Dixon represented the state, and Melisa W. Gay represented Respondent. R. 2. At the conclusion of the hearing, Judge McDonald granted Respondent's motion to suppress. R. 77, lines 15-17.

The prosecution filed a notice of appeal. On March 6, 2014, the state, represented by Mark Farthing, filed the initial brief of appellant. Respondent now files his brief.

STATEMENT OF THE FACTS

On November 10, 2011, Lee Holbrook and Kimberly Milks, employees of the Berkeley County Sheriff's Office, were in Moncks Corner. An unknown agent received a phone call "stating that there was drug activity at a particular residence" and called Holbrook on his cellular phone with this information. Because Holbrook and Milks "just happened to be in Moncks Corner," they "drove over there and handled it." R. 20, lines 10-17; R. 44, line 4; R. 44, lines 16-24; R. 46, lines 4-6; R. 54, lines 11-17; R. 60, lines 14-18. Holbrook readily admitted he had no idea who provided the tip. He had no identifying information about the tipster and had no way to contact the tipster. R. 42, lines 11-21; R. 44, lines 13-15. Holbrook had no prior dealings with the tipster and had no information about the tipster's credibility or reliability. R. 43, lines 1-11.

> When asked for the specifics of the anonymous tip, Holbrook responded: The - - the tip was actually, if I'm not mistaken, that there was drug activity occurring at that exact time, and it was at [redacted address]. And it - - just specifically, that there was drug activity occurring at that incident. So we happened to be in Moncks Corner and were right around the corner and attempted to go handle that complaint.

R. 21, lines 19-25; R. 22, lines 1-4.

Holbrook and Milks put on their police vests and hats. R. 54, lines 18-22. Holbrook estimated that he arrived at the home, in an unmarked car, "within ten minutes or so" after learning of the anonymous tip. R. 21, lines 13-16; R. 45, lines 14-18. Holbrook and Milks were followed to the home by numerous other agents. R. 46, lines 7-10. Holbrook located the house associated with the address. There were no lights on at the home. He noticed "that there were some males behind the house in a grassy area." Therefore, "instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the

backyard where the individuals were – there were several individuals back there - - and simply got out of the vehicle to meet with those folks." R. 22, lines 8-16; R. 54, lines 22-24. Holbrook saw "several black males standing by a little shed." Additionally, "there was a pickup truck pulled in on to the grass area." R. 26, lines 19-24. Holbrook readily admitted he was in the home's yard. R. 45, line 22 – R. 46, line 1; R. 55, lines 3-11.

The home "is entirely fenced in, the front and the back." The fence has a "walk-through gate" leading to a small utility shed "on the other side of the fence." R. 27, lines 3-8. When Holbrook observed the black men in the yard, he pulled up to them. R. 27, lines 22-24. Holbrook pulled his car "in behind where the truck was parked in the grass." Holbrook parked on the grass. Holbrook did not use a driveway or any other established access to the home. He simply drove his car from the road directly into the home's yard. R. 28, lines 16-23.

Holbrook was "twenty feet or so" from the truck. R. 30, lines 14-17. Holbrook pulled on to the grass because he "received a tip that there was some type of active drug activity going on at that time." When he approached the house from the front, he did not see anybody around it. This "caught [his] attention." He drove to the back of the property because the "activity was supposed to be happening in the - - in the rear of the property." He saw no need to make contact with the house because he saw people in the backyard. R. 28, line 25 – R. 29, line 12.

When Holbrook got out of his car, three people were standing around, including the property owner. R. 31, lines 19-23; R. 36, lines 12-13. Holbrook said, "Hey guys, what's going on." R. 36, lines 18-20; R. 46, lines 20-23. Milks also got out of the unmarked car and approached the individuals in the yard. R. 55, lines 10-11. Milks

approached the truck from the passenger side. Then, "one individual that was standing in the grass threw down a plastic bag containing a white powder substance that appeared to be cocaine." R. 30, lines 8-13. Holbrook was eight or nine feet from the individual who threw the bag to the ground. R. 30, lines 18-23. Then, the passenger door of the truck parked in front of Holbrook opened and a person ran into the woods. The agents, except for Holbrook, chased the individual. R. 31, lines 5-18; R. 32, lines 22-25; R. 56, lines 15-19. The driver – Respondent - got out and asked what was going on. R. 32, lines 7-9; R. 35, lines 3-13. Holbrook asked Respondent "to step to the rear of his vehicle" where Holbrook had gathered the others who were in the yard. R. 32, lines 10-21. Holbrook kept the individuals in that area until a second agent arrived. Then, Holbrook arrested the person who threw the plastic bag to the ground. Thereafter, Holbrook and the second agent detained everyone "due to the fact that the complaint was narcotic activity and the fact that there was narcotics thrown to the ground." R. 33, line 12 – R. 34, line 2; R. 48, lines 7-14; R. 50, lines 15-24.

Approximately ten minutes later, when the agents, who were involved in the foot chase, returned, Holbrook "peer[ed] into the truck through the window." The truck's door was closed. Holbrook claimed he could see "in plain view what appeared to be cocaine weighing scales." He thought "there may have even been some cocaine base right there in the console area also." R. 34, lines 3-16; R. 48, lines 21-24; R. 51, lines 15-23; R. 56, lines 23-25; State's Exhibit #2; State's Exhibit #3. Milks saw a plastic bag containing white material in the floorboard on the passenger side. She also saw "a white bag containing white material" on the floorboard of the truck on the driver's side. R. 58, lines 1-19; State's Exhibit #4; State's Exhibit #5.

ARGUMENT

The lower court correctly granted Bash's motion to suppress where law enforcement, acting on an anonymous tip and with the intent to search for drugs, entered the backyard of a residence without a warrant because the backyard was curtilage, not open fields, and therefore, protected by the Fourth Amendment to the United States Constitution and the officer's exceeded any implied license by approaching the backyard.

Relevant facts

Respondent moved to suppress the evidence uncovered during the illegal search of his truck. R. 6, lines 13-24. Respondent was sitting in his parked pickup truck at a barbecue in the backyard at his friend's house when the police arrived. R. 9, line 22 – R. 10, line 8. Respondent argued that the search and seizure was in violation of the Fourth Amendment to the United States Constitution, and therefore, the items seized should be suppressed. R. 10, lines 14-24; R. 74, lines 20-21. Respondent noted the officers "suited up" prior to going to the residence. The officers saw no suspicious behavior until they were physically in the yard. R. 74, lines 1-16. Respondent argued the area where he was sitting in his parked pickup truck was within the curtilage of the home and protected under the Fourth Amendment. Further, Respondent cited Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013) to support his position that the search was illegal. R. 11, line 5 – R. 12, line 1.

The prosecutor appeared to argue two theories for admissibility. First, he argued the area where Holbrook and Milks encountered Appellant was not "part of the curtilage"; rather, this area was "considered open fields." R. 68, lines 5-7. The prosecutor argued that the home's backyard was open fields because there was a fence

around the house and "this particular property [was] beyond the fence" and open to two public roads." R. 75, line 22 – R. 76, line 2.

Alternatively, if the area were part of the curtilage, he analogized the encounter to a "knock and talk." R. 68, lines 7-11. He argued that nothing precludes an officer "from intruding on private property where a private citizen could have intruded." R. 75, lines 2-8.

At the conclusion of the pretrial hearing, Judge McDonald granted Appellant's motion to suppress relying upon Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013). After reading the materials supplied by the prosecution and defense and conducting independent research, she concluded "this one's not even close." She held that "[a]n anonymous tip is not enough to allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." R. 65, lines 12-22. She found the backyard where Holbrooks and Milks apprehended Appellant was part of the curtilage based upon State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). R. 73, lines 8-11. Judge McDonald explained there were no exigent circumstances present and that Holbrooks and Milks did not observe anything suspicious from the street. R. 73, lines 3-7. Essentially, Judge McDonald found "they suited up and went into the curtilage of this lady's house based on an anonymous tip alone." R. 81, lines 9-11.

Judge McDonald made a credibility determination as well: "[T]he tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any." R. 73, lines 13-21.

Discussion

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013) (finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment). In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court's review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court may only reverse where there is clear error. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005). The evidence in the record clearly supports the circuit court's ruling that the backyard was curtilage protected by the Fourth Amendment and that the officers exceeded any implied license by approaching the backyard of the residence.

A. The police intruded upon the curtilage of the home, which is protected by the Fourth Amendment, by entering the backyard.

The Fourth Amendment's protection to be free from police intrusion and unreasonable searches and seizures extends to the curtilage of the home. Oliver v. United States, 466 U.S. 170, 181 (1984). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207 (1986). A warrantless search of a home's curtilage

implicates the core of the Fourth Amendment and presumptively is unreasonable. Bleavins v. Bartels, 422 F.3d 445, 451 (7th Cir. 2005). "The curtilage of a residence means the land immediately surrounding and associated with the home, including the backyard, although the question of where the curtilage ends is determined on a case-by-case basis." Ann K. Wooster, Search and Seizure: Reasonable Expectation of Privacy in Backyards, 62 A.L.R.6th 413. Curtilage includes areas, such as the backyard, that are intimately connected with activities of the home. Bleavins, 422 F.3d at 452.

"At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver, 466 U.S. at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); see also Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001). Curtilage is defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." Oliver, 466 U.S. at 180. "No single factor determines whether an individual may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant." Id. at 177. "In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." Id. at 178 (internal citations omitted). Additionally, the Court held:

> that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987). However, the factors are merely "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id. In short, the inquiry can be boiled down to one question – "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver, 466 U.S. at 182-183.

In contrast to curtilage, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Hester v. United States, 265 U.S. 57, 58 (1924). The Oliver Court concluded that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Oliver, 466 U.S. at 181. "The 'open fields' doctrine ... permits police officers to enter and search a field without a warrant." Id. at 173. The Oliver Court reaffirmed the rule announced in Hester, supra, that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounded the home." Id. The Court explained that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." Id. at 179.

In a case similar to the one at issue, in Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013), the police had "an unverified tip" that Jardines was growing marijuana in his home. Id. at 1413. Without a warrant, the police took a drug dog into the curtilage of Jardines' house and on his front porch. Id. The dog indicated marijuana was present at "the base of the front door." Id. The police then used the dog's activity to obtain a warrant. Id.

The Court ruled this police activity violated the Fourth Amendment. Id. at 1417-18. The majority decided the case solely on property rights grounds without resorting to the Katz[1] test. Id. at 1417 ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under Katz."); see also Jones, supra; Bleavins, 422 F.3d at 450 (holding that "a property-based concept – curtilage – remains important in evaluating privacy interests"). The Court explained that the analysis in Katz concerning a reasonable expectation of privacy "may add to the baseline" protection of property rights, but "it does not subtract anything from the Amendment's protections 'when the Government **does** engage in [a] physical intrusion of a constitutionally protected area.'" Jardines, 133 S.Ct. at 1414 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983)(Brennan, J. concurring in the judgment))(emphasis in original). The Court explained:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

In discussing the curtilage, the Jardines Court held that the right to be free from unreasonable government intrusion in a home "would be of little practical value if the state's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." Id. The "area 'immediately surrounding and associated with the home'" is the curtilage and is "'part of the

[1] Katz v. United States, 389 U.S. 347 (1967).

home itself for Fourth Amendment purposes.'" Id. (quoting Oliver, 466 U.S. at 180). The "area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" Id. at 1415 (quoting Ciraolo, 476 U.S. at 213). The Court held the front porch was "the classic exemplar of an area adjacent to the home and 'to which the activity of the home life extends.'" Id. (quoting Oliver, 466 U.S. at 182, n.12).

Numerous courts have found the backyard to be protected by the Fourth Amendment as part of the home's curtilage. See e.g., Bleavins, 422 F.3d at 452 (stating that "[a]reas that are intimately connected with the ... activities of the home include, for example, backyards.")(internal citations omitted); Lundstrom v. Romero, 616 F.3d 1108, 1128-1129 (10th Cir. 2010)(having "little trouble finding that Lundstrom's backyard qualified as curtilage" where it "directly abut[ted] the rear of his house, was enclosed such that the officer had to go over a fence or open a gate to access it, was used in a manner typical of an ordinary residential backyard, and was protected from observation to an extent that prevented the neighbor from peering into it over the fence"); United States v. Struckman, 603 F.3d 731, 739 (9th Cir. 2010)(finding the "backyard – a small, enclosed yard adjacent to a home in a residential neighborhood" was "unquestionably such a clearly marked area to which the activity of the home life extends and so is curtilage subject to Fourth Amendment protection")(internal citiations omitted); Feller v. Township of West Bloomfield, 767 F.Supp.2d 769, 774 (E.D. Mich. 2011)(finding the warrantless entry onto the back yard of property to post notices to stop illegal work violated the Fourth Amendment); State v. Kruse, 306 S.W.3d 603 (Mo. Ct. App. 2010)(suppressing evidence discovered by law enforcement entering the defendant's backyard at 12:21 a.m. to guard

against anyone running from the home when police were knocking on the front door despite the lack of gates to hinder entrance into the backyard and the presence of a well-travelled route from the driveway to the rear of the property); State v. Frizzelle, 89 S.E.2d 725, 726 (N.C. 1955)(finding that "curtilage fo the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings").

In State v. Morsman, 394 So.2d 408, 408 (Fla. 1981), the Supreme Court of Florida found a police officer conducted an illegal search and seizure when he walked into the backyard and seized marijuana plants. Morsman's neighbor told another neighbor that marijuana plants were in Morsman's backyard. The second neighbor called the police. Id. An officer went to Morsman's home to investigate the complaint. The officer knocked on the front door. When no one answered, the officer walked around the house and saw marijuana plants growing in the backyard. Id. The Florida Supreme Court held "[t]he officer had no right to be in [Morsman]'s backyard." Id. Although the officer going to the front door to investigate did not infringe upon Morsman's right to privacy, the officer entering the backyard violated the Fourth Amendment. Id. at 409.

Ample evidence supports the trial judge's finding that the backyard where the police trespassed, after "suiting up," was part of the curtilage of the residence. By all accounts, it was the backyard to the home, and the officers knew they were entering private property when they drove into the backyard. The officers did not use an existing driveway to make their entrance into the backyard. Thus, even the officers knew the area was curtilage when they made their illegal entry. Consideration of the factors enunciated by the Supreme Court leads to the same result. First, the area was in very close proximity to the home. Although

no one testified as to the exact distance, the photographs show the area was close to the home. See Defendant's Exhibit #2; Defendant's Exhibit #4; Defendant's Exhibit #5. Several courts have recognized the importance of considering whether the area in question is in a rural, urban, or suburban setting. See United States v. Johnson, 256 F.3d 895, 902 (9th Cir. 2001)(citing United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996); United States v. Acosta, 965 F.2d 1248, 1256 (3d Cir. 1992); United States v. Seidel, 794 F.Supp. 1098, 1103 (S.D. Fl. 1992)). The Ninth Circuit recognized that in rural areas, the curtilage of a home may extend farther than in urban or suburban areas. The Court explained "[t]he realities of rural country life dictate that distances between outbuildings will be greater than on urban or suburban properties and yet still encompass activities intimately associated with the home; this is the nature of the 'farmstead.'" Johnson, 256 F.3d at 902. The area in question is rural. The curtilage, therefore, extends greater than in more urban areas.

The state's only argument that the backyard was not curtilage was based on the lone fact that part of it was outside a fence. This argument has been squarely rejected by the United States Supreme Court. In Dunn, 480 U.S. at 301 n. 4, the United States Supreme Court rejected the government's argument that a home's curtilage "should extend no farther than the nearest fence surrounding a fenced house." Further, an enclosure is unnecessary to demarcate the curtilage. See Florida v. Riley, 488 U.S. 445, 454 (1989)(O'Connor, J. concurring)("To require individuals to completely cover and enclose their curtilage is to demand more than the precautions customarily taken by those seeking privacy.")(internal citations omitted); see also, Williams v. Garrett, 722 F.Supp. 254, 261 (W.D. Va. 1989)(explaining that "requiring a person to expend resources and sacrifice aesthetics by

building a fence in order to obtain protection from unreasonable search is not required by the constitution").

The area was being used in a manner consistent with and intimately connected with activities of the home. The record shows that individuals had gathered for a barbecue. Obviously, the acts of cooking, eating, and gathering of friends and family are activities of the home are intimately connected with activities of the home as Americans traditionally have cooked, eaten, and gathered in their homes. Few events are more American than a backyard barbecue. See Young v. City of Radcliff, 561 F.Supp.2d 767, 784-785 (W.D. Ky. 2008). Judge McDonald did not only have abstract considerations before her as to whether the backyard was used as curtilage. At the time of the search, the backyard was being used for a party.

Further, the location of the activity occurred in an area protected from the observation of people passing by. The backyard was blocked from the main road by the house. Portions of the backyard were blocked from view by the side road by the shed. See Defendant's Exhibit #2; Defendant's Exhibit #4; Map. The backyard was protected from view by the trees planted as well. The photographs show a clear line of trees and shrubs planted in the backyard area very close to the dirt road on the back side of the house. See R. 94; R. 98. The photographs also show a thick grove of mature trees growing along the side of the house, including the side of the backyard, blocking the view of passersby on the dirt road. R. 96; R. 97; Map. Without question, the trees and shrubs evidence the intent to block observation of people passing by on the side road. Thus, the Dunn factors clearly demonstrate that the backyard as part of the curtilage of the residence.

Looking beyond the factors to the ultimate question of whether the government's intrusion infringed upon personal and societal values protected by the Fourth Amendment, see Oliver, 466 U.S. at 182-183, it is clear that having a backyard barbecue with friends free from the police arriving and harassing the hosts and guests is a personal value and societal value protected by the Fourth Amendment. The actions by the police of "suiting up" and entering the backyard constituted an illegal search on the curtilage of the residence. Judge McDonald correctly found the backyard was curtilage and suppressed the evidence.

B. The police exceeded the implied license to trespass on property when the investigators intruded entered the backyard for the purpose of search for drugs.

Based upon the habits of Americans, the Court has recognized an implied license for trespass on property: "'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'" Jardines, 133 S.Ct. at 1415 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)). This implied license "permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id.

The Jardines Court reaffirmed the holding in Kentucky v. King, 563 U.S. ___, 131 S.Ct. 1849, 1862 (2011) that due to the theory of implied license, which is what permits a Girl Scout or trick-or-treater to approach one's home, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any other private citizen might do.'" Id. at 1416. However, "[t]here is no customary invitation to" introduce "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." Id. The Court compared the scenario to a "visitor exploring the

front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission." Id. "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." Id.

Further, the Jardines Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant." Id. at 1416-17. Subjective intent is not considered unless the police conduct is objectively unreasonable. Id. at 1416. Jardines explicitly asked the question of "whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." Id. at 1417. Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4. Here, the conduct was objectively unreasonable and the court's finding that the officers intended to search is amply supported in the evidence. Judge McDonald specifically found the intention of the officers when they arrived was to search for drugs.

Of particular interest to the instant case is the recent decision from the North Carolina Court of Appeals in State v. Grice, 735 S.E.2d 354 (N.C. Ct. App. 2012), review granted 743 S.E.2d 179 (N.C. 2013). The police went to Grice's home to investigate an anonymous tip that Grice was growing and selling marijuana. Id. at 355. One officer went to the front door to initiate a "knock and talk." The second officer stayed in the driveway. Id. While the first officer was knocking, the second officer looked around the residence. He saw marijuana plants growing in four plastic buckets. Id. at 355-356. Both officers then walked to the backyard where the plants were growing beside an outbuilding. Id. at 356. The officers seized the plants and sought a search warrant. Id. Recognizing the privacy protections afforded curtilage under the Fourth Amendment, the

North Carolina Court of Appeals held the "initiation of a valid 'knock and talk' inquiry" did not give the officers "a lawful right of access to walk across [Grice's] backyard in order to seize the plants." Id. at 357-358. Holding otherwise would make it "difficult to articulate a limiting principle such that 'knock and talk' investigations would not become a pretense to seize any property within the home's curtilage." Id. at 358; See also Powell v. State, 120 So.3d 577, 584-89 (Fla. Ct. App. 2013) (holding that "knock and talk" did not salvage officers' purposeful warrantless intrusion into the curtilage and peering through a window).

Similarly, the Michigan Court of Appeals held helicopter surveillance and movement by law enforcement officers on the ground directly into the backyard of a private home do not constitute ordinary citizen contact. People v. Galloway, 675 N.W.2d 883, 887 (Mich. Ct. App. 2003). Four officers in plainclothes and two in uniforms arrived at Galloway's home in several vehicles. The police had received an anonymous tip that marijuana was in a container right behind the house. Id. The first officer "proceeded directly to the back of defendant's home after his contact with an individual in the side yard of the home." Id. A second officer also entered the backyard and approached an individual there. The first officer saw marijuana plants inside the lean-to. Id. "The police did not first approach the front door of the home, nor did they proceed along a path that the public could be expected to travel in visiting defendant's home, or simply approach defendant as he was standing in his yard to ask permission to 'look around.'" Id.

The Supreme Court of Kentucky provided a lengthy discussion of "knock and talk" procedures and the interplay between those procedures and curtilage in Quintana v.

Commonwealth, 276 S.W.3d 753 (Ky. 2009). After noting that most "knock and talks are typically conducted at the front door" and that the front door is "the main entrance to the home," the Kentucky Court explained that the homeowner's consent to approach the main entrance to the home is assumed. Id. at 758. As long as the officer has legitimate business, he may approach the front door of a residence. Id. When there has been no finding of probable cause to grant a warrant, "the knock and talk is limited to only the areas which the public can reasonably expect to access." Id. at 759. While noting "[t]he back door of a home is not ordinarily understood to be public accessible," the court explained that a side or back door used as primary access by the resident may be appropriate for a "knock and talk" if the officer was aware of the resident's prior use of the door. Id.

The officers in the Kentucky case approached the front door of Quintana's residence for a "knock and talk." When the officers received no answer, one officer walked the length of the driveway and into the back yard to look for a back door. Id. at 760. When the officer found no back door, he continued to walk across the back yard until he found a window with an air conditioning unit in it where he claimed to smell marijuana. Id. The court held that when the officer "moved beyond the public entrance of the home, he went beyond the limits of a proper knock and talk." Id. After noting that "[a] backyard is not normally an area that the general public would perceive as public access," the court explained that rarely would a backyard not be considered curtilage. Id. Due to the backyard's status as curtilage and the officer's veering from the area in which he had an implied license to be, the Kentucky Supreme Court suppressed

the evidence found pursuant to a search warrant obtained based upon the officer's sniffing in the backyard. Id. at 761.

The Third Circuit held the "knock and talk" exception to the warrant requirement did not apply where an officer proceeded directly through the backyard and did not begin his visit at the front door. Carman v. Carroll, 749 F.3d 192, 194 (3d Cir. 2014). The police were dispatched to search for a man who had stolen a car and two loaded handguns. According to dispatch, the man "might have fled" to a particular residence. Id. at 195. The residence sat on a corner lot with a main street running along the front and a side street running along the side. A marked path led to the front door and a stone parking area was on the left side. Id. The police parked their cars and immediately entered the backyard. An officer believed a sliding glass door attached to the back deck of the house looked like a customary entryway and approached it. Id.

The Third Circuit held that "[f]rom the moment that [the officer] entered the ... backyard, he was in the curtilage surrounding their house." Id. at 197. Citing Jardines, supra, the court explained that a "knock and talk" must satisfy three requirements: (1) the officer, like any visitor, must knock promptly, wait briefly, and then leave if not invited to stay longer; (2) the purpose of the "knock and talk" must be to interview the occupants of a home, not to conduct a search; and (3) a "knock and talk" encounter must begin at the front door because that is where police officers, like any other visitors, have an implied invitation to go." Id. at 198. The court was not persuaded by the officer's argument that the back door was more convenient because "the Fourth Amendment is not grounded in expediency." Id. at 199. "The 'knock and talk' exception requires that police officers begin their encounter at the front door, where they have an implied

invitation to go. This exception does not license officers to bypass the front door and enter other parts of the curtilage based on where they park their cars." Id.

Although the Fourth Circuit refused to adopt the requirement that the police must knock at the front door under all circumstances, the court made clear that an officer's intrusion into the curtilage of a residence must be reasonable. Alvarez v. Montgomery County, 147 F.3d 354, 358 (4th Cir. 1998); see also United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974)(holding that the police officer did not exceed the scope of his implied license by walking around to the back door when he was unable to get an answer at the front door where he had a legitimate reason – questioning the homeowner about an abandoned car near his property - for this intrusion unconnected with a search of the premises). Officers were investigating a complaint about underage drinking at a house party. Alvarez, 147 F.3d at 356. When an officer approached the front door to knock, a second officer observed a sign affixed to a lamppost in the front driveway directing guest to the party in the backyard. Rather than knocking on the front door, the officers went to the backyard. Once in the backyard, the officers observed teenagers drinking. Id. at 357. The officer's entry into the backyard was reasonable because they were responding to a call about underage drinking, they entered the property simply to notify the homeowner of the complaint – which was a legitimate reason to enter the property unconnected with a search of the premises. Id. at 358. In light of the sign directing guests to the party in the backyard, it was reasonable for the officers to proceed directly there. Id. at 359.

In United States v. Perea-Rey, 680 F.3d 1179, 1186-88 (9th Cir. 2012), U.S. Border Patrol agents watched a man scale the border fence between the United States and Mexico and followed him to Perea-Rey's house. Id. at 1182-83. Uninvited, the agent

walked into Perea-Rey's carport. Id. Based on Jones and Jardines, the court determined that the warrantless entry into the carport was an entry into the curtilage and violated the Fourth Amendment. Id. at 1186. The court stated, "[T]he ability to see into the curtilage or the home does not, absent some other exception to the warrant requirement, authorize a warrantless entry by the government." Id.

The government contended that "the so-called 'knock and talk' exception to the warrant requirement" justified the warrantless trespass. Id. at 1187. The court rejected this contention, based in part on the agent's conduct. Id. at 1187-88. The court noted the agent "did not seek Perea-Rey's consent to enter the property or even to speak with him." Id. at 1188. The agent identified himself and ordered Perea-Rey not to move. Id. Importantly, the court held that "Perea-Rey never had an opportunity to simply ignore a knock on the door to his home by police." Id.

The police exceeded the scope of the implied license for a "knock and talk" by immediately proceeding to and entering the backyard with the intent to search. Judge McDonald made the factual finding that the officers intended to search when they intruded upon the backyard. Based upon her view of Holbrooks and Milks as witnesses and in judging their credibility, Judge McDonald found the officers went into the backyard, not with the purpose of interviewing the occupants of the home. The evidence that the officers "suited up," drove directly into the backyard of a residence without any attempt to knock on the front door supports the trial court's logical conclusions.

CONCLUSION

Respondent respectfully requests this Court affirm the ruling by the Circuit Court to suppress the evidence seized during the illegal search.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 2nd day of September, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Stephanie P. McDonald, Judge

THE STATE,

APPELLANT,

V.

WALTER M. BASH,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of September, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of September, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.