THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2017-001247

Corey Arness McCluney,

Appellant,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety,

Defendants,

Of which South Carolina Department of Motor Vehicles is the Respondent.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. **DID THE ADMINISTRATIVE LAW COURT (ALC) ERR IN AFFIRMING THE "FINAL ORDER AND DECISION" OF THE HEARING OFFICER FOR THE OFFICE OF MOTOR VEHICLE HEARINGS (OMVH) WHO ALLOWED THE ARRESTING OFFICER TO TESTIFY TO NEW MATTERS IN A CONTESTED CASE HEARING IN RESPONSE TO THE APPELLANT'S MOTION TO DISMISS, AFTER THE ARRESTING OFFICER HAD RESTED HIS CASE AND NO OTHER EVIDENCE WAS PRESENTED, BECAUSE SUCH PROCEDURE WAS UNLAWFUL AND IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT?**

STATEMENT OF THE CASE

On May 22, 2016, Trooper R.B. Thorton, of the South Carolina Department of Public Safety, arrested the Appellant, Corey Arness McCluney, for Driving Under the Influence. Immediately following the Appellant's arrest he was transported to the Spartanburg County Detention Center, where Trooper Thorton offered the Appellant a breath test. The Appellant refused the breath test, which resulted in the suspension of his driver's license. Thereafter, the Appellant timely requested a contested case hearing with the Office of Motor Vehicle Hearings (OMVH) pursuant to S.C. Code Ann. §56-5-2951(B).

On August 29, 2016, a contested case hearing was held as provided for by S.C. Code Ann. §56-5-2951. At the hearing, Trooper Thorton, as the arresting officer, was the only witness to testify. At the conclusion of Trooper Thorton's direct testimony, the Appellant did not cross-examine Trooper Thorton. Trooper Thorton then rested his case. No evidence was offered by the Appellant. Based upon the limited testimony of Trooper Thorton, the Appellant

then made a motion to dismiss based upon Trooper Thorton's failure to present evidence as to matters required to be established at the contested case hearing. In response to the Appellant's motion to dismiss, Trooper Thorton was then allowed to continue testifying as to new matters, over the objection of the Appellant. The Appellant objected to the procedure being used by the Hearing Officer, and the hearing was concluded.

Following the contested case hearing, the Hearing Officer issued a "Final Order and Decision" on October 18, 2016, sustaining the suspension of the Appellant. Thereafter, the Appellant appealed the Hearing Office's decision to the Administrative Law Court (ALC) stating in his "Notice of Appeal" that the Hearing Officer erred by employing an unlawful procedure, and that the said procedure employed improperly shifted the burden of proof to the Appellant. On May 4, 2017, the Administrative Law Court affirmed the decision of the Hearing Officer. The Appellant then filed a motion to reconsider, which was denied by the ALC on May 17, 2017. The Appellant filed a "Notice of Appeal" with this Court on May 25, 2017.

STANDARD OF REVIEW

The provisions of S.C. Code Ann. §1-23-610(B) (Supp. 2016) set forth the standard of review for an appeal from an order of the Administrative Law Court. Lapp v. South Carolina Department of Motor Vehicles, 387 S.C. 500, 504, 692 S.E.2d 565, 567 (Ct.App. 2010). Section §1-23-610(B), reads:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings; or, it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> **(a) in violation of constitutional or statutory provisions;**
>
> (b) in excess of the statutory authority of the agency;
>
> **(c) made upon unlawful procedure;**
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. **[Emphasis Added]**

On appeal to this Court, the Appellant asserts that the OMVH Hearing Officer's decision was the result of an unlawful procedure, and that such procedure improperly shifted the burden of proof to the Appellant in violation of the statutory provisions of S.C. Code Ann. §56-5-2951(F), and that the ALC erred in affirming the decision of the Hearing Officer.

ARGUMENT

1. **THE ADMINISTRATIVE LAW COURT (ALC) ERRED IN AFFIRMING THE "FINAL ORDER AND DECISION" OF THE HEARING OFFICER FOR THE OFFICE OF MOTOR VEHICLE HEARINGS (OMVH) WHO ALLOWED THE ARRESTING OFFICER TO TESTIFY TO NEW MATTERS IN A CONTESTED CASE HEARING IN RESPONSE TO THE APPELLANT'S MOTION TO DISMISS, AFTER THE ARRESTING OFFICER HAD RESTED HIS CASE AND NO OTHER EVIDENCE WAS PRESENTED, BECAUSE SUCH PROCEDURE WAS UNLAWFUL AND IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT.**

A. Statement of Applicable Law

Pursuant to the provisions of S.C. Code Ann. §56-5-2950(A)(Supp. 2016), a person arrested in South Carolina for Driving Under the Influence has given their consent to chemical testing of the person's breath, blood or urine for the purpose of determining the presence of alcohol and/or drugs. When a person refuses to submit to a chemical test, the driver's license of such person is immediately suspended. S.C. Code Ann. §56-5-2951(A). A person who has his driver's license suspended for refusing to submit to testing may request a contested case hearing to challenge the suspension. S.C. Code Ann. §56-5-2951(B). When a contested case hearing is requested, the scope of the hearing when a motorist has refused a breath test is limited to three simple issues, which are, whether the motorist:

> (1) was lawfully arrested or detained;
>
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
>
> (3) refused to submit to a test pursuant to Section 56-5-2950...
>
> S.C. Code Ann. §56-5-2951(F)(Supp.2016).

Pursuant to the provisions of S.C. Code Ann. §56-5-2950(B) (Supp. 2016), which are referenced in the above quoted statute, before a breath test may be administered, the person arrested must first be given a written copy of and verbally informed that:

> (1) the person does not have to take the test or give the samples, but his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least one month if he takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
>
> (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
>
> (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
>
> (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

In a section 56-5-2951 contested case hearing, the burden of proof is borne by the arresting officer and the Department of Motor Vehicles, as expressly provided for by S.C. Code Ann. §56-5-2951(F), which reads in pertinent part:

> The Department of Motor Vehicles and the arresting officer shall have the burden of proof in contested case hearings conducted pursuant to this section. If neither the Department of Motor Vehicles nor the arresting officer appears at the contested case hearing, the hearing officer shall rescind the suspension of the person's license, or nonresident's operating privileges regardless of whether the person requesting the contested case hearing or the person's attorney appears at the contested case hearing.

Accordingly, in a contested case hearing where a motorist has refused a breath test, the Department of Motor Vehicles and the arresting officer have the burden of proof to establish the lawfulness of any arrest, whether the motorist was properly advised of his implied consent rights, and that the motorist refused the test. Indeed, in a contested case proceeding under section 56-5-2951(F), the motorist or his attorney need not appear at all, because the motorist has no burden of proof. Instead of not appearing at all, a motorist, or his attorney, may choose to appear at a hearing and simply remain silent during the presentation of evidence by the arresting officer or the Department, to see whether the Department or the arresting officer can satisfy the required burden of proof.

If during the contested case hearing the arresting officer or the Department establish a prima facie case against the motorist, then the burden of proof shifts to the motorist to present evidence to rebut the prima facie case. S.C. Department of Motor Vehicles v. Powers, 06-ALJ-21-0578-AP (January 10, 2007) (explaining the

application of this principle throughout the states). A prima facie case is made by presenting evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. LaCount v. General Asbestos & Rubber Co., 184 S.C. 232, 240, 192 S.E. 262, 266 (1937). If the motorist fails to rebut the prima facie showing, then judgment must go against the motorist. See Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 539, 61 S.E.2d 165, 168-69 (1950)("it is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the prima facie presumption.").

B. Statement of Applicable Facts

In the matter before this Court, during the Appellant's contested case hearing the only witness to testify was the arresting officer, Trooper R.B. Thorton, who was the arresting officer and the breath test operator in the Driving Under the Influence case against the Appellant. The totality of Trooper Thorton's initial testimony was as follows:

> **Trooper Thorton**: Thank you. On May 23rd of this year here in Spartanburg County, I was called to an accident on 85 Southbound near the 82 mile marker. When I arrived on scene, there was a Nissan - four-door Nissan in the ditch on the shoulder of the road and when I arrived on the scene, Mr. McCluney was standing outside of his vehicle talking with a bystander who had pulled over to check on him to make sure he was okay. He just ran off and was just stuck into the ditch. As I was

speaking with him, I could notice an odor of alcohol coming from him as he's speaking to me, so I asked him just to step back to the - my patrol car so I could speak to him a little further. And due to the closeness of the highway there to the interstate, I didn't want - I didn't do the normal field sobriety tests because of how close we were to the lane of traffic, so I just did the HGN test on him and observed the clues in his eyes there, nystagmus. And then asked him just to, you know, say the simple just alphabet just so I can just get a feel from that, and he would not. He would say A to Z, but he would not do anything else as far as alphabet E to X is what I normally just ask them where they have to remember to start and stop, and he refused to do that. And just based on him having no reason to wreck on the side of the road and the odor of alcohol and refusing to really comply with other requests, I placed him under arrest there for DUI and transported him to the county jail and offered him a breath test and waited the 20 minutes and he advised that he was not going to - he was advising from the beginning, but wasn't going to take the test. So I waited the 20 minutes anyway and offered him and he still refused to take the test. Then I was (inaudible) just for a minute.

Hearing Officer: Okay.

Trooper Thorton: Just put in a note charged with DUI and booked him in there at the County.

Hearing Officer: Okay. State's resting?

Trooper Thorton: Yes, ma'am.

Hearing Officer: Cross-examination?

Mr. Pruett: No questions.

Hearing Officer: Is there anything from the respondent?

Mr. Pruett: I'd move to dismiss the suspension...

ROA, p. 8, l. 21 through p. 10. l. 22.

As just noted, at the conclusion of Trooper Thorton's testimony, he rested his case. The Appellant did not cross-examine Trooper Thorton, and the Appellant presented no evidence. The Appellant then made a motion to dismiss the Appellant's suspension, based upon Trooper Thorton's failure to establish that the arrest of the Appellant was lawful, and that the Appellant had been advised of his implied consent rights. While it might be argued that Trooper Thorton's testimony established a prima facie case as to the lawfulness of the Appellant's arrest, there was no testimony or evidence presented that the Appellant was given an implied consent advisement, verbal or written, as required by S.C. Code Ann. §56-5-2951(F). In response to the Appellant's motion to dismiss, the OMVH Hearing Officer then stated that no ruling would be made on the Appellant's motion to dismiss, "I will not make a ruling on your dismissal." ROA p. 11, l. 16-17, Instead, the Hearing Officer allowed Trooper Thorton to introduce "rebuttal" testimony, even though there was no testimony or evidence offered by the Appellant to rebut. Trooper Thorton then begin to testify as to new additional facts, to which the Appellant objected. ROA p. 11, l. 24-15 through p. 12, l. 1-6. The Hearing Officer overruled the Appellant's objection regarding the new "rebuttal testimony," holding that the record was not closed, even though the Department had "rested." The Hearing Officer stated that the hearing was a "fact finding administrative hearing," and as such, even though

Trooper Thorton had "rested" and no evidence was offered by the Appellant, the record would nevertheless remain open, until it was closed. The Hearing Officer further advised Appellant's attorney that once the record was closed, then any motion to dismiss would be too late, because then it would be time for closing statements. ROA p. 12, l. 7-16. What then followed was an exchange between the Hearing Officer and the Appellant's attorney that is set forth in the ROA, pps. 12-20, which consumes most of the transcription of the hearing, in which the Hearing Officer reiterated that under the procedure being used by the Hearing Officer, the arresting officer could continue to introduce new evidence after the arresting officer had rested his case, even though there had been no cross-examination or the introduction of evidence by the Appellant.

C. <u>Use of Unlawful Procedure and Shifting of Burden of Proof</u>

As outlined above, it is the position of the Appellant that the Hearing Officer employed an unlawful procedure which improperly shifted the burden of proof to the Appellant.

The issue on appeal to this Court can be simply characterized by setting out this factual scenario. Let us say that we are at a OMVH contested case hearing because the motorist's driving privileges have been suspended for refusing to submit to breath testing after being arrested for Driving Under the Influence. The hearing begins and arresting officer testifies, "I arrested the motorist and he refused the breath test." The arresting officer

then rests his case, and there is no cross-examination or evidence offered by the motorist. The question before this Court is at this juncture in the proceeding is it then incumbent upon the motorist to ferret out the facts from the arresting officer to establish a prima facie case as required by S.C. Code Ann. §56-5-2951(F), whether such facts are elicited by cross-examination or by a motion to dismiss?

The testimony in the example just given was the gist of Trooper Thorton's testimony at the Appellant's contested case hearing. It is indisputable that the Trooper Thorton's initial testimony failed to establish a prima facie case that the Appellant was given his implied consent advisement as required by S.C. Code Ann. §56-5-2951(F). Once Trooper Thorton rested his case, and no evidence was offered by the Appellant, the Appellant timely moved for a dismissal of the case. At this juncture the Hearing Officer should have ruled on the motion before it, and dismissed or rescinded the suspension of the Appellant. Instead, the Hearing Officer essentially treated the Appellant's motion as cross-examination, and allowed Trooper Thorton to present additional testimony. The legal fallacy of the Hearing Officer's procedure, is that the attorney's motion was not evidence or cross-examination, nor was it presented as such by the Appellant. Therefore, in the absence of any cross-examination or rebuttal evidence, there was

nothing for Trooper Thorton to further testify to in response or reply.[2] The only matter that should have been addressed by the Hearing Officer was the Appellant's motion to dismiss. Nowhere, under any rule of procedure in any court, including the Rules of Procedure for the Office of Motor Vehicle Hearings, is an opposing party in response to a motion to dismiss, allowed to continue to testify and present additional evidence in reply to a legal motion.[3]

1. South Carolina Department of Motor Vehicles v. Brown

The ALC ruled that the open-ended procedure followed by the Hearing Officer was permitted under South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), however, the facts and the holding in Brown are inapplicable to the Appellant's case. In Brown, which was also an OMVH hearing

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2 It is a rudimentary point of procedure and evidence, that cross examination involves the questioning of an opposing party's witness, and likewise, re-examination can only follow the cross-examination of a witness. See Rule 611(c),(d), of the South Carolina Rules of Evidence. Similarly, reply testimony can only be presented to rebut, contradict, or impeach the case presented by the opposing party. Moreover, reply testimony may not be used to complete a party's case-in-chief. State v. Huckabee, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010); State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct.App. 1998).

3 Rule 15, of the Rules of Procedure for the OMVH, provides that "Normally, the party with the burden of proof will be the first to present evidence, all other parties being allowed to cross-examine in an orderly fashion. When that party rests, other parties will then be allowed to present evidence, again allowing for cross-examination." For other comparable rules of procedure in South Carolina addressing motions to dismiss at the close of the case of the party with the burden of proof, see: Rule 50(a), SCRCP, a motion for a directed verdict is to be at the close of the evidence offered by the opponent; Rule 19(a), SCRCrimP, a directed verdict may be granted after the close of evidence on either side; Rule 16(a), South Carolina Rules of Magistrates Courts, at the close of evidence offered by a party, a magistrate may grant a directed verdict.

involving an implied consent suspension, the motorist had a Blood Alcohol Concentration (BAC) breath test of .15 or more. During the arresting officer's initial testimony he established a prima facie case which included the motorist's BAC breath test of .17. The attorney for the motorist did not conduct any cross examination or offer any evidence. Once closing arguments began, the attorney then moved to dismiss the motorist's suspension based upon the arresting officer's failure to specifically testify or to present documentary evidence as to certain matters regarding the testing procedure and the breath test result. The Supreme Court sustained the suspension of the motorist, finding that if the motorist wished to address specific matters not included in the prima facie showing going to the reliability of the breath test result then the motorist should have objected to such evidence when it was offered. Brown, 406 S.C. at 633, 753 S.E.2d at 528.

The holding in Brown is not applicable to the Appellant's case. As noted, in Brown the arresting officer made out a prima facie case in his initial testimony. In the case before this Court, the arresting officer failed to establish a prima facie case in his initial testimony. Also in Brown, the attorney for the motorist failed to make a timely motion to dismiss, waiting until closing arguments. In the case before the Court, the Appellant's attorney timely made a motion to dismiss after the arresting officer had rested his case, and no other evidence was presented. The ALC noted

that Brown, while not addressing the identical issues in the Appellant's case, nevertheless stands for the broader proposition that "evidentiary rulings should not be used as a trap rather than a tool to discover facts in a DUI suspension hearing." (ALC Order dated May 4, 2017, ROA, p.---) Assuming that rules of evidence and procedure are more relaxed in these administrative hearings, they are not to be altogether abandoned. See South Carolina Department of Motor Vehicles v. McCarson, 391 S.C. 136, 149, 705 S.E.2d 425, 431(2011)(disallowing hearsay testimony during OMVH contested case hearings, because such hearsay evidence "would essentially render meaningless the procedure established by our Legislature in section 56-5-2951.") A procedure that requires a motorist to elicit from the opposing party the facts necessary to establish a prima facie case would eviscerate and defeat any burden of proof statutorily imposed upon the arresting officer or the Department. Moreover, the Appellant's motion to dismiss his suspension based upon the failure of the Department or the arresting officer to establish a prima facie case, can hardly be considered a "trap," where the law in question has been in place for almost twenty years. In this case, where the arresting officer failed to establish a prima facie case, it was not the responsibility or burden of the Appellant to assist the arresting officer in the presentation of his case by eliciting evidence through cross-examination or by motion.

2. S.C. Code Ann. §56-5-2951(F)

In the Appellant's case, the ALC failed to discuss or address the application of S.C. Code Ann. §56-5-2951(F) to the Appellant's case in its order, or after the Appellant filed a motion to reconsider the ALC's initial order.

When South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524 (2014), was decided by the South Carolina Supreme Court in 2014, the 2012 amended provisions of S.C. Code Ann. §56-5-2951(F) were not applied. The Brown case arose in 2008, with the contested case hearing being held that same year. The Administrative Law Court ruling then occurred, followed by the unpublished opinion of the Court of Appeals in 2011. See South Carolina Department of Motor Vehicles v. Brown, Op. No. 2011-UP-130 (S.C.Ct.App. Mar. 29, 2011). In 2012, while the Brown case was on appeal to the South Carolina Supreme Court, the General Assembly amended S.C. Code Ann. §56-5-2951(F) to include express provisions relating to the Department's burden of proof. S.C. Act No. 212, §4 (effective June 7, 2012). The Court of Appeals opinion in Brown that was issued in 2011 would seem to have been a precursor to the amendment to subsection (F) in 2012. See State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183, 186 (2014)(the General Assembly is presumed to be aware of an appellate court's interpretation of a statute). When interpreting a statute, courts must presume the legislature did not intend to do a futile act. State v. Sweat, 379 S.C. 367,

481, 665 S.E.2d 645, 651 (Ct.App. 2008). The General Assembly amended the provisions of S.C. Code Ann. §56-5-2951(F) for some ostensible purpose. The Appellant maintains that the purpose of the amended provisions of S.C. Code Ann. §56-5-2951(F) is to unequivocally place the burden of proof on the Department or arresting officer in the these contested case hearings, and to require that such burden be satisfied without the aid, assistance or even presence of the motorist. Such was not done in the case before the Court.

The procedure used by the Hearing Officer shifted the burden of proof to the Appellant. The Appellant had no burden of proof, and therefore had no affirmative duty to question any witness, or to present any testimony or evidence. When Trooper Thorton's testimony fell short of what was required under S.C. Code Ann. §56-5-2951(F) to establish a prima facie case, and the Appellant's motion to dismiss was made, the Hearing Officer improperly treated the motion as cross-examination or as rebuttal evidence. By treating the Appellant's motion as cross-examination or as reply evidence, the Hearing Officer effectively made the Appellant's attorney the counsel for the Department, with Appellant's counsel pointing out the deficiencies of the Department's case, and slowly bringing Trooper Thorton up to the legal task of establishing the Department's burden of proof that was the subject of the contested case hearing. The role of opposing counsel in a "contested" case

hearing is not to painstakingly elicit from an opposing party that testimony and evidence needed for the party-opponent to establish its case, whether by cross-examination or motion. Rather, the role of opposing counsel is to hold a party to its burden of proof. In this instance, the Department and the arresting officer failed in its burden of proof to establish those matters set forth in S.C. Code Ann. §56-5-2951(F), after having had an opportunity to present its case.

Having failed to meet its burden of proof in establishing a prima facie case, the motion of the Appellant to dismiss the case was timely made, and it was legal error for the Hearing Officer to not rule on, and then to grant, the Appellant's motion.

CONCLUSION

That based upon the above argument and the applicable law, the Order of the Administrative Law Court, and the Final Order and Decision of the Hearing Officer, should be reversed, and the suspension of the Appellant rescinded.

Respectfully submitted,

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June 15, 2017

THE STATE OF SOUTH CAROLINA
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Deborah Brooks Durden, Administrative Law Judge

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Corey Arness McCluney,

Appellant,

v.

South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety,

Defendants,

Of which South Carolina Department of Motor Vehicles is the Respondent.

PROOF OF SERVICE

I certify that I have served the "Initial Brief of the Appellant," by depositing the original or copies in the United States Mail, first class postage prepaid, on June 16, 2017, addressed to the following:

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June 16, 2017

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Re: Corey Arness McCluney v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety
Appellate Case No. 2017-001247

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of the Appellant, with Proof of Service; and the Appellant's Designation of Matter to be Included in Record on Appeal, with Proof of Service.

Please contact my office if you have any questions about this matter.

Sincerely,

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Encl.: As Stated

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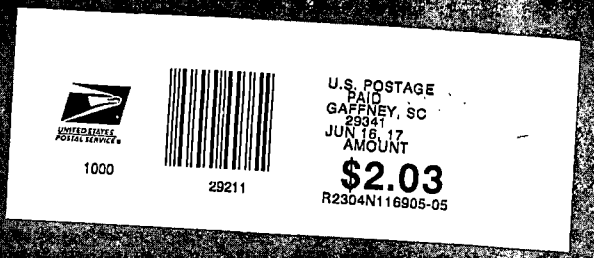

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