

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

19992

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3692

The City of Columbia Appellant,

v.

Carol A. Davis Respondent.

RECORD ON APPEAL

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Court of Appeals

INDEX

Order of March 15, 2012	2
Transcript of Proceedings of October 4, 2010.....	5
Transcript of Proceedings of May 12, 2011	34
Transcript of Proceedings of February 3, 2012	64
Affidavit for Failure to Produce Videotape, dated March 31, 2010.....	101
Affidavit for Failure to Produce Videotape, dated April 5, 2010.....	103
Correspondence dated April 7, 2010, from Shirlean Steater.....	104
Certificate of Appellant	105

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Columbia Municipal Court,)
)
 Respondent.)
 vs.)
)
 Carol A. Davis,)
)
 Appellant.)
 _____)

IN THE COMMON PLEAS COURT
 FIFTH JUDICIAL CIRCUIT

CASE NO: 2011CP4003692

ORDER

RICHLAND COUNTY
 FILED
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 JEANETTE W. McBRIDE
 C.C.P. & G.S.

This matter came before the Court on February 3, 2012 upon an appeal filed by the City of Columbia. The City of Columbia was represented by Assistant City Attorney David Fernandez and Assistant City Attorney Constance Holloway. The Defendant Carol A. Davis was represented by John A. O'Leary, Esquire, of Columbia.

FACTS

This matter was tried before the Honorable Marion O. Hanna on May 12, 2011 following earlier hearings on October 4, 2010 and May 12, 2011 at which time rulings on these motions were withheld with jurisdiction retained by Judge Hanna. At the hearing on May 12, 2011 Judge Hanna, upon motion of the defense, suppressed the DataMaster results, suppressed the DataMaster video, and dismissed the case pursuant to Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007). These issues were challenged on the appeal by the City of Columbia and the City argued that it was error for the court to grant the motion to dismiss under Suchenski. The facts surrounding the motion to dismiss based upon Suchenski were as follows:

The arrest occurred on October 8, 2008. Discovery motions were filed by the Defense requesting specific information as to the video equipment assigned to the officer's vehicle at the time of the arrest. The Defense received an Affidavit dated March 31, 2010 which was a form with a check mark indicating that, at the time of the Defendant's arrest, the equipment was in an inoperable condition. The City claims the affidavit that was submitted applied to another case and subsequently, a second Affidavit was sent to the Defendant's counsel dated April 5, 2010. This Affidavit was also a form Affidavit with a check mark indicating that the vehicle had yet to be equipped with a videotaping device.

Neither Affidavit had a legible signature or identification as to who the arresting officer

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was. Neither had a date of the arrest, the defendant's name (or the name of the person arrested), the arresting officer's name, the location of the arrest, the case number for the arrest, nor any type of indicator regarding to which case these Affidavits applied. Clearly they are inconsistent Affidavits. One or both of them is false. S.C. Code Ann. § 56-5-2953 requires the video recording devices at the incident site and the breath test site. Section 56-5-2953(B) states that the failure to produce the video is not alone a basis for dismissal of the charges if the arresting officer submits a sworn affidavit certifying that the video recording equipment is, at the time of the arrest or probable cause determination, inoperable (with reasonable efforts being made to repair) or unavailable at the time of the arrest. Essentially, these Affidavits allow exceptions to the mandates set forth in the requirement of Section 56-5-2953.

The transcript of the hearing before Judge Hanna, clearly points out that there was nothing on either of the forms indicating to what case the form applied. Tr. p. 28. She found that there was no procedure for obtaining the affidavit and the affidavit was provided some two years after the 2008 arrest. Tr. p. 30. The Court, as evidenced by the transcript, acted correctly in finding that the Affidavits were fatally flawed. A review of those Affidavit shows that the Affidavits were without a factual basis, the two were inconsistent with each other, both were filed approximately two years after the date of the incident, and neither Affidavit had any identifying information including the name of the case, the officer's name, the assigned case number, or any ticket number referenced on them. On their faces, there is absolutely no way to identify to which case, if any, these two form Affidavits would actually apply. Reviewing the Affidavits further, the signatures on the face of these form affidavits are illegible, the arresting officer's name is not listed anywhere on the affidavit and there is no way to know exactly who the officer was that signed these particular affidavits.

Based on the totality of the circumstances and the irregularities referenced above, it is apparent that Judge Hanna acted reasonably, correctly, and in no way abused her discretion in refusing to accept the affidavits as complying with the provisions of Section 56-5-2953. Viewing the totality of the circumstances and the irregularities of both affidavits, they are not trustworthy and do not provide sufficient information to allow any court to make any intelligent decision as to whether the reasons asserted apply to the arrest of this defendant and are the reasons for the video tape not being available. Judge Hanna was correct in her decision to not

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Affidavits.

At that point, it was clear that Judge Hanna was left with a situation in which §56-5-2953(A) mandates that the entire incident be videotaped at the incident site as well as the breath site. Pursuant to Rock Hill vs. Suchenski, it is required that the case be dismissed. Suchenski states that the plain language of the statute requires that the "failure to produce the videotapes would be a ground for dismissal if no exceptions apply." Judge Hanna was correct in her analysis as to the sham affidavits, in applying Rock vs. Suchenski, and in dismissing the underlying charge of driving under the influence. Once the affidavits were dismissed there were no applicable exceptions for the failure to produce the videotapes and the plain language of the statute provided for dismissal. There is no requirement to show any prejudice to the defendant. See Rock Hill vs. Suchenski, *supra*.

Several issues were raised by the City of Columbia in the appeal, specifically referencing the suppression of the DataMaster results and the videotape of the breath test site. It was proper to dismiss the case under Suchenski and therefore the additional issues are moot. Futch v. McAllister Towing of Georgetown, Inc., 355 S.C. 598, 518 S.E.2d 591 (1999).

IT IS HEREBY ORDERED that the decision of the Honorable Marion O. Hanna is AFFIRMED and the appeal is hereby dismissed.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Fifth Judicial Circuit

March 15, 2012
Columbia, South Carolina

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1 DAY I'LL PASS UP TO THE COURT A COPY OF THOSE S.L.E.D. RECORDS AND IT
2 SHOWS THAT -- I'LL TAKE IT TWO DIFFERENT WAYS HERE. I'LL PASS UP TO THE
3 COURT A COPY OF THE DATAMASTER SLIP. A SIMULATOR SOLUTION WAS
4 SUPPOSED TO BE ON THAT ONE, 088020940 WHICH SHOWS ON THE FACE OF THAT
5 DATAMASTER MACHINE. THE DATE OF THE OFFENSE WAS 10-8-08. AND WHEN I
6 GOT THE S.L.E.D. RECORDS OFF LINE IT SHOWS THAT ON 10-2 THERE WAS A
7 DIFFERENT SIMULATOR SOLUTION IN THAT PARTICULAR MACHINE AND THE
8 OFFICIAL CHANGE RECORDS FROM S.L.E.D. DON'T EVER SHOW THAT SIMULATOR
9 SOLUTION BEING PUT INTO THAT MACHINE. I MAY HAVE TO POINT THAT OUT TO
10 YOU TO SHOW YOU BUT I'LL PASS IT UP TO YOU. THESE THINGS ARE HARD TO
11 READ AFTER A WHILE. JUDGE, ON THE SHEET THAT YOU'VE BEEN HANDED IF
12 YOU'LL LOOK ON THE DATE OF THE TESTING YOU'LL SEE A 10-2-08 AND THEN GO
13 OVER TO THE SIMULATOR AND LOT NUMBER AND BOTTLE NUMBER YOU'LL SEE
14 THAT IT SAYS 9643 AND UNDERNEATH THAT 8765 AS BEING THE SIMULATOR
15 SOLUTION IN THAT MACHINE. NOW IF YOU'LL FLIP OVER TO THE NEXT PAGE
16 YOU WILL SEE THE ONLY SOLUTIONS PUT INTO THAT MACHINE BY S.L.E.D. THAT
17 MONTH AT ALL WERE 90940 AND 0925 ARE THE BOTTLE NUMBERS. SO WHAT I'M
18 TRYING TO SAY TO THE COURT IS THAT THIS THING THAT TOOK PLACE ON 10-2,
19 THAT THOSE SIMULATOR SOLUTIONS -- I HAVE NO -- SOMEBODY OBVIOUSLY
20 HAD TO DO SOMETHING TO THAT MACHINE BECAUSE THEY'VE GOT A
21 SIMULATOR SOLUTION IN THERE THAT WAS NEVER PUT IN THERE OFFICIALLY
22 BY S.L.E.D. RECORDS. SO WHAT I DID WAS I DID SUBPOENA THE DEPARTMENT
23 RECORDS AS TO WHAT THEY HAD AND THE SUBPOENA THAT I PASSED UP TO THE
24 COURT WAS THE SUBPOENA THEY NEVER RESPONDED TO. SO I NEVER COULD
25 ACCOUNT FOR WHAT HAPPENED AND HOW THIS OCCURRED AND HOW THESE

1 OFFICIAL RECORDS SHOW THAT ON 10-2 THERE WAS A DIFFERENT SIMULATOR
2 SOLUTION IN THAT PARTICULAR MACHINE. AND I THINK IT'S CRITICAL AND I
3 THINK UNDER THE CASES I WOULD MOVE TO SUPPRESS THE DATAMASTER
4 RESULTS FROM THAT, THE PRIMARY REASON BEING THAT THEY NEVER
5 PROVIDED ME RECORDS THAT I NEEDED THAT I BELIEVE I'M ENTITLED TO AND
6 THEY ARE REQUIRED TO BE KEPT AND THEY IN FACT DO KEEP THEM IN
7 HANDWRITTEN DOCUMENTS OF TRANSACTIONS INVOLVING PARTICULAR
8 MACHINES BECAUSE I'VE GOTTEN THEM IN THESE COURTS BEFORE. SO I THINK
9 JUST ON ITS FACE THERE'S A PROBLEM WITH THIS MACHINE. WHAT THAT
10 PROBLEM IS I HONESTLY DON'T KNOW BUT I DO THINK HAD THEY PROVIDED
11 THOSE MATERIALS I WOULD HAVE BEEN ABLE TO MAYBE FIGURE OUT AND
12 EXPLAIN IT AS AN ANOMALY OR SOMETHING BUT YOU CAN'T GET OFFICIALLY
13 INTO THE S.L.E.D. RECORDS AND YOU'LL SEE CLEARLY ON THE S.L.E.D. RECORDS
14 THAT SOLUTION ON THE 2ND WAS NEVER EVER PUT INTO THAT MACHINE. I
15 HOPE IT WASN'T TOO CONFUSING FOR YOU, JUDGE, BECAUSE IT IS A LITTLE
16 HARD TO FOLLOW. YOU CAN CLEARLY SEE IT'S GOT SOMETHING IN HERE THAT
17 SHOULDN'T BE THERE.

18 **THE COURT:** WHAT YOU'VE HANDED ME ON PAGE ONE OF TWO AS
19 A REFERENCE TO OCTOBER 2ND, 2008, THERE ARE TWO ENTRIES FOR THAT DATE
20 THAT YOU HAVE CIRCLED AND THEN IT SHOWS BOTTLE NUMBER, SIMULATOR
21 LOT, SLASH BOTTLE, WAS 9643 AND 8765.

22 **MR. O'LEARY:** YES, MA'AM.

23 **THE COURT:** ON THE OTHER PAGE THAT YOU'VE GIVEN ME, IT
24 SAYS PAGE ONE OF ONE SHOWS OCTOBER 22ND, 2008, AND BOTTLE NUMBER 925.

25 **MR. O'LEARY:** YES, THAT'S AFTER THE DATE OF OUR TEST.

1 **THE COURT:** OKAY. BOTH OF THESE REPORTS ARE DATED
2 DECEMBER 12TH, 2008?

3 **MR. O'LEARY:** YES, I RAN THAT ON DECEMBER 12TH. THAT'S WHY
4 I SUBPOENAED THE RECORDS. YOU'LL SEE RIGHT ABOVE THAT ON 9-24-08 THAT
5 IS WHEN BOTTLE NUMBER 0940 WAS PUT IN. SO IF THEY HAD HAD ONE IN THERE
6 ON 10-2 THAT REFLECTED THE NUMBER OF 9643, 8765 THAT SHOULD HAVE
7 SHOWN UP ON THIS SOLUTION CHANGE REPORT AT S.L.E.D. WHICH WE JUST
8 WENT OVER AND IT DOESN'T. SOMEBODY HAD TO HAVE EITHER PUT ANOTHER
9 SOLUTION IN THERE THAT DAY AND THEN CHANGED IT BACK SOMEHOW BUT IT
10 WOULD SHOW UP. AND THAT'S THE THING I'M BAFFLED WITH. I HONESTLY
11 DON'T THINK I'VE EVER SEEN THAT BEFORE. MAYBE IT WAS EXPLAINABLE
12 FROM THE ACTUAL DEPARTMENT RECORDS BUT THEY NEVER RESPONDED TO
13 THE SUBPOENA.

14 **THE COURT:** AND THE BREATH ALCOHOL ANALYSIS TEST REPORT
15 YOU'VE HANDED UP REFERS TO B.A.C. DATAMASTER SERIAL NUMBER 881273
16 AND THE TWO PAGES WHICH WE'VE JUST REFERENCED REFER TO THE SAME --

17 **MR. O'LEARY:** 881273.

18 **THE COURT:** RIGHT. OKAY. AND THERE'S NOTHING ON THE
19 DATAMASTER REPORT SHOWING WHAT BOTTLE NUMBER. THAT DOESN'T SHOW
20 ON THERE.

21 **MR. O'LEARY:** YES, IT DOES.

22 **THE COURT:** DOES IT? OH, YES, IT DOES. I SEE.

23 **MR. O'LEARY:** YOU'LL SEE IT SAYS --

24 **THE COURT:** I SEE IT, YES. THERE'S LOT NUMBER 8802 AND
25 BOTTLE NUMBER 0940. 0940 APPEARS ON HERE ON 9-24. SEPTEMBER 24TH ON

1 THIS REPORT THAT YOU HANDED UP THAT BOTTLE NUMBER APPEARS. AND
2 THAT LOT NUMBER. AND YOU'RE SAYING THAT WAS --

3 **MR. O'LEARY:** JUDGE, WHAT I'M SAYING IS THIS MACHINE, THE
4 NUMBER WHICH YOU JUST READ, 881273, THE MACHINE, THAT ON 10-2 THAT
5 MACHINE, A TEST WAS RUN AND IT WAS RUN WITH BOTTLE 96438765. SO IT HAD
6 TO HAVE BEEN THE SIMULATOR SOLUTION IN THE MACHINE THAT DAY. NOW
7 HOW IT GOT THERE AND HOW IT GOT OUT I DON'T KNOW BECAUSE YOU'LL SEE
8 ON THE SIMULATOR SOLUTION CHANGE RECORDS OF S.L.E.D. THERE'S NO
9 REFERENCE TO THOSE BOTTLE NUMBERS AT ALL. THAT'S WHY I THOUGHT IT
10 WAS CRITICAL. I THINK ON IT'S FACE IT SHOWS PROBLEMS, SOMETHING IS
11 GOING ON WITH THIS MACHINE.

12 **THE COURT:** MR. FERNANDEZ.

13 **MR. FERNANDEZ:** THANK YOU, YOUR HONOR. REGARDING THE
14 SUBPOENA, I BELIEVE -- I JUST SAW IT VERY BRIEFLY -- I BELIEVE IT WAS SENT
15 TO CITY OF COLUMBIA POLICE DEPARTMENT. C.P.D. DOESN'T HAVE ANY
16 RECORDS ON THE DATAMASTER. S.L.E.D. IS THE ONE WHO IS CHARGED BY
17 STATUTE TO MAINTAIN THE DATAMASTER MACHINE EVEN THOUGH THEY ARE
18 PHYSICALLY LOCATED AT DIFFERENT POLICE DEPARTMENTS. C.P.D. DOESN'T
19 PERFORM ANY MAINTENANCE ON THE DATAMASTER MACHINES. ONLY S.L.E.D.
20 WOULD HAVE THE RECORDS. I DON'T HAVE ACCESS TO THOSE RECORDS. I
21 HAVE TO GET THEM THE SAME WAY ANYONE ELSE WOULD HAVE TO GET THEM.
22 SO AS FAR AS SUBPOENA TO THE CITY OF COLUMBIA POLICE DEPARTMENT
23 THERE WOULD BE NO DOCUMENTATION ABOUT THAT BECAUSE WE HAVE NO
24 RESPONSIBILITY OR EVEN AUTHORITY TO DO ANYTHING TO THE MACHINES
25 OTHER THAN OPERATE THEM.

1 YOUR HONOR, ABOUT THE SOLUTION, THIS IS TEXTBOOK STATE V.
2 HUNTLEY, YOUR HONOR. I'VE INCLUDED THAT CASE. THAT CASE ACTUALLY
3 HAD TO DO WITH THE SIMULATOR SOLUTION AS WELL. I DO HAVE A COPY OF IT
4 IF YOUR HONOR WOULD LIKE.

5 **MR. O'LEARY:** JUDGE, I HAVE ONE. I'LL PASS IT UP TO YOU.

6 **MR. FERNANDEZ:** YOUR HONOR, THE STATE V. HUNTLEY
7 ACTUALLY DOES A GOOD JOB OF EXPLAINING WHAT THE PURPOSE OF THE
8 SIMULATOR SOLUTION IS. ALL THAT IS IS AN ALCOHOL AND DISTILLED WATER
9 MIXTURE THAT IS SEPARATE FROM THE MACHINE'S OPERATION ITSELF. IT IS
10 PART OF THE PROCESS THAT THE MACHINE GOES THROUGH WHILE TESTING. IT
11 HAS NOTHING TO DO WITH THE ACTUAL READING OF THE BREATH ALCOHOL
12 FROM THE SUBJECT. IT'S ONLY PURPOSE IS TO PUMP A CERTAIN AMOUNT OF
13 ALCOHOL INTO THE MACHINE THAT IT'S DESIGNED TO PUMP INTO IT AT
14 AROUND THE POINT ZERO EIGHT MARK. THE ONLY PURPOSE IS TO HAVE THE
15 MACHINE TESTED TO MAKE SURE THE MACHINE CAN READ THAT ALCOHOL
16 SOLUTION. IT HAS NOTHING TO DO WITH THE ACCURACY OF THE MACHINE OR
17 ANYTHING LIKE THAT. AND THAT'S WHAT HUNTLEY SAYS. IN THIS CASE IN
18 HUNTLEY I THINK THE SOLUTION WAS HIGH, LIKE A POINT ONE "O" INSTEAD OF
19 A POINT "O" EIGHT. WHAT THE COURT SAID IS THAT --

20 **THE COURT:** THIS HAD TO DO WITH THE MISTAKE IF YOU WILL IN
21 THE CODE, RIGHT? HUNTLEY?

22 **MR. FERNANDEZ:** I'M SORRY?

23 **THE COURT:** HUNTLEY HAD TO DO WITH SOMETHING DIFFERENT
24 BEING IN THE CODE, IN THE WRITTEN CODE, ABOUT THIS --

25 **MR. FERNANDEZ:** THE ACTUAL STATUTE?

1 **THE COURT:** YES.

2 **MR. FERNANDEZ:** THERE WAS THAT ISSUE BUT THE SUPREME
3 COURT DIDN'T OVERRULE IT BASED ON THAT ISSUE. THIS IS A COURT OF
4 APPEALS (INAUDIBLE). THEY DIDN'T OVERRULE IT BASED ON THE DIFFERENCE
5 IN THE CODE. THEY OVERRULED IT BECAUSE WHAT THEY SAID WAS THE
6 SOLUTION EVEN THOUGH IT WAS AT A POINT ONE "O" HAS NOTHING TO DO WITH
7 THE ACCURACY OF THE MACHINE. THE MACHINE READ IT AT POINT ONE "O"
8 EVEN THOUGH IT'S SUPPOSED TO BE A POINT "O" EIGHT BUT THAT STILL HAD
9 NOTHING -- IT COULD HAVE BEEN A POINT TWO FIVE. IT HAS NOTHING TO DO
10 WITH WHETHER OR NOT THE MACHINE CAN READ A SUBJECT'S SAMPLE. IT
11 ONLY HAS TO DO WITH WHAT THE MACHINE CAN READ THAT SAMPLE. I DON'T
12 KNOW IF I'M EXPLAINING IT CORRECTLY OR NOT.

13 **THE COURT:** I'VE LOOKED AT HUNTLEY QUITE A BIT SO, YES, I
14 UNDERSTAND IT.

15 **MR. FERNANDEZ:** BUT THE BASIS OF HUNTLEY IS THE OLD
16 STANDARD WE FALL BACK ON IS THAT -- AND THIS ISN'T A SUCHENSKI BECAUSE
17 WE ARE OBVIOUSLY NOT TALKING ABOUT THE SAME STATUTE BUT HUNTLEY
18 BASICALLY SAYS DEVIATION OF THE IMPLIED CONSENT WHICH WOULD BE THE
19 OPERATION OF THE MACHINE GO TO THE WEIGHT, NOT THE ADMISSIBILITY. IN
20 THIS CASE -- AND THERE'S A PREJUDICE ANALYSIS THAT HAS TO GO FORWARD,
21 TOO. IN THIS CASE THE ONLY POSSIBLE PREJUDICE OF AN UNDOCUMENTED
22 SOLUTION WOULD BE -- I CAN'T POSSIBLY SEE -- THERE WAS A SOLUTION OF
23 POINT ZERO EIGHT ALCOHOL. THE MACHINE READ THAT SOLUTION
24 CORRECTLY. I THINK WHAT COUNSEL IS ARGUING IS THAT THE BOTTLE
25 NUMBER -- WE'RE NOT SURE IF IT'S BOTTLE NUMBER 940 OR NOT. I THINK IT'S

1 JUST UNDOCUMENTED. THERE'S NOTHING TO SUGGEST THAT ANYTHING WAS
2 IMPROPER WITH THE TEST ITSELF. THERE'S AN ASSERTION THAT WE DON'T
3 KNOW IF THE ALCOHOL SIMULATOR WAS AT POINT "O" EIGHT OR THERE WAS AN
4 ACCURATE SAMPLE IN THERE BUT WE KNOW THERE WAS BECAUSE THE TEST
5 RAN. YOU HAVE THE B.A. TICKET. THE TEST RAN. IT RAN AT POINT ZERO SEVEN
6 NINE AND THAT'S WHAT IT READ. IT THEN CLEARED ITSELF OUT AND THEN
7 WENT ON TO DO A SUBJECT SAMPLE WHICH IS WHAT MS. DAVIS PROVIDED AT
8 POINT ONE SEVEN. THERE'S NOTHING WRONG WITH THE MACHINE AT ALL. THE
9 MACHINE WAS WORKING CORRECTLY. EVERY SINGLE TEST IT TOOK IT PASSED
10 SO WE ARE NOT TALKING ABOUT THE -- WE ARE TALKING ABOUT THE HUNTLEY
11 ISSUE. THERE'S NOTHING WRONG WITH THE MACHINE.

12 MR. O'LEARY: JUDGE, I WOULD DISAGREE. ONE, THEY DO KEEP
13 RECORDS BECAUSE I'VE SUBPOENAED THEM BEFORE. THEY HAVE
14 HANDWRITTEN NOTES AS TO THE DATES THEY DO CERTAIN THINGS WITHIN THE
15 DEPARTMENT.

16 THE COURT: WELL --

17 MR. O'LEARY: YEAH, COLUMBIA DOES IT. THEY KEEP THEM OUT
18 AT -- MY UNDERSTANDING IS THEY KEEP THEM AT THE SUBSTATION OUT NEAR
19 THE FIRE DEPARTMENT IN THE IRMO AREA. BUT IN ANY EVENT NOT ARGUING
20 THAT, THE ONLY RECORDS I WAS ABLE TO GET ARE THE S.L.E.D. RECORDS AND
21 THESE S.L.E.D. RECORDS SHOW CLEARLY THAT THERE'S A SOLUTION IN THIS
22 MACHINE ON 10-2 THAT DOESN'T SHOW UP ON HERE AS EVER BEING PUT INTO
23 THAT MACHINE. AND I THINK THAT ON ITS FACE CREATES -- MAYBE THEY CAN
24 CORRECT IT; HOWEVER, THESE RECORDS, THE ONLY ONES THEY SAY I'M
25 ENTITLED TO, SHOW THAT THERE'S A PROBLEM WITH THIS PARTICULAR DEVICE.

1 AND FOR THOSE REASONS -- THE TWO REASONS BEING THEY DIDN'T PROPERLY
2 COMPLY WITH THE SUBPOENA AND, NUMBER TWO, THAT THESE RECORDS ON
3 THEIR FACE SHOW PROBLEMS WHICH I THINK ARE SERIOUS IN REFERENCE TO
4 THIS PARTICULAR MACHINE.

5 **THE COURT:** MR. FERNANDEZ IS ARGUING THAT YOU SHOULD
6 HAVE SENT THE SUBPOENA TO SOMEONE AT S.L.E.D.

7 **MR. O'LEARY:** YOUR HONOR, IT'S NOT S.L.E.D. THE STATE LAW
8 SAYS THE DEPARTMENT SHALL KEEP RECORDS. I'VE GOT S.L.E.D.'S. S.L.E.D.'S
9 RECORDS ARE THESE. I'VE GOT S.L.E.D.'S RECORDS. THEY ARE THE OFFICIAL
10 RECORDS. BUT THE STATE LAW UNDER THE OLD LAW SAYS THAT THEY STILL
11 HAVE TO KEEP RECORDS OF ANY CHANGES OR TRANSACTIONS INVOLVING THAT
12 MACHINE. THEY ARE SUPPOSED TO KEEP IT WITHIN THE DEPARTMENT WITH THE
13 MACHINE AND I KNOW THAT THEY DO THAT SO THAT'S MY FRUSTRATION OF
14 THIS THING THAT I HAVEN'T BEEN ABLE TO SEE IT. THEY WOULD HAVE SHOWN -
15 - IF THEY HAD A HANDWRITTEN ONE, THEY WOULD HAVE SHOWN THE
16 SOLUTIONS THAT WERE PUT IN AND OUT OF THIS MACHINE AND ANY WORK
17 THAT WAS DONE INTERNALLY WITH IT. NOW THE TRUTH OF THE MATTER IS
18 S.L.E.D. DOES THE OFFICIAL MAINTENANCE ON THEM BUT THERE'S SEVERAL
19 TINKERING THINGS THAT GO ON WITH THE DEPARTMENT BUT THEY DO KEEP
20 THOSE RECORDS AND THE STATE LAW DID SAY THAT SO THERE SHOULD BE TWO
21 SETS OF RECORDS. AND THE ONLY ONE THAT THEY ARE SAYING I'M ENTITLED
22 TO AND I GET SHOWS A PROBLEM TO ME.

23 **THE COURT:** YES, MR. FERNANDEZ.

24 **MR. FERNANDEZ:** YOUR HONOR, THE B.A. TICKET ITSELF SAYS
25 BOTTLE NUMBER 940 WAS USED AND BOTTLE 940 PUT INTO THE SIMULATOR

1 SOLUTION OF POINT ZERO EIGHT -- POINT ZERO SEVEN NINE WHICH THE
2 MACHINE. I DON'T KNOW WHAT THE OTHER SOLUTION IS UNDOCUMENTED.
3 THERE'S NO SUGGESTION OF WHAT HAPPENED THERE AND I DON'T (INAUDIBLE)
4 THAT. I KNOW COUNSEL IS SAYING THAT WE KEEP RECORDS. WE DON'T DO ANY
5 WORK ON THE MACHINES. I DON'T KNOW WHAT RECORDS HE'S REFERRING TO.
6 I'VE NEVER SEEN THAT SUBPOENA. HE SENT IT TO THE CITY OF COLUMBIA
7 POLICE DEPARTMENT. THEY NEVER FORWARDED IT TO US. I'VE NEVER SEEN
8 THAT. I'VE NEVER HEARD OF ANY RECORDS BEING KEPT BY US IN ANY D.U.I.
9 CASE WE'VE EVER DONE. NOW IF COUNSEL SAYS HE'S HAD RECORDS BEFORE I
10 CAN'T SAY THAT BUT I KNOW WE DON'T DO ANY WORK ON THE MACHINES. WE
11 ARE NOT ALLOWED TO, WE ARE NOT TRAINED TO.

12 BUT TO THE CASE AT HAND, YOUR HONOR, THE B.A. TICKET IS
13 CLEAR. 940 WAS USED. THAT WAS WHAT WAS IN THE MACHINE. WE KNOW
14 THAT BECAUSE IT READS 940 BOTTLE NUMBER ON THE B.A. TICKET. THE
15 SAMPLE PROVIDED POINT ZERO SEVEN NINE. THAT'S WITHIN THE STATUTORY
16 COMPLIANCE OF THE SIMULATOR SOLUTION THAT MUST BE (INAUDIBLE) EVEN
17 THOUGH IT'S NOT EVEN NECESSARY BECAUSE (INAUDIBLE). IT READ IT
18 ACCURATELY AND THEN IT PROVIDED A SUBJECT SAMPLE. THERE IS NO ISSUE
19 HERE. THE TEST WAS RUN ACCURATELY. THE TEST THAT WAS RUN WAS AN
20 ACCURATE TEST.

21 **THE COURT:** SO YOU ARE SAYING IF THE REPORT SHOWS THAT IT
22 MEASURED AS IT DOES, POINT "O" SEVENTY-NINE PERCENT THAT THERE'S NO
23 WAY THERE COULD BE A PROBLEM WITH IT?

24 **MR. FERNANDEZ:** ALL THAT MEASURES IS WHAT IS PUT IN THE
25 MACHINE ITSELF, INJECTED ALCOHOL (INAUDIBLE).

1 **THE COURT:** THE SIMULATOR?

2 **MR. FERNANDEZ:** RIGHT. SO WHAT HUNTLEY IS SAYING IN THAT
3 CASE IT WAS POINT ONE "O" AND THEY WERE ARGUING, WELL, THAT'S
4 INACCURATE. THE SUPREME COURT SAID ON PARAGRAPH, ON THE LAST PAGE,
5 FOUR, THE THIRD PARAGRAPH BEFORE THE END, THEY SAID THAT HAS NOTHING
6 TO DO WITH THE QUALITY OF THE READING. THAT ONLY HAS TO DO WITH ITS
7 ABILITY TO READ WHAT IT PUTS INTO ITSELF.

8 **MR. O'LEARY:** JUDGE, MY ONLY (INAUDIBLE) TO THAT IS THAT
9 SOMEBODY HAD TO HAVE PUT THAT OTHER SIMULATOR SOLUTION IN THERE ON
10 10-2 AND SOMEBODY HAD TO REPLACE THAT SIMULATOR SOLUTION FROM 10-2
11 TO GET BACK TO THE BOTTLE OF 0940. IF THEY DID THAT THEN IT SHOULD HAVE
12 SHOWN -- SOMETHING SHOULD HAVE SHOWN UP ON PAGE TWO WHICH SHOWS
13 THE SOLUTION CHANGE RECORDS. SOMEBODY HAD TO PUT THE ORIGINAL
14 BACK IN THERE IF THIS OTHER REPLACED IT ON 10-2.

15 **THE COURT:** SO HOW DOES THAT PREJUDICE YOUR CLIENT?

16 **MR. O'LEARY:** IT PREJUDICES OUR CLIENT BECAUSE THERE'S
17 SOMETHING GOING ON WITH THIS MACHINE, SOMETHING THAT OCCURRED
18 THAT'S NOT IN THESE OFFICIAL RECORDS BECAUSE THIS IS IMPOSSIBLE. I MEAN
19 THE OFFICIAL RECORD -- IS IT POSSIBLE IF YOU JUST DID IT WITHIN THE
20 DEPARTMENT? YES, IT IS. AND THAT WOULD BE REFLECTED IN THE
21 DEPARTMENT RECORDS WHICH I REQUESTED. AND HONESTLY I HAVE SENT
22 THOSE SUBPOENAS IN THE PAST. I THINK I'VE PROBABLY BEEN IN FRONT OF
23 YOU SEVERAL TIMES WHERE I'VE DONE THIS, I'VE SENT THEM TO THE
24 DEPARTMENT AND THEY'VE RESPONDED TO THEM WITH THE HANDWRITTEN
25 SHEETS THAT SOLUTION CHECKED ON THIS DAY IN THEIR OWN HANDWRITING

1 AS WAS REQUIRED UNDER THE STATUTE THAT SAYS YOU HAVE TO KEEP
2 WRITTEN RECORDS WITH THE MACHINE. AND NOW THEY ARE SAYING, WELL, NO
3 WE DON'T DO THAT, WE JUST DO S.L.E.D. AND IN THESE RECORDS SOMETHING IS
4 WRONG.

5 **THE COURT:** WELL, WHAT ABOUT THE REPORT SAYS THAT IT WAS
6 WORKING PROPERLY? DOES NOT THE REPORT INDICATE THAT IT WAS WORKING
7 PROPERLY IN THAT IT GAVE THE SIMULATOR TEST WAS DONE AND IT GAVE A
8 POINT "O" SEVEN NINE PERCENT READING.

9 **MR. O'LEARY:** THAT GIVES THE "O" SEVEN NINE READING. IT'S
10 PROBABLY WITHIN THE PARAMETERS THAT THEY SAID PLUS OR MINUS FIVE
11 WHICH ACTUALLY MAKES A DIFFERENCE, TOO, BUT TO GET TO THAT POINT
12 SOMEBODY HAD TO TAKE THE OTHER SOLUTION OUT, PUT THE 940 BOTTLES
13 BACK IN AND THEN LET THE MACHINE RUN AND TO DO THAT WITHOUT
14 OFFICIALLY HAVING IT RUN BY S.L.E.D. AND REFLECTED IN THEIR OFFICIAL
15 RECORDS AT S.L.E.D. I THINK IS A VIOLATION OF THE PROCEDURE IN THE STATE
16 STATUTE.

17 **THE COURT:** BUT YOU DON'T REALLY KNOW IF THAT'S A CHANGE,
18 AN ERROR IN THE REPORT, THAT IT COULD HAVE BEEN THE BOTTLE 940 IN
19 THERE, CORRECT AND WRITTEN DOWN WRONG? COULD IT NOT?

20 **MR. O'LEARY:** HOW THAT GOT THERE I DON'T KNOW, JUDGE. I
21 CAN'T SPECULATE BUT I DO KNOW THAT SOMETHING HAPPENED ON 10-2 AND
22 THERE'S A DIFFERENT BOTTLE NUMBER AND EVERYTHING AND IT'S THE SAME
23 MACHINE SO I CAN JUST GO ON THE ASSUMPTION THAT SOMEBODY HAD TO
24 CORRECT THAT BOTTLE, REPLACE IT WITH THE 0940 ONES AND IF THAT'S TRUE
25 THEN THOSE OFFICIAL CHANGES, WHEN THEY TAKE ONE SOLUTION OUT AND

1 PUT A NEW ONE IN, THAT SHOULD SHOW UP ON THE OFFICIAL RECORDS. IF IT
2 DOESN'T THEN THERE'S SOMETHING INHERENTLY WRONG WITH THIS BECAUSE
3 TECHNICALLY IF THEY PUT IN THIS OTHER SOLUTION THEN THAT WOULD
4 NEGATE THE 940 BECAUSE IT HADN'T BEEN OFFICIALLY PUT BACK IN AND
5 RECOGNIZED BY S.L.E.D.

6 **THE COURT:** WOULDN'T YOU NEED SOMEONE WHO IS AN EXPERT
7 IN ALL THIS TO TELL US WHAT THAT MEANS?

8 **MR. O'LEARY:** WELL, JUDGE, I WOULD ASK THE COURT TO ALLOW
9 US TO ORDER THE CITY TO TURN OVER THOSE RECORDS AND I KNOW EXACTLY
10 THE OFFICER WHERE THEY KEEP THE RECORDS AND SEE WHAT WENT ON THAT
11 DAY. I THINK I'VE GOT A RIGHT TO THAT AS COUNSEL.

12 **THE COURT:** WELL, MR. FERNANDEZ SAYS THEY DON'T HAVE THE
13 RECORDS.

14 **MR. O'LEARY:** JUDGE, I'D ASK TO BE ALLOWED TO REISSUE THE
15 SUBPOENA AND I'LL HAND CARRY IT OUT TO WHO I KNOW KEEPS THE RECORDS.

16 **MR. FERNANDEZ:** YOUR HONOR, I REALLY THINK WE CAN SOLVE
17 THIS TODAY. I'LL QUOTE HUNTLEY. THE ALCOHOL LEVEL IN THE SIMULATOR
18 TEST USED TO DETERMINE THE RELIABILITY OF THE BREATHALYZER
19 MACHINE'S TEST RESULTS; IT NEITHER CALIBRATES THE BREATHALYZER
20 MACHINE NOR AFFECTS THE CAPABILITY OF THE MACHINE TO PROPERLY
21 MEASURE THE SUBJECT'S BLOOD-ALCOHOL LEVEL. GOING ON. WHAT IS
22 RELEVANT IS THAT THE MACHINE ACCURATELY MEASURES THE PERCENTAGE
23 OF ALCOHOL IN THE SIMULATOR TEST SO THAT IT WILL, LIKEWISE,
24 ACCURATELY MEASURE THE PERCENTAGE OF ALCOHOL IN THE SUBJECT'S
25 BREATH. AND THE HOLDING IS EVIDENCE OF THE SIMULATOR TEST WAS NOT

1 RUN IN CONFORMITY WITH WHATEVER, INSERT STATUTE, GOES TO THE WEIGHT,
2 NOT THE ADMISSIBILITY, OF THE BREATHALYZER RESULTS. IT'S IRRELEVANT.

3 MR. O'LEARY: JUDGE, I DON'T THINK IT'S IRRELEVANT.

4 THE COURT: WELL, IT'S IRRELEVANT UNDER HUNTLEY WHETHER
5 THEY WERE USING A POINT ONE "O" OR A POINT "O" EIGHT PERCENT AS A
6 SIMULATOR. THAT'S WHAT'S IRRELEVANT UNDER HUNTLEY. BUT I DON'T
7 KNOW EXACTLY HOW THIS IS THE SAME THING HERE THAT WE ARE DEALING
8 WITH WHEN HE'S ALLEGING THERE IS SOME PROBLEM, MALFUNCTION I ASSUME,
9 OR PROBLEM THAT CAUSED THIS 940 BOTTLE TO BE IN THE MACHINE AND
10 THERE'S NO RECORD OF IT HAVING BEEN IN THERE. IS THAT CORRECT, MR.
11 O'LEARY?

12 MR. O'LEARY: IT IS, JUDGE. IF IT WAS IN THERE AND THEN
13 REPLACED WITH THE OTHER ONE SOMEBODY HAD TO HAVE TAKEN IN OUT AND
14 THAT SHOULD BE REFLECTED IN THE OFFICIAL RECORDS AND IT ISN'T. SO THEY
15 DON'T TECHNICALLY HAVE A SOLUTION IN THERE THAT HAS EVEN BEEN
16 RECOGNIZED BY S.L.E.D. AS THE ORIGINAL HAD BEEN REPLACED AND THEN
17 THEY BROUGHT IT BACK. I THINK THAT THAT MAKES IT FATAL.

18 MR. FERNANDEZ: YOUR HONOR, WE ARE ENGAGING IN PURE
19 SPECULATION WHEN THERE ARE CERTAIN THINGS WE CAN NARROW DOWN IN
20 THIS CASE. THE B.A. READS BOTTLE 940 SO WHATEVER THE S.L.E.D. RECORDS
21 INDICATE, WHATEVER IT DOESN'T INDICATE BECAUSE WE ARE SPECULATING
22 AND I THINK I SAW IT VERY BRIEFLY, YOUR HONOR, BUT I THINK THERE IS A
23 BLANK WHERE THERE SHOULD BE SOME WRITING.

24 THE COURT: YOU WANT TO TAKE A LOOK AT THIS?

25 MR. FERNANDEZ: YOUR HONOR, I LOOKED AT IT LIKE A MINUTE

1 THIS MORNING.

2 THE COURT: OKAY.

3 MR. FERNANDEZ: BUT WHAT WE ARE SPECULATING IS THAT
4 SOMETHING WAS CHANGED. IT IS JUST AS LIKELY THAT THIS IS A PURE
5 CLERICAL ERROR OR OVERSIGHT ON WHOEVER DID THIS THING.

6 THE COURT: WELL, THIS IS -- I WOULD THINK IT MIGHT BE A
7 CLERICAL ERROR. (INAUDIBLE) IT'S BOTTLE NUMBER 0940 AND I BELIEVE THE
8 ONE THAT'S INDICATED THERE IS 9643 SO I MEAN THEY ARE NOT REALLY THAT
9 SIMILAR IN THEIR NUMBERING SO THAT YOU COULD SEE IT'S CLEARLY A
10 SCRIBNER'S ERROR.

11 MR. FERNANDEZ: EVEN THESE RECORDS SHOW 940 AS THE TEST
12 RUN ON 10-8, CORRECT? WE CAN AGREE ON THAT. SO 940 WAS IN PLACE ON 10-2.

13 MR. O'LEARY: MY POINT IS THAT IT HAD BEEN TAKEN OUT AND
14 REPLACED.

15 MR. FERNANDEZ: HOW DO WE KNOW THAT?

16 MR. O'LEARY: WELL, BECAUSE THERE'S ANOTHER SOLUTION IN
17 THERE THAT PRINTS OUT RIGHT IN THE MIDDLE.

18 MR. FERNANDEZ: SO WHAT? IT WAS REPLACED A WEEK BEFORE
19 BY S.L.E.D AND 940 WAS REPLACING 820 AND THEN 940 WAS REPLACED BY 925.
20 WHAT IS THE POINT?

21 MR. O'LEARY: BECAUSE THERE'S ANOTHER ONE IN BETWEEN IT.

22 MR. FERNANDEZ: THEY CAN CHANGE --

23 MR. O'LEARY: NO, THEY CAN'T WITHOUT (INAUDIBLE).

24 MR. FERNANDEZ: IT'S DOCUMENTED. IT SAYS 940 WAS REPLACED
25 AT SOME TIME AND PUT BACK IN.

1 **MR. O'LEARY:** BUT IF IT'S REPLACED, JUDGE, IT HAS TO BE BACK
2 ON THE OFFICIAL SOLUTION CHANGES BY S.L.E.D. IF WHAT THEY SAY IS THAT
3 S.L.E.D. DOES ALL THE OFFICIAL MAINTENANCE AND EVERYTHING. IT SHOULD
4 HAVE SHOWN 10-2 OR WHATEVER THAT SOLUTION, THE OTHER NUMBER BEING
5 PUT IN AND THEN THE DATE OF THIS CASE THE 940 BEING REPLACED AND IT
6 DOESN'T SHOW THAT. IT'S GOT A NUMBER OF A BOTTLE OF SOLUTION THAT
7 SHOWS UP NOWHERE IN THE OFFICIAL RECORDS. HE SAYS THEY ARE THE ONLY
8 RECORDS.

9 **THE COURT:** WELL, AS MR. FERNANDEZ POINTED OUT THE 940 IS
10 ON HERE AND THE UNIT (INAUDIBLE) FROM OCTOBER THE 2ND THAT IT DOES
11 SHOW THAT IT WAS USED THAT DAY.

12 **MR. O'LEARY:** BUT IT HAD TO BE PUT BACK IN AFTER THE OTHER
13 ONE IS TAKEN OUT. THAT'S WHAT I'M TRYING TO SAY, JUDGE.

14 **THE COURT:** WELL, I STILL CAN'T SEE HOW THAT PREJUDICES
15 YOUR CLIENT.

16 **MR. O'LEARY:** JUDGE, IT PREJUDICES MY CLIENT WITHOUT BEING
17 ABLE TO HAVE THOSE RECORDS BECAUSE CLEARLY SOMEBODY OTHER THAN
18 S.L.E.D. HAS GOTTEN INTO THAT MACHINE AND DONE SOMETHING ON 10-2. I
19 THINK I HAVE AN ABSOLUTE --

20 **THE COURT:** WELL, I MEAN I DON'T THINK YOU HAVE ENOUGH
21 INFORMATION TO REACH THAT CONCLUSION.

22 **MR. O'LEARY:** THAT'S MY POINT. THAT'S WHY I'M ASKING THE
23 COURT TO REISSUE THAT SUBPOENA.

24 **THE COURT:** BUT SUPPOSE THEY DID, HOW WOULD THAT
25 PREJUDICE YOUR CLIENT?

1 **MR. O'LEARY:** BECAUSE S.L.E.D. WAS NEVER NOTIFIEDED THAT THE
2 SOLUTION WAS PUT IN AND OUT OF THAT MACHINE.

3 **THE COURT:** WELL, YOU DON'T KNOW THAT EITHER?

4 **MR. O'LEARY:** WELL, YEAH, I DO BECAUSE IT DOESN'T SHOW UP
5 ON HERE, JUDGE.

6 **THE COURT:** WELL, YOU KNOW IT DOESN'T SHOW UP ON HERE.

7 **MR. O'LEARY:** IF THEY HAD CHANGED THAT SOLUTION TO THE
8 OTHER NUMBER, THAT SHOULD SHOW UP IN THESE OFFICIAL RECORDS AND IF
9 THEY CHANGED IT BACK TO THE 940 THAT SHOULD HAVE SHOWN UP ON THE
10 OFFICIAL SOLUTION CHANGE RECORDS AT S.L.E.D. THAT TELLS ME THAT
11 SOMEBODY IS DOING SOMETHING TO THE MACHINE THAT S.L.E.D. DOESN'T
12 KNOW ABOUT AND HE SAYS THEY DON'T KEEP THE RECORDS.

13 **THE COURT:** ALL RIGHT. AND WHO WAS YOUR OFFICER ON THIS,
14 MR. FERNANDEZ?

15 **MR. FERNANDEZ:** THE ARRESTING OFFICER IS CHRISTIAN ROSS.
16 THE B.A. OPERATOR IS (INAUDIBLE).

17 **THE COURT:** ALL RIGHT. I DON'T SEE WHERE THERE'S CLEARLY
18 SOME SORT OF ERROR HERE WITH THE MACHINE. I DON'T SEE THAT THIS IS
19 PREJUDICIAL TO YOUR CLIENT WHEN THE RECORDS DO SHOW THAT THAT
20 TICKET OR BOTTLE WAS USED AND THE RECORDS MATCH WITH THIS REPORT SO
21 YOUR MOTION IS DENIED. LET ME PASS THIS BACK OVER.

22 **MR. O'LEARY:** JUDGE, CAN I RENEW THE MOTION TO ALLOW ME
23 TO TRY TO GET THOSE RECORDS FROM THE DEPARTMENT?

24 **THE COURT:** YOU ARE ASKING, WHAT, FOR A CONTINUANCE ON
25 THIS?

1 **MR. O'LEARY:** WELL, I THINK I HAVE A RIGHT TO THOSE RECORDS
2 TO PROPERLY ANALYZE IT FOR THE DEFENSE OF THE CASE AND THEY HAVEN'T
3 PRODUCED THEM. HE SAYS THEY DON'T HAVE IT. I KNOW THEY HAVE IT. I
4 THINK THAT IT MAY WELL SHOW SOMEBODY WAS TAMPERING WITH THAT
5 MACHINE WHICH WE WOULD BE PREJUDICIAL TO ME.

6 **THE COURT:** SO YOU THINK THAT THE CITY OF COLUMBIA POLICE
7 DEPARTMENT IS GOING TO HAVE THOSE RECORDS?

8 **MR. O'LEARY:** YES, THEY HAVE RECORDS. THEY HAVE
9 HANDWRITTEN RECORDS BECAUSE I'VE GOTTEN THEM ON MOST OF MY OTHER
10 CASES.

11 **THE COURT:** AND YOU SAY YOU KNOW WHO KEEPS THEM?

12 **MR. O'LEARY:** I KNOW WHERE THEY KEEP THEM. I CAN'T TELL
13 YOU WHO IS IN CHARGE.

14 **THE COURT:** WHERE THEY KEEP THEM.

15 **MR. O'LEARY:** I'LL HAVE TO GO BACK AND LOOK AT THE OTHER
16 FILE TO SEE WHO I ACTUALLY DEALT WITH. I CAN'T REMEMBER THE OFFICER'S
17 NAME BUT THEY WERE KEPT I KNOW OUT IN THE IRMO FIRE DEPARTMENT AREA
18 AT THAT STATION OUT THERE. I THINK IN ALL FAIRNESS TO MY CLIENT I
19 BELIEVE -- I'M AT A LOSS WHEN I COME IN HERE AND THEY HAVEN'T
20 RESPONDED IN TWO YEARS TO THE SUBPOENA. I DON'T KNOW WHAT ELSE TO
21 DO. I WOULD ASK THE COURT TO REISSUE THAT SUBPOENA AND ALLOW ME TO
22 HAND DELIVER IT TO THAT OFFICE AND HAVE THEM PRODUCE THOSE RECORDS.

23 **THE COURT:** MR. FERNANDEZ, DO YOU HAVE ANY COMMENT TO
24 THAT?

25 **MR. FERNANDEZ:** YOUR HONOR, THIS IS A 2008 CASE.

1 **THE COURT:** I KNOW THAT. I'M QUITE WELL AWARE OF IT.

2 **MR. FERNANDEZ:** THIS IS THE FIRST TIME I'VE EVER HEARD OF
3 ANY OF THESE ISSUES. WE HAD CONSIDERABLE AMOUNT OF TIME WE COULD
4 HAVE DISCUSSED THIS BEFOREHAND. OBVIOUSLY, NOW HE'S ASKING FOR A
5 CONTINUANCE. IT WOULD HAVE BEEN JUST AS EASY TO GIVE ME A PHONE CALL
6 AND SAY I SENT A SUBPOENA BACK ON WHATEVER DATE, NEVER HEARD A
7 RESPONSE, CAN YOU FIND SOMETHING FOR ME.

8 **THE COURT:** WELL, LET'S DEAL WITH WHAT WE HAVE ON THE
9 TABLE, NOT WHAT COULD HAVE BEEN.

10 **MR. FERNANDEZ:** YOUR HONOR, I STILL -- EVEN IF WE ARE GOING
11 TO GO DOWN THESE RABBIT HOLES AND ASSUME THE WORST THAT THE TEST
12 WAS TAMPERED WITH, WHAT WE DO HAVE IS VERIFIABLE DOCUMENTATION.
13 THE TEST WAS OPERATED PROPERLY AND THE FORM SHOWS THAT IT'S
14 OPERATING PROPERLY FOR HOWEVER LONG THAT TEST GOES TO. A YEAR. IF IT
15 REALLY WAS BEING TAMPERED WITH, IF WE ASSUME THE WORST, IF IT WAS
16 REALLY BEING TAMPERED WITH S.L.E.D. GOES OUT THERE THREE TIMES A
17 MONTH TO CHECK THE TEST CERTAINLY WOULD HAVE REMOVED IT FOR
18 REPAIR. THERE'S NOTHING TO INDICATE THAT -- NOTHING WAS EVER WRONG
19 WITH THE TEST SO WE CAN KIND OF ELIMINATE CERTAIN THINGS JUST USING
20 COMMON SENSE. YOU ASKED HIM HOW WAS HIS CLIENT PREJUDICED, HE SAID I
21 DON'T KNOW. LET'S ENGAGE IN THE WORSE CASE SCENARIO. WHAT COULD
22 POSSIBLY BE WRONG THAT S.L.E.D. WOULDN'T HAVE PICKED UP EVERY OTHER
23 TIME THEY WENT OUT THERE TO CHECK THE SAME TEST?

24 **MR. O'LEARY:** JUDGE, I DIDN'T SAY I DIDN'T KNOW. WHAT I'M
25 SAYING IS I CAN ASSUME MY CLIENT HAS BEEN PREJUDICED BY THE FACT THAT

1 THE RECORDS ON THEIR FACE SHOW AN ANOMALY ON THIS MACHINE AND THE
2 WAY IT WAS HANDLED. AND THE GOVERNMENT SAYS, WELL, WE DON'T REALLY
3 HAVE THOSE RECORDS SO I THINK THAT'S AN UNFAIR POSITION TO PUT A
4 DEFENDANT IN AND I WOULD ASK TO BE ALLOWED TO ASK THAT OFFICER WHO
5 IS IN CHARGE OF THAT SECTION WHO HANDLES THESE THINGS FOR THE
6 DEPARTMENT TO COME IN AND EXPLAIN THOSE RECORDS. I THOUGHT HE WAS
7 GOING TO PRODUCE THEM. THEY NORMALLY DO BUT THEY DIDN'T.

8 **THE COURT:** AND HOW LONG DO YOU THINK IT'S GOING TO TAKE
9 YOU TO GET THAT IF YOU HAVE THAT OPPORTUNITY?

10 **MR. O'LEARY:** PROBABLY IN A COUPLE OF DAYS.

11 **THE COURT:** COUPLE OF DAYS.

12 **MR. O'LEARY:** DEPENDING ON WHERE THE OFFICER -- I MEAN
13 THERE ARE SOME VARIABLES ON THAT. WHOEVER IS IN CHARGE OF IT. I HAVE
14 TO FIND THE NAME OF THE OFFICER AND PRESENT IT, GIVE HIM THE SUBPOENA
15 AND FIND OUT. IF IT'S WRONG I'LL BRING HIM IN AND HE CAN SAY WE DON'T
16 KEEP THOSE RECORDS BUT THEY SURE AS HECK DID KEEP THOSE RECORDS.

17 **THE COURT:** LET ME PASS YOUR COPY OF HUNTLEY BACK OVER.

18 **MR. O'LEARY:** OKAY. JUDGE, THAT'S AN EXTRA IF YOU WANTED
19 IT. YOU CAN KEEP IT.

20 **THE COURT:** I'M PRETTY SURE I HAVE SEVERAL COPIES.
21 SOMETHING CAME IN RECENTLY ON THIS OR A SIMILAR ISSUE BUT I DON'T HAVE
22 A COPY OF THAT. I'VE ONLY SEEN IT IN E-MAIL BUT YOU THINK YOU CAN BE
23 BACK HERE ON THURSDAY WITH THIS AND READY TO GO?

24 **MR. O'LEARY:** IF I DON'T HAVE A FEDERAL CONFLICT OR
25 SOMETHING, YES, YOUR HONOR. I'LL HAVE TO LOOK AND SEE IF THURSDAY.

1 **THE COURT:** WHAT ABOUT YOU, MR. FERNANDEZ?

2 **MR. FERNANDEZ:** I'M FINE FOR THURSDAY BUT I'D LIKE TO
3 CONFIRM A DAY.

4 **MR. O'LEARY:** CAN I MAKE A PHONE CALL?

5 **THE COURT:** SURE.

6 (PAUSE)

7 (HEARING RESUMES)

8 **MR. O'LEARY:** JUDGE THURSDAY LOOKS PRETTY GOOD. I'VE GOT
9 A MEDIATION BUT I THINK IT'S GOING TO BE DROPPED. THAT WAS MY
10 UNDERSTANDING, SO THURSDAY SEEMS FINE.

11 **THE COURT:** ALL RIGHT. IS THURSDAY GOING TO WORK FOR YOU
12 AND YOUR WITNESSES?

13 **MR. FERNANDEZ:** YES, YOUR HONOR.

14 **THE COURT:** ALL RIGHT. LET'S RECONVENE ON THIS ON
15 THURSDAY. DID YOU HAVE SOME OTHER MOTIONS YOU WANTED ME TO HEAR
16 PRETRIAL AS LONG AS WE ARE WORKING ON THESE?

17 **MR. O'LEARY:** JUDGE, YEAH, IF YOU WANT TO. JUDGE, CAN I GET
18 THAT SUBPOENA REISSUED OR WHATEVER OR BACK AND I'LL RESERVE IT.

19 **THE COURT:** I THINK I GAVE IT BACK TO YOU.

20 **MR. O'LEARY:** DO I NEED TO DO A NEW ONE?

21 **THE COURT:** I REALLY DON'T KNOW.

22 **MR. FERNANDEZ:** YOUR HONOR CAN ORDER ME TO TURN IT OVER.
23 I'LL FIND IT.

24 **MR. O'LEARY:** I'LL TELL YOU WHERE TO GO.

25 **THE COURT:** ALL RIGHT.

1 **MR. FERNANDEZ:** I'LL CALL WHOEVER JOHN THINKS MIGHT BE IN
2 CHARGE. I'LL MAKE SOME OTHER PHONE CALLS TO HIGHER UPS AND SEE IF WE
3 CAN FIND ANYTHING.

4 **THE COURT:** ALL RIGHT.

5 **MR. O'LEARY:** JUDGE, THERE IS ANOTHER MOTION. IN THIS CASE
6 THERE WERE -- I WOULD REQUEST, JUDGE, THE IN-CAR VIDEO AND EVERYTHING
7 UNDER DISCOVERY BUT ALSO WITH A SUBPOENA WHICH I WILL PASS UP TO THE
8 COURT. AND I RECEIVED BACK TWO DIFFERENT AFFIDAVITS TWO YEARS LATER.
9 I RECEIVED IN MARCH OF 2010 AND IN APRIL OF 2010. FIRST, I RECEIVED AN
10 AFFIDAVIT. IN APRIL -- APRIL 5TH, 2010, THAT THIS VEHICLE HAD NOT BEEN
11 EQUIPPED WITH A VIDEOTAPING EQUIPMENT. AND THEN ABOUT A WEEK OR
12 TWO LATER I RECEIVED A SECOND -- MAYBE I'VE GOT IT BACKWARDS. YES,
13 EXCUSE ME. THE APRIL ONE WAS THE SECOND ONE. FIRST ONE WAS MARCH
14 31ST. THE AFFIDAVIT SAID AT THE TIME OF THE PROBABLE CAUSE THE VIDEO
15 EQUIPMENT WAS IN AN INOPERABLE CONDITION SO I GOT TWO DIFFERENT
16 AFFIDAVITS, THE SECOND ONE SAYING ESSENTIALLY THAT THEY DIDN'T HAVE
17 VIDEOTAPING EQUIPMENT. I THINK THAT THOSE TWO AFFIDAVITS FILED TWO
18 YEARS LATER AFTER THE INCIDENT, APPROXIMATELY TWO YEARS, GIVE OR
19 TAKE A FEW MONTHS, AS TO A REQUEST THAT WAS PROPERLY SUBPOENAED IN
20 DECEMBER OF '08. I THINK IT'S IMPROPER FOR THE DEPARTMENT TO SAY WE
21 HAVE CONFLICTING -- SOMEBODY OBVIOUSLY DIDN'T KNOW THE TRUE STORY
22 AND IT WAS PROBABLY IN RESPONSE TO THE CITY GETTING READY FOR TRIAL
23 AND SENT OUT THE AFFIDAVIT. IF IN FACT THERE IS NO EQUIPMENT IN THE CAR,
24 I WOULD MOVE AND USE A COPY OF THE CASE OF THE TOWN OF MT. PLEASANT
25 WHICH BASICALLY MT. PLEASANT VS. (INAUDIBLE) ROBERTS IN WHICH THE

1 COURT FOUND THAT THE FACT THAT IN 19 -- THIS IS A CIRCUIT COURT CASE
2 FROM COMMON PLEAS, JUDGE NICHOLSON, WHERE MT. PLEASANT DIDN'T HAVE
3 VIDEOTAPING EQUIPMENT IN SPITE OF THE VIDEOTAPING LAW GOING INTO
4 EFFECT IN 1999 AND THE STATE FUNDING AND PROVIDED FUNDING FOR VIDEO
5 EQUIPMENT FOR THE CARS, THE CITY OF COLUMBIA -- THIS BEING NINE YEARS
6 LATER -- STILL DOESN'T HAVE A VIDEOTAPING EQUIPMENT AND THEY TRY TO
7 ESCAPE THE VIDEOTAPING EQUIPMENT SAYING WE DON'T HAVE IT AND,
8 THEREFORE, WE DON'T NEED IT UNDER THE STATUTE. JUDGE NICHOLSON SAID
9 IN THIS OPINION -- I'LL PASS UP A COPY -- THAT THAT WAS ABSOLUTELY
10 LUDICROUS BECAUSE OF THE FACT THAT THEY COULD CIRCUMVENT THE
11 VIDEOTAPING REQUIREMENT FOR THE STATE PASSED IN '99 BY SIMPLY SIGNING
12 THE AFFIDAVITS AND SAYING WE DON'T HAVE THE EQUIPMENT; THEREFORE, WE
13 DON'T NEED IT EVEN THOUGH IT'S REQUIRED, MANDATORY VIDEOTAPING
14 UNDER THE D.U.I. STATUTES AND VIDEOTAPING STATUTES WHICH ARE 56-5-2954
15 I BELIEVE. EXCUSE ME, 56-5-2953. IF IN FACT THEY DON'T HAVE VIDEOTAPING
16 EQUIPMENT AFTER NINE YEARS I WOULD MOVE THAT THE COURT FOLLOW THE
17 DECISION SET FORTH IN THAT MT. PLEASANT CASE, THAT THAT CASE SHOULD
18 CONTROL THE LOGIC OF IT BECAUSE TRULY YOU CAN GET AROUND THE WHOLE
19 MANDATES OF THE LEGISLATURE FROM '99 BY SIMPLY SIGNING THE AFFIDAVIT
20 UNDER EXCEPTION "B" UNDER 2953. AND THAT'S WHAT THAT CASE GOES INTO.
21 JUDGE, FOR THE PURPOSES OF ARGUMENT, I ASSUME THE OFFICER -- DID YOU
22 SAY BUCK WAS HERE? (INAUDIBLE)

23 **THE COURT:** DO YOU KNOW WHO SIGNED THEM? LET'S ADDRESS
24 THIS POINT OF CONFLICTING AFFIDAVITS.

25 **MR. FERNANDEZ:** SURE. OFFICER ROSS HAS A LARGE NUMBER OF

1 D.U.I.'S, PROBABLY THE MOST OF ANY OFFICER AT LEAST HAVING JURY TRIALS.
2 HE CAME IN AND HE'S COME IN FREQUENTLY TO FILL OUT AFFIDAVITS. THE ONE
3 THAT'S FILLED OUT ON MARCH 31ST IS NOT FOR THIS CASE. IT WAS SENT IN
4 ERROR. IT WAS SENT BY OUR -- I HAVE THE FAX, YOUR HONOR. IT WAS SENT BY
5 MY PARALEGAL. SHE JUST ASSIGNED IT TO THE WRONG CASE. THAT'S ALL IT IS.
6 THE CORRECT AFFIDAVIT IS THE APRIL 5TH -- FOR THIS CASE IS APRIL 5TH, 2010,
7 WHICH INDICATES THERE WAS NO VIDEO. THE OFFICER IS HERE. HE CAN TELL
8 YOUR HONOR THERE WAS NO EQUIPMENT IN HIS CAR AT THE TIME. IT WAS
9 MERELY AN OVERSIGHT BY MY PARALEGAL.

10 **MR. O'LEARY:** JUDGE, MY ONLY RESPONSE TO THAT THERE ARE
11 TWO AFFIDAVITS SIGNED BY THE OFFICER AND IT WAS BOTH FOR THIS CASE
12 AND THEY ARE CONTRADICTORY AFFIDAVITS AND IT JUST SHOWS ME THAT THE
13 SYSTEM USED BY THE CITY OF JUST SIGNING AT RANDOM THESE AFFIDAVITS
14 WITH REALLY NO FACTUAL BASIS OR THOUGHT GIVEN TO IT, THIS IS AN
15 IMPORTANT CASE. EVERY CRIMINAL CASE IS IMPORTANT TO THE DEFENDANT
16 THAT'S CHARGED AND TO HAVE SOMEBODY COME IN WITH TWO AFFIDAVITS
17 TOTALLY OPPOSITE THERE'S SOMETHING WRONG WITH THAT SYSTEM. AND I
18 DON'T THINK THAT WAS JUST AN INADVERTENT ERROR BY THE CITY SENDING IT
19 OUT.

20 **MR. FERNANDEZ:** YOUR HONOR, THERE IS NOTHING ON THE
21 AFFIDAVITS THAT MARK IT FOR A PARTICULAR CASE. THERE'S NOWHERE TO
22 WRITE STATE V. WHOEVER AND THAT'S WHY THE OVERSIGHT HAPPENED. THEY
23 ARE GENERIC. IF YOU LOOK AT THE FORM UNLESS YOU KNEW EXACTLY WITH
24 SOME SORT OF STICKY NOTE IT'S POSSIBLE TO MIX THEM UP FROM CASE TO
25 CASE AND THAT'S WHAT THEY DID. OFFICER ROSS HAS MANY CASES. SOME

1 INVOLVE A CAR THAT HAD VIDEO WITH MALFUNCTIONING PROBLEMS AND
2 SOME LIKE THIS CASE IN 2008 INVOLVING A CAR THAT JUST WASN'T EVEN
3 EQUIPPED. THAT'S THE MIX-UP. IT TRULY IS A MIX-UP. THE MARCH CASE, THE
4 MARCH AFFIDAVIT THAT WAS SENT WAS NOT FOR THIS CASE.

5 **THE COURT:** ALL RIGHT. DO YOU WANT TO ADDRESS THE ISSUES
6 RAISED IN MT. PLEASANT?

7 **MR. FERNANDEZ:** YES, YOUR HONOR. I'VE READ THAT CIRCUIT
8 COURT ORDER. IT'S QUITE LONG. THE FACT OF THE MATTER IS JUDGE
9 NICHOLSON JUST GOT IT WRONG. IT'S ON APPEAL. HE'S WAY OVERSTEPPING HIS
10 BOUNDS THERE. YOUR HONOR, THE STATUTE SAYS CLEARLY THAT D.P.S.,
11 DEPARTMENT OF PUBLIC SAFETY, SHALL PROVIDE CAMERAS FOR ALL POLICE
12 DEPARTMENTS IN THE STATE FOR PURPOSES OF VIDEOTAPING (INAUDIBLE). THE
13 CITY OF COLUMBIA REQUESTED CAMERAS. WE WERE GIVEN NINE OUT OF A
14 REQUEST FOR THE WHOLE DEPARTMENT. BECAUSE WE WERE GIVEN NINE AND
15 WE THOUGHT D.U.I.'S WERE IMPORTANT WE AT OUR OWN EXPENSE WENT AND
16 FILLED OUT AS MANY CARS AS WE COULD AND I THINK A SIGNIFICANT
17 MAJORITY OF THE FLEET IS EQUIPPED WITH A VIDEO CAMERA AT THIS POINT.
18 D.P.S. ONLY PROVIDED US WITH NINE CAMERAS. I THINK RECENTLY ACTUALLY
19 AS IN A MONTH AGO THEY SENT THE LETTER SAYING THAT THEY ARE GOING TO
20 DO ANOTHER ROUND OF CAMERAS ALL TWO YEARS PLUS LATER. SO AS FAR AS
21 WHAT THE LEGISLATURE INTENDED THEY SPECIFICALLY WROTE INTO THE LAW
22 THAT D.P.S. ONLY SHALL PROVIDE THE CAMERAS. IT'S THEIR RESPONSIBILITY.
23 IT'S NOT THE RESPONSIBILITY OF TOWNS TO GO THAT EXTRA STEP. WE DID
24 AFTER IT BECAME CLEAR THAT D.P.S. WASN'T -- EITHER DIDN'T HAVE ENOUGH
25 MONEY OR -- I GUESS IT ALL COMES DOWN TO MONEY. PROVIDE AS MANY

1 DEPARTMENTS AND SHERIFF'S DEPARTMENTS CAMERAS. WE WENT THE EXTRA
2 STEP BECAUSE THEY WEREN'T GOING TO DO IT BUT TO BE PENALIZED FOR
3 DOING THAT AND WHEN IT BECAME CLEAR THEY WEREN'T GOING TO GIVE US
4 ANY CAMERAS WE DID GO THAT EXTRA STEP. BUT IN 2008 WHICH IS AROUND
5 THE TIME WE REQUESTED THE CAMERAS FROM THEM THEY WEREN'T GIVING
6 THEM TO US.

7 **THE COURT:** ALL RIGHT. LOOKING AT THE TRANSMITTAL -- THE
8 FAX TRANSMITTAL FROM MARCH 31ST REFERS TO THE CITY OF COLUMBIA
9 VERSUS CAROL DAVIS. THAT WAS ON MARCH 31ST AND THIS ONE SAYS THE
10 VIDEO EQUIPMENT WAS IN AN INOPERABLE CONDITION. HOWEVER, THE LETTER
11 SENT APRIL 7TH WHICH IS FAIRLY CLOSE IN TIME -- THIS IS ALSO 2010 -- THE
12 LETTER SAYS THAT PLEASE FIND A CORRECT AFFIDAVIT AND REPLACE THE
13 PREVIOUS ONE WHICH WE PROVIDED WHICH WAS SENT IN ERROR. SO THAT
14 LOOKS LIKE THAT WAS A MISTAKE THAT WAS FAIRLY QUICKLY TAKEN CARE OF
15 THOUGH IT MIGHT BE A GOOD IDEA TO PUT THE CASE NAMES ON THESE
16 AFFIDAVITS. IN THE FUTURE I THINK THAT WOULD ELIMINATE THAT SORT OF
17 PROBLEM. AS TO THE -- THE QUESTIONS RAISED AS I REMEMBER LOOKING AT
18 THIS EARLIER, JUDGE NICHOLSON'S ORDER, HIS -- IT SEEMS TO ME THAT HIS
19 CONCLUSION WAS THAT MT. PLEASANT JUST DECIDED THEY WEREN'T GOING TO
20 DO IT AND WEREN'T GOING TO MAKE ANY EFFORT TO OBTAIN THE
21 VIDEOTAPING EQUIPMENT. I THINK, MR. O'LEARY, YOU WOULD AGREE THAT'S
22 NOT THE CASE WITH THE CITY OF COLUMBIA, WOULD YOU NOT?

23 **MR. O'LEARY:** NOT NECESSARILY. I MEAN I MAY ISSUE SOME
24 SUBPOENAS TO DO A HEARING ON THAT AND PUT THE NUMBERS BECAUSE I WAS
25 UNDER THE IMPRESSION, CLEARLY TOLD BY S.L.E.D., THAT MONIES WERE

1 AVAILABLE BUT THE POINT IS WHEN YOU GET A DEPARTMENT THAT SORT OF
2 GETS INTO SORT OF A PATTERN OF JUST SAYING, WELL, JUST SIGN OFF, WE
3 DON'T HAVE THE CAMERAS, AND TRY TO USE THAT EXCEPTION. THAT'S WHAT
4 IT APPEARS TO ME. I HAVEN'T HAD TESTIMONY TO THAT EFFECT BUT I THINK
5 THAT NINE YEARS IS A LONG TIME. THIS IS A MAJOR CITY AND THEY HAVE A
6 LOT OF D.U.I.'S. THEY HAVE (INAUDIBLE) OUT THERE AND A LOT OF
7 SATURATION TYPE OF PATROLS AND THAT WAS WHAT THE WHOLE STATUTE
8 WAS REALLY DESIGNED TO DO, TO VIDEOTAPE THE STREET ENCOUNTERS. AND
9 FOR THOSE REASONS I THINK SUCHENSKI SHOULD TRUMP THIS. THE FACT THAT,
10 ONE, THEY DON'T EVEN KNOW BECAUSE THEY ARE SIGNING WRONG
11 AFFIDAVITS ABOUT THE CARS AND IT LOOKS TO ME LIKE IT IS KIND OF A
12 PATTERN. AND MAYBE THEY ARE PUTTING THEM IN NOW, MAYBE THEY ARE
13 ALL IN NOW BUT IN 2008 HER RIGHTS WERE JUST AS IMPORTANT IN 2008 AS THE
14 PEOPLE IN 2010 WHO ARE NOW BEING ARRESTED.

15 THE COURT: WELL, I CERTAINLY AGREE WITH YOU ON THAT BUT I
16 THINK THAT THIS IS CLEARLY AN ERROR WHICH WAS FAIRLY QUICKLY
17 RECOGNIZED AND CORRECTED.

18 MR. O'LEARY: I JUST WANTED TO PLACE THAT ON THE RECORD,
19 JUDGE.

20 THE COURT: THANK YOU. ALL RIGHT. ANYTHING ELSE THEN?

21 MR. O'LEARY: NOTHING AT THIS TIME, JUDGE, EXCEPT A MOTION
22 TO SEQUESTER WHEN WE GET TO THE TRIAL.

23 THE COURT: ALL RIGHT. WE'LL DO THAT ON THURSDAY THEN.

24 MR. O'LEARY: THANK YOU, JUDGE.

25 THE COURT: ALL RIGHT. THESE ARE YOUR S AND DO YOU WANT

1 THIS NICHOLSON ORDER BACK?

2 MR. O'LEARY: NO, YOU CAN KEEP IT IF YOU WANT. JUDGE, I
3 WOULD PUT THIS IN THE RECORD AND FILE. IF I COULD HAVE THAT PUT IN THE
4 RECORD THAT DOCUMENT FROM S.L.E.D. AND ALSO THE ACTUAL -- I'LL REDO
5 THE SUBPOENA AND PUT IT IN THURSDAY FOR THE RECORD.

6 THE COURT: OKAY. THIS IS IN SUPPORT OF YOUR MOTION.

7 MR. O'LEARY: YES. AND I'LL MAKE COPIES OF THESE TWO
8 AFFIDAVITS.

9 THE COURT: OKAY.

10 MR. O'LEARY: APPRECIATE IT, JUDGE. THANK YOU VERY MUCH.

11 THE COURT: ALL RIGHT. THANK YOU.

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(ADJOURNED)

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CITY OF COLUMBIA,)	TRANSCRIPT OF RECORD
)	
vs.)	MAY 12, 2011
)	JURY TRIALS
CAROL A. DAVIS,)	TICKET NO: 22260EQ
)	JUDGE MARION O. HANNA
DEFENDANT)	ACA DAVID A. FERNANDEZ

1 **MR. FERNANDEZ:** YOUR HONOR, PAGE 17, LINE 6. IT'S CAROL
2 DAVIS. THIS IS WHAT MR. O'LEARY IS PRESENT FOR.

3 **MR. O'LEARY:** JUDGE, MY UNDERSTANDING IS THAT WE'LL DO
4 THE MOTIONS.

5 **THE COURT:** ALL RIGHT, MR. O'LEARY.

6 **MR. O'LEARY:** YOUR HONOR, I BELIEVE THIS IS THE CASE THAT
7 WE STARTED IN FRONT OF YOU MONTHS AGO AND YOU RETAINED JURISDICTION
8 ON IT. DO YOU RECALL?

9 **THE COURT:** I'M SORRY. WHICH CASE IS THIS?

10 **MR. O'LEARY:** THIS IS THE DAVIS CASE.

11 **THE COURT:** ALL RIGHT. LET ME SEE IF I CAN FIND THAT ON THE
12 DOCKET.

13 **MR. FERNANDEZ:** PAGE 17, LINE 6 YOUR HONOR.

14 **THE COURT:** OKAY. ALL RIGHT. GO AHEAD. I'M SORRY, MR.
15 O'LEARY.

16 **MR. O'LEARY:** JUDGE, WE HAD ORIGINALLY A DISCUSSION ON
17 THIS, A DISCUSSION IN CHAMBERS AND YOU RETAINED JURISDICTION. IT WAS
18 AN ISSUE -- THE ISSUE WE'RE TALKING ABOUT THIS MORNING, I BELIEVE THE
19 FIRST ISSUE WOULD BE THE ISSUE OF THE DATAMASTER. IN THIS PARTICULAR
20 CASE THE DATAMASTER THAT -- YOU MAY OR MAY NOT RECALL IT BUT THERE

1 WAS A PROBLEM OF GETTING THE RECORDS THAT WERE MAINTAINED BY THE
2 COLUMBIA POLICE DEPARTMENT WITH REFERENCE TO THE DATAMASTER AND
3 ULTIMATELY AFTER SOME SEARCHING WE FOUND THAT THERE WERE
4 HANDWRITTEN RECORDS WITH REFERENCE TO SIMULATOR SOLUTIONS WHICH I
5 BELIEVE I SUBMITTED TO THE COURT BUT THIS IS ANOTHER COPY OF THOSE.
6 THE SIMULATOR SOLUTION IN THIS CASE WOULD HAVE BEEN CHANGED ON
7 SEPTEMBER 24TH, '08. I THEN GOT THE S.L.E.D. RECORDS AND THE S.L.E.D.
8 RECORDS IF YOU RECALL SHOWED THAT OCTOBER 8TH OF '08 SHE DID IN FACT
9 TAKE A DATAMASTER TEST BUT ON OCTOBER 2ND THERE WAS AN UNKNOWN
10 SOLUTION. I CIRCLED IT FOR YOU THERE. THAT WAS THE ONE THAT SHOWED
11 UP. THE SOLUTIONS WERE STANDARD BUT THE TEST IMMEDIATELY BEFORE
12 HERS THERE WAS ANOTHER SOLUTION IN IT THAT I HAVE NO IDEA HOW IT GOT
13 THERE BECAUSE IF YOU LOOK AT THE COLUMBIA RECORDS FROM THE CITY
14 THEY SHOW -- DIDN'T EVEN SHOW A SIMULATOR CHANGE AT ANY TIME NEAR
15 THAT. AND YOU'LL SEE THAT THAT PARTICULAR SOLUTION WAS ONLY IN
16 THERE FOR ONE TEST AND THEN IT GOES BACK TO THE ORIGINAL SOLUTION.
17 AND UNDER LONDON I FELT THAT THAT WAS KIND OF AN IMPROPRIETY AND I
18 FELT THAT -- I DON'T HAVE ANY WAY OF EXPLAINING HOW THAT GOT IN THERE.
19 I THINK THE BURDEN IN THIS CASE IS ON THE STATE TO SHOW HOW THAT
20 SIMULATOR SOLUTION GOT IN THERE SINCE IT'S NOT RECORDED IN THE S.L.E.D.
21 RECORDS, IT'S NOT RECORDED IN THE COLUMBIA CITY RECORDS. AND FOR
22 THOSE REASONS I MOVE TO SUPPRESS THE BREATHALYZER ON THE FACT THAT
23 IT WAS AN UNKNOWN SOLUTION PUT IN THERE BY AN UNKNOWN PARTY AND
24 WAS NEVER RECORDED ON THE DEPARTMENT'S RECORDS NOR ON THE S.L.E.D.
25 RECORDS. MY UNDERSTANDING IS THAT EVERYTHING THAT YOU DO ON THE

1 DATAMASTER WITH REFERENCE TO SIMULATOR SOLUTION CHANGES IS
2 RECORDED AND REFLECTED IN THE S.L.E.D. RECORDS, THE PRINTOUT ONE,
3 WHICH I'VE SUBMITTED TO THE COURT AND CLEARLY IT SHOWS THAT ON A
4 COUPLE OF DAYS PRIOR TO THIS TEST THERE WAS A SOLUTION IN THAT
5 MACHINE FROM SIMULATOR 9643 AND BOTTLE NUMBER 8765 AND THEN
6 MYSTERIOUSLY IT -- LATER THAT DAY IT THEN GOES BACK TO THE SIMULATOR
7 SOLUTION 08802 AND 0940 BOTTLE. AND THAT TO ME IS AN ANOMALY AND IT'S
8 SOMETHING THAT I THINK -- IT GOES TO THE INTEGRITY OF THE MACHINE AND
9 ACCESS TO THESE MACHINES BY PARTIES THAT I DON'T KNOW WHO THEY ARE
10 BECAUSE IT'S NOT SHOWN ANYWHERE. AND IRONICALLY IN THIS CASE THE
11 SIMULATOR CHANGE IS REFLECTED ON THE COLUMBIA RECORDS DON'T SHOW
12 UP ON THE S.L.E.D. SHEET. SUPPOSEDLY THAT WAS DONE ON LIKE THE 24TH AND
13 WE DON'T HAVE ANY SIMULATOR SOLUTION SHOWING UP ON SEPTEMBER 24TH.
14 SIMULATOR SOLUTIONS IS MY UNDERSTANDING ARE GOOD FOR THIRTY DAYS
15 OR SO MANY TESTS SO THE SIMULATOR SOLUTION ON THE DATE THAT MY
16 CLIENT TOOK IT SHOULD HAVE BEEN 08802, 0940 AS THE SIMULATOR BOTTLE
17 AND SOLUTION NUMBER. AND YET IN BETWEEN -- SOMEHOW OR ANOTHER
18 THERE IS ANOTHER SOLUTION THAT WAS PUT IN AND TAKEN OUT BY AN
19 UNKNOWN PARTY AND I THINK THAT THAT WOULD GO TO THE INTEGRITY OF
20 THE MACHINE. FOR THOSE REASONS I MOVE TO SUPPRESS.

21 **THE COURT:** MR. FERNANDEZ.

22 **MR. FERNANDEZ:** YES, YOUR HONOR. AND OUR ARGUMENT ALL
23 ALONG HAS BEEN THAT THE SIMULATOR SOLUTION, WHATEVER THIS ANOMALY
24 WAS ON THAT 2ND LINE, YOUR HONOR, OF THE PRINTOUT IS THERE WAS A NON-
25 IMPLIED CONSENT TEST. WHAT WE DID IS I HAD BRUCE SMITH FROM S.L.E.D.,

1 HE'S IN CHARGE OF THE IMPLIED CONSENT FOR THE COLUMBIA AREA, TO SHED
2 SOME LIGHT ON IT. HE AND I HAVE DISCUSSED THIS MATTER.

3 **THE COURT:** WELL, IF YOU WANT TO PROFFER HIM AS EVIDENCE
4 LET'S HAVE HIM SWORN IN. COME FORWARD, SIR, PLEASE.

5 **MR. O'LEARY:** JUDGE, I WOULD ALSO INTRODUCE THOSE TWO
6 DOCUMENTS FOR THE RECORD BUT FOR THE PURPOSE OF CROSS EXAM I
7 PROBABLY NEED THOSE TWO BACK BECAUSE I HIGHLIGHTED WHERE THEY
8 WERE.

9 **THE COURT:** ALL RIGHT. YES. I'LL PASS THEM OVER TO YOU.

10 **DAVID BRUCE SMITH, AFTER BEING DULY SWORN BY THE**
11 **COURT, TESTIFIES AS FOLLOWS:**

12 **THE COURT:** STATE YOUR NAME, PLEASE.

13 **A.** DAVID BRUCE SMITH.

14 **DIRECT EXAMINATION BY**

15 **MR. FERNANDEZ:**

16 **Q.** MR. SMITH, WHAT'S YOUR CURRENT ASSIGNMENT WITH S.L.E.D.? WHAT
17 FUNCTION DO YOU PERFORM?

18 **A.** PRESENTLY I WORK AS A BREATH TEST SPECIALIST WITH S.L.E.D. IN THE
19 IMPLIED CONSENT DEPARTMENT WHERE I'VE WORKED THIRTEEN YEARS IN
20 THAT DEPARTMENT AND I'VE WORKED TWENTY YEARS AT S.L.E.D. PRIOR TO
21 THAT I WORKED FOR SEVEN YEARS AS A TOXICOLOGIST.

22 **Q.** THE PIECE OF PAPER I'M SHOWING YOU IS A S.L.E.D. PRINTOUT. ARE YOU
23 FAMILIAR WITH THIS RECORD?

24 **A.** YES.

25 **Q.** DO YOU ALSO HAVE YOUR OWN RECORDS?

1 A. I'VE GOT MY OWN RECORDS.

2 Q. OKAY.

3 A. VERY SIMILAR TO THAT.

4 Q. FOR PURPOSES OF THIS ARGUMENT TODAY, THIS ARREST OCCURRED ON --
5 I MEAN THIS BREATH TEST OCCURRED ON OCTOBER 8, 2008, AND IT REGISTERED
6 A READING. THE ANOMALY WE ARE SPEAKING OF OCCURRED ON -- IT DOESN'T
7 HAVE A DATE BUT --

8 **THE COURT:** DOESN'T IT HAVE A DATE OF OCTOBER 2ND?

9 Q. (BY MR. FERNANDEZ) OCTOBER 2ND, 2008. IT SHOWS A NON-IMPLIED
10 CONSENT TEST. IT ALSO SHOWS AN OPERATOR WITH THE NAME AND AGE, A C.E.
11 NUMBER AND THEN IT SHOWS A SIMULATOR LOT AND BOTTLE. WOULD YOU
12 PLEASE EXPLAIN TO US WHAT YOU ARE ABLE TO GLEAN FROM THAT TEST AND
13 MOST IMPORTANTLY IS IF IT WOULD HAVE AFFECTED ANY SUBSEQUENT TESTS
14 THAT OCCURRED.

15 A. OKAY. YOUR RECORD SHOWS THE SAME THING AS MY RECORD. MINE
16 JUST GOES PREVIOUSLY TO MORE THAN, YOU KNOW, TWO MONTHS PRIOR TO
17 THAT. AND MY RECORD SHOWS THAT THE SOLUTION CHANGE WAS MADE ON 9-
18 24-08 WHICH IS USING THE BOTTLE NUMBER 08802 OR LOT NUMBER 08802 AND
19 BOTTLE NUMBER 0940. OKAY. WHAT'S IMPORTANT ABOUT THIS SOLUTION
20 CHANGE WAS THAT THIS SOLUTION CHANGE WAS MADE AND THIS TEST WAS
21 RUN ON THE SAME LOT NUMBER AND BOTTLE NUMBER AS THAT SOLUTION
22 CHANGE. OKAY. THAT'S GOOD TO REMEMBER BECAUSE THIS ANOMALY THAT
23 THIS PERSON DID ON 10-2 WHICH IS INITIALS ARE K-U-L AND WE TRIED TO FIND
24 HIS OPERATOR NUMBER AS S.C. 044010 AND WE COULDN'T FIND A RECORD OF
25 THIS PERSON ANYWHERE. WE DON'T KNOW WHO THIS PERSON WAS BUT

1 SOMETIMES THESE PEOPLE WHEN THEY ARE RUNNING NON-IMPLIED CONSENT
2 TESTS WHICH IS WHAT THIS PERSON DID BECAUSE OF THE INITIAL V.R. IN THE
3 LEFT-HAND CORNER WHICH IS A BREATH TEST. AND WHEN HE RAN THIS NON-
4 IMPLIED CONSENT TEST, YOUR HONOR, HE DID NOT BLOW INTO THE
5 INSTRUMENT BECAUSE IT HAS REFUSAL ON IT AND HE WROTE DOWN THAT THE
6 LOT NUMBER AND BOTTLE NUMBER OF 9643 AND 8765. NOW WHERE HE COME UP
7 WITH THIS NUMBER I HAVE NO IDEA. WE'D HAVE TO ASK K-U-L.

8 **THE COURT:** AND YOU DON'T KNOW WHO THAT IS?

9 **A.** WE DON'T KNOW WHO THAT IS. AND SOMETIMES THESE PEOPLE WILL
10 PUT THEIR INITIALS AND NAMES WRONG.

11 **THE COURT:** WHAT PEOPLE ARE YOU REFERRING TO?

12 **A.** COLUMBIA POLICE DEPARTMENT OR HIGHWAY PATROL OR WHOEVER.
13 THE AGENCY OR OFFICER, WHOEVER HE IS. WE DON'T KNOW WHICH OFFICER --

14 **THE COURT:** WHO HAS THE AUTHORITY TO CHANGE THESE
15 BOTTLES? WHO HAS THE AUTHORITY TO CHANGE THIS?

16 **A.** NOBODY CAN CHANGE THE NUMBERS. I MEAN WE DON'T KNOW HOW HE
17 CAME UP WITH THIS NUMBER.

18 **Q:** (BY MR. FERNANDEZ) IF SOMEONE RUNS A NON-IMPLIED CONSENT TEST,
19 BASICALLY DO YOU WRITE IN WHATEVER INFORMATION YOU WANT?

20 **A.** YES, BECAUSE WE SEE ALL KINDS OF NAMES WITH THESE NON-IMPLIED
21 CONSENT TESTS. WE USUALLY CALL THE OFFICERS BACK AND TELL THEM YOU
22 ARE NOT SUPPOSED TO BE DOING THIS. THEY COME UP WITH CRAZY NAMES
23 SUCH AS I.B. DRUNK, I AM STUPID. YOU KNOW, WE SEE ALL KIND OF THINGS
24 AND WE TELL THEM DO NOT PLAY AROUND ON THIS BECAUSE THIS IS SERIOUS.
25 LAWYERS SEE THIS, COURTS SEE THIS. AND THEY HAVE TO UNDERSTAND THAT

1 EVERYTHING THEY TYPE IN IS RECORDED. SOME OF THESE OFFICERS DON'T
2 KNOW THAT. WE EVEN HAVE CASES WHERE PEOPLE GIVE FALSE INFORMATION.
3 THEY GIVE THEIR BEST FRIEND'S NAMES AND IDENTIFICATION AND ADDRESSES
4 AND OFFICERS CALL US ALL THE TIME SAYING, HEY, WE GET FALSE
5 INFORMATION, WHAT DO WE DO ABOUT IT, AND THERE'S NOTHING YOU CAN DO
6 BECAUSE IT'S RECORDED INTO THE DATABASE. AND SO YOU HAVE TO
7 REMEMBER THAT WHATEVER IS TYPED IN IS RECORDED INTO THE DATABASE.

8 **THE COURT:** SO MOSTLY THIS IS OFFICERS TYPING THIS IN?

9 **A.** THAT'S RIGHT. THAT'S RIGHT.

10 **THE COURT:** OKAY.

11 **A.** THE OFFICERS TYPE THIS INFORMATION IN. AND WHERE HE CAME UP
12 WITH THESE NUMBERS IS FRIVOLOUS INFORMATION. IT DOESN'T MEAN
13 ANYTHING UNLESS IT MEANS SOMETHING TO THAT OFFICER. AND I DON'T
14 KNOW WHERE HE CAME UP WITH THE NUMBERS BECAUSE IT DOESN'T MEAN
15 ANYTHING BUT HE DIDN'T MAKE A SOLUTION CHANGE. THAT'S THE MAIN
16 THING. THAT'S THE IMPORTANT THING.

17 **THE COURT:** HE DID WHAT?

18 **A.** HE DIDN'T MAKE A SOLUTION CHANGE.

19 **THE COURT:** HOW DO YOU KNOW THAT?

20 **A.** BECAUSE IT DIDN'T RECORD IT INTO THE INSTRUMENT. WE DIDN'T SEE
21 THAT RECORDED. IT DOESN'T SHOW UP AS A SOLUTION CHANGE.

22 **THE COURT:** BUT THERE'S A DIFFERENT NUMBER?

23 **A.** YES, MA'AM, THERE'S A NUMBER HE PUT IN BUT IT DOESN'T SHOW UP AS
24 A SOLUTION CHANGE BECAUSE YOU CAN SEE ON THE DATA THERE'S A
25 SOLUTION CHANGE IN THE FAR LEFT. IT HAS S.O. WHICH MEANS SOLUTION

1 CHANGE ON THE RECORD ON 9-24-08.

2 **THE COURT:** OKAY. LET ME LOOK AT THIS AGAIN.

3 **Q.** (BY MR. FERNANDEZ) AND THAT 9-24 SOLUTION CHANGE IS ALSO
4 CORROBORATED BY THE LOGS.

5 **THE COURT:** WAIT JUST A MINUTE, MR. FERNANDEZ.

6 **A.** CHRONOLOGICAL RECORDS.

7 **THE COURT:** OKAY. YOU GAVE ME THIS A WHILE BACK. I DON'T
8 HAVE IT TODAY WITH ME. ALL RIGHT. THIS OCCURRENCE ON OCTOBER THE
9 2ND, 2008, NON-IMPLIED CONSENT TEST, OPERATOR NAME, AGENCY, K-U-L,
10 OPERATOR NUMBER, DM543689 AND SIMULATOR LOT, SLASH, BOTTLE 9643, 8765,
11 WHICH THE PREVIOUS NUMBER AND THE ONE FOLLOWING THAT FOR 10-8 AND 18
12 AND 10-23 ARE ALL 8802. THIS NUMBER IS 9643, 8765. NOW THAT'S A SIMULATOR,
13 LOT, SLASH, BOTTLE?

14 **A.** THAT'S RIGHT.

15 **THE COURT:** OKAY. SO YOU'RE SAYING THAT EVEN THOUGH IT
16 SHOWS HERE THAT THERE WAS A CHANGE THERE WAS NO CHANGE?

17 **A.** THAT'S CORRECT. SEE, WHEN AN OFFICER DOES A SOLUTION CHANGE
18 THERE'S A LABEL THAT COMES WITH THE BOTTLES AND THEY STICK THE LABEL
19 ON THE INSTRUMENT RIGHT WHERE THE EXTERNAL STANDARD OR SIMULATOR
20 SOLUTION GOES ON THE INSTRUMENT.

21 **THE COURT:** OKAY.

22 **A.** IT HAS THE LOT NUMBER AND BOTTLE NUMBER.

23 **THE COURT:** HOW DOES THE RECORD SHOW THAT? NEXT YOU'VE
24 GOT EXPIRATION DATE, 10-3-2008, FOR THAT ENTRY AND THIS IS THE
25 TEMPERATURE IS THE NEXT, THIRTY-THREE POINT NINE (33.9) AND ZERO EIGHT

1 "O." (080) FOR THE SIMULATOR TEST I ASSUME. A ZERO EIGHT "O" (080) AND
2 THERE SHOULD BE ANOTHER NUMBER. ALL THE OTHER ENTRIES HAVE -- CARRY
3 THAT OUT A LITTLE FURTHER OR PERHAPS THAT WAS ZERO EIGHT "O" (080). I
4 DON'T KNOW IF I HAVE A COPY THAT HAS LOST SOMETHING IS WHAT I'M
5 SAYING HERE. THERE IS ONE MORE AT THE BOTTOM WHICH IS ZERO EIGHT ONE
6 (081) BUT DOESN'T HAVE FOUR DIGITS BEHIND THE DECIMAL. SO HOW DO YOU
7 KNOW THIS WAS NEVER THERE? YOU SAY BECAUSE IT WAS NOT ON THE
8 MACHINE ITSELF BUT THE MACHINE ITSELF IS NOT WITHIN YOUR PURVIEW, IS IT,
9 IT'S AT THE POLICE DEPARTMENT? IS THAT CORRECT?

10 A. YES, MA'AM. COLUMBIA POLICE DEPARTMENT.

11 THE COURT: RIGHT. SO HOW DO YOU KNOW THAT IT WAS NOT
12 CHANGED?

13 A. BECAUSE A SOLUTION CHANGE PRIOR TO THAT WAS MADE ON 9-24-08
14 AND IT SHOWS THAT THE BOTTLE NUMBER AND LOT NUMBER IS 08802 AND 0940
15 AND THE TEMPERATURE WAS THIRTY-FOUR POINT ONE (34.1) AND THE RESULT
16 WAS POINT "O" SEVEN NINE (.079) AND THAT WAS THE LAST TIME IT WAS
17 CHANGED.

18 Q. (BY MR. FERNANDEZ) THAT --

19 THE COURT: LET'S HEAR FROM THE WITNESS. YOU ARE NOT THE
20 EXPERT, MR. FERNANDEZ. IF YOU WANT TO ASK HIM QUESTIONS THAT WOULD
21 BE APPROPRIATE.

22 A. AND IT SHOWS THAT EVER SINCE THEN EVERYBODY USED 08802 AND AN
23 0940 EXCEPT FOR THAT ONE TIME K-U-L, WHOEVER THAT WAS, PUT IN THESE
24 FRIVOLOUS NUMBERS AND HE GOT A REFUSAL WHICH MEANS HE NEVER BLEW
25 INTO THE INSTRUMENT ANYWAY. HE JUST LET IT TIME OUT FOR TWO MINUTES

1 BECAUSE THE INSTRUMENT POPS UP ON THE DISPLAY DO YOU REFUSE AND HE
2 DIDN'T TYPE ANYTHING AND DIDN'T GO SO IT REFUSED IT.

3 **THE COURT:** BUT IF YOU ONLY HAVE THIS RECORD AND WE ARE
4 NOT LOOKING AT THE INSTRUMENT ITSELF THEN YOU WOULD BELIEVE THAT
5 THE BOTTLE HAD BEEN CHANGED, CORRECT? ACCORDING TO THIS THERE WAS
6 A CHANGE IN IT?

7 **A.** WHAT DO YOU MEAN JUST LOOKING AT THIS?

8 **THE COURT:** JUST LOOKING AT THIS RECORD WITHOUT LOOKING
9 AT THE MACHINE AND SEEING WHETHER THERE IS A CHANGE NOTED ON THERE
10 THIS --

11 **A.** NOT BY LOOKING AT ALL THE DATA. BY LOOKING AT ONE LINE YOU
12 WOULD SAY, WELL, YES, HE MUST HAVE HAD THAT LOT NUMBER AND THAT
13 TICKET NUMBER. BUT I WOULD SAY BY LOOKING AT 9643, I WOULD SAY THAT IS
14 AN IMPROPER LOT NUMBER BECAUSE THEY HAVE FIVE NUMBERS. 08802 IS FIVE
15 NUMBERS. ALL OF THEM HAVE BEEN FIVE NUMBERS.

16 **THE COURT:** ALL OF THEM START WITH ZERO?

17 **A.** NOT ALWAYS BUT THEY ALWAYS HAVE FIVE NUMBERS. AND I WOULD
18 SAY 9643 IS NOT RIGHT BECAUSE WE DON'T EVER HAVE FOUR NUMBERS FOR LOT
19 NUMBERS. AND I WOULD LOOK AT THE WHOLE TOTAL SITUATION. I WOULDN'T
20 LOOK AT ONE LINE, YOU KNOW.

21 **THE COURT:** WELL, I'M JUST TRYING -- I'VE LOOKED AT ALL THIS.
22 I'M JUST TRYING TO INTERPRET THIS WHOLE THING AS IT MAY RELATE TO THIS
23 PARTICULAR CASE. MR. FERNANDEZ. DO YOU HAVE ANY MORE QUESTIONS OF
24 THE WITNESS?

25 **A.** (BY MR. FERNANDEZ) THE TEST THAT OCCURRED -- IN YOUR DATA THE

1 TEST THAT OCCURRED ON 10-8-08 THERE WAS A READING THAT WAS
2 REGISTERED? THIS WAS RUN BY M.P. JENKINS, THAT WAS THE OPERATOR?

3 A. YES.

4 Q. IT WAS REGISTERED A POINT ONE SEVEN EIGHT (.178)?

5 A. YES.

6 Q. IS THAT AN ACCURATE TEST?

7 A. YES, IT IS. IT WOULD NOT HAVE -- THIS TEST FROM K-U-L HAS NO
8 BEARING ON POINT ONE SEVEN EIGHT (.178).

9 MR. FERNANDEZ: THAT'S ALL THE QUESTIONS I HAVE, YOUR
10 HONOR.

11 THE COURT: ALL RIGHT, MR. O'LEARY?

12 CROSS EXAMINATION BY

13 MR. O'LEARY:

14 Q. SO YOU ARE TELLING ME THAT ANY OFFICER COULD GO IN AND TAMPER
15 WITH THE MACHINE?

16 A. HE HAS TO BE BREATH CERTIFIED.

17 Q. WELL, WE DON'T KNOW WHO THIS PERSON IS. HERE, THIS K-U-L IS A
18 FALSE NAME?

19 A. WELL, I DON'T KNOW --

20 Q. THE INITIALS.

21 A. IF IT'S INITIALS THAT APPLY TO A PERSON OR SOMEBODY HAS MADE UP
22 THESE INITIALS.

23 Q. WELL, BUT THE I.D. NUMBER THAT HE'S PUT FOR A CERTIFICATION
24 NUMBER IS NOT CORRECT. YOU CHECKED THAT OUT, CORRECT? 440010 IS A
25 NON-EXISTENT OPERATOR?

1 A. WELL, I CALLED THE POLICE DEPARTMENT TO CHECK ON IT AND THEY
2 SAID THEY COULDN'T FIND ANYBODY.

3 Q. SO SOMEBODY FALSIFIED THOSE RECORDS?

4 A. IT MIGHT HAVE BEEN FALSIFIED.

5 Q. WELL, IT IS FALSIFIED. YOU HAVE TO AGREE, DON'T YOU?

6 A. EVIDENTLY IT MUST HAVE BEEN FALSIFIED.

7 Q. ISN'T IT POSSIBLE THAT YOU COULD PUT A SIMULATOR SOLUTION IN,
8 CHANGE THE SIMULATOR SOLUTION THAT DAY AND THEN CHANGED IT BACK?

9 A. I DON'T KNOW. IF YOU -- I GUESS IF SOMEBODY WANTED TO DO
10 SOMETHING ILLEGAL I GUESS YOU COULD DO THAT.

11 Q. WELL, IT'S NOT PROPER FOR PEOPLE TO GO AND PLAY WITH THESE
12 MACHINES, PERIOD, RIGHT?

13 A. IT'S NOT PROPER TO DO THAT, NO, SIR.

14 Q. AND --

15 A. IF SOMEBODY WAS IN THERE BY HIMSELF AND WANTED TO DO
16 SOMETHING ILLEGAL HE COULD PROBABLY GO IN THERE AND CHANGE IT AND
17 NOT TYPE ANYTHING IN THAT WAS CORRECT AND DO SOMETHING -- YOU KNOW,
18 FALSIFY IT. HE COULD PROBABLY FALSIFY IT IF HE WANTED TO.

19 Q. AND IT'S POSSIBLE HE COULD HAVE PUT THAT SIMULATOR SOLUTION IN
20 THAT'S LISTED THERE AND TAKEN IT OUT, CORRECT?

21 A. WHAT DO YOU MEAN TAKE IT OUT?

22 Q. REMOVE THAT SIMULATOR BOTTLE, CHANGE THE SOLUTION. COULD
23 THAT SOLUTION HAVE BEEN CHANGED ON 10-2 AND THEN CHANGED BACK TO
24 THE OTHER SIMULATOR SOLUTION OF VIAL 90940?

25 A. WELL, THE ONLY WAY HE COULD DO THAT IS NOT REPORT IT?

1 Q. BUT HE REPORTED FALSE STUFF HERE, YOU AGREE?

2 A. YEAH. HE MAY FALSIFY SOMETHING AND THEN NOT REPORT SOMETHING

3 AGAIN. I MEAN --

4 Q. OBVIOUSLY SOMETHING THAT HE PUT IN IS FALSE?

5 A. YES, THAT WOULD BE FALSIFYING TWICE.

6 Q. WELL, IS IT POSSIBLE?

7 A. YEAH, DOING SOMETHING WRONG IS ALWAYS POSSIBLE.

8 Q. AND YOU HAVEN'T PHYSICALLY INSPECTED THIS MACHINE OR ANYTHING

9 TO CHECK ON THOSE DATES AND TIMES, HAVE YOU?

10 A. SAY IT AGAIN NOW.

11 Q. HAVE YOU CHECKED -- LET ME ASK YOU THIS. I THINK THE SIMULATOR

12 SOLUTION YOU SAID WAS CHANGED ON SEPTEMBER 24TH, CORRECT?

13 A. THAT'S CORRECT.

14 Q. BUT THAT DOESN'T SHOW UP ON THIS HERE, DOES IT? 9-21, 9-27. IT

15 DOESN'T SHOW A SIMULATOR CHANGE THAT IT WAS A CHANGE MADE

16 (INAUDIBLE) CHECKED IT OUT. IT DOESN'T SHOW UP, DOES IT?

17 A. 9-21 IT WAS USING THE OLD LOT NUMBER. WELL, THE SAME LOT NUMBER

18 BUT A DIFFERENT BOTTLE NUMBER ON 9-21.

19 Q. BUT THE FIRST TIME 0940 SHOWS UP IS ON 9-27. LET ME SHOW YOU. 9-27.

20 THAT'S THE FIRST TIME IT SHOWS THAT.

21 A. YEAH. IT'S THE SAME THING I'M SHOWING.

22 Q. YES. BUT IT DOESN'T SHOW THAT THE SIMULATOR SOLUTION WAS IN

23 THERE ON 9-24, DOES IT? ON THIS SHEET THAT I HAVE?

24 A. YEAH, THAT'S THE SAME THING I HAVE RIGHT HERE.

25 Q. YES, BUT IT DOESN'T SHOW -- THERE'S NO 9-24 ENTRY.

1 A. THAT'S BECAUSE THIS IS CHRONOLOGICAL OVER HERE.

2 Q. YES, BUT THIS IS THE PRINTOUT FROM S.L.E.D., OFFICIAL RECORD.

3 SHOULDN'T IT SHOW UP ON 9-24 THAT THE SIMULATOR WAS CHANGED, THE

4 SOLUTION WAS CHANGED?

5 A. WELL, THAT'S THE BREATH RECORDS. THAT'S NOT SOLUTION CHANGE.

6 Q. WELL, SHOULDN'T IT SHOW UP THAT SOMEBODY DID SOMETHING ON 9-24

7 WITH THIS PARTICULAR MACHINE?

8 A. NO, THAT'S JUST HAS BREATH RECORDS. THAT JUST HAS BREATH. THAT

9 JUST HAS BREATH RECORDS. IF YOU GO TO SOLUTION CHANGE OR

10 CHRONOLOGICAL, IT'LL HAVE EVERYTHING.

11 Q. BUT YOU HAVE TO AGREE WITH ME THAT THIS MACHINE HAS BEEN

12 TAMPERED WITH AT SOME POINT BY AN UNKNOWN PARTY?

13 A. WELL, HE EVIDENTLY RAN A NON-IMPLIED CONSENT TEST BUT HE DIDN'T

14 BLOW INTO IT.

15 Q. WITH THE SIMULATOR SOLUTION --

16 A. THE ONLY THING HE DID WAS JUST PUT IN THE WRONG LOT NUMBER AND

17 BOTTLE NUMBER.

18 Q. AND IT'S POSSIBLE HE CHANGED THE SIMULATOR SOLUTION?

19 A. THIS IS NOT SOMETHING THAT WE'VE SEEN FOR THE FIRST TIME EVER.

20 YOU KNOW, I MEAN WE SEE PEOPLE PUT IN THE WRONG NUMBERS MANY TIMES.

21 I MEAN THEY MIGHT MISS IT BY ONE NUMBER, THEY MIGHT MISS IT BY TWO

22 NUMBERS. YOU KNOW, HE JUST MISSED IT COMPLETELY.

23 Q. BUT DO THEY PUT IN FALSE INITIALS AND FALSE CERTIFICATION

24 NUMBERS?

25 A. WELL, THEY PUT IN WRONG NAMES.

1 Q. THAT IS FALSE INFORMATION?

2 A. THAT IS FALSE INITIALS. WE DON'T KNOW WHOSE. THEY PUT IN FALSE
3 NAMES A LOT.

4 Q. IT'S FALSE I.D. NUMBERS, TOO?

5 A. SOMETIMES THEY PUT IN NAMES LIKE I. B. DUMB AND THINGS LIKE THAT.
6 YOU KNOW, WE DON'T KNOW WHO THAT IS.

7 Q. SO HOW DO YOU PROTECT THE INTEGRITY OF THESE MACHINES FROM
8 TAMPERING?

9 A. WELL, RIGHT NOW WE HAVE THE D.M.T. THAT PROTECTS IT.

10 Q. BUT YOU AGREE HERE --

11 A. IT'S A NEW INSTRUMENT.

12 Q. SOMEBODY FOOLED WITH THIS PARTICULAR MACHINE A COUPLE OF
13 DAYS PRIOR TO THIS TEST?

14 A. THIS GUY -- WE WANT TO FIND OUT WHO IT IS SO WE CAN STRAIGHTEN
15 HIM OUT. YOU KNOW, IT WOULD BE NICE TO TALK TO HIM AND STRAIGHTEN
16 HIM OUT BUT WE DON'T KNOW WHO IT IS.

17 Q. WOULD IT BE A CRIME?

18 A. NO, IT'S NOT A CRIME. IT'S SOMEBODY THAT DOESN'T KNOW WHAT HE'S
19 DOING, NEEDS TO BE RETRAINED.

20 Q. SO IF HE DOESN'T KNOW WHAT HE'S DOING, WHY WOULD THEY PUT IN A
21 FALSE I.D. NUMBER FOR THEIR CERTIFICATION?

22 A. WELL, SOMETIMES OFFICERS -- I DON'T KNOW IF THEY ARE GETTING IN A
23 HURRY OR JUST DON'T TAKE THE TIME TO DO THINGS RIGHT. YOU KNOW, IT'S
24 JUST A MATTER OF DOING THINGS INCORRECTLY AND I DON'T KNOW HIS
25 REASON WHY HE PUT THE WRONG NUMBERS IN. YOU KNOW, IT'S JUST ...

1 **Q.** FALSE NUMBERS IN?

2 **A.** JUST FALSE NUMBERS. I DON'T EVEN KNOW WHAT THESE NUMBERS
3 MEAN.

4 **MR. O'LEARY:** NO FURTHER QUESTIONS.

5 **THE COURT:** ALL RIGHT. MR. FERNANDEZ, DO YOU HAVE ANY
6 FURTHER QUESTIONS?

7 **MR. FERNANDEZ:** YES, YOUR HONOR.

8 **REDIRECT EXAMINATION BY**

9 **MR. FERNANDEZ:**

10 **Q.** MR. SMITH, ASSUME -- LET'S JUST ASSUME THAT SOMETHING -- EVEN
11 WORSE CASE SCENARIO SAY SOMEONE DID CHANGE THE SIMULATOR LOT
12 BOTTLE ON 10-2-2008 AND THEN FOR WHATEVER REASON SOMEONE CHANGED IT
13 BACK TO THE ORIGINAL SIMULATOR LOT BOTTLE ON THE SAME DAY, IT LOOKS
14 LIKE THE SAME DAY THE NUMBER REVERTS BACK TO THE ORIGINAL SAMPLE
15 SOLUTION AND LOT NUMBER --

16 **A.** RIGHT.

17 **Q.** -- AFTER IT HAD BEEN CHANGED BACK, EVEN ASSUMING -- PLAYING WITH
18 DEFENSE'S ARGUMENT, ASSUMING THAT IT HAD BEEN CHANGED AT ONE POINT,
19 AFTER THEY HAD TRANSFERRED THE ORIGINAL LOT BACK TO IT, WOULD THAT
20 TEST THAT WAS ON 10-2 AND 10-8 AND THEN 10-18, WOULD THAT TEST HAVE
21 BEEN AFFECTED BY THE CHANGE IN THE SOLUTION? WE'RE TALKING ABOUT
22 THE SIMULATOR SOLUTION? DOES IT HAVE ANY BEARING ON THE ACTUAL TEST,
23 THE DATAMASTER MACHINE ITSELF?

24 **A.** WELL, CHECKING BY THE RECORDS IT SHOWS THAT NO SOLUTION
25 CHANGE WAS MADE ACTUALLY, CHANGING OF THE SOLUTION, SO IT WAS NO --

1 IT'S THE SAME SOLUTION LOT NUMBER AND BOTTLE NUMBER SO IT DOES NOT
2 AFFECT THE RECORDINGS OR THE READINGS IN ANY WAY SO TO ME THE
3 READINGS ARE GOOD. I MEAN IT HAS NO BEARING ON THE RESULTS OF MAKING
4 THEM BAD IN ANY WAY SO I DON'T SEE ANY PROBLEM.

5 **THE COURT:** MR. SMITH, EXCUSE ME. DOES ANYONE ACCOMPANY
6 OR ANYONE ELSE WHO IS AUTHORIZED TO LOOK AT THESE MACHINES AND RUN
7 TESTS ON THEM OR SERVICE THEM OR ANYTHING LIKE THAT, THE COMPANY
8 THAT MAKES THE MACHINE PERHAPS. IS THERE ANYONE ELSE OR DOES S.L.E.D.
9 DO ALL THAT ITSELF?

10 **A.** WELL, OUR EMPLOYEES DO ALL THE ROUTINE INSPECTIONS AND
11 MAINTENANCE ON THE INSTRUMENTS AND WE HAVE FIVE PEOPLE IN OUR
12 DEPARTMENT THAT DO IT. WE ARE ALL CERTIFIED FROM THE FACTORY IN OHIO.

13 **THE COURT:** WELL, I JUST NOTICED -- NOTICED EARLIER THAT
14 THIS K-U-L IS ALL CAPITAL LETTERS, K, SLASH, U, SLASH, L WHICH IS, YOU
15 KNOW, TOTALLY DIFFERENT FROM ALL THE REST OF THEM IS THE REASON FOR
16 MY QUESTION. OKAY. ANYTHING ELSE?

17 **MR. FERNANDEZ:** NO, YOUR HONOR.

18 **THE COURT:** ALL RIGHT. THANK YOU. THANK YOU, MR. SMITH.
19 YOU MAY BE SEATED.

20 **MR. O'LEARY:** JUDGE, COULD I JUST ASK HIM ONE MORE
21 QUESTION?

22 **THE COURT:** OH, I'M SORRY.

23 **RE CROSS EXAMINATION BY**

24 **MR. O'LEARY:**

25 **Q.** Y'ALL MONITOR ALL THE MACHINES THROUGHOUT THE STATE, DON'T

1 YOU?

2 A. YES, SIR.

3 Q. DID SOMEBODY CATCH THIS?

4 A. WE DON'T ACTUALLY GO THROUGH ALL THE CHRONOLOGICAL RECORDS.
5 DAVID FERNANDEZ CAUGHT IT AND (INAUDIBLE) HE ASKED ME OVER THE
6 PHONE.

7 Q. HE ASKED YOU OVER THE PHONE AFTER WE FOUND THE RECORDS AND
8 SOLUTIONS?

9 A. THAT'S CORRECT.

10 Q. YOU WOULDN'T CATCH -- YOU DON'T JUST RANDOMLY CHECK OUT TO
11 SEE IF THE SIMULATOR SOLUTIONS ARE THE SAME ALL THE WAY DOWN, DO
12 YOU?

13 A. WE DON'T GO THROUGH AND CHECK RECORDS AS FAR AS THE NUMBERS
14 ALL THE TIME TO SEE IF THEY ARE CORRECT.

15 MR. O'LEARY: THANK YOU, SIR, YOU MAY BE SEATED.

16 (WITNESS TO THE SIDE)

17 THE COURT: ALL RIGHT. WE'VE HEARD THIS THIS TIME AND WE
18 DID HEAR OF IT BEFORE AND I DID WANT TO HEAR FROM S.L.E.D. AND HAVING
19 DONE THAT, MR. O'LEARY, I GRANT YOUR MOTION TO SUPPRESS THIS. WHILE
20 THERE'S CERTAINLY NO INTENT ON S.L.E.D.'S PART, IT'S JUST THAT THIS IS THE
21 PROSECUTION'S EVIDENCE AND IT CAN'T BE TAMPERED WITH. THANK YOU.

22 MR. FERNANDEZ: YOUR HONOR, CAN I --

23 THE COURT: NO, NOT ON THIS. I'VE RULED. THANK YOU. ALL
24 RIGHT WHAT DO YOU HAVE NEXT, MR. O'LEARY.

25 MR. O'LEARY: JUDGE, I HAVE A MOTION. I HAVE NO PROBLEM

1 WITH THE S.L.E.D. GUY BEING EXCUSED.

2 **MR. FERNANDEZ:** YOUR HONOR, I WOULD ASK TO -- I DID HAVE
3 OTHER EVIDENCE I'D LIKE TO PROFFER BUT I KNOW YOU'VE ALREADY RULED
4 AND CAN I SIMPLY PUT ON THE RECORD WHAT I WOULD HAVE SHOWN?

5 **THE COURT:** I HAD NO IDEA YOU HAD OTHER EVIDENCE. YOU
6 HAVE OTHER WITNESSES?

7 **MR. FERNANDEZ:** I HAVE ONE OTHER WITNESS AS FAR AS THE
8 SOLUTION.

9 **THE COURT:** ALL RIGHT. WHO IS YOUR OTHER WITNESS?

10 **MR. FERNANDEZ:** IT WILL BE OFFICER WILSON.

11 **THE COURT:** ALL RIGHT. OFFICER WILSON THEN.

12 **S. A. WILSON, AFTER BEING DULY SWORN BY THE COURT,**

13 **TESTIFIES AS FOLLOWS:**

14 **DIRECT EXAMINATION BY**

15 **MR. FERNANDEZ:**

16 **Q.** OFFICER WILSON, YOU ARE A POLICE OFFICER WITH THE CITY OF
17 COLUMBIA, CORRECT?

18 **A.** YES, I AM.

19 **Q.** YOU HAVE NO INDEPENDENT KNOWLEDGE OF THIS CASE TODAY. THIS IS
20 CITY OF COLUMBIA VERSUS CAROL DAVIS, IS THAT CORRECT?

21 **A.** I KNOW NOTHING ABOUT IT.

22 **Q.** I'M GOING TO ASK YOU TO THINK BACK TO THE YEAR 2008 AT
23 APPROXIMATELY SEPTEMBER AND OCTOBER OF 2008. DURING THAT TIME
24 FRAME WAS YOUR RESPONSIBILITY MAINTAINING THE B.A. ROOM, THE
25 BREATHALYZER ANALYSIS ROOM?

1 A. ONE OF MY RESPONSIBILITIES, YES.

2 Q. AND THAT WAS ASSIGNED TO YOU BY WHOM?

3 A. THE TRAFFIC SERGEANT.

4 Q. AND IS THERE MULTIPLE PEOPLE THAT THIS DUTY IS ASSIGNED TO OR IS

5 THERE ONLY ONE PERSON?

6 A. EITHER ONE OR TWO BUT I'M THE PRIMARY ONE.

7 Q. I'M SHOWING YOU A LOG HERE. ARE YOU FAMILIAR WITH THIS LOG?

8 A. YES.

9 Q. AND WHAT IS THAT?

10 A. THIS IS A COPY OF THE LOG SHEET THAT WE HAVE DOWN IN THE

11 DATAMASTER ROOM. ANY TIME WE CHECK THE ROOM, CHANGE SOLUTIONS OR

12 HAVE PROBLEMS WITH THE MACHINE, WE LOG THEM IN HERE.

13 Q. AND THE HANDWRITING ON THERE AND THE NAMES LISTED, IS THAT

14 YOUR HANDWRITING, IS THAT YOUR NAME LISTED?

15 A. YES, IT IS.

16 Q. IF ANYONE ELSE HAD BEEN IN THAT B.A. ROOM AND DONE ANYTHING ON

17 THAT MACHINE, WOULD THEY HAVE BEEN REQUIRED TO LOG IT IN THE

18 MAINTENANCE LOG?

19 A. THEY ARE REQUIRED TO, YES.

20 Q. NOW DIRECTING YOUR ATTENTION TO THE DATES PRIOR TO OCTOBER

21 8TH, WHEN WAS THE SIMULATOR SOLUTION CHANGED PRIOR TO OCTOBER 8TH?

22 A. FOR ONE OF THE MACHINES IT WAS CHANGED SEPTEMBER 24TH. LOOKS

23 LIKE FOR THE OTHER ONE IT WAS SEPTEMBER 21ST.

24 Q. AND WHEN WAS IT CHANGED AFTER OCTOBER 8TH? WHEN WAS THE

25 NEXT TIME IT WAS CHANGED AFTER OCTOBER 8TH?

1 **A.** AFTER OCTOBER 8TH, THEY WERE BOTH CHANGED OCTOBER 22ND.

2 **Q.** IS THERE ANY LOG IN THERE THAT INDICATES A CHANGE ON OCTOBER
3 2ND?

4 **A.** NOT ACCORDING TO THIS, NO.

5 **Q.** AND WOULD YOU HAVE NOTICED THAT A -- WOULD YOU HAVE BEEN
6 AWARE OF ANY SOLUTION THAT WAS MISSING OR CHANGED IN THE MACHINES?
7 I UNDERSTAND YOU TAKE THEM IN ORDER ON THE BATCH, THE NUMBERS
8 GENERALLY FOLLOW IN ORDER?

9 **A.** CORRECT. WE HAVE THEM STORED IN A CABINET IN THE B.A. ROOM.

10 **Q.** AND WHO WOULD HAVE ACCESS TO THAT CABINET?

11 **A.** ANYBODY THAT HAS ACCESS TO THAT ROOM.

12 **Q.** AND AS FAR AS YOU ARE AWARE, AS FAR AS YOU ARE CONCERNED, WAS
13 THAT SOLUTION CHANGED ON ANY OTHER DATES OTHER THAN WHAT IS
14 INDICATED HERE?

15 **A.** BASED ON THIS, NO.

16 **MR. FERNANDEZ:** THAT'S ALL THE QUESTIONS I HAVE, YOUR
17 HONOR.

18 **THE COURT:** ALL RIGHT.

19 **MR. O'LEARY:** I HAVE NO QUESTIONS.

20 **THE COURT:** ALL RIGHT THEN. THANK YOU. I DON'T THINK THIS
21 CHANGES ANYTHING, THIS TESTIMONY. I DO APPRECIATE IT AND I APOLOGIZE. I
22 DID NOT KNOW YOU HAD THIS WITNESS BUT THE MOTION IS GRANTED AND THIS
23 TEST IS, THIS B.A. RESULT IS SUPPRESSED.

24 **MR. FERNANDEZ:** YOUR HONOR, CAN I GET A CLARIFYING
25 RULING? I UNDERSTAND YOU ARE SUPPRESSING THE NUMBER BUT WILL WE BE

1 ABLE TO PLAY THE VIDEO ITSELF SHOWING THE PROCEDURE?

2 **THE COURT:** IN THE B.A. ROOM?

3 **MR. FERNANDEZ:** CORRECT?

4 **THE COURT:** MR. O'LEARY?

5 **MR. O'LEARY:** JUDGE, I'D OBJECT TO THAT.

6 **MR. FERNANDEZ:** THE DEFENDANT MAKES NUMEROUS
7 STATEMENTS OF GUILT IN THE VIDEO AND WITHOUT A NUMBER WE ARE
8 CERTAIN WE COULD STILL GO FORWARD WITH THE TRIAL. I DON'T THINK THE
9 DEFENDANT'S STATEMENTS HAVE ANYTHING TO DO WITH SOMETHING THAT
10 MAY OR MAY NOT HAVE HAPPENED ON OCTOBER 10TH WHICH WAS A WEEK
11 BEFORE HER TEST. WE WOULD WANT TO PLAY THE VIDEO AND SIMPLY GO
12 FORWARD WITHOUT THE NUMBER.

13 **MR. O'LEARY:** JUDGE, I OBJECT TO THAT. THE STATEMENTS HE'S
14 TALKING ABOUT SHE SAID SHE HAD SOMETHING TO DRINK BUT SHE'S
15 (INAUDIBLE) AND THAT I THINK IS REALLY OFF THE TRACK FOR A D.U.I. THAT IS
16 PREJUDICIAL I BELIEVE THAT YOU HAVE SUPPRESSED THE MACHINE. I THINK
17 THE PREJUDICIAL EFFECT OF SHOWING THE VIDEO WOULD FAR EXCEED ANY
18 BENEFIT.

19 **MR. FERNANDEZ:** I CAN GO THROUGH THE STATEMENTS, YOUR
20 HONOR. THERE ARE A NUMBER, MORE THAN JUST TWO.

21 **THE COURT:** ALL RIGHT. MR. O'LEARY, YOUR MOTION WAS TO
22 SUPPRESS THE --

23 **MR. O'LEARY:** DATAMASTER WHICH I ASSUME WOULD INCLUDE
24 THE VIDEO.

25 **THE COURT:** DATAMASTER RESULT. DID YOU MAKE A WRITTEN

1 MOTION?

2 MR. O'LEARY: I DID, YOUR HONOR.

3 THE COURT: OKAY. LET ME TAKE A LOOK AT IT.

4 MR. O'LEARY: JUDGE, THIS FILE IS SO BIG --

5 THE COURT: WE SHOULD HAVE IT IN THE FILE.

6 MR. O'LEARY: I CAN FIND IT FOR YOU. JUDGE, I CAN'T TELL YOU
7 WITHOUT LOOKING.

8 THE COURT: I'LL FIND IT IF IT'S IN THERE. NO PROBLEM. ALL
9 RIGHT. I HAVE HERE THE SECOND MOTION TO DISMISS SO I'M ASSUMING THERE
10 WAS A FIRST ONE. I HAVE TWO MOTIONS TO DISMISS BUT NEITHER OF THEM
11 ADDRESSES THE ISSUES WE ARE TALKING ABOUT TODAY.

12 MR. O'LEARY: JUDGE, THE REASON IS THOSE WERE FILED
13 BECAUSE YOU KEPT THE JURISDICTION. (INAUDIBLE) A COUPLE OF TIMES CAME
14 UP BEFORE THE WRONG JUDGE.

15 THE COURT: OH, OKAY.

16 MR. O'LEARY: JUDGE, I WOULD ARGUE THAT THE VIDEO WOULD
17 BE HIGHLY PREJUDICIAL SINCE YOU GRANTED THE MOTION TO SUPPRESS THE
18 DATAMASTER RESULTS

19 MR. FERNANDEZ: YOUR HONOR, REFERRING BACK I JUST ALSO
20 WANT TO PUT ON THE RECORD THAT I KNOW AT A PREVIOUS HEARING I RELIED
21 A LOT ON STATE V. HUNTLEY. I KNOW I PASSED THE CASE UP. I JUST WANT TO
22 REASSERT STATE V. HUNTLEY. THAT'S A SIMULATOR SOLUTION CASE. IT'S
23 SAYS THE SIMULATOR SOLUTION HAS LITTLE TO DO WITH THE ACTUAL
24 MACHINE.

25 THE COURT: WELL, THAT CASE IS CONSIDERABLY MORE IN-

1 VOLVED AND DIFFERENT.

2 **MR. FERNANDEZ:** THE SIMULATOR SOLUTION WAS OFF IN THAT
3 CASE AND THE READING WAS NOT SUPPRESSED EVEN THOUGH THE SIMULATOR
4 SOLUTION WAS INCORRECT OR NOT WORKING.

5 **THE COURT:** WELL, THAT WASN'T ALL. IT WAS A DIFFERENCE AS I
6 RECALL IN WHAT WAS REQUIRED AND WHAT WAS DONE. BUT ANYWAY --

7 **MR. FERNANDEZ:** REGARDING THE VIDEO, YOUR HONOR, ALL WE
8 HEAR ABOUT DAY IN AND DAY OUT DOWN HERE IS THE IMPORTANCE OF THE
9 VIDEO AND HOW IMPORTANT IT IS TO A D.U.I. CASE. I'VE ARGUED THE MOTION --

10 **THE COURT:** MR. FERNANDEZ, LET'S TRY TO RELY ON THE LAW
11 AND NOT ALL WE HEAR ABOUT DAY IN AND DAY OUT IN HERE.

12 **MR. FERNANDEZ:** WELL, I UNDERSTAND. IN THIS CASE WE DO
13 HAVE A VIDEO. ALL IMPLIED CONSENT WAS FOLLOWED CORRECTLY. IN FACT,
14 THE SUPPRESSION -- IF THE READING WAS SUPPRESSED HAVING NOTHING TO DO
15 WITH ANY LEGAL ARGUMENT PURSUANT TO 2953, IT SIMPLY HAD TO DO WITH
16 WHAT YOUR HONOR DETERMINED TO BE SOME SORT OF TAMPERING WITH THE
17 MACHINE THAT OCCURRED PRIOR, NONE OF THAT WOULD HAVE BEEN --

18 **THE COURT:** I DID NOT DETERMINE WHETHER ANY TAMPERING
19 HAD BEEN DONE. THERE WAS JUST NO EVIDENCE OF WHAT HAPPENED AND
20 HOW IT HAPPENED AND WHO HAPPENED IT, MADE IT HAPPEN.

21 **MR. FERNANDEZ:** THAT'S CORRECT. AND WE WERE RELYING ON
22 BRUCE SMITH'S TESTIMONY THAT THE READING WAS VALID.

23 **THE COURT:** ALL RIGHT. I'M GOING TO ALSO SUPPRESS THE
24 VIDEO IN THIS CASE OF THE B.A. ROOM. WAS THERE ALSO A VIDEO ON THE
25 STREET?

1 **MR. FERNANDEZ:** I THINK WE'VE ALREADY DISCUSSED THAT.

2 **MR. O'LEARY:** JUDGE, THERE IS ONE MOTION IN REFERENCE TO
3 THE VIDEO ON THE STREET. THIS IS THE ONE WHERE I ACTUALLY HAVE ISSUED
4 SUBPOENAS TO TWO OF THE CLERKS WHO SIGNED THESE AFFIDAVITS. WE HAVE
5 AN AFFIDAVIT DATED APRIL 5TH OF '10 AND THERE WAS A SECOND AFFIDAVIT --
6 EXCUSE ME. MARCH 31ST, 2010, WHICH SAYS THAT THE EQUIPMENT WAS
7 INOPERABLE AND THEN SIX DAYS LATER THERE'S A SECOND AFFIDAVIT ON 4--5-
8 10 WHICH SAYS, SORRY, IT DIDN'T HAVE ANY EQUIPMENT. AND I HAVE
9 SUBPOENAED THE TWO WOMEN THAT SIGNED THESE -- THAT VERIFIED THESE
10 AFFIDAVITS AND I WOULD MOVE TO SUPPRESS -- OR ACTUALLY MOVE TO
11 DISMISS THE CASE ON THE GROUNDS OF A SUCHENSKI ISSUE AS TO THE VIDEO. I
12 THINK THOSE TWO AFFIDAVITS ARE CONTRADICTORY WHICH TELLS ME -- AND
13 YOU'LL NOTICE THEY ARE SIGNED IN 2010. THIS IS A 2008 CASE. AND THE
14 AFFIDAVITS ARE ALMOST A COUPLE OF YEARS LATER. AND FOR THOSE
15 REASONS I WOULD ASK THAT THE CASE BE DISMISSED UNDER SUCHENSKI. IN
16 ADDITION I BRING TO THE COURT'S ATTENTION THE CASE OF TOWN OF MT.
17 PLEASANT VS. ROBERTS, I DO HAVE A COPY OF THE ORDER, WHICH REQUIRES
18 THAT THE DEPARTMENTS HAVE VIDEO CAMERAS TO START IN 2000, 2001. BY
19 2008 WE STILL DON'T HAVE VIDEO CAMERAS. I WOULD ASK THE COURT TO TAKE
20 THAT CASE INTO CONSIDERATION. BUT THESE TWO AFFIDAVITS WHICH ARE
21 TOTALLY CONTRADICTORY TO EACH OTHER AND APPROXIMATELY TWO YEARS
22 LATER I THINK THAT WOULD TAINT THE ISSUE OF THE AFFIDAVIT AND FOR
23 THOSE REASONS WE ASKS THAT THE CASE BE DISMISSED UNDER SUCHENSKI.

24 **THE COURT:** ALL RIGHT. MR. FERNANDEZ. HAVE YOU COPIES OF
25 THESE?

1 **MR. FERNANDEZ:** YES, YOUR HONOR.

2 **THE COURT:** OKAY

3 **MR. FERNANDEZ:** CAN I ASK YOUR HONOR ABOUT THE
4 SUPPRESSION OF THE B.A. FIRST SO I UNDERSTAND. CAN I ASK WHAT THE BASIS
5 FOR THE SUPPRESSION IS OF THE ENTIRE VIDEO PROCEDURE, NOT JUST THE
6 READING?

7 **THE COURT:** WELL --

8 **MR. FERNANDEZ:** COUNSEL ARGUED THAT IT WAS -- I THINK IT
9 WAS PREJUDICIAL TO PLAY THE VIDEO. IS THAT THE BASIS FOR THE
10 SUPPRESSION?

11 **THE COURT:** ALL RIGHT, MR. FERNANDEZ, WE ARE GOING TO
12 MOVE ON TO THESE RIGHT NOW.

13 **MR. FERNANDEZ:** YOUR HONOR, IT'S MY UNDERSTANDING IN THIS
14 CASE, FIRST OF ALL, THERE'S NO TIME REQUIREMENT ON WHEN TO TURN OVER
15 AN AFFIDAVIT. THE STATUTE SAYS IT MUST BE TURNED OVER PRIOR TO TRIAL.
16 WE ARE STILL PRIOR TRIAL AND WE ARE IN 2010. YOUR HONOR, THIS CASE -- I
17 BELIEVE IN THIS CASE THERE ARE TWO AFFIDAVITS. ONE WAS SIMPLY
18 OVERTURNED AN ERROR. THE SECOND ONE WAS TURNED OVER WITH A NAME
19 AND CAR NUMBER ON IT AND THEN THAT WAS THE CORRECT ONE.

20 **THE COURT:** WHICH ONE IS THE CORRECT ONE SIGNED BY WHOM?

21 **MR. FERNANDEZ:** SIGNED BY OFFICER ROSS ON 10-27-2010,
22 NOTARIZED ON 10-27-2010 BY JENNIFER HENDRIX, CHECKING SUBSECTION "A"
23 THE VEHICLE WAS NOT EQUIPPED AT THE TIME OF THIS INCIDENT. THAT WOULD
24 BE THE CORRECT AFFIDAVIT, YOUR HONOR.

25 **MR. O'LEARY:** JUDGE, FOR THE RECORD, I DID ISSUE SUBPOENAS

1 WHICH WERE PROPERLY SERVED TIMELY IN A TIMELY FASHION FOR MS.
2 HENDRIX AND ALSO DEDRE FLUITT WITH REFERENCE TO HOW AND WHEN THESE
3 PARTICULAR DOCUMENTS WERE SIGNED. IT'S OBVIOUS THEY WERE JUST
4 CHECKED OFF AND SIGNED AND PROBABLY TURNED OVER TO SOMEBODY TO
5 NOTARIZE AND DIDN'T FOLLOW THE STATE PROCEDURE OR PROTOCOL UNDER
6 THE SECRETARY OF STATE'S PROTOCOL WHICH I HAVE A COPY OF HERE.

7 **THE COURT:** AS FAR AS THE NOTARIZATION YOU DON'T KNOW
8 THAT, YOU ARE JUST SPECULATING?

9 **MR. O'LEARY:** I DON'T KNOW. THAT'S WHY I SUBPOENAED THEM.
10 I MEAN OBVIOUSLY ONE OF THEM IS WRONG OR THEY ARE BOTH WRONG, I
11 DON'T KNOW. THE POINT IS I THINK YOU HAVE AN OBLIGATION BEFORE YOU
12 CHECK OFF AN AFFIDAVIT ABOUT SOMETHING THAT YOU KNOW WHAT IT IS.
13 FIRST, IT SAYS THERE'S EQUIPMENT. NOW EITHER YOU'VE GOT IT OR YOU
14 DON'T. AND THEN YOU COME BACK SIX OR SEVEN DAYS LATER AND SAY, OH,
15 NO, I DIDN'T HAVE EQUIPMENT. THAT TELLS ME THAT EITHER THEY ARE JUST
16 DOING IT IN KIND OF A PRO FORMA THING BY CHECKING OFF THAT BOX, PLUS
17 THESE FORMS -- HONESTLY I DON'T THINK THAT'S THE BASIS FOR A PROPER
18 AFFIDAVIT. THERE'S NO FACTUAL STATEMENTS AS TO WHAT THEY DID. IT'S
19 JUST A FORM.

20 **THE COURT:** WAS THERE VIDEO EQUIPMENT OR NOT?

21 **MR. FERNANDEZ:** NO VIDEO AT THE TIME.

22 **THE COURT:** OKAY. BUT THE AFFIDAVIT SAYS THAT -- THE ONE
23 THAT'S DATED MARCH 31ST SAYS IT WAS INOPERABLE.

24 **MR. FERNANDEZ:** YES, YOUR HONOR. AND AS I WAS SAYING
25 BEFORE I HAD OFFICER ROSS COME TO MY OFFICE AT 1401 MAIN STREET AND

1 FILL OUT A BUNCH OF AFFIDAVITS THAT DAY. HE FILLED OUT AFFIDAVITS FOR
2 AT LEAST FOUR CASES THAT HE HAD PENDING, D.U.I.'S. THIS WAS ONE OF THEM.
3 WHAT WE DID IS WE FAXED THE WRONG AFFIDAVIT. I THINK WE BROUGHT THIS
4 UP AND YOUR HONOR SAID IT WOULD BE A GOOD IDEA TO PUT THE NAMES AT
5 THE TOP OF THE AFFIDAVITS SO IT DIDN'T OCCUR AGAIN AND I AGREED WITH
6 YOU. I HAVE SINCE DONE THAT BUT AS SOON AS WE RECOGNIZED THAT THERE
7 WAS A MISTAKE, THE WRONG AFFIDAVIT WAS SENT TO MR. O'LEARY, WE SENT
8 THE CORRECT AFFIDAVIT, YOUR HONOR. AND THAT'S WHAT WE HAVE HERE
9 TODAY.

10 **THE COURT:** STILL WE DON'T HAVE ANY -- ON THESE TWO
11 THERE'S NOTHING INDICATING WHAT CASE IT GOES TO. I THINK IT WOULD ALSO
12 BE A GOOD IDEA FOR THIS TO BE FILLED OUT AT THE TIME THE SITUATION
13 OCCURS IF THERE'S NO VIDEO IN THE CAR WHICH I THINK MOST OF THEM DO
14 HAVE THEM NOW BUT IF THERE IS NONE. THAT WOULD CERTAINLY BE DONE OR
15 AT LEAST AS SOON AS ONE COULD BE FOUND OUT THAT WAS NOT OPERATING
16 PROPERLY AND THE REASON FOR IT. SO IN THIS CASE THERE WAS NO VIDEO
17 AND THIS CASE OCCURRED BACK IN 2008.

18 **MR. O'LEARY:** OCTOBER 8TH OF '08, YOUR HONOR.

19 **THE COURT:** RIGHT. WELL, AS FAR AS THE MT. PLEASANT CASE
20 I'M FAMILIAR WITH IT, OF COURSE, AND IT HAS -- I DON'T KNOW WHAT THE
21 DATE -- THIS WAS THE DATE OF THE ORDER IN 2010 BUT LET'S SEE WHAT THE
22 DATE OF THE ...IT LOOKS LIKE THE INITIAL STOP WAS NOVEMBER 11TH, 2007 SO
23 THAT INCIDENT IN THE MT. PLEASANT CASE ACTUALLY OCCURRED EARLIER
24 THAN THE ONE THAT WE ARE LOOKING AT HERE WHICH IS ...I THINK THAT -- IF
25 YOU KNOW, MR. FERNANDEZ, WHEN DID THE CITY OF COLUMBIA BEGIN

1 PUTTING THESE MACHINES IN THE VEHICLES?

2 **MR. FERNANDEZ:** CITY OF COLUMBIA WENT THROUGH A COUPLE
3 OF STAGES. WHEN THE VIDEO REQUIREMENT CAME OUT, 2953, SUBSECTION "D"
4 SAID THAT D.P.S. MUST PROVIDE ALL CAMERAS FOR USE FOR THIS STATUTE.
5 D.P.S. SENT A (INAUDIBLE) CALL TO THE POLICE DEPARTMENT. IT WAS
6 PROBABLY AROUND THIS TIME, MAYBE A LITTLE BIT BEFORE, PROBABLY 2007,
7 2006 2007 WHEN IT CAME OUT, ASKING THE POLICE DEPARTMENTS TO GIVE THEM
8 VEHICLES THAT WERE PRIMARILY USED IN D.U.I. SUPPRESSION. THE CITY OF
9 COLUMBIA SENT BACK A REQUEST FOR I BELIEVE TEN VEHICLES WHICH
10 CONSTITUTED TRAFFIC UNITS BECAUSE THAT WAS PRIMARILY THE D.U.I.
11 SUPPRESSION --

12 **THE COURT:** WHAT YEAR WAS IT THAT THE CITY OF COLUMBIA
13 BEGAN COMPLIANCE WITH THAT DIRECTIVE?

14 **MR. FERNANDEZ:** WE NEVER COMPLIED WITH THE STATUTE
15 NECESSARILY BECAUSE D.P.S. JUST DIDN'T HAVE ANY CAMERAS. THEY ONLY
16 GAVE US TEN OR FIFTEEN OVER THE COURSE OF -- WELL, SINCE THE PROGRAM
17 BEGAN. WE HAVE EQUIPPED OUR OWN CARS AT OUR OWN EXPENSE WHICH I
18 BELIEVE GOES -- WELL, IT DOES. IT GOES BEYOND WHAT THE STATUTE
19 REQUIRES. THE CITY SHOULDN'T BE PENALIZED FOR GOING BEYOND WHAT THE
20 STATUTE REQUIRES. I DON'T KNOW THE PERCENTAGE BUT A LARGE,
21 SIGNIFICANT PERCENT OF OUR CARS NOW ARE EQUIPPED WITH VIDEO.

22 **THE COURT:** OKAY. DID YOU EVER TELL ME WHEN THAT WAS
23 BEGUN?

24 **MR. FERNANDEZ:** I WANT TO SAY IT'S PROBABLY AROUND THIS
25 TIME THAT WE BEGAN PUTTING CAMERAS IN OUR CARS.

1 **THE COURT:** AROUND THIS TIME MEANING WHICH TIME?

2 **MR. FERNANDEZ:** AROUND THE END OF 2008, MAYBE 2009. I
3 COULDN'T GIVE YOU A SPECIFIC DATE BUT I CAN (INAUDIBLE).

4 **THE COURT:** ALL RIGHT. WELL, I JUST CERTAINLY KNOW THAT
5 WE'VE BEEN DEALING WITH THIS QUESTION AND THAT'S -- HOWEVER, YOU'VE
6 GOT TWO CONFLICTING AFFIDAVITS AND I THINK THAT THE PROCEDURE FOR
7 OBTAINING THESE AFFIDAVITS IS FLAWED. AS I SAID THE LAST TIME WE
8 LOOKED AT THIS ISSUE THAT THERE SHOULD HAVE BEEN A CASE CAPTION OR
9 AT LEAST A NAME AND A TICKET NUMBER ON THEM. THERE'S NO
10 IDENTIFICATION AS TO WHICH -- THIS COULD GO FOR ANYTHING. AND THE WAY
11 THAT IT'S DONE WHERE YOU ARE CALLING SOMEBODY IN TO SIGN -- DID YOU
12 SAY TWENTY SOMETHING?

13 **MR. FERNANDEZ:** NO. FOUR.

14 **THE COURT:** FOUR. OH, I THOUGHT YOU SAID QUITE A LARGE
15 NUMBER.

16 **MR. FERNANDEZ:** NO. FOUR D.U.I.'S FOR ONE OFFICER IS A DECENT
17 AMOUNT.

18 **THE COURT:** WELL, FOUR YOU SHOULD BE ABLE TO KEEP THAT
19 STRAIGHT. I'M GOING TO GRANT THIS MOTION. CASE IS DISMISSED.

20 **MR. O'LEARY:** THANK YOU, YOUR HONOR.

21 **MR. FERNANDEZ:** WELL, YOUR HONOR, THAT WOULD BE BECAUSE
22 YOU SAID THE AFFIDAVIT FAILS?

23 **THE COURT:** MR. FERNANDEZ, DON'T ARGUE WITH ME ANY MORE.
24 THANK YOU. HERE YOU GO.

25 (ADJOURNED)

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2011-CP-40-3692

City of Columbia,)
Plaintiff,)
vs.)
Carol Davis,)
Defendant.)

Transcript of Record

February 3, 2012
Columbia, South Carolina

B E F O R E:

The Honorable Alison Renee Lee, Judge

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

David A. Fernandez, Esquire
Attorney for the Plaintiff

John A. O'Leary, Esquire
Attorney for the Defendant



Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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<u>Witness/Description</u>	<u>Page No.</u>
Motion by Mr. Fernandez	3
Certificate Page	37

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>
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No Exhibits Introduced.

1 THE COURT: We'll go to *City of Columbia vs. Carol*
2 *Davis*. It's docket number 2011-CP-40-3692. And city is
3 represented by?

4 MR. FERNANDEZ: David Fernandez, Your Honor.

5 THE COURT: David Fernandez, and Carol Davis is
6 represented by John O'Leary.

7 MR. O'LEARY: Yes, ma'am.

8 THE COURT: We are here on appeal from municipal court
9 on a charge of, I believe, driving under the influence. Is
10 that correct?

11 MR. FERNANDEZ: That's correct, ma'am.

12 THE COURT: And at the trial, the matter was
13 dismissed, and the city has appealed that dismissal. Is
14 that correct?

15 MR. FERNANDEZ: Yes, Your Honor.

16 THE COURT: Okay. I have had the opportunity to
17 review the record and the file. There is a transcript of
18 the proceedings, and I have had a chance to review that as
19 well. And so I'll hear from you, Mr. Hernandez.

20 MR. FERNANDEZ: Thank you, Your Honor. May it please
21 the court? The -- you're likely aware since you read the
22 transcript that this matter was dismissed by the court.
23 It's actually a multi-tiered appeal because multiple things
24 went on. So, I'll -- chronologically, there were two
25 issues of suppression and then ultimately a dismissal. It

1 makes more sense to work somewhat backwards, so I'll start
2 with the dismissal and then work into the suppression.

3 Beginning with the dismissal, it's clear from the
4 transcript page 30, beginning at line 4 and then continuing
5 through the rest of the page, the judge discusses the basis
6 for the dismissal. A motion was made based on, I guess,
7 two, two, two reasons why the case should be dismissed.
8 One, that there was no roadside video because the camera
9 was -- there was no camera installed in the car.

10 This has been an issue that went all the way to the
11 Supreme Court in a case called *Town of Mount Pleasant vs.*
12 *Roberts* or *Roberts vs. Town of Mount Pleasant* where they,
13 where they really fleshed out when it is, when it is
14 permissible or not permissible for a police department to
15 still have cars that are not equipped with roadside video.

16 It, it started out as that, but it ended up turning
17 into something different, and it's clear from the
18 transcript that the judge dismissed the case based on what
19 she determined was some sort of issue with the affidavit
20 process. Now, the affidavits that are submitted in a DUI
21 when there is no roadside video, it's a, it's a requirement
22 in order to assert a 29-53 Subsection B defense.

23 In this case, specifically what happened was the
24 officer that was, that -- the arresting officer in this
25 case had filled out numerous affidavits prior to -- this is

1 just some background -- prior to this case. Through an
2 error in my office, the wrong affidavit was submitted for
3 this case; the wrong affidavit was placed in this file,
4 affidavit that belonged to another case. As soon as the
5 problem was recognized, it was fixed. A new affidavit --
6 or the original affidavit that should have been in it was
7 forwarded to defense counsel and was placed in the file.

8 The new, the correct affidavit clearly stated the name
9 of Carol Davis on it, with the car number that was used in
10 her arrest. The car number did not have video installed,
11 and the officer, the officer verified that on that
12 affidavit.

13 What was raised at the court is that the defendant was
14 somehow confused by the two affidavits, and the judge took
15 issue with the fact that one affidavit was submitted and
16 then was corrected, subsequently corrected. So, the
17 dismissal pretty clearly hinges on that. She does not
18 address the Town of Mount Pleasant issue. She doesn't get
19 to that point, so I don't think it's before the court at
20 this juncture.

21 The affidavit issue -- and, and, and the basis is
22 entirely that there is no, there is no legal basis to
23 dismiss a case because one affidavit was submitted, and
24 then when it was discovered it was an incorrect affidavit,
25 the problem was corrected. There's absolutely no legal

1 basis to dismiss an affidavit. We're not even talking
2 about evidence in the general sense. We're talking about
3 an affidavit that's required simply to assert a defense.

4 The defendant certainly suffered no prejudice because
5 regardless of which affidavit was submitted, at the end of
6 the day there was no roadside video. That didn't change
7 based on whether or not the affidavit was submitted for
8 this case or another case. The fact of the matter remained
9 that there would never be roadside video, and the argument
10 would still be generally the same.

11 THE COURT: But that affidavit allows you to go
12 forward with a case on the basis and explains why there's
13 no roadside video. And so if the court finds, and if it's
14 mandatory and it's required, and if the court finds that
15 it's either not credible or that it's not been filed
16 properly, then the case can be dismissed on that basis. At
17 least, isn't that the -- what I thought was the state of
18 the law at the time?

19 MR. FERNANDEZ: I know of no case ever being
20 dismissed, at least in a court of record, based on an
21 affidavit.

22 THE COURT: Yes, sir.

23 MR. FERNANDEZ: The, the issue -- and as far as
24 providing the defendant proper notice in order to prepare
25 for a motion to dismiss, that was accomplished because the

1 case -- the correction was remedied within a few weeks and
2 long time before we actually even argued in May 2011.

3 As Your Honor -- I don't know if it's attached, but
4 this case had multiple tiers of motions that occurred
5 dating all the way back to the prior year. So, there was
6 more than enough time for the defendant to prepare a new,
7 essentially, argument against -- to dismiss.

8 THE COURT: Well, none of the motions are attached to
9 the transcript. Basically what I have is the transcript of
10 record, and a statement as to what the charge was, and I'm
11 sure you received a copy of the return as I've received it.
12 What the charge is, when the charge was issued, the
13 citation, who the attorneys were at the motion hearings,
14 all the appropriate dates. But I have no exhibits. I have
15 no motions. I have no other documents that would have been
16 filed with the court. I don't even have the affidavit in
17 question. I have none of that.

18 MR. FERNANDEZ: Okay. I assume Your Honor has the May
19 12, 2011, transcript as part of the return?

20 THE COURT: I have the transcript because that's what
21 I read. I have the transcript from the motion hearing that
22 led up to the case being dismissed, which is dated May the
23 12th of 2011, and that's all I have.

24 MR. FERNANDEZ: Okay. Well, as far as just some
25 background, this case came up in October of 2010 prior to

1 the May 2011. And because of scheduling, what the judge --
2 it took that long to -- in order to have it ultimately
3 addressed. So, there had been a significant amount of time
4 between when the document, the original affidavit, was
5 submitted versus when the corrected affidavit was
6 submitted. Certainly more than enough time for someone to
7 prepare for a motion to dismiss.

8 So, again the argument is essentially the defendant
9 did not suffer any prejudice because her position hadn't
10 changed. It never changed, and that there is no legal
11 foundation for a dismissal under those circumstances. The
12 affidavit, the affidavit was submitted in plenty of time.
13 And it was a mere clerical error, essentially, why one
14 affidavit was submitted versus the other. And the one
15 affidavit indicated, I think, that the car was inoperable,
16 which is why there was no video. And the other, the
17 correct affidavit indicated that the car was just never
18 equipped, which was, which was what was going forward here.

19 So, because it's pretty clear, I think, from the
20 transcript that the judge dismissed it solely based on the
21 affidavit issue, we contend that that's either an error of
22 law because there is no law on point about that, and
23 there's no authority to dismiss based on a correction of an
24 affidavit. And or, too, it's an abuse of discretion in
25 that there is, there's no, just no legal basis for it.

1 Your Honor, moving on to the second tier of what went
2 on at the dismissal hearing, two, two things occurred. The
3 BA, the breath analysis result was suppressed, and then
4 two, the breath analysis video was suppressed after the,
5 after the result was suppressed. And the city contends
6 that both of those were an abuse of discretion, and I'll
7 elaborate way.

8 The defendant was obviously arrested and provided a
9 breath sample at the request of the officer. The sample
10 was 1.7 percent. What occurred or what the allegation was
11 is that as Your Honor is probably aware, all these docum --
12 all the breathalyser and all these docum -- they're all
13 documented electronically. So, anything that's input into
14 the breath analysis machine, SLED maintains records on
15 this.

16 One of the records, there appeared an anomaly, and
17 there's a line item of every test performed. Whether it's
18 a successful test, whether it's a refusal, there's, there's
19 line items for all these, any, any kind of thing that is --
20 occurs on this machine. And there was an anomaly in the,
21 in the printouts somewhat -- some time before the
22 defendant's test that indicated a solution number that was
23 different than the one that was in the machine. And
24 initials that were, I think KUH or whatever the documents
25 say, the transcript says. And a Data Master ID number,

1 which is what you get when you become Data Master
2 certified, that was longer than any Data Master number in
3 existence. They just couldn't numerically --- so, it was
4 larger than even the latest Data Master number issued was.
5 I think it was six digits instead of four or five.

6 In any event, the, the issue became -- the allegation
7 was that there was -- somehow the test was unreliable or
8 inaccurate, or that the machine had been tampered with.
9 That was the basis -- that was the essential allegation.

10 And so in order to address that, I brought in two
11 people to testify for the city. The two gentleman were
12 Office Scott Wilson with CPD and Bruce Smith, SLED
13 toxicologist in charge of implied consent at SLED for the
14 region, for the Midlands region.

15 Officer, the purpose of Officer Wilson's testimony is
16 that he is the officer assigned to the maintenance and --
17 of the actual breath analysis room. It involves basic
18 stuff such as cleaning and its organization, but it also
19 includes changing the solution whenever it's required.

20 And this is a very technical argument, and I do have a
21 case to pass up that was referenced throughout the
22 transcript if it would help Your Honor. But the solution
23 is part of the BA machine, and it, what it does is it's an
24 alcohol solution that the BA machine uses to self-test
25 prior to testing someone else's breath. So, the machine

1 essentially inserts that solution into itself, tests it to
2 make sure it's at .08, which is what it should be, and then
3 vacates the solution, and then performs a real test.

4 Officer Wilson testified that he had not changed the
5 solution. He changed it to the solution bottle that was in
6 the machine, and had never changed it during the anomaly.
7 But only after the next solution bottle came up, when the
8 expiration came up.

9 THE COURT: So, basically he put a bottle in there,
10 and then it wasn't changed again until it was time for it
11 to be changed?

12 MR. FERNANDEZ: And that's, that's correct, and he
13 said the bottle he pulled out, the bottle he pulled out was
14 the one he put in the month prior, two months prior or
15 however long it takes to exhaust the solution.

16 He is the one in charge of the cabinet that the
17 solutions are under lock and key from. And he is the one
18 who conducts the changing of the solution. So, he said he
19 had not done that.

20 The SLED toxicologist testified that he had reviewed
21 the records, and what he essentially said was that
22 sometimes people input random things into the machine
23 because you can, you can just input anything. I can.
24 Anyone could go in there and simply type their name, and it
25 would show up on the records. Doesn't mean you actually

1 did anything. It just means you type something into a
2 computer.

3 And what he said was he reviewed the logs, he reviewed
4 the machine. There is no such person as a KUH. There's no
5 initials with KUH in the state of South Carolina. There's
6 no BA number that was presented on the machine. He chalked
7 it up to pure anomaly. Someone just entered something that
8 didn't make any sense. And there was no solution number
9 that was alleged to have been installed. He said it's an
10 anomaly: that someone made up some numbers and put it in
11 the machine.

12 And most importantly when I asked whether the machine
13 -- whether the test that was the result of, of the
14 defendant was accurate, scientifically sound and accurate,
15 he said yes, it is. That the anomaly in no way affected
16 the reading. And to support that, I'll pass up to Your
17 Honor the case law, with permission to approach?

18 THE COURT: Yes, sir.

19 MR. FERNANDEZ: To support the argument of a solution
20 not affecting the machine is the case of *State vs. Huntley*
21 that dealt with -- it's a solution case. And the court
22 very clearly said that the solution in no way affects the
23 machine. It simply is the solution that it uses to, to
24 test itself. And the court very clearly says that any
25 evidence of something that went on that wasn't exactly

1 according to plan goes to the weight, not the
2 admissibility. It's very clear that that's the standard.
3 Not, not to be suppressed. It just goes to the weight.
4 Counsel can certainly ask questions of a SLED expert, or
5 the arresting officer, or Officer Wilson. It goes to the
6 weight.

7 The, the -- so, two, two things on that. One, that it
8 was purely an anomaly. In no way affected the machine. In
9 no way changed the machine. It never happened essentially.

10 And then second, even if you assume the worst, even if
11 you assume someone snuck in there, stole a key from the
12 only officer that had a key, and changed the solution of
13 all things, even if that were to have occurred, it still
14 wouldn't affect the machine itself. So, even worse, even
15 assuming worst case scenario, it doesn't change the fact
16 that the reading is true and accurate.

17 The second, the second thing that spiraled out of
18 that, as soon as the suppression was granted on the BA
19 reading, defense counsel moved to suppress the entire BA
20 video. It's unclear if it was moved to suppress based on
21 -- I think he argued it was unduly prejudicial. It's
22 unclear if it was just as a result of the reading, or if it
23 was just in general prejudicial to the defendant. I'll
24 address both of them.

25 The -- as far as being prejudicial, it's of course

1 prejudicial. The defendant was extremely intoxicated and
2 was discussing that pretty liberally in the BA room. So,
3 of course it's going to be prejudicial because she's
4 essentially admitting what she was charged with.

5 But as far as, as far as that's concerned, all implied
6 consent laws were followed. There's no legal basis to
7 suppress the BA because there was no legal error. The
8 legislature is very clear that it prefers, if at all
9 possible, to have video in DUI cases. And in this case, we
10 did have a video. It was -- it complied with all relevant
11 laws.

12 It simply didn't assist the defendant in her defense,
13 but that's not the purpose of evidence. The purpose of
14 evidence is, obviously the state would assert, that it
15 proves the matter that she was charged with. The -- so, if
16 it's just prejudicial, that's just clearly an abuse of
17 discretion because there's no, there's no basis for
18 suppressing something that isn't favorable to the
19 defendant.

20 The second issue is whether it was suppressed because
21 just as a result of the BA reading being suppressed. It
22 didn't -- it was unfair to show the procedure. Whether or
23 not the BA reading comes into evidence or not, it still
24 shows her conduct. And one of the requirements in the
25 videotape statute is certainly to show the defendant's

1 conduct. So, it certainly helps the trier of fact,
2 regardless of whether there's an actual number to assign to
3 her test. Simply observing her conduct is something the
4 legislature very clearly wants for a jury to have in order
5 to decide whether or not a person's intoxicated.

6 So, under any -- either circumstance, it's still
7 relevant and should not have been suppressed. But
8 certainly if the BA reading is valid, then there is
9 absolutely no reason to suppress the video following her.
10 I think that's all I have, Your Honor.

11 THE COURT: Mr. O'Leary.

12 MR. O'LEARY: Yeah, Judge, I'll work backwards.

13 Just one comment on the -- about the videotape in the
14 Data Master room. They had never under *Roberts* gotten the
15 cameras for the cars, and I believe he said that, Mr.
16 Fernandez says we've never even complied with the statute
17 necessarily because they just didn't have any cameras. My
18 point is, I mean, they're playing it both ways.

19 This case, if we started to work backwards, there are
20 two affidavits. They do not have any identifier on them as
21 to which case it is. They're signed in 2010 for an offense
22 that took place in 2008. So, it's two years later. We've
23 got two affidavits that are contradictory affidavits.
24 They're not identified. They're not, they're not factually
25 based. There's nothing in there to explain why *Roberts* or

1 anything else, why they haven't complied. But I think that
2 the judge said it best on page 30 of the transcript when
3 she said:

4 You got two conflicting affidavits, and I, and I
5 think the procedure for obtaining these
6 affidavits is flawed. As I said the last time we
7 looked at this issue, there should have been a
8 case caption, or at least a name or a ticket on
9 them. There's no identification as to which.
10 They can go for anything.

11 And what I'm, what I'm saying is what they've used,
12 what they've done for years, the City of Columbia, and it's
13 right out of *Roberts* issues being looked at. There was a
14 full-scale hearing with all cases that we had that had this
15 problem about, what, two months, David?

16 MR. FERNANDEZ: In October.

17 MR. O'LEARY: In October, I guess, and it still hasn't
18 been ruled on by the judge. But what happens on this, on
19 this particular case, what they do is they use the
20 affidavits. They give it to you the day before trial
21 saying, oh, there's no, there's no camera, and they try to
22 use the exception because they haven't complied with the
23 statute.

24 That affidavit -- and the affidavit should be in the
25 court record -- neither of them are signed. Neither of

1 them have any factual basis. And one of them or both of
2 them are wrong. Judge, I have copies of those. I thought
3 they were in the file. I don't ---

4 THE COURT: They're not in the file, so I would need
5 copies of them to rule on the issue.

6 MR. O'LEARY: Judge, I'll give you my copy here.

7 THE COURT: Thank you.

8 MR. O'LEARY: Judge, they can't use that exception
9 when they're putting in an affidavit to get around the
10 videotaping law, and that's what the City of Columbia has
11 done. That's what their own judge recognized. That, you
12 know, they've been doing this and they said -- and she says
13 that the affidavits are flawed.

14 There's no abuse of discretion by saying the affidavit
15 is improper. An affidavit signed two years later -- the
16 first one, he must have sworn to, if he swore to it. He
17 must have sworn to it and said, well, the machine was
18 broken. Well, we know that's not true.

19 So, then they come back a couple of weeks later and
20 they get a second affidavit saying oh, there was no
21 machine. Now, the reason they looked for it was I had
22 subpoenaed the records from the initial arrest in 2008. I
23 in discovery request automatically a copy of the video
24 cameras assigned to the particular car. And that's why,
25 you know, this became an issue.

1 Now, he referenced a couple of earlier hearings. They
2 were more like informal meetings really, and no issue was
3 ever decided. But what happened was the issue was brought
4 up as to the second issue, the simulator solution, and the
5 discrepancy in the SLED records. That was brought up
6 several months earlier. At that point, David got ahold of
7 SLED, brought in the SLED man to testify. And he testified
8 he here, and he says -- I mean, his testimony is he's got a
9 machine that obviously somebody has been playing with, and
10 that was the reason for the judge's ruling as to the
11 suppression of the Data Master. I mean, on page, on page
12 12 of the transcript, he's, he's asked:

13 So, somebody may have falsified those records?

14 They might have been falsified. Well, if it's
15 falsified.

16 And he goes on:

17 He could falsify it if someone wanted to.

18 And then he's got like maybe a double falsification.
19 See, what they're trying to lead you to believe is that
20 those -- that the data in the machine is, it can only be
21 put in that machine when the officer enters into it. So, I
22 can go into that evidence room, which should be secure,
23 which should be, but it's not. The judge even recognized
24 that, and she says look. Essentially on page, her ruling
25 on page 18, which again is not abuse of discretion. It's

1 their own witnesses that they brought in after the issue
2 was raised six months earlier. She says on line 20 and 21:
3 It's just that this is the prosecution's evidence, and it
4 can't be tampered with.

5 And this machine obviously had been tampered with.
6 Their own ev -- their own witness said yeah, there was some
7 evidence in here that's falsified. There's some numbers
8 falsified, names falsified, and that was the basis for her
9 suppression.

10 But I think that's a secondary issue because the real
11 issue is the two affidavits, and she, she dismissed the
12 case based upon the fact that those affidavits were not
13 specific enough. They didn't say anything. They were
14 contradictory, and at that point she dismissed it.

15 So, I really believe, Judge, the best evidence of this
16 case is the transcript and their own witnesses as to not
17 only the falsification of records, of the records of the
18 Data Master. But, more importantly, the actual affidavits
19 that we submitted to the court, and I actually thought they
20 were going to go on record.

21 And we would ask that this, that the dismissal by the
22 lower court -- there's no abuse of discretion. When you
23 see two false affidavits, obviously something was fault --
24 and she says I'm not taking it, and so she dismisses it.

25 THE COURT: Mr. ---

1 MR. O'LEARY: And that's under the old *Shishinki*
2 [phonetic] case. That's a, that's a proper remedy.

3 THE COURT: Mr. O'Leary, how did these affidavits come
4 to produced? In what manner were they produced? I mean,
5 is it produced as part of a file or part of a record or?

6 MR. O'LEARY: No. What happened was I came to trial,
7 and I can't tell, tell you the dates because this thing did
8 go on for a long time. And one of the times that we were
9 scheduled for trial, I brought up the affidavit issue.
10 Then I, then I didn't hear anything until it ultimately
11 came up in October or so of whatever the first date was on
12 the affidavits.

13 When we came into court, at that point I got that
14 affidavit. Then I get another one in the mail that says
15 oh, no. That one's not right, and this is again two years
16 after the incident. So, the whole procedure or lack of
17 procedure by the city -- they can't just have somebody come
18 in and sign a blank affidavit and say that we don't have a
19 machine. Therefore, we fit within the exception of the
20 videotaping requirement required on a DUI case on the site
21 -- excuse me, on the scene, not necessarily the site.

22 So, they're playing it both ways. They say oh, this
23 affidavit gets us around, and we don't comply with *Roberts*.
24 But, on the other hand, we got a machine that's obviously
25 been tampered with in some way. We want that video in.

1 So, I would ask that the court uphold the dismissal of the
2 lower court, and those affidavits don't have any markings
3 on them. They don't have any case names on them. They
4 don't have anything on them.

5 THE COURT: So, what about, what about the video part?
6 Even if someone, for example, even if someone were arrested
7 and was transported for purposes of taking the
8 breathalyser, and after the twenty-minute observation
9 period refused the test, the video would still be
10 admissible, would it not?

11 MR. O'LEARY: No, you're talking, you're talking the
12 Data Master room itself.

13 THE COURT: Right.

14 MR. O'LEARY: Not the site one. Yeah, in that
15 particular situation, we actually had an administrative
16 hearing. That was another kind of a distorted thing.
17 There was testimony, and the video wasn't introduced in the
18 administrative hearing. I don't know why they didn't.
19 They just didn't have it, I guess, at the date of the
20 hearing. But the law is clear as to the, as to the *Roberts*
21 case for the, for the site location. And those, if that's
22 a valid affidavit, you've really made a mockery of the
23 whole law.

24 THE COURT: Right. I understand, I understand that
25 what goes on at the scene at the time that somebody is

1 stopped ---

2 MR. O'LEARY: Yeah.

3 THE COURT: --- and arrested at the scene that there
4 are certain rules that govern that, and the statute covers
5 that. But then once, once that person is placed under
6 arrest and is transported to the testing site, was that
7 video not offered, or she excluded that video as well?

8 MR. O'LEARY: She excluded the video of the Data
9 Master room after she suppressed the Data Master. And the
10 reason I argued was that it's prejudicial and it would have
11 to be -- I mean, even David admitted to that. But it would
12 be because you see somebody in a room. There's no
13 admissions, like he says, that I'm drunk or something.

14 THE COURT: Right.

15 MR. O'LEARY: She said yeah, I had something to drink,
16 and he brought that to the court's attention.

17 THE COURT: But wouldn't, wouldn't -- other than that
18 particular finding by the court, those videos can be
19 routinely introduced and used even if the person -- even if
20 there's no subsequent breathalyser test taken.

21 MR. O'LEARY: Oh, yeah, for observation of the
22 person's conduct.

23 THE COURT: Right.

24 MR. O'LEARY: In the video. I agree with you.

25 THE COURT: Exactly.

1 MR. O'LEARY: I agree with you there.

2 THE COURT: So, how was that not an abuse of
3 discretion to not allow that particular video which just
4 shows her basically sitting in a chair for twenty minutes?

5 MR. O'LEARY: Well, one, she'd already determined that
6 this machine, there'd been some tampering or falsification
7 or whatever. But the -- there's a difference, I think,
8 between somebody in there and refuses where they never take
9 the mouthpiece, put it in their mouth, and blow. But when
10 you actually put it in your mouth and blow, there's going
11 to have a really negative impact in terms of the jury
12 because the jury is going to wonder, well, she blew. What
13 did she blow, and it's not a refusal.

14 THE COURT: Well, that part, that part could have been
15 stopped, could it not? I mean, they could have taken, they
16 could have taken the video up to the point where she's
17 asked, you know, does she want to blow.

18 MR. O'LEARY: Yeah, it could have been redacted at
19 that point, but I, I, I think the whole crux of the thing
20 was the case really was dismissed because of the two
21 affidavits which kind of moves out this question in here
22 about the Data Master.

23 I'll be honest with you. I've never seen a sloppier
24 operation in terms of the security of the Data Master. I
25 mean, and people had access to that room, unlike what Mr.

1 Fernandez just led you to believe, that there was only one
2 person with a key to the room. He was asked, he was asked
3 about who could get in there and he said, you know, the
4 people that run the test. So, so, and some other officers,
5 and somebody obviously got in there, and somebody obviously
6 played on that machine.

7 And it shocked me that SLED doesn't have in place with
8 local departments real security protocol for that
9 particular machine. He even admitted yeah, you could have
10 put a solution in there and taken it out. He said, well,
11 but it wasn't recorded. Yeah, you're right, didn't record
12 it. He didn't, he didn't type in I falsified this, I put
13 extra solution, but it shows up on their printout.

14 So, I mean, I'm, I'm saying that this was really a
15 poorly -- I'm not blaming David. The whole operation in
16 terms of the security and integrity of the Data Master room
17 itself, in terms of the Data Master records themselves
18 showing on its face somebody had been in that machine, and
19 then you got the affidavits two years later for the street
20 situation.

21 I mean, the court at that point, what do you do? Do
22 you really make a mockery of the state law? And I think
23 that's what they've done is they never even put the cameras
24 in the street. So, I ask that the dismissal be sustained
25 or upheld.

1 THE COURT: Mr. Fernandez.

2 MR. FERNANDEZ: Yes, Your Honor. Essentially, it's --
3 first of all, I take issue with the fact that it's not a
4 secured area. In order to access the BA room, it is in the
5 basement of the police department under -- you have to
6 first of all get past all those security measures the
7 police department has, which includes locked doors only
8 accessible by special keys, multiple elevators that are
9 only accessible by special keys, and a special number to be
10 able to get in the room. If you were to accomplish that
11 and got into the BA machine, you can't even do anything on
12 it unless you have a valid BA number, which means you went
13 through the SLED certification in order to be BA certified.

14 What we're talking about is if there were tampering,
15 it was done by a uniformed police officer. So, assuming
16 the worst, assuming a uniformed police officer with the City
17 of Columbia, who had access to all these keys and access to
18 the BA machine, went into the BA machine to somehow change
19 the solution and marked it as a changed solution, didn't
20 put his name down because he didn't want to get caught, and
21 then however -- apparently changed the solution because
22 when the officer who was in charge of it went to replace
23 the solution, it was the original solution he'd put in.
24 So, somehow someone in this diabolic plan decided to change
25 the solution with a fake number and then replace it without

1 reporting it, all for what purpose? For a solution that in
2 no way would affect the results of the machine. It's an
3 absurd proposition.

4 The actual -- what we're going on here was just
5 somebody who was in there likely for another test and put
6 some mistaken initials and numbers in there, and then
7 cleared it out. That's it. That is likely what happened,
8 but we can't say because we'll never be able to tell. And
9 that's essentially what SLED was saying is that I can't
10 tell you what's going on there because there is no way to
11 determine it. I can tell you, though, that the machine is
12 working properly because we've inspected it, and that the
13 machine -- and that the test that happened on this date is
14 accurate. That's what he can say, and that's what he did
15 testify to.

16 THE COURT: And this was the next test after the
17 anomaly?

18 MR. FERNANDEZ: It was either -- and, Your Honor, I'm
19 not certain, but I do know the next test or one or two
20 after, but certainly a number if tests occurred before the
21 machine was actually maintained by SLED, which occurs
22 either monthly or bimonthly.

23 Then going to the affidavit, in order for -- well,
24 first of all, and to the suppression of the BA result, the
25 judge even admits she found no tampering. On page 24, line

1 19, she says: I am not finding that it was tampered with.
2 So, that's why it's an abuse of discretion. She, she
3 suppressed it without even finding what she needed in order
4 to suppress it. It would have, it would have necessarily
5 required a finding of tampering in order to suppress, and
6 she said clearly I'm not finding that it was suppressed.
7 I'm not finding that it was tampered with. We just don't
8 know. Well, that's not a valid reason because what we do
9 know was that it was accurate because that's what the --
10 SLED testified to.

11 As about -- and in regards to the two affidavits, what
12 it necessarily requires in that regard is they said that
13 there was some underhanded thing going on with the officer
14 either swearing under oath both times that two different
15 things were going on, or somehow the city wanted so much to
16 save this case that it was going to fabricate a, a -- an
17 affidavit with information that can be easily verified.

18 What we're talking about, and I don't know what Mr.
19 O'Leary passed forward to Your Honor as far as the
20 affidavit. I have my copy, but the second affidavit that
21 was submitted does have some identifying features on it.

22 MR. O'LEARY: There's an error on the one that was
23 provided to me.

24 MR. FERNANDEZ: Okay.

25 MR. O'LEARY: It wasn't provided.

1 MR. FERNANDEZ: This is the same I ---

2 MR. O'LEARY: It wasn't provided -- it was provided
3 after -- he must have put that on after ---

4 MR. FERNANDEZ: It's possible.

5 MR. O'LEARY: Yeah, it is possible.

6 MR. FERNANDEZ: I want to see what was going --
7 what was going was submitted to Your Honor.

8 THE COURT: Well, the ones I have had no information
9 on them. They don't even state the officer's name, and
10 there's a signature. Those are the two affidavits that
11 were provided. They have no identifying information.
12 Don't even say what the date of the offense was.

13 MR. FERNANDEZ: Okay.

14 THE COURT: It doesn't say.

15 MR. FERNANDEZ: I don't have any -- I, I -- that's
16 possible that it was added after the fact. That's, that's
17 certainly possible.

18 MR. O'LEARY: Judge, my only response to David's
19 argument is this. When she ---

20 THE COURT: Well, let him finish his argument.

21 MR. O'LEARY: Oh, I thought he was through. I'm
22 apologize.

23 THE COURT: Yes.

24 MR. FERNANDEZ: The -- so -- and, Your Honor, that is
25 -- it's an affidavit, and you can see it's a form. It

1 doesn't ever ask for any identifying features. The options
2 you checked, it's either the car wasn't equipped, or it was
3 inoperable. If you have some other-exigent circumstances
4 or medical, there are spaces for you to elaborate. But in
5 order for to -- you to assert a subsection B defense for
6 the two things we're talking about here today doesn't
7 require anything. And I'll remind Your Honor what an
8 affidavit is. It's simply a document that we're required
9 to submit in order to proffer some evidence in order to
10 assert a defense.

11 The officer needs -- would be under oath when he's
12 talking about what's going on in this case. So, an
13 affidavit is essentially a place holder. And what we had
14 here was not the officer signing saying on this day, on
15 this case the car was inoperable. It was not equipped. He
16 signed the correct affidavit. It was a failure on my
17 office to forward the incorrect affidavit for the case.

18 So, if there's, if there's a, if there's a mistake
19 here, it's not on the officer and what he asserted in an
20 affidavit and what he would testify to at trial. It's a
21 mistake on my office not forwarding the correct one from
22 the correct file.

23 THE COURT: So, are you arguing that the court can
24 disregard the affidavit and still go forward with the
25 trial?

1 MR. FERNANDEZ: No. What I'm arguing is that defense
2 counsel has a motion for Mount, for *Mount Pleasant* that he
3 references. It's not before the court because it wasn't
4 ever ruled on. It requires a much larger showing than what
5 Mr. O'Leary did. You can't simply reference *Mount*
6 *Pleasant*. It's an extremely long case, and it requires a
7 defendant to make a significant showing of why the city did
8 not comply with the videotaping requirement statute. As,
9 as Mr. O'Leary referenced, Ms. Holloway here went through
10 this and it took nearly an entire day fleshing out the
11 entire argument from *Mount Pleasant*. It's a significant
12 motion.

13 THE COURT: And what's the year of the *Mount Pleasant*
14 case?

15 MR. FERNANDEZ: *Mount Pleasant* hit the Supreme Court
16 very recently. I think 2011.

17 THE COURT: Which would have been after?

18 MR. FERNANDEZ: At this time, *Mount Pleasant*, when
19 it's referenced in this transcript, *Mount Pleasant* is a
20 circuit court order.

21 THE COURT: Okay. So, it basically has no force or
22 effect on it?

23 MR. FERNANDEZ: Not at the time of this motion,
24 correct.

25 THE COURT: All right. So, in other words, at that

1 time there was not a requirement that the defendant jump
2 through a lot of hoops in order to establish?

3 MR. FERNANDEZ: Well, I suppose. I guess. Correct.
4 If it were to go be remanded, then Mr. O'Leary would have
5 to comply with whatever is now required by, by our...

6 THE COURT: But at the time, all the law required at
7 the time is that if there was no videotape, then there had
8 to be the affidavit. And what the statute says is that the
9 failure to produce the videotapes was not by itself a
10 ground to dismiss if the affidavits were, if the affidavit
11 was produced. And if the court finds that the affidavit is
12 not credible or not sufficient or not worthy of
13 consideration, then, in essence, there's no videotape,
14 right? Which means, in essence, it goes away, right?

15 MR. FERNANDEZ: That's not, that -- well, the --
16 there's no case law on when you can submit an affidavit.
17 There's nothing --

18 THE COURT: It's not, it's not a matter of when the
19 affidavit is submitted. It's a matter of the contents of
20 the affidavit and whether or not there's reason to believe
21 that the affidavit that was provided does, in fact, relate
22 to the particular charge in the case, and whether or not it
23 relates to the vehicle he was driving. You know, and part
24 of that, part of that may, in fact, be a question of when
25 the affidavit was done in conjunction with when the

1 citation or the arrest occurred.

2 MR. FERNANDEZ: Well, as far as when the arrest
3 occurred, it's a bit of a red herring because we don't
4 necessarily -- I don't control when the case is put forward
5 for trial.

6 THE COURT: I understand.

7 MR. FERNANDEZ: I'm at the mercy of the court to
8 schedule it, and certainly we accommodate defense attorneys
9 who are frequently in other courts.

10 THE COURT: But if, in fact, and I'm -- if I were the
11 trial judge, this is the way I'd be viewing it. If, in
12 fact, I'm operating a vehicle, the police officer is
13 operating a vehicle which he knows is not equipped with
14 video equipment and he makes a stop for suspicion of
15 driving under the influence and there is a subsequent
16 arrest, then it would appear to me that contemporaneous
17 with that arrest, and as part of completing the paperwork
18 for that arrest, there would be some notation made at that
19 time that this particular -- I was operating this vehicle
20 at this time. And this particular individual was stopped
21 and arrested on this date for driving under the influence,
22 and my vehicle was not equipped.

23 To come up with an affidavit two years later that
24 doesn't tell me what the officer's name is -- it's just a
25 signature -- that also doesn't tell me when he was

1 operating the vehicle, doesn't tell me whether anybody was
2 stopped or not, it has no information to provide anything
3 that could even remotely be connected to the offense in
4 question. And for all I know -- and that goes to
5 credibility. For all I know, he signed it the day, the day
6 of. And it seems to me there's nothing that ties the two
7 together. Then there doesn't appear to be a base to which
8 to give it a lot of credence.

9 MR. FERNANDEZ: Well, I -- and, Your Honor.

10 THE COURT: And isn't that a discretionary call with
11 the judge as to whether or not to believe the testimony or
12 believe the affidavit?

13 MR. FERNANDEZ: Well, that -- and I think I agree with
14 you to a certain extent because what we had then was never
15 -- and I admit it would never satisfy a judge just in
16 practical terms, and I don't even think the statute
17 requires it. Affidavit alone would never satisfy a judge.
18 It's always going to be supplemented by a proffer and by
19 obviously argument from counsel. So, in this case,
20 whenever ---

21 THE COURT: I disagree. I think under the statute
22 very clearly the affidavit has to particularly relate to
23 that particular offense. It's just not a blanket I drive a
24 car that not equipped, and here's my affidavit that says so
25 and, therefore, every time I stop somebody, I'm absolved

1 from having to do a videotape. That's not what -- that's
2 not the intent of this particular statute. And I don't
3 know any court that would hold that it would be. And to
4 allow, to allow the officer to come in and testify during a
5 trial or during a hearing before the trial to supplement
6 his affidavit that the statute clearly says that he has to
7 produce ahead of time would -- I think is inconceivable.
8 Maybe the state, the state does it, but I'm just really
9 surprised about that.

10 MR. FERNANDEZ: Okay. Well, and I don't know if there
11 is anything else I need to say anything about it other than
12 we weren't given the opportunity to supplement an
13 affidavit. We didn't -- we never -- and I don't know what
14 Your Honor does in your courts. But in practicality and
15 practice in the municipal court, affidavits don't suffice.
16 They're usually a place holder in order to make a full,
17 full-fledged argument. And that's what one expects to do
18 when you file an affidavit, at least in our court. And so
19 we were never provided the opportunity for the officer to
20 testify. Now, obviously if the judge just simply didn't
21 believe the testimony, I suppose that's a basis, but we
22 were never afforded the opportunity.

23 THE COURT: Well, isn't it discretionary with the
24 court as to whether to accept evidence with respect to the
25 affidavit? The whole purpose for an affidavit is not to

1 have testimony. It's a sworn statement of fact.

2 MR. FERNANDEZ: I agree.

3 THE COURT: And it should stand on its own without the
4 need for additional testimony.

5 MR. FERNANDEZ: But to that, Your Honor, the *Mount*
6 *Pleasant* case goes much further.

7 THE COURT: Well, the *Mount Pleasant* case wasn't in
8 effect at the time that this particular incident occurred,
9 was it?

10 MR. FERNANDEZ: No, it was not.

11 THE COURT: All right, unless you've got something
12 else different?

13 MR. FERNANDEZ: Your Honor, I think that's all, Your
14 Honor.

15 MR. O'LEARY: Judge, just, just one point. The -- he
16 mentioned about the evidence room. The analogy is -- this
17 room used in the Data Master, the officer said on page 21
18 anybody, anybody that has access to the room would have
19 access to the materials. But what's more important, if I
20 -- if somebody breaks into an evidence room of let's say
21 SLED or one of the sheriff's offices and fools with some of
22 the evidence, that -- and contaminates basically the whole
23 evidence room. So, what I would say is, I would ask again
24 a court to uphold the decision of the lower court and find
25 that the affidavits were not in compliance, and the case

1 was dismissed properly.

2 THE COURT: I'll ask that you all submit proposed
3 orders to me in electronic format by February the 10th.
4 You can submit them to my law clerk.

5 MR. O'LEARY: Judge, could I ask you just one thing?

6 THE COURT: Yes.

7 MR. O'LEARY: Is it possible a little further down?
8 I've got two briefs due in the Court of Appeals.

9 THE COURT: Sure. What time -- how much time ---

10 MR. O'LEARY: February 10th and the 15th.

11 THE COURT: 15th is fine.

12 MR. O'LEARY: I appreciate it. Thank you, Judge.

13 THE COURT: And no need to reply to each other's
14 orders. Just put everything and all arguments you think
15 are to be made, and address them in your initial order.
16 That way I won't have to wait for replies. Thank you.

17 MR. O'LEARY: Thank you, Judge.

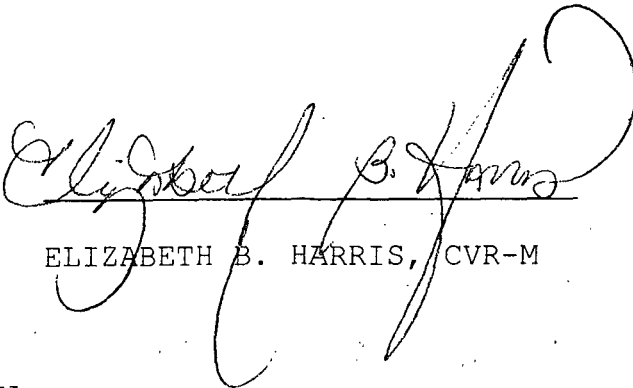
18 MR. FERNANDEZ: Thank you.

19 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 3RD DAY OF FEBRUARY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

A handwritten signature in cursive script, reading "Elizabeth B. Harris", written over a horizontal line.

ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

JUNE 1ST, 2012

AFFIDAVIT FOR FAILURE TO PRODUCE VIDEOTAPE

hereby affirm that I cannot produce a videotape:

From the vehicle I was operating because:

A. At the time of the defendant's arrest the vehicle I was operating had not yet been equipped with a videotaping device and therefore pursuant to Section 18 of Senate Bill 174 of 1998, the videotaping requirement regarding vehicles is not applicable.

B. At the time of the defendant's arrest or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition.

C. It was physically impossible to produce a videotape from the vehicle I was operating of the Defendant at the time of the arrest or probable cause determination because:

The Defendant needed emergency medical treatment, or

Exigent circumstances existed which are outlined below:

D. Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. These reasons are outlined below:

From the breath testing site because:

A. At the time of the defendant's arrest the breath testing site had not yet been equipped with a videotaping device and therefore pursuant to Section 18 of Senate Bill 174 of 1998, the videotaping requirement regarding breath testing sites is not applicable.

B. At the time of the defendant's arrest or probable cause determination, the video equipment at the breath testing site was in an inoperable condition and reasonable efforts have been made to maintain the equipment in an operable condition and there was no other operable breath testing facility in the county. Operable breath test facility means a site with both an operable breath testing machine and an operable videotaping equipment.

It was physically impossible to produce a videotape from the breath testing site of the Defendant because:

The Defendant needed emergency medical treatment, or

Exigent circumstances existed which are outlined below:

Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. These reasons are outlined below:

I am unable to produce a videotape that shows the Defendant's actions during the twenty-minute pre-test waiting period. It was physically impossible to videotape the Defendant's actions during the twenty minute pre-test waiting period because:

Additional room is needed for an explanation, please attach a separate sheet to this form referring to the item number being addressed.

[Signature]
Signature of Officer

3-31-2010
Date

State of South Carolina
County of Richland

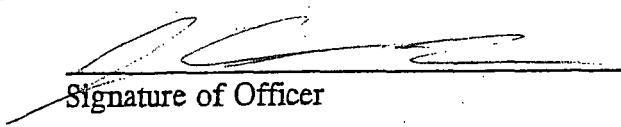
Sworn to and subscribed before me this 31st day of March, 2010
Jennifer A. Hendrix Notary Public for the State of South Carolina.
My commission expires: 3/14/2015



**SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
AFFIDAVIT FOR FAILURE TO PRODUCE VIDEOTAPE**

I hereby affirm that I cannot produce a videotape from the vehicle I was operating because:

- A. At the time of the defendant's arrest the vehicle I was operating had not yet been equipped with a videotaping device and therefore pursuant to Section 18 of Act 434 of 1998, the videotaping requirement regarding vehicles is not applicable.
- B. At the time of the defendant's arrest or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition.
- C. It was physically impossible to produce a videotape from the vehicle I was operating of the defendant at the time of the arrest or probable cause determination because:
- The defendant needed emergency medical treatment, or
 - Exigent circumstances existed which are outlined below:
- D. Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. These reasons are outlined below:


Signature of Officer

Date

4-5-2010

State of South Carolina
County of

Sworn to and subscribed before me this 5th day of April, 2010
Dedre L. Fluit Notary Public for the State of South Carolina.
My commission expires: April 29th, 2012.



CITY OF COLUMBIA
SOUTH CAROLINA

OFFICE OF THE CITY ATTORNEY • POST OFFICE BOX 667 • COLUMBIA, SC 29202 • (803) 737-4242 • FAX (803) 737-4250

April 7, 2010

John A. O'Leary, Esquire
714 Calhoun Street
Columbia, South Carolina 29201

RE: City of Columbia vs. Carol Davis
Ticket # 22260-EQ

Dear Mr. O'Leary:

Enclosed please find the 'correct' Affidavit for Failure to Produce Videotape'. Please replace the previous one we provided, which was sent in error.

Sincerely yours,

Shirlean L. Streater
Paralegal
City of Columbia

Enclosure

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3692

The City of Columbia Appellant,

v.

Carol A. Davis Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 28, 2012



David A. Fernandez, Esquire
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
Tel: (803) 737-4242
Attorney for the Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3692

The City of ColumbiaAppellant,

v.

Carol A. DavisRespondent.

PROOF OF SERVICE

I certify that I have served the *Record on Appeal* on Carol A. Davis by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2012, addressed to her attorney of record, John A. O’Leary, Esquire, at his office at 714 Calhoun Street, Columbia, South Carolina 29201.

September 4, 2012



David A. Fernandez, Esquire
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
Tel: (803) 737-4242
Attorney for Appellant

RECEIVED

SEP 04 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3692

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SC Court of Appeals

The City of ColumbiaAppellant,

v.

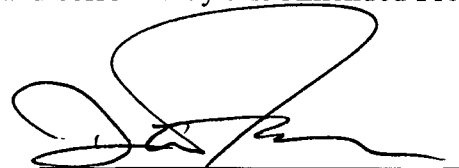
Carol A. DavisRespondent.

AMENDED PROOF OF SERVICE

I certify that I have served the *Record on Appeal* on Carol A. Davis by depositing a copy of it in the United States Mail, postage prepaid, on September 4, 2012, addressed to her attorney of record, John A. O'Leary, Esquire, at his office at 714 Calhoun Street, Columbia, South Carolina 29201.

The original proof of service for the *Record on Appeal* included an incorrect date as the date of service, which has been addressed and corrected by this Amended Proof of Service.

September 21, 2012



David A. Fernandez, Esquire
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Post Office Box 667
Columbia, South Carolina 29202
Tel: (803) 737-4242
Attorney for Appellant