

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5025 (S.C. Ct. App. filed 8/22/2012)

RECEIVED
DEC 21 2012
S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

RANDY VICKERY;

PETITIONER

Appellate Case No. 2012-213211

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Randy Vickery,

Respondent.

Appeal From Greenwood County
Eugene Griffith, Circuit Court Judge

Opinion No. 5025
Heard March 20, 2012 – August 22, 2012

REVERSED AND REMANDED

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Columbia, for Appellant.

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Respondent.

KONDUROS, J.: In this criminal case, the State appeals the trial court's suppression of evidence arising out of a driver's license checkpoint because it alleges the checkpoint was constitutional. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Sometime between 9 p.m. April 25, 2009, and 3 a.m. April 26, 2009, officers with the Greenwood Police Department conducted a license checkpoint at the intersection of New Market Street and Milwee Avenue in Greenwood, South Carolina. During that checkpoint, while detaining Randy Jason Vickery for suspicion of driving under the influence, officers spotted methamphetamines and drug paraphernalia in his vehicle and arrested him. That same night, the Greenwood Police Department conducted three other checkpoints in the same vicinity from 9 p.m. until 3 a.m. The four checkpoints produced a total of fifty-six violations, including forty-eight traffic cases and eight criminal cases.

Vickery was indicted for possession of methamphetamine with intent to distribute and possession of methamphetamine with intent to distribute within proximity of a school. At trial, Vickery made a motion to suppress the evidence discovered as a result of the stop, challenging the stop's constitutionality, arguing it violated the Fourth Amendment. The State presented the testimony of Officer Robbie Byrd. Officer Byrd testified he was employed by the Greenwood Police Department in the traffic unit. He stated that on the night of April 25, 2009, through the morning of April 26, he conducted traffic safety checkpoints. He testified that checkpoint locations were determined based on "traffic flow, speeding complaints, loud music complaints, anything such as that nature, primarily just involving traffic." He indicated that the checkpoint locations were selected by Lieutenant Jennifer Bass, who was over the traffic unit, and Major James Marshall. He stated that they had contact with the citizens who were complaining about speeding and loud music coming from cars. Officer Byrd stated the primary purpose of the checkpoints was to check for traffic safety, such as child restraints, seatbelts, driver's licenses, vehicle tags, and the proper credentials. He testified the officers would stop each car that came through the checkpoint and check each driver's license. He further testified the four checkpoints that

night resulted in forty-eight traffic cases and two drug cases. He testified the stops that produced no violations lasted no longer than a minute.

Following Officer Byrd's testimony, Vickery argued the State had not laid the proper foundation to establish the checkpoint's constitutionality under Brown v. Texas, 443 U.S. 47 (1979), and Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). He argued State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008), was "adamant" the State must present empirical data gathered prior to the checkpoint to justify setting up the checkpoint. He maintained the State only provided empirical data on the "back side, what the results were, but they have produced nothing to indicate why the Greenwood Police Department wanted to set up a checkpoint here." He asserted the State needed to provide information as to how many tickets were written and people had been arrested on the road in the month or year prior to the checkpoint. He stated those who established the checkpoints needed to testify and supply the empirical data.

The State responded and agreed Sitz, while critical of the searching examination of effectiveness by trial courts, "retains the requirement that the State produce empirical data to support the roadblock." It argued the report marked Court Exhibit Number 1 established how the checkpoint was effective and what the results were. Vickery argued that report "would probably be very good empirical data for the next checkpoint that they want to have at this location." He asserted that the State was arguing that if it set up a checkpoint and arrested forty-eight people, then it was a good checkpoint. Vickery argued, "It's data on the front side [that case law requires], not on the back side."

Before adjourning for lunch, the trial court stated it was going to take the matter under advisement and would leave the record open if the State wished to see if the file contained any additional empirical data. Following the break, the State called Major Urban Mitchell to testify. He stated he was in charge of the administration division of the Greenwood Police Department. He stated that the position involved records, training, evidence, and crime scenes and included gathering statistics. The State introduced, for the purposes of the hearing, several traffic enforcement activity reports that included the intersection of New Market and Milwee or an intersection

located two blocks away. Major Mitchell testified that the police department had determined that conducting traffic safety checkpoints was an effective way to manage traffic problems. On cross-examination, Major Mitchell could not say how many of the fifty-six violations on April 26 occurred at the intersection of New Market and Milwee but admitted fifty-six tickets at the police headquarters could be obtained to show which of the incidents occurred at that intersection.

The trial court found the State presented

insufficient empirical data justifying the authorization and implementation of the roadblock in question Except for the traffic testimony offered by Major Mitchell, no testimony was offered by the State about the number of tickets, wrecks, and/or citizen complaints related to traffic concerns at the intersection of New Market Street and Milwee Avenue prior to the roadblock in question. Testimony by the State's witnesses indicates that the Greenwood Police Department relied on general knowledge of the neighborhood to justify the roadblock in question.

The trial court further found:

[T]he Traffic Enforcement Activity Reports contain some empirical data regarding the intersection of New Market Street and Milwee Avenue, but the data presented is insufficient to constitutionally justify the roadblock on April 25, 2009, at which [Vickery] was stopped and arrested. The record is absent of any specific evidence for the Court to determine the number of cases which resulted from the roadblock in question. Furthermore, the evidence in the record is insufficient for the Court to determine the effectiveness of the roadblock in question. No

testimony was presented about how many vehicles passed through the roadblock in question.

The court determined the roadblock "did not violate [Vickery's] Fourth Amendment rights because its primary purpose was traffic safety enforcement." However, the court found the roadblock did violate his Fourth Amendment rights because

the State provided insufficient empirical data to support the effectiveness of the roadblock in question. Without sufficient empirical data to justify the implementation of the roadblock and without sufficient data derived from conducting this roadblock, the Court is unable to do the necessary comparison analysis to determine the effectiveness of this roadblock as required under Brown v. Texas, 443 U.S. 47 (1979).

Accordingly, the trial court granted Vickery's motion to suppress and suppressed all drugs and drug paraphernalia located in Vickery's vehicle and on his person, as well as all statements made, observations of his behavior, and recordings. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The South Carolina Supreme Court has articulated the standard of review to apply to Fourth Amendment search and seizure cases. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The court has specifically rejected the de novo standard the United States Supreme Court set forth in Ornelas v. United States, 517 U.S. 690 (1996), for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures. State v. Williams, 351 S.C. 591, 597, 571 S.E.2d 703, 706 (Ct. App. 2002). The Brockman court determined the trial court's ruling would be reviewed like any other factual

finding: reversed if there is clear error and affirmed if any evidence supports the ruling. 339 S.C. at 66, 528 S.E.2d at 666.

On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.

State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citation omitted). Under the clear error standard, "an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Rather, the appellate court must determine whether, based on the evidence, it is left with the definite and firm conviction the trial court committed a mistake. Id. Accordingly, we will apply an any evidence standard to the trial court's ruling. Williams, 351 S.C. at 597, 571 S.E.2d at 707.

LAW/ANALYSIS

The State contends the trial court erred in suppressing the stop by finding the State failed to produce sufficient empirical data to justify the effectiveness of the checkpoint. We agree.

The Fourth Amendment guarantees a person the right to be secure from unreasonable searches and seizures: U.S. Const. amend IV; State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000). "[T]he Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980)). "[S]topping a vehicle at a checkpoint constitutes a seizure of a person within the meaning of the Fourth Amendment." United States v. Brugal, 209 F.3d 353, 356 (4th Cir. 2000) (citing Mich.

Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976)).

Constitutional challenges to checkpoint seizures turn on whether the initial stop at the checkpoint was reasonable. . . . Whether particular checkpoint seizures are reasonable is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped.

Id. (citing Sitz, 496 U.S. at 449-55).

The United States Supreme Court has applied this balancing analysis and "upheld the constitutionality of government checkpoints set up to detect drunken drivers, see [Sitz, 496 U.S. at 454], and illegal immigrants, see Martinez-Fuerte, 428 U.S. at 556-67 . . . , so long as they involve no more than an 'initial stop . . . and the associated preliminary questioning and observation by checkpoint officers.'" Id. at 356-57 (quoting Sitz, 496 U.S. at 450-51) (second ellipses added by court). "The seizure at the sobriety checkpoint upheld in Sitz lasted approximately twenty-five seconds, and the seizures at the immigration checkpoint upheld in Martinez-Fuerte lasted three to five minutes." Id. at 357 (citations omitted).

"The [United States] Supreme Court has also recognized that a state has a substantial interest in enforcing licensing and registration laws, though that interest is not substantial enough to justify roving patrol stops as an enforcement mechanism." Id. (citing Prouse, 440 U.S. at 658-59). However, the Court suggested in Prouse, "checkpoints to check driver's licenses would be permissible even in the absence of articulable and reasonable suspicion that a driver was unlicensed." Id. (citing Prouse, 440 U.S. at 663; Texas v. Brown, 460 U.S. 730, 743 (1983) (plurality opinion) (noting that the circumstances surrounding stop at driver's license roadblock gave "no suggestion that the roadblock was a pretext whereby evidence of a narcotics

violation might be uncovered in 'plain view' in the course of a check for driver's licenses"))).

Drawing on these authorities, courts have concluded that a brief stop at a checkpoint for the limited purpose of verifying a driver's license, vehicle registration, and proof of insurance is a reasonable intrusion into the lives of motorists and their passengers even in the absence of reasonable suspicion that a motorist or passenger is engaged in illegal activity.

Id. (citing United States v. Galindo-Gonzales, 142 F.3d 1217, 1221 (10th Cir. 1998) (finding brief detention of motorist to inspect driver's license, vehicle registration, and insurance information at an established license checkpoint comports with the Fourth Amendment); United States v. McFayden, 865 F.2d 1306, 1310-13 (D.C. Cir. 1989) (finding a roadblock to inspect drivers' licenses and vehicle registrations met the Fourth Amendment standard of reasonableness)).

[T]he Court has determined that the gravity of the public interests that such stops seek to advance and the general efficacy of checkpoint stops in advancing those interests outweigh the minimal intrusions on protected Fourth Amendment liberty interests that are caused by the brief stops required for such limited questioning and observation. But, the Court has also cautioned that "[d]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard."

Norwood v. Bain, 143 F.3d 843, 848 (4th Cir. 1998) (ellipsis and last set of brackets by court) (quoting Sitz, 496 U.S. at 451), vacated, aff'd this ground on reh'g en banc, 166 F.3d 243, 245 (4th Cir. 1999). "[A] claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." Martinez-Fuerte, 428 U.S. at 559.

In State v. Groome, 378 S.C. 615, 619, 664 S.E.2d 460, 462 (2008), the trial court found a roadblock violated the Fourth Amendment under Brown v. Texas, 443 U.S. 47 (1979). The Groome court noted "Brown established a three part balancing test for determining the constitutionality of a traffic checkpoint: 1) the gravity of the public interest served by the seizure; 2) the degree to which the seizure serves the public interest; and, 3) the severity of the interference with individual liberty." Id. at 619, 664 S.E.2d at 462. The trial court held the first and third factors easily weighed in the State's favor but found the State presented no evidence on the second factor. Id.

On appeal, the State argued the trial court abused its discretion in finding the State failed to meet the second Brown factor, the "effectiveness" requirement. Id.

The State argues that it need not introduce evidence about the specific effectiveness of this roadblock because, by its very nature, every license check roadblock determines whether the driver is legally licensed. The State's position that license check roadblocks are ipso facto constitutional, thereby eliminating the requirement of effectiveness from the Brown formula relies upon [Sitz]. While Sitz does criticize "searching examination of effectiveness" by trial courts, it retains the requirement that the State produce empirical data to support the effectiveness of its roadblock. Sitz, [496 U.S.] at 454 ("unlike [Prouse], this case [does not involve] a complete absence of empirical data. . . ."). The record supports the trial court's finding that the State failed to produce any evidence satisfying the second prong of the Brown test.

Groome, 378 S.C. at 619-20, 664 S.E.2d at 462 (ellipsis and last set of brackets added by court).

In Sitz, 496 U.S. at 453, the Michigan Court of Appeals "consider[ed] as part of the balancing analysis the 'effectiveness' of the proposed checkpoint program." The United States Supreme Court found the court of appeals erred in concluding the checkpoint program failed the effectiveness part of the test and the failure materially discounted the State's strong interest in implementing the program. Id. The court noted, "The actual language from Brown v. Texas, upon which the Michigan courts based their evaluation of 'effectiveness,' describes the balancing factor as 'the degree to which the seizure advances the public interest.'" Id. (quoting Brown, 443 U.S. at 51). "This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Id. "But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." Id. at 453-54. "Brown's rather general reference to 'the degree to which the seizure advances the public interest' was derived, as the opinion makes clear, from the line of cases culminating in Martinez-Fuerte, . . . Neither Martinez-Fuerte nor [Prouse], however, the two cases cited by the Court of Appeals as providing the basis for its 'effectiveness' review, . . . supports the searching examination of 'effectiveness' undertaken by the Michigan court." Id. at 454.

The Sitz court further noted:

In Delaware v. Prouse, we disapproved random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. We observed that no empirical evidence indicated that such stops would be an effective means of promoting roadway safety and said that "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."

Id. (quoting Prouse, 440 U.S. at 659-60) (alteration by court). The court "observed that the random stops involved the 'kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'" Id. (quoting Prouse, 440 U.S. at 661) (alteration by court).

The Sitz court found that "[u]nlike Prouse, this case involves neither a complete absence of empirical data nor a challenge to random highway stops." Id.

During the operation of the Saginaw County checkpoint, the detention of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped. By way of comparison, the record from one of the consolidated cases in Martinez-Fuerte showed that in the associated checkpoint, illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint. The ratio of illegal aliens detected to vehicles stopped (considering that on occasion two or more illegal aliens were found in a single vehicle) was approximately 0.5 percent. We concluded that this "record . . . provides a rather complete picture of the effectiveness of the San Clemente checkpoint," and we sustained its constitutionality. We see no justification for a different conclusion here.

Id. at 454-55 (alteration by court) (citations omitted). The court determined "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program" and found it consistent with the Fourth Amendment. Id. at 455.

In State v. Larson, 485 N.W.2d 571, 573 (Minn. Ct. App. 1992), the Minnesota Court of Appeals found "the state failed to present any evidence of the effectiveness of the checkpoint." (citing Brown, 443 U.S. at 51 (holding the court must balance "the degree to which the seizure advances the public interest"); Prouse, 440 U.S. at 659-60 (finding the State presented no empirical evidence that random driver's license checks were effective)). It noted, "Here, there was no testimony on how many driver's license or equipment violations were uncovered or other empirical data on the effectiveness of the checkpoint in advancing the public interest." Id. (emphasis added) (citing Chock v. Comm'r of Pub. Safety, 458 N.W.2d 692, 694 (Minn. Ct. App. 1990) (approving legality of sobriety checkpoint on which empirical data of effectiveness was presented)).

Vickery argued and the trial court found the State presented no evidence of empirical evidence that led to the determination of the location of the checkpoint.¹ However, the cases on point do not require the State to present pre-existing empirical data to justify setting up the checkpoint. The case law does require some basis for the location of the checkpoint. Here, Officer Byrd testified the checkpoint was placed in that location due to citizen complaints about speeding and loud music. Major Mitchell also testified he had personal knowledge of the problems at the intersection before the checkpoint was set up from seeing incident reports, traffic tickets, and statistics. Additionally, the Traffic Enforcement Activity Reports for dates prior to April 26 show that license checkpoints in the same area resulted in thirty to sixty traffic and criminal offenses on each occasion. Therefore, the

¹ The State also had the burden of showing the purpose of the stop and that it served the public interest. The checkpoint was not established by the officers conducting it but rather by their supervisors. Also, this was not a roving stop. None of these factors are at issue in this case.

trial court committed an error of law in requiring the State to present empirical data to justify the authorization and implementation of the checkpoint.

The trial court also suppressed the search because the State's empirical data regarding the effectiveness of the checkpoint was insufficient. The trial court acknowledged the State presented some empirical data regarding the intersection, but that it was insufficient to justify the roadblock. Prouse, Groome, and Sitz all require some empirical data that supports the second prong of Brown, that the seizure serves the public interest. However, none of these cases state how much evidence is considered enough. The United States Supreme Court, as well as our own supreme court, has stressed that no evidence is not enough. Here, we do have some evidence, lying somewhere between Prouse and Sitz. The two facts that seem to be lacking to paint the entire picture are how many vehicles came through this stop or all of the stops and how many of the tickets were specific to this stop location. According to Groome, the question before us is whether the record supports the trial court's finding that the State's empirical data was insufficient to satisfy the second prong of Brown. By showing the stops resulted in a total of forty-eight traffic violations and eight criminal cases including two drug arrests, the State met its burden under the second prong of Brown and the trial court erred in determining the State had to put up more evidence to show the checkpoint's effectiveness.

The purpose of the empirical data on the effectiveness is to be able to balance the effectiveness of the checkpoint with the other two prongs set forth in Brown, (1) the gravity of the public interest served by the seizure and (3) the severity of the interference with individual liberty. Here, the point of the checkpoint was to prevent traffic offenses and people driving without a license. This serves the public interest in that traffic violations and people driving without a license can cause injury to others. The severity with individual liberty was low in that the stops were marked so drivers could anticipate it and each stop lasted under a minute, if there was no violation. Weighing those two factors with the data provided as to the second factor, effectiveness, the license checkpoint did not violate the Fourth Amendment. Accordingly, the trial court's decision is

REVERSED AND REMANDED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RANDY VICKERY,

PETITIONER.

Appeal from Greenwood County

Eugene Griffith, Circuit Court Judge

Opinion No. 5025

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Randy Vickery petitions this Court to rehear this case because this Court may have overlooked the fact that Brown v. Texas, 443 U.S. 47 (1979), and Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990), require the state to produce *empirical* data to support the effectiveness of a checkpoint, and law enforcement in this case was simply doing an impermissible general fishing expedition hoping to find violations of the law during the roadblock. A roadblock is a major intrusion on the lives of citizens who have the right to be left alone absent good cause, and, as the trial court properly pointed out: "[T]he record is absent of any specific evidence for the Court to determine the number of cases which resulted from the roadblock in question. Furthermore, the evidence in the record is insufficient for the Court to determine the effectiveness of the roadblock in question." R. 5.

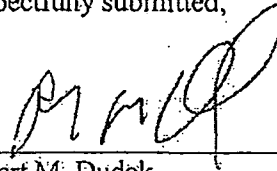
In this case, the state simply did not do its job of providing the court with any firsthand data about the checkpoint on April 25, 2009 at the specific location of New Market Street and Milwee Avenue. Major Urban Mitchell testified that on the night of April 25, 2009 the Greenwood Police Department conducted roadblocks at four locations, including the one at the intersection of New Market Street and Milwee Avenue where petitioner was detained and arrested. R. 48, ll. 17-21. Mitchell further testified that a total of 56 traffic violations occurred at the four locations. R. 48, l. 22 – 49, l. 1. However, *Mitchell was unable to indicate how many total vehicles were detained at the New Market and Milwee roadblock and how many of the 56 violations actually occurred at that location as opposed to the other three locations.* R. 49, ll. 2-10. Mitchell did admit that such information was available at the police department; but that he did not bring it to the hearing nor did the solicitors ask for this specific documentation. R. 49, ll. 11-24. *The government is respectfully not entitled to the benefit of the doubt because it is the government.*

In contrast, in Sitz, the State of Michigan provided evidence that 126 vehicles were detained at the checkpoint in that case which resulted in two arrests of drunken drivers or approximately 1.6 percent of the drivers passing through the checkpoint. 496 U.S. at 454-455. The United States Supreme Court held that this empirical data was sufficient. Sitz, 496 U.S. at 455.

Additionally, in one of the consolidated cases in U.S. v. Martinez-Fuerte, 428 U.S. 543, 554 (1979), empirical data was provided establishing that in an eight day period in 1974 that included the arrests involved, “roughly 146,000 vehicles passed though the checkpoint during the 124 1/6 hours of operation. Of these, 820 vehicles were referred to the secondary inspection area, where Border Patrol agents found 725 deportable aliens in 171 vehicles.” The United States Supreme Court held that this empirical data provided a complete picture of the effectiveness of this particular checkpoint. Id.

Sitz and Martinez-Fuerte clearly require a more detailed showing than what the state produced in this case. The state's failure to produce sufficient empirical data left the trial court unable to perform the necessary analysis to determine the effectiveness of the roadblock in which petitioner was detained and arrested as required under Brown v. Texas, 443 U.S. 47 (1979). The City of Greenwood was unable to produce specific empirical data about the roadblock *where petitioner was stopped*, and the state should not be allowed to evade its obligation of proving its evidentiary predicate before it intrudes into the lives of the citizens of Greenwood, South Carolina by allegedly stopping everyone going through four intersections in that city on the night in question. The state utterly failed in its obligation to justify the roadblock at the intersection of New Market Street and Milwee Avenue, and it showed disrespect for the applicable case law that mandates objective empirical evidence to justify a roadblock. Petitioner respectfully requests rehearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 6th day of September, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Eugene Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

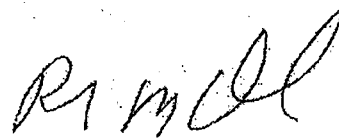
V.

RANDY VICKERY,

PETITIONER.

CERTIFICATE OF SERVICE

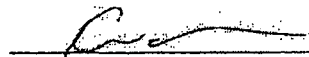
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr. Esquire, this 6th day of September, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of September, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013

The South Carolina Court of Appeals

The State, Appellant,
v.
Randy Vickery, Respondent.

RECEIVED

Appellate Case No. 2010-159807

SEP 20 2012

SC OFFICE OF
APPELLATE DEFENSE

ORDER

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

Daniel G. Pieper

J.

U. Ke

J.

John O. Seath

J.

Columbia, South Carolina

cc:

William M. Blich, Jr.
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FILED

20 September 2012

1903 1

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal From Greenwood County DEC 21 2012
Eugene Griffith, Jr., Circuit Court Judge

S.C. Supreme Court

THE STATE,

Appellant,

vs.

RANDY JASON VICKERY,

Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
 COUNTY OF GREENWOOD) FOR THE EIGHTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

v.

RANDY JASON VICKERY,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION TO SUPPRESS**

09-GS-24-1068

09-GS-24-1069

2010 APR 27 PM 4 06

FILED GENERAL SESSIONS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

TRIAL JUDGE:
COURT REPORTER:
STATE'S ATTORNEYS:

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HENRY P. YOUNG
JANE H. MERRILL AND ANDREW M. HODGES

DEFENDANT'S ATTORNEYS:

BILLY J. GARRETT JR., ROBERT J. TINSLEY, AND CARSON M. HENDERSON

DATE OF HEARING:

WEDNESDAY, MARCH 3, 2010

THIS MATTER came before the Court in Greenwood County on Wednesday, March 3, 2010, upon the Defendant's motion to suppress pursuant to State v. Groome, S.C. , 664 S.E.2d 460 (2008) and the U.S. Supreme Court cases cited therein. The State was represented by Jane H. Merrill, Esquire and Andrew M. Hodges, Esquire of the Eighth Circuit Solicitor's Office, and the Defendant, who was present, was represented by Billy J. Garrett Jr., Esquire, Robert J. Tinsley, Esquire, and Carson M. Henderson, Esquire of the Greenwood County Bar.

At the call of the case, the Defendant moved to suppress all drugs and paraphernalia found on the Defendant and in the Defendant's vehicle, alleging that the roadblock conducted by the Greenwood Police Department violated the Defendant's Fourth Amendment rights. The State presented testimony that the primary purpose of the roadblock was traffic safety.

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 S. C.

Furthermore, the Defendant argued that the State failed to provide any empirical data to establish the effectiveness of the roadblock and that the roadblock served the public interest, as required by Brown v. Texas, 443 U.S. 47 (1979), and Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

The Court heard testimony from two (2) employees of the Greenwood Police Department: Officer Robbie Byrd and Major Urban Mitchell. The Court reviewed five (5) documents submitted into evidence:

- A. Traffic Enforcement Activity Report dated April 25, 2009;
- B. Greenwood Police Department procedures regarding traffic safety checkpoints last revised on June 1, 2007;
- C. Traffic Enforcement Activity Report dated December 19, 2008;
- D. Traffic Enforcement Activity Report dated December 31, 2008–January 1, 2009; and
- E. Traffic Enforcement Activity Report dated March 7, 2009–March 8, 2009.

The Court heard testimony from Major Mitchell and reviewed documents (B)–(E) after a lunch break during which the State was provided the opportunity to gather more evidence in opposition to the Defendant's motion to suppress. The Defendant timely and sufficiently noted his objection to the testimony of Major Mitchell and documents (B)–(E) pursuant to Rule 5 SCRCrimP and Brady, because this material had not previously been provided in discovery. Based upon the sworn testimony of Officer Byrd and Major Mitchell, review of the five (5) documents submitted into evidence, and arguments of counsel, the Court hereby makes the following

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. The Defendant was stopped at a roadblock operated by the Greenwood Police Department on April 25, 2009. The roadblock was at the intersection of New Market



Street and Milwee Avenue in the City of Greenwood.

2. After being stopped at the roadblock, the Defendant was arrested for PWID methamphetamine, PWID methamphetamine proximity, and DUI 1st by Officer Byrd.

The DUI 1st charge was dismissed in Greenwood Municipal Court.

3. Officer Byrd testified:

- a. that the roadblock was authorized by two (2) of his supervising officers, Lt. Jennifer Bass and Major James Marshall.
- b. that Lt. Bass and Major Marshall authorized the roadblock after receiving various traffic-related complaints from citizens in the neighborhood and officers comments regarding their knowledge of the areas.
- c. that he had no knowledge of a specific number of complaints received by the Greenwood Police Department.
- d. that he was not involved in authorizing the roadblock.
- e. that the purpose of the roadblock was traffic safety enforcement.

4. Major Mitchell testified:

- a. that he authorized the roadblock after being approached by Lt. Bass and Major Marshall.
- b. that he was not aware of any specific empirical data used by Lt. Bass and Major Marshall in deciding to set up the roadblock in question.
- c. that he was not present during the roadblock.
- d. that the purpose of the roadblock was traffic safety enforcement.
- e. that he has a general knowledge of and access to traffic tickets, wrecks, traffic-related complaints filed by citizens, and other traffic safety statistics generated within the City of Greenwood.
- f. that he did not have any specific knowledge of traffic incidences at the intersection of New Market Street and Milwee Avenue.
- g. that he is responsible for maintaining the traffic ticket and accident report records within the Greenwood Police Department.

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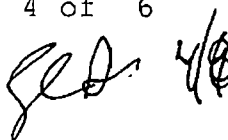
h. that the Greenwood Police Department does not use empirical data prior to authorizing roadblocks and that no reference to empirical data is contained in the department's procedures for traffic safety checkpoints.

i. that he assisted in writing the department's current version of the procedures.

5. The documents introduced by the State through Major Mitchell offered a compilation of generalized, non-specific data generated as a result of the roadblock in question and prior roadblocks.

6. The Traffic Enforcement Activity Report dated April 25, 2009, indicates that fifty-six (56) cases were made by the Greenwood Police Department on that date at four (4) roadblock locations, one of which was where the Defendant was stopped. Major Mitchell testified that he had no knowledge of which cases were made at which locations on April 25, 2009. The Court takes judicial notice that at least one (1) of the fifty-six (56) the cases – the Defendant's arrest – made on April 25, 2009, occurred at the intersection of New Market Street and Milwee Avenue. Otherwise, there is no evidence before the Court about how many other cases, if any, were made at the roadblock in question on April 25, 2009.

7. This Court finds that the State presented insufficient empirical data justifying the authorization and implementation of the roadblock in question at the location of New Market Street and Milwee Avenue at the specific time of the roadblock. Except for the traffic testimony offered by Major Mitchell, no testimony was offered by the State about the number of tickets, wrecks, and/or citizen complaints related to traffic concerns at the intersection of New Market Street and Milwee Avenue prior to the roadblock in question. Testimony by the State's witnesses indicates that the Greenwood Police Department relied on general knowledge of the neighborhood to justify the roadblock in question.

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8. The Court finds that the Traffic Enforcement Activity Reports contain some empirical data regarding the intersection of New Market Street and Milwee Avenue, but the data presented is insufficient to constitutionally justify the roadblock on April 25, 2009, at which the Defendant was stopped and arrested. The record is absent of any specific evidence for the Court to determine the number of cases which resulted from the roadblock in question. Furthermore, the evidence in the record is insufficient for the Court to determine the effectiveness of the roadblock in question. No testimony was presented about how many vehicles passed through the roadblock in question.

9. The Court finds that the roadblock in question did not violate the Defendant's Fourth Amendment rights because its primary purpose was traffic safety enforcement. However, the Court finds that the roadblock in question did violate the Defendant's Fourth Amendment rights because the State provided insufficient empirical data to support the effectiveness of the roadblock in question. Without sufficient empirical data to justify the implementation of the roadblock and without sufficient data derived from conducting this roadblock, the Court is unable to do the necessary comparison analysis to determine the effectiveness of this roadblock as required under Brown v. Texas, 443 U.S. 47 (1979).

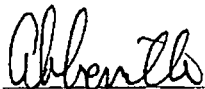
10. The Court is not ruling that all roadblocks conducted by the Greenwood Police Department are unconstitutional. In fact, the Court sees no reason that other arrests, if any, made by the Greenwood Police Department on April 25, 2009, at the intersection of New Market Street and Milwee Avenue would not be constitutional provided that sufficient empirical data is provided to justify the roadblock and to establish the effectiveness of the roadblock in other cases from that evening.

IT IS THEREFORE ORDERED that the Defendant's motion to suppress is granted and the Court hereby suppresses and excludes from evidence all drugs and paraphernalia located in the Defendant's vehicle and/or on the Defendant's person, as well as all other evidence against the Defendant which arose or was collected after the Defendant was stopped, including but not limited to all statements made by the Defendant before and after his arrest, all observations of the Defendant's behavior by any law enforcement officer before and after his arrest, and all video and audio recordings of the Defendant.

IT IS SO ORDERED.



EUGENE C. GRIFFITH, JR.
Presiding Circuit Court Judge
Eighth Judicial Circuit

, South Carolina

April 27th, 2010

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

2009-GS-24-1068

COUNTY OF GREENWOOD

2009-GS-24-1069

STATE OF SOUTH CAROLINA,

- vs -

RANDY VICKERY,

Defendant.

March 3, 2010

B E F O R E:

HONORABLE EUGENE GRIFFITH, JR.

A P P E A R A N C E S:

ANDREW M. HODGES, Esquire
JANE H. MERRILL, Esquire
Attorneys for the StateBILLY GARRETT, JR., Esquire
ROBERT J. TINSLEY, Esquire
CARSON M. HENDERSON, Esquire
Attorneys for the DefendantHenry P. Young
Court Reporter

I-N-D-E-X

WITNESS:

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P-R-O-C-E-E-D-I-N-G-S

(Convened at 12:21 p.m., March 3, 2010)

THE COURT: Mr. Tinsley and Miss Merrill and I have had some conversations in chambers regarding some pretrial matters. Mr. Tinsley, I understand you and Mr. Garrett have a motion or maybe two to present. The record is yours.

MR. TINSLEY: Thank you, Your Honor. We'll start with Mr. Henderson. He will lead us in our initial motion.

MR. HENDERSON: Our first motion would be a motion to suppress under State versus Groome, a Supreme Court case, 378 South Carolina 615, 664 S.E.2d 460, a 2008 case.

Your Honor, that case deals with the constitutionality of checkpoints. Actually Judge Hill was the trial judge in that matter out of Greenville that suppressed everything that was found at a traffic stop, Your Honor, and during the discovery of this matter all we have been provided is just some data from what happened on the night of this roadblock, Your Honor, on 4/25, 4/25, 09. Actually it is a document that covers four separate roadblocks that same night that was conducted, it looks like by the city police department. Your

1 Honor, I pass this up and that is the only piece of
2 discovery we've been given on the roadblock issue,
3 Your Honor.

4 Groome makes very clear that the government
5 has got to jump through a lot of hurdles to show
6 the constitutionality of a roadblock or checkpoint,
7 Your Honor. First of all the government has got to
8 show and provide supporting evidence, I believe, in
9 discovery that the roadblock complies with the City
10 of Indianapolis versus Edmond, United States
11 Supreme Court 531 U.S. 32. And also the government
12 has got to show that the roadblock complies with
13 Brown versus Texas, 443 U.S. 47, Your Honor, and
14 our Supreme Court goes through a very, very
15 detailed analysis in State versus Groome about what
16 hurdles have to be jumped through before the
17 government can prove that a checkpoint is
18 constitutional.

19 And again, Your Honor, the only discovery
20 that has been provided to us that goes toward the
21 State v. Groome matter is that document that the
22 Clerk just handed up to you, that they made a lot
23 of stops that night. That is all we've gotten,
24 Your Honor, and again I believe the burden is on
25 the government to prove the constitutionality of

1 this checkpoint and the stop and, Your Honor, it is
2 our position that that just has not been done.
3 Nothing has been done under State v. Groome but
4 that particular document.

5 Your Honor, for the record, if I could get a
6 copy of that document marked as a Court's exhibit.

7 Your Honor, it's the defense's position --

8 THE COURT: I detached a letter which was a
9 transmittal letter showing the production of this
10 what has been marked Court's Exhibit Number 1, so
11 all right, now you may continue.

12 MR. HENDERSON: Thank you, Your Honor.

13 (Traffic Enforcement Activity Report marked
14 as Court Exhibit Number 1).

15 MR. HENDERSON: If it pleases the Court, the
16 defendant's position is that based on what has been
17 produced that the government has not put forth
18 evidence establishing the constitutionality of this
19 traffic stop and, Your Honor, we believe the Court
20 should suppress everything discovered as a direct
21 result of the stop of the defendant's car.

22 THE COURT: All right, Miss Merrill?

23 MS. MERRILL: Your Honor, I do have a witness
24 to call to testify about the traffic checkpoint.

25 THE COURT: All right.

1 MS. MERRILL: The State calls Robbie Byrd.

2 THE COURT: Mr. Byrd, come to the center and
3 be sworn and then take the witness stand.

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1 ROBBIE BYRD,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. MERRILL:

5 Q Please state your name for the record.

6 A Robbie Byrd.

7 Q Where do you work?

8 A Greenwood City Police Department.

9 Q How long have you worked there?

10 A About six years in August.

11 Q And what do you do?

12 A Currently I'm in traffic, the traffic unit.

13 Q And what does that mean, being in the traffic
14 unit?

15 A Primarily just traffic violations, seatbelts,
16 accidents, stuff of that nature.

17 Q Were you working at the Greenwood Police
18 Department on April 25th, 2009?

19 A Yes, ma'am.

20 Q And into the night of or the morning of April
21 26th, 2009?

22 A Yes, ma'am.

23 Q And what were you doing that evening?

24 A We were conducting traffic safety
25 checkpoints.

1 Q And how do you determine where to set up
2 traffic safety checkpoints?

3 A It is really based on traffic flow, speeding
4 complaints, loud music complaints, anything such as
5 that nature, primarily just involving traffic.

6 Q Okay.

7 MS. MERRILL: Your Honor, may I approach the
8 witness?

9 THE COURT: You may.

10 MS. MERRILL: And get the Court's Exhibit?

11 THE COURT: You may.

12 MS. MERRILL: Thank you.

13 BY MS. MERRILL:

14 Q Officer Byrd, I'm going to hand you what has
15 been marked as Court's Exhibit 1. Looking at that
16 and looking at those officers, was that specific
17 unit working that evening?

18 A No, ma'am.

19 Q So, these officers don't make up a drug unit?

20 A No, ma'am.

21 Q Do they make up an investigation unit?

22 A No, ma'am.

23 Q Crime investigation unit?

24 A No, ma'am.

25 Q Can you give me a couple officers' names on

1 this report and tell me in what capacity they work
2 at the police department?

3 A Yes, ma'am. At the time Officer Pinkney was
4 assigned to the, I can't recall the name of it,
5 housing authority, where she is, you know, based at
6 the housing authority. She just deals with, you
7 know, any issues that they might have down there.

8 Officer Watt, Officer Owen, Officer Wideman,
9 Officer Bell, most of them were just shift
10 employees. I think Officer Kay was working
11 warrants at that time.

12 Q Okay, thank you. That evening was there a
13 drug dog present?

14 A No, ma'am.

15 Q And looking at what has been marked as
16 Court's Exhibit 1, how many checkpoints were set
17 up?

18 A I believe four.

19 Q And at that checkpoint were there signs
20 indicating that the checkpoint was there?

21 A Yes, ma'am, on both sides of the checkpoint
22 there were signs.

23 Q So drivers could see that ahead of time?

24 A Yes, ma'am.

25 Q Okay. Did you stop people randomly or stop

1 every vehicle?

2 A Every vehicle that came through the
3 checkpoint was stopped and we made contact with the
4 driver of that vehicle.

5 Q And what is the primary purpose of doing
6 these traffic checkpoints?

7 A The primary purpose is pretty much for just
8 traffic safety, like child restraint, seatbelt, you
9 know, driver's license check, checking the tag of
10 the vehicle, making sure they have all the
11 credentials.

12 Q Did you, when you stopped someone did you
13 check everyone's driver's license?

14 A Just the driver of the vehicle but every
15 driver that came through we checked their license,
16 yes, ma'am.

17 Q Okay. And looking at this report, what is
18 marked Court's Exhibit 1, how many traffic cases
19 were there?

20 A A total of 48 traffic cases made that night.

21 Q Okay. And how many drug cases were there?

22 A It looks like, from reading it, it looks like
23 a total of two.

24 Q There is a one by simple possession of
25 marijuana and one by methamphetamines, is that

1 correct?

2 A Yes, ma'am.

3 Q So, would you agree the purpose of this is
4 not general crime suppression or general drug
5 activity suppression?

6 A Yes, ma'am.

7 MS. MERRILL: Beg the Court's indulgence.

8 Q And were there supervisors at the checkpoint?

9 A Yes, ma'am.

10 Q And were they there the whole evening?

11 A Yes, ma'am.

12 Q If you needed to, if someone did need to be
13 taken to City Hall for some reason, for example, a
14 DUI, would one of the other officers take that
15 person and the supervisor stay there?

16 A That's correct.

17 Q And who determined the location of the
18 checkpoint?

19 A I believe at the time Lieutenant Bass, who
20 was over the traffic unit, and Major James Marshall
21 were in control of where the checkpoints were,
22 being that they had contact with the citizens who
23 were complaining about speeding and loud music
24 coming from cars and what not.

25 MS. MERRILL: Beg the Court's indulgence one

1 moment, please.

2 THE COURT: Yes, ma'am.

3 Q When you stopped the vehicle, if they had
4 their driver's license and everything was okay did
5 you detain them?

6 A No, ma'am.

7 Q About how long would you say the average stop
8 was where someone had their driver's license
9 present?

10 A Just long enough, you know, to greet them and
11 ask for their license, walk back to the back of the
12 vehicle and check the tag and hand their license
13 back and told them to have a good night. Maybe a
14 minute at most.

15 Q Okay. When you all do traffic checkpoints,
16 this type report like is marked as Court's Exhibit
17 Number 1, are those produced after each checkpoint?

18 A Yes, ma'am, they are.

19 Q And do you know who produces these reports?

20 A At this time I believe Lieutenant Bass would
21 be the one to do them. We use this information for
22 the law enforcement network, it is for, you know,
23 the state numbers, traffic numbers, DUI numbers and
24 such.

25 MS. MERRILL: Please answer any questions

1 from the defense. Thank you.

2 THE WITNESS: Yes, ma'am.

3 MR. HENDERSON: If you will bear with us one
4 moment, Your Honor?

5 THE COURT: Yes, sir.

6 MR. HENDERSON: Nothing further, Your Honor.

7 THE COURT: All right.

8 (Witness excused).

9 THE COURT: All right?

10 MR. HENDERSON: Yes, sir, Your Honor. First
11 of all I want to make sure that the government's
12 argument is done.

13 THE COURT: Anything else, Miss Merrill?

14 MS. MERRILL: If I can briefly follow up, I
15 don't know if that would be more appropriate after
16 their argument.

17 THE COURT: Go ahead.

18 MS. MERRILL: Thank you, Your Honor. The
19 U.S. Supreme Court in Edmond stated that law
20 enforcement will be able to establish checkpoints
21 for virtually any purpose so long as they include a
22 license and sobriety check. From that, I think
23 this case is distinguishable from Groome in that in
24 Groome the checkpoint was conducted by the Directed
25 Patrol Unit. Here officers came from a variety of

1 departments within the Greenwood Police Department,
2 there was not a specific unit. In Edmond a K-9
3 patrol unit with drug dog was participating, that
4 is how the defendant was charged, was through a
5 drug dog hitting on his car. Here the incident
6 report indicates there was a meth pipe in plain
7 view.

8 And we presented evidence about the
9 procedures of the roadblocks. The report details
10 the duration was four hours and that each person as
11 long as they had their driver's license, the most
12 they were detained was about a minute. That was an
13 estimate. It still seems that the individual
14 liberty of the person, that is not a severe
15 interference. And they placed signs at the
16 roadblock, they introduced themselves to the driver
17 of the car, if they had a valid license they were
18 let go and individual liberty intrusion was minimal
19 and there is high interest in preventing unlicensed
20 drivers from driving on the roads and I think this
21 stop or these checkpoints were, are distinguishable
22 from the checkpoint that was set up in the Groome
23 case.

24 THE COURT: It is also my understanding from
25 the testimony of Officer Byrd that the checkpoint

1 location and length was set forth by the traffic
2 unit, the lieutenant in charge of the traffic unit.
3 Is that right?

4 MS. MERRILL: That's correct, Your Honor. I
5 think the supervisors select the locations based on
6 traffic complaints.

7 THE COURT: All right.

8 Mr. Henderson?

9 MR. HENDERSON: Yes, sir. I just wanted to
10 make sure the government is through with its
11 argument.

12 Your Honor, I still think the government has
13 failed to lay the proper foundation, especially
14 under Brown versus Texas, 443 U.S. 47, and Michigan
15 Department of State Police versus Sitz. Your
16 Honor, that is 496 U.S. 444.

17 What we have got to have, and our state
18 Supreme Court is adamant about that in Groome, is
19 you have got to have the empirical data prior to
20 setting up the checkpoint, that the government has
21 to have these documents, these numbers in hand to
22 justify setting up checkpoints in the first place.
23 The government has given up empirical data on the
24 back side, what the results were, but they have
25 produced nothing to indicate why the Greenwood

1 Police Department wanted to set up a checkpoint
2 here.

3 Your Honor, there is no information of how
4 many tickets have been written on this road in the
5 last month, in the last year, how many people have
6 been arrested in the last month, in the last year,
7 why we were putting this checkpoint here. The
8 testimony from Officer Byrd was that it's not his
9 decision to make, it was Lieutenant Bass' and, I
10 believe, Mr. Marshall's decision to make this and,
11 Your Honor, who knows why they would make this
12 decision. They are not here, the government did
13 not call them to testify. I think the people who
14 are responsible for establishing these checkpoints,
15 i.e., the supervisors, in this case Lieutenant Bass
16 and Officer Marshall, they need to come in here,
17 they need to bring the empirical data, and that's
18 what Judge Hill, basically that is why he
19 suppressed the drugs in the State versus Groome
20 case, and the Supreme Court upheld him on that, is
21 that the government brought in no empirical data as
22 to why we picked this location to do the
23 checkpoint.

24 And, Your Honor, on the Groome case,
25 especially page 462 of the opinion, which would be

1 the third page, our Supreme Court lays out a
2 wonderful analysis of the empirical data and here,
3 Your Honor, we have none and again we believe that
4 the government has failed to meet the
5 constitutional mandate as required by the United
6 States Supreme Court and we ask that everything
7 discovered as a result of this stop be suppressed.

8 THE COURT: Miss Merrill, how do you respond
9 to that?

10 MS. MERRILL: Your Honor, I think the cases,
11 while Sitz does criticize searching examination of
12 effectiveness by trial courts, it retains the
13 requirement that the State produce empirical data
14 to support the effectiveness of its roadblock. I
15 think this report marked as Court Exhibit Number 1
16 does that. It shows how it was effective and what
17 the results were. I don't think it requires the
18 trial court to search every single reason and in
19 fact Michigan v. Sitz criticizes, you know,
20 examination of effectiveness by the trial court. I
21 think this report does show the effectiveness of it
22 and I think that meets that requirement to show
23 some empirical data but I don't think the State has
24 to pull out every single speeding ticket someone
25 has gotten in the area, every single seatbelt

1 violation they have written in those areas. I
2 don't think that is what the case requires the
3 State to do.

4 THE COURT: Is there any evidence regarding
5 the number of vehicles that came through the
6 checkpoint?

7 MS. MERRILL: What they keep, they keep this.
8 I was under the impression from talking with the
9 police department they do not keep numbers and it
10 is not a standard procedure of the police
11 department to keep numbers of every vehicle,
12 specially the ones where there was not a violation.

13 THE COURT: I asked if they kept a count of
14 the number of people that came through during that
15 24 hour period.

16 MR. HENDERSON: Your Honor, very briefly, I
17 didn't address that point, and the Court is
18 absolutely right. How do we know 48 stops were
19 effective? If 48 people went through it might be
20 100 percent effective. If it was a thousand people
21 went through it might be very ineffective. Again,
22 these are the empirical data that would be used to
23 establish whether or not the checkpoint should be
24 held.

25 And, Your Honor, Court's Exhibit Number 1

1 would probably be very good empirical data for the
2 next checkpoint that they want to have at this
3 location but we're not there at that point yet.
4 The issue is the data that the government has as to
5 what justified the stop on that night. Your Honor,
6 we just don't have that. We don't know how many
7 cars went through or even if that's a high crime
8 area for this type stuff. We don't know, we don't
9 have a supervisor here to testify about what type
10 of data that they relied upon to set up this
11 checkpoint.

12 Your Honor, if the data is not available the
13 government can go out here and set up a checkpoint
14 anywhere they want to and if we arrest 48 people
15 that night, hey, it was a good checkpoint. That's
16 not what the case law requires. It's data on the
17 front side, not on the back side.

18 THE COURT: All right. Mr. Henderson, tell
19 me this. What type data is the State, I guess
20 maybe I'm just naive, how does the State know there
21 is a problem of seatbelt and child restraint and
22 safety of vehicles, driver's licenses, by observing
23 the vehicle driving by, without creating a
24 checkpoint, how does it determine initially, what
25 are they supposed to have?

1 MR. HENDERSON: Accidents, wrecks, injuries,
2 DUI arrests, DUS, "We ran our database last month
3 and we discovered we had fourteen driving under
4 suspensions over here where this, where this stop
5 happened." That information is readily available
6 to these gentlemen because they're the ones that
7 produce the documents, they write the tickets.
8 That is the type of stuff the government has got to
9 come in here with and say that, "At this quarter of
10 a mile of road last month we had two wrecks,
11 fourteen DUS." However people were getting stopped
12 and arrested, really that is of no concern. The
13 concern is that they actually got arrested, that is
14 the data that needs to be used to come justify this
15 stop and here they have laid no foundation,
16 provided no evidence other than the fact, "We just
17 went out here and set up this checkpoint, that is
18 where the supervisors wanted to put it at."

19 THE COURT: All right.

20 Miss Merrill, it's close to lunch time. I'm
21 going to take this matter under advisement and
22 during the lunch period if you wish to see if your
23 file contains any other empirical data I will leave
24 the record open with regard to this issue, okay?

25 MS. MERRILL: Thank you, Your Honor.

1 THE COURT: All right what, else have we got?

2 MR. HENDERSON: Yes, sir, Your Honor. The
3 defendant's second argument, Your Honor, the first
4 time the defendant was Mirandized, we're asking,
5 seeking relief of the Court to suppress everything
6 from that point forward.

7 To give the Court a little bit of background
8 information on this, this case arose obviously at a
9 checkpoint. Mr. Vickery was detained on suspicion
10 of driving under the influence and pursuant to the
11 DUI law ultimately he was Mirandized. Your Honor,
12 up to that point in time we're not arguing, we
13 might be arguing if it was a DUI trial but we're
14 not arguing that here today, but from that point
15 forward when he was first Mirandized, Your Honor,
16 it's the defense's position he was given incomplete
17 and insufficient Miranda.

18 Your Honor, if I may call the Court's
19 attention to South Carolina Court of Appeals case
20 of State versus Robert Kennedy, 510 S.E. 2d 714,
21 and I will read for the record, Your Honor, this is
22 our Court of Appeals discussing Miranda, and
23 actually it is Judge Anderson discussing what
24 Miranda means, I have great respect for him.

25 Miranda warnings, a suspect in custody may

1 not be subjected to interrogation unless he is
2 informed that he has the right to remain silent.
3 Anything he says can be used against him in a court
4 of law. He has a right to the presence of an
5 attorney. If he cannot afford an attorney one will
6 be appointed for him prior to any questioning if he
7 so desires. And he has the right to terminate the
8 interrogation at anytime and not to answer any
9 further questions.

10 Your Honor, in this case Mr. Vickery was
11 Mirandized on the road videotape, from in-car
12 videotape. He is Mirandized on the Datamaster room
13 videotape and he is Mirandized on statements he has
14 given to law enforcement, and on every last one of
15 those times, Your Honor, the government does not
16 inform him he has the right to terminate the
17 interrogation at anytime and not to answer any
18 further questions.

19 Your Honor, in a very illuminating Circuit
20 Court order which I understand is not binding on
21 this Court, Your Honor, but if I could pass it
22 forward, Judge Couch out of Spartanburg, I believe,
23 and he has written a very good order detailing all
24 the steps of Miranda, Your Honor, and actually it
25 is in accord with this State versus Kennedy case.

1 Your Honor, I know this is a Highway Patrol case
2 but I always like to hand the Court a copy of what
3 the Highway Patrol does on Miranda, because this
4 gives Miranda that complies with State versus
5 Kennedy.

6 Your Honor, it is our position if he was not
7 given a full Miranda warning and adequate Miranda
8 warning he cannot knowingly and voluntarily waive
9 any right because they have not been displayed to
10 him in full.

11 Your Honor, Officer Byrd on tape says, "I'm
12 reading from my card." Actually you can see him
13 reading from his card and in fact they are reading,
14 from a defense's position, a defective card because
15 it does not cover all of the Miranda rights.

16 One moment, Your Honor.

17 Your Honor, again, when these Miranda
18 warnings are being given there is no doubt that the
19 defendant is in custody and he's being
20 interrogated, Miranda applies. Not only does it
21 apply under the Constitution but history dictates
22 it applies because it is in a DUI setting which
23 leads to the arrest.

24 Your Honor, based upon that statement in
25 Kennedy, the Circuit Court order, and State versus

1 LeRoy Jenkins, we would ask that the Court suppress
2 everything that was found on my client, on his
3 possession, in his vehicle, everything he said from
4 the point that he was first attempted to be
5 Mirandized, forward, Your Honor.

6 THE COURT: Mr. Henderson, what statements in
7 particularly that you wish to be suppressed, what
8 are they in particular? I have not seen the
9 videotape.

10 MR. HENDERSON: Your Honor, it is not so much
11 as what is on the videotape, as what happens when
12 they get down to the detective room. They have
13 numerous conversations, they have numerous
14 conversations about my client sold before, he might
15 sell in the future. Your Honor, for the Court's
16 edification, prior to any Miranda issues here law
17 enforcement had discovered the methamphetamine,
18 that is not the issue. We come into court and
19 acknowledge that. The issues come in once he gets
20 down to the station house, that is when, and the
21 defense's position that promises are being made,
22 there is interactions and lots of stuff going on
23 but it all deals with my client having sold in the
24 past, possibly wanting to sell in the future, just
25 other general criminal conduct that I believe the

1 government is seeking to use to prove that he
2 intended to distribute drugs on this particular
3 night.

4 THE COURT: All right. So, his comments
5 regarding his participation in drug dealing, those
6 type comments are the ones you are saying were
7 retrieved in violation of his full Miranda
8 advisements?

9 MR. HENDERSON: Absolutely, Your Honor,
10 because we discussed with Mr. Vickery, he is stuck
11 with them discovering the meth, he has the meth on
12 him, in the ashtray, we're stuck with that but it's
13 what is going on after the fact, Your Honor.

14 THE COURT: All right.

15 Miss Merrill?

16 MS. MERRILL: Your Honor, the Supreme Court
17 recently addressed this, about a week or two weeks
18 ago, in Fordham v. Powell. I'm sorry, all I have
19 right now is a WestLaw, it is not in the U.S.
20 Reporter yet, 210 WL 605603, and in that case, it
21 comes from Florida, and it basically questions what
22 the officer said. And in this it says, I'm
23 comparing what the Court approved in this case with
24 the card that Officer Byrd just handed me that has
25 their Miranda warnings on it, and first and

1 foremost the Supreme Court of the United States
2 says, "While the warnings prescribed by Miranda are
3 invariable, this Court has not dictated the words
4 in which the essential information must be
5 conveyed." So, as long as the essential
6 information is conveyed that's enough.

7 The language they approved, again, they did
8 not say you must have specific language but the
9 language that was being argued in this case was you
10 have the right to remain silent. If you give up
11 the right to remain silent anything you say can be
12 used against you in court. You have the right to
13 talk to a lawyer before answering any of our
14 questions. If you cannot afford to hire a lawyer
15 one will be appointed for you without cost before
16 any questioning. You have the right to exercise
17 any of these rights anytime you want during this
18 interview.

19 I'm looking at the card Officer Byrd handed
20 me. You have the right to remain silent. Anything
21 you say can and will be used against you in a court
22 of law. You have the right to talk to a lawyer and
23 have him present with you while you are being
24 questioned. If you cannot afford to hire a lawyer
25 one will be appointed to represent you before any

1 questions if you wish. You can decide at anytime
2 to exercise these rights and not answer any further
3 questions or make any additional statements.

4 So, I think that the United States Supreme
5 Court has not said that the specific words must be
6 used and every officer must say these specific
7 words so long as they include every right that is
8 required by Miranda, and I think this card does.
9 And just to review those rights in the Miranda
10 case, he must be clearly informed that he has the
11 right to consult with a lawyer, have the lawyer
12 with him, the right to talk to a lawyer before
13 answering any questions, and the ability to invoke
14 those rights during the interview. The Supreme
15 Court held standard given at the Tampa police
16 headquarters was enough, Your Honor.

17 THE COURT: I believe it would be helpful if
18 I saw some of the video. I mean, am I mistaken,
19 for me to make a determination, don't I have to
20 hear what was said?

21 MR. HENDERSON: I believe so, Your Honor, in
22 all fairness.

23 THE COURT: Both of you?

24 MS. MERRILL: Yes, Your Honor, I think that
25 would be fair, so you know what would be said.

1 THE COURT: All right, so be it. So, with
2 that, I cannot make a ruling until I hear that.

3 Is that your last motion, Mr. Henderson?

4 MR. HENDERSON: No, sir, Your Honor. I have
5 another one.

6 THE COURT: Let's break for lunch. The young
7 lawyers are having something, the young lawyers, it
8 is set at 1:00 o'clock, I need to get there, so
9 let's adjourn this. I want to hear the video when
10 we come back from lunch and then I will hear you
11 further on that, just for planning purposes, and we
12 can continue these on at 2:00 o'clock, 2:15.

13 MR. HENDERSON: Not a problem, Judge, at the
14 Court's convenience.

15 THE COURT: All right. So, we'll be in
16 recess until 2:00. The jury is coming back at
17 2:15, we'll be back before then, we'll be back
18 probably about 2:00 o'clock. About an hour. We'll
19 not start before 2:00.

20 (Recessed at 1:05 p.m.).

21 (Reconvened at 2:05 p.m.)

22 THE COURT: All right. When we adjourned,
23 Miss Merrill, you were going to seek out any other
24 empirical data or facts or witnesses you would like
25 regarding this issue on the constitutionality of

1 the roadblock.

2 MS. MERRILL: Thank you, Your Honor. The
3 State calls Urban Mitchell.

4 MR. HENDERSON: Your Honor, I'm going to
5 object to this right now. We have been provided
6 with some documents from Miss Merrill's file during
7 the recess. The Court instructed her to go look
8 for files, we have been provided with several
9 documents that had not been provided to us, nothing
10 from Officer Mitchell, he is not listed as a
11 witness. I mean, we haven't been put on notice of
12 any of this. Obviously the government had this,
13 they just went and pulled it out of the file.

14 THE COURT: It is my understanding you had
15 asked for it?

16 MR. HENDERSON: Absolutely.

17 THE COURT: Okay.

18 All right?

19 MS. MERRILL: Your Honor, I did not, once you
20 asked us to seek out further information I called
21 over to the city police department during lunch and
22 got this information and immediately handed it
23 over, made a copy so they would have it. It was
24 not in our office files and, you know, as soon as
25 we received a copy we gave a copy to them. I'm not

1 sure, I don't think this falls under Brady, it is
2 not specifically to do with this case. These are
3 the prior checkpoints done, this is not checkpoints
4 that night but I got them at the request of the
5 Court, Your Honor, and I think with the witness, we
6 don't intend to call him at trial; he may not have
7 been voir dired in front of the jury, I think the
8 Court can hear the testimony.

9 THE COURT: Since this is in-camera testimony
10 I think I can hear it. Let me, I'm going to hear
11 it very briefly because I have spoken with Judge
12 Hill on this, I figured since he is the chief
13 administrative judge and he was the trial judge on
14 the Groome case, what better person to talk to, so
15 I was just on the phone with him and he is
16 transmitting to me his trial court order that he
17 ruled and the Supreme Court evaluated. I don't
18 quite have that yet, so until that gets to me I
19 will just hear the testimony. I understand your
20 objection. I also understand you asked if that was
21 the State's case regarding this issue, so that
22 issue is reserved for you, too, Mr. Henderson.

23 MR. HENDERSON: Your Honor, just for
24 reference, the next thing out of my mouth was going
25 to be Brady violation. This is extremely

1 exculpatory, this goes toward trying to convict our
2 client of something, that the government had in
3 their possession, they know the constitutional
4 issue. This should have been provided, they had
5 it.

6 THE COURT: Did you ask specifically about
7 roadblock factual basis? I see the reply letter to
8 Miss Merrill, the letter directed to, regarding
9 Rule 5 Brady, it does not say what the Rule 5 Brady
10 specifically delineated.

11 MR. TINSLEY: While he is looking, Your
12 Honor, let me point out this. We will gladly plead
13 Mr. Vickery to possession right now, waive all
14 these issues, which we think is a just result, and
15 if we prevail on these issues the case goes away
16 and we want to make that clear, in the matter of
17 justice, that we will hold to that position.

18 THE COURT: That was, in the pretrial
19 conference we had in chambers you made that
20 abundantly clear to Miss Merrill. She, I think,
21 represented to you as accurately as she could she
22 was allowed some latitude, however the Solicitor
23 was also involved in negotiations and her authority
24 was limited, and I think that was about as far as
25 the conversation went. You all may continue that

1 conversation but call your witness.

2 MS. MERRILL: The State calls Urban Mitchell.

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1 URBAN MITCHELL,
2 after being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. MERRILL:

5 Q Please introduce yourself to the Court.

6 A Major Urban Mitchell of the Greenwood Police
7 Department.

8 Q And, Major, what do you do with the police
9 department?

10 A I'm over the administration division. That
11 includes records, training, evidence, crime scenes.

12 Q Does that include gathering statistics?

13 A Yes, it does.

14 Q And whenever the Greenwood Police Department
15 sets up a traffic checkpoint do you gather
16 statistics?

17 A Yes, I do. The person in charge of the
18 checkpoint usually does a memorandum to the chief
19 that shows the results of the checkpoint --

20 MR. HENDERSON: Your Honor, this is classic
21 hearsay, and if the Court is inclined to do that,
22 where's the memorandum?

23 THE COURT: Is your question again --
24 rephrase it, if you would like.

25 MS. MERRILL: If I can have a moment, Your

1 Honor.

2 BY MS. MERRILL:

3 Q Does the Police Department in the ordinary
4 course of its business generate these reports?

5 A Yes, they do and a copy is forwarded to me to
6 include in the accreditation file.

7 MS. MERRILL: Beg the Court's indulgence.

8 (Safety Checkpoint Procedures marked as
9 Court's Exhibit Number 2).

10 MS. MERRILL: Your Honor, may I approach the
11 witness?

12 THE COURT: Yes, ma'am.

13 BY MS. MERRILL:

14 Q Major Mitchell, I'm going to hand you what
15 has been marked for identification purposes as
16 Court Exhibit 2. Can you tell me what that is,
17 please?

18 A This is the department policy concerning
19 traffic safety checkpoints.

20 Q And there is a statement there. Can you read
21 the policy statement, please?

22 A "It is the policy of the Greenwood Police
23 Department to safely and legally conduct traffic
24 safety checkpoints as a means to promote traffic
25 safety and/or to target specific criminal

1 activity."

2 Q Can you explain that last part of that
3 sentence, to target specific criminal activity?

4 A Yes. I think that's referring to search for
5 a specific suspect on a crime, like if we had an
6 armed robbery or bank robbery, if we got a
7 description of a vehicle and suspect and we got a
8 direction of travel we may set up a check, traffic
9 safety checkpoint looking for that type vehicle and
10 that type suspect.

11 Q Do you set up traffic safety checkpoints as,
12 do you have them for traffic and for that, do you
13 set them up as a general --

14 May I approach the witness, Your Honor?

15 THE COURT: Yes, ma'am.

16 (Traffic Enforcement Activity Reports were
17 marked as Court's Exhibits 3, 4 and 5).

18 BY MS. MERRILL:

19 Q I would like to show you what has been marked
20 Court's Exhibits 3, 4 and 5 for identification
21 purposes. Can you briefly tell us what these
22 reports are?

23 A These are the traffic enforcement activity
24 reports that are generated from the person in
25 charge of the traffic checkpoints. They just show

1 the results and the locations and the dates of when
2 the checkpoint was conducted.

3 Q And these are kept in the ordinary course of
4 business?

5 A Yes.

6 MS. MERRILL: Your Honor, at this time the
7 State would move Court's Exhibits 2, 3, 4 and 5
8 into evidence for purposes of this hearing.

9 MR. HENDERSON: Your Honor, I do have an
10 objection, relevance, and if I may take them one at
11 a time?

12 THE COURT: Sure.

13 MR. HENDERSON: Exhibit Number 2 is a policy.
14 Nowhere in Exhibit Number 2, the policy, does it
15 talk about any type of meeting or gathering of
16 supervisors to discuss empirical data. I mean,
17 that is the constitutional foundation upon which
18 all this rests. There is nothing in there. This
19 document is not relevant because it doesn't go to
20 the core of the matter.

21 Your Honor, Court's Exhibit Number 1, which
22 was previously admitted, it's at the corner, let me
23 make sure, the issue here happened at the corner of
24 New Market and Milwee. It was one of four
25 locations. But New Market and Milwee is where our

1 client was stopped at.

2 And on Exhibits 3, 4 and 5, again I'm not
3 sure which one is which, Your Honor.

4 THE COURT: Let me see.

5 MR. HENDERSON: I have copies. If the Court
6 can tell me which one was marked as Exhibit 3, I
7 will take them in that order.

8 THE COURT: Exhibit 3 is dated 12/19/08.
9 Does that help?

10 MR. HENDERSON: Absolutely, Your Honor. If
11 you notice on that, as far as the relevancy goes,
12 there is no stop there that happened at the corner
13 of New Market and Milwee, which is why we're here
14 today. It happened on New Market and Creswell and
15 three other places. So, Your Honor, whatever
16 underlying data this may indicate, it is not
17 relevant to why we're here today because it didn't
18 happen at the stop location.

19 If the Court can tell me which one is Exhibit
20 Number 4?

21 THE COURT: They are basically in
22 chronological order, 12/31/08 and 1/1/09,
23 straddling that date, New Year's Eve, is Number 4.

24 MR. HENDERSON: Your Honor, that one does
25 show New Market and Milwee and two other places and

1 again as the Court would note on Exhibit Number 1,
2 there is no breakdown as to which ones of these
3 happened at New Market and Milwee, which ones
4 happened at Bypass 25 and Marshall and which ones
5 happened at Laurel and Cokesbury. They just took a
6 bunch of statistics and threw them together on a
7 piece of paper.

8 And, Your Honor, by default, that leaves
9 number five. And again this happened at New Market
10 near Creswell, whereas Mr. Vickery's stop was at
11 New Market and Milwee. Again, this is just not
12 relevant as to why we're here today.

13 THE COURT: All right.

14 Miss Merrill, as to the relevance of these
15 three marked C-3, C-4 and C-5, and the one, Number
16 4, New Market and Milwee is the one which will be
17 C-4, I'm sorry, Mr. Henderson, your objection as to
18 relevance of these is that numbers three and five
19 do not contain any data regarding the location of
20 the traffic checkpoint in this case?

21 MR. HENDERSON: Absolutely, Your Honor.
22 Whatever the underlying reasons are for these data
23 don't make a hill of beans in our case because this
24 happened at other locations, and Exhibit Number 4,
25 Your Honor, which does include New Market and

1 Milwee, again it's not relevant because they don't
2 break down which ones of these violations occurred
3 at New Market and Milwee, which ones happened at
4 Bypass 25 and Marshall, which ones at Laurel and
5 Cokesbury. Again, they take every traffic
6 checkpoint they have that night and throw all the
7 numbers on a piece of paper and the document is
8 created, but that is, again, it's just a
9 hodgepodge.

10 THE COURT: All right. I will allow them
11 just for the purpose of this hearing, for me to
12 consider. I understand your relevance objection to
13 three and five but I'm going to allow them just for
14 purposes of this issue. So, I will accept them
15 into evidence for the purpose of this hearing. As
16 I understand, they are not relevant whatsoever in
17 the case in chief to come forward.

18 MR. HENDERSON: Thank you, Your Honor.

19 BY MS. MERRILL:

20 Q Major Mitchell, can you tell us where
21 Creswell is in relation to Milwee?

22 A Yes. It's about two blocks south of Milwee.

23 Q All this data includes traffic checkpoints at
24 either New Market and East Creswell or New Market
25 and Milwee? I'm talking about three, four and

1 five.

2 A That's correct, it includes that data.

3 MS. MERRILL: Okay. I beg the Court's
4 indulgence.

5 Q Has the police department determined that
6 conducting traffic safety checkpoint is an
7 effective way to manage traffic problems?

8 A Yes, it is, it's an effective tool in
9 managing traffic.

10 Q And are these reports, Court's 3, 4 and 5,
11 and I'm not sure --

12 MS. MERRILL: May I approach, Your Honor?

13 Q I'm not sure if you saw Court's 1. That is
14 Court's 1. Have you all determined these reports
15 are effective for your office to handle traffic
16 checkpoints?

17 A Yes, ma'am, they are.

18 MS. MERRILL: No further questions, Your
19 Honor.

20 MR. HENDERSON: May I have one moment, Your
21 Honor?

22 THE COURT: All right.

23 CROSS EXAMINATION

24 BY MR. HENDERSON:

25 Q Major, how you doing today, sir?

1 A Doing good.

2 Q I want to turn to what has been marked as
3 Exhibit Number 2, your policies and procedures. Do
4 you have a copy, sir?

5 A Yes, sir.

6 Q And were you involved in writing this
7 document?

8 A Yes, sir.

9 Q Okay. And I guess back in 1996?

10 A That's correct.

11 Q And it looks like it was revised back three
12 years ago?

13 A Yes, sir.

14 Q Can you point to me in this document where it
15 talks about having any type of meetings where you
16 all are discussing empirical data at any particular
17 location?

18 A There is nothing to that verbiage in this
19 policy.

20 Q Okay. And the police department came up with
21 this policy on its own or did you all have some
22 outside help or do you know?

23 A Well, we have had some outside help. There
24 is a CALEA, which is Commission on Accreditation
25 for Law Enforcement Agencies. There is a standard

1 that addresses checkpoints and we had to come up
2 with the policy to address that standard.

3 Q And I believe I heard some of your testimony
4 on direct, who was the supervisor this night of
5 this traffic safety checkpoint on April 25th of '09
6 at New Market and Milwee as referenced on Court
7 Exhibit 1?

8 A Major James Marshall and Lieutenant Jennifer
9 Bass.

10 Q I believe your testimony was they would have
11 written you a memorandum about that. Did you bring
12 that with you?

13 A Well, the memorandum, I refer to as this
14 traffic enforcement activity report.

15 Q Okay, it is not a separate document?

16 A Not a separate document.

17 Q Okay. I want to keep your attention on
18 number one there, Court's Exhibit Number 1 dated
19 4/25/09. You would agree there were checkpoints
20 that night at four locations?

21 A Yes, sir.

22 Q And you would agree in total it looks like
23 there was 56 traffic tickets or 56 something?

24 A Yes, sir.

25 Q What would that be, 56 what?

- 1 A Traffic violations.
- 2 Q Okay. How many of those 56 occurred at New
3 Market and Milwee?
- 4 A I couldn't say.
- 5 Q How many of them occurred at Laurel and
6 Cokesbury?
- 7 A I couldn't say on this.
- 8 Q I suppose this document right here just,
9 would you agree it's a compilation?
- 10 A Yes, sir, that's correct.
- 11 Q But would you agree back at the police
12 department there would be documents underlying
13 this, meaning there would be someplace 56 tickets?
- 14 A Yes, sir.
- 15 Q And those 56 tickets would show which one was
16 at Milwee and New Market?
- 17 A Yes, sir.
- 18 Q You agree with that?
- 19 A Yes, sir.
- 20 Q You didn't bring those with you?
- 21 A No, sir.
- 22 Q Has the Solicitor's office asked you for
23 those documents?
- 24 A No, sir.
- 25 Q Okay. When is the first time that you

1 figured that you may be called to testify in this
2 trial?

3 A About an hour ago.

4 Q An hour ago, okay. Number 3, Court's Exhibit
5 Number 3, I believe your testimony was that New
6 Market and East Creswell is somewhat close to New
7 Market at Milwee?

8 A Yes, sir.

9 Q Okay. On Court's Exhibit Number 3, how many
10 of those thirty violations happened at New Market
11 and East Creswell?

12 A I wouldn't be able to tell you, sir.

13 Q But you would have that information back at
14 the office, wouldn't you?

15 A Yes, sir.

16 Q And nobody has asked you to bring that here
17 with you?

18 A No, sir.

19 Q Okay. Court's Exhibit Number 4, it looks
20 like that's dated, it looks like New Year's Eve,
21 '08, going into '09, and again three locations, one
22 at New Market and Milwee.

23 Would you agree?

24 A Yes, sir.

25 Q Of those 33 violations how many occurred at

1 New Market and Milwee?

2 A I couldn't tell you from this.

3 Q And I guess the same thing for Exhibit 5,
4 that you can't tell how many of these 60 violations
5 occurred at New Market near Creswell?

6 A No, sir.

7 Q Where would New Market near Creswell be, if
8 it's not New Market at Creswell?

9 A Since I wasn't there I couldn't say for sure
10 but I would assume it's in the flat near the
11 intersection.

12 Q So, you're telling me there would be somebody
13 else better suited to be in here testifying about
14 this?

15 A For actual location, yes, sir.

16 Q Okay. And actual breakdown of statistics and
17 empirical data, is that correct? I mean, you're
18 not the appropriate person to be here today, there
19 is somebody more suited --

20 MS. MERRILL: Objection, Your Honor, asked
21 and answered.

22 THE COURT: I'm going to let him ask it and
23 then let him answer it.

24 Q Let me clarify my question. I guess there
25 would be somebody at the police department with

1 more knowledge about this information than you, is
2 that correct?

3 A More knowledge about the checkpoint but not
4 more knowledge about the statistics.

5 Q You didn't bring those statistics with you?

6 A No, sir.

7 Q But you would agree that those statistics
8 exist?

9 A Yes, sir, we could pull individual tickets,
10 yes, sir.

11 MR. HENDERSON: Okay, one moment, please,
12 Judge.

13 Q Major, prior to setting up any of these
14 checkpoints, and you may have answered this and may
15 not have, but let's turn to the one in question
16 here with Mr. Vickery, the one on Court's Exhibit
17 Number 1, April 25, '09. Prior to -- were you
18 involved in determining to set up this checkpoint
19 or do you recall?

20 A No, sir, I was not.

21 Q Do you know if anybody on your staff pulled
22 individual tickets from any of these four locations
23 prior to setting up this checkpoint that night?

24 A No, sir, I don't have any knowledge if they
25 did or didn't.

1 Q Have you ever been involved in pulling
2 tickets prior to setting up a checkpoint?

3 A No, sir.

4 Q And your policy, Court's Exhibit Number 2,
5 doesn't say anything about having to pull specific
6 data prior to setting up checkpoints, does it?

7 A No, sir.

8 Q Is it fair to say that your practices and
9 procedures don't include empirical analysis?

10 A That's correct, the actual written policy
11 does not.

12 Q Okay.

13 MR. HENDERSON: Nothing further, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. MERRILL:

16 Q Major Mitchell, what goes into the major
17 decision where to set up a checkpoint?

18 A I think a lot of different things together go
19 into a decision, complaints from residents,
20 personal knowledge of officers, statistics on motor
21 vehicle accidents. Different factors contribute to
22 that decision.

23 MS. MERRILL: Thank you.

24 THE COURT: Anything else?

25 MR. HENDERSON: Very quickly.

1 RECROSS EXAMINATION

2 BY MR. HENDERSON:

3 Q Major, going back to Court's Exhibit Number
4 1, 4/25/09, prior to the implementation of this
5 checkpoint that night at New Market and Milwee how
6 many complaints had your office received about
7 conduct at that location?

8 A I couldn't give you a specific number.

9 Q Okay. So, you don't know how many complaints
10 they had about speeding?

11 A No, sir, I don't.

12 Q Do you know how many complaints about drug
13 dealing?

14 A No, I don't.

15 Q Driving without a driver's license?

16 A No, I don't.

17 Q You just don't have that information?

18 A No, sir, I don't have the specific number,
19 no.

20 Q What personal knowledge did you have about
21 that before this checkpoint was set up, the one
22 referenced on Court Exhibit Number 1?

23 A Personal knowledge I had was from seeing
24 incident reports and traffic tickets and
25 statistics.

1 Q You just didn't bring that with you?

2 A No, sir, I didn't.

3 Q You didn't give it to the Solicitor's office?

4 A No, I hadn't.

5 MR. HENDERSON: One moment, please.

6 Q Do you have knowledge that any other officer
7 provided any knowledge about setting up this
8 checkpoint or any of the underlying information or
9 you just don't know?

10 A I just don't know. I was not in on the
11 planning of this particular checkpoint.

12 Q Okay.

13 THE COURT: Anything else?

14 MS. MERRILL: No further questions.

15 THE COURT: All right, thank you. You may
16 step down.

17 (Witness excused).

18 THE COURT: All right, Miss Merrill.

19 MS. MERRILL: Thank you, Your Honor. In this
20 issue it seems the appropriate test is the three
21 part test laid out in Brown v. State cited in the
22 Groome case that the defense has relied so heavily
23 on and that is it establishes a three part
24 balancing test for determining the
25 constitutionality of a traffic checkpoint. You

1 have to determine the gravity of the public
2 interest serviced by the seizure, the degree to
3 which the seizure serves the public interest, and
4 the severity of the interference with individual
5 liberty.

6 It seems to me the empirical data is not in
7 and of itself a separate test but can be used to
8 show the second prong of that test, the degree to
9 which the seizure serves the public interest. Here
10 there was testimony that these checkpoints have
11 been effective. Additionally, it seems in the
12 Groome case the State didn't introduce any evidence
13 about the roadblock because it said every license
14 check roadblock determined whether the driver was
15 legally licensed. Here the State's position is
16 that we have shown data from that night and then at
17 the Court's request and the defense wanting more
18 data we went and talked to the police department
19 and brought even more data in.

20 However, it seems to me that the Sitz case,
21 Michigan Department of State Police versus Sitz,
22 I'm trying to give you a good spot to look, it is
23 right under the WestLaw, and I don't know if that
24 is the copy, if yours is WestLaw, but right under a
25 headnote six it talks about the effectiveness,

1 describes the balancing factor as to the degree to
2 which the seizure advances the public interest. It
3 was not meant to transfer from politically
4 accountable officials to the Court the decision as
5 to which among reasonable alternatives law
6 enforcement techniques should be employed to deal
7 with a serious public danger. Experts in police
8 science might disagree over which of several
9 methods of apprehending drunk drivers is preferable
10 as ideal. The choice among such reasonable
11 alternatives remains with the governmental
12 officials who have a unique understanding of and a
13 responsibility for limited public resources,
14 including a finite number of police officers.

15 The Greenwood Police Department has
16 determined that traffic safety checkpoints are an
17 effective way to manage traffic problems. You have
18 heard testimony about that and it is not for, with
19 all due respect, Your Honor, the courts to
20 determine how law enforcement should handle that
21 and I believe Justice Toal in the Groome case,
22 while she does dissent in that case, she says, in
23 ruling, this is the paragraph next to, next to last
24 paragraph, excuse me, third to last paragraph in
25 her opinion, "In ruling on the constitutionality of

1 a suspicionless checkpoint in which police stopped
2 every vehicle the Court noted that the case did not
3 involve a complete absence of empirical data.
4 However, the Supreme Court went on to hold that the
5 second prong of the Brown test was not meant to
6 transfer from politically accountable officials to
7 the courts the decision," and I think I just read
8 that from Sitz.

9 I think the difference here, Your Honor, is
10 in Groome the State provided no empirical evidence.
11 Here we have provided empirical evidence. While we
12 may not have dragged in 56 separate tickets or all
13 the details that went into generating this report,
14 I don't think that's required. We did show
15 empirical data from the date of this checkpoint and
16 in the Groome case they showed nothing. I think
17 that is sufficient for purposes of the second prong
18 of the Brown test, also cited in Groome and Sitz.

19 MR. HENDERSON: Very briefly, Your Honor, in
20 reply. State v. Groome makes it very clear that
21 the Brown v. State, the second test is the
22 effectiveness test, i.e., the empirical data test.
23 And, Your Honor, reading from State v. Groome, it
24 requires the State produce empirical data that
25 supports the effectiveness of its roadblock. Your

1 Honor, Major Mitchell just testified they don't use
2 empirical data prior to deciding where to set up
3 one of these roadblocks. I asked him was it fair
4 to say they don't use it. That was his testimony.
5 So, by his own testimony he says they don't use
6 empirical data prior to setting up roadblocks and
7 checkpoints, and, Your Honor, on its face this
8 particular roadblock we submit is unconstitutional.
9 We're not challenging the validity of other
10 roadblocks, just this one that night, Your Honor.

11 MS. MERRILL: Your Honor, if I may, I think
12 there is one critical sentence in the majority
13 opinion in the Groome case and it states, "While
14 Sitz does criticize searching examination of
15 effectiveness by trial courts, it retains the
16 requirement that the State produce empirical data
17 to support the effectiveness of its roadblock. The
18 record supports the trial court's finding that the
19 State failed to produce any evidence satisfying the
20 second prong of the Brown test."

21 I think the difference is here we did produce
22 evidence. In that case the State produced none.

23 THE COURT: All right. Explain to me, then,
24 this is where I'm struggling, your own sentence,
25 other than the statement by, I'm sorry, Major

1 Mitchell, he testified that the safety checkpoints
2 were effective, you've got that evidence. What
3 data other than a more or less inventory of charges
4 made at the respective checkpoints on four
5 different nights, what data or presentation, I
6 guess my question is effectiveness compared to
7 what? Effectiveness, to me, in the plain meaning
8 is, is it your position that effectiveness of the
9 checkpoint means they took people without licenses
10 off the road, or they reduced the number of people
11 driving without a license? Do you see?

12 MS. MERRILL: I think it's up to the police
13 department to determine what they, how they define
14 effectiveness and I think the way they keep data
15 helps them define that.

16 THE COURT: All right. So, then, what data
17 shows that, other the inventory, other than the
18 summary of the tickets written, what data have you
19 presented that shows this was an effective method
20 of reducing traffic problems, which was the primary
21 purpose of this checkpoint?

22 MS. MERRILL: Let me make sure I get the
23 correct one out, Your Honor. I think the total
24 number of traffic cases on this sheet is 48. I'm
25 looking at, I think it has been marked as Court's 1

1 but is dated 4/25/09.. The actual data on the sheet
2 shows there were 48 traffic cases and there were 56
3 total. I guess that bears the weight, its primary
4 purpose was traffic control, I think that's the
5 primary purpose, as if it were something else the
6 numbers would bear out differently. I think the
7 data is on the sheet.

8 THE COURT: If I follow your logic, then the
9 folks in '08 that had 28 traffic cases, 25 traffic
10 cases, the effectiveness goes down because then
11 they become 57 and 48, so it looks to me like the
12 traffic is getting worse. I mean, I don't know.
13 What I'm saying is, the effectiveness compared to
14 what? I don't have a benchmark and that is where I
15 think Mr. Henderson was arguing, is what is your
16 benchmark, what are you comparing this data to?
17 That is what he was asking all the way down the
18 line and I think that Major Mitchell understood
19 that and part of his analysis of why they put
20 things in there is a combination of things. He
21 knows Greenwood, he has worked here so long, he
22 sees the traffic accident reports coming across his
23 desk, so he makes some professional decisions in
24 there. There is some data somewhere that he sees
25 also that can give him some indications of where he

1 ought to put these safety checkpoints.

2 Do you see what I'm getting at? Where is the
3 benchmark? Or is that the effectiveness test?

4 MS. MERRILL: I think it is an effective
5 means of helping control traffic as compared to
6 other methods such as regular, you know, routine
7 traffic stops for speeding and things like that or
8 putting up little signs that have the speed limit,
9 that type thing is an effective method compared to
10 other methods and there is empirical data to show
11 that.

12 THE COURT: Mr. Henderson, have you got
13 anything?

14 MR. HENDERSON: Your Honor, if it pleases the
15 Court, again the State is trying to use the results
16 of the night of April 25th as showing that it was
17 effective, but again you've got to have the
18 underlying empirical data that goes by Major
19 Mitchell's desk, that he should be able to see as
20 to why we're having the checkpoint here, why we
21 feel it is necessary to have it at the corner of
22 New Market and Milwee. Did they have a lot of
23 speeding complaints last week, wrecks last week,
24 last month? I don't know. The government has got
25 that information and by using that empirical data

1 they should be able to determine where to set up a
2 roadblock which in turn will produce more empirical
3 data for the next roadblock.

4 But again going back to Officer, Major
5 Mitchell's testimony, the police department doesn't
6 use empirical data. I mean, I don't know if they
7 use hunches or what not, they just don't use it,
8 they don't have meetings to discuss the data prior
9 to having these sobriety checkpoints and, Your
10 Honor, they just, again I just don't think there is
11 any constitutional underpinning for it.

12 THE COURT: Do you all have that Supreme
13 Court case you quoted earlier, the WestLaw case
14 that was recent, because it is my understanding it
15 was a roadblock case that was just considered by
16 the United States Supreme Court, Justice Roberts
17 had written a dissent, I believe. Does that strike
18 a familiar cord with either of you all? I want to
19 read that case, too.

20 MS. MERRILL: I did bring up a recent Supreme
21 Court case but that was regarding the Miranda
22 issue.

23 THE COURT: I was thinking there was
24 something on roadblocks, an issue regarding this
25 issue in the United States Supreme Court.

1 MR. HENDERSON: Judge, I don't recollect one.
2 I know there has been some search issues recently,
3 Miranda issues recently.

4 MS. MERRILL: Your Honor.

5 THE COURT: Yes, ma'am.

6 MS. MERRILL: What I think is illogical about
7 Mr. Henderson's argument is that he is saying you
8 have to have empirical data to even set up the
9 roadblock. Well, if you set up a roadblock, a
10 checkpoint, and then get the data from that one for
11 your next one, is that first one not
12 unconstitutional?

13 THE COURT: They're unconstitutional from
14 there on.

15 MS. MERRILL: That data, you can't use. I
16 think in reading this it requires the State to
17 produce empirical data to support the effectiveness
18 of its roadblock to show that this particular one
19 was effective however the police department defines
20 effectiveness. If this chart gives them enough
21 information to know whether or not that was worth
22 doing or effective, I don't think it's appropriate
23 for us to be able to go back in and try to rewrite
24 their way of doing things to make sure their report
25 says it a certain way. I think that is kind of

1 what the Sitz court talked about, everybody can
2 disagree how they can set up their report but, you
3 know, it was talking about police scientists, not
4 political scientists, police intellectuals, I
5 guess, for lack of a better word, can sit and
6 debate this but really each department has to set
7 up their own way of determining whether the traffic
8 checkpoint is effective.

9 MR. HENDERSON: Your Honor, just to clarify
10 that, to make sure I was clear --

11 THE COURT: Okay.

12 MR. HENDERSON: If you've got a properly set
13 up roadblock using proper empirical data as
14 required by the U.S. Supreme Court and our Supreme
15 Court the results of that will be data for the next
16 constitutionally appropriate set up roadblock.
17 You've got to have a constitutional starting point,
18 and from Major Mitchell's testimony there has never
19 been a constitutional starting point for any of
20 these roadblocks, checkpoints. His testimony was
21 they just don't consider empirical data in setting,
22 in determining where to place them at.

23 THE COURT: I thought he said otherwise, I
24 thought he said that he now in his position as
25 major, head of the department, administration

1 department, would consider such things as tickets
2 written, community complaints, personal knowledge
3 of the officers that are out working the street and
4 motor motor vehicle statistics in making the
5 decision. I think that is what he said. That is
6 several of the things that he uses to evaluate and
7 then decides to put a roadblock here at this
8 location or that location.

9 Anyway, understanding that is his testimony
10 and that shows he had a rationale for trying to
11 impose and follow the guideline for the purpose of
12 this roadblock, which it has not been contradicted
13 this was a traffic safety checkpoint, in Groome
14 there was a definitive finding that was general
15 crime control and that has not been an issue here.
16 This has been a traffic checkpoint, uncontradicted,
17 that if there were the parameters that Major
18 Mitchell described and he made the decision that on
19 this night during the four hours there were some 56
20 violations written, that it was effective towards
21 the traffic safety goal.

22 In Groome there was absolutely no empirical
23 data whether any tickets were written or any data
24 was considered or motor vehicle accident reports,
25 any rationale whatsoever as to why this roadblock

1 were set up, from my reading of the Groome case.
2 So, for those reasons I believe factually the State
3 has met its burden to meet the second prong of the
4 effectiveness test, albeit very closely, as to the
5 effectiveness, that there were some traffic issues
6 in the area and on that night it was effective. I
7 may be wrong but that is going to be my ruling.

8 MR. HENDERSON: Your Honor, just to clarify
9 one thing. Major Mitchell testified that he wasn't
10 involved in the setting up of this particular
11 checkpoint and I assume he wasn't involved in any
12 of the analyzing of whatever data may have been
13 there. Correct me if I misheard his testimony but
14 he wasn't involved in any of the setup or planning
15 of this roadblock.

16 THE COURT: All right. I'm going to go back
17 to Officer Byrd's testimony. I thought that
18 Officer Byrd stated that Lieutenant Bass of the
19 traffic unit had input as to speed complaints and
20 music complaints and he along with Major Mitchell
21 made decisions as to where to implement the traffic
22 checkpoints, safety checkpoints.

23 Now, aside from that, my recollection of
24 Major Mitchell's testimony was that he was not, I
25 don't believe he was there that night, perhaps it

1 was an inartful response but this is just what I
2 thought he meant, that he wasn't out there that
3 night and helped set it up and where to park the
4 cars and where the officers would stand. I thought
5 that was his testimony, he had no part in setting
6 it up, meaning what jacket you're going to wear,
7 where everybody is going to stand, who is going to
8 be there. I don't think he had any part in setting
9 up on that site that night. That is what I
10 understood him to testify to.

11 MR. HENDERSON: I think that and also, Your
12 Honor, I don't believe he was, the way I understand
13 his testimony, that he wasn't involved in the
14 planning of it, in determining where it would be,
15 that type implementation, and also the setting up
16 of it, physically setting it up. I don't think he
17 was involved. He is the wrong person to be
18 testifying about this particular checkpoint.

19 THE COURT: I don't know. I don't remember
20 that testimony. I took detailed notes but not
21 quite that detailed so I'm not certain as to that
22 issue, whether he was involved as you're
23 describing.

24 MR. HENDERSON: As I recollect Officer Byrd's
25 testimony, it was Lieutenant Bass and Officer

1 Marshall who were involved in planning and setting
2 this up, preplanning and physically setting it up,
3 which is consistent with Major Mitchell's testimony
4 that he had no involvement with this, Your Honor,
5 either in the preplanning stage or the physical
6 setup.

7 THE COURT: I don't know that. I will just
8 have to get Mr. Young to tell me what was said
9 because I don't remember that. I'm not going to
10 say what I remember when I don't remember that. I
11 don't remember one way or the other, so I have no
12 specific recollection.

13 MR. HENDERSON: Your Honor, we just ask prior
14 to making a ruling that you confer with that
15 testimony.

16 THE COURT: We'll do that. We'll go off the
17 record while Mr. Young checks it out for me.

18 (Brief recess).

19 THE COURT: All right, it is my understanding
20 that Officer Byrd's testimony was that the
21 determinations of where to locate the traffic
22 safety checkpoints were made by Officer Marshall
23 and Officer Bass, and the testimony went on further
24 that they were the ones who had spoken with a
25 number of complaining citizens about the music and

1 speed.

2 All right, Mr. Henderson, to that end, the
3 testimony being along those lines, tell me again
4 your argument.

5 MR. HENDERSON: Your Honor, Officer Byrd, my
6 notes reflected and the testimony reflected that
7 Officer Byrd said Bass and Marshall, those two
8 officers were the ones that set up this checkpoint
9 or approved this checkpoint, they had to approve it
10 and then go out there and physically set it up.
11 Major Mitchell testified that Lieutenant Bass and
12 Officer Marshall came to him wanting to set up this
13 checkpoint and he said he wasn't, that he wasn't
14 involved in them coming to him other than I guess
15 he signed off on it, but they came to him, but
16 there has been no evidence of what data, what
17 records, statistics that they had when they went to
18 Major Mitchell seeking approval of this particular
19 checkpoint on April 25th, '09, which is consistent
20 with Major Mitchell's testimony that the police
21 department doesn't use empirical data prior to
22 setting up one of these. We haven't heard from
23 Officer Bass and Officer Marshall and they weren't
24 called to testify. Officer Byrd has said that they
25 told him to do it, and Mitchell has testified they

1 came to him about it, but again they are crucial
2 here, Your Honor, they are the ones that should be
3 here to testify as to what their basis and their
4 empirical data was that might to set up this
5 checkpoint. As I recollect, Major Mitchell
6 testified that he just didn't have any involvement
7 with it, you know, in wanting to originate the
8 checkpoint or in physically going out there and
9 setting up the checkpoint.

10 THE COURT: All right, Miss Merrill?

11 MS. MERRILL: I think Officer Byrd was there,
12 he testified there had been citizen complaints
13 about speeding and loud music.

14 THE COURT: The testimony was -- that's what
15 he said and then he went farther to say that
16 Lieutenant, I can't recall his name, Lieutenant Bass
17 and Major Mitchell were the ones that he understood
18 received the complaints, that was his testimony Mr.
19 Young just read back to me.

20 MR. HENDERSON: Marshall, wasn't it?

21 THE COURT: Marshall and Byrd and Bass were
22 together.

23 MS. MERRILL: There was evidence in the
24 record that there were these complaints, that is
25 why they had set up the traffic checkpoint and then

1 there has been testimony that this was effective
2 and they kept data on it.

3 THE COURT: All right. I want to step down
4 and walk around, I think better standing up. The
5 Jackson Deno hearing, the tape and what not I have
6 got to watch, is it 15, 20 minutes long?

7 MS. MERRILL: Eight and a half minutes, Your
8 Honor.

9 MR. HENDERSON: It is on audio, Your Honor.

10 THE COURT: All right. Is there anybody has
11 got objection to us doing that today? I really
12 don't want to hold this jury back there any longer,
13 they've been back an hour and 45 minutes, an hour
14 and 25 minutes, roughly. If I take about ten
15 minutes, then that takes longer and I haven't made
16 a decision on this, and then starting this thing in
17 the morning, because that jury, they don't know
18 what in the world is going on in here, and bring
19 them back in the morning, we can still conduct
20 this, have them call back after 6:00.

21 Any objection to that?

22 MS. MERRILL: No objection from the State.

23 MR. GARRETT: Nothing from us.

24 THE COURT: All right, let's do that. Send
25 them home, call back after 6:00, otherwise 9:30 in

1 the morning.

2 BAILIFF: All right.

3 THE COURT: All right, I will walk around,
4 take a short break.

5 (Recessed at 3:42 p.m.).

6 (Reconvened at 4:14 p.m.).

7 THE COURT: Have you all read Michigan versus
8 Sitz from top to bottom?

9 MR. GARRETT: Yes, sir.

10 THE COURT: I hadn't but now I have. I have
11 got concern all sorts of different places, but to
12 tie in Major Mitchell's testimony, I think there is
13 some factual basis to go along with the
14 effectiveness. It's not being tied and I don't
15 believe it is tied because Officer Byrd said, I'm
16 sorry, yes, Officer Byrd said that Lieutenant Bass,
17 was it -- let me go back. Lieutenant Bass and
18 Major Marshall were the ones who implemented the
19 stop, on their direction, regarding some speeding
20 complaints and music complaints from citizens. So,
21 I lost the tie that my rationale was going on, so
22 I'm looking for that tie.

23 What is tying Greenwood Police Department and
24 their understanding of the problems around the city
25 for speeding or for child restraint and all those

1 sort of things, they are writing tickets day to
2 day, week in and week out, month in and month out,
3 and Major Mitchell knows that but how do you tie
4 what he knows to how that traffic point was set up?
5 You haven't done that over here. He's got it but
6 he didn't direct the officers that set it up there,
7 and that is the tie that I'm missing, that is the
8 connection point.

9 If you read Michigan versus Sitz, their
10 analysis of the effects of this is not how many
11 tickets were written but how many cars passed and
12 how many tickets were written. It was a lot more
13 involved, more data and data analysis in what they
14 were trying to support as their public purpose,
15 balancing the Brown test as to the interest of the
16 public and having this type crime stopped and the
17 reasonableness of the seizure, the reasonableness
18 of the stop and the effectiveness of the stop. I'm
19 missing that connection with Major Mitchell's
20 testimony and Sergeant Bass, if that is not your
21 recollection I apologize, and Mr. Byrd, I'm missing
22 that tie. I don't have that and you all presented
23 that to me. That is causing me some big concerns.
24 I don't know how you all can give that to me.

25 MR. HODGES: May I?

1 THE COURT: Sure, you can stand, I will be
2 glad to hear from you.

3 MR. HODGES: Your Honor, it was the testimony
4 of Major Mitchell that the police department, he
5 testified that he was actually involved in writing
6 the policy for the police department on traffic
7 checkpoints.

8 THE COURT: All right, I got that.

9 MR. HODGES: He was involved with the
10 administration and the accreditation process and
11 following the standards for traffic checkpoints and
12 accreditation and that there had been a
13 determination by the police department as a whole
14 that doing these traffic checkpoints is an
15 effective means of addressing the traffic safety
16 problems and so there has been a decision made by
17 the administration of the police department, which
18 Major Mitchell is a representative of, that this is
19 an effective means of traffic control and what
20 Officer Byrd testified about is that Major Marshall
21 and Lieutenant Bass as a part of that process by the
22 Greenwood Police Department set up a traffic safety
23 checkpoint because of complaints about loud music
24 and speeding and all those factors that they
25 mentioned in that particular area, so that's the

1 connection, is that there is a policy of the
2 Greenwood Police Department to conduct these kind
3 of checks because it's an effective means for them
4 to address the traffic safety problem and that
5 those officers under that umbrella policy set up a
6 checkpoint based on those complaints from that
7 specific area.

8 THE COURT: All right. Again, the
9 effectiveness of meeting their goals, I'll go back,
10 yes, there were tickets written. Does that mean it
11 is effective or is there a benchmark to compare to
12 that, you know? This was not testified to and I'm
13 not suggesting this is what has got to be done but
14 if a survey was taken in a neighborhood with one of
15 those independent machines looks like a sign with a
16 radar gun on it which represents back to the
17 drivers what their speed is, that conducts some
18 sort of survey analysis as to number of cars
19 passing, the number of speeders, every fifteenth
20 car is going ten miles over the speed limit, that
21 would be a very good example of empirical data
22 there is speeding in that neighborhood, you go set
23 a traffic safety checkpoint out there and then you
24 write fifteen speeding ticket it is very effective
25 because you're meeting the percentages. That's not

1 here and that is kind of the perfect world. I'm
2 not suggesting that is what the Greenwood city has
3 got to do but I'm missing something in the analysis
4 as to the status quo, Greenwood's goal of having a
5 safe neighborhood and the effectiveness of this
6 procedure. There is something missing data wise.
7 I mean, it says empirical data and the only data we
8 have is the number of tickets written at numerous
9 points. That is what is kind of confusing me, is
10 how do we tie that back together.

11 MR. HODGES: Doesn't that analysis, for
12 instance, of the machine tracking traffic or
13 pulling copies of all the traffic tickets written
14 from a particular area, I mean, isn't all that the
15 sort of in depth empirical analysis that that Sitz
16 frowns upon, and Groome actually recognizes that,
17 that Sitz frowns upon, you know, an in depth
18 digging into all the empirical data that goes into
19 that analysis. I think all that Sitz and Groome
20 require is that the State provide some testimony
21 and some evidence to support that second prong that
22 this is an effective means of traffic enforcement
23 as opposed to, for instance, putting that machine
24 out there, you know. Maybe that is an effective
25 means of traffic enforcement, is putting that

1 machine out there showing people what their speed
2 is, or maybe setting up an officer, you know,
3 pulling people over is an effective means of
4 traffic enforcement, you know. There is testimony
5 in the record that the police department has
6 determined that the checkpoint is an effective
7 means and the State has provided some empirical
8 data showing that there were --

9 THE COURT: Tell me this. How can the police
10 department determine it is effective other than,
11 that is exactly what Major Mitchell said, no
12 question that is what he said and there is no
13 question that the police says we like to use those,
14 but where does it say, where is the data that says
15 it is effective?

16 MR. HODGES: I would suggest the reports the
17 State has provided showing they made traffic
18 related charges. I mean, let's say, for instance,
19 those reports indicate that they didn't make, they
20 were out there four hours and there were zero
21 traffic related charges made. That seems pretty
22 ineffective, for them to stand out there for four
23 hours and not make any cases, but for them to spend
24 four hours out there and then make, you know, it
25 differs obviously from report to report, but on the

1 one this night I think it was about 54 or 56, 48
2 traffic cases and 56 total in a four hour period.
3 I mean, arguably that is a pretty effective use of
4 that personnel in that four hour period addressing
5 a specific problem, which is traffic related
6 offenses.

7 THE COURT: All right. Compared to what?
8 That is where I keep getting back to. You say that
9 is effective. Compared to what? That is where I'm
10 missing it.

11 MR. HODGES: I don't think the State has to
12 prove that it is more effective than something
13 else.

14 THE COURT: To say it's effective, it has to
15 be compared to something.

16 MR. HODGES: I would say --

17 THE COURT: That is why I'm struggling, I
18 don't see the benchmark showing, I mean, showing
19 where our beginning point was.

20 MR. HODGES: Effective as opposed to not
21 being successful? Effective as opposed to being
22 ineffective? I would argue that ineffective would
23 be that they didn't address the traffic safety
24 problem.

25 THE COURT: I see. So, it's a definition of

1 effective?

2 MR. HODGES: Arguably, as opposed to this
3 being a more effective method than some other
4 method. I mean, obviously it's a problem they have
5 to address and they've got to figure out what is
6 the most effective means for them to address that
7 problem with the limited resource that they have
8 and it may be a multi-tiered approach that
9 sometimes they are going to do checkpoints,
10 sometimes they are going to put the machine out
11 there showing speed, sometimes they are going to
12 have individual officers pulling people over.

13 THE COURT: I kind of expected it would be.

14 MR. HODGES: Right, but they have got to
15 determine for different areas what is the most
16 effective means of using the manpower that they've
17 got to address those problems and there is
18 testimony in the record that the police department
19 has made that determination that this is an
20 effective means, they've got a policy because they
21 have made that determination that they will set
22 them up following the standards and that this was
23 done pursuant to that policy because of complaints
24 in that area and it was effective because they made
25 48 traffic related arrests on this particular

1 night. You know, you could also argue this
2 particular checkpoint was actually particularly
3 effective as compared to a couple of the other
4 reports Your Honor has before you when they made
5 only 28.

6 THE COURT: I mean, so long as they made at
7 least one case it was effective. That is what I'm
8 getting to.

9 MR. HODGES: You're right, it comes down to
10 what does effective mean.

11 THE COURT: Right. If you catch anything
12 fishing, if you caught one you caught something, so
13 you had a good day fishing, that is better than
14 working.

15 MR. HODGES: If I went fishing for four hours
16 and caught 48 fish I would feel like I had a pretty
17 good day.

18 THE COURT: Right, so compared to zero. But
19 when you're addressing the problem you're trying to
20 reduce the violations so what were the violations
21 to begin with, I think needs to be the starting
22 point, what was the problem, how bad was it and,
23 yes, we're reducing that. That is where I'm having
24 difficulty understanding.

25 MR. HODGES: Well, that gets back to what

1 they were saying about the seatbelt violations and
2 the speeding and the loud music and whatever, and
3 the report breaks out, you know, what offenses they
4 were writing tickets for. There you have four
5 child restraint violations, you've got 33 driver's
6 license violations, you know, so it shows
7 specifically what problems they were able to
8 address effectively during that four hour period.

9 What we're getting into is us trying to here
10 in court second guess, looking at the data, what,
11 or how the police department should be using their
12 manpower most effectively. I think the State has
13 to provide, to meet element two, prong two, that
14 there is some data to back up the fact that, how
15 they made this determination that it's effective
16 and there needs to be some data to back up that
17 determination by the police department. You've got
18 testimony in the record that they have made the
19 determination that it's effective and then there is
20 some data to back up that on this particular night
21 they made 48 traffic arrests, which is arguably
22 data to back up the fact or to back up that
23 decision by the police department that it's an
24 effective means of traffic control. Digging any
25 deeper into the empirical data is what Sitz, I

1 think is what Sitz frowned upon, trying to second
2 guess the decision by the police department that
3 it's an effective law enforcement tactic.

4 THE COURT: Mr. Henderson, would you like to
5 say anything?

6 MR. HENDERSON: Just very briefly, Your
7 Honor. Again we're not here asking the Court to
8 second guess anybody's data, we just want to see
9 the data, Your Honor. I mean that is, again that
10 is what Sitz goes to, the government has got to
11 show the data. I think once the data is shown it
12 is not up to the Court to second guess what they
13 might do with the data. We just don't have it.

14 Your Honor, I call the Court's attention back
15 to Court Exhibit Number 1, talking about 56
16 violations that night. Your Honor, we only know of
17 actually two violations occurred. My client was
18 arrested for DUI and was arrested for meth. So,
19 two of those, I mean, for all I know, the other 54
20 were on Laurel and Cokesbury, West Cambridge and
21 Grove, or Mantague and Highland Park.

22 Your Honor, I don't consider, if you look at
23 the results, I don't necessarily see that two is a
24 good night. Your Honor, if they went back and
25 pulled their records and their statistical data it

1 may be, and Mr. Hodges made the point, what if they
2 set out there for four hours and it turned out
3 xero? What if they pulled their last thirty days
4 of records and there was zero violations here?
5 Then, Your Honor, if you look at the statistical
6 data we may be able to show it was zero, yet we're
7 still going out here and setting up a checkpoint,
8 which is flagrantly violative of Sitz and Groome, I
9 do believe. That is why it is so important for the
10 government to produce the data. Once they produce
11 all this, what the police department does with it
12 to a certain degree is their business but they've
13 got to show, they've got to produce it to go in
14 here and to justify the constitutionality of why we
15 put this particular checkpoint here, because just
16 to have them come in on the back side defeats the
17 whole purpose of this, to say because we have
18 however many arrests we had that night it's
19 effective, it was successful, like the Court said,
20 as to what? We've got to go back and see, number
21 one, was it effective? Number two, was it even
22 constitutional? Is there even a problem in this
23 location, or are we just taking a whole hodgepodge
24 of locations, throwing numbers together to justify
25 having a checkpoint at a particular spot? I don't

1 know.

2 Your Honor, just, you know, just the worst
3 case scenario, some sort of roving patrol out here,
4 not saying that is what the police department is
5 doing, but if we just go through and we have a
6 checkpoint one place, we go through and add a
7 couple other checkpoints and we just mix and mingle
8 all the data and if you don't break it down and
9 show the underlying data, I mean, it is not in
10 compliance with Sitz and Groome.

11 MR. HODGES: Your Honor, could I make one
12 last comment?

13 THE COURT: Sure.

14 MR. HODGES: Just about Groome. The critical
15 difference between this case and the Groome case is
16 that in Groome the State produced no evidence to
17 satisfy the second prong at all. That is clear
18 from the Groome case, the record was silent on
19 prong two. That is not the case here. We have
20 both data and testimony to support prong two and I
21 think that is the critical difference between this
22 case and the Groome case.

23 MR. HENDERSON: Your Honor, that still misses
24 the analysis under Sitz, regardless. I mean, we
25 have got to have the data. You know, as Groome

1 says, and again reading from Groome, the State
2 argues that it need not introduce evidence about
3 the specific effectiveness, and our Supreme Court
4 says, well, you do have to produce the data, the
5 empirical underlying evidence, which we just don't
6 have it here, Your Honor. We have post-arrest data
7 but we don't have the underlying empirical data.
8 Your Honor, it would be like justifying probable
9 cause, after I found the drugs I come back and
10 create my probable cause, or I found the gun and I
11 come back and create my probable cause. Again, the
12 government is trying to back in to solve the
13 problem instead of starting from A and moving to B.

14 THE COURT: What I keep searching for is what
15 data supports the identifying of the problem for
16 which to attack it or address it with an effective
17 means of law enforcement, whether it be routine
18 patrol car, partolman on a bicycle, radar on the
19 sign, to traffic safety stop, what empirical data
20 have you shown which would identify the need for
21 the State's behavior for the safety checkpoint?

22 MR. HODGES: The previous traffic safety
23 checkpoints in that area showing that having a
24 checkpoint there was effective in addressing
25 traffic safety issues which was done to address

1 citizen complaints, officer knowledge about the
2 problems, statistics as testified by Major Mitchell
3 regarding traffic accidents in that area, those
4 prior checkpoints. The effectiveness of those
5 prior checkpoints is empirical data showing the
6 effectiveness of doing checkpoints in the area,
7 both at that intersection and two blocks away.
8 That in itself is empirical data.

9 MR. HENDERSON: Very quickly, Your Honor,
10 Court's Exhibit 3, 4 and 5, as Major Mitchell
11 testified, he's got no knowledge of any of these
12 violations being at the designated area on New
13 Market and Milwee or East Creswell. Your Honor,
14 there has been no evidence before this Court that
15 there was even one violation at any of those
16 locations on Court's Exhibit 3, 4 and 5. It wasn't
17 testified to on Exhibit Number 1 but we know that
18 two of them were Mr. Vickery's on this most recent.
19 That is the only evidence before the Court that any
20 violation ever happened here at this particular
21 intersection.

22 MR. HODGES: Why would the police department
23 over four times in the space of a year waste time
24 and manpower to set up a checkpoint there if it
25 wasn't effective?

1 THE COURT: Show me why you put it there.

2 MR. HODGES: Well, the effectiveness of the
3 checkpoints that were done previously. It's
4 working there, so keep doing it there. They are
5 continuing to have problems there, continuing to
6 have complaints there. They had checkpoints there
7 in the past and had successfully caught people
8 making traffic violations, so it works having the
9 checkpoints there and they have complaints about
10 speeding and loud music and they are continuing to
11 see reports of wrecks and DUI's and that sort of
12 thing, as testified by Major Mitchell, they know it
13 has worked in the past because they have had
14 several in the past year, and so it has been
15 effective so they set up another one because it's
16 an effective tool to address the problem in that
17 area.

18 MR. HENDERSON: Your Honor, there is no
19 testimony that those three road checks, assuming
20 the worst, even existed. I didn't hear that come
21 out of Major Mitchell's mouth, he didn't know
22 anything about them.

23 THE COURT: I'm still struggling with the
24 issue of what data commenced identifying there was
25 a problem with traffic safety in the town of

1 Greenwood and I don't know that we can use the
2 prior ones to say there was a problem. I want to
3 define effectiveness as it's addressing and
4 reducing the problem, not we're writing tickets
5 toward the problem. That is why I'm having an
6 issue. Effective, I think means successful as
7 opposed to any. That is where I'm struggling with
8 that issue. Is it effective in generating traffic
9 tickets, certainly, but is it effective in
10 addressing the traffic problem?

11 MR. HODGES: That's a really esoteric
12 question. Does the fact that somebody gets a
13 speeding ticket mean that they are never going to
14 speed again?

15 THE COURT: Have you got any data to show me
16 that?

17 MR. HODGES: I don't.

18 THE COURT: All right.

19 MR. HODGES: I mean, other than just common
20 sense. I don't know that necessarily addressing
21 the problem cures the problem but you can't just
22 throw your hands up and say well, we can't fix it
23 so we're not going to try to stem the tide.

24 THE COURT: Certainly there is data out there
25 somewhere that if you divided the town of Greenwood

1 into four quadrants and the analysis of all the
2 tickets written in the last twelve months show
3 there is a concentration of tickets in the
4 southwest quadrant, well, then all right, we're
5 going to put our traffic safety checkpoint in the
6 southwest quadrant to address that problem and then
7 if you wrote 40 tickets we're addressing that
8 problem. That is what I'm missing. The Sitz case,
9 the Brown, all the cases said yes, there is a
10 problem with people driving while intoxicated,
11 people doing this, people doing that, and everyone
12 agrees that problem has got to be addressed but --

13 MR. HODGES: Isn't basically all traffic
14 tickets kind of a self fulfilling prophecy? If the
15 police target a particular area writing tickets and
16 then bring forth the tickets as supporting data
17 that there is a problem in that area, isn't that
18 kind of a self fulfilling prophecy? You could go
19 to any particular area and really saturate it and
20 increase the number of tickets that are written in
21 that particular area if you ignore some other
22 particular area.

23 THE COURT: I'm talking about without
24 saturating. You're saturating. I'm saying go back
25 and look. Again, I mean, I'm dealing with the

1 facts you all presented me here and I kind of
2 opened the door and let you all go back and get
3 some more facts over lunch but if you look back at
4 one time period, say the last twelve months, and
5 just see where the tickets have been written, there
6 is obviously going to be a concentration most
7 likely around that bypass and some cut-throughs
8 coming through on Montague and what not, you're
9 probably going to find some traffic pattern where
10 we've got a problem here. I mean, I remember
11 fifteen years ago I heard the rumor through the
12 troopers that there was a speeding problem coming
13 between Ninety Six and Greenwood, be careful right
14 there because they'll write you up, and I still
15 remember that because I go slow through Ninety Six
16 and all the way to Greenwood, but how did they
17 figure that out?

18 MR. HODGES: Miss Merrill has directed me,
19 Your Honor, to Sitz versus the Department of State
20 Police, the underlying Michigan case, and that is
21 429 N.W. 2d 180, and they say in that case, this is
22 the case that ultimately went to the Supreme Court,
23 the trial court found, number one, that the degrees
24 to which a sobriety checkpoint program --

25 THE COURT: You're talking about this is the

1 opinion on remand?

2 MR. HODGES: Right, this is the original
3 Michigan appeals opinion that then ultimately led
4 to the Supreme Court case and was overturned.

5 THE COURT: Which reversed that, so why do I
6 want to read that?

7 MR. HODGES: What I'm sharing with the Court
8 is what the Michigan court found that was overruled
9 by the Supreme Court.

10 THE COURT: Okay.

11 MR. HODGES: The Supreme Court said to the
12 Michigan court you're incorrect. This is what the
13 Michigan court found. One, "The degree to which a
14 sobriety checkpoint program would deter drunk
15 driving was directly related to the program's
16 success in achieving actual arrests sobriety
17 checkpoints were not an effective means of actually
18 apprehending drunk drivers and the statistical data
19 and testimony presented at trial demonstrated at
20 most a short term deterrent effect. We're
21 convinced from our review of the evidence presented
22 at trial the trial court's findings were clearly
23 erroneous."

24 So, they are talking, that is what the
25 Michigan court was looking at, is what we're

1 talking about here, how long term effective was
2 this, you know, is this fixing the problem, and
3 that is what Sitz overruled.

4 THE COURT: Summarize that one more time for
5 me because I didn't read it that way.

6 MR. HENDERSON: Your Honor, there is another
7 cite when it was remanded back down.

8 THE COURT: Right, that is 135, I know that
9 cite.

10 MR. HODGES: This is 429 N.W. 2d 180. The
11 third point there is the statistical data and
12 testimony presented at trial demonstrated at most a
13 short term deterrent effect. That is what you were
14 talking about, that we don't know how effective
15 this is because we don't know if it's fixing the
16 problem.

17 THE COURT: All right.

18 MR. HODGES: And that is what, I think, is
19 ruled on by the Supreme Court, that is not what we
20 have to look at.

21 THE COURT: All right. I don't read it that
22 way. I agree that is what it says, I don't agree
23 with you. What I'm saying, what I read the Sitz
24 case to say is there must be some empirical data,
25 we don't want to scrutinize every single traffic

1 ticket and every single arrest and every single
2 charge and every single police methodology for
3 addressing crime, they must make a determination
4 based upon their budget, their size of their law
5 enforcement force, their cars, their equipment
6 within the cars and all that sort of things in
7 addressing their own specific problems.

8 MR. HODGES: Isn't that what the defense is
9 asking us to do by pulling all the traffic tickets
10 written over a period of time in a particular area
11 and bringing that in to prove to the Court there is
12 underlying data such to support it was reasonable
13 to have a checkpoint in that particular area? I
14 think that is what the defense is asking the State
15 to do.

16 THE COURT: No, they are saying you said you
17 had some, where is it? We don't have any. I think
18 that is what they're saying. I may have missed
19 that but I thought that is what they said, "We
20 don't have any to present to the Court today."

21 MR. HODGES: Well, we do. We've got the
22 citizen complaints that are being addressed, the
23 officer knowledge, all that that was testified to
24 and then the empirical data of the checkpoints in
25 that particular area over a year's period. I mean,

1 that is data showing that there were over that
2 period of time traffic related charges. I can
3 concede that doesn't, that data doesn't show
4 whether or not doing that is fixing the problem but
5 that's a determination the police department has
6 got to make in, you know, apportioning their
7 manpower and addressing the problems of the city.
8 The testimony has been that is what they have
9 decided to do, they have decided it is an effective
10 means of controlling the traffic problem. I just
11 don't think Sitz requires the State to bring in all
12 the data about every traffic incident and traffic
13 charge, whatever it may be in a particular area, to
14 justify the police department's decision that that
15 is the effective thing to do to combat citizen
16 complaint in that area.

17 THE COURT: I was under the impression what
18 they wanted, "We had a hundred tickets written for
19 speeding last year or we wrote fifty tickets for
20 speeding, or driver's licenses, we're trying to
21 reduce that number," and what they said is, "We
22 have a problem with speeding or with driver's
23 license." Well, how do you know that? Is there, I
24 mean, obviously there are tickets written, there is
25 a database of information somewhere and it's not

1 been presented here today, you know, that last year
2 there was a thousand tickets written in the town of
3 Greenwood. That hasn't been said and I'm not going
4 to say it because I don't know it. It isn't
5 something for me to say. That is what hasn't been
6 said. What has been said is, "There is some motor
7 vehicle accident reports, I consider those." How
8 many were there, that's not before the Court, the
9 motor vehicle accidents. There are complaints of
10 citizens and law enforcement's input as to where
11 did they put it.

12 MR. HODGES: Personal knowledge.

13 THE COURT: Personal knowledge of the
14 officers.

15 MR. HODGES: Right. There were --

16 THE COURT: "And here are some roadblocks
17 that were set up, three prior to this one, and it
18 must be effective, we wrote forty tickets that
19 night." That's, I think, the definition under
20 Sitz, that there has got to be something to compare
21 this to and I have not been provided what I'm
22 comparing the data you have shown me to. I don't
23 know of anything to compare it to to see if it's
24 effective or not, and the definition you're using
25 as effective is it's effective because we charged

1 some people or we charged people and now we're
2 charging less. That's the difference in the
3 definition, and I'm splitting a hair with you, I
4 believe, your definition is one way, his is the
5 other and I'm struggling with how --

6 MR. HODGES: Are you suggesting effective in
7 comparison to some other method?

8 THE COURT: No, no, because that is the
9 police department's determination. That is what
10 your argument says, the police must make a
11 determination what is the most effective use of its
12 assets to address the problem. What I believe
13 there must be when they decide to establish a
14 traffic safety point or DUI checkpoint or a drug
15 checkpoint, whichever it is, in this case it is a
16 traffic safety checkpoint, what caused them to
17 establish that procedure. That is where the data
18 is missing. There has got to be data on DUI's,
19 drugs, lack of safety. Motor vehicle accidents is
20 probably the best example. He said there were some
21 motor vehicle accidents. There has not been
22 testimony as to, I mean, how many.

23 MR. HODGES: But does the State have to prove
24 that the problem has improved?

25 THE COURT: No, I don't think so. It is just

1 that, I don't know, I don't think they've got to do
2 that. I think they've got to establish some sort
3 of data other than we had motor vehicle accidents
4 in the town of Greenwood, you're going to have
5 some, but the data was missing thus far in what
6 caused the city of Greenwood to establish the
7 putting of checkpoints out there. I don't have
8 that. You may not be able to give it to me but I
9 would guess you could.

10 MR. HODGES: Well, I mean, and I keep
11 repeating myself, but the testimony is citizen
12 complaints and personal knowledge of the officers
13 and the statistics about the reports that Major
14 Mitchell has looked at about problems in that area.
15 I mean, that is, I mean, we didn't bring in copies
16 of all those reports, copies of all those tickets
17 but there is testimony in the record that they are
18 addressing that particular data, that particular
19 issue.

20 THE COURT: I may be over analyzing this
21 thing but I think there has got to be some data to
22 initiate discovery of the problem. I don't have
23 that before me. It may be back in the Greenwood
24 city police department, it may be in Mitchell's
25 computer, that 25, you know, motor vehicle

1 accidents in the year 2008, 2009, we need some
2 traffic safety. Obviously it had to be before that
3 because this was established in '96. Something
4 happened.

5 MR. HODGES: Aren't the prior checkpoints
6 evidence that there is, there are those problems in
7 that area, showing they have made, I mean, that
8 essentially is a compilation of the data that the
9 Court is talking about encapsulated on a couple
10 different nights but, I mean, that is prior data
11 from that particular area showing that those
12 problems were occurring within that particular area
13 where this checkpoint was taking place, I mean,
14 that prior empirical data from that area. Could
15 there be additional data out there, sure? I mean,
16 we could bring in boxes and boxes of tickets and
17 incident reports and all kind of stuff showing all
18 kind of problems going on in that area but again I
19 think that's the sort of thing that Sitz is saying
20 is unnecessary to delve into that volume of
21 empirical data. I think prong two of the test is
22 just that the police department has to have made a
23 decision it is effective and there has to be
24 something to back that up and what backs that up is
25 the testimony about the complaints and that

1 empirical data showing that there are those
2 problems in that area that they have been trying to
3 address over a period of time and each time they
4 have been there to address it they have written
5 tickets.

6 I mean, if this was out on some lonely
7 country road and the prior reports showed zero
8 tickets, zero tickets, zero tickets and there was a
9 history of them setting up a checkpoint out
10 somewhere and it was completely ineffective because
11 they weren't addressing any problems and they were,
12 you know, bothering citizens who were coming
13 through there and not addressing any problems, then
14 it would certainly be questionable constitutionally
15 because they are not effectively addressing some
16 problem. All they are doing is harassing folks
17 going through an area and not addressing any
18 problems but here there is a pattern of them
19 addressing the problem.

20 THE COURT: Well, another piece of data
21 compared to what? If a hundred cars came through
22 here and you wrote 60 tickets, you know, why didn't
23 they keep track of the number of cars coming
24 through? I mean, if 250 came through and got
25 atta-boys, and they kept coming, license is fine,

1 seatbelt is on, you've got some empirical data
2 showing there were violations out there of traffic
3 problems and several other criminal laws. I don't
4 have any data of how many have a nice days they
5 handed out. I mean, that's where I've got, I don't
6 think I have the empirical data I need to compare
7 effectiveness, because that would be the perfect
8 thing, if the number of cars coming through here,
9 and this occurred to me, if 200 cars came through
10 and they wrote thirty tickets you have a percentage
11 of how many are coming through. Next time 500 come
12 through and the percentage is about the same, I
13 mean, you know --

14 MR. HODGES: But who is to say a certain
15 percentage is effective?

16 THE COURT: The police department but I don't
17 have anything to justify it and they don't know how
18 many cars came through. They know how many tickets
19 they wrote. They are assuming it's effective
20 because they caught some fish but, you know, if
21 5,000 cars came through and they wrote 60 tickets
22 versus 500 and they wrote 60 tickets, that's a
23 measure of its effectiveness. I didn't hear any
24 testimony about that, and I'm changing the facts on
25 you, but that was not presented to me. I just

1 think you have to have something to compare to and
2 we don't. I have not been presented anything.

3 I don't think we can rehash the weighing of
4 the evidence any further. I understand your point
5 completely, I disagree with it slightly.

6 All right, considering the motion regarding
7 the constitutionality of the checkpoint, I don't
8 believe this meets the constitutional muster it
9 must along the lines of all those cases we have
10 discussed, starting with Groome and going out to
11 the Supreme Court cases. Factually I do not think
12 there was sufficient evidence of empirical data.
13 Albeit there is empirical data presented, there is
14 not sufficient empirical data for which the Court
15 can compare and measure effectiveness under my
16 definition of the effectiveness.

17 All right?

18 MR. HODGES: Your Honor, the State would, for
19 protection of the record the State would
20 respectfully object to the Court's ruling based on
21 all the State's previous argument.

22 THE COURT: Absolutely.

23 Off the record.

24 (Brief recess).

25 THE COURT: All right, back on the record.

1 Mr. Hodges, if you would like to file a
2 written memorandum regarding your objections I will
3 allow that but, Mr. Henderson, if you and Mr.
4 Garrett would prepare an order for this matter and
5 give it to me when you can.

6 MR. HENDERSON: I will, Your Honor. Thank
7 you.

8 MR. HODGES: Thank you, Your Honor.

9 MS. MERRILL: Thank you.

10 (Concluded at 5:12 p.m.).

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4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Greenwood County,
11 South Carolina, on the 3rd day of March, 2010.

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

14 March 18, 2010

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18 Henry P. Young
19 Court Reporter
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GREENWOOD POLICE DEPARTMENT TRAFFIC ENFORCEMENT ACTIVITY REPORT



Nature of Assignment: Traffic Safety Checkpoint

Date: 4/25/09 Time: 2100-0300 hrs Weather: Clear

Supervisors: Marshall, Martin, Davenport, Bass

Additional Officers: Pinkney, Watt, Owen, Wideman, Bell, Rosado, Kay, Budreau, Blackwell, Cantledge, Garg, Greenfield, Byrd, Crisp

Locations: Laurel @ Lakesbury
W. Cambridge @ Grove
New Market @ Milwee
Montague @ Highland Park

VIOLATIONS	#	VIOLATIONS	#	NOTES
Driving Under the Influence	3	Equipment Violations		
Driving Under Suspension	3	Shifting Lanes Improperly		
Open Container In Vehicle	4	Fail to Yield Right of Way		
Altered I.D.		Following to Closely		
Viol. Window Tint Law		Resisting Arrest		
Poss. Alcohol by Minor	2	Fail to Stop (Blue Lights)		
Driver's License Violations	32	Improper Passing		
Vehicle License Violations	2	Driving Left of Center		
Child Restraint Violations	4	Loud Music Violation		
Violation Seatbelt Law	1	Other Violations	2	
Speeding CODE 21				
Speeding CODE 41		TOTAL TRAFFIC CASES	48	
Speeding CODE 64				
Disregarding Traffic Control		TOTAL CRIMINAL CASES	8	
Reckless Driving				
Operating Uninsured Vehicle		TOTALS	56	

VIOLATION (Drugs)	Cases	Amount	VIOLATION (Other)	Cases	Amount	*Please attach copies of all incident reports for these violations*
Simple Poss. Marijuana	1		Vehicles Recovered			
Poss. Crack Cocaine			Weapon Violations			
Poss. Cocaine			Fugitive Arrests			
Methamphetamines	1	2.23	Vehicles Seized	1		
Other Drugs			Currency Seized	1	878.00	

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GREENWOOD POLICE DEPARTMENT TRAFFIC ENFORCEMENT ACTIVITY REPORT



Nature of Assignment: Shaffer Safety Checkpoint - Sober or Slammer Holiday 2008

Date: 12/19/2008 Time: 1900hrs - 0200hrs Weather: Cloudy

Supervisors: Maj. Marshall, Capt. Butler

Additional Officers: Capt. Chandon, Lt. Bass, Owen, Kay, Pullay, Gracy, Byrd, Greenfield, Haralson, Nichols

Locations: New Market @ E. Cheswell
Hwy 34 @ Margaret
Edgefield @ Wells
Pearl @ Walker

VIOLATIONS	#	VIOLATIONS	#	NOTES
Driving Under the Influence	2	Equipment Violations		
Driving Under Suspension	2	Shifting Lanes Improperly		
Open Container In Vehicle	3	Fail to Yield Right of Way		
Altered I.D.		Following too Closely		
Viol. Window Tint Law		Resisting Arrest		
Foss. Alcohol by Minor		Fail to Stop (Blue Lights)		
Driver's License Violations	19	Improper Passing		
Vehicle License Violations		Driving Left of Center		
Child Restraint Violations	2	Loud Music Violation		
Violation Seatbelt Law		Other Violations		
Speeding CODE 21				
Speeding CODE 41		TOTAL TRAFFIC CASES	28	
Speeding CODE 64				
Disregarding Traffic Control		TOTAL CRIMINAL CASES	2	
Reckless Driving				
Operating Uninsured Vehicle		TOTALS	30	

VIOLATION (Drugs)	Cases	Amount	VIOLATION (Other)	Cases	Amount	*Please attach copies of all incidents reports for these violations*
Simple Poss. Marijuana	2	2.76gr	Vehicles Recovered			
Poss. Crack Cocaine			Weapon Violations			
Poss. Cocaine			Fugitive Arrests			
Methamphetamines			Vehicles Seized			
Other Drugs			Currency Seized			

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GREENWOOD POLICE DEPARTMENT TRAFFIC ENFORCEMENT ACTIVITY REPORT

Nature of Assignment: Traffic Safety CheckpointDate: 12-31-08/01-01-09 Time: 1900-0100 Weather: ClearSupervisors: Maj Marshall, Capt Chandon, Lt Bass, Lt DavenportAdditional Officers: Budreau, Lovett, Trath, Nichols, Pinkney, Gray, Taskovic, Pullay, Archibald, Gossett

Locations: New Market at Milwee
Bypass 25 at Marshall
Laurel at Cokesburg

VIOLATIONS	#	VIOLATIONS	#	NOTES
Driving Under the Influence		Equipment Violations		
Driving Under Suspension	3	Shifting Lanes Improperly		
Open Container In Vehicle	2	Fail to Yield Right of Way		
Altered I.D.		Following to Closely		
Viol. Window Tint Law		Resisting Arrest		
Poss. Alcohol by Minor		Fail to Stop (Blue Lights)		
Driver's License Violations	20	Improper Passing		
Vehicle License Violations		Driving Left of Center		
Child Restraint Violations	1	Loud Music Violation		
Violation Seatbelt Law		Other Violations	4	
Speeding CODE 21				
Speeding CODE 41		TOTAL TRAFFIC CASES	25	
Speeding CODE 64				
Disregarding Traffic Control		TOTAL CRIMINAL CASES	8	
Reckless Driving				
Operating Uninsured Vehicle	1	TOTALS	33	

VIOLATION	Cases	Amount	VIOLATION	Cases	Amount	*Please attach copies of all incidents reports for these violations*
(Drugs)			(Other)			
Simple Poss. Marijuana	1		Vehicles Recovered			
Poss. Crack Cocaine			Weapon Violations			
Poss. Cocaine			Fugitive Arrests			
Methamphetamines			Vehicles Seized			
Other Drugs			Currency Seized			

C

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GREENWOOD POLICE DEPARTMENT TRAFFIC ENFORCEMENT ACTIVITY REPORT



Nature of Assignment: Traffic Safety Checkpoint

Date: 03072009

Time: 2000-0400

Weather: Clear

03082009

Supervisors: Maj Marshall, Capt. Clenden, Lt. Mages, Lt. Bass

Additional Officers: Pollen, Trotter, Kay, Bideman, Lovett, Archibald, Gossett, Gary, Nichols, Pinken

Locations: New Market near Clewell, Edgefield @ Parola
Laurel at Fairview,
Bypass 25 near Sweetwater

VIOLATIONS	#	VIOLATIONS	#	NOTES
Driving Under the Influence	1	Equipment Violations		
Driving Under Suspension	1	Shifting Lanes Improperly		
Open Container In Vehicle	3	Fail to Yield Right of Way		
Altered I.D.		Following too Closely		
Viol. Window Tint Law		Resisting Arrest		
Poss. Alcohol by Minor	1	Fail to Stop (Blue Lights)		
Driver's License Violations	30	Improper Passing		
Vehicle License Violations		Driving Left of Center		
Child Restraint Violations	15	Loud Music Violation		
Violation Seatbelt Law	4	Other Violations	1	(Littering)
Speeding CODE 21	2			
Speeding CODE 41		TOTAL TRAFFIC CASES	57	
Speeding CODE 64				
Disregarding Traffic Control		TOTAL CRIMINAL CASES	3	
Reckless Driving				
Operating Uninsured Vehicle		TOTALS	60	

VIOLATION (Drugs)	Cases	Amount	VIOLATION (Other)	Cases	Amount	*Please attach copies of all incidents reports for these violations*
Simple Poss. Marijuana	2	14.45 _{gr}	Vehicles Recovered			
Poss. Crack Cocaine			Weapon Violations			
Poss. Cocaine			Fugitive Arrests			
Methamphetamines			Vehicles Seized			
Other Drugs			Currency Seized			

D

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GREENWOOD POLICE DEPARTMENT

Greenwood, South Carolina



DIRECTIVE TYPE General Order	EFFECTIVE DATE 09/15/1996	NUMBER 7-15
SUBJECT Traffic Safety Checkpoints REVISED 06/01/2007		
CALEA REFERENCE 61.1.6(d)	AMENDS/SUPERSEDES All Others	
DISTRIBUTION All Personnel	RE-EVALUATION DATE Annual	NO. PAGES 3

Purpose:

To provide guidelines for the proper use of traffic safety checkpoints.

Policy:

It is the policy of the Greenwood Police Department to safely and legally conduct traffic safety checkpoints as a means to promote traffic safety and/or to target specific criminal activity.

Procedure:

Implementation of Traffic Safety Checkpoints: The Chief of Police or the Patrol Division Major must approve the use of all checkpoints prior to implementation.

- Any supervisor may cancel operation of a traffic safety checkpoint. A traffic safety checkpoint may be cancelled for any reason including traffic congestion, unsafe activity or conditions, poor weather, poor visibility, patrol workload increase, etc.
- The only type of checkpoint authorized for use is the fixed roadblock.
- All checkpoints must be supervised by a supervisor, of the rank of Lieutenant or higher, who is present at the scene.
- A checkpoint will be used only in the following circumstances:
 - ✓ Driver license/vehicle registration/occupant restraint checks/Driver sobriety checks;

2

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General Order 7-15

Traffic Safety Checkpoint **110**

- ✓ Participation in established traffic safety awareness programs, i.e. Thank You Tickets issued as part of the Occupant Protection Safety Traffic Enforcement Program (OPSTEP), etc.;
- ✓ Searches for criminal suspects in a restricted area.
- Checkpoints/roadblocks shall not intentionally be used as a means to stop fleeing vehicles or as a means of use of force against a person or vehicle.
- All searches and seizures of vehicles, persons, or containers will be based on the legal premises of plain view, valid consent, incident to arrest, and/or probable cause. All applicable laws and court decisions will be complied with at all times.
- The checkpoint supervisor is responsible for planning and operating the checkpoint in compliance with this procedure. The supervisor will brief all involved personnel on how to properly conduct the checkpoint. The supervisor is responsible for training involved officers on how to properly conduct the checkpoint on an as needed basis.

Conducting Traffic Safety Checkpoints: The checkpoint will be conducted as follows:

Staffing - A minimum of two officers, including a supervisor (Lieutenant or above), must be present at the checkpoint. At least two officers must be in uniform. The uniform includes the hat and reflective vest or the reflective side of the raincoat or lightweight jacket. All other officers must be readily identifiable as police officers and wear the reflective vest or high visibility raincoat or jacket. At the checkpoint there shall be at least one officer to check traffic in each direction. All vehicles coming through the checkpoint will be stopped and checked. The only exception will be in a criminal case where only a specifically described vehicle or type of vehicle is being sought.

Location - The location must allow the checkpoint to be seen by approaching motorists at a minimum of 500 feet in each direction. It must not be set up in a curve, over the crest of a hill or other dangerous location. Advanced warning to motorists will be accomplished by placing a "Police Checkpoint Ahead" sign approximately 300 feet prior to the checkpoint location. The traffic flow must not be allowed to back up so much that it becomes a hazard. More officers and additional precautions are required when setting up a checkpoint on a four lane road or at a four way intersection. The site must include adequate space on the roadside to move vehicles which may be cited, an arrest is to be made, or further investigation is required. If the checkpoint is set up at night, there must be adequate street lights available or other light sources as well as the use of the vehicle's rear flashing bar-lights and, if deemed necessary, traffic cones. To minimize confusion to motorists at night, only the rear bar-lights should be used.

Arrangement - At least one marked patrol car will be on the side of the highway at the site of the checkpoint where the officers are located. If needed for visibility, the

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General Order 7-15

Traffic Safety Checkpoints **111**

vehicle(s) may utilize the four way flashers and/or the rear flashing bar-lights. In the daytime, the front and rear bar-lights may be activated. At night, only the rear lights may be used. The supervisor must notify the communications center of the operation. All officers must maintain radio contact at all times.

Roving vehicle(s) - The supervisor may designate a uniformed officer(s) to remain outside the checkpoint area to stop motorists who turn to evade the checkpoint or who fail to stop at the checkpoint.

NOTE: Officers will take the appropriate enforcement action, consistent with Department procedures and state law, for any violations detected at the checkpoint.

(Ref: CALEA 61.1.6, item d)

END

This is not a contract of employment. Employment remains at-will and may be terminated by either party at any time, with or without notice or reason.

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WITNESSES

Jarrison Lovett

Greenwood Police Department

WARRANT NUMBER

I826358



Foreman of the Grand Jury

Date: 8/21/09

VERDICT

True Bill

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

August Term, 2009

Indictment # 09GS24-1068

THE STATE

VS.

Randy Jason Vickery

INDICTMENT FOR

POSSESSION OF METHAMPHETAMINE
WITH INTENT TO DISTRIBUTE
44-53-0375

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

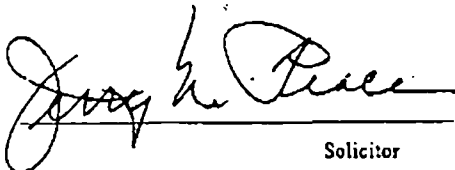
INDICTMENT FOR

POSSESSION OF METHAMPHETAMINE
WITH INTENT TO DISTRIBUTE
44-53-0375

At a Court of General Sessions, convened on the 21st day of August, 2009 the Grand Jurors of Greenwood County present upon their oath:

That Randy Jason Vickery, did in Greenwood County, state aforesaid, on or about the 25th day of April, 2009 willfully, unlawfully, and knowingly manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, or deliver methamphetamine, in violation of the provisions of Section 44-53-375 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 cases made and provided.



Solicitor

114 WITNESSES

Jamison Lovett
Greenwood Police Department

WARRANT NUMBER

1826359

Dean Donnell

Foreman of the Grand Jury

Date: *8/22/09*

VERDICT

True Bill

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

August Term, 2009

Indictment # 09GS24- *1069*

THE STATE

VS.

Randy Jason Vickery

INDICTMENT FOR

VIOLATION SECTION

44-53-0445

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

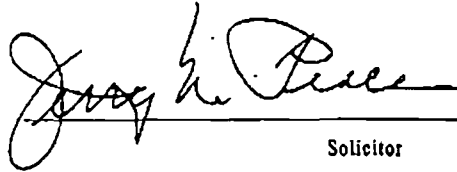
COUNTY OF GREENWOOD

VIOLATION SECTION
44-53-0445

At a Court of General Sessions, convened on the 21st day of August, 2009 the Grand Jurors of Greenwood County present upon their oath:

That Randy Jason Vickery, did in Greenwood County, state aforesaid, on or about the 25th day of April, 2009 willfully, unlawfully and knowingly distribute, sell, purchase, manufacture, or possess with intent to distribute, a quantity of Methamphetamine, a Schedule II controlled substance, while in, on, or within a one-half mile radius of the grounds of a public or private school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university, in violation of Section 44-53-445 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 cases made and provided.



Solicitor

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 
WILLIAM M. BLITCH, JR.
Assistant Attorney General

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ATTORNEYS FOR APPELLANT

March 7, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenwood County
Eugene Griffith, Jr., Circuit Court Judge

THE STATE,

Appellant,

vs.

RANDY JASON VICKERY,

Respondent.

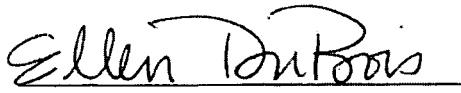
PROOF OF SERVICE

I, Ellen 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:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 7th day of March, 2011.


ELLEN DUBOIS
Legal Assistant

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 21 2012

Appeal From Greenwood County, S.C. Supreme Court,
Hon. Eugene Griffith, Jr., Circuit Court Judge

The State,

Appellant,

v.

Randy Vickery,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

The circuit court erred in suppressing the evidence found as a result of a drivers' license checkpoint when the checkpoint did not violate the Fourth Amendment.

STATEMENT OF THE CASE

The Greenwood County Grand Jury indicted Respondent on one count of possession with intent to distribute methamphetamine (PWID) and one count of PWID in proximity to a school. Respondent moved to suppress the drugs and paraphernalia found during a license checkpoint. The circuit court granted Respondent's motion to suppress by Order dated April 27, 2010. On April 28, 2010, the State served and filed a timely Notice of Appeal pursuant to State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985).

STATEMENT OF FACTS

As a result of citizen complaints regarding loud noise and speeding, as well as to ensure roadway safety, officers decided to establish a license checkpoint at the intersection of New Market and Milwee in Greenwood. (T.8; 11; R. 14; 17). The checkpoint began the night of April 25, 2009, and continued into the early morning hours of April 26. (Court's Exhibit 1; R. 105). Officers established three other checkpoints in the same vicinity of the checkpoint in question. Officer Byrd and several other officers from various areas of the police department were involved in manning the checkpoints. (T.8-9; R. 14-15).

The checkpoints were established and operated pursuant to the guidelines established by the Greenwood Police Department. (T.34-35; Court's Exhibit 2; R. 40-41; 109). All cars entering the checkpoint were stopped just long enough to verify driver's license, registration, and license plate information. (T.10; 12; R. 16; 18).

Respondent entered the checkpoint at New Market and Milwee. Respondent was detained on suspicion of driving under the influence. (T.21; R. 27). During the detainment, law enforcement located methamphetamine in his vehicle. (T.24; R. 30). According to Respondent's counsel, Respondent made a statement to officers after he is taken to the police station. In the statement, he acknowledges having sold methamphetamine in the past and looking to sell in the future. (T.24-25; R. 30-31).

Prior to trial, Respondent moved to suppress the evidence seized as a result of the checkpoint on the grounds the checkpoint was unconstitutional. (T.3; R. 9). The trial court allowed presentation of evidence and testimony by the State to support the constitutionality of the checkpoint.

Officer Byrd indicated the main purpose behind the checkpoints was traffic safety. (T.10-11; R. 16-17). He maintained the individuals were only briefly detained at the checkpoints, roughly a minute. (T.12; R. 18).

Major Mitchell testified the traffic safety checkpoints are "an effective tool in managing traffic." (T.40; R. 46). To corroborate his testimony, the State presented the report detailing the number of violations found during the checkpoints operated on April 25-26. (Court's Exhibits 1; 3; 4; 5; R. 105-111). Further, Major Mitchell indicated the decision regarding where to establish a checkpoint involves many different considerations, including: complaints from residents, personal knowledge of officers, and statistics on motor vehicle accidents. (T.47; R. 53). The State also provided evidence from three prior checkpoints all established in the vicinity of the April 25-26 checkpoint to show the effectiveness of prior checkpoints and why the traffic safety checkpoints were necessary in the area.

The trial court found the State failed to provide sufficient empirical evidence of why the site was chosen and how it was ultimately effective at reducing traffic related violations. The trial court suppressed the evidence seized as a result of the checkpoint detention of Respondent, and the State appeals. (T. 96-97; Court's Order dated April 27, 2010; R. 102-103; 1-6).

ARGUMENT

I. The circuit court erred in suppressing the evidence found as a result of a drivers' license checkpoint when the checkpoint did not violate the Fourth Amendment.

The circuit court erred in granting Respondent's motion to suppress the evidence obtained as a result of the license checkpoint. The checkpoint was properly established pursuant to the Greenwood Police Department's guidelines for traffic safety checkpoints. The State presented evidence of the reason for the checkpoint satisfying City of Indianapolis v. Edmond, 531 U.S. 32 (2000), and establishing its effectiveness pursuant to Brown v. Texas, 443 U.S. 47 (1979) and State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008). Therefore, the checkpoint was constitutional and the circuit court erred in suppressing the evidence.

The Fourth and Fourteenth Amendments are implicated because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. See United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976). "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions'" Delaware v. Prouse, 440 U.S. 648, 653-654 (1979) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)). "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's

Fourth Amendment interests against its promotion of legitimate governmental interests.” Id. at 654.

In Prouse, the United States Supreme Court (USSC) held roving traffic stops to check licenses and registrations was a violation of the Fourth Amendment. The Court, however, indicated a traffic checkpoint in which all vehicles are stopped for a brief time for roadway safety was appropriate and not violative of the Fourth Amendment. Prouse, 440 U.S. at 663. Furthermore, in Edmond, the USSC held a police checkpoint with a primary purpose of general crime control is unreasonable under the Fourth Amendment, but a checkpoint targeting traffic safety or driving under the influence is reasonable. Edmond, 531 U.S. at 48.

The checkpoint in this case, as found by the trial court was clearly established for traffic or roadway safety and not general crime control. Every vehicle was stopped and all licenses, registrations, and license plates were checked. Officer Byrd specifically testified: “The primary purpose is pretty much for just traffic safety, like child restraint, seatbelt, you know, driver’s license check, checking tag of the vehicle, making sure they have all the credentials.” (T.10; R. 16). Accordingly, the checkpoint was appropriate under Edmond and Prouse.

Further, “[a] central concern in balancing these competing considerations in a variety of settings has been to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” Brown v. Texas, 443 U.S. 47, 51 (1979). “[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a

plan embodying explicit, neutral limitations on the conduct of individual officers.” Id. (citing Prouse, 440 U.S. at 663; Martinez-Fuerte, 428 U.S. at 558-562)).

The USSC stated in Brown: “Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” Brown, 443 U.S. at 50-51; See also, Groome, 378 S.C. at 619, 664 S.E.2d at 462 (noting the three-pronged balancing test established in Brown for determining the constitutionality of a checkpoint).

The first and third prongs of Brown are clearly met in this case. The basis of the checkpoint was traffic and roadway safety. Further, testimony indicated the checkpoints are established based on complaints from citizens, the personal knowledge of the officers, and motor vehicle statistics. (T.47; R. 53). Also, the prior checkpoints resulting in numerous violations in the same area as the checkpoint in question provide empirical support for the decision to continue establishing checkpoints in the same vicinity. (Court’s Exhibits 3-5; R 106-108). The trial court erred in requiring additional empirical support beyond that provided by the State. Proper considerations, including the complaints and the officers’ personal knowledge, as well as the empirical data from prior checkpoints in the close vicinity support the decision to establish the checkpoint at New Market and Milwee.

There is a serious public concern in keeping the roadways safe and occupied only by those legitimately entitled to be on the road. The checkpoint was carried out in accordance with the Greenwood Police Department’s Guidelines for the proper use of traffic safety checkpoints. (Court Exhibit 2; R. 109-111). Every vehicle that entered the checkpoint was

briefly detained and asked for their licenses and registration. (T.10; 12; R.16; 18). As a result, the severity of the interference with individual liberty was not great.

The only remaining prong, and the one the circuit court found lacking, is the degree to which the seizure advances the public interest. In discussing this prong, the USSC has stated: "This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 453 (1990). Further, the USSC indicated none of its prior case law supports a "searching examination of 'effectiveness.'" Id. at 454. The USSC in Sitz required some evidence in support of the "effectiveness" or the advancement of the public interest. It distinguished the case from Prouse in which there was a complete lack of data or evidence indicating the effectiveness of the random, roving stops. Id.

The South Carolina Supreme Court also analyzed the second prong in Groome. The Court recognized the need for some empirical data, and found the State failed to provide any evidence and instead argued the checkpoint was "*ipso facto* constitutional, thereby eliminating the requirement of effectiveness from the Brown formula." Groome, 378 S.C. at 619, 664 S.E.2d at 462. The South Carolina Supreme Court found the State failed to demonstrate the constitutionality of the checkpoint because "the State failed to produce any evidence satisfying the second prong of the Brown test." Id. at 620, 664 S.E.2d at 462 (emphasis added).

This case is distinguishable from Groome and more analogous to Sitz. The State presented the testimony of Major Urban Mitchell. Major Mitchell indicated the police

department has determined conducting traffic safety checkpoints is an “effective tool in managing traffic.” (T.40; R. 46). Further, the vicinity in which the current checkpoint was established had previously resulted in between 25 and 57 total traffic related cases and between 30 and 60 total violations. (Court’s Exhibits 3-5; R. 106-108).

On the night in question, four checkpoints were established lasting approximately six hours. The checkpoints were all in the same vicinity and within 2 miles of each other.¹ The checkpoints resulted in 48 traffic violations and 56 total cases, including Respondent’s methamphetamine case. (Court’s Exhibit 1; R. 105). As a result, the State’s evidence in the instant case was not totally lacking as in Prouse and Groome. The State presented the police department’s conclusion the checkpoint was a viable and effective means of traffic safety management. The State presented the current violations resulting from the checkpoints established on the night Respondent was stopped, as well as the records from the checkpoints established on three prior nights in the same vicinity. The trial court erred in finding the State’s case completely lacking in evidence and, specifically, empirical evidence. The circuit court, instead, went on a “searching examination of effectiveness” frowned upon by the USSC in Sitz. As a result, the suppression of the evidence should be reversed and the case remanded for trial.

¹The State believes this Court can take judicial notice of the location of each of the checkpoints and will determine they are all in the same general area within about 1.5 miles of each other. See e.g., <http://maps.google.com/> or <http://www.bing.com/maps/>

CONCLUSION

The decision of the circuit court granting Respondent's motion to suppress the evidence found as a result of the constitutional license checkpoint should be reversed and the case remanded for trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

March 23, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
Hon. Eugene Griffith, Jr., Circuit Court Judge

The State,

Appellant,

v.

Randy Vickery,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR APPELLANT

March 23, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
Hon. Eugene Griffith, Jr., Circuit Court Judge

The State,

Appellant,

v.

Randy Vickery,

Respondent.

PROOF OF SERVICE

I, ELLEN 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:

Robert M. Dudek, Esquire
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 23rd day of March, 2011.



ELLEN DuBOIS
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE

APPELLANT

V.

RANDY VICKERY

RESPONDENT

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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DEC 11 2012

S.C. Supreme Court

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There was evidence to support the circuit judge's suppression order where Officer Robbie Byrd did not have any first-hand knowledge about the checkpoint, and where the state was unable to present the court with any specific evidence or empirical data about the check point at New Market and Milwee, particularly its effectiveness, its justification, and its implementation.....	5
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<u>State v. Groome</u> 378 S.C. 615, 664 S.E.2d 460 (2008).....	6, 8, 10
<u>United States v. Martinez-Fuerte</u> 428 U.S. 543 (1996).....	9

STATEMENT OF ISSUES ON APPEAL

Whether the circuit court erred in suppressing the evidence found as a result of the driver's license checkpoint when the checkpoint did not violate the Fourth Amendment?

COUNTER STATEMENT OF ISSUE ON APPEAL

There was evidence to support the circuit judge's suppression order where Officer Robbie Byrd did not have any first-hand knowledge about the checkpoint, and where the state was unable to present the court with any specific evidence or empirical data about the check point in question at New Market and Milwee, particularly its effectiveness, its justification, and its implementation.

STATEMENT OF THE CASE

Respondent Randy Vickery was indicted by the Greenwood County Grand Jury on one count of possession with intent to distribute methamphetamine and one count of possession with intent to distribute methamphetamines in the proximity of a school. The meth was found in respondent's car during a roadblock search at New Market in Milwee in Greenwood on the night and early morning hours of April 25, 2009 and April 26, 2009. See, Court's Exhibit #1. R. 105.

Respondent moved to suppress the evidence, and his statement to the police given as a result of the checkpoint. A hearing was held before the Honorable Eugene Griffith, Jr on March 3, 2010. Carson Henderson, Billy Garrett, and Robert Tinsley represented respondent. The solicitors were Andrew Hodges and Jane Merrill. R. 7.

Judge Griffith ruled at the conclusion of the hearing that the evidence derived from the checkpoint search at New Market and Milwee had to be suppressed. He issued a suppression order dated April 27, 2010. R. 1.

The state served its notice of intent to appeal, and filed its brief of appellant. This brief of respondent follows.

ARGUMENT

There was evidence to support the circuit judge's suppression order where Officer Robbie Byrd did not have any first-hand knowledge about the checkpoint, and where the state was unable to present the court with any specific evidence or empirical data about the check point at New Market and Milwee, particularly its effectiveness, its justification, and its implementation.

Relevant Facts

On the night of April 25, 2009 four separate checkpoints were set up in Greenwood between the hours of 9:00 pm and 3:00 am. Court's Exhibit #1 R. 105. These checkpoints were held at Laurell and Cokesbury Streets, West Cambridge and Grove Streets, New Market and Milwee Streets and Montague and Island Park Streets. Forty-eight traffic cases and eight criminal cases, for a total of fifty-six cases, were made from these four roadblocks. R. 105.

The checkpoint at issue in this case was at the corner of New Market and Milwee Streets. It was impossible from the testimony of Officer Robbie Byrd and Officer Urban Mitchell to tell which officers presided over the New Market and Milwee checkpoint. Defense counsel also correctly argued, as will be seen infra, that other than the arrest of respondent Vickery, it was impossible to tell what other traffic or criminal cases were made that night at the New Market and Milwee checkpoint.

Robbie Byrd worked with the traffic unit in Greenwood and he said on the night of April 25 and the early morning of April 26, 2009 "we were conducting traffic safety checkpoints." R. 13, ll. 23-25 (emphasis added). When Byrd was asked how the police determined where to set up the checkpoints Byrd could only say it was based on "traffic

flow, speeding complaints, loud music complaints, anything such as that nature, primarily just involving traffic.” R. 14, ll. 1-5.

Byrd said he thought there were four checkpoints that evening. R. 15, ll. 15-18. Byrd said, “A total of 48 traffic cases [were] made that night.” R. 16, ll. 17-20.

Byrd acknowledged that Lieutenant Bass and Major James Marshal were in charge of setting up the checkpoints. However, neither Bass nor Marshal testified during the suppression hearing. R. 17, ll. 17-24. Byrd estimated that each stop probably took “a minute at most.” R. 18, ll. 7-14.

Following Byrd’s testimony, defense counsel Henderson argued that the state had not provided the court with any specific information or empirical data about the checkpoints. Counsel noted that Bass and Marshal set up the checkpoints but “the government did not call them to testify.” R. 21, l. 9 – 22, l. 23.

Counsel cited this Court’s opinion in State v. Groome 378 S.C. 615, 664 S.E.2d 460 (2008) for the proposition that the state had utterly failed to carry its burden of proof to justify the checkpoint under the Fourth Amendment pursuant to Brown v. Texas 443 U.S. 47 (1979) and Michigan Department of State Police v. Sitz 496 U.S. 444 (1990). R. 21, l. 9 – 26, l. 18. The judge responded that he would give the state time to present any other evidence it wished before he ruled.

After a break in the case the state called Major Urban Mitchell of the Greenwood Police Department as a witness. Mitchell said he was “over the administrative division. That includes records, training, evidence, crime scenes.” R. 39, ll. 5-11. Defense counsel argued that nowhere in the Greenwood County Department Purpose and Policy of Checkpoints did it mention any meeting or gathering of supervisors to discuss empirical

data: "I mean, that is the Constitutional foundation upon which all this rests, there is nothing in there. This document is not relevant because it doesn't go to the core of the matter." See Policy and Procedure statement. R. 109. Defense counsel Henderson also argued that the New Market and Milwee Street checkpoint was only one of four checkpoints for which information or data on the number of traffic or criminal cases had been recorded. Defense counsel had repeatedly told the judge the state had not offered anything about the empirical data for this specific roadblock: "They just took a bunch of statistics and threw them together on a piece of paper . . . Again, this is just not relevant as to why we're here today." R. 41, l. 19 – 45, l. 9.

Mitchell testified that he thought that the Creswell checkpoint was "about two blocks south of Milwee," but outside of that guess there was no other evidence was offered about the location of the checkpoints. R. 45, ll. 20-21.

Mitchell said the policies and procedures regarding the checkpoints were developed "I guess back in 1996." They had apparently been revised about three years ago. R. 47, ll. 6-13.

Mitchell stated that the decision where to set up a checkpoint depended on "a lot of different things," including "complaints from residents, personal knowledge of officers, [and] statistics on motor vehicle accidents." R. 53, ll. 16-22. Mitchell repeatedly had to admit he could not testify as to which traffic offenses or criminal charges arose from which of the four checkpoints. R. 48, l. 22 – 49, l. 24.

Mitchell admitted the solicitor's office had not asked them for any further documentation about the checkpoint. R. 49, l. 22 – 51, l. 6.; 54, ll. 3-8. During the colloquy between the court, the solicitor and defense counsel the point was repeatedly made that the

state had not produced any specific evidence regarding what occurred, and violation as to the specific individual checkpoint, New Market and Milwee. R. 87, ll. 9-21.

At the end of the hearing the judge ruled he simply did not have any specific data from which to rule in the state's favor based upon the case law. R. 100, l. 20 – 103, l. 7. In his written order the judge ruled that the data presented by the state was insufficient to constitutionally justify the roadblock on April 25, 2009 at which the defendant was stopped and arrested. The judge noted the state's case was simply inadequate for the court to determine the effectiveness of the roadblock. The judge noted "no testimony was presented about how many vehicles passed through the roadblock in question." R. 5.

The judge specifically ruled that he did not find all roadblocks conducted by the Greenwood Police Department were unconstitutional but, as to this single roadblock, the state had not provided sufficient empirical data from which the court could rule it did not violate the constitution. R. 5-6.

Discussion

The court correctly ruled under State v. Groome 378 S.C. 615, 664 S.E.2d 460 (2008) that the evidence had to be suppressed which was found during the checkpoint pursuant to Brown v. Texas 443 U.S. 47 (1979) and Michigan Department of State Police v. Sitz 496 U.S. 444 (1990). R. 1-6. See, also, City of Illinois v. Edmond 531 U.S. 32 (2000).

The state here simply did not do its job of providing the court with any first-hand, specific information or data about the checkpoint in question. It is clear from this record that the state's argument was that the Greenwood Police thought the checkpoints were a good idea and that should be the end of the matter.

The solicitor here protested about the court's finding that there was no specific evidence from which it could determine whether the state met the second factor in Brown v. Texas 443 U.S. 47 (1979), the "effectiveness" requirement, since the data kept by the state applied to four different checkpoints. Defense counsel correctly argued it was clear the methamphetamines seized on April 25, 2009 at the New Market at Milwee Street checkpoint were attributed to respondent. However, *none of the other* traffic and criminal offenses could not be traced to a specific checkpoint. R. 105-108.

The solicitor repeatedly and essentially argued that the state should be given *carte blanche* and the fact that the Greenwood Police Department wanted to set up checkpoints should be blindly accepted by the court. R. 78, l. 9 - 102, l. 16.

There is no doubt under the applicable case law, including Michigan Department of State Police v. Sitz 496 U.S. 444 (1990) and United States v. Martinez-Fuerte 428 U.S. 543 (1996) that a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. While citizens have less expectation of privacy in their automobiles there should be no doubt that the stop at a checkpoint, when the police have no individualized suspicion the citizen has done anything wrong, is a significant intrusion on the citizen's liberty and his "right to be left alone." See, FCC v. Pacifica Foundation 438 U.S. 726, 748 (1978).

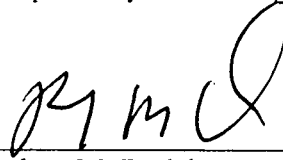
Here, the state did not provide any specific empirical data about the checkpoint at New Market and Milwee Streets. Respectfully, the lower court correctly rejected the solicitor's argument that because Greenwood Police thought checkpoints were necessary that the court should "rubber stamp" their decision. There was an abundance of evidence to support the lower court's ruling, and it should be affirmed under the any evidence standard.

See State v. Groome 378 S.C. 615, 664 S.E.2d 460 (2008); City of Illinois v. Edmond 531 U.S. 32 (2000).

CONCLUSION

By reason of the foregoing argument, the suppression order of the lower court should be affirmed.

Respectfully submitted,

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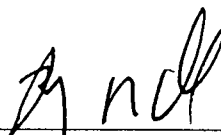
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 15th day of March, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

Eugene C. Griffith, Jr., Judge

THE STATE,

APPELLANT,

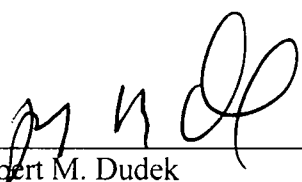
V.

RANDY VICKERY,

RESPONDENT

CERTIFICATE OF SERVICE

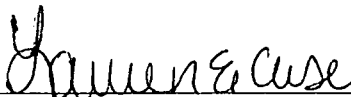
The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina, 29201, this 15th day of March, 2011.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.