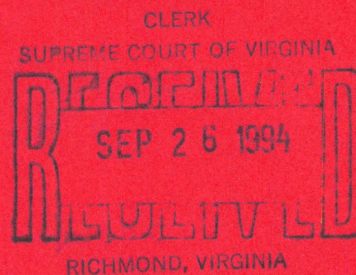


IN THE
Supreme Court of Virginia

RECORD NO. 940602



MARK SCHNUPP,

Appellant,

v.

ANDRE L. SMITH,

Appellee.

JOINT APPENDIX
Volume II

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1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

3
4 ANDRE L. SMITH

5 vs.

6 MARK SCHNUPP, et al.

)
)
) LU 3435-1
) VOLUME II
)

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8 October 26, 1993

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10 **COPY**

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13 Transcript of trial in the above, when heard
14 before The Honorable Melvin R. Hughes, Jr.

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1
2
3 THE COURT: Mr. Benedetti, you have a
4 motion?

5 MR. BENEDETTI: Yes, sir, I do.

6 THE COURT: For the record, this motion is
7 being taken out of time. How many witnesses do
8 you have left on your case, Mr. Baugh?

9 MR. BAUGH: One, Your Honor.

10 THE COURT: And that witness, I think you
11 mentioned, would only speak to the issue of
12 damages?

13 MR. BAUGH: Yes, sir.

14 THE COURT: And you agree that this motion
15 be made now even though you haven't rested your
16 case?

17 MR. BAUGH: Yes, sir.

18 THE COURT: Mr. Benedetti?

19 MR. BENEDETTI: If Your Honor please, the
20 motion is to strike the evidence of the
21 plaintiff on the grounds that it's insufficient
22 as a matter of law to prove defamation.

23 I have a summary of the law and I have the
24 case to support it. I have highlighted that
25 portion which I'm going to discuss relating to

1 this, because as the evidence now stands there
2 is a conflict in the evidence as to what took
3 place on the 900 block of North 26th Street the
4 date that this action arose. But I'm referring
5 now to this third paragraph where we talk about
6 defamation per se.

7 THE COURT: All right. Third paragraph of
8 your summary?

9 MR. BENEDETTI: Third paragraph of my
10 little paper.

11 THE COURT: All right.

12 MR. BENEDETTI: This is the theory of the
13 plaintiff's case, and that is that we have
14 imputed to him the crime of possession of
15 narcotics. You'll see the Great Coastal case
16 against Ellington cited in the second paragraph
17 which says that determination as to whether or
18 not defamatory words impute crime is a question
19 of law to be decided by the judge.

20 The Great Coastal case was a case in which
21 the driver of a truck suggested to one of the
22 mechanics that his governor be altered. The
23 employer was upset with the driver, I think, for
24 some other reason, so he accused him of bribery
25 and accused him of that in front of his wife.

1 The Court said in that case, because the
2 argument from the defendant was that commercial
3 bribery, and that's what this was defined as,
4 was not a crime involving -- it was not a
5 felony, was not a crime involving moral
6 turpitude. The Court said that determination is
7 solely up to the Court. There are other cases
8 for that, but I think that's the most recent one
9 and the most pertinent one. So that being the
10 case, it's up to Your Honor to decide whether or
11 not a crime has been alleged.

12 The crime of possession of a narcotic is,
13 as the evidence shows, a felony. However, the
14 Code of Virginia very specifically says under
15 Code Section 18.2-250, which is the possession
16 statute, it's unlawful for a person knowingly or
17 intentionally to possess a controlled substance
18 and so on.

19 The second paragraph of that says, "Upon
20 the prosecution of a person for the violation of
21 this section, ownership or occupancy of premises
22 or vehicle upon or in which a controlled
23 substance was found, shall not create a
24 presumption that such person either knowingly
25 or intentionally possessed such controlled

1 substance."

2 The witness, Cynthia Goss, who was called
3 by the plaintiff testified that her notes, which
4 are evidence, Plaintiff's Exhibit Number 1, that
5 she asked Officer Schnupp to repeat what he had
6 said to her and she wrote down what he said.
7 What he said was that the vehicle --

8 THE COURT: Where is that exhibit? Go
9 ahead.

10 MR. BENEDETTI: First she said that the
11 officer identified himself as a member of the
12 Richmond city police department. He reported
13 that an ARA van had been stopped at 3:25 p.m.
14 and that a passenger in that vehicle had gotten
15 out of the vehicle, approached a person and
16 exchanged something, and got back in the vehicle
17 and the vehicle left. I believe she says in
18 there the dispatcher was radioed by Officer
19 Schnupp and the vehicle was stopped and
20 searched.

21 Number one, if the code section that I
22 have referred to is applied to that factual
23 situation, then the only person who could be
24 convicted of a crime would be the passenger,
25 because there was absolutely no evidence of any

1 control exercised over that narcotic, if that's
2 what it was, by Andre Smith. If he had wanted
3 to accuse or if he accused the commission of a
4 crime, as Mr. Baugh and Mr. Smith would suggest,
5 you will notice that the last sentence in which
6 he describes this activity says "no drugs were
7 found." If he were going to accuse Mr. Smith
8 of having contraband and therefore being in
9 possession, he certainly would not have said
10 no drugs were found.

11 And so I would submit to the Court that his
12 own witness, Cynthia Goss, called as his
13 witness, says that this is a verbatim statement
14 of what she heard. That is not a defamatory
15 statement. And the reason it's not a defamatory
16 statement is, as I have suggested, there is no
17 accusation of a commission of a crime by Andre
18 Smith.

19 Now, taking it one step further, and we
20 discussed this a little bit yesterday in our
21 motion in limine, and that was the privilege
22 that attaches to a police officer who has a
23 duty or an interest in a transaction, and
24 communicates to someone else a certain statement
25 which is alleged to be defamatory.

1 Obviously in a situation like this where
2 the police officer is on duty at a certain
3 location and sees something that to him
4 indicates that something is going on that needs
5 to be investigated, and when the stop is made
6 and no drugs are found, then the suspicion
7 arises in his mind, number one, that the drugs
8 were disposed of; number two, this is a van
9 carrying ARA which may not be an ARA but may
10 just be a subterfuge. It may be that the driver
11 of an ARA had loaned the vehicle to somebody
12 else to commit a crime, which, I will suggest to
13 the Court, occurs all the time in the city of
14 Richmond, where certain people will lend a
15 vehicle to someone who is caught in a drug
16 transaction and then the owner will say, "The
17 vehicle was stolen. I didn't lend it to him,"
18 and so on.

19 All of these things are things that a
20 proper officer ought to investigate. He had an
21 interest in it. Certainly ARA had an interest
22 in it by virtue of the fact that they needed to
23 know where the driver was at a certain
24 particular time. And the only suggestion that
25 there was any drugs involved was a statement

1 that this is a high drug crime area. The
2 witnesses, both the adverse witness and both
3 witnesses for the plaintiff who testified about
4 that location, all agree that that was a high
5 drug crime area.

6 I'm suggesting to the Court that because
7 there was an interest on the part of the police
8 officer in his investigation and that there was
9 a common interest on the part of ARA that
10 communication be made, that this was a
11 privileged statement that he made.

12 I'm not giving up my argument that the
13 statement was not defamatory, but I'm suggesting
14 to the Court that if it was at least some
15 imputation that a crime had been committed, that
16 this case cannot go forward on the grounds that
17 the statement is privileged.

18 As we suggested yesterday, if the Court
19 should agree that it is privileged by virtue of
20 this common interest or this social duty or
21 whatever the reason that the Court may find that
22 the police officer -- and I suggest to the Court
23 that the cases support the view that a police
24 officer has a right to make statements like he
25 made so long as they are not an abuse of the

1 privilege that he had.

2 The case of Great Coastal, and I don't
3 have it on this sheet, but the case for this
4 representation that I'm about to make talks
5 about what is an abuse of privilege. And they
6 talk about willful, they talk about bad
7 feelings, they talk about things of that type.
8 There are five separate things, but really only
9 one is applicable in this particular situation.
10 And that is that he knew it was false or that he
11 recklessly told, not knowing it was false,
12 recklessly told something that was untrue. And
13 that was the standard by which the Court must
14 decide under this Great Coastal case whether
15 or not there was an abuse of privilege. And I
16 suggest to the Court there was no abuse of
17 privilege for the reasons I've already stated.

18 This was a call made at a time when a
19 police officer was investigating a situation
20 that he was not satisfied with, and he wanted to
21 make sure that, number one, the vehicle was
22 operated by somebody who had permission and
23 authority to operate it and that it was not some
24 vehicle that was disguised as an ARA van, or for
25 whatever other reason. And I think the other

1 reason that I was trying to think of was that he
2 said when the vehicle was stopped, a large crowd
3 gathered. And he felt the need to make sure
4 that ARA understood why the vehicle was stopped
5 and why the occupants therein were searched.

6 And I submit to the Court the accumulated
7 evidence, that plaintiff's own evidence is
8 uncontradicted, that the facts as I have stated
9 them are true and correct. And for that reason
10 we move that the plaintiff's evidence be struck.

11 THE COURT: Thank you.

12 MR. BAUGH: Referring to the exhibit you're
13 looking at, it goes in, I think, the second
14 sentence, "He was observed pulling up to this
15 location and a passenger got out of the
16 passenger side, went to this location, gave
17 people something and received something in
18 return. Then this person known as Robert B.
19 Ragin, Jr. got back in the van. And they drove
20 by the officer, Mark Schnupp, and he recorded
21 the license plate of the van and called it in to
22 the police dispatcher. And a police officer
23 stopped the van at 3:30 p.m. and proceeded to
24 search the van and occupants to find nothing.
25 They then were let off with a warning."

1 Your Honor, first, and Mr. Benedetti
2 continues to forget and I do note to bring it up
3 again today, 18.2, I believe it's 28, describes
4 a principal in the second degree. A person who
5 actually commits the offense is a principal in
6 the first degree. Anyone else who knows of the
7 commission of the offense and aids, abets,
8 encourages, permits, allows or anything like
9 that, is an aider or abettor.

10 According to this statement, my client
11 would be, if it occurred, an aider and abettor.
12 And that is a felony. It carries the same
13 punishment as possession under 18.2 --

14 THE COURT: How is that? Now, he's driving
15 the van?

16 MR. BAUGH: And he stops the van to permit
17 someone --

18 THE COURT: Does it say permit?

19 MR. BAUGH: Does it say permit? No, it
20 does not say permit.

21 THE COURT: He lets the fellow out of -- I
22 mean the fellow gets out of the vehicle, goes
23 over to this third party. They do whatever they
24 do. He then gets back in the van. How does
25 that show that the plaintiff is guilty of a

1 crime?

2 MR. BAUGH: Your Honor, we would submit
3 that there is a question of whether or not that
4 is an allegation of aiding and abetting. And
5 further I remind the Court, if you look at all
6 the evidence, the police officer said, I didn't
7 say that. The police officer said, I told her
8 I looked through and the person sat in the van,
9 and the passenger held out his hand and the
10 drugs were put out in his hand and I could
11 observe it and watched it. And the driver was
12 three feet away. And then after -- not while
13 the crime was being committed, but after it was
14 completed, then the driver engaged the vehicle
15 and drove away. And that is what Officer
16 Schnupp said I said.

17 THE COURT: Excuse me. Officer Schnupp
18 said that he never saw the passenger leave the
19 van.

20 MR. BAUGH: That's what I'm talking about.
21 That's what I'm saying. Officer Schnupp said
22 the offense was even closer. He said that's
23 what I told the woman, that this is what
24 happened. And so there's a question now, did
25 she write it down right.

1 THE COURT: Right.

2 MR. BAUGH: But Officer Schnupp has it
3 occurring within three feet of the defendant.
4 So, Your Honor, we would submit that that is an
5 allegation of a crime.

6 I would also submit that it could be
7 reasonably inferred, and inferences and
8 innuendoes are sufficient under the law in this
9 state for defamation, I would cite the Court to
10 the James case, that this is aiding and
11 abetting.

12 The next issue, Your Honor, would be one
13 of privilege. One, there is no evidence of
14 privilege before this Court at this time. Ms.
15 Goss was not examined on the issue of privilege.
16 Mr. Schnupp was not cross-examined on the issue
17 of privilege.

18 We would submit that if a privilege did
19 exist, if Officer Schnupp had a legitimate law
20 enforcement purpose in investigating whether or
21 not that vehicle was stolen, and if Ms. Goss had
22 the same interest, which is required for
23 privilege, then he would have a right to make
24 inquiry, is your vehicle stolen. He would not
25 have the right to cast this aspersion or this

1 defaming statement concerning involvement in a
2 drug transaction. So if he does have a
3 privilege, his privilege is limited to what he
4 was allegedly investigating. And by his own
5 statement, the purpose for calling was to
6 investigate whether or not the vehicle was
7 stolen.

8 Now, whether or not that's a subterfuge or
9 a falsehood is a jury question, giving rise to
10 the fact that he's never run a radio request, he
11 never told the other officers, and according to
12 Ms. Goss he never asked her about whether or not
13 the vehicle was stolen. So if he did have a
14 privilege, it's limited to that thin issue. And
15 if this statement goes beyond that, there is no
16 privilege for that aspect of the communication.

17 And then lastly, on the issue of privilege,
18 as we sit here now there is a blatant jury
19 question as to whether or not that was a false
20 statement. And as long as that exists out
21 there, this Court cannot rule that there was a
22 privilege, all of this was under privilege, and
23 there was no abuse of privilege. As long as
24 there remains a fact question as to what
25 occurred on August 21 in the 900 block of North

1 26th Street, that issue is not resolved. All
2 factual issues are not resolved, and it must go
3 to the jury on that issue.

4 But getting back to the first one, Your
5 Honor, we would submit that it is against the
6 law to possess drugs. It's against the law to
7 aid and abet.

8 And then we get that document, thank you.
9 Your Honor, if that document is an explanation
10 of the first telephone conversation -- and I
11 will submit there might be a factual discrepancy
12 into what was said. Mr. Schnupp said I didn't
13 say that. Ms. Goss said he said it and he said
14 it again and she wrote it down.

15 So there's a question. The issue is is
16 there something else we can look to to determine
17 what was said in that conversation. And that
18 document comes up, not as a separate charge, but
19 as an explanation, an expansion of what was said
20 in the first conversation. And, Your Honor,
21 that document right there flat out -- that's
22 aiding and abetting.

23 In fact it goes on to add something else in
24 there at the second to the last sentence, "the
25 drugs were destroyed. Not "we couldn't find

1 them." Not "maybe we have the wrong thing."
2 That statement presumes that drugs were in that
3 vehicle. And they were purchased within three
4 feet of the driver, and that the driver stopped
5 the vehicle, had conversation with a drug
6 dealer, the deal was committed in his presence.
7 And then after the deal was completed, he
8 proceeded on in the vehicle. That is aiding and
9 abetting. And that was offered. And Ms. Goss
10 said it and Mr. Schnupp said it, that is an
11 explanation of the first conversation, the
12 telephone conversation of August 21. That was
13 what was intended to be communicated.

14 In fact Officer Schnupp said that's what I
15 told her, but she got it wrong and wrote down
16 this. But Officer Schnupp said, that's what I
17 told her except I didn't mention cocaine. I
18 mentioned drugs. That's what she said too. So
19 he said high drug area. She said he mentioned
20 drugs.

21 With that document alone right there, Your
22 Honor, that is slander per se. If the contents
23 of that document, referring to what is -- is it
24 Exhibit B?

25 THE COURT: 2.

1 MR. BAUGH: If the contents of Exhibit 2
2 were communicated orally on August 21 as
3 Mr. Schnupp says they were with a few minor
4 differences, which he indicated what they were,
5 that is slander per se. That is an allegation
6 for commission of a felony.

7 THE COURT: Thank you. The report doesn't
8 mention anything about the passenger leaving the
9 van?

10 MR. BENEDETTI: No, it does not.

11 THE COURT: Well, if the passenger didn't
12 leave the van, and I do have a note here that
13 Officer Schnupp observed a person with a Miami
14 Dolphins shirt walked up, went around the
15 passenger, and white rock was poured out in the
16 passenger's hand --

17 MR. BENEDETTI: Yes.

18 THE COURT: -- doesn't that suggest that
19 the plaintiff was there and may have known what
20 was going on? Well, certainly he was there, but
21 may have been able to see and know that this was
22 improper?

23 MR. BENEDETTI: Well, I'm not sure exactly
24 what the question is. But I think the law is
25 not what Schnupp said, but what the party heard

1 is what determines whether or not it's
2 defamation, because if I said something
3 defamatory but the party listening to me says it
4 did not hear it to be defamatory, then it's not
5 defamatory.

6 But more significantly Mr. Baugh overlooks
7 the fact that the person who was dealing the
8 drugs, if that's what was happening on that day,
9 walked up to Andre Smith and Andre Smith refused
10 to purchase.

11 MR. BAUGH: Objection, Your Honor. That is
12 not in the record. There is no allegation of
13 refusal. No one has so testified.

14 MR. BENEDETTI: I think that is certainly
15 an inference from the fact that the person
16 walked up to the driver, there were some words
17 exchanged, although Officer Schnupp was not able
18 to distinguish what was said, and the target
19 then walked around the vehicle and spoke with
20 the passenger who allegedly took some white
21 rock-like substances in exchange for currency.
22 That I think absolves Mr. Smith in Mr. Schnupp's
23 eyes of being party to this activity.

24 THE COURT: Who said that, Officer Schnupp?

25 MR. BENEDETTI: Officer Schnupp's

1 testimony.

2 THE COURT: He said the third party first
3 went to the driver?

4 MR. BENEDETTI: That's correct.

5 THE COURT: Then went around to the
6 passenger?

7 MR. BENEDETTI: That's correct. That may
8 be in the investigative report too.

9 THE COURT: Okay. This says, "The target
10 of the surveillance approached the passenger of
11 the van" -- doesn't say anything about first
12 approaching the driver. This goes into saying,
13 "The target of the surveillance approached the
14 passenger of the van and exchanged cocaine for
15 money. The van left the area."

16 MR. BENEDETTI: His testimony from the
17 stand was that he first approached the driver.
18 But there are two cases, and I'm going to refer
19 you now to the second page of this little
20 statement of the law I gave you, the last
21 paragraph. An aider and abettor is another way
22 of saying a principal in the second degree.

23 The statement I think is a very clear
24 statement of what the law is. The mere presence
25 is not sufficient to charge somebody with a

1 crime. Couple that with the statutory law that
2 says an owner or an operator of a vehicle, just
3 because he's got contraband in his vehicle,
4 cannot be convicted because there's no
5 presumption that it belongs to him or that he
6 exercises control over it. But the situation,
7 if the aider and abettor has to excite,
8 encourage, advise and assist, there's absolutely
9 no evidence in this case that he did anything,
10 that Mr. Smith did anything like that or even
11 resembling that. The evidence is that he
12 rejected the offer from the so-called target,
13 and the so-called target then walked around to
14 the passenger.

15 Mr. Smith, according to Mr. Schnupp
16 yesterday from the stand, was not in his mind
17 guilty of anything. And he said that. "I never
18 once accused him of doing anything." That was
19 his statement from the witness stand yesterday.
20 I submit that the evidence is clear, that the
21 law is certainly clear on this point.

22 Now, on the privilege aspect I think,
23 again, he overlooks the fact that the police
24 officer has a duty. And the duty is to
25 investigate a situation in which he has

1 suspicion that criminal activity has occurred.
2 And he wanted to make sure that that van really
3 belonged to ARA. He wanted to make sure that
4 the person who was operating it or the person
5 who was in it had some authority to be where he
6 was. And again I say that it's evidence it's
7 undisputed that this was a high drug trafficking
8 area.

9 MR. BAUGH: Your Honor, in light of the
10 fact that one new issue was raised, may I
11 respond?

12 THE COURT: Yes.

13 MR. BAUGH: First, Mr. Benedetti misreads
14 aiding and abetting -- I'm sorry, 18.2-250. Not
15 giving rise to presumption does not mean one
16 cannot be convicted. There's a big difference.
17 18.2-250 states that "ownership of a vehicle or
18 a house in which drugs may have been recovered
19 is not a presumption." Does not mean they
20 cannot be convicted of it by any stretch of the
21 imagination. It's just not presumption. That
22 with other things can be offered as evidence of
23 ownership, but it is not a presumption in and of
24 itself. And that is what 18.2-250 of the case
25 law thereunder states.

1 Additionally, Your Honor, Mr. Benedetti
2 continues to get up here and say the evidence
3 was that the drug dealer, according to Mr.
4 Schnupp, walked over to Mr. Smith and he
5 rejected his entreaty or offer. There is
6 nothing in the record as to what was said there.
7 Not one person has testified as to -- Mr. Smith
8 said there was no such conversation. Mr. Ragin
9 said there was no such conversation. And Mr.
10 Schnupp said I couldn't hear what the drug
11 dealer told Mr. Smith. So where this stuff
12 comes in, Mr. Smith was approached by a drug
13 dealer and rejected his offer to buy drugs, that
14 does not exist in the record anywhere. And I
15 would challenge the defense to tell me which
16 witness said that. That is a false statement.

17 And lastly and most importantly, the
18 question is whether or not a reasonable person
19 hearing the words could find reasonably that
20 this person was engaged in illegal activity and
21 what was the intent. Intent is a jury question,
22 reasonableness is a jury question, and they've
23 not been resolved. And as we sit here now in
24 the juncture of this case, I'm entitled to all
25 reasonable inferences unless this Court says

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1 based on the evidence, one, I know what
2 happened, meaning you know whether or not Mr.
3 Schnupp is telling the truth or Mr. Smith and
4 Mr. Ragin are telling the truth.

5 THE COURT: The only question of whether
6 or not a crime has been alleged or charged to
7 the plaintiff is a matter for the Court to
8 determine?

9 MR. BAUGH: Yes, sir. I would agree with
10 you that the question is at this juncture of
11 whether or not a reasonable -- is there
12 sufficient evidence for it to go to the jury
13 with all reasonable inferences going to us that
14 a reasonable person could perceive based on the
15 words -- and there's a question. There's a
16 factual question of what the words were, because
17 Mr. Schnupp said what he said, Ms. Goss said
18 what she received and wrote these notes down.
19 Both of them have agreed.

20 The next exhibit is an amplification of
21 what was said, which I would say could be
22 considered also --

23 THE COURT: Exhibit 2?

24 MR. BAUGH: Number 2, yes, sir. So, Your
25 Honor, I would submit clearly that a reasonable

1 person could find once they were made
2 knowledgeable to all--

3 THE COURT: If you were defending Mr. Smith
4 you wouldn't be saying he would be guilty on
5 this evidence, would you, in a criminal case?

6 MR. BAUGH: Would I say he would be guilty
7 on just that evidence? No, I would not. And I
8 would argue -- but I'll tell you this, Your
9 Honor. If it were proven that Person A drove
10 Person B someplace so Person B could get drugs,
11 or was driving somewhere and intentionally
12 stopped his vehicle --

13 THE COURT: Well, that's the very reason I
14 asked Ms. Goss was there any statement about
15 what Mr. Smith's purpose was in doing what he
16 did that day.

17 MR. BAUGH: No one could testify to
18 purpose. The question is whether or not -- no,
19 purpose is always proven from circumstances.

20 I will tell you this. If I were
21 prosecuting the case, I would argue, if I were
22 the prosecutor --

23 THE COURT: All right.

24 MR. BAUGH: -- that he was over there for
25 whatever reason. He intentionally stopped his

1 car, the drug deal went down, and he
2 intentionally kept it there and didn't reengage
3 that vehicle into movement until after it was
4 completed. And following the language of Mr.
5 Benedetti's case law, last paragraph, that's
6 assisting, because if he hadn't stopped it
7 wouldn't have gone down. And if he had driven
8 away before contact was made or during the
9 commission, it would not have occurred.

10 THE COURT: But there's no evidence,
11 though, about what he knew or should have known
12 at the point he stopped, at that instance when
13 he stopped. He didn't know what he was getting
14 into by the evidence.

15 MR. BAUGH: But the question is once he
16 stopped, if he saw the drug dealer, as Mr.
17 Schnupp said, by his not proceeding, by his
18 allowing it to go on, is he assisting? I would
19 submit that's a jury question. Remember, the
20 standard for defamation isn't that he's going to
21 be convicted, but that an allegation of a felony
22 for which he might be convicted was made.

23 I would ask you this, Your Honor, if I can,
24 being as how you were a general district court
25 judge once upon a time. If a police officer

1 came and said to a magistrate, "I was in
2 surveillance, I saw this vehicle come and stop.
3 The driver then waited, a drug deal was
4 consummated by the passenger. After the drug
5 deal was consummated, the passenger and the
6 driver drove off together. I want an arrest
7 warrant for the driver and the passenger," yes,
8 it would issue. That is probable cause, because
9 they get those inferences. And I would submit
10 that is the standard for finding a defamation
11 per se.

12 THE COURT: I don't know if you judge in a
13 slander context the commission of a crime on a
14 probable cause standard.

15 MR. BAUGH: Well, Your Honor, I would
16 submit the only other standard you could look at
17 then is whether or not he could be convicted,
18 and that is surely not the standard. And I
19 wasn't showing that as a standard. I was only
20 showing --

21 THE COURT: Let me put you in a defense
22 position, defending Mr. Smith. Surely you would
23 make a lot of the fact that there's no evidence
24 indicating what he knew or what he knew about
25 these gentlemen and what they were about, if

1 they were about anything, by the way.

2 MR. BAUGH: Yes, I would. That's exactly
3 what I would do. But that does not mean that
4 reasonable people could not infer that a
5 defamatory statement was made concerning the
6 commission or involvement in a crime. I asked
7 Ms. Goss --

8 THE COURT: Are you saying he could be
9 convicted on that angle?

10 MR. BAUGH: Do I think he could be
11 convicted?

12 THE COURT: Yes.

13 MR. BAUGH: Could be?

14 THE COURT: Yes.

15 MR. BAUGH: Yes. I know some lawyers who
16 could get him convicted.

17 THE COURT: You wouldn't, though, would
18 you?

19 MR. BAUGH: I would hope not. If you
20 believe what you read in the papers, no.

21 However, Your Honor, and more importantly,
22 Ms. Goss sat up here and said, and I asked her,
23 as we sit here now do you view that he was
24 involved in a drug transaction? And true, I had
25 to ask her several times. Eventually she said

1 yes, because he told me. That's defamation per
2 se and that's what's in this record. And I mean
3 it doesn't have to rise any higher than that.

4 THE COURT: Well, he told her what he said
5 he saw.

6 MR. BAUGH: Yes.

7 THE COURT: And there's no question that he
8 said at least, Officer Schnupp, that he made no
9 statement regarding the driver. He never asked
10 or said anything regarding the driver or that
11 the driver was using drugs. That's in my notes.

12 MR. BAUGH: I would concede, Your Honor,
13 that is what he said.

14 THE COURT: He said nothing derogatory
15 regarding the driver.

16 MR. BAUGH: Well, he can't say whether or
17 not it's derogatory or not.

18 THE COURT: I don't know if that's the word
19 he used. Maybe that's my word. I have a note
20 here plaintiff did not do anything wrong.

21 MR. BAUGH: Oh, I heard that. And, Your
22 Honor, I will tell you this and I will argue to
23 the jury, when he made that statement it's just
24 as false as the statement he made over there.
25 And I'm going to argue that is not true. And

1 he was not offered as my witness. I was
2 cross-examining him and they didn't object.

3 THE COURT: Well, you offered him --

4 MR. BAUGH: I offered him and then I
5 qualified him as an adverse witness. I asked
6 him whether or not he knew that he was being
7 sued by this man and I represented this man. He
8 said yes and that is in the record. And that
9 qualifies him as an adversarial party. And
10 those questions are in the record and he
11 answered them, just the way you're supposed to.
12 Took it right out of the book.

13 And, Your Honor, I'm going to submit that
14 this whole thing about "I didn't accuse him,"
15 that's a creature created in some defense ploy.

16 Your Honor, I'll ask you this. As you look
17 at the --

18 THE COURT: Well, isn't this evidence
19 really suspicion? It's suspicion. If this
20 evidence came before a criminal court, it might
21 be suspicion but it might not be enough to
22 support --

23 MR. BAUGH: May not be enough?

24 THE COURT: May not be.

25 MR. BAUGH: Your Honor, you're right.

1 It may not be enough. It might not be enough.

2 THE COURT: And if it may not be enough,
3 it's not enough under the standard of reasonable
4 doubt, beyond a reasonable doubt.

5 MR. BAUGH: No, Your Honor. When I say may
6 not be enough, I'm saying some juries wouldn't
7 convict and some juries would convict.

8 THE COURT: But as a legal standard,
9 though, you and I as legal experts --

10 MR. BAUGH: Your Honor, I know that --

11 THE COURT: -- would it be proper for a
12 court to let that conviction stand? People may
13 get all concerned about the drug problem and so
14 forth and see this evidence.

15 MR. BAUGH: With a jury the question could
16 be could a reasonable jury infer, based upon the
17 evidence, could this be an inference based upon
18 the fact?

19 THE COURT: And after they made that
20 inference adversely to Mr. Smith as a defendant
21 in a criminal case, would in law that conviction
22 be allowed to stand by a judge?

23 MR. BAUGH: Yes.

24 THE COURT: You think so?

25 MR. BAUGH: Yes. Unfortunately I do.

1 Unfortunately there are many variables in your
2 equation, because the practice of law is an art
3 and not a science. And the persuasive skills
4 are very difficult to determine, but --

5 THE COURT: But if he had you?

6 MR. BAUGH: I have convicted people of
7 similar acts.

8 THE COURT: Because you recall this morning
9 about the insufficiency of the evidence to
10 support proof beyond a reasonable doubt?

11 MR. BAUGH: Unfortunately it's pointed out
12 by Mr. Benedetti, and it's a sad state of the
13 civics education in our classes, we're trained
14 to trust officers. If the officer said it, I
15 have to believe it.

16 So, Your Honor, I would submit this is
17 slander per se. There is an allegation here
18 that this man knowingly permitted or assisted in
19 the commission of a felony.

20 And further, Your Honor, if you accept
21 Exhibit 2 as an amplification of what that
22 officer intended to communicate, I don't even
23 have a problem.

24 THE COURT: All right. Mr. Benedetti, this
25 is your motion. If you want the last word, you

1 have it.

2 MR. BENEDETTI: I don't have many. I think
3 he's been arguing all along this is a jury
4 question. But as I pointed out to you, Great
5 Coastal says this is not a jury question.

6 If the allegation is that it's defamatory
7 per se because we have been accused of a crime,
8 it's a legal question and therefore must be
9 decided by the Court. So it's the Court's
10 decision as to whether or not the statement
11 amounts to the allegation or imputation that
12 this man has committed a crime.

13 One more time I point out that the
14 statement taken down supposedly as it was being
15 dictated or being repeated a second time was
16 that "we found nothing." If they found nothing,
17 there could not be a crime. And that's what he
18 said, "we found nothing." She wrote it down.

19 THE COURT: What about this other thing,
20 "upon searching the occupants and the vehicle
21 for the cocaine, it was determined that the
22 cocaine was destroyed prior to the officers
23 making a stop"?

24 MR. BAUGH: Sorry. Did you say occupants?
25 Both?

1 THE COURT: It says, "Upon searching the
2 occupants and the vehicle for the cocaine, it
3 was determined that the cocaine was destroyed
4 prior to the officers making a stop."

5 MR. BENEDETTI: Well, I don't know that I
6 need to argue that, because that of course is
7 dated the 25th, which is several days after the
8 allegation that the statement was made that was
9 defamatory.

10 Mr. Baugh keeps arguing that this is agreed
11 it's an extension of the telephone conversation,
12 but I dispute that. The evidence is that this
13 is not an extension of the telephone
14 conversation. What it is is a recount of what
15 took place on that particular day at that
16 particular time. This is not an extension of
17 the telephone conversation at all. If there is
18 defamation, it had to have occurred on the 21st,
19 the day that they were stopped.

20 THE COURT: All right. Gentlemen, let me
21 think about it about ten minutes or so. We have
22 about that time before the jury comes in.

23
24 (Brief recess.)
25

1 JURY IN

2 THE COURT: Gentlemen, I'm going to keep
3 that matter under advisement until after we hear
4 from the next witness. Your next witness?

5 MR. BAUGH: Mrs. Smith, please.
6
7

8 SHEILA SMITH, the witness, called by the
9 plaintiff, first being duly sworn, testifies as
10 follows:

11 DIRECT EXAMINATION BY MR. BAUGH:
12

13 Q Please state your full name.

14 A It's Sheila Smith.

15 Q How old are you?

16 A 34.

17 Q You are married to the plaintiff in this
18 case?

19 A That's correct.

20 Q How long have you been married?

21 A 15 years this April.

22 Q When your husband was terminated from ARA,
23 tell me what you heard about why he was terminated.

24 A Because they received a phone call from the
25 police officer saying that he had purchased drugs and

1 there was drugs in the van. And after they searched
2 and they let him go, they called the company and told
3 them what had transpired.

4 Q Did your husband deny that?

5 A Oh, yes.

6 Q Who was in the van with him?

7 A His friend, Ronald Ragin.

8 Q Ronald Ragin?

9 A I mean Robert. We call him Buttons.

10 Q The case took on a new dimension there for
11 a minute.

12 A That's right.

13 Q What were he and Mr. Ragin working on?

14 A Andre had purchased a step van, which is a
15 bigger type truck, and they were putting it together
16 for like a little sandwich catering mobile unit.

17 Q Had Mr. Smith ever been fired from a job
18 before?

19 A Oh, no, no. This was the first time.

20 Q How did he handle it?

21 A He was angry. He was frustrated.

22 Q Why was he frustrated?

23 A Because he's always been loyal. He always
24 puts forth his best effort, whatever he does. And
25 he's worked hard for these people, and they just let

1 him go without him giving any explanations as far as
2 what happened.

3 Q They never permitted him to give his side?

4 A No. They never asked him what happened.
5 After he went in to work that morning, he worked with
6 them about an hour or so, I guess, and then they
7 called him in and terminated him.

8 Q Did he show you a copy of that
9 investigative report that was sent?

10 A Right. That came later on that week.

11 Q And he got a copy of it too?

12 A That's correct.

13 Q And he showed it to you?

14 A Yes.

15 Q You said he was frustrated?

16 A Oh, yeah.

17 Q He was also angry? What was he angry
18 about?

19 A He was angry, because they said he had done
20 something he didn't do. And he always preaches to
21 the kids, you know, not to do this and not to do
22 that. And here they were saying that he had done
23 something like that.

24 Q The neighborhood in which you live, how
25 long have you lived there?

1 A Since 1987.

2 Q Now, immediately before Mr. Smith was fired
3 y'all were getting ready to buy a new house?

4 A Oh, yeah. Our house was on the market and
5 we had found a bigger place.

6 Q How many kids do you have?

7 A Three.

8 Q And how many bedrooms do you have in the
9 existing house?

10 A Three bedrooms.

11 Q And the new place was going to be how much
12 bigger?

13 A Oh, a lot bigger. It was going to be four
14 bedrooms, a family room, living room, a Florida room
15 which was heated and air conditioned, two and a half
16 baths. We only have one bath right now.

17 Q For the five of you?

18 A For the five of us.

19 Q Were you making arrangements to buy the new
20 house?

21 A Yes. We had went to look at it with the
22 kids and had got with our real estate agent, and she
23 made the offer to the other party.

24 Q And you were going to get a VA loan?

25 A Yeah, we were going to get a VA loan.

1 Q Did you have to back out of that deal?

2 A Oh, yeah, because that happened. He didn't
3 have a job and I was the only one working. And
4 although we had sold our house, we were going to rent
5 it to some friends that we knew. So we just had to
6 tell her to hold up on it and everything was at a
7 standstill.

8 Q How long was your husband out of work
9 before he started doing anything?

10 A I think it was about three months. Then he
11 went to a temporary agency after trying a lot of
12 places.

13 Q How long after he was terminated from ARA
14 did he go to the temporary agency?

15 A About three months before he actually
16 started working with them.

17 Q So what did he do during those three
18 months?

19 A He was looking for a job.

20 Q He was staying home?

21 A Yes. He wasn't working, but he was going
22 out each day looking for a job.

23 Q So he did that for three months?

24 A He did that for three months.

25 Q Did you help him fill out applications?

1 A Yeah. He usually brought them home and we
2 went over them together and I typed them.

3 Q How many applications were you doing a day?

4 A Three to four, if not more.

5 Q Then after three months he got a job where?

6 A With this temporary agency at this place
7 called Omni Products where they were working on a
8 production line.

9 Q During the three months that your husband
10 was out of work, how did y'all pay the bills?

11 A With my paycheck, because they denied him
12 employment originally because he was terminated.

13 Q Now, he later got unemployment?

14 A He later got unemployment, yeah.

15 Q So the firing was found to be
16 inappropriate?

17 A Right, found to be unjustified.

18 Q And he was paid?

19 A Yeah, he was paid.

20 Q Now, did you fall behind in the bills?

21 A Yes.

22 Q Which bills?

23 A The mortgage -- well, we had just bought a
24 new car February '92 and he was fired August '92.
25 And first payment on the car was May, so my paycheck

1 will only cover -- if I took my entire paycheck, it
2 will only cover the car payment, one paycheck. And
3 the next paycheck would cover the mortgage payment,
4 but it would leave absolutely nothing. So one month
5 I would, you know, sort of juggle it around so I had
6 enough in the checking account to make one of those
7 payments, either the car or the mortgage.

8 Q Where is your husband working now?

9 A Avis Rent-A-Car.

10 Q And when did he start working there?

11 A January '93.

12 Q What hours does he work now?

13 A He works from 2:30 to 11:00 at night.

14 Q And what time do your kids go to bed?

15 A My kids go to bed at 9:00.

16 Q So he doesn't see them in the evening?

17 A No, he doesn't see them until when he gets
18 up Saturday morning. He only sees them Saturday and
19 Sunday.

20 Q Now that he is at Avis, is he making as
21 much money as he was making before?

22 A No. He's still short.

23 Q And he has no seniority?

24 A No, because he just started in January.

25 Q What time do you go to work in the morning?

1 A I work from 7:30 to 3:45, but I usually
2 stay up so that I can see him when he gets home.

3 Q So you get to see him for like an hour a
4 day?

5 A Right. I stay up until -- he usually gets
6 there about 11:30, so I stay up with him from about
7 11:30 to 12:30 or so.

8 Q And then when you leave in the morning he's
9 still asleep?

10 A Oh, yeah, he's still sleeping.

11 Q How long is this going to have to keep up?

12 A Until he gets a promotion with Avis or
13 something else comes up. I don't know.

14 Q At Avis does he have to work on the
15 weekends sometimes?

16 A Yeah. He works on occasional weekends.

17 Q And on those weekends he won't see the
18 children at all?

19 A Well, usually if it's an occasional weekend
20 he'll see them when he gets up Saturday morning,
21 because they usually want him to come in Sundays.

22 Q Did his firing have a bad impact on your
23 family?

24 A Yeah. I was scared. You know, there was a
25 lot of tension.

1 Q How did he handle the tension?

2 A Well, ranting and -- well, he was ranting
3 and raving and constantly arguing about, you know,
4 why did they do that, they know that I'm loyal, why
5 would they accuse me of something. And it would just
6 go on and on and on.

7 He stopped helping my daughter -- they were
8 out of school when it all happened, but it was right
9 before the Labor Day holiday. Usually he helps the
10 smaller ones or my older daughter with homework, and
11 that sort of stopped and I had to pick up the slack.
12 I mean his usual confident strong self was -- his
13 self esteem had gone down almost to zero.

14 Q Thank you. No further questions.

15

16

17 CROSS-EXAMINATION BY MR. BENEDETTI:

18

19 Q Mrs. Smith, at the time that he was -- and
20 "he" being your husband, Andre Smith, was working at
21 ARA, you only had one car, is that correct?

22 A That's correct.

23 Q And you were working at Innsbrook during
24 that time?

25 A Uh-huh.

1 Q And you would normally take him to work,
2 pick him up and bring him home?

3 A Yeah. Or sometimes if he was going to be
4 working in the warehouse, he will drop me off at work
5 and go to ARA and come back and pick me up. It
6 depends. Usually if he knew he was going to run what
7 they call a route, then he would just -- he knew that
8 he was going to be bringing the van home, so I will
9 drop him off.

10 Q Now, was this what happened on August 21st?

11 A Right. It was his day to do the route
12 work.

13 Q Did he know on that day he was going to
14 bring the van home?

15 A Yes. That's because I dropped him off.
16 Usually if I dropped him off, that was because he's
17 going to run a route and he's going to bring the van
18 home. He usually always brings it home on Fridays,
19 because they were working on the truck.

20 Q And you worked until 3:45, that is at your
21 job?

22 A (Witness nods head.)

23 Q What time would you normally get to ARA?

24 A About 4:00. He usually had about a
25 30-minute wait before I got there. He usually was

1 sitting on the steps.

2 Q And you say he normally brought it home
3 every weekend?

4 A If he was running a route on that Friday he
5 usually would bring the van home, especially while he
6 was working on the truck, because he will go and pick
7 up lumber and that type of stuff.

8 Q When he was working a route, is this what
9 I've heard described as somebody who once they finish
10 their route they're free to go the rest of the day?

11 A Yeah, because sometimes he would be home
12 early in the day. He would call and say he was
13 already there.

14 Q And this was on the Fridays when he usually
15 worked the route?

16 A They had a little -- it was sort of a
17 complicated schedule they had worked out for him. I
18 believe Fridays was a route that it was maybe Monday,
19 Wednesday, Friday. I mean it was awkward. It was
20 complicated.

21 Q How many days did he have a route?

22 A I believe it was three or so. I'm not
23 sure. Sometimes they would change up, depending on
24 if somebody was out.

25 Q The best that you know, on the days that he

1 had the route he was allowed to go home whatever time
2 he finished?

3 A Uh-huh, either the route or when they go
4 out. If he was going to be over on Southside, then
5 his supervisor would just tell him to go ahead, he
6 can just go ahead and go home. He would take the van
7 home then.

8 Q I believe you told me first on the days he
9 had the route that he would usually drop you off and
10 then come and pick you up?

11 A Uh-huh.

12 Q Right?

13 A Right. If he knew that he was going to be
14 on Southside -- it was always scheduled. They have
15 like a square board they wrote everything down. If
16 he knew that he was going to be either on Southside
17 on the route or on one of those troubleshoot things,
18 then I would drop him off and he would bring the van
19 home.

20 Q Well, normally you would drop him off by
21 7:00 or 7:30?

22 A Or before that.

23 Q Before 7:00 or 7:30?

24 A Uh-huh.

25 Q Why is that?

1 A Because I wanted to go to work at 7:30,
2 so I'd drop him off early.

3 Q And you say at that time he knew what his
4 route was going to be for the day?

5 A It was always on the board. See, they have
6 it -- they have like a little board where they write
7 stuff in.

8 Q So you would wait for him to check the
9 board and he'd tell you whether or not --

10 A Oh, no. He would check the board the day
11 before. Even that Friday, he would look at the board
12 and know that Monday I'm going to be doing this.

13 Q How do you know his self esteem went down
14 to zero?

15 A Well, at that time we had been married for
16 14 years. And he had, I mean, no enthusiasm
17 whatsoever. No interest in the kids, no want to do
18 anything anymore. And he's always been an outgoing
19 person. I mean he was so angry all the time, so I
20 mean --

21 Q You take that to be lower his self esteem?

22 A Not necessarily, but I mean I can tell my
23 husband. We've been married for so long. He had no
24 confidence in himself anymore. Even filling out
25 these job applications, rejection, rejection,

1 rejection. He started doubting himself. Is there
2 something wrong with me or what. We never went
3 through a termination, so automatically we put
4 "terminated" on the applications. We didn't know
5 that that was something that the employers would
6 look at as bad.

7 Q You said you helped him with the
8 applications?

9 A Yes.

10 Q Can he read and write?

11 A Yes, he can.

12 Q That's all I have.

13
14 THE COURT: Anything else, Mr. Baugh?

15 MR. BAUGH: Yes, briefly.

16
17
18 REDIRECT EXAMINATION BY MR. BAUGH:

19
20 Q In a given year how often would your
21 husband bring the van home?

22 A In a year?

23 Q Yes. Every weekend?

24 A I would say three weekends out of a month,
25 I guess.

1 Q Now, your husband wore a beeper, right, so
2 they could contact him?

3 A Right.

4 Q Was it uncommon for your husband to be home
5 as early as 1:00, 2:00 in the afternoon?

6 A No, especially when it's on a Friday. It's
7 usually a slow time for him.

8 Q And if anyone needed him he had the beeper?

9 A Right.

10 Q And that was going on the whole time he was
11 working there?

12 A Oh, yeah. They would -- sometimes I would
13 call looking for him and they would give me his
14 beeper number and I could beep him and he'll call me
15 back.

16 Q But I'm saying it's not unusual for him to
17 get off early?

18 A In the middle of the day, right.

19
20 MR. BAUGH: Thank you. Pass the witness.

21 THE COURT: Thank you, Mrs. Smith.

22 MR. BENEDETTI: May I just clear up one
23 thing?

24 THE COURT: Yes.

1 RECROSS-EXAMINATION BY MR. BENEDETTI:

2
3 Q I wrote down you said you picked him up
4 about 3:30, is that correct?

5 A No. I get off at 3:45. It's usually about
6 4:00. It only takes 10 or 15 minutes to get to
7 Staples Mill Road.

8 Q Thank you. That's all.

9
10 MR. BAUGH: No further questions.
11 Plaintiff would rest, Your Honor.

12 THE COURT: Thank you, ma'am. You may step
13 down.

14 THE COURT: Ladies, step back in the jury
15 room a moment, please. Thank you.

16
17 JURY OUT

18 THE COURT: Gentlemen, I've read over these
19 exhibits and consulted again Great Coastal, the
20 case that the defendant relies on, and I
21 recognize that case is --

22 MR. BENEDETTI: Judge, I'm sorry. I cannot
23 hear you.

24 THE COURT: I'm sorry. I looked over again
25 Great Coastal and I'm reminded by this case. In

1 JURY OUT

2 Great Coastal is the issue whether or not an
3 alleged slanderous statement of commercial
4 bribery was a crime, and had to do, I think,
5 more with the matter of categorizing the
6 statement as imputing criminal conduct.

7 Here we have there's agreement that if
8 these matters were true, that aiding and
9 abetting this activity is a crime, there's no
10 question about that. In Great Coastal the
11 question was whether commercial bribery was a
12 criminal offense.

13 The other issue is whether or not in these
14 matters does a statement have to state enough
15 facts upon which one can conclude that a
16 criminal activity or what is recognized as a
17 crime is afoot. And the case also mentioned the
18 slanderous statement for which one could be
19 indicted and punished. I think that's what the
20 word would suggest to me, of course, that one
21 could be convicted.

22 There are some discrepancies about what
23 was said and what was heard here. Ms. Goss
24 mentioned that the only difference between the
25 written statement and what she was told is the

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1 JURY OUT

2 word "cocaine," I believe she said, according to
3 my notes. But of course if you read the written
4 report, it's not at all like what she says she
5 heard, that is as recorded by her in her written
6 statement of August 21, 1992.

7 Then we have the investigative report,
8 again, which to me is at variance with what she
9 said the officer told her. And then we have the
10 officer's statement today, or yesterday,
11 regarding that he made no statement against the
12 plaintiff, nothing derogatory he ever said about
13 him. So I don't know.

14 I'm going to keep the matter under
15 advisement and ask that defendant proceed with
16 his witnesses. Do you have any witnesses?

17 MR. BENEDETTI: Yes, I do.

18 THE COURT: Are you prepared to offer them?

19 MR. BENEDETTI: Are we proceeding on the
20 basis that there is a privilege?

21 THE COURT: Well, I meant to mention that
22 too. I'm going to take that matter under
23 advisement too, whether there was a privilege,
24 whether they extend to all of the statements
25 that allegedly he made. And I think that if

1 JURY OUT

2 there is a privilege, it would have to be
3 overcome by New York Times malice, by knowing
4 falsity or a reckless disregard for the truth.

5 MR. BENEDETTI: Done by clear and
6 convincing evidence.

7 THE COURT: Well, that's what the case
8 holds. That's another significant issue there
9 in this case. Clearly the officer had a right
10 to investigate and make inquiries about the
11 vehicle.

12 The argument from the plaintiff is while
13 conceding that the privilege would attach to the
14 statements he made allegedly about what the
15 plaintiff made doing it, there is another
16 question about whether he was chargeable with a
17 crime.

18 If we go with Ms. Goss's statement that's
19 recorded, she said she recorded it, I don't
20 think that constitutes a crime. But there are a
21 lot of issues in this case and I think I may
22 call for some briefs later, but I'll keep the
23 motion under advisement.

24 Are you ready now to proceed?

25 MR. BENEDETTI: Yes, Your Honor. I'd like

COOK & WILEY, INC.

1 to call David Williams.

2
3 JURY IN
4

5 DAVID WILLIAMS, the witness, called by the
6 defendant, first being duly sworn, testifies as
7 follows:

8 DIRECT EXAMINATION BY MR. BENEDETTI:
9

10 Q Please state your name and your occupation.

11 A Patrolman David Williams, Richmond Police
12 Department.

13 Q How long have you been so employed?

14 A A little over three years.

15 Q What on August the 21st, 1992 was your
16 assignment?

17 A Myself and two other officers were assigned
18 to takedown team during surveillance.

19 Q Are you assigned to any particular part of
20 the police department?

21 A Yes, sir. I'm assigned to the uniform drug
22 enforcement unit.

23 Q Is that called the strike force unit?

24 A Yes, sir. At one time it was.

25 Q And on that date you were part of the

COOK & WILEY, INC.

1 takedown unit?

2 A Yes, sir.

3 Q And on that date did you receive a report
4 from Officer Schnupp?

5 A I received a radio transmission from him,
6 yes, sir.

7
8 MR. BENEDETTI: May I show the witness a
9 document?

10 THE COURT: All right.

11
12 Q At the time that you received that radio
13 communication from Officer Schnupp, did you make a
14 note of that?

15 A Yes, sir, I did.

16 Q And is what you're holding in your hand a
17 note of that?

18 A Yes, sir, it is.

19 Q And would you read for the jury what you
20 wrote down?

21 A I wrote the date, which was 8/21/92. Next
22 to that I wrote 1531, which is military time for 3:31
23 p.m. Below that I wrote, number one, b/m, stands for
24 black male. Long black shorts, multicolored shirt.
25 I believe that was a description of the person that

1 was identified as a dealer by Officer Schnupp. Below
2 that I wrote p-a-s-s period, which is abbreviation
3 for passenger. And next to that I wrote ARA
4 Services.

5 Below that it says truck, and there's a
6 license plate, Lincoln King Apple 792, which was the
7 license plate of the vehicle. Below that I have
8 driver, which was Andre L. Smith, and his Social
9 Security number. Below that is pass period again,
10 which is abbreviated for passenger, Robert B. Ragin,
11 Jr., and his Social Security number.

12 Q Now, at what time did you write down the
13 first four lines, that is through truck LKA-792?

14 A At approximately 3:31 p.m.

15 Q And when did you write driver and
16 passenger?

17 A After we had stopped the vehicle.

18 Q Where was the vehicle stopped, do you know
19 what location?

20 A On 24th Street, I believe, north of
21 O Street.

22 Q Was there some particular structure that
23 would bring it back to your attention as to where it
24 might be located?

25 A I can see the retirement home which was

1 about a block north of our location.

2 Q Is that near Venable?

3 A Yes, sir.

4 Q And I assume that when you stopped the
5 vehicle that a search was undergone?

6 A Yes, sir.

7 Q And what was your responsibility for the
8 search?

9 A I searched the interior of the vehicle.

10 Q Did you search either of the passengers?

11 A No, sir.

12 Q Did you find anything in the interior of
13 the vehicle?

14 A No, sir. No contraband.

15 Q What was in the vehicle?

16 A There were some coffee pots in the back of
17 the vehicle behind the two front seats. There was a
18 lot of trash between the two front seats.

19 Q What kind of trash?

20 A Paper cups, food wrappers, different items.

21 Q Please continue.

22 A Between the driver seat and the passenger
23 seat, there was -- I believe it was a cardboard box
24 which contained paperwork and things like that, and
25 some trash.

1 Q There are some other writings on this
2 particular piece of paper. Were they written by you?

3 A No, sir.

4 Q Can you identify by whom they were written?

5 A It would have been one or both of the
6 officers I was riding with, but I'm not sure who
7 wrote what.

8 Q And do you know their names?

9 A Yes, sir.

10 Q What are they?

11 A Officer English and Officer Kurisky.

12 Q I assume that no contraband was found in
13 the vehicle or on the persons?

14 A No, sir.

15 Q And were they released?

16 A Yes, sir, they were.

17 Q And do you know approximately what time?

18 A Wasn't too long after that. We searched
19 the vehicle. I had Officer English go back over the
20 interior of the vehicle. We checked -- I believe we
21 checked Mr. Smith's driver's license to make sure it
22 was valid. And at that point they were released.

23 Q Did you call in to see whether or not the
24 vehicle was stolen?

25 A No, sir, I didn't.

1 Q Is that routine police investigation?

2 A Depending on the circumstances. At that
3 point I didn't feel the vehicle was stolen. However,
4 afterwards I had a conversation with Officer Schnupp,
5 and we weren't sure whether the driver was supposed
6 to be in that area with a company vehicle or have a
7 passenger in the vehicle.

8 Q Did he have a uniform on?

9 A Yes, sir, he did.

10 Q And what did it have on it, anything to
11 identify him?

12 A It was an ARA Services uniform.

13
14 MR. BENEDETTI: I'd like to offer the
15 officer's note as Defendant's Number 2.

16 MR. BAUGH: Your Honor, I would ask that
17 that be marked for identification at this time,
18 so I could have a chance to cross- him on it.

19 THE COURT: All right.

20

21

22 CROSS-EXAMINATION BY MR. BAUGH:

23

24 Q Officer, you said Mr. Schnupp and yourself
25 had a question as to whether or not the vehicle

1 should have been in that area or whether or not there
2 should be a passenger in it?

3 A Yes, sir.

4 Q Those aren't crimes, are they? Is it a
5 crime to be in an area like Church Hill?

6 A It could be. If it's --

7 Q Well, did you have any --

8 A -- not his assigned vehicle --

9
10 MR. BENEDETTI: Your Honor, please.

11
12 A -- it would be unauthorized use.

13
14 MR. BENEDETTI: Your Honor, he's not
15 letting him answer the question.

16 THE COURT: Officer, did you finish your
17 answer?

18 THE WITNESS: Yes.

19
20 Q So you're saying that you weren't just
21 concerned whether or not the car was supposed to
22 be in that area, you're saying you had a concern
23 of possible unauthorized use?

24 A Yes, sir.

25 Q Which is a crime?

1 A Yes, sir, it is.

2 Q And did you investigate that crime while
3 you had them there?

4 A No, sir, I didn't.

5 Q Did you see any indication that this was
6 unauthorized use?

7 A Not at that point, no, sir.

8 Q In fact he was wearing an ARA uniform,
9 wasn't he?

10 A Yes, he was.

11 Q Did you check the registration on the
12 vehicle to see if it came back to ARA?

13 A No, I didn't check the registration.

14 Q Now, you said also you didn't know if he
15 should have a passenger in there. Is that a crime?

16 A Not that I know of.

17 Q Well, what gives you and this other man,
18 police officers, the right to investigate things that
19 aren't crimes? I mean are you the street monitor or
20 something?

21

22 MR. BENEDETTI: I object.

23

24 A We were investigating an unauthorized or
25 possible unauthorized use.

1 Q When did you start investigating
2 unauthorized use?

3 A After Officer Schnupp had concluded the
4 surveillance and we had a chance to discuss the
5 situation.

6 Q Tell me what your probable cause was for
7 unauthorized use. In your estimation, what did you
8 see that amounted to evidence of unauthorized use?

9 A The only thing I saw was contact I had with
10 the vehicle.

11 Q And I'm asking you, what about the contact
12 that you had with the vehicle made you agree with
13 Officer Schnupp that there was a possibility of an
14 unauthorized use?

15 A We weren't sure at that point.

16 Q No, I'm not asking you weren't you sure. I
17 didn't ask you what you weren't sure of. I'm asking
18 you what you were sure of. What was the basis for
19 your --

20 A Actually I stopped that vehicle on 24th
21 Street.

22
23 THE COURT: Well, they didn't stop the
24 vehicle for unauthorized use. They stopped the
25 vehicle because of narcotics.

1 MR. BAUGH: Allegedly.

2 THE COURT: So what's the problem with the
3 unauthorized use?

4 MR. BAUGH: Well, the reason, Your Honor,
5 I was asking is whether or not if their concern
6 in calling was about something which they're
7 not charged with investigating, it can't be
8 privileged.

9 THE COURT: But he didn't call.

10 MR. BAUGH: No, but I'm saying they. He's
11 talking about what led to the holdup, and he's
12 the only witness here now.

13 THE COURT: Did you have an objection,
14 Mr. Benedetti?

15 MR. BENEDETTI: No.

16 THE COURT: You rose.

17 MR. BENEDETTI: I did, but the question was
18 answered before I had a chance to state my
19 objection.

20 THE COURT: All right.

21

22 Q Now, did you write a report about that
23 stop?

24 A I don't recall. I don't recall whether I
25 did or Officer Schnupp did.

1 Q Did you see during this stop anyone --
2 well, did you have them open their mouths?

3
4 THE COURT: Did they open?

5
6 Q Did you have them open their mouths? Did
7 you look under their tongues for drugs?

8 A I didn't search either one of the
9 occupants.

10 Q Did you see anyone make a gesture that
11 indicated use or might be eating evidence?

12 A No, sir. I couldn't see into the van until
13 we got right up next to it.

14 Q Who was the first officer to the van?

15 A I don't know. I approached the driver's
16 side, the other two officers approached the passenger
17 side.

18 Q Now, something else because the jury
19 doesn't know this. As an officer you've been doing
20 this quite a while, right?

21 A About two years.

22 Q Now, if you have probable cause that
23 someone might have eaten drugs, you can take them to
24 MCV and have their stomach pumped, can't you?

25 A Yes.

1 Q And then you can charge them for the drugs
2 you found in their stomachs, is that correct?

3 A Yes.

4
5 THE COURT: I don't know if he can do that.

6 MR. BAUGH: Smirker (phonetic) versus
7 California.

8 THE COURT: I thought they ruled that that
9 was too much.

10 MR. BAUGH: Believe it or not, it's going
11 on. Two cases in Petersburg.

12 MR. BENEDETTI: I object to his pursuit of
13 this line of questioning. It has absolutely
14 nothing to do with the facts of this case,
15 whether or not defamation took place.

16 MR. BAUGH: Your Honor, that statement says
17 that drugs were destroyed. Mr. Schnupp said
18 that he was told that one of the officers
19 observed the passenger eat something or make a
20 gesture towards his mouth. And I'm trying to
21 find out if that's true, these guys could have
22 checked. I think that's a false statement and
23 I'm trying to prove it.

24 THE COURT: But there's nothing related as
25 part of this alleged defamatory statement of any

1 eating.

2 MR. BAUGH: No, Your Honor, but it says
3 drugs were destroyed. In the written report --

4 THE COURT: Right.

5 MR. BAUGH: -- it says evidence was
6 destroyed. And if I understand the proof of
7 their suspicion was it was destroyed by
8 ingestion.

9 THE COURT: Well, why do you want to pursue
10 that?

11 MR. BAUGH: Because I don't think that's a
12 true statement and I want to show it's a false
13 statement.

14 I believe also Mr. Schnupp said he believed
15 Officer D.C. Williams. I believe Mr. Williams'
16 recollection, I asked him about that, I thought
17 he said -- it could have been the deposition --
18 that he believes this officer saw the passenger
19 make a motion toward his mouth.

20 THE COURT: Did he?

21 MR. BAUGH: He said no.

22 THE WITNESS: No, sir, I didn't. I
23 approached the driver's side of the vehicle.

24 MR. BAUGH: Thank you, Your Honor. We'll
25 move on.

1 Q Now, you mentioned there are other
2 notations on this document. Who made them?

3 A One or both of the other officers that
4 I was riding with that day.

5 Q Number 1531, that's military time for 3:31?

6 A Yes, sir, it is.

7 Q Are you telling me now that you recollect
8 writing that or did someone else write that?

9 A That's my handwriting.

10 Q How many stops did y'all make that day?

11 A I don't recall.

12 Q Did you make any arrests that day?

13 A No. The takedown team I was working, we
14 didn't.

15 Q And you recollect that this notation at the
16 top, one black male, long black shorts, multicolored
17 shirt, that refers to the suspect target, that was
18 the dealer?

19 A Can I take a look at it, please?

20 Q Sure.

21
22 MR. BAUGH: May I approach the witness,
23 please, Your Honor?

24 THE COURT: Yes.

1 A Next to the number one?

2 Q Yes, sir.

3 A Yes. I believe that referred to the
4 dealer.

5 Q All right. Now, also as part of your
6 search, do you recollect having them take their
7 shoes off?

8 A I didn't search either one of them.

9 Q Well, you were present watching them?

10 A No, sir. I was searching the interior of
11 the vehicle.

12 Q Well, while you were searching the interior
13 of the vehicle, did anyone say, "There's no need
14 searching in there, because I think I saw one of
15 these guys eat it"? Anybody say anything like that?

16 A I don't recall.

17 Q Well, if they had said that, would you have
18 stopped looking? Or you might turn up something
19 else?

20 A (No verbal response.)

21 Q If you had heard that, would you have
22 stopped looking?

23 A No, sir.

24 Q Did Mr. Smith have an ARA ID card or
25 something on him? Did you ask him for it?

1 A I don't recall.

2 Q So while they were there you certainly had
3 no concern that this was unauthorized use, because
4 the guy was in a uniform that had ARA and you don't
5 even recall asking for an ID card?

6 A No. At that time that wasn't my main
7 concern.

8 Q No. Let me ask you this. Did you have any
9 other concern except drugs for stopping that car?

10 A No, sir.

11 Q Did anyone ever communicate to you the
12 possibility prior to your stop that the vehicle might
13 be stolen or unauthorized use or anything like that?

14 A I don't believe so.

15 Q Now, did you ever work for a company like
16 this?

17 A At one time, yes, sir.

18 Q And did you make comments to Mr. Smith and
19 his passenger that you used to work for a company
20 like this and how much money they allegedly make,
21 stuff like that? Did you do that?

22 A I don't think I made statements to that
23 effect.

24 Q Well, had you ever met this man before?

25 A No, sir.

1 Q Did he work with you when you worked --

2 A No, sir.

3 Q Well, then can you tell us how you might
4 think he could possibly know that, unless you told
5 him, that you used to work for a food service
6 company?

7 A Well, I made mention of that, but I didn't
8 say anything about how much money they made or
9 anything.

10 Q Oh, you just happened to mention, "By the
11 way, I used to work like this too"?

12 A Sure. There's nothing wrong with making
13 conversation with somebody who's stopped.

14 Q But you didn't say anything else about how
15 much money you made and "you're not supposed to be
16 over here" and stuff like that?

17 A I don't believe I did, no.

18 Q But you might have?

19 A It's possible, but I really don't believe
20 I did.

21 Q Now, afterwards when you and Mr. Schnupp
22 were talking, Mr. Schnupp indicated a question as to
23 whether or not Mr. Smith was supposed to have a
24 passenger in that car? That was a concern?

25 A I don't recall the conversation verbatim,

1 Mr. Baugh.

2 Q No, I'm not asking --

3 A I do recall that we had discussed the fact
4 the vehicle possibly didn't belong in that area as a
5 part of Mr. Smith's job.

6 Q Wait. Let's back up now. If he's supposed
7 to drive home one route and he drives home another
8 route, is that a crime?

9 A Depends on the company he works for.

10 Q No, no. Is it a crime?

11 A That would depend on the company he works
12 for. If they didn't consider it to be something they
13 wanted to press as an issue, then no, sir, it's not a
14 crime. If they decided that, yes, they wanted to
15 press it as an issue and file a report at that time,
16 it would be a crime.

17 Q So it's your understanding of the law that,
18 for instance, if you use your police car to stop off
19 at the bank on your own personal business, that's a
20 crime, because you're going --

21
22 MR. BENEDETTI: Your Honor, I would object
23 on the grounds that the question is absolutely
24 irrelevant.

25 MR. BAUGH: Your Honor, I am submitting

1 that he has just indicated that if the vehicle
2 is not where it's supposed to be, it's supposed
3 to be a crime, which is preposterous. And I'm
4 going to question him.

5 MR. BENEDETTI: And that also is irrelevant
6 to the issue before the Court.

7 THE COURT: How does that relate to what
8 we're here for?

9 MR. BAUGH: Your Honor, they have just
10 asserted privilege. The street monitors here
11 are now going beyond drug checking. And they're
12 going to make sure, one, that people aren't
13 breaking company rules by having passengers, and
14 number two, they're not breaking company rules
15 by stopping where they're not supposed to stop.
16 And company rules have nothing to do with badges
17 and police, and that cannot be privileged.

18 MR. BENEDETTI: That's not a fair
19 representation of what the officer testified.

20 MR. BAUGH: I paraphrased.

21 THE COURT: Well, I think it's matter of
22 degree. If you were going to have a vehicle
23 within your charge and you were out on a lark,
24 it might be unauthorized use. I don't know.

1 Q Did you ask the driver if he had any
2 accounts over there?

3 A No, sir, I didn't.

4 Q Did you ask him whether or not he was there
5 with permission?

6 A No, sir, I didn't.

7 Q So whatever concern you had, you didn't
8 have enough concern to ask him about it?

9 A Not at that point, no, sir.

10 Q Sir, based on the information given to you
11 by Mr. Schnupp, did you form the opinion that a drug
12 deal had gone down and y'all just didn't find the
13 drugs?

14 A Yes, sir.

15 Q In fact as you sit here now, understand
16 that this guy was the driver and Mr. Robert Ragin was
17 the passenger, were you under the impression the two
18 of them participated in the commission of a crime?

19 A I was under the impression the passenger
20 did.

21 Q Oh, by the way, question. Were you given
22 a copy of Mr. Schnupp's deposition to review? It's
23 a transcript.

24 A I've looked at several. I don't know
25 whether I've looked at his or not.

1 Q Who gave you depositions to look at?

2 A (No verbal response.)

3 Q Who gave you copies of the depositions?

4 A I looked at a couple of them down the hall.

5 Q No, no, no, no. Who gave you --

6 A I don't know. They were there when I got
7 there.

8 Q Well, wait. You mean depositions were
9 lying on the floor and you just reached over and
10 picked them up?

11 A They were lying next to two police
12 officers.

13 Q Well, what police officers were they?
14 Were they police officers involved in this case?

15 A Yes, sir.

16 Q Now, you know that witnesses are excluded
17 in cases like this, don't you?

18 A Yes, sir.

19 Q And that happens in criminal cases, right?

20 A Yes, sir.

21 Q And it's the purpose for excluding
22 witnesses so the officers can't get together and tell
23 the same story. Isn't that one of the reasons we
24 exclude them?

25 A Yes, sir.

1 Q But you reviewed how many transcripts about
2 this case?

3 A I believe they were the two that were taken
4 from ARA employees.

5 Q You found two? Sir, would it surprise you
6 to find that there's only one deposition of the two
7 ARA employees? So I'll ask you pointedly --

8 A It wouldn't surprise me, no, sir.

9 Q Now, I'll remind you you're under oath and
10 these women are looking at you. Did you look at Mr.
11 Schnupp's deposition as to what he said happened that
12 day before you came in here and testified?

13 A I don't believe I've seen it, Mr. Baugh.

14 Q I got a question. Did you search the
15 driver?

16 A No, sir.

17 Q Well, did someone search the driver?

18 A Yes, sir. I assume they did.

19 Q Who was the lead officer? Who was the big
20 kahuna out there that day?

21 A I think we were all equal.

22 Q Well, nobody calls the shots?

23 A No.

24 Q Did you observe that the driver was
25 searched?

1 THE COURT: Why are we --

2
3 A I didn't observe the search --

4
5 THE COURT: Wait, wait. That's not
6 relevant.

7 MR. BAUGH: Here's why, Your Honor.

8 THE COURT: We're not trying a false arrest
9 case.

10 MR. BAUGH: No, Your Honor, but --

11 THE COURT: This is a defamation case.

12 MR. BAUGH: One, that could be a damage.

13 THE COURT: Damage?

14 MR. BAUGH: A damage. And number two, and
15 most importantly --

16 THE COURT: How could that be damage?

17 MR. BAUGH: Can I ask one question, Your
18 Honor?

19
20 Q Sir, if you, speaking generically, didn't
21 think he committed a crime, why did y'all search him?

22 A I didn't see a search, Mr. Baugh.

23
24 MR. BENEDETTI: Your Honor, I'd ask that
25 counsel be restricted to stand behind.

1 Q Don't let me intimidate you. Just tell the
2 truth and you'll be okay. You're telling me you
3 never saw anyone get searched?

4 A I didn't see his search.

5 Q Did you know they were searching him that
6 day? Let's not be cute. Did you know they were
7 going to search those guys?

8 A I knew they were going to pat him down for
9 weapons.

10 Q You're telling me you did not know the
11 driver was going to be searched?

12 A I didn't see a search, Mr. Baugh.

13 Q No, I didn't ask you did you see it.
14 This is a real simple question.

15 A How can I know something that I haven't
16 seen?

17 Q Did you search the driver's area?

18 A Did I search the driver's area of the
19 vehicle?

20 Q Is there an echo? Did you search the
21 driver's area?

22 A Yes, sir, I did.

23 Q Well, if he didn't do anything wrong,
24 why are you searching his area?

25 A Because if the passenger had suspected

1 narcotics in his hand, he could have tossed it to the
2 driver's side of the vehicle.

3 Q He could have tossed it to the driver
4 possibly?

5 A That's possible.

6 Q Well, did you think that might have
7 happened?

8 A I wasn't sure. That's why I searched the
9 interior of the vehicle.

10 Q No, I didn't ask you you weren't sure.
11 Did you suspect? Was that a concern?

12 A I suspected, yes, sir.

13 Q Well, then you had a suspicion that he
14 might have committed a crime, because if they had
15 been tossed to him he would be committing a crime,
16 right?

17
18 MR. BENEDETTI: If Your Honor please, I
19 think that's an unfair assumption based on what
20 he has said.

21 MR. BAUGH: These people are reviewing
22 transcripts, coming in here and giving the same
23 thing about I didn't think this man committed a
24 crime and they searched him. And I think that
25 is responsive and I think the jury's entitled to

1 hear it.

2 THE COURT: I don't know why this is all
3 relevant. This is a defamation case.

4 MR. BAUGH: Your Honor, if these officers
5 are getting up here saying they were not under
6 the impression based upon this man's statements
7 that the plaintiff committed a crime -- I think
8 it's a simple question. If he didn't commit a
9 crime, why was he searched. And I want to know
10 why.

11 THE COURT: He doesn't know if he was.

12 MR. BAUGH: Your Honor, he didn't say he
13 didn't know. He said he didn't see it. The
14 question I asked which he refuses to answer is
15 did you know they were going to be searched.

16 THE COURT: Did you know?

17 THE WITNESS: I knew he was going to be
18 patted down for weapons. I didn't know he was
19 going to be searched. I didn't see a search.
20

21 Q Is it routine when you stop a car for
22 suspicion for drugs it's going to be searched?
23

24 MR. BENEDETTI: Your Honor, I have a
25 continuing objection to this line of questioning

1 for the reasons it has nothing to do with the
2 case involved in a defamation action. The one
3 question before this Court is whether or not the
4 statement that was communicated to the ARA
5 employee imputed a crime to this gentleman.
6 That is the only issue before this Court. What
7 the police officer thought or what the police
8 officer saw at the search makes no difference
9 whatsoever.

10 MR. BAUGH: Your Honor, that is not the
11 issue. The issue is whether or not statements
12 were communicated which could be by inference,
13 implication or insinuation an allegation of a
14 crime, based on whatever was said and whatever
15 information this man was relaying. This officer
16 just testified, "I didn't think he did anything
17 wrong." And I'm trying to find out if y'all
18 didn't think it was wrong, why was he searched?
19 I would submit that he does think he did
20 something wrong.

21 THE COURT: If that's the case, then it
22 seems like your point is made. Why do you need
23 to go into it?

24 MR. BAUGH: Your Honor, you want to tell
25 the jury my point is made, I'll sit down. Never

1 mind. With that statement, I'll sit down. Pass
2 the witness.

3 THE COURT: Do you have any questions?

4 MR. BENEDETTI: No, Your Honor.

5 MR. BAUGH: I'll withdraw my objection to
6 introduction of that document.

7
8 (Officer Williams' note was marked
9 for identification as Defendant's
10 Exhibit 2.)

11
12 THE COURT: Your next witness?

13 MR. BENEDETTI: Officer Kurisky.

14
15 (Discussion off the record.)

16
17 MR. BAUGH: Your Honor, could I recall
18 the witness for just a moment to ask him about
19 that note so he doesn't have to come back up?

20 THE COURT: All right.

21
22 Q Sir, where did you keep this? Where did
23 you find it, this report?

24 A I'm sorry?

25 Q Where did you find this so you could bring

1 it to court?

2 A I didn't bring it to court.

3 Q Well, who did you give it to?

4 A I gave it to Officer Schnupp.

5 Q Where did you find it to give it to Officer
6 Schnupp?

7 A Out of the police vehicle I was driving
8 that day.

9 Q When, that day?

10 A Yes.

11 Q When did you give it to him?

12 A The same day of the incident.

13 Q And you're telling me that Mr. Schnupp has
14 had this since August 21, 1992?

15 A I'm not sure. I know he had it that day.
16 What he did with it after that day, I can't testify
17 to.

18 Q When police officers testify in a case,
19 there's one case report, right?

20 A One or more, yes, sir.

21 Q And the officers look at it together? I
22 mean you'll use it and then you'll give it to another
23 officer and they'll give it to another officer --

24 A Sometimes, yes, sir.

25 Q -- in anticipation. Is there a case report

1 made if there's no arrest made?

2 A There might be notes included in a case
3 report, but there's not a separate case report made
4 if there's not an arrest made, not one report that's
5 dedicated entirely to that stop.

6 Q So only Mr. Schnupp would know where this
7 has been for the last year?

8 A I can't testify to that.

9
10 MR. BAUGH: Thank you. Pass the witness.
11 He may be excused.

12 THE COURT: Anything else, Mr. Benedetti?

13 MR. BENEDETTI: No.

14 THE COURT: Thank you, Officer. You may be
15 excused.

16 MR. BAUGH: Your Honor, we are going to ask
17 that an objection to introduction be taken up
18 outside the presence of the jury.

19 THE COURT: Next witness?

20 MR. BENEDETTI: Officer Kurisky.

21 THE COURT: We'll take that up outside the
22 presence of the jury, Mr. Baugh.

1 MICHAEL KURISKY, the witness, called by the
2 defendant, first being duly sworn, testifies as
3 follows:

4 DIRECT EXAMINATION BY MR. BENEDETTI:

5
6 Q State your name and your occupation.

7 A Michael Kurisky, police officer with the
8 city of Richmond.

9 Q How long have you been a police officer?

10 A Approximately three years.

11 Q And you're assigned to the strike force?

12 A Not at this time, no sir.

13 Q What are you assigned to?

14 A Currently I'm assigned to the Weed & Seed
15 project.

16 Q Is that an anti-drug program?

17 A Yes, sir.

18 Q Are you in the Church Hill area?

19 A Jackson Ward.

20 Q You on August 21st, 1992 were assigned to
21 the strike force, weren't you?

22 A Yes, sir, I was.

23 Q And on that date were you part of the
24 takedown team?

25 A Yes, sir, I was.

1 Q And approximately mid afternoon on that
2 date, did you receive a radio message from Officer
3 Schnupp concerning an ARA vehicle?

4 A Yes, sir, I did.

5 Q Do you recall approximately what time?

6 A I believe it was 1500, 1530. I don't have
7 any notes with me.

8 Q Have you seen the note that Officer
9 Williams took?

10 A I saw it briefly yesterday.

11 Q Who showed it to you?

12 A You did, sir.

13 Q Is that time consistent with your
14 recollection that's on that note?

15 A Yes, sir.

16 Q What did the radio message from Officer
17 Schnupp say?

18 A Officer Schnupp stated to us that a
19 transaction had just occurred between one of the
20 individuals who was a suspected dealer and a
21 passenger in the van with the ARA logo on the side.

22 Q Did he give you the license plate number?

23 A I don't recall if he gave us the license
24 number. He did give us a description of the van.

25 Q Do you know where Officer Schnupp was on

1 his stakeout?

2 A Yes, sir. He was positioned up on the
3 second floor of an abandoned building, a warehouse,
4 that was located right next to the area he was
5 surveilling.

6 Q And how far away from him were you in that
7 particular area in your vehicle?

8 A The target area was the 900 block of North
9 26th Street, and we were located in the 700 block
10 between 25th Street and 26th Street.

11 Q Is that where the strike force parking lot
12 is?

13 A Yes, sir.

14 Q So you were in the parking lot?

15 A Yes, sir.

16 Q And who was in the vehicle with you?

17 A Officer D.C. Williams was driving and
18 Officer Eric English was in the front seat and I was
19 sitting in the back passenger seat.

20 Q And as a result of that radio message, did
21 you then take some action?

22 A Yes, sir.

23 Q And did you subsequently get in behind the
24 ARA van?

25 A Yes, sir.

1 Q Do you know what that location would be?

2 A Officer Schnupp stated to us that the
3 vehicle, I believe, turned onto P Street headed out
4 towards 25th Street. Our vehicle was parked on N
5 Street, so we also turned onto 25th Street and we saw
6 the vehicle coming across 25th Street. At that time
7 we turned up 25th Street and fell in behind the
8 vehicle.

9 Q Did the vehicle continue on 25th Street?

10 A It continued across 25th Street headed
11 towards 24th Street.

12 Q Did you then get in behind?

13 A Yes, sir.

14 Q At what point did you turn your lights on,
15 or were the lights turned on?

16 A Shortly after the ARA van crossed over 25th
17 Street, Officer Williams turned on the lights.

18 Q What period of time lapsed between the time
19 the lights were turned on and the van was stopped?

20 A I believe it was probably five to ten
21 seconds.

22 Q And then what did you do?

23 A I was the first out of the vehicle and I
24 approached the passenger side of the van.

25 Q And Officer Williams, do you know where he

1 went?

2 A He went to the driver's side, I believe.
3 Officer English was behind myself.

4 Q Both of you were on the passenger side?

5 A Yes, sir.

6 Q Did you search one of the occupants?

7 A Yes, sir.

8 Q Which one?

9 A The passenger of the vehicle.

10 Q Do you know who searched the driver?

11 A No, I do not.

12 Q Do you know who searched the van?

13 A I believe Officer English was involved in
14 the searching of the van. My concentration was
15 directed towards the passenger of the vehicle since
16 he was supposedly being the individual who had
17 purchased the drugs.

18 Q How long did the search continue?

19 A The search or the stop itself?

20 Q The stop, before you made a decision as to
21 whether or not you were going to find anything?

22 A Probably maybe around five, seven minutes,
23 ten minutes. I don't really recall. I wasn't timing
24 it or anything at the time. But we did take the
25 occupants out of the vehicle. The interior of the

1 van was searched as well as the passenger who was
2 supposed to have purchased the drugs.

3 Q You don't know whether the driver was
4 searched or not?

5 A I did not personally search the driver.
6 I don't know if he was searched or not.

7
8 MR. BAUGH: Objection withdrawn.

9
10 Q Eventually you found no contraband and you
11 let the persons go?

12 A Yes, sir.

13 Q You subsequently met with Officer Schnupp
14 at headquarters?

15 A At the strike force headquarters, yes, sir.

16 Q What time were you getting off that day,
17 do you recall?

18 A Since we were there during the day we were
19 working the day shift, so it was probably around 5:00
20 or 6:00 p.m.

21 Q Thank you. No further questions.

22
23 CROSS-EXAMINATION BY MR. BAUGH:

24
25 Q How long did you detain the suspects?

1 A As I said, I don't really recall. Five,
2 ten minutes maybe.

3 Q And how many suspects were detained?

4 A There were two of them, sir.

5 Q So the driver was a suspect?

6 A Well, that's what you'd call him.

7 Q Well, I'm asking you. Was the driver --
8 was there a third person in the car?

9 A No, sir.

10 Q So when I ask you were there two suspects,
11 who are you talking about?

12 A I said there were two occupants in the
13 vehicle, sir. Sorry.

14 Q That's fine. Now, did you put him on the
15 same side of the vehicle? You put the passenger on
16 what side of the vehicle when you searched him?

17 A I took the passenger out of the passenger
18 side of the vehicle. The driver was eventually
19 brought around to that side.

20 Q Was the passenger searched on the passenger
21 side?

22 A Yes, sir, he was.

23 Q And you conducted that search?

24 A Yes, sir.

25 Q While you were conducting your search,

1 where was the driver?

2 A It was not my side of the van.

3 Q Where was Officer English?

4 A Officer English was behind me or standing
5 at the door to get into the passenger side of the
6 vehicle.

7 Q How many of you were in the police car when
8 you started? Three, right?

9 A Yes, sir.

10 Q And you're saying that you stayed on the
11 passenger side with the passenger and conducted your
12 search, right?

13 A Yes, sir.

14 Q And Officer English was behind you, right?

15 A Right. Well, next to me.

16 Q All right, next to you. And you're saying
17 that eventually the driver was brought around, but he
18 wasn't searched while you were standing there with
19 the passenger, right?

20 A No, sir.

21 Q So he had to have been searched on the
22 other side if he was searched, right?

23 A If he was searched.

24 Q And the only officer on the other side was
25 Officer D.C. Williams who just left, right?

1 A Yes, sir. He was the one who went up to
2 the driver's side.

3 Q Now, as part of your search on the
4 passenger, did you ask him to take his shoes off?

5 A No, sir.

6 Q You didn't have him loosen his shoes so you
7 could put your hands down in them?

8 A No, sir.

9 Q Did you look in his mouth?

10 A No, I did not look in his mouth.

11 Q Did you ever tell anyone that as you
12 approached the vehicle the driver made a motion
13 toward his mouth indicating he might be eating
14 contraband?

15 A No, sir, I did not.

16 Q And, of course, as you sit here now you
17 have no personal knowledge of what happened over on
18 North 26th Street in the 900 block? Everything you
19 know about it is what this gentleman told you, right?

20 A As far as the transaction that occurred?

21 Q The alleged transaction.

22 A The alleged transaction.

23 Q Everything you know he told you, right?

24 A Yes.

25 Q And in fact, based on your own knowledge,

1 you don't even know if that van even stopped up
2 there, do you?

3 A I personally do not know. I just received
4 information from Officer Schnupp.

5
6 MR. BAUGH: Thank you. Pass the witness.

7 MR. BENEDETTI: No further questions.

8 THE COURT: Thank you, Officer. You may
9 step down.

10 MR. BENEDETTI: Officer English.

11
12
13 ERIC ENGLISH, the witness, called by the
14 defendant, first being duly sworn, testifies as
15 follows:

16 DIRECT EXAMINATION BY MR. ERNEST:

17
18 Q Could you state your name and occupation
19 for the record, please?

20 A My name is Eric English. I'm a police
21 officer with the city of Richmond.

22 Q And what particular branch or specialty or
23 department do you belong to?

24 A Right now I'm assigned to uniform and drug
25 enforcement. At the time of this incident I was

1 assigned to strike force.

2 Q And how long at the time of the incident
3 were you part of the strike force?

4 A Probably about a year, approximately a
5 year.

6 Q And on that day you worked with the
7 defendant, Officer Schnupp?

8 A Yes, sir.

9 Q And how long had you been working with
10 Officer Schnupp at that time?

11 A On that particular day?

12 Q Not on that day. Just as part of the
13 strike force?

14 A We came to strike force at the same time,
15 so been about the same amount of time.

16 Q And on August 21st, 1992 what were you
17 doing as part of the strike force?

18 A I was assigned as one of the takedown unit
19 surveillance. They had me set up in the 800 block of
20 North 26th Street.

21 Q So you were in the police car?

22 A Yes, I was.

23 Q With who else?

24 A Officer D.C. Williams and Mike Kurisky.

25 Q And where were you in the police car?

1 A I was in the front passenger seat.

2 Q Did you participate in the stop and the
3 search of the ARA van on August 21st?

4 A Yes, I did.

5 Q Why was the van stopped?

6 A Basically the information we received from
7 Officer Schnupp, we stopped the van based on
8 information that the passenger supposedly wanted to
9 purchase narcotics.

10 Q Did you search the passenger?

11 A Yes, I did.

12 Q And did you find any narcotics?

13 A No, I did not.

14 Q Were you looking for any type of narcotic
15 in particular?

16 A Crack cocaine.

17 Q And approximately how much did you suspect
18 at the time may be in the van?

19

20 MR. BAUGH: Objection, Your Honor. Can we
21 have a basis for his suspicion what was he told.
22 Otherwise it is conjecture. Unless he was told
23 that he was looking for one rock or --

24 THE COURT: Did you know, Officer?

25 THE WITNESS: Not the amount, no.

1 Q But you say that it was crack cocaine?

2 A Yes, sir.

3 Q Could you describe that, please?

4 A Describe crack cocaine?

5 Q Yes, sir, please.

6 A It's a small rock-like object, white
7 substance, off-white substance, small amount.

8 Q How small?

9 A Usually comes in tenths of a gram, and
10 they're I mean probably smaller than the head of a
11 screw.

12 Q And did you find any substance like that on
13 the passenger?

14 A No, sir, I did not.

15 Q Did you search the van?

16 A Yes, I did.

17 Q What was in the van when you searched it?

18 A A lot of paper scattered throughout the
19 van. There were tools inside the van. Well, just --
20 it was paper everywhere throughout.

21 Q Was there anywhere in the van, in the
22 interior of the van that you didn't search?

23 A I mean there was a lot of areas inside the
24 van it's impossible for us to search.

25 Q Could you give me an example, please?

1 A Well, the framework of the van inside has
2 railings that go from the rear all the way from the
3 top down to the floor board. The interior frame of
4 the van holds a grille throughout those frameworks.
5 In order for us to even look inside of those, you
6 have to take the van apart, I mean as far as
7 unscrewing the railings or whatever, and there's no
8 way we would do that.

9 Q How large were the holes?

10 A They were real small holes like what a
11 drill bit that's drilled inside the van.

12 Q Back to the actual stop, how much time
13 elapsed from the time that you pulled out behind the
14 ARA van to the time that it actually pulled over?

15 A I'd say it was within a matter of seconds.
16

17 THE COURT: Why do we need to go into all
18 of this about how the stop was conducted, how
19 much time it took? How is this relevant or
20 material to the issue of this case?

21 MR. ERNEST: In the second statement -- may
22 I approach?

23 THE COURT: Ladies, step back in the jury
24 room.
25

1 JURY OUT

2 THE COURT: I'm just wondering why do we
3 need to go into all of this when it's a given?
4 Everybody agrees that the van was stopped, no
5 drugs were found. This is a defamation claim.
6 It's a slander claim.

7 MR. ERNEST: Where it comes in is the
8 second statement, the written statement, does
9 make a statement that it was determined that the
10 cocaine was destroyed.

11 Now, at some point the jury is going to be
12 asked, if this goes to the jury, whether Officer
13 Schnupp was either negligent or reckless when he
14 made that statement.

15 Now, Officer Schnupp talked to all of these
16 officers. And I'm trying to establish now that
17 given the area where something may or may not
18 have been deposited, whether or not something
19 was ever in the van, that it was not
20 unreasonable or it was not reckless for Officer
21 Schnupp to draw the conclusion that he did.

22 MR. BAUGH: And therefore would be our
23 objection, thank you. The statement is it's
24 destroyed. He's now asking the gentleman
25 whether or not anybody got up and hid it.

1 JURY OUT

2 I don't know where they're going with it. If
3 they're seeking to prove that this evidence, the
4 cocaine was destroyed, assuming it was there in
5 the first place, because they didn't find it,
6 no, that is not accurate. He can ask whether or
7 not he saw anyone making destructive acts, but
8 other than that we would object to it as being
9 irrelevant.

10 THE COURT: But the idea that it may have
11 been hidden or destroyed, I understand what you
12 now say about the statement in the report being
13 destroyed. You want to establish the basis that
14 the officer could not have made that recklessly,
15 that statement, is that right?

16 MR. ERNEST: Exactly.

17 THE COURT: And that there was enough about
18 the van, the physical condition of the van one
19 might destroy it before the police got there?

20 MR. ERNEST: Yes, Your Honor. And, again,
21 this is only relevant on the question of the
22 second report. And if you eventually rule that
23 that only comes in as evidence of motive, then
24 it won't be relevant.

25 THE COURT: How many other witnesses?

1 JURY OUT

2 MR. ERNEST: (Holds up four fingers.)

3 THE COURT: Who are they?

4 MR. ERNEST: ARA people.

5 THE COURT: These three were the only
6 police officers?

7 MR. BENEDETTI: I do have Officer Bennett
8 for a very short second.

9 THE COURT: All right.

10 MR. BENEDETTI: Also Officer Ambrozy.

11 THE COURT: He was with Officer Schnupp in
12 the building?

13 MR. ERNEST: Yes.

14 THE COURT: Now, there are other claims
15 pending against other officers, are there?

16 MR. BENEDETTI: Officer English is a
17 defendant, Officers Williams and Kurisky are
18 defendants.

19 THE COURT: Now, the claims there are not
20 defamation?

21 MR. BENEDETTI: No, no. That's assault and
22 battery, false arrest.

23 THE COURT: When are they going to be
24 tried?

25 MR. BAUGH: Hasn't been set.

1 JURY OUT

2 MR. BENEDETTI: I'm not part of that case.

3 THE COURT: I understand. I will permit
4 this examination.

5 MR. ERNEST: I'm actually through with that
6 portion of my questioning.

7 THE COURT: Thank you, Mr. Ernest.

8
9 JURY IN

10
11 Q How long were you part of the takedown unit
12 that day?

13 A Maybe an hour and a half.

14 Q In that time did you stop anybody other
15 than the ARA van?

16 A Yes, I did.

17 Q How many other people did you stop?

18 A Stopped one other female that day
19 afterwards, after the van.

20 Q And why did you stop her?

21 A Receiving information from Officer Schnupp
22 that she had purchased cocaine.

23 Q Did you find at the time cocaine on her?

24 A No. She had dropped it.

25
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1 MR. BAUGH: Objection, Your Honor. That is
2 a rank conclusion unless he can say he saw her
3 drop it. We ask that be stricken. That is
4 conjecture.

5 MR. ERNEST: Your Honor, if you allow me
6 to continue with this line, we have evidence
7 that she did have cocaine by the person who he
8 actually searched.

9 THE COURT: In the other case, in the
10 lady's case?

11 MR. ERNEST: In the second stop, the
12 woman's stop.

13 MR. BAUGH: Well, Your Honor, that name was
14 certainly never intended to be in discovery.
15 This is all fresh news to me.

16 THE COURT: Well, again, I'm wondering why
17 we need to go into another case. It's the lady,
18 it's another person.

19 MR. ERNEST: It, again, goes to the
20 reasonableness of whether there were drug
21 transactions going on that day.

22 MR. BAUGH: Your Honor, if one transaction
23 goes on, that does not mean that this person or
24 anyone in his vehicle participated in a drug
25 transaction. They didn't ask Miss Irving if she

1 was a drug dealer.

2 MR. ERNEST: There's an established dealer,
3 though. It's reasonable that someone he speaks
4 to or appears to have some transaction with may
5 have exchanged drugs.

6 MR. BAUGH: Your Honor, so far we have been
7 told that the person that allegedly approached
8 the van is a black male in long black shorts.
9 He said it was a guy in a Miami Dolphins shirt,
10 and we don't know who he's talking about yet.
11 Sounds like everybody who's up there is dealing
12 drugs. And I just want to know who he's talking
13 about.

14 THE COURT: How many more questions do you
15 have about this? You have many more?

16 MR. ERNEST: Three more and then I'm done
17 with direct.

18 THE COURT: All right. Go ahead.

19

20 Q Did you find cocaine on the woman that you
21 stopped?

22

23 MR. BAUGH: Objection, Your Honor, unless
24 he tells us with whom this person allegedly had
25 contact. Otherwise it is irrelevant to this

1 case.

2 THE COURT: Well, he's asking him --

3 MR. ERNEST: He's already established that
4 he stopped the woman due to a radio call from
5 Officer Schnupp.

6 MR. BAUGH: And I'm saying who did this
7 lady allegedly buy this from? The guy in the
8 Miami Dolphins shirt, the one in the black
9 shorts, or Miss Irving for all I know.

10 THE COURT: Maybe we'll get an answer to
11 that question. I don't know. Go ahead.

12
13 Q Did Officer Schnupp communicate to you
14 which target had a transaction with the woman that
15 you stopped?

16 A To my recollection, I don't recall which
17 individual made communication as far as who she
18 bought it from.

19 Q Did the woman that you stopped admit --

20
21 MR. BAUGH: Objection. Relevance.

22 THE COURT: What is the relevance of this?

23 MR. ERNEST: Again, it goes to
24 reasonableness, reckless disregard. It's all a
25 question.

1 THE COURT: This case doesn't concern this
2 lady, whoever she is or was. This has to do
3 with Mr. Schnupp. I'm going to sustain the
4 objection.

5 MR. ERNEST: Your Honor, may I? Mr. Baugh
6 has brought up and has emphasized that nobody
7 else --

8 MR. BAUGH: Objection, Your Honor. I
9 object to it being made in the presence of the
10 jury. If you're going to continue, we ask the
11 jury be removed.

12 THE COURT: You know what this means,
13 ladies.

14
15 JURY OUT

16 MR. ERNEST: Your Honor, Mr. Baugh has
17 emphasized that no other stops, no other arrests
18 have been made, so that has been put before the
19 jury. The impression it's creating is that
20 possibly Officer Schnupp was way off base in
21 truth in selecting the target in the first
22 place.

23 Now, evidently that one of the two targets
24 or thee target -- and we may, when Officer
25 Schnupp is on the stand, he'll be able to

1 JURY OUT

2 testify to which target this involved, that
3 target actually did sell drugs to somebody, that
4 goes to reasonableness. Now, if reasonableness
5 is not a factor, then all of the arguments Mr.
6 Baugh made regarding whether or not anyone else
7 was stopped, whether or not drugs were found on
8 these people who were stopped, are equally
9 irrelevant.

10 THE COURT: But I thought as far as the
11 defendant was concerned, he did not ever mean to
12 implicate the plaintiff in any activity. So if
13 he didn't mean to impute or claim or charge him
14 with a crime, then the fact that there were
15 other people out there involved allegedly in
16 criminal activity is what?

17 MR. ERNEST: Well, that is the entire case.
18 The defendant didn't mean to implicate --

19 THE COURT: The only people who were -- he
20 only meant to implicate people who observed the
21 scene?

22 MR. ERNEST: Exactly. And to the extent
23 that Mr. Baugh is insisting that he was a
24 co-possessor or that -- I'm sorry -- that
25 Officer Schnupp was implicating that Mr. Smith

1 JURY OUT

2 was either a co-possessor or an accomplice or
3 principal in the second degree, that is what
4 Mr. Baugh's case hinges on.

5 What you have just said is our position,
6 that this should not even be tried beyond our
7 motion to strike, because he has not implicated
8 Officer Schnupp actually said something about
9 Mr. Smith personally.

10 THE COURT: Right.

11 MR. ERNEST: Now, the fact that we're still
12 here, we need to go on the assumption that this
13 is going to go before the jury, and the jury may
14 decide that Officer Schnupp was implicating that
15 Mr. Smith was either a co-possessor or that he
16 was an accomplice. If that happens, and we have
17 absolutely no evidence in there that Officer
18 Schnupp was reasonable in selecting a target,
19 then we're in a bad position.

20 Now, if you're going to rule that nothing
21 was said, defamation per se, about Mr. Smith by
22 Officer Schnupp, I agree, this is an irrelevant
23 line of questioning.

24 THE COURT: But you want to show this other
25 transaction with the lady to show what?

1 JURY OUT

2 MR. ERNEST: That if this woman did receive
3 these drugs from the target, then Officer
4 Schnupp was reasonable in identifying the
5 target. He was reasonable in his suspicion in
6 saying that this target may have sold drugs to
7 the van or to the occupants of the van. It
8 all goes toward the reasonableness or the
9 recklessness of Officer Schnupp's actions.

10 MR. BAUGH: Your Honor, until they bring
11 that woman in here, we're going to object to
12 anything she told them. Her name was not on my
13 witness list, her name was not in my statement
14 of interrogatories, and this is the first I
15 heard of it.

16 Now, if they have her out there, we have to
17 put her on. Otherwise we object about what
18 somebody might have told her.

19 THE COURT: Well, have you asked him, the
20 officer, anything about what she may have said?

21 MR. BAUGH: Yes, sir. There was a question
22 about an admission made by her as to that she
23 had thrown the drugs.

24 THE COURT: That's an admission that would
25 come in, wouldn't it, if it's relevant?

1 JURY OUT

2 MR. BAUGH: Your Honor, however, we would
3 still entitled to cross-examine the woman as to
4 whether she even said it or if she even exists,
5 because -- I mean if you want to open it up, I
6 have my cross- prepared.

7 THE COURT: That's what I'm wondering, if
8 we're just opening up into a criminal case,
9 because it seems like a criminal case is more
10 about probable cause, and certainly some of
11 those issues may impact on this defamation
12 claim. But this is a civil matter involving a
13 claim of defamation. It's not a question of
14 search and seizure and all of that, or whether
15 or not the officers acted reasonably in
16 searching others.

17 The defendant's position is that the focus
18 of his inquiry was the passenger, is that right?
19 He's never focused on the driver.

20 MR. ERNEST: Exactly. That Officer Schnupp
21 implicated the passenger, not the driver.

22 THE COURT: But you want to show this other
23 transaction to show that he was acting
24 reasonably as to others inasmuch as he didn't?

25 MR. ERNEST: He was acting reasonably --

1 JURY OUT

2 THE COURT: Successfully, if you will.
3 That's maybe a bad term, but he identified
4 another transaction with the same third party
5 that involved the passenger in this case?

6 MR. ERNEST: (Attorney nods head.)

7 THE COURT: I'm trying to see how could
8 that help the jury to determine whether or not
9 he was or was not reckless in saying what he
10 said if he said it. This inquiry about the
11 other person --

12 MR. ERNEST: The other person --

13 THE COURT: It's your position that he
14 never did mean to implicate the plaintiff in
15 the first place?

16 MR. ERNEST: Exactly. That is our
17 position. Now, we can't maintain that position
18 if it goes to trial on a defamation per se based
19 on the crime of possession or accomplice. If it
20 does and the plaintiff can prove, well, that the
21 statement was false, then it may or may not
22 shift the burden of proof, depending on some
23 other matters.

24 But another factor is whether or not the
25 defendant was either reckless or he was

1 JURY OUT

2 negligent. Again, that's to be decided on jury
3 instruction argument, whether he was reckless or
4 whether he was negligent in establishing the
5 truth. And we propose that this goes toward the
6 question of whether Mark Schnupp was reckless or
7 negligent in making the statement.

8 THE COURT: In stating what he said about
9 Smith and his passenger?

10 MR. ERNEST: Exactly.

11 THE COURT: By establishing that he had a
12 basis to say what he said about the lady,
13 therefore you can infer that he was within
14 proper limits --

15 MR. ERNEST: That he was at least on the
16 right track that day, that he was in a high
17 drug trafficking area. And, again, it is
18 certainly much more relevant to the second
19 statement. The second statement is entirely
20 different from the first statement and that's
21 what's causing all this confusion. The first
22 statement was the one alleged --

23 THE COURT: The second statement by that
24 company?

25 MR. ERNEST: The written statement, yes.

1 JURY OUT

2 MR. BAUGH: Your Honor, we take exception
3 to them saying "alleged." Please say "on or
4 about." And in response to interrogatories,
5 defendant's on notice we allege both as part of
6 the same statement. We allege that he made it
7 orally and in writing.

8 THE COURT: All right. Bring the jury
9 back. We're really far afield.

10 MR. ERNEST: What about the ruling on the
11 hearsay? We may as well get a decision.

12 THE COURT: What is he going to say about
13 hearsay?

14 MR. ERNEST: The testimony will be, if I
15 may, that the woman that he stopped had come to
16 the police department later that day, admitted
17 that she had crack cocaine on her, that she had
18 destroyed it or disposed of it somehow, but that
19 Officer English stole some money off of her at
20 the same time.

21 MR. BAUGH: We'll withdraw our objection.
22 Objection withdrawn. It goes to credibility of
23 the witness. Objection withdrawn.

24 THE COURT: But we're going off in a whole
25 different area.

1 JURY OUT

2 MR. BAUGH: Oh, but a relevant area, Your
3 Honor.

4 THE COURT: Testimony about this lady and
5 her admissions and her accusations.

6 MR. BAUGH: Your Honor, he was accused of
7 theft that day of money on someone he didn't
8 find drugs on? Your Honor, I think that clearly
9 goes to credibility. I have no objection to
10 that question.

11 THE COURT: I think this is just too far
12 afield, gentlemen. I cannot allow it. It's
13 just going to -- this case is going a little bit
14 beyond its limits already. I don't see how this
15 will help the jury delve into the depths of this
16 problem with this other person.

17 MR. BAUGH: If I understand the defense
18 position, I don't mean to hamstring, they feel
19 it's necessary, because I do plan to make that
20 argument. I ask they be permitted to make
21 inquiry, limited inquiry on that topic. Please?

22 THE COURT: No. I can't accept that.

23 You have anything else?

24 MR. ERNEST: Yes, sir, I have one more
25 thing.

1 JURY IN

2 MR. ERNEST: I would like Defense Exhibit
3 Number 2, I believe it was, the note?

4 THE COURT: Yes.

5
6 Q Do you recognize the handwriting on that
7 note?

8 A Yeah. The handwriting at the top is
9 Officer Williams' handwriting.

10 Q And below that?

11 A I'm not sure of the handwriting below.
12 I know Officer Williams' handwriting. He's been my
13 partner for a long time.

14 Q And does your handwriting appear on that
15 note anywhere?

16 A No, it's not.

17 Q I have no further questions.

18
19
20 CROSS-EXAMINATION BY MR. BAUGH:

21
22 Q Were the suspects searched?

23 A The suspects?

24 Q Were they searched?

25 A People in the van?

1 Q Were the suspects searched?

2 A Who are you referring to as the suspects?

3 Q Who were the suspects?

4 A Well, there were people that he gave
5 descriptions of in the block along with the people in
6 the van.

7 Q What suspects in the van were searched?

8 A I know I searched the passenger. I'm not
9 sure if the driver was searched or not.

10 Q You're saying you didn't search the driver
11 and you didn't see the driver searched either, right?

12 A I approached the passenger side of the
13 van --

14 Q No. The question was --

15 A I did not see the driver being searched.

16 Q Thank you. And there were only three
17 officers out there, right?

18 A That is correct.

19 Q Now, you also got in the van and searched
20 it, right?

21 A That's correct.

22 Q And you were looking for contraband?

23 A That's correct.

24 Q Now, did you have a concern the vehicle
25 might be stolen?

1 A No, I didn't.

2 Q Did you have a concern that it might be
3 unauthorized use?

4 A No, I didn't.

5 Q In fact in your presence -- you were with
6 the passenger, right?

7 A That's correct.

8 Q The whole time you were out there, did
9 anybody even ask the passenger if he worked for ARA?

10 A I don't recall if they did or not. I know
11 I didn't.

12 Q Well, wait, wait. I'm not asking just what
13 you did. You're standing there the whole time and
14 this other officer is right there with you?

15 A That's not correct.

16 Q Kurisky wasn't there with you on your side?

17 A Kurisky was -- all the officers --

18 Q I'm asking you about Kurisky. Did you or
19 Kurisky, did either one of you ever ask that man if
20 he had any connection with ARA?

21 A I don't recall if we did or not.

22 Q Now, have you reviewed transcripts?

23 A As far as?

24 Q Before you came here today --

25 A The notes?

1 Q -- did you review testimony of transcripts
2 of witnesses?

3 A Of the witnesses? Some of them, yes.

4 Q Which ones?

5 A The statement of Ms. Goss. I think that's
6 the only one I read.

7 Q What about Schnupp?

8 A Yes, and Officer Schnupp.

9 Q And Officer Schnupp's transcript and
10 Ms. Goss's transcript, were they together?

11 A What do you mean, together?

12 Q Were you shown the two of them at one time?

13 A No.

14 Q Where did you see them, out here in the
15 hallway?

16 A Yes, sir.

17 Q And did you get them from another officer
18 or did you get them from Mr. Benedetti?

19 A I got them -- they were just laying down
20 there on the bench area.

21 Q You don't know how they got there? The
22 transcript fairy could have dropped them?

23 A There were other officers there.

24 Q Kurisky, Williams, Schnupp, right?

25 A Right.

1 Q Now, this note, this doesn't reflect all
2 the stops you made that day, does it, the note that
3 you were just shown?

4
5 MR. BAUGH: May I approach the witness?

6 THE COURT: Certainly.
7

8 Q That doesn't show all the people you
9 stopped that day, does it? There's a note in there
10 about a pink shirt and glasses, an older lady,
11 heavyset, and then there is a white truck with wood
12 sides and a Mercedes. That's not the only people you
13 stopped that day, was it?

14 A The pink shirt and the ARA van, the pink
15 shirt is the lady that we stopped. I'm not sure of
16 the rest of the others.

17 Q You didn't stop another woman that day?

18 A I don't recall stopping her.

19 Q No, no. Wait a minute. I'm asking you,
20 did you stop someone else out there that day?

21 A I stopped the lady in the pink shirt,
22 I just said.

23 Q What about this younger woman you were
24 talking about before, did you stop a younger woman
25 out there that day? The one who later came down to

1 the strike force?

2 A I wouldn't say she was a younger woman.

3 Q Well, is that the woman who made the
4 accusation against you?

5 A Yes.

6 Q Did the person making the accusation accuse
7 you of stealing money from her?

8
9 THE COURT: Mr. Baugh, I'm not going to
10 permit this examination. I precluded it before
11 and it's not coming in now. Do you have any
12 other questions?

13 Ladies, this other lady is irrelevant and
14 you're not to consider it.
15

16 Q Is it your testimony that the driver of
17 that vehicle was never searched in your presence?

18 A I didn't see him searched.

19 Q So he was never searched in your presence?

20 A That's correct.

21 Q And, of course, you could not have told
22 Mr. Schnupp that the officers stopped the van and
23 searched the van and occupants? You never told him
24 that, did you? Because the occupants, plural, were
25 never searched in your presence? That's your

1 testimony, right?

2 A I don't remember Mr. Smith being searched.

3 Q And, of course, you wouldn't have told him
4 if you had remembered it, would you?

5 A No.

6 Q So you couldn't have told him that, right?

7 A I don't recall that.

8 Q You don't recall that either, okay. Do you
9 recall ever telling anyone that the driver was
10 searched?

11 A No, I don't.

12 Q And I assume he's anyone, so you don't
13 recall that either. Now, do you recall that you and
14 Williams and Kurisky are all being sued by him for
15 false arrest?

16 A Yes, I do.

17 Q In fact let's clear that up right now. Did
18 anyone ever tell you that the driver did anything
19 illegal?

20 A No.

21 Q So therefore you had no reason or right to
22 conduct a search of the driver?

23
24 MR. BENEDETTI: Objection. That's a legal
25 question.

1 MR. BAUGH: Patrick versus South Carolina.
2 The officer is supposed to know criminal law.

3 THE COURT: That is a legal question.

4 MR. BAUGH: Your Honor, Patrick versus
5 South Carolina.

6
7 Q Are you trained in the law of search and
8 seizure?

9 A It's like I said, I don't recall him being
10 searched.

11
12 THE COURT: He has a right to search him.

13 MR. BAUGH: No, Your Honor. Patrick
14 versus -- that wasn't the objection.

15 THE COURT: No. He's got a right under
16 those circumstances to pat him down.

17 MR. BAUGH: I didn't say pat down. I said
18 search. I agree a Terry stop -- we're going to
19 waive a Terry stop.

20 THE COURT: What does that have to do with
21 this case?

22 MR. BAUGH: Your Honor, bias. This man and
23 the other two officers who don't remember a
24 whole lot and they used the exact same words,
25 such as "passenger," are all saying the same.

1 thing.

2 MR. BENEDETTI: I object to that
3 characterization. I think that's inaccurate.

4 MR. BAUGH: I don't.

5 THE COURT: You have any other questions,
6 Mr. Ernest or Mr. Benedetti?

7 You walked away. I didn't know if --

8 MR. BAUGH: No. I was getting out of the
9 way. I wanted to be courteous.

10
11 Q After this all went down, did you tell
12 Mr. Schnupp what you did?

13 A I told him we didn't find anything.

14 Q But did you all sit down and tell what you
15 searched and all that sort of stuff?

16 A I didn't talk with him, no.

17 Q But did y'all get together, you and
18 Williams and Kurisky and Schnupp, did y'all ever get
19 together in a room to find out what had happened?

20 A We went back to the office that day as we
21 were getting off. Just discussed that I didn't find
22 any drugs in the van. Explained to him that it could
23 have been anywhere.

24 Q Now, during that conversation when all of
25 you were in this room together with the strike force

1 and all, did anyone ever mention to you, "My, I
2 wonder if that vehicle was supposed to be there or
3 it might be an unauthorized vehicle or it might be
4 stolen"? Any of that mentioned?

5 A I don't recall that.

6 Q You don't recall that either?

7 A No, sir.

8
9 MR. BAUGH: Thank you. Pass the witness.
10 No further questions.

11 MR. BENEDETTI: No further questions.

12 THE COURT: Thank you, Officer.

13 MR. BENEDETTI: Call Officer Ambrozy.

14
15
16 MARK AMBROZY, the witness, called by the
17 defendant, first being duly sworn, testifies as
18 follows:

19 DIRECT EXAMINATION BY MR. ERNEST:

20
21 Q Would you state your name, please?

22 A Mark Ambrozy.

23 Q And you are obviously a police officer.
24 What department or specialty do you have?

25 A At this time I'm with the uniform drug

1 enforcement unit.

2 Q And on August 21st, 1992 with what unit did
3 you work?

4 A Drug and firearms strike force.

5 Q Have you ever worked with the defendant in
6 this case, Officer Schnupp?

7 A Yes, I have.

8 Q Were you working with him on August 21st,
9 1992?

10 A Yes, I was.

11 Q And in what capacity?

12 A On a surveillance.

13 Q Were you with Officer Schnupp?

14 A Yes, I was.

15 Q Could you describe that, please, where you
16 and Officer Schnupp were situated?

17 A In an abandoned warehouse on the corner of
18 26th Street and -- 900 block of 26th Streert.

19 Q What were you watching or what were you
20 surveilling at the time?

21 A Watching drug activity on that block.

22 Q And were you watching suspected dealers?

23 A Dealers and buyers.

24 Q How many suspected dealers were there?
25

1 MR. BAUGH: Objection, Your Honor. In
2 light of the Court's ruling, I will say all
3 that's irrelevant. Let's cut to the chase.
4 Otherwise I'll cross-examine on all those other
5 transactions.

6 MR. ERNEST: I'll go on.

7 THE COURT: All right.

8
9 Q Could you and Officer Schnupp observe the
10 same areas?

11 A Most of them. We'd both look out of one
12 side and then I would move to another window in the
13 house, or warehouse.

14 Q Did you see an ARA van?

15 A Yes, I did.

16 Q About what block and what street was this?

17 A 900 block of North 26th Street.

18 Q Did the ARA van stop?

19 A Yes, it did.

20 Q And what happened after the ARA van
21 stopped?

22 A It stopped about in the middle of the
23 block. There was a long fence behind the warehouse
24 where most everybody was congregated around. There
25 was a few holes in the fence, and they walked out to

1 the back there and stopped in the middle of the
2 street. Then a few people approached the driver's
3 side and spoke with -- appeared to speak with the
4 driver. I couldn't hear what they were saying.
5 Walked around the van to the passenger's side. About
6 that time was when I went to another part of the
7 warehouse where I was looking out at the corner at
8 another transaction taking place.

9 Q Did you see anything take place between the
10 person or persons who went around to the passenger's
11 side of the van?

12 A No. From where I was standing I could just
13 see that there was a person at the passenger side
14 door, but I couldn't see. I really wasn't paying
15 attention at what was taking place at that point.

16 Q Did you see the person at the passenger
17 side door?

18
19 MR. BAUGH: Objection. Assumes facts not
20 in evidence. The witness said "persons." He's
21 said it about five times. Persons, plural, went
22 around to the passenger side.

23 THE COURT: How many people did you see go
24 around to the passenger side?

25 THE WITNESS: I can't remember exactly. I

1 just recall -- it was like I said, I walked to
2 the other side to watch another deal, another
3 drug transaction taking place. I didn't count
4 them or watch them.

5 THE COURT: So you can't say it was one or
6 two or three?

7 THE WITNESS: I know it was at least one at
8 the driver's side -- I mean at the passenger
9 side, but I didn't pay much attention, because I
10 was watching another transaction that was taking
11 place right in front of me.
12

13 Q Well, backing up one, how many person or
14 persons approached the driver's side?

15 A I recall we had two targets, I believe.
16 And as the people -- there was a small group out
17 there. I recall somebody going up to the driver's
18 side --
19

20 MR. BAUGH: Objection, Your Honor. This is
21 nonresponsive. I would ask that he answer the
22 question. The question was how many people
23 walked up to the driver's side.

24 MR. BENEDETTI: Your Honor, please, if he's
25 got an objection he should state it and not try

1 to examine the witness while he's on direct
2 examination.

3 MR. BAUGH: Your Honor, nonresponsive is
4 proper under the rules of evidence. That is a
5 proper objection. I object to the narratives by
6 this witness that are not responsive.

7 THE COURT: Would you repeat the question?
8

9 Q How many people did you observe approach
10 the driver's side of the ARA van?

11 A Well, what I recall is that there were
12 people out there. People came to the van. One
13 person went up there. I recall a few people out
14 there. I recall some people on the other side of the
15 van. There were people standing on the sidewalk over
16 there or on the side of the street. But I couldn't
17 see exactly -- I could not see the passenger. From
18 where I moved to I could not see what was taking
19 place. I know there was somebody there from what
20 I saw.

21 Q Among the people or persons who went to the
22 driver's side of the van, was one of your targets
23 that you identified that day among them?

24 A Yes.

25 Q How close were you to the van when it

1 stopped?

2 A I'd say 50 feet, 60 feet or so, I think it
3 was, or maybe further. I'm not sure. It was in the
4 middle of the block and I was in the corner, so maybe
5 a hundred feet.

6 Q Was Officer Schnupp closer than you?

7 A Yes, he was.

8 Q How long was the van stopped?

9 A About a minute, maybe less. A little bit
10 less.

11 Q Now, you say you were watching another
12 target at the time?

13 A Yes.

14 Q Did you make any calls to the takedown unit
15 that day?

16
17 MR. BAUGH: Objection under relevance
18 again. If we're going to speed this up, do we
19 want to hear about all the other transactions?

20 THE COURT: Did you make any other calls?

21 MR. ERNEST: Yes, sir.

22 THE COURT: Did you make a call?

23 THE WITNESS: On the other car, yes, sir,
24 I did.

25 THE COURT: Oh, on other matters?

1 THE WITNESS: On other matters.

2 THE COURT: I see.

3 Why do you want to go into that?

4 MR. ERNEST: Again, it has come in that a
5 Volvo in the block passed Officer Schnupp and
6 was not stopped. Mr. Baugh stated on a number
7 of occasions that other suspects were out there
8 who were not stopped. I'm just --

9 THE COURT: Mr. Baugh said that?

10 MR. ERNEST: During opening statements.

11 THE COURT: That's not evidence. The
12 objection is sustained. Don't go into that.

13 MR. ERNEST: I have no further questions.

14
15
16 CROSS-EXAMINATION BY MR. BAUGH:

17
18 Q How many fingers am I holding up?

19 A One.

20 Q Is this more than one?

21 A At this point it is.

22 Q Did you see more than one person walk over
23 to the driver's side or did you see one person walk
24 over to the driver's side? Real simple.

25 A There was a few people out there.

1 MR. BAUGH: Thank you. Pass the witness.
2 No further questions.

3 MR. ERNEST: No further questions.

4 THE COURT: Thank you, Officer. You may
5 step down.

6 Ladies, it's ten minutes to 1:00 and I
7 think we'll recess now. Given that we started
8 at 11:00, we'll make this a little shorter
9 today. It's ten minutes to 1:00. Please come
10 back at 1:30. That's about 40 minutes.

11
12 (Luncheon recess.)
13

14 LINWOOD G. BENNETT, JR., the witness, called by
15 the defendant, first being duly sworn, testifies as
16 follows:

17 DIRECT EXAMINATION BY MR. ERNEST:

18
19 Q Would you state your name for the record,
20 please?

21 A Linwood G. Bennett, Jr.

22 Q And you're a police officer? How long have
23 you been a police officer?

24 A 23 years, sir.

25 Q And what is your current position?

1 A I'm a sergeant or a supervisor assigned to
2 uniform drug enforcement unit.

3 Q How long have you held that position?

4 A Since August 21st. Before that the unit
5 was called strike force, and I'd been assigned to
6 that unit almost five years.

7 Q That was August 21st of this year?

8 A Yes, sir.

9 Q And so a total under either name, how long
10 were you in this position?

11 A Approximately five years.

12 Q Thank you. How many police officers do you
13 supervise?

14 A Directly I supervise seven. Overall
15 there's about 40 people that I -- in one form or
16 fashion or another I supervise from time to time.

17 Q Do you supervise the defendant in this
18 case?

19 A At the present time, no. At the time of
20 this incident we're here about, I did.

21 Q And this incident, meaning the August 21st
22 incident, correct?

23 A Yes.

24 Q At that time how long had you supervised
25 Officer Schnupp?

1 A I don't remember the exact time. He was
2 over there for a training situation that was being
3 run through the federal government where we bring
4 officers in for three to six months at a time,
5 putting them through a training schedule where we
6 have them working with other officers.

7 Q So you say you were his supervisor on
8 August 21st. Did you know of the surveillance
9 operation that day?

10 A Yes, I did.

11 Q How did you know?

12 A The officers would plan a situation along
13 with us. We would approve it. They would set it up
14 and we would supervise the running of it.

15 Q What do you mean when you say "we"?

16 A Myself, there's another supervisor who was
17 assigned and two others at the time this occurred.
18 We would go over what they were doing, approve it or
19 make suggestions or whatever was necessary to make
20 sure it run smoothly, provide them with whatever
21 equipment or support they needed, and basically let
22 them run the operation and we just oversee it.

23 Q Other than knowing of the operation on the
24 21st, were you otherwise involved?

25 A I was present on the street. I wasn't at

1 the surveillance scene. I was in another vehicle out
2 there. When stops were made I would go to each one
3 from time to time to see what was going on.

4 Q Did you know of the ARA van being stopped
5 by Mark Schnupp's particular surveillance team?

6 A Not until after the fact.

7 Q And how did you learn that?

8 A He told me of the situation and asked some
9 questions in reference to contacting the office of
10 ARA.

11 Q And what was the nature of those questions?

12 A He wanted to know if it was all right or if
13 I thought it was all right that he call and talk with
14 them about why the van was in the area, who should
15 have it, as I remember. And there were some other
16 questions that he had, but I don't remember the
17 entire conversation.

18 Q What did you say to him?

19 A I told him it was okay. I didn't have
20 any problem with that. I thought it would be
21 appropriate.

22 Q Why did you say that?

23 A To find out the real reason that the van
24 was over there, if there was one; who should have the
25 van or who was authorized to have it; what area this

1 person should be in, this type of thing. It's not
2 anything unusual. We do that from time to time.

3 Q Do you recall other instances when that has
4 been done?

5 A Several instances. I can't give you names
6 and dates and times, but I know of a lot of other
7 situations where this occurred.

8 Q Did Officer Schnupp ask you anything else
9 regarding stopping the ARA van in communication with
10 ARA itself?

11 A He came to me a second time very shortly
12 thereafter. I don't know whether it was the next day
13 or several days. Again, I don't remember all the
14 conversations. He wanted to know if it was okay if
15 he gave a written synopsis or handwritten information
16 on what occurred.

17 Q Do you recall what you said?

18 A I said that would be all right also.
19 I didn't see any problem with that.

20 Q Did Officer Schnupp indicate to you at the
21 time why he wanted to send a written report to ARA?

22 A He may have, but I don't remember.

23 Q Now, the written report, was that unusual?

24 A No. A written report would be okay. I
25 mean just to write down what happened and give them

1 this information, I didn't see any problem with that.

2 Q Okay. No further questions.

3
4
5 CROSS-EXAMINATION BY MR. BAUGH:

6
7 Q Sergeant Bennett, is it unusual to prepare
8 a written investigative report if no arrest is made?

9 A Yes, sir.

10 Q Is that usual?

11 A No, it's not unusual at all.

12 Q It's not unusual?

13 A To prepare a written report?

14 Q Yes, when no arrest is made and nothing
15 seized?

16 A That's not unusual.

17 Q And it's your understanding that Mr.
18 Schnupp asked you if he could call ARA to find out
19 the real reason the vehicle was in that area?

20 A That I recall. I don't remember exactly
21 what he said, but --

22 Q Well, tell me exactly what you remember,
23 all the other reasons.

24 A To find out if this person in the van was
25 authorized to have it, what area this person should

1 have been in, if he was authorized to have it, if it
2 was okay for him to be where he was, those types of
3 things.

4 Q Now, your duty was in drug and firearms
5 strike force?

6 A That's right.

7 Q Did you view this as under the drug duty or
8 the firearms duty?

9 A It's all on one. It was designed as a unit
10 to operate on street level. Narcotics and firearms
11 enforcement.

12 Q Did you understand that this duty or this
13 action that the officers were going to take was going
14 to be in discharge of investigative duties as a drug
15 and firearms strike force officer?

16 A Yes, sir. I would say it would be.

17 Q So this was part of his drug and firearms
18 investigation?

19 A Yes, sir, it was.

20 Q It was not an investigation about a stolen
21 vehicle, was it?

22 A No, sir.

23 Q There's another unit that covers that,
24 don't they?

25 A All police officers should be responsible

1 for seeing something.

2 Q Yes, but if an officer sees something --
3 but if an officer suspects a crime is committed, say,
4 for instance, in another area, which is homicide or
5 automobile or larceny, isn't it the requirement of
6 the Richmond Bureau of Police that you report it to
7 the detective division if it's merely a suspicion?

8 A If after he has investigated to the point
9 where he suspects that, yes.

10 Q Now, have you ever done something like
11 this, inquired as to why a certain vehicle was in a
12 given area?

13 A Yes, sir, I have.

14 Q Is it necessary in your estimation to
15 communicate that the vehicle was in a high drug area,
16 and the occupants and the van were both searched?
17 Is it necessary to communicate that in order to
18 determine where that vehicle was?

19 A I would say no. However, if I was asked --

20 Q Okay. Was this the time period Mr. Schnupp
21 was in training, August 21, '92?

22 A Yes, sir.

23 Q And so now he's permanently on the strike
24 force, right?

25 A Yes, he is.

1 Q And strike force, would you consider strike
2 force to be an elite unit?

3 A For the most part I'd say yes.

4 Q In fact it is not uncommon for strike force
5 officers to not have to wear a blue uniform, is it?

6 A From time to time, no, they don't.

7 Q They get to wear the jump boots and the
8 army pants and the black T-shirt and all that stuff?

9 A And the jeans and their work shirt and
10 whatever's necessary.

11 Q And the web gear or the pistols and all
12 that, the bags and stuff, like Rambo?

13 A Well, I wouldn't call them Rambo, sir.

14 Q I mean the kind of equipment, the web
15 equipment?

16 A Tactical equipment.

17 Q Tactical equipment, that's it. And on
18 August 21, 1992 that man was trying to get on the
19 unit?

20 A No, sir. He was over there for training.

21 Q Yes, but I mean after his training did
22 someone ask him to join the unit?

23 A After his training he put in a letter of
24 request to be transferred to the unit.

25 Q And, of course, in the letter of request,

1 you were one of the people who reviewed it, right?

2 A Yes, sir.

3 Q And you, of course, were familiar with his
4 performance?

5 A Yes, sir.

6 Q And, of course, were you one of the people
7 who recommended that based on his performance he be
8 allowed to join this elite unit?

9 A He and several others.

10
11 MR. BAUGH: Thank you. Pass the witness.
12 No other questions.

13 MR. ERNEST: Nothing further.

14 THE COURT: Thank you, Sergeant. You may
15 be excused.

16 MR. BENEDETTI: Your Honor, we have a
17 stipulation. Detective Crew (phonetic) is a
18 member of the Richmond police department, and
19 his responsibility is to confer with the public
20 about complaints against police officers.

21 On Monday, the 24th day of August, I'm not
22 sure exactly what time of day, a call was made
23 to Detective Crew by Andre Smith. It's routine
24 in that department of the police department,
25 that area of the police department, to record

1 those calls. There is a recording of this
2 telephone conversation and I would like to play
3 a portion of it, which is a stipulation.

4 MR. BAUGH: Wait a minute. We have one
5 slight problem, Your Honor, and I need to ask
6 this, because I forgot I was in civil court, not
7 criminal court. I need to find out whether or
8 not a provision was given to tape it, because
9 the Court is well aware in a civil court
10 unadvised recordings can be used in criminal,
11 but it can't be used in civil, unless the person
12 making the statements is advised his comments
13 are in fact being taped.

14 THE COURT: Is there an objection to having
15 it played?

16 MR. BAUGH: Yes, I believe, for two
17 reasons. The most important one I'll object
18 to, one, is relevance, because I believe Mr.
19 Smith indicated he called the police, and he
20 told them that there was no one else in the van
21 which is not true. I'm going to object to the
22 tape, because, one, it's cumulative; number two,
23 it's not an issue in controversy; and number
24 three, I haven't even heard it. I mean I don't
25 know.

1 THE COURT: Number three is what?

2 MR. BAUGH: I mean I don't know. My
3 client, he wasn't advised it was going to be
4 recorded. He just told me that.

5 THE COURT: I don't understand the
6 stipulation here.

7 MR. BAUGH: I was under the impression that
8 we were going to stipulate that the phone call
9 was made and that my client indicated that there
10 was no one else in the car and that was not
11 true. And I told Mr. Benedetti, while I was
12 sitting there eating my hotdog, that it was my
13 objection that it was irrelevant. I'm willing
14 to stipulate the call was made, that's my
15 client's voice, and that he made a false
16 statement.

17 THE COURT: Is that satisfactory or is
18 there something else you want?

19 MR. BENEDETTI: I will accept that as a
20 stipulation as the way he has just said it.
21 That the phone call was made to the police on
22 the 24th day of August, the Monday after the
23 stop and the day he was fired, explaining that
24 he said -- he didn't explain this -- he alleged
25 to the police officer that there was no one else

1 in the vehicle with him.

2 THE COURT: All right. Ladies, accept that
3 as evidence in the case, what Mr. Benedetti and
4 Mr. Baugh have just mentioned, for your
5 consideration in the case.

6 All right. Mr. Benedetti, next witness?

7 MR. BENEDETTI: Next witness is Ann Ball.

8 THE COURT: Ann Baugh?

9 MR. BAUGH: Ball, B-a-l-l. No relation.

10
11
12 ANN BALL, the witness, called by the defendant,
13 first being duly sworn, testifies as follows:

14 DIRECT EXAMINATION BY MR. BENEDETTI:

15
16 Q Would you please state your name?

17 A My name is Ann Canfield Ball.

18 Q On August the 21st, 1992 where were you
19 employed?

20 A I was employed with ARA Corp. Refreshment
21 Services.

22 Q Is this the same organization with which
23 Andre Smith was employed?

24 A Yes.

25 Q And what was your role?

1 A I was the general manager.

2 Q How long had you been the general manager?

3 A That was for approximately three years.

4 Q Were you on the job on August 21st, 1992?

5 A No, I was not.

6 Q Where were you?

7 A I was in Henrico Doctors' Hospital
8 delivering twins.

9 Q That's about 16 months ago?

10 A Yes.

11 Q And you're away from your twins right now?

12 A Yeah, as they anxiously wait.

13 Q On August the 21st, 1992 did you speak to
14 Cindy Goss?

15 A Yes, I did.

16 Q What was the substance of her conversation
17 with you?

18 A She was calling to get instructions on what
19 she should do, because she had been called by a
20 police officer about one of the current employees.
21 And our regional manager, who was acting in my place
22 as far as being the person who she would report to,
23 was unable to respond to her call. So she needed to
24 know who she should contact next.

25 Q Did you suggest anything to her as to what

1 she should do with the information that she had
2 received?

3 A Yes. I told her that she should call our
4 Human Resources manager, Angie Burt, who was located
5 in Chicago, Illinois.

6 Q Did she call you back?

7 A She called me back, said Angie Burt was on
8 vacation on that day. And Angie Burt's office had
9 instructed her to call Flo Bellows Love, who is
10 counterpart to Angie Burt. And she didn't know
11 whether she should call Flo Bellows Love, because she
12 was not familiar with this person. And I told her
13 yes, that she had the same capacity as Angie Burt.

14 Q As far as you know, did she make that call?

15 A I know that she made the call, because she
16 called me back to tell me that she had gotten in
17 touch with Ms. Love.

18 Q Did she call anyone else?

19 A At that time I know she left a voice mail
20 for Jim Foley, because, as I said, he was unable to
21 be contacted because he was flying home.

22 Q Who is Jim Foley?

23 A Jim Foley is the current regional manager.

24 Q And where is his office?

25 A Radnor, Pennsylvania.

1 Q Do you know whether or not she actually
2 spoke to Jim Foley?

3 A I don't think that she spoke to him on that
4 exact day. I think that she did not speak with him
5 until that Monday.

6 Q Did you concur with the decision that was
7 made by the Human Resources person?

8
9 MR. BAUGH: Objection, Your Honor. The
10 decision made by Human Resources has not been
11 indicated. That would be hearsay. We would
12 object to that. He can ask her what her opinion
13 was or what her decision was.

14 MR. BENEDETTI: I'll rephrase.

15
16 Q Did you have an opportunity to consider a
17 decision as to what should be done in the case of
18 Andre Smith?

19 A The way that our termination policy states
20 is that we have to present the evidence to our Human
21 Resource director or manager, and we may decide as
22 far as what our policy is and how to determine that.
23 And she -- at that time I didn't know exactly what
24 they would do. I would assume they would suspend or
25 dismiss Andre. And that's when she called Flo, but I

1 didn't know any of that until she called back.

2 Q Had you had occasion at some time prior to
3 August the 21st, 1992 to speak to Andre Smith about
4 personal use of a vehicle?

5 A Yes.

6 Q What was the occasion?

7 A Andre first worked for ARA Vending. And
8 when he came on board with us, we reemphasized all
9 the policies and procedures that we had including the
10 vehicle policy. Andre also was evaluated every year,
11 and during each evaluation we go over the vehicle
12 policies. There was also an incident in which I was
13 called by Service America stating that Andre had come
14 to try to purchase --

15
16 MR. BAUGH: Objection to hearsay, Your
17 Honor, please.

18
19 Q You received a call from whom?

20 A From the manager at Service America.

21 Q When did you receive that call?

22 A That was like about in January or February
23 of '92.

24 Q As a result of that call what did you do?

25 A I had spoke to Eric Bowers first to see if

1 he had any knowledge of Andre going to Service
2 America. He did not. So he and I met with Andre
3 Smith to see what the incident was about, to see what
4 Andre had done and see how that concurred with what
5 the manager at Service America told me.

6 And at that time Andre said that he had
7 gone over there to purchase a part. Not a vending
8 part, but something to use, a type of heating element
9 tray that he was going to use on the back of a truck
10 that he was going to take like to carnivals and parks
11 to sell things with. And at that time I instructed
12 Andre -- Andre said he was not on my time when he
13 went there. I know that he did go there during
14 business hours. And I instructed Andre then that he
15 could not use my truck for personal reasons or could
16 he do personal things like that on my time.

17 Q Now, coming back to August the 21st --
18 well, first, what action would be taken by ARA
19 against a driver who violated the company rules
20 concerning the taking of a vehicle?

21
22 MR. BAUGH: Objection. Relevance, Your
23 Honor. What would usually be done would not be
24 relevant. The question pertains to this case
25 and this case alone. Routine would not be an

1 issue.

2 THE COURT: Why don't you ask her what is
3 the policy?

4 MR. BENEDETTI: That's what I asked. I did
5 say the policy.

6 THE COURT: Go ahead.

7 MR. BENEDETTI: I'll say the company policy
8 if that's more appropriate.

9 THE COURT: All right.

10
11 A The policy stated that the vehicle would
12 not be used for personal use. An employee who had to
13 take the vehicle should take the shortest route to
14 and from work to the person's home. And also the
15 policy says that -- well, that specific part says
16 that if he violated any of that, he could be
17 dismissed or put on disciplinary action.

18 Q Is the policy the same for carrying
19 unauthorized passengers?

20 A The policy does not state as far as the
21 passenger is concerned.

22 Q Does it have a policy with regard to using
23 a vehicle for personal purposes?

24 A What we have done in the past is any
25 personal vehicle that should be used, like to have to

1 go home, like I said, there are certain -- we realize
2 that my drivers who are out have to stop for lunch
3 and things. They're instructed they should be eating
4 in the area in which they're doing their service or
5 their task. It is also the type of thing that on
6 occasion some people would ask permission to use a
7 vehicle for personal, but everything has to be
8 approved by the manager.

9 Q Have you from time to time allowed people
10 to use it for personal purposes?

11 A Yes.

12 Q Did Cindy Goss use it to move?

13 A Yes.

14 Q Did a certain lady who worked, the closest
15 bus stop to her house was about two miles away and
16 she was allowed to use it?

17 A For a short time, yes.

18 Q Now, let's talk about what jobs Andre held
19 with ARA. Could you describe what his jobs were?

20 A As far as the date of what he was doing
21 that day?

22 Q Yes -- well, no. What he was doing the
23 week before, all week long?

24 A Okay. In that capacity he worked kind of
25 as a swing type position. He had three major

1 responsibilities. One was in our warehouse where in
2 the mornings he would wash pots and report to the
3 operations manager. Then around 9:30 he would report
4 to the supervisor of service, was Eric Bowers, and
5 then Eric would then give him a daily routine to
6 follow. One day a week he was what's called a
7 customer service representative where he went to
8 accounts to actually deliver coffee.

9 Q During the times he was working for Eric
10 Bowers on service calls, when did he receive those
11 assignments?

12 A Usually in the mornings. Andre would
13 probably pick up some equipment in the morning, Eric
14 would look on the board and see what orders had been
15 written, and then Eric would distribute them.

16 Q Did he have any way of knowing what service
17 calls would be necessary the day before the service
18 calls were made?

19 A I would imagine sometimes Eric would
20 mention to him tomorrow we're going to be removing
21 this equipment. The work orders are up for public
22 view, so if Andre wanted to see them that week, he
23 could look at them. For each day, though, he would
24 have to complete a route manifest stating where he
25 was.

1 Q You were not in the office when the
2 termination took place, were you?

3 A No, I was not. I was in the hospital.

4 Q You haven't talked to Andre about this?

5 A I've never spoken to Andre.

6 Q Has Andre called you and asked you to give
7 an explanation?

8 A No. Andre has not contacted me.

9 Q Do you recall whether or not he spoke to
10 Jim Foley at some time after the 24th of August?

11 A I didn't know whether Jim Foley had a
12 conversation with him after the 24th.

13 Q What was the purpose?

14
15 MR. BAUGH: Objection, Your Honor. That's
16 privileged conversation.

17
18 Q Do you know why the conversation took
19 place?

20
21 MR. BAUGH: Objection, Your Honor. Basis
22 for how she knows why. Unless she was there,
23 it would have to be hearsay to find out why.

24 THE COURT: I tend to agree, Mr. Benedetti.

25 MR. BENEDETTI: I'll withdraw the question.

1 Q So you have not spoken to Andre at all?

2 A No. I saw him yesterday for the first
3 time.

4 Q Have you verified whether or not Andre was
5 paid for any time beyond the 24th day of August 1992?

6 A I have verified that. Cindy Goss did the
7 payroll for that period of time. And what she did
8 was under the regular column she paid him for eight
9 hours. The payroll was called in to corporate, as
10 our standard policy stated, and it was a mathematical
11 error that when she reported his total time it would
12 have been 80 hours instead of eight.

13 Q Should he have been paid for 80 hours?

14 A No. He should have only been paid for
15 eight. The actual day, the 24th.

16 Q What day was his termination effective?

17 A The 24th of August, that Monday.

18 Q Thank you. Answer counsel's questions.
19
20

21 CROSS-EXAMINATION BY MR. BAUGH:
22

23 Q Did Mr. Andre Smith work for Mr. Eric
24 Bowers every Monday, Wednesday and Friday?

25 A It was generally stated in his job

1 description --

2 Q Ma'am, did Mr. Smith work for Eric Bowers
3 Mondays, Wednesdays and Fridays?

4 A As it was stated in his job description,
5 each day he would report to the operations manager
6 and that was determined that day. Generally he
7 worked Monday, Wednesday and Friday with Mr. Bowers,
8 but if something else came up he would be rerouted.

9 Q Generally did Mr. Smith work for Mr. Bowers
10 on Monday, Wednesday and Fridays?

11 A I just stated generally he worked for
12 Mr. Bowers Mondays, Wednesdays and Fridays.

13 Q Now, did anyone tell you on August 21st,
14 1992 that Mr. Andre Smith was seen in an ARA vehicle
15 in a high drug area?

16 A Yes.

17 Q Were you told that the police stopped the
18 vehicle?

19 A Yes.

20 Q Were you told that the police searched the
21 van?

22 A Yes.

23 Q And were you also told the police searched
24 the occupants?

25 A I don't recall whether they actually

1 searched the occupants or not.

2 Q Well, did you get that information from
3 Ms. Goss?

4 A Ms. Goss did call me, yes.

5 Q Was it your understanding that information
6 would be given to other people as well, that the van
7 was searched, the van that was in his control was
8 searched?

9 A Yes, because she would repeat the same
10 story to the Human Resources manager.

11 Q So it's your understanding that whatever
12 she got from the police, she was going to read the
13 same story to them too?

14 A Correct.

15 Q And you know, of course, she took notes on
16 it, because later you saw those notes, didn't you?

17 A I did not read the notes, but I did see the
18 notes.

19 Q Did you formulate an opinion as to whether
20 or not the statements concerning the police officer
21 were true?

22

23 MR. BENEDETTI: I object to whether or not
24 she formulated any opinions, whether they were
25 true or not. I think that's irrelevant.

1 MR. BAUGH: Your Honor, reputation is a
2 damage. If my client's reputation changed, that
3 is most relevant.

4 THE COURT: Well, I think you ought to ask
5 her, if that's the case, what, if any, opinions
6 she has and whether that changed in light of the
7 statement.

8
9 Q Well, as you sit here now, are you of the
10 impression that the vehicle that Mr. Smith was
11 operating on that day, the vehicle was present in a
12 drug transaction and that the vehicle was searched?

13 A I understood that the vehicle was searched
14 on that day.

15 Q Do you believe that to be true?

16 A I'd have no way of knowing that it isn't
17 true, so I believe that it is true.

18 Q And based upon that information, do you
19 have a belief as to whether or not Mr. Smith was
20 involved in a drug transaction?

21 A I didn't have to make a formulation whether
22 he was --

23 Q No, I'm not asking you that. I'm not
24 asking you to tell me --

25 A No, I didn't.

1 Q You don't believe one way or the other?

2 A That isn't how I interpreted your question.
3 Would you repeat it, please?

4 Q As you sit here now, do you have an opinion
5 as to whether or not Mr. Smith and your vehicle were
6 involved in a drug transaction?

7 A I did not believe that, per se, Mr. Smith
8 was involved with the facts that I was given, but I
9 felt as though my vehicle was.

10 Q Now, how many times have you met with
11 Mr. Benedetti?

12 A I've never met with Mr. Benedetti outside
13 of this courthouse.

14 Q Well, ma'am, let me ask you this --

15 A He introduced himself to me yesterday.

16 Q Ma'am, would it surprise you to find out
17 that this man has been using vehicles for personal
18 use with his supervisor's permission for years?
19 Would that surprise you?

20 A Yes. It depends what you consider personal
21 use.

22 Q Well, isn't it true that you authorized
23 Florence James to use a vehicle for personal use for
24 almost a year?

25 A Only to drive to and from work.

1 Q Ma'am, are you telling us she did not ask
2 you permission to use a car because she needed
3 transportation to do her personal errands?

4 A I know that my authorization was for her to
5 drive to and from work.

6 Q On weekends only?

7 A She drove it during the week, but to my
8 information she drove it to her home and parked it.

9 Q So it's your understanding that she drove
10 it every day to and from work, not just on weekends?

11 A For a short period of time.

12 Q What do you call a short period of time,
13 a year?

14 A No, I don't think it was a year.

15 Q Well, you assume Ms. James would know
16 better, don't you?

17 A No. I think that I could --

18 Q You think Ms. James wouldn't know whether
19 or not --
20

21 MR. BENEDETTI: Your Honor, please, the
22 witness hasn't had an opportunity to answer the
23 question.

24 MR. BAUGH: In the interest of time I
25 thought I would stop the absurd.

1 THE COURT: Could you complete your answer,
2 ma'am?

3 THE WITNESS: I'm sorry. I need him to
4 repeat any question he'd like for me to answer.

5
6 Q Ma'am, you mean to tell me that you think
7 you'd know better than Ms. James when Ms. James used
8 the car?

9 A I'm sorry. Could you repeat that? You
10 confused me when you started interrupting me. What
11 I was answering to is I don't think that was a year.

12 Q Ma'am, the question I asked you, as you sit
13 here obviously biased, is do you think --

14
15 MR. BENEDETTI: I object to the
16 characterization of the witness's testimony.

17 MR. BAUGH: Your Honor, she is volunteering
18 information. It's not a really hard question.
19 It used monosyllabic words.

20 THE COURT: Use those words, but don't make
21 any comments to the jury.

22 MR. BAUGH: Thank you.

23 THE COURT: Except when you argue the case
24 and that's that.

25 Better yet, disregard Mr. Baugh's

1 characterization of this witness as biased.

2 THE WITNESS: Thank you.

3
4 Q Ma'am, are you sitting here saying that you
5 think you'd know better than Ms. James when Ms. James
6 used the car?

7 A I'm not saying that. I'm saying --

8 Q So I'm asking you the question.

9
10 MR. BENEDETTI: Your Honor, he will not let
11 her answer the question.

12 MR. BAUGH: Your Honor, it's a simple
13 question. Could you have the lady answer it,
14 please. She's very charming, but she's also
15 evasive.

16 THE COURT: She was trying to answer, but
17 at the end I couldn't hear what she said.

18 MR. BAUGH: No, she wasn't.

19 THE COURT: Did you complete your answer?

20 THE WITNESS: What I'm trying to say is I
21 don't think it was a year that she used it. I
22 was not trying to say whether Ms. James would
23 know better than I. I was just trying to say
24 that I didn't think it was a year she used the
25 car.

1 Q So I should assume then that you believe
2 that Ms. James probably knows more than you do about
3 when she used the car, right?

4 A Well, are you talking about personal use or
5 to and from work?

6 Q I'm talking about using the car. She knows
7 more about using the car --

8 A I'm just telling you at this point I can't
9 tell you how long she used the car.

10 Q How long did Andre Smith work for you?

11 A He worked for us from December of '90 to
12 February of '90. He worked at ARA Vending before
13 that.

14 Q Is it usual for people to be terminated not
15 given a chance to give their side?

16 A I wasn't there, so --

17 Q No. I'm asking you is it usual. I didn't
18 ask you were you there. I asked is it usual for
19 people to be terminated not to be allowed to give
20 their side of the facts?

21 A When I terminate people, I allow them to
22 tell their side of the facts.

23 Q Is it usual for people to be terminated
24 without being given an opportunity to explain?
25 Is that usual?

1 A When I have terminated people, I have given
2 them an opportunity to explain.

3 Q So in your experience it's unusual?

4 A For them to explain?

5 Q For them not to be able to explain?

6 A No. In my experience people have
7 explained.

8 Q And then lastly and most importantly, it is
9 your testimony that in the presence of Eric Bowers
10 you told Andre Smith that he was not permitted to use
11 vehicles for personal business? That was told to you
12 in the presence of Eric Bowers, that's what you're
13 saying?

14 A Yes.

15 Q Thank you. And if Eric Bowers said he
16 never was present in such a conversation, it's your
17 testimony he is mistaken, am I correct?

18 A I would say that he had forgotten.

19
20 MR. BAUGH: Thank you. Pass the witness.
21 No further questions.

22 MR. BENEDETTI: If Your Honor please, I
23 forgot to ask her one question, so I may not be
24 responsive to cross-.

1 REDIRECT EXAMINATION BY MR. BENEDETTI:

2
3 Q The question I wanted to ask was on the
4 days that Andre Smith was working for service call
5 purposes, what was his schedule?

6 A He would report to the operations manager
7 at 7:30 and then he would report to the service
8 supervisor around 9:30. And he was to work until
9 4:00 with a 30-minute lunch.

10 Q If he had finished all of his service calls
11 earlier than 4:00, was he free to leave?

12 A No.

13
14 MR. BAUGH: Objection, Your Honor, unless
15 she knows what his supervisor, Eric Bowers, told
16 her. The question is not one of corporate
17 policy. The question is one of truth, was he
18 permitted by his supervisor to leave, and Mr.
19 Bowers has said yes.

20 THE COURT: She's the manager, though.

21 MR. BENEDETTI: This witness should be
22 allowed to testify without interruptions. And
23 then if he wants to object to the answer as
24 being unresponsive or inappropriate or in
25 conflict with what has been said by another

1 witness, then he has a perfect right to do that.

2 THE COURT: I thought this witness was the
3 general manager.

4 MR. BAUGH: Yes, Your Honor. But the
5 question wasn't he didn't think was it in
6 violation of policy. He said was he permitted,
7 or words to that effect, and Mr. Bowers can
8 permit. He may permit in violation of the
9 contract, but he has the power. He's the
10 supervisor. Now, she can say it's against
11 corporation policy --

12 THE COURT: She didn't say whether he was
13 authorized.

14 MR. BAUGH: Okay. Withdrawn.

15
16 Q Could you please state the policy first as
17 to a person who is employed in doing service calls
18 for ARA?

19 A A person doing service calls is supposed to
20 be there -- like for Andre, his scheduled hours were
21 from 7:30 to 4:00. So when he was an equipment
22 technician, he was supposed to be on duty until 4:00
23 as stated in the job description which he signed.
24 And it's so noted in there.

25 Q Do you know whether the policy with Eric

1 Bowers in supervising persons who worked service
2 calls was the same as that?

3
4 MR. BAUGH: Objection. Hearsay unless --

5 MR. BENEDETTI: Your Honor, please, I asked
6 her if she was aware of his policy.

7 MR. BAUGH: Your Honor, if she became aware
8 from someone telling her, it's hearsay.

9 THE COURT: Well, she may have seen things.

10 MR. BAUGH: Okay. If she can say I've seen
11 what his policy is, that's fine.

12 THE COURT: She may have seen activity that
13 would establish what the policy was in the
14 course of treatment, for lack of a better term
15 right now.

16
17 Q Can you answer that question?

18 A Andre generally left at 4:00.

19 Q Was he allowed to leave when his work was
20 finished and the orders or this paperwork done and in
21 what capacity?

22
23 MR. BAUGH: Objection, Your Honor, as to
24 who allowed him.

25 THE COURT: I didn't understand that

1 question.

2
3 Q What is the company policy --

4
5 MR. BAUGH: Your Honor, that was not the
6 question. The question was, and I quote, "was
7 he allowed to leave."

8 THE COURT: I think he's changing the
9 question.

10 MR. BAUGH: If he's withdrawing it, I'll
11 withdraw the objection.

12
13 Q What is the policy of ARA Refreshments --
14 have I got it right, ARA Refreshments? -- with
15 respect to persons who are allowed to leave after
16 they have run their route and done their paperwork?

17 A They're called customer service
18 representatives and they usually come in around 6:30.
19 They run their route --

20
21 MR. BAUGH: Objection, Your Honor, as to
22 what is usually. That would be irrelevant.

23
24 Q The question is the policy?

25 A The policy is they come in at their stated

1 time, they line their route, they do their paperwork,
2 and they can leave that afternoon.

3 Q Did Andre Smith occupy such a position?

4 A One day a week.

5 Q What day a week?

6 A Wednesday.

7 Q Thank you very much.

8
9 MR. BAUGH: No questions.

10 THE COURT: Thank you, ma'am. You may be
11 excused.

12 MR. BENEDETTI: Call Brett Ramsey.

13
14
15 BRETT RAMSEY, the witness, called by the
16 defendant, first being duly sworn, testifies as
17 follows:

18 DIRECT EXAMINATION BY MR. ERNEST:

19
20 Q Would you state your name, please?

21 A Yes, sir. Herbert Brett Ramsey.

22 Q And your occupation?

23 A Currently a sales representative with
24 (unintelligible) Conservation.

25 Q And how long have you had that job?

1 A Approximately six months.

2 Q And before that where did you work?

3 A I was employed with ARA Services.

4 Q How long were you with ARA?

5 A Approximately two years.

6 Q What was your position there?

7 A My last position there was territory
8 manager.

9 Q On August 24th, 1992 what was your position
10 at ARA?

11 A I was territory manager.

12 Q Did you supervise the plaintiff, Andre
13 Smith?

14 A Yes, sir.

15 Q Did you supervise him for the entire week
16 or only on certain days?

17 A No, sir. Normally just one day a week.

18 Q Did you know Mr. Smith was terminated from
19 ARA employment August 21st, 1992?

20 A Yes.

21 Q And how do you know that?

22 A I was involved in his termination with Eric
23 Bowers.

24 Q So did you speak to Mr. Smith on that day
25 regarding his termination?

1 A Yes, sir.

2 Q Did you explain to Mr. Smith why he was
3 terminated?

4 A Yes, sir.

5 Q Why was Mr. Smith terminated?

6 A He was -- he had a non-ARA employee in
7 the vehicle, and he was in an ARA vehicle in a
8 nondesignated work area.

9 Q What did you communicate to Mr. Smith as to
10 why he was terminated?

11 A For those two reasons.

12 Q Did you accuse Mr. Smith of using drugs?

13 A No, sir.

14 Q Did you accuse him of possessing drugs?

15 A No, sir.

16 Q Is there a policy at ARA regarding
17 passengers in vehicles and personal use of vehicles?

18 A Yes, sir, to my knowledge.

19

20 MR. BAUGH: Objection, Your Honor. He's
21 getting ready to repeat the last witness. She
22 just said there wasn't a policy regarding that.
23 We can read it back if you want to. There was
24 one about going to and from, but when asked by
25 Mr. Benedetti about policy on the passengers,

1 she said there wasn't one.

2 THE COURT: This is another witness here.

3 MR. BAUGH: And I think he's impeaching the
4 last one and he can't do that. And unless he's
5 getting ready to say that other one doesn't know
6 what she's talking about, that's impeachment.

7 THE COURT: I don't think it's impeachment.

8 MR. ERNEST: I will reword the question.

9
10 Q To your knowledge, is there a policy
11 regarding passengers in vehicles?

12 A To my knowledge, yes, sir.

13 Q And that policy was what?

14 A That you cannot have non-ARA personnel in
15 the company vehicle.

16 Q During your conversation with Mr. Smith,
17 did he deny having a passenger in the ARA vehicle?

18 A Yes, sir.

19 Q And the date when you discussed, was it
20 August 21st, 1992?

21 A If that was a Friday, yes, assuming that
22 was a Friday.

23 Q No further questions.

1 CROSS-EXAMINATION BY MR. BAUGH:

2
3 Q Was it your decision to terminate Mr. Smith
4 or were you told to?

5 A No, sir. I was told to.

6 Q And were you told what had allegedly
7 happened on Friday?

8 A Yes, sir.

9 Q And in that conversation, did anyone
10 mention that the vehicle was seen in a high drug
11 area?

12 A Yes, sir.

13 Q And did anyone mention that the vehicle was
14 searched?

15 A Yes, sir.

16 Q And did anyone mention the occupants of the
17 vehicle were searched?

18 A Yes, sir.

19 Q Now, that was told to you, but you did not
20 give that as an official reason for termination, am I
21 correct?

22 A No, sir, that's correct.

23 Q But that was mentioned in the same
24 conversation?

25 A Yes, sir.

1 Q Where you were being told we're going to
2 terminate him?

3 A Yes, sir.

4 Q So there were company vehicle not where
5 it's supposed to be, passenger in the car, plus all
6 this other stuff about drugs. All those things were
7 mentioned, right?

8 A Yes, sir.

9 Q But the official reason, the reason that
10 was written down, only had to do with use of the
11 vehicle, am I correct?

12 A Yes, sir.

13 Q Now, when you gave that use of the vehicle,
14 did either Mr. Bowers or Mr. Smith say, "This is B.S.
15 I mean, come on, be serious"? Did anyone say that to
16 you or words to that effect? When you said, "This is
17 the reason you're being terminated," did either Mr.
18 Bowers or Mr. Smith say, "This is B.S. This isn't
19 the real reason"?

20 A Not to my knowledge, no, sir.

21 Q But there was a time when Mr. Bowers and
22 Mr. Smith were together by themselves?

23 A I assume so.

24 Q How many conversations did you have about
25 terminating Mr. Smith with other people besides Mr.

1 Smith?

2 A With other people?

3 Q Yes. Just the one?

4 A I had a conversation with Cindy Goss who
5 basically directed me.

6 Q And is that the conversation where she
7 mentioned the reasons for termination?

8 A Yes, sir.

9 Q And she mentioned the official reasons and
10 she mentioned the other reasons as well?

11 A Yes, sir.

12 Q And the other reasons for termination
13 included these allegations of being involved in drugs
14 and being searched and all that sort of stuff?

15 A No, sir.

16 Q Wait. She didn't mention those when she
17 was listing the reasons?

18 A She mentioned -- she described the events.

19 Q This was in the conversation when you --

20 A (Witness nods head.)

21 Q Well, why else did y'all get together
22 at that particular moment except to discuss his
23 termination?

24 A That was it.

25 Q So during this discussion about why you're

1 going to terminate the guy, why he's going to be
2 terminated, these drug allegations were mentioned,
3 right?

4 A Yes, sir.

5 Q Now, there is no official drug policy at
6 ARA, is there?

7 A I have no idea.

8 Q You've never seen it in writing?

9 A No, sir.

10 Q But the reasons that were chosen in your
11 understanding for him to be terminated were violation
12 of the official reasons, right, the official policy,
13 as you understand it?

14 A Yes, sir.

15 Q Did you get the impression when talking
16 with Ms. Goss that she believed these drug
17 allegations?

18
19 MR. BENEDETTI: Objection. The witness
20 can't possibly answer that question, what's in
21 someone else's mind. He can ask him what she
22 said. He certainly can't get her state of mind
23 from his impression.

24 MR. BAUGH: Your Honor, I didn't ask did
25 she believe. That would be conjecture, that

1 would be impossible. I said did he get the
2 impression. I'm only asking about his
3 impression, which the jury is entitled to know,
4 which the Court is well aware it's an admissible
5 question. And the weight of it is determined by
6 the jury.

7 THE COURT: Who are you speaking of again?

8 MR. BAUGH: I asked him, I said did you get
9 the impression as you spoke with Ms. Goss --

10 THE COURT: Ms. Goss?

11 MR. BAUGH: Yes. Did you get the
12 impression that she believed these allegations
13 about the drugs and stuff?

14 THE COURT: The objection is overruled.

15 MR. BAUGH: Thank you.

16
17 Q When you spoke with Ms. Goss, did you get
18 the impression that she believed these allegations
19 about drugs and stuff?

20 A I really didn't think about it. I was
21 trying to do what I was instructed as far as the
22 termination.

23 Q She never mentioned it again?

24 A In reference to?

25 Q Anything. Wrote on the bathroom wall, I

1 don't care. Did she ever mention these allegations
2 about drug involvement and this man over here?

3 A I assume so.

4 Q To you?

5 A Yes, sir, I guess.

6 Q So you've had more than one conversation
7 about that?

8 A More than one.

9 Q In any of those conversations, was it again
10 mentioned those were some of the reasons the guy got
11 terminated?

12 A I can't say.

13 Q Well, you've already said she did say that
14 was the reason. Did you ever turn around and say
15 that wasn't a reason?

16 A Wasn't a reason for --

17 Q For him being terminated, these allegations
18 about drugs and stuff?

19 A I don't remember.

20 Q And based upon what she told you, did you
21 get the impression that this man was involved in a
22 drug transaction and got searched because of it?

23 A Did I get the impression?

24 Q Did you get the impression?

25 A He told me he was getting a haircut.

1 Q No. I said based on your conversations
2 with Ms. Goss, did you get the impression that this
3 man was involved in a drug transaction and that's why
4 he got stopped and searched?

5 A I honestly didn't know what he was doing.

6 Q No. I didn't ask you. I said your
7 impression. Did you get the impression, did you
8 formulate the belief, did you have a conjecture, did
9 you think about was it possible? Did you suspect --

10 A Oh, it was certainly possible.

11 Q -- that he did that?

12 A Certainly was possible.

13 Q Did you think that he did it?

14 A I had no idea what he was doing.

15
16 MR. BAUGH: Thanks. Pass the witness.
17 No further questions.

18 MR. BENEDETTI: No further questions.

19 THE COURT: Thank you, Mr. Ramsey. You may
20 step down.

21 MR. BENEDETTI: Call Mark Schnupp.

22
23
24 MARK SCHNUPP, the defendant, called on his own
25 behalf, first being duly sworn, testifies as follows:

1 DIRECT EXAMINATION BY MR. BENEDETTI:

2
3 Q Mark, you are the defendant in this case,
4 of course?

5 A Yes, sir.

6 Q How long have you been a police officer?

7 A Approximately three years.

8 Q And how long have you been assigned to the
9 strike force?

10 A Approximately two years now.

11 Q At the time that this incident occurred
12 giving rise to this suit on August 21st, 1992, was
13 your supervisor Sergeant Linwood Bennett?

14 A Yes, sir, he was.

15 Q And was it true that whenever he decided
16 you were going to do a stakeout, the guys on strike
17 force would come up with a plan and Sergeant Bennett
18 would approve it?

19 A Yes, sir.

20 Q And Sergeant Bennett approved this stakeout
21 for the 21st day of August 1992?

22 A Yes, sir.

23 Q Had you previously served in that area?

24 A Yes, sir.

25 Q And in what capacity?

1 A When I was in patrol, a foot unit was
2 created. And it wasn't just in the 900 block of
3 North 26th Street. The foot patrol stretched from
4 the First Precinct which was situated at the corner
5 of 25th and Q, a block radius or two-block radius
6 around the entire precinct. Because of problems with
7 drugs and problems with a lot of people who were
8 drinking in public, vagrants and things of that
9 nature, the captain of the precinct at that time
10 created a foot patrol. Every officer had to work
11 that foot patrol. I believe it was once a month.

12 Q And when you were working that foot patrol,
13 you established a stakeout position?

14 A Yes, sir, I did.

15 Q And where did you establish that?

16 A It was in an abandoned warehouse in the
17 900 block of North 26th Street on the second floor.

18 Q Is this the same location you were in on
19 the 21st day of August 1992?

20 A Yes, sir. I used to go up there during my
21 time when I was on foot patrol and try to arrest
22 people for narcotics violations.

23 Q Is this an area where you frequently saw
24 drug trafficking?

25 A Yes, sir, it was. We get a lot of

1 complaints and a lot of calls on the help line to the
2 precinct from actual people that have lived there.
3

4 MR. BAUGH: Objection. That is not
5 responsive. He's going way beyond the question
6 asked.
7

8 Q That was the question I was going to ask
9 you. What prompted you to use that area so
10 frequently?
11

12 MR. BAUGH: I'll object to the relevance of
13 that, Your Honor.

14 THE COURT: What do you mean by what
15 prompted him to use the area? You mean the
16 warehouse or --

17 MR. BENEDETTI: Yes, the 900 block of North
18 26th Street.

19 THE COURT: I thought he was assigned.

20 MR. BENEDETTI: Why did he continually go
21 back to that area.

22 THE COURT: I thought he was assigned to
23 that area.

24 MR. BAUGH: That's where he was assigned,
25 Your Honor.

1 MR. BENEDETTI: Well, that was one of the
2 blocks.

3 MR. BAUGH: I thought Sergeant Bennett
4 testified that they told him they wanted to set
5 up surveillance in that building in the 900
6 block. And it was approved, he was sent there,
7 so I would say all this other stuff is
8 irrelevant.

9
10 Q Well, were you requested by anyone else to
11 establish a stakeout in that block?

12
13 MR. BAUGH: Unless it's on August 21st,
14 it's still irrelevant. Objection.

15 THE COURT: Anyone else? On that day or --

16 MR. BENEDETTI: No, just at any time. It's
17 not irrelevant if it will establish that this is
18 what it has been represented to be, a very hot
19 spot for drug trafficking.

20 MR. BAUGH: Your Honor, that's
21 paraphrasing. No one said it's a hot spot.
22 This officer said just about everywhere in
23 Church Hill is, quote, a high drug area. And
24 unless he can say he saw this guy over here
25 before, it's irrelevant to the issue we're here

1 on today.

2 THE COURT: Objection overruled.

3 MR. BAUGH: Please note our exception.

4
5 A Could you repeat the question, please?

6
7 (The previous question was read
8 by the reporter as requested.)
9

10 A When I was on the foot patrol or strike
11 force or both?

12 Q Both.

13 A Both? Due to the amount of drug activity
14 that was in that area. We used to receive numerous
15 complaints on our help line for officers to come
16 over there and try to do something about the drug
17 trafficking problems in that area.

18 Q Do you know approximately what time of day
19 that you went to that stakeout on that particular
20 day, August 21st, 1992?

21 A I would say approximately 3:10, 3:15.

22 Q And how long did you stay there?

23 A I'd say approximately an hour and a half.

24 Q Well after 4:00?

25 A Yes, sir.

1 Q Do you know approximately what time you saw
2 that ARA van?

3 A Yes, sir, it would be 3:30 p.m.

4 Q At that time had you identified a target?

5 A Yes, sir. I identified two targets that
6 day.

7 Q Can you describe the persons who were your
8 targets?

9 A I remember one of the subjects was a black
10 male who had on a Miami Dolphins T-shirt, and it had
11 the light blue with orange colors with the helmet
12 logo on it. And another subject who had on a white
13 T-shirt and a pair of cutoff jeans.

14 Q How many transactions did you observe with
15 these two targets?

16 A Approximately three transactions before the
17 ARA van pulled into the area.

18 Q Did you radio the takedown unit on any of
19 those three?

20 A No, sir, I did not.

21 Q Why not?

22 A In drug work whenever surveillance is set
23 up, probable cause needs to be established by an
24 officer conducting a surveillance in order to
25 establish who a target is. I personally, when I set

1 up a surveillance, never go out and just from the
2 first person I see pull up to somebody I might think
3 is dealing drugs automatically radio that in and
4 expect that vehicle to be stopped. I allow at least
5 three what I consider to be clearcut narcotics
6 transactions to take place before I'll stop any
7 vehicle, have any vehicle stopped by a fellow
8 officer. That way I have probable cause when it
9 comes to court. If somebody asks me how do I know
10 that this person I was watching was a target, I can
11 say because of this, this and this.

12 I'm trained in narcotics surveillance. I
13 know what to look for in a surveillance. I know what
14 type of actions a drug dealer takes when he's dealing
15 on a street corner. And I know what to look for when
16 people are pulling up either in vehicles or on foot
17 and what takes place between a target and someone
18 who's about to buy drugs.

19 Q Did you on your radio say anything about
20 the vehicle being stolen?

21 A What, the ARA?

22 Q The ARA van.

23 A No, sir, I did not.

24 Q At what point in time did this come up?

25 A After the surveillance had concluded and I

1 returned to the office. It was close to when we were
2 getting off. I was on day shift that day. And I
3 remember at that time we had a really small office
4 and everybody was changing and we were just
5 discussing the surveillance from that day. And I
6 asked I believe it was Officer English, you know,
7 what happened when they searched the vehicle. And he
8 described the inside of the vehicle, described to me
9 about how there was a lot of stuff inside the vehicle
10 and a lot of places that contraband could have been
11 hidden.

12 At that time I just had a bad feeling,
13 based on what I had seen the passenger do and based
14 on previous experiences with drug work, that the
15 possibility that those two individuals in that
16 vehicle did not belong in that vehicle. And my
17 suspicion -- I just couldn't go home that night after
18 the surveillance was over without, you know, making
19 some effort to see if in fact those people were
20 authorized to be in that vehicle.

21 Q Did you mention this uncertainty to your
22 supervisor?

23 A Yes, sir, I did.

24 Q Who was that?

25 A Sergeant Bennett.

1 Q And did you make a request of him?

2 A Yes, sir. I asked him -- because of the
3 time I was over there in training, I still knew what
4 I was doing, but I wanted to check with him, because
5 I knew he has been a police officer for 20 some
6 years, if that would be okay to be able to call and
7 in fact check to see if these individuals were
8 authorized, because, as I stated in the past, I have
9 had situations where I have stopped vehicles and the
10 vehicle does not appear to be stolen. The keys are
11 in the car, the registration's fine, both occupants
12 have a valid driver's license. But when an
13 investigation is conducted, it turns out that those
14 people did not have authorization to have that
15 vehicle. In fact a report would have been made that
16 it was going to be, say, if someone didn't have a car
17 back by 5:00, that the person was going to make a
18 stolen report out of it.

19 Q How did you locate ARA?

20 A I think I called information and asked for
21 a number.

22 Q Did you call a number?

23 A Yeah. The first number I called, I think
24 was -- it wasn't the right one. When I asked about
25 the van, they said, "Oh, that's one of the coffee

1 vans. You need to call this number." And they gave
2 me another number, which I called that number at that
3 time.

4 Q And that's when you spoke to who?

5 A Ms. Goss I believe her name was.

6 Q And you've heard her testimony. Did she
7 relate accurately what --

8
9 MR. BAUGH: Objection, Your Honor. It's
10 improper to state. He can't comment on the
11 truth and veracity of another witness. He
12 cannot comment on veracity.

13 THE COURT: Perhaps you can rephrase that
14 question.

15
16 Q Do you recall what you said to her?

17 A Yes, sir, very much so.

18 Q Would you tell us again what you said?

19 A When I called I spoke to Ms. Goss. I first
20 explained myself, told her I was a police officer
21 with the city of Richmond, that I worked for the drug
22 and firearms strike force.

23 At that time I asked her if she knew of the
24 vehicle. And I gave her the license plate and asked
25 her if she was in charge of it or the manager of that

1 vehicle, at which time she said she was.

2 At that time I gave her the names of Robert
3 Ragin and Andre Smith, and told her that those two
4 individuals and their vehicle had been in the 900
5 block of North 26th Street, which is a high drug
6 area, and that myself and my partner were conducting
7 a narcotics surveillance at approximately 3:30 that
8 day. And that vehicle was stopped, based on the fact
9 that the passenger had had contact with a person who
10 was deemed to be a target, and had then driven off
11 and was stopped by what I call the takedown team,
12 consisting of three other officers from our
13 department.

14 At that time I asked her if she knew who
15 Robert Ragin or Andre Smith was. She hesitated for a
16 few minutes and said she had never heard of a Robert
17 Ragin. She knew of an Andre Smith, but, being that
18 it was a common name, that she wasn't exactly sure
19 who it was. I asked her if she knew that if either
20 of those two had authorization to be driving that
21 vehicle, and she said that she was not sure about
22 Robert Ragin, she had never heard of him. But the
23 Andre Smith that she knew of, she was not sure if he
24 was authorized to have the vehicle that day at that
25 time.

1 Q Was that the end of the conversation?

2 A Yes, sir, it was. Based on the fact that
3 she was not a hundred percent sure who Robert Ragin
4 was and Andre Smith was, I told her why the vehicle
5 was stopped, which I just explained; that nobody was
6 charged with any criminal offense and that they were
7 let go, but I was trying to figure out if those
8 people were authorized to be there. And due to the
9 fact that she wasn't a hundred percent sure who they
10 were, I then terminated the conversation with her.

11 Q Did you also tell her that there were no
12 drugs found?

13 A Yes, sir. Told her no charges and no drugs
14 were found.

15 Q August 26, 1992 was a Friday, wasn't it?

16 A Yes, sir, it was.

17 Q And what was the next day that you went to
18 work?

19 A That would have been our long weekend.
20 We would have been off Saturday, Sunday and Monday.
21 I came back to work on Tuesday night shift at
22 approximately 4:00.

23 Q Did you have a conversation with Cindy Goss
24 on that date?

25 A Yes. I believe she did call me back that

1 day when I had gotten there.

2 Q Did you speak with any other person at ARA
3 other than Cindy Goss?

4 A Not that I recall, no, sir.

5 Q And as a result of that conversation, you
6 had a subsequent conversation with Sergeant Bennett
7 about writing a report?

8 A Yes, sir. I went to Sergeant Bennett and I
9 explained to him that Cindy Goss had asked if I would
10 type a narrative of what had taken place and send it
11 to her. And he said that he had no problem with that
12 and told me to go ahead and do it.

13 Q And how did you get it to her?

14 A I sent it in the mail. She gave me an
15 address.

16 Q Any further contact with ARA subsequent to
17 that?

18 A No, sir.

19 Q That's all. Answer counsel's questions.
20
21

22 CROSS-EXAMINATION BY MR. BAUGH:
23

24 Q Mr. Schnupp?

25 A Yes, sir.

1 Q If a person walks up to you on the street
2 and opens a container --

3 A Yes, sir.

4 Q -- and it spills out some off-white
5 soap-looking material and sells it to someone else
6 next to you, are you saying that you can't arrest
7 that person until he does three deals?

8 A No, sir, that's not what I'm saying.

9 Q Because you are actually observing
10 everything that you need to make an arrest in that
11 scenario I just gave you, right? You are actually
12 observing what you have probable cause to believe is
13 crack cocaine, you have probable cause to believe
14 that someone's in possession, and you have probable
15 cause to believe that person is distributing to
16 another person, is that correct?

17 A That's correct.

18 Q And based upon your training, you could
19 arrest that person right there?

20 A Yes, sir.

21 Q Now, didn't you just tell the jury that you
22 saw the car that he was driving, the vehicle stop,
23 and you actually saw someone pour out into their hand
24 small portions of off-white material that you
25 recognized or suspected was crack cocaine? You saw

1 that, right? Didn't you just say you saw that?

2 A Yes, sir, I did see that.

3 Q In fact if you had been standing next to
4 them, you could have made an arrest, am I correct?

5 A I would have attempted to make an arrest,
6 yes, sir.

7 Q And you wouldn't have to do any more
8 surveillance, because everything you need you've
9 seen. You don't have to formulate anything else by
10 supposition, am I correct? Every element of the
11 offense is there, right?

12 A In that particular case, yes, sir.

13 Q And on the case what you say you saw happen
14 in this vehicle, every element for an offense was
15 there. You saw the item, you saw the transfer, you
16 saw him put it in his hands, and you saw the money
17 change hands, right?

18 A That's right.

19 Q So you didn't need any other transactions,
20 did you?

21 A That's not true, sir. Each officer
22 conducts himself in his own way. I have ways of
23 conducting myself so that I know that when I make an
24 arrest I'm not making a mistake. Now, if you were an
25 officer you would have your own way of doing things

1 too.

2 Q Who told you this bit about somebody making
3 the motion toward the mouth?

4 A From what I recall, Officer D.C. Williams
5 told me that when I radioed to him.

6 Q That he saw the person --

7 A I don't know if he said that he actually
8 saw them, but when I radioed to them he said that the
9 passenger made a motion to his mouth with his hand.

10 Q And you remember that as being D.C.
11 Williams?

12 A I remember that being D.C. telling me that.
13 I don't know if he was the one that saw it, but, yes,
14 I do recall D.C. telling me that.

15 Q And is that where you get this stuff, "Upon
16 searching the occupants," plural, "and the vehicle
17 for the cocaine, it was determined that the cocaine
18 was destroyed prior to the officers making the stop"?

19 A Yes, sir.

20 Q And when you communicated that, you
21 intended to communicate that the occupants, plural,
22 and the vehicle were searched and that the drugs had
23 been there but they had been destroyed, am I correct?

24 A I'm not sure if I understand your question.

25 Q All right. We'll do a little bit at a

1 time. When you made that statement --

2
3 MR. BENEDETTI: Your Honor, please, I think
4 the statement speaks for itself.

5 MR. BAUGH: I'm going to his intent, Your
6 Honor. I know what the statement is, so they'll
7 get it.

8 THE COURT: Go ahead.

9
10 Q Did you intend to communicate that, one,
11 the occupants, plural, were searched for drugs?

12 A Based on what Officer -- well, Mr. Baugh,
13 if you would like for me to answer your question,
14 it's not a one-answer question. I'm sorry.

15 Q Did you intend to communicate that the
16 occupants were searched for drugs?

17 A Based on what Officers Kurisky, English and
18 Williams told me, yes, sir.

19 Q No, no. I'm not asking you why, all right?
20 I'm asking you not where it came from, okay? I'm
21 asking you what came out, all right? Now, did you
22 intend to communicate that?

23 A That the occupants were searched based on
24 what Officer --

25 Q That they were searched?

1 A -- Williams and Kurisky told me. What
2 Officers Williams, English and Kurisky --

3 Q Did you put down here that they were
4 searched based on what the other officers told you?

5 A No, sir.

6 Q Can you spell their names?

7 A Yes, sir.

8 Q Well, if you intended to communicate that,
9 could you have written it? That's not a hard one,
10 is it? Is it? Answer the question. Is it?

11 A No, sir.

12 Q Thank you. Now, did you also intend to
13 communicate that the van was searched? Not who told
14 you, but that the van was searched for contraband?

15 A Yes, sir.

16 Q And did you also intend to communicate that
17 the drugs were destroyed?

18 A Yes, sir.

19 Q And by saying they're destroyed, are you
20 communicating the drugs were in the van?

21 A No, sir. I'm saying that the drugs were
22 seen in the passenger's hands and that the passenger
23 was seen making a motion to his mouth.

24 Q Excuse me? Do you say in here that the
25 passenger did something or did you say that the

1 drugs, the cocaine --

2 A I believe I'm saying that the passenger was
3 the one who was seen buying drugs.

4 Q I'm talking about this wonderful motion
5 that you've got about something making something.
6 I mean you sat here and heard D.C. Williams testify,
7 didn't you?

8 A Yes, sir.

9 Q Did you hear D.C. Williams say that "I saw
10 something like that" or "I told you" that he saw
11 something like that?

12 A No, sir. D.C. Williams said that he saw
13 nothing.

14 Q Based on your experience, is it unusual for
15 police officers when testifying to not know anything
16 about what anybody else does? I mean, "Did you?
17 I didn't do it. I didn't see anybody else do it."
18 Is that usual?

19 A Well, sir, I believe that what they
20 testified to was one of the officers searched the
21 passenger and the other officer searched the van.
22 Now, I can't explain to you why they didn't see what
23 was going on, but if they were doing their job like
24 they should have been, they should have concentrated
25 on what they should have been doing.

1 Q Because part of being a police officer is
2 situational awareness. They teach you that, don't
3 they? To be aware of what's going on around you?

4 A Also to be aware of -- you have to have not
5 only peripheral vision, you sometimes have to have
6 tunnel vision.

7 Q Now, when you made the phone call, it's
8 your statement here that afterwards you got concerned
9 that this vehicle may be unauthorized, unreported?

10 A My concern, as I stated, was that the
11 occupants of the vehicle were unauthorized in
12 operating that vehicle based on what I saw the
13 passenger do.

14 Q Was there a Mercedes stopped earlier or was
15 there a Volvo stopped?

16 A No, sir. That was part of my probable
17 cause.

18 Q Was the Mercedes stopped?

19 A No, sir. At that time no takedown teams
20 were there. You'd have to ask Officer Ambrozy on
21 that, because that was his. Yes, it is written down
22 if that's going to be your question.

23 Q Yeah. Mercedes Benz, light blue, PND-378,
24 four-door -- well, let me ask you this. Did anybody
25 run that tag, to your knowledge, to see if it was

1 stolen?

2 A Couldn't tell you, sir.

3 Q Now, what time does the Department of Motor
4 Vehicles shut down so you can't find out about
5 somebody's license?

6 A I can call 24 hours a day and get anything
7 I want on a license.

8 Q Okay. So you could have found out if that
9 vehicle was stolen, couldn't you? Any time of day
10 you could have called in to see if that vehicle was
11 stolen?

12 A Mr. Baugh, you're assuming that the vehicle
13 had been reported stolen. I have told you --

14 Q Sir, don't tell me what my assumption is,
15 because you don't know, okay? Did you ever, out of
16 concern that it might be stolen, did you ever check
17 with the official police machine?

18 A If you'd allow me to answer the question --

19 Q No, you don't have a question. I have a
20 question. Now, answer my question. Did you ever
21 check --

22 A That was not my concern that it was
23 reported stolen. My concern was that it was
24 unauthorized use and that the occupants were not
25 supposed to be in it, and therefore a report could

1 not have been made at that time.

2 Q Now, in that telephone conversation when
3 you were calling about unauthorized use, did you tell
4 her that the van and the occupants were searched and
5 nothing was found? Did you tell her that or did she
6 make this up? Like to see it?

7 A I don't think she made it up.

8 Q Well, then she got it from you?

9 A I don't recall if I told her that the van
10 and occupants were searched. I told her that the van
11 was stopped, that the passenger was searched.

12 Q When you wrote this report -- and you wrote
13 this one, right?

14 A Yes, sir.

15 Q She didn't write this one down, did she?

16 A No, she didn't.

17 Q In this one you say the van and the
18 occupants were searched?

19 A Yes, sir.

20 Q And by coincidence or some reason she says
21 the van and occupants were searched, am I correct?

22 A Yes, sir.

23 Q Now, when you say occupants, who are you
24 talking about?

25 A That would have been the driver and the

1 passenger.

2 Q And was the driver Andre Smith?

3 A Yes, sir.

4 Q So you were intending to communicate in
5 this one over here and possibly in the handwritten,
6 that the occupant, the driver, Mr. Andre Smith was
7 searched for drugs?

8 A No, sir. I was just telling her based on
9 what I had received from Officers English, Kurisky
10 and Williams that they had stopped the van and that
11 the van and occupants were searched.

12 Q Sir, what does searching the people have to
13 do with asking whether or not the car is stolen or
14 being used illegally?

15 A I believe if you'll recall in my deposition
16 I gave you two reasons for why I called ARA.

17 Q No, I didn't ask you that. I'm asking
18 you if the reason for your call was about a stolen
19 vehicle or --

20 A One of my reasons, yes.

21 Q One of your reasons?

22 A Yes, sir.

23 Q All right. And that was it might be
24 stolen. The other one was it was not supposed to be
25 there at that time?

1 A No, sir.

2 Q What was the other reason?

3 A Second reason was because a large group had
4 gathered and I wanted to tell them why the vehicle
5 was stopped.

6 Q Wait a minute. Tell me then why you have
7 to tell them that the occupants and the van were
8 searched. You could have communicated your concern
9 about --

10 A I was giving them the explanation of why
11 the van was stopped. And that the reason the van was
12 stopped was because the passenger was seen --

13 Q I'm not asking you the reason the van was
14 stopped. I'm asking you after the van was stopped
15 the people were searched, right? Right?

16 A I don't know. I was not there. I was
17 told.

18 Q Somebody told you that?

19 A (Witness nods head.)

20 Q And you relied on that and made -- are you
21 saying that you didn't know that when you wrote this
22 out?

23 A I was told that.

24 Q You just told this jury you didn't know it.
25 Now, are you telling the jury when you wrote this you

1 didn't know it?

2 A That's not what I said.

3 Q Well, then, sir, did you feel confident
4 enough in the information that you had to write it
5 down and send it to someone?

6
7 MR. BENEDETTI: Your Honor, please. I
8 object. I think the question has been answered
9 about three times and need not be answered any
10 further.

11 THE COURT: Why are we going over this?

12 MR. BAUGH: Because this witness has stated
13 a number of times, "I don't know" -- all the
14 police officers -- "I don't know this, I don't
15 know this." He just indicated, "I don't know if
16 they were searched." And the question is and I
17 believe one of the standards is if he doesn't
18 make enough effort to find out, he's not
19 supposed to publish it. So I'm trying to find
20 out if he believed it when he wrote it.

21 THE COURT: Can you answer that question?

22 THE WITNESS: Yes, sir. If he'd asked me
23 that way if I believed it, yes, I believed what
24 I was told. But I did not see with my own eyes
25 the occupants in the van.

1 THE COURT: You weren't there?

2 THE WITNESS: No, sir. Exactly.

3

4 Q Now, let me ask you this. When you call a
5 takedown on a vehicle, is it part of a takedown --
6 takedown means the vehicle's stopped, right?

7 A Yes, sir.

8 Q Means the people are searched, right?

9 A (No verbal response.)

10 Q And that means the probable cause is there
11 to have the vehicle searched?

12 A You're trying to generalize, Mr. Baugh.

13 Q That's exactly right.

14 A I'm trying to be specific.

15 Q I'm trying to just --

16 A I had specific instructions that the
17 passenger was seen buying the cocaine. As far as
18 what the officers did when the van was stopped was up
19 to them.

20 Q Did you tell them that the driver was not
21 involved, not to search him?

22 A I didn't say don't search the driver.

23 Q Let me ask you this. If you didn't think
24 the driver did anything wrong, why did you tell them
25 the occupants, plural, were searched? Why did you

1 tell them occupants, both of them, were searched?

2 A Because that's what I was told by Officers
3 Kurisky, Williams and English.

4 Q But you didn't think the driver had done
5 anything wrong?

6 A The driver at that point -- what I had seen
7 he had not done anything wrong, no, sir.

8 Q Let me ask you this. Now that you've seen
9 this information and it details -- you have said that
10 this man was seen in a high drug area, that his
11 passenger engaged in a direct hand-to-hand
12 transaction that you witnessed, that the driver then
13 drove away, the vehicle was stopped. You have
14 communicated that both people were searched and the
15 van was searched?

16 A Yes, sir.

17 Q You have also indicated that drugs were
18 destroyed?

19 A Yes, sir.

20 Q Don't you think, sir, that that might cause
21 a reasonable person to assume that he was involved in
22 illegal activity?

23 A (Witness shakes head.)
24

25 MR. BENEDETTI: Objection. That's the

1 point that has to be decided either by the Court
2 or by the jury.

3 MR. BAUGH: I'll rephrase.

4
5 Q Weren't you concerned or were you totally
6 without regard for whether or not a reasonable person
7 might assume that this man was involved in drug
8 activity because he was in a high drug area, the
9 vehicle stopped, he was in operation of the vehicle
10 when it stopped, a drug transaction occurred within
11 three feet of him according to your testimony today,
12 that the vehicle then drove away, and that he and the
13 passenger were searched and then the vehicle was
14 searched. Did you care whether or not someone got
15 the impression that he might be engaged in illegal
16 activity?

17 A Yes, sir, I cared very much. That's why I
18 told them that Mr. Smith was not the reason the van
19 was stopped, that Mr. Smith did absolutely nothing
20 wrong. That Mr. Ragin, the passenger, was the one
21 who conducted the buy of the narcotics, if that's
22 what you're asking me.

23 Q Wait, wait, wait, wait. Where in this
24 report does it say Mr. Smith did nothing wrong, or
25 did you intend that that was to be inferred -- well,

1 I'll read it, "Upon searching the occupants," plural,
2 and the vehicle for the cocaine." Searching the
3 occupants for the cocaine, it says that, doesn't it?

4 A Yes, sir.

5 Q And he's one of them (indicating
6 plaintiff)?

7 A Yes, sir.

8 Q And so this says he was searched for
9 cocaine, doesn't it?

10 A It says searched --

11 Q No, no. "Upon searching the occupants and
12 the vehicle for the cocaine" --

13 A Yes, sir.

14 Q -- does that mean the occupants were
15 searched for cocaine?

16
17 MR. BENEDETTI: Your Honor, please, I
18 object on the same basis. I object to the form.
19 We've been over this now about six times and I
20 object, because it's repetitious.

21 MR. BAUGH: Your Honor, this is really
22 different, because in this instance the way he's
23 answering it he's saying I communicated that
24 that man as one of the occupants was searched
25 for cocaine. And that's what this statement

1 says. And that's what I'm asking, did he intend
2 to communicate that or did he care. And that,
3 of course, is one of the elements.

4 THE COURT: Did he intend or did he care?

5 MR. BAUGH: Did he intend or did he care.
6 Either intentional or reckless disregard.

7 MR. BENEDETTI: The answer has been that he
8 was not at the scene. He reported what he was
9 told by the officers who were at the scene.

10 MR. BAUGH: Which is the next element.
11 Before you say something like that, you better
12 check it out. But the question I have right now
13 is did he intend to communicate by this
14 statement that the occupants, including this
15 occupant, were searched for cocaine.

16 THE COURT: All right.

17
18 Q Answer the question. Did you intend to
19 communicate by this document which says "upon
20 searching the occupants and the vehicle for the
21 cocaine," did you intend to communicate that this man
22 was searched for cocaine?

23
24 MR. BENEDETTI: Your Honor, I object again
25 on the same reason. This is the seventh time.

1 He's answered the question three or four times.

2 THE COURT: I thought he's answered this
3 already too.

4 MR. BAUGH: Your Honor, I would ask the
5 Court's indulgence. I would like just one
6 answer. Did he intend to communicate that.
7 And if he says yes, then I don't need to go any
8 further.

9 THE COURT: Can you answer that question?
10

11 Q Did you intend to communicate that?

12 A Based on what I was told from Officers
13 Kurisky, Williams and English, that's what I put in
14 that letter.

15 Q That does not answer the question. The
16 question was did you intend to communicate that this
17 man was searched for drugs? Not what you were told.
18 Did you intend to communicate it to others that he
19 was searched for cocaine?
20

21 THE COURT: Don't we have to just look at
22 what the writing says?

23 MR. BAUGH: No, Your Honor, because we have
24 a whole lot of stuff.

25 THE COURT: All these circumstances around

1 it, the jury can make a determination about --

2 MR. BAUGH: All right.

3 MR. BENEDETTI: It's really splitting hairs
4 here.

5 MR. BAUGH: Your Honor, my client's
6 reputation in drug involvement is not splitting
7 hairs. And I take exception to that.

8 MR. BENEDETTI: You can take any exception
9 you want.

10 MR. BAUGH: That's it. Your Honor, take
11 the jury out. If he wants to make a lousy
12 closing argument, we will make it now.

13 MR. BENEDETTI: What I would like to do,
14 Your Honor, is to say that the man has testified
15 repeatedly.

16 MR. BAUGH: Your Honor, this is an
17 argument. I ask the jury be removed.

18 THE COURT: Do you have an objection,
19 Mr. Benedetti?

20 MR. BENEDETTI: The objection is what I
21 previously said, that it's repetitious. The
22 witness has said repeatedly --

23 THE COURT: Well, I think he's going to go
24 on to something else.

25 MR. BAUGH: There wasn't a question on the

1 floor.

2 THE COURT: And he said he had no other
3 question to ask after that, is that right?

4 MR. BAUGH: I didn't ask a question after
5 that.

6 THE COURT: You said that --

7 MR. BAUGH: No. I said I have no other
8 questions on this topic. There wasn't a
9 question on the floor.

10 THE COURT: I see.

11
12 Q As you look back on this now, you think
13 there's a better way you could have communicated what
14 actually happened out there so that what this man
15 didn't do would come to surface?

16 A No, sir, because I told them exactly what
17 he did not do. I told them who did it and I told
18 them that Mr. Smith did nothing illegal.

19 Q Now, in this statement where does it say
20 that this man did anything?

21 A I'll admit that it's not in there, but --

22 Q Oh, thank you.

23 A Yes, sir.

24 Q Two questions. One, how many drug dealers
25 did you see approach the vehicle, one or many?

1 A There was one that approached the vehicle
2 and went around.

3 Q And, secondly, am I correct that no one
4 else as far as you know saw this alleged transaction
5 involving dope going into somebody's hand three feet
6 from the defendant and all that? As far as you know,
7 no one else saw it?

8 A All I can tell you is from myself and
9 Officer Ambrozy's point of view, I was the one in
10 charge of that dealer and he was in the other part of
11 the house. It was multiple dealers out there that
12 day that I was watching and he was watching.

13 Q You're not telling this jury that everyone
14 who goes down North 26th Street --

15 A Oh, no, sir. Not at all.

16 Q -- is involved in drugs?

17 A As a matter of fact, that's why we're
18 there, to try to keep these people out down there for
19 the people that don't want it.

20 Q And then lastly, you said you've been out
21 there many times?

22 A That's correct.

23 Q You sat and heard Miss Irving testify,
24 didn't you?

25 A (Witness nods head.)

1 Q On any of those other occasions, did you
2 ever see this man stop out there?

3 A Not that I recall. I've come in contact
4 with thousands of people. I wouldn't know half of
5 them if they walked in here right now. I probably
6 wouldn't recognize half the people I've arrested.

7 Q Wait, wait, wait. When you come to court
8 you don't have trouble recognizing --

9 A No. When I come to court, that's a
10 different story. You're asking me --

11 Q You're in court now.

12 A I've been a police officer for three years.

13 Q And before that you were the manager of the
14 Black-eyed Pea?

15 A That's correct.

16 Q As you sit here now, do you understand how
17 ARA might have gotten the impression that this man
18 was stopped and searched for drugs?

19
20 MR. BENEDETTI: I don't think the witness
21 has any ability to answer the question.

22 MR. BAUGH: No, I didn't ask him about
23 that. Do you understand how they might have
24 gotten that from his perception.

25 THE COURT: His perception doesn't have

1 anything to do with it.

2 MR. BAUGH: Then I will withdraw it.

3
4 Q When you wrote this last statement and when
5 you made the first one, you had no idea how long
6 Andre Smith had been on the job, his relation with
7 his family, his obligations or anything?

8 A I knew nothing about Mr. Smith.

9 Q And you're telling this jury that you had
10 no suspicion, you had no concern that this might
11 negatively impact his employment?

12 A I never said that. I was doing my job.

13 Q Well, I'm asking you --

14 A I was doing my job. I was following my
15 intuition, that I thought those two individuals were
16 in an unauthorized vehicle.

17 Q Your intuition?

18 A I was following my job as a police officer.

19 Q Wait a minute. Did you just say intuition?

20 A I didn't mean intuition.

21 Q Well, sir, when you're under oath, try to
22 mean it, okay? Now, did you just say intuition,
23 hunch, suspicion?

24 A No, sir. That's not what I meant.

25 Q Tell me what you mean by intuition.

1 A I told you I take that back. I didn't mean
2 that.

3 Q Once you say things that hurt people, you
4 can't just take them back. You understand that,
5 don't you? If you make a mistake, you can't just
6 take it back.

7 A I didn't make a mistake.

8
9 MR. BENEDETTI: Your Honor, please --

10 MR. BAUGH: Pass the witness.

11 MR. BENEDETTI: No further questions from
12 us either.

13 THE COURT: Thank you, Officer. You may
14 step down.

15 Ladies, let's take a recess.

16
17 (Brief recess.)

18
19 MR. BENEDETTI: If it please the Court,
20 defendant rests.

21 THE COURT: Any rebuttal, Mr. Baugh?

22 MR. BAUGH: One witness, Your Honor. Call
23 Mr. Andre Smith, please.
24
25

1 ANDRE SMITH, the plaintiff, called as a rebuttal
2 witness, previously being duly sworn, testifies as
3 follows:

4 DIRECT EXAMINATION BY MR. BAUGH:

5
6 Q Mr. Smith, a few questions. One, on the
7 day that you were stopped, August 21st, were you
8 searched on the driver's side of that vehicle?

9 A Yes, sir.

10 Q The tall officer, Mr. D.C. Williams, is he
11 the officer that searched you?

12 A Yes.

13 Q Were you searched again?

14 A Okay. When I dismounted the vehicle,
15 he told me place my hands on the driver's side.

16 Q And he searched on that side?

17 A Yes.

18 Q Did he take you around to the other side of
19 the van and search you there also?

20 A Yes, he did.

21 Q What did he do on the other side?

22 A That's when he went down, you know,
23 searched me, patted me down, felt around in the back
24 of my shoes.

25 Q Is that the same officer who told you he

1 worked in a food service company at one time?

2 A That's correct.

3 Q Same officer who made fun of you that day?

4 A Yes, he did.

5 Q Concerning the van, who did you report to,
6 who gave you orders?

7 A Eric Bowers.

8
9 MR. BAUGH: Thank you. Pass the witness.

10 MR. BENEDETTI: I have no questions.

11 THE COURT: Mr. Smith, thank you, sir.

12 MR. BAUGH: Plaintiff rests, Your Honor.

13 THE COURT: Ladies, that's all the
14 evidence and I'm going to ask that you now step
15 out of the jury box. And you may go either to
16 the jury room or to the hallway, but in any
17 place please don't discuss the case. Just stay
18 close by, if you would. Thank you.

19
20 JURY OUT

21 THE COURT: Mr. Benedetti?

22 MR. BENEDETTI: If Your Honor please,
23 I renew the motion that I made at the conclusion
24 of plaintiff's evidence, and that is to strike
25 the plaintiff's evidence on the grounds it's

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2 insufficient at law to establish that a crime
3 has been committed.

4 The only thing I would add to what I
5 previously said is some reference to innuendo
6 was made as alleged in a crime I cited to the
7 Court, the case of Moss against Harwood, in
8 which the statement was it was within the past
9 12 months the plaintiff has collected certain
10 fines, which fines did not appear by the records
11 of the police court to have been reported. The
12 question was whether or not that alleged a crime
13 of embezzlement of fines by a person responsible
14 in the clerk's office for collecting those fines
15 and applying them to the locality which was due
16 to receive the fines.

17 The defense was that no crime had been
18 charged. The Court said there when the words
19 set forth as having been spoken by the
20 defendant, the first question is whether he is
21 imputed a charge of a felony or any other
22 infamous crime punishable by law. If they do
23 not, such an innuendo cannot aid it.

24 "But if their words do not impute" -- this
25 is further down. This is on Page 390 of this

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2 case. "But if their words do not impute such
3 infamous crime by their natural sense and
4 meaning, then, as a general rule, the plaintiff
5 is not entitled to recover; and, as he cannot
6 enlarge that meaning by an innuendo so as to let
7 in proof of extraneous facts, his action must
8 fail."

9 And a little further down, "interpreted in
10 the usual and ordinary acceptation of their
11 meaning, do not impute a crime, their meaning
12 cannot be enlarged by an innuendo so as to
13 accomplish that purpose."

14 I think that is the argument that Mr. Baugh
15 is going to make, because the innuendo --
16 because of the fact that the written statement
17 has something to say about the destruction of
18 contraband, and that it's both statements say
19 that the passengers or the occupants were
20 searched. And I suggest that's nothing more
21 than innuendo.

22 And I've already said this before, and the
23 Court has not yet decided whether or not we have
24 a privilege. And if we do have a privilege,
25 obviously the written portion of his claim, the

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2 statement that is in writing, is not admissible
3 in evidence and should not be considered either
4 by the Court or by the jury either as an
5 extension or anything more than a possible
6 second charge rather than part of this first
7 charge.

8 MR. BAUGH: One, I have not read that case.
9 However, I will tell you this. I would agree
10 that is merely an inference, because there is no
11 dollar figure. And it could be construed that
12 someone may have made a mistake. No one said he
13 took it and there was no dollar fee. No dollar
14 fee. Can't be a felony. Can't be petty
15 larceny. There's an allegation of taking or
16 commission of a crime. In this instance we're
17 talking about cocaine. First of all, drugs.
18 Talking about cocaine. Every cocaine related
19 offense is a felony. Every one of them. So
20 therefore we don't have that problem in this
21 case.

22 Additionally, Your Honor, I would again
23 renew that -- and I think that's a misstatement
24 of law. If this Court finds out that a
25 privilege exists, then the only thing we're

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2 going to do is charge the jury that a privilege
3 existed. And then they're going to decide
4 whether or not the statement is false or not.
5 And if it's false, the privilege is gone. If
6 this Court finds that privilege existed --

7 THE COURT: I'm not sure that's right.

8 MR. BAUGH: Well --

9 THE COURT: I think as I understand it now
10 that the statement was made knowing that it was
11 false or with a reckless disregard as to whether
12 it was true.

13 MR. BAUGH: Right.

14 THE COURT: New York Times versus Sullivan.

15 MR. BAUGH: New York Times versus Sullivan,
16 that's right. So, Your Honor, what I'm saying
17 is this --

18 THE COURT: Beyond common law malice?

19 MR. BAUGH: Right. We have to go into --
20 but, Your Honor, to go to constitutional
21 matters, and constitutional matters also include
22 reckless disregard for whether it is false or
23 not. That's at the top, "Actual malice
24 (unintelligible) was made with knowledge, it is
25 false or with reckless disregard whether it's

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2 false or not." That's constitutional malice.
3 If this man intentionally made a false statement
4 concerning commission of a crime and published
5 it to others knowing it was false or with a
6 reckless disregard, it was --

7 THE COURT: The false statement is what
8 about the crime?

9 MR. BAUGH: I am saying, Your Honor, that
10 the false statement is everything that this
11 officer told about the vehicle stopping, the
12 drug transaction occurring, all of that is
13 false. It did not happen. It is a falsehood.
14 And that is --

15 THE COURT: In other words, that's the
16 point, I suppose, that the plaintiff's theory
17 is this didn't happen. The defendant has his
18 theory.

19 MR. BAUGH: Yes.

20 THE COURT: But that the stop never
21 occurred.

22 MR. BAUGH: Right -- no. Well, the first
23 stop.

24 THE COURT: The first stop. But that the
25 van never stopped, and they never had any

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2 contact with anyone.

3 MR. BAUGH: Right, and that none of this
4 allegation of crime, and further --

5 THE COURT: Yes. But the difference is
6 obviously the police stopped, the takedown stop
7 occurred. That occurred.

8 MR. BAUGH: I'm agreeing. That occurred.
9 No, that is not the question. The question
10 is --

11 THE COURT: But there's a sharp direct
12 difference between the plaintiff and the
13 defendant as to whether or not this so-called
14 drug dealer came to the vehicle and there were
15 dealings with him.

16 MR. BAUGH: I will submit --

17 THE COURT: Dealings with him and the
18 passenger at the vehicle.

19 MR. BAUGH: And that, Your Honor -- in fact
20 I hate to be the one -- I hate this all or
21 nothing. But if that statement is false and
22 this jury finds it's false, almost every other
23 issue -- now, you may throw some other issues in
24 between, but if they find it's false, that
25 finding of false is going to clear up every one

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2 of those issues. Every one of them. If you
3 find there's a privilege here, falsity knocks it
4 out. If you find its -- I mean if we have to go
5 under New York Sullivan, if we have to go to
6 that standard, falsity knocks it out.

7 If this jury comes back and says their
8 statement's false, they can start assessing
9 damages. That's the way it is right now whether
10 privilege is there or not, because privilege
11 will knock out -- falsity is an abuse of
12 privilege. And if you find that privilege
13 exists, first, I don't see how you can -- I
14 personally -- I wrote my instructions assuming
15 that you would. The burden is on them to prove
16 the existence of privilege. And that is what
17 the jury instructions say. And then the burden
18 shifts back to me to show if a privilege exists,
19 the abuse of it.

20 I have not heard that the information about
21 which we're complaining, about the drugs and
22 searching of occupants and the use of the word
23 "coke," all of this, that this was in
24 furtherance of an official police officer's
25 duties. He said, I came and asked the guy could

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2 I do it. But I asked Sergeant Bennett, look,
3 does this have anything to do with drugs or
4 firearms? He said no, it doesn't. And those
5 were his duties. And he never called it in.
6 Well, that may be a jury question.

7 Your Honor, I would submit if it's false,
8 we don't have a problem with it at all. If you
9 want to say there's a privilege, I could tell
10 you everything is going to rise and fall the
11 same.

12 THE COURT: Well, let's see.

13 MR. BAUGH: But I've not seen the defendant
14 meet its burden, the burden of proving to this
15 point that it was -- I was waiting for them to
16 ask Mr. Schnupp the requisite question, but they
17 didn't for some reason. I assume it was an
18 oversight.

19 THE COURT: Did you understand, Mr.
20 Benedetti, that really what the plaintiff is
21 saying is that the vehicle never stopped, it
22 never stopped?

23 MR. BENEDETTI: Right.

24 THE COURT: Because Officer Schnupp said he
25 observed something. In fact Officer Ambrozy

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2 said he observed the vehicle stop and have some
3 interaction with people off the street. The
4 gravamen of this claim by the plaintiff is that
5 that never happened.

6 MR. BENEDETTI: Right, I understand.

7 THE COURT: All right. Obviously stating
8 the obvious.

9 MR. BENEDETTI: And I disagree with the
10 conclusion reached by Mr. Baugh that that
11 settles everything in the case. If we're not
12 telling the truth, that doesn't sell it at all.

13 THE COURT: He says falsity.

14 MR. BENEDETTI: That's right. We're not
15 telling the truth. The burden, of course, is on
16 him to prove by a preponderance of evidence that
17 the statement is false, and that's a jury
18 question as to whether or not they have
19 prevailed or they have failed to prevail.

20 But the issue that the Court has to decide,
21 as the Court has mentioned several times, and
22 that is even if it's false, if no crime is
23 charged, and that's the whole case that he has
24 presented to you and that is that we have
25 accused him of a crime. And if no crime is

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2 charged, and there's no -- as I suggest, you
3 cannot use an innuendo that a crime has been
4 charged, then the case fails, because he is
5 going under the per se defamation common law
6 definition where it says accusing somebody of
7 having an incurable disease or accusing somebody
8 of having committed a crime. If we have not
9 accused him of committing a crime, then his case
10 fails.

11 And with respect to the privileged aspect
12 of it, he repeats the word over and over again.
13 It concerns a duty. But it's not only a duty,
14 but it is also an interest. If we have an
15 interest, that's all it takes. If they have an
16 interest also, then it is privileged. Then the
17 burden is on him, assuming that you grant us
18 that privilege.

19 And I submit to the Court that the evidence
20 is very clear, unrebutted, that we are entitled
21 to this privilege. He expressed an interest.
22 He spoke with his sergeant about it, Sergeant
23 said okay. He followed up, called somebody who
24 definitely had an interest in this, and
25 obviously they took action after the telephone

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2 call was made, so you know they had an interest
3 in it. That clearly, I think, un rebuttedly
4 establishes a fact that there is an interest in
5 this case. Conditional, of course, but it still
6 is an interest.

7 We take it from there and the burden is on
8 him to prove by clear and convincing evidence
9 that we knew it was false or that we acted
10 recklessly. And that only relates to the
11 privilege. That doesn't relate to the first
12 issue I've discussed, and that is whether or not
13 a crime has been charged. And I submit to the
14 Court on that basis only, on the fact that we
15 have not charged a crime, that we are entitled
16 to have this plaintiff's evidence struck.

17 THE COURT: Gentlemen, I'm going to keep
18 the motion under advisement and ask that you
19 infer, if you haven't already, on your
20 instructions. Do you have an instruction on
21 privilege?

22 MR. BENEDETTI: Oh, yes, sir.

23 MR. BAUGH: Both of us do.

24 THE COURT: I intend to give that to the
25 jury.

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2 MR. BENEDETTI: We've got instructions with
3 the privilege and without privilege.

4 THE COURT: I'm going to give them the
5 instructions with the privilege.

6 MR. BAUGH: As a matter of form, I think I
7 should object.

8 THE COURT: All right.

9 MR. BAUGH: Thank you.

10 MR. ERNEST: Your Honor, if I may, the
11 instruction for the privilege already assumes
12 that you've ruled that there is a privilege.
13 The privilege itself doesn't actually deal with
14 ascertaining whether or not the privilege
15 exists, but it's charging the jury with
16 ascertaining whether or not the privilege has
17 been abused. So the determination --

18 THE COURT: I intend to charge the jury
19 with the question on whether or not the
20 privilege has been abused.

21

22 (Discussion off the record.)

23

24 THE COURT: All right, gentlemen. I have a
25 number of instructions I guess you all agree on

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2 and there's some others that you don't agree on.
3 Is that right?

4 MR. BAUGH: Yes, sir. Perhaps the first
5 one that we disagree upon, we have offered an
6 instruction that says you are instructed -- it
7 states, almost as a judicial notice, that crimes
8 involving narcotics are felonies, what is a
9 principal in the first degree and a principal in
10 the second degree.

11 My learned opponent is going to suggest, in
12 addition to that, he wants one in there with the
13 third paragraph of 18.2-250, indicating that
14 ownership of the vehicle or the building in
15 which drugs may be recovered is no inference of
16 guilt, to which I would disagree.

17 MR. BENEDETTI: Judge, I point out to the
18 Court that's the law and it appears to me that
19 that's appropriate. Mere presence at the scene
20 does not mean a principal in the second degree.

21 THE COURT: Isn't that a presumption? The
22 statute states it as a presumption.

23 MR. BENEDETTI: Yes, sir. I just asked for
24 the statute. And I want that and we have not
25 proffered it before.

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2 MR. BAUGH: Let me see. Shall not create a
3 presumption.

4 THE COURT: Gentlemen, I'm thinking that
5 perhaps it would just be appropriate to tell the
6 jury the first paragraph of the first
7 instruction Mr. Baugh gave, you are instructed
8 that the possession of cocaine --

9 MR. BAUGH: But, Your Honor --

10 THE COURT: Well, the theory here, though,
11 is that he was not possessing. But didn't the
12 report say that the cocaine was destroyed and
13 that the van was searched without turning up
14 anything and that the cocaine must have been
15 destroyed or words to that effect?

16 MR. BAUGH: Yes, sir, that is in there.
17 But the question is, we would submit, Your
18 Honor, that the concept of aiding and abetting
19 unfortunately is unknown by most of the public,
20 because they so often get in trouble. They run
21 afoul of it. Even with the facts submitted by
22 Mr. Schnupp, we would submit that there is
23 evidence of aiding and abetting and that would
24 be it.

25 Now, I'm sure that doesn't deal with the

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2 falsity issue, but it does meet the threshold of
3 he was accused of being an aider and abettor.
4 If they find he was accused of being an aider
5 and abettor, then he was accused of a crime.
6 That's a jury issue. Your Honor, we have to
7 tell them what it is.

8 MR. BENEDETTI: Well, as I pointed out, the
9 Great Coastal case says it's a legal issue as to
10 whether or not a so-called defamatory statement
11 charges commission of a crime. The state that
12 we're in right now, at least before the case
13 goes to the jury, is that we ought to be able to
14 argue that a principal in the second degree does
15 not suggest that a person who's just present at
16 the scene is aiding and abetting --

17 MR. BAUGH: I agree with that.

18 MR. BENEDETTI: -- or gives rise to the
19 presumption that constitutes a principal in the
20 second degree.

21 THE COURT: I don't know. Let me think
22 about that a moment. What else do you have that
23 you dispute?

24 MR. BAUGH: The next one we have, Your
25 Honor, we offer an instruction stating, "In

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2 determing whether the statement made by the
3 defendant is in defamatory inferences and
4 reasonable language," it's verbatim from 48.021
5 in the jury instructions. "If you believe from
6 a preponderance of the evidence that the
7 defendant spoke the words through the plaintiff
8 which from their usual construction and common
9 acceptance are construed as" -- wrong one,
10 sorry.

11 "In determining whether the statement made
12 by the defendant is defamatory, you are to
13 consider the words used in their proper context
14 and in their plain and natural meaning as other
15 people would understand them and according to
16 the sense in which they appear to have been
17 used. Defamation may be made by inference,
18 implication or insinuation by the words used if
19 such an inference, implication or insinuation is
20 a reasonable one and if a reasonable person
21 could draw it from the words used."

22 And that's from Carwile C-a-r-w-i-l-e,
23 versus Richmond Newspapers, 196 Virginia 1.

24 THE COURT: You object to this?

25 MR. BENEDETTI: I object, Your Honor.

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2 THE COURT: Why?

3 MR. BENEDETTI: (Unintelligible) that says
4 inference is not sufficient to charge my client.

5 THE COURT: What about this instruction
6 here that's in the Virginia Model Jury
7 Instructions? "A statement is defamatory if
8 people in the community understand the words in
9 it, in their normal usage, to mean that the
10 plaintiff has committed the crime"?

11 MR. BAUGH: Oh, I like that better.

12 THE COURT: Crime of whatever.

13 MR. BAUGH: If the Court would prefer that
14 one, we could get it typed up. I would prefer
15 that.

16 THE COURT: Well, you have it already. You
17 have it in so many words. You've got it in one
18 of the instructions I have, "The statement is
19 defamatory if people in the community understand
20 the words in it, in their normal usage, to mean
21 that the plaintiff has committed the crime of
22 aiding and abetting in the possession of
23 narcotics, a felony."

24 MR. BAUGH: I'll withdraw that one.

25 THE COURT: Anything else you have,

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2 Mr. Baugh?

3 MR. BAUGH: The others we have, these are
4 kind of unusual, we've agreed to disagree, Your
5 Honor. The other one was submitted by Mr.
6 Benedetti. I've never seen this before. I
7 don't know what it means exactly. Why don't you
8 read it out loud?

9 THE COURT: Oh, yes. This is a standard
10 instruction. You object to this?

11 MR. BAUGH: Yes. The "unequivocally."

12 THE COURT: You're offering this, Mr.
13 Benedetti? "When one of the persons testifies
14 unequivocally to facts within his own knowledge,
15 those statements of fact" --

16 MR. BENEDETTI: Yes, yes. We're offering
17 that.

18 THE COURT: All right.

19 MR. BAUGH: Your Honor, there's so much
20 legalese, it makes no sense.

21 THE COURT: This is Massey versus
22 Firmstone.

23 MR. BENEDETTI: That's exactly what it is.

24 THE COURT: I'll include this instruction.

25 MR. BAUGH: We'll object.

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2 THE COURT: Anything else, Mr. Benedetti?

3 MR. BAUGH: There is one other one.

4
5 (Discussion off the record.)

6
7 MR. BAUGH: Your Honor, may I approach the
8 bench, make sure you got copies of these too?

9 THE COURT: Yes.

10 MR. BAUGH: "Under certain circumstances
11 the limited privilege."

12 THE COURT: I thought we had this.

13 MR. BAUGH: I'm making sure you have it.

14 THE COURT: I think I do.

15 MR. BAUGH: And the other one here is --

16 THE COURT: Yes, I have it.

17 MR. BENEDETTI: I wanted only one of those
18 three in.

19 MR. BAUGH: Well, that's what I thought at
20 first, but the one you brought me --

21 THE COURT: Right. I got -- this isn't the
22 one you provided.

23 MR. BENEDETTI: May I see it again?

24 THE COURT: You object to Number 3?

25 MR. BENEDETTI: Yes, sir.

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2 THE COURT: Where did you get Number 3,
3 by the way?

4 MR. BAUGH: I can tell you why I want it
5 in. Maybe that would explain it.

6 THE COURT: You wanted it, but why he would
7 object to it?

8 Why do you object to Number 3? This puts
9 the burden on the plaintiff.

10 MR. BENEDETTI: No, I'll withdraw it.
11 I'll take mine back.

12 THE COURT: All right. Are we all set?

13 MR. BAUGH: I believe so.

14 THE COURT: Except for this last question
15 about the crime?

16 MR. BAUGH: Oh, yes.

17 THE COURT: Is this one you provided
18 Mr. Benedetti is the statute?

19 MR. BAUGH: That's correct, en toto.

20 MR. BENEDETTI: And --

21 THE COURT: Is this all of it?

22 MR. BENEDETTI: What I wanted to add was,
23 "It is further instructed that under Virginia
24 law, mere presence at the scene of the crime
25 does not in and of itself constitute a person

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2 as a principal in the second degree."

3 THE COURT: What is it, Mr. Ernest?

4 MR. ERNEST: May I approach the bench?

5 This is the statute. There's a little bit more
6 to it.

7 MR. BAUGH: If I might, sir?

8 THE COURT: Yes.

9 MR. BAUGH: My problem with Mr. Benedetti's
10 instruction indicates what it is not. It
11 doesn't indicate the positive of what it is.
12 He's attempting to argue with his instruction.
13 The instruction I presented indicates what is a
14 violation of the law.

15 In light of the instruction you are giving
16 about language, in the normal course of business
17 and all that sort of stuff, I would submit that
18 the Court would be bound to explain what the law
19 is, so the jury can determine whether or not the
20 language used in its fair and reasonable and
21 objective interpretation amounts to a violation
22 of that.

23 THE COURT: Well, I'm going to give them
24 both these instructions.

25 MR. BAUGH: Isn't that like cutting the

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2 baby in half?

3 THE COURT: I don't know. All right.
4 Are we ready then?

5 MR. BAUGH: Yes, sir. I had my verdict
6 form here. We gave you one.

7 THE COURT: I think you gave me one, but I
8 had one typed up on one piece of paper.
9

10 JURY IN

11 THE COURT: Ladies of the jury, if you can
12 recall back to yesterday morning, I had informed
13 you of what the procedure was. And at this
14 point in the procedure the Court will read the
15 instructions to you, the instructions on the law
16 applicable to this case. And after that you'll
17 hear from counsel by way of closing argument,
18 and after that you'll be asked to begin your
19 deliberations.

20 You are the judges of the facts, the
21 credibility of the witnesss, and the weight of
22 the evidence. You may consider the appearance
23 and manner of the witnesses on the stand, their
24 intelligence, their opportunity for knowing the
25 truth and for having observed the things about

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1 which they testified, their interest in the
2 outcome of the case, their bias, and, if any
3 have been shown, their prior inconsistent
4 statements, or whether they have knowingly
5 testified untruthfully as to any material fact
6 in the case.

7 You may not arbitrarily disregard
8 believable testimony of a witness. However,
9 after you have considered all the evidence in
10 the case, then you may accept or discard all or
11 part of the testimony of a witness as you think
12 proper.

13 You are entitled to use your common sense
14 in judging any testimony. From these things and
15 all the other circumstances of the case, you may
16 determine which witnesses are more believable
17 and weigh their testimony accordingly.

18 You must not base your verdict in any way
19 upon sympathy, guesswork or speculation. Your
20 verdict must be based solely upon the evidence
21 and instructions of the Court.

22 When a party has the burden of proving an
23 issue by the greater weight of all the evidence,
24 he must prove the evidence which you find more
25 convincing. This is sometimes called the

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1 preponderance of the evidence. The testimony of
2 one witness whom you believe can be the greater
3 weight of the evidence.

4 When one of the parties testifies
5 unequivocally to facts within his own knowledge,
6 those statements of fact and the necessary
7 inferences from them are binding upon them. He
8 cannot rely on other evidence in conflict with
9 his own testimony to strengthen his case.

10 However, you must consider his testimony as
11 a whole, and you must consider a statement made
12 in one part of his testimony in the light of any
13 explanation or clarification made elsewhere in
14 his testimony.

15 The plaintiff called the defendant as an
16 adverse witness. The plaintiff is bound by as
17 much of the defendant's testimony given as an
18 adverse witness as is clear, logical,
19 reasonable, and uncontradicted.

20 The plaintiff is not bound by any of the
21 defendant's testimony given as an adverse
22 witness that conflicts with any of the other
23 evidence in the case.

24 During the trial, evidence was introduced
25 that the plaintiff had previously made a

1 statement and/or given testimony that was
2 consistent with his testimony at this trial.
3 The only purpose for which that evidence was
4 admitted was its bearing on the witness's
5 credibility. It is not proof that what the
6 witness may have said earlier is true.

7 Your verdict must be based on the facts as
8 you find them and on the law contained in all of
9 these instructions. The issues in this case
10 are:

11 (1) Did the defendant make the following
12 statement or implied its contents, quote: "that
13 [an ARA] van, license LKA-792, with our driver,
14 Andre L. Smith, was seen at 3:25 p.m. at a high
15 profile drug area on 900 North 26th Street. He
16 was observed pulling up to that location and a
17 passenger got out of passenger side, went up to
18 this location, gave people something and
19 received something in return. Then this person
20 known as Robert B. Ragin, Jr. got back in the
21 van and they drove by the officer," close quote.

22 (2) If he did, was it heard by someone
23 other than the plaintiff?

24 (3) Is the statement about the plaintiff?

25 (4) Is the statement defamatory?

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1 (5) Did Officer Mark Schnupp make the
2 statement knowing it was false or so recklessly
3 as to amount to a willful disregard of the
4 truth?

5 On these issues the plaintiff has the
6 burden of proof.

7 (6) Is the statement substantially true?

8 On this issue the defendant has the burden
9 of proof.

10 (7) If the plaintiff is entitled to
11 recover, what is the amount of his damages?

12 On this issue the plaintiff has the burden
13 of proof.

14 Your instructions on these issues must be
15 governed by the instructions that follow.

16 The defendant claims that the alleged
17 defamatory statement was substantially true.
18 Truth is a defense to an action for defamation.
19 If the statement was substantially true, then
20 the plaintiff cannot prevail.

21 A statement is defamatory if people in the
22 community understand the words in it, in their
23 normal usage, to mean that the plaintiff has
24 committed the crime of aiding and abetting in
25 the possession of narcotics, a felony.

1 It is unlawful for any person knowingly or
2 intentionally to possess a controlled substance
3 unless the substance was obtained directly from,
4 or pursuant to, a valid prescription or order of
5 a practitioner while acting in the course of his
6 professional practice, or except as otherwise
7 authorized by the Drug Control Act.

8 Upon the prosecution of a person for a
9 violation of this section, ownership or
10 occupancy of premises or vehicle upon or in
11 which a controlled substance was found shall not
12 create a presumption that such person either
13 knowingly or intentionally possessed such
14 controlled substance.

15 You are instructed that to possess narcotic
16 controlled substances, and cocaine is a narcotic
17 controlled substance, is a felony offense.

18 You are further instructed that a person
19 who commits a crime is a principal in the first
20 degree. A person who is present, aiding and
21 abetting, by helping in some way in the
22 commission of the crime, is a principal in the
23 second degree.

24 A principal in the second degree is subject
25 to prosecution and conviction as if he or she

1 had committed the actual offense themselves.

2 A proximate cause of an injury or damage is
3 is a cause which in natural and continuous
4 sequence produces the injury or damage. It is a
5 cause without which the injury or damage would
6 not have occurred.

7 The burden is on the plaintiff to prove by
8 the greater weight of the evidence each item of
9 damage he claims and to prove that each item was
10 caused by the defendant Officer Schnupp's
11 defamatory statements, if any. He is not
12 required to prove the exact amount of his
13 damages, but he must show sufficient facts and
14 circumstances to permit you to make a reasonable
15 estimate of each item. If the plaintiff fails
16 to do so, then he cannot recover for that item.

17 If you find that the plaintiff is entitled
18 to be compensated for his damages, and if you
19 further believe by clear and convincing evidence
20 that the defendant, Officer Mark Schnupp, made
21 the statements with actual malice; that is, he
22 knew they were false or he made them so
23 recklessly as to amount to a willful disregard
24 for the truth, then you may also award punitive
25 damages to punish a defendant for his actions

1 and to serve as an example to prevent others
2 from making such statements in the future.

3 If you award punitive damages, you must
4 state separately in your verdict the amount you
5 allow as compensatory damages and the amount you
6 allow as punitive damages.

7 If you find your verdict for the plaintiff,
8 then in determining the amount of damages to
9 which he is entitled, you may take into
10 consideration all of the circumstances
11 surrounding the statements, the occasion on
12 which they were made and the extent of their
13 publication, the nature and character of the
14 insult, the probable and natural effect upon the
15 plaintiff's personal feelings and upon his
16 standing in the community and in business.

17 Your verdict should be for an amount that
18 will fully and fairly compensate him for:

19 (1) any insult to him including any pain,
20 embarrassment, humiliation and mental suffering;

21 (2) any injury to his reputation.

22 And while there is no fixed standard for
23 measuring compensatory damages, it must bear a
24 reasonable relation to the damages sustained.

25 Under certain circumstances a person has a

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1 limited privilege to make a defamatory statement
2 about another without being liable for damages.

3 Under the circumstances of this case, the
4 defendant's statement was privileged because he
5 had an interest or duty in the subject and he
6 made the statement to another person with a
7 similar interest or duty. The defendant's
8 statement is not protected, however, if he
9 abused the privilege.

10 A privilege is abused when the plaintiff
11 proves by clear and convincing evidence that:

12 (1) The defendant knew the statement was
13 false or made it with reckless disregard of
14 whether it was false or not;

15 (2) The statement was deliberately made in
16 such a way that it was heard by persons having
17 no interest or duty in the subject of the
18 statement;

19 (3) The statement was made because of
20 hatred, ill will or a desire to hurt the
21 plaintiff rather than as a fair comment on the
22 subject.

23 You shall return your verdict for the
24 plaintiff if he has proved by clear and
25 convincing evidence that:

1 (1) The defendant made the following
2 statement or inferred the subject of the
3 following statement, quote: "that [an ARA] van,
4 license LKA-792, with our driver, Andre L.
5 Smith, was seen at 3:25 p.m. at a high profile
6 drug area on 900 North 26th Street. He was
7 observed pulling up to that location and a
8 passenger got out of passenger side, went up to
9 this location, gave people something and
10 received something in return. Then this person
11 known as Robert B. Ragin, Jr. got back in the
12 van and they drove by the officer," close quote.

13 (2) It was heard by someone other than
14 plaintiff.

15 (3) It was about the plaintiff.

16 (4) It was defamatory.

17 (5) It was made by Officer Mark Schnupp
18 knowing it was false or so reckless as to amount
19 to a willful disregard of the truth.

20 You shall find your verdict for the
21 defendant if:

22 (1) The plaintiff failed to prove any one
23 or more of the five elements above; or

24 (2) The defendant proved by the greater
25 weight of the evidence that the statement was

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1 substantially true.

2 When a party has the burden of proving an
3 issue by clear and convincing evidence, he must
4 produce evidence that creates in your mind a
5 firm belief or conviction that he has proved the
6 issue.

7 The amount sued for is not evidence in this
8 case; you should not consider it in arriving at
9 the amount of your verdict, if any.

10 MR. BAUGH: Your Honor, may I approach off
11 the record just a moment?

12
13 (Side-bar conference.)

14
15 MR. BAUGH: May it please the Court,
16 counsel, ladies, this is the part of the trial
17 which is called the closing argument. What I'm
18 about to say is not evidence. The reason I'm
19 doing this is to call your attention to those
20 things which I think are important. Mr.
21 Benedetti is going to do the same thing when
22 I'm finished.

23 In the heat of battle sometimes we hear
24 things differently, so if one of us says a
25 statement concerning the facts that you don't

1 recollect as being accurate, don't assume
2 automatically that either one of us is trying to
3 hoodwink you, because sometimes people based on
4 their perspective see and hear things
5 differently.

6 This is probably one of the most important
7 days that any of you are ever going to spend,
8 because you are now jurors and you are going to
9 pass judgment on two other human beings that you
10 have never met before in your life. In fact,
11 because of the way our system is, I've never
12 spoken to any of you, because we're not supposed
13 to speak to you. But you're going to pass
14 judgment on them. And quite candidly I will
15 tell you this case all depends on one issue, and
16 that is whether or not Mr. Schnupp saw what he
17 said he saw in the 900 block of North 26th
18 Street on August 21st. That is everything.

19 And the Court has given you some
20 instructions. On the issue of defamation, we
21 have the burden. And believe me, if I only read
22 from some of the instructions, that does not
23 mean -- they are all equally important, believe
24 me. And if I choose to emphasize some and Mr.
25 Benedetti does, that doesn't mean you can get by

1 without reading the rest of them.

2 But on Instruction 7, it indicates what
3 plaintiff has to prove, one, that this statement
4 was made; two, that if he did it, he was heard
5 by someone other than Mr. Smith. Well, we
6 already know Ms. Goss heard it, and, in fact,
7 then she passed it on to other people. Three,
8 the statement was made about the plaintiff.
9 They were talking about him. Four, that the
10 statement was defamatory.

11 The Court has already instructed you that
12 if you find that from the language of what was
13 said, reasonable people would find that he was
14 being accused of involvement in a crime, then
15 that is in fact defamatory. Did Mr. Schnupp
16 make the statement knowing it was false or so
17 recklessly as to amount to willful disregard of
18 the truth? We would submit -- you'll get to the
19 second -- the first one was if it didn't happen
20 it was false.

21 The next issue is is the statement
22 substantially true, but that is not our burden.
23 The burden for showing substantial truth sits
24 over there. The burden is on Mr. Schnupp to
25 prove that what he said he saw actually

1 occurred. And if he cannot carry that burden,
2 he has made a false statement.

3 Now, there are a number of things -- and
4 remember, we don't have a computer for this. We
5 don't have a machine, we don't give it to the
6 judge. You are the people who will determine
7 this. And unfortunately you are limited in your
8 determination as to what you heard come out of
9 the witness stand, the exhibits, and the
10 stipulations of counsel.

11 Now, what happened here? First, there's
12 another issue. And after we prove the
13 defamatory statement was made, we have to prove
14 that there were damages as a consequence of that
15 statement. And I want to tell you now right up
16 front, even if the allegation of drug
17 involvement was not a factor in this man being
18 fired, he still has damages. He just won't have
19 any damages about getting fired, but there are
20 still damages there. We would submit, in fact,
21 based on the testimony of the defendant's
22 witness, Mr. Brett Ramsey, there were a number
23 of reasons given for his termination, but we
24 wrote down the official ones. And that was his
25 testimony. And they could rise no higher than

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1 that. He said when they told me the reason he
2 was being fired, they mentioned out of his area,
3 they mentioned a passenger, they mentioned this
4 drug stuff, but we wrote down the official
5 reason.

6 I would also recall your attention to Mr.
7 Eric Bowers' testimony. Less than delicate. I
8 brought it up when he saw the document, why am I
9 being fired, he said this is B.S. The reason he
10 was fired was because of the allegation of his
11 involvement in this illegal activity. But,
12 again, there are other damages and I will
13 discuss them, but falsity is still the key.

14 Now, I also want to point this out. All of
15 this could have been avoided if Mr. Schnupp had
16 made a false statement, and we're submitting
17 that he did, and those police officers stopped
18 that vehicle and they found nothing and they
19 drove away, we wouldn't be here. If any police
20 officer had made a false statement and they had
21 driven away, we wouldn't be here. The problem
22 is that afterwards he submitted it to other
23 people, and that's why we're here. Because not
24 only did he do it, not only was it wrong, but
25 then he told other people about it. He threw

1 out an accusation that was false and he knew it.

2 Now, the testimony that we have, one, Mr.
3 Schnupp said I saw -- well, there's a question.
4 Cindy Goss says, and I wrote it down, he saw the
5 ARA vehicle stop, he saw the passenger get out,
6 go over to some people, he said make a
7 transaction, get back in the vehicle and drive
8 away.

9 Now, we also have this other report which
10 is given as an explanation which you all have
11 not seen yet. "On August 21, '92, members of
12 the Richmond Bureau of Police were conducting a
13 surveillance in the 900 block of North 26th
14 Street. A subject was identified as the target
15 of a surveillance, paren, this subject was
16 dealing crack cocaine, close paren.

17 "At approximately 1531 hours, 3:31 p.m., an
18 ARA Services van entered the surveillance area
19 and stopped in the 900 block. The van had two
20 occupants, both black males, and was bearing
21 license plates LKA-792. The target of the
22 surveillance approached the passenger of the van
23 and exchanged cocaine for money. The van then
24 left the area. All the information was relayed
25 to a takedown unit which stopped the vehicle in

1 the area of 25th and Venable Streets. Upon
2 searching the occupants of the vehicle for the
3 cocaine, it was determined that the cocaine was
4 destroyed prior to the officers making the stop.

5 "All of these events occurred north of the
6 James River in an area that is now an active
7 drug spot. If any further information is
8 needed, please don't hesitate to call the strike
9 force office at," and they give the phone number
10 for the strike force office.

11 Now, both witnesses said this statement was
12 given to amplify or explain the telephone call.
13 We would submit it is also false. Mr. Schnupp
14 says that is what happened.

15 Now, who has corroborated? Mr. Ambrozy was
16 brought in to corroborate, but Mr. Ambrozy said
17 I didn't see any of this transaction. He said I
18 saw the car stop, but, one, for some reason Mr.
19 Ambrozy, he said, I saw several people, in fact
20 he said more than one person, approach the
21 vehicle.

22 Then, no, that was the wrong answer. He
23 came back and said, well, it could have been
24 one, I can't tell. Well, when police officers
25 don't know the answer, they always say, "I

1 didn't see it." But, of course, we came back
2 and eventually it was that he saw several people
3 approach the driver, go around to the
4 passenger's side and stay over there and
5 something. And he, for some other reason,
6 walked away.

7 Now, he said the reason he walked away was
8 because his target was doing something else.
9 You might ask yourself, how can you know this
10 target over here is doing something else if
11 you're watching this one over here? And
12 further, if you know something's happening here,
13 why do you walk away? But the bottom line is he
14 says the vehicle stopped. Mr. Ambrozy does, Mr.
15 Schnupp does. Everything else Mr. Schnupp says
16 is uncorroborated.

17 Now, let's go on further. Logical. I
18 started off in education as a physics major.
19 I believe in research. I believe in the
20 (untelligible) which is the research theory.
21 Whenever there are multiple explanations for
22 something, the simplest one is normally the
23 truth.

24 Now, we know from the witnesses and
25 according to that report, after this alleged

1 drug deal went by, that vehicle went down to the
2 end and made about one block before it was
3 pulled over. According to this it was pulled
4 over at 25th and Venable Streets.

5 Now, if Mr. Ragin did have drugs and he
6 didn't know that he was being followed, why
7 would he get up and go through between the seats
8 in the back of the van and take this one little
9 rock of drugs and put it somewhere? He didn't
10 know anyone was following him. Why would he do
11 that?

12 Now, we heard testimony that someone said
13 he was eating something, but all the police
14 officers said, "I never said that. I didn't see
15 it." So I would submit the drugs were never
16 there. And if the drugs were not there, then
17 when Mr. Schnupp said he saw Mr. Ragin pull the
18 rock of cocaine out, that could not have
19 happened. He said, I saw him take it and I saw
20 him give money for it. And then, assuming it's
21 still in his hand, they drove away. Well, if
22 they did that, where is it? Well, he could have
23 hidden it in the back. Did he have time to get
24 up, go into the back of the van while it's
25 moving a block away -- that's as far as they

1 got -- and do this? I would submit that is
2 incredible.

3 Further, let's look at something else.
4 We have two men according to the testimony,
5 Mr. Ragin and Mr. Smith, who have not been in
6 trouble with the law. This man over here is a
7 military veteran, 16 years. He knows he's
8 subject to periodic drug screens. Further, more
9 important, Eric Bowers testified to it, and Mr.
10 Ragin, his wife, he's going home. He is on his
11 way home to work on the ugly truck. Is he going
12 to take drugs to that house? Oh, it's okay,
13 Robert, bring your crack on over to my house and
14 smoke it. No. Is that credible? I would
15 submit that is incredible.

16 Further, as Mr. Schnupp pointed out, there
17 are many places in the city where you can buy
18 drugs. He also said many places in Church Hill
19 you can buy drugs. Does Mr. Smith drive his
20 friend, Mr. Ragin, does he help him get drugs at
21 one of these other places? No. He goes to the
22 neighborhood where he was raised for some 20
23 some years, and all the winos on the corner know
24 him and people sit there and know him. He goes
25 to where he is known in his company truck with

1 his company uniform on to buy drugs in front of
2 people he knows when there are places all over
3 the city you can go. There are places on
4 Southside. He didn't come over and do it.
5 Is that credible?

6 I would submit that unless they can answer
7 that question, they have not met their burden of
8 showing truth. Why on August the 21st would
9 this man decide today I'll stop being a law
10 abiding citizen. Oh, well, you can always
11 argue, well, he's been doing this in the past.
12 The guy's a military veteran, active, meaning
13 he's in the Reserves, periodic drug screenings,
14 always subject to them. He's an E-5. He's got
15 a job, he comes home, he works, he pays his
16 bills. This is not the conduct of a drug dealer
17 or a drug user or someone who would even -- he
18 tells his children. His wife said he's worried
19 about that. He educates his children about the
20 problem with drugs. Is that credible?

21 Do you believe Mr. Schnupp when he says on
22 that day this man decided to give all that up to
23 help Mr. Ragin and take him over to his house
24 with the drugs? I would submit no. Is it
25 possible that Mr. Schnupp thought, I bet the

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1 people in that car have something illegal. I
2 think I'll try and stop them. And if they find
3 something, then we'll arrest them. And if they
4 don't, we'll let them go. That's illegal. But
5 we wouldn't be here today. But they didn't find
6 anything.

7 So then Mr. Schnupp says, well, I then
8 thought, well, you know, that truck might be
9 stolen. That's right, the guy could be driving
10 around in an ARA truck with an ARA uniform. Oh,
11 I didn't see he had an ARA uniform, even though
12 that's ARA right here. He said he looked right
13 through the driver's window. It's written right
14 here on his chest. I didn't notice that.
15 Remember that? He was trained to notice people
16 so he can testify later about who they are. And
17 he didn't know whether he was going to go to
18 court, so he would have been watching so he
19 could identify them. "I didn't notice the ARA
20 uniform. I didn't notice that." He said, "I
21 didn't see that."

22 So now the question is did it happen? Have
23 they met their burden? The answer is no. But
24 that wasn't bad enough, then he turns around and
25 tells people. He says, "Well, I thought the van

1 was stolen." And then after all this was over,
2 I asked the other officers, you know, that van
3 might be stolen. Well, did you pick up your
4 radio and call and say is this vehicle stolen?
5 Well, no. Just because something's not listed
6 stolen doesn't mean it's not stolen.

7 But that's a good place to start, don't you
8 think? I mean you always don't know if the
9 grocery store has pickled peppers, but you go
10 there to start your look, don't you? Well, if
11 you think a car is stolen, you call. Well,
12 maybe it was stolen that day and until 5:00
13 nobody knows it's stolen. Did he call in after
14 5:00? No. In fact since that day, almost a
15 year and some months ago, he still hasn't taken
16 time to contact to see if that vehicle was
17 stolen. And I would submit to you the whole
18 reason for calling this in about missing a
19 stolen car or unauthorized use -- that's a bad
20 word. It is not worthy of belief. That is
21 something he made up. And I guess it's nice --
22 lawyers, Southern lawyers, we have a tendency to
23 want to say nice things, but there's no better
24 way to say this. That's the obligation, all
25 right?

1 Now, credibility of the witnesses. The
2 Court says you are the judges of the facts, the
3 credibility of the witnesses, the weight of the
4 evidence. You may consider the appearance and
5 the manner of the witnesses on the stand, their
6 intelligence, their opportunity for knowing the
7 truth and having observed the things about which
8 they testify, their interest in the outcome of
9 the case and their bias.

10 Let's talk about the interest in the
11 outcome of the case. We are going to ask you
12 for monetary damages. That's our interest in
13 this case. And he wants to be vindicated.

14 Now, let's look at the demeanor of the
15 witnesses. I have children. And two things you
16 can tell about children when they're getting
17 ready to tell you a false statement, one is they
18 repeat the question. Now, Mr. Williams did
19 that. My youngest daughter is Catherine.
20 "Catherine, did you eat the cookies?" "Did I
21 eat the cookies?" Whatever comes after this
22 is just -- she's a charming child. I love her
23 dearly. But that's true. That's what Officer
24 Williams did on several occasions. At one point
25 actually I asked him, is there an echo in here?

1 Remember that one? I was calling your
2 attention. Be careful of that. Anyone who has
3 children knows this.

4 Another one I've noticed is what I call the
5 foul movement. Doctors are very good at this.
6 Whenever you ask them a question and they know
7 the answer, they kind of throw up words on you.
8 Anytime you can't answer a question without
9 giving a long explanation, something's funny.
10 Sometimes you give an answer and then you'd say,
11 "Yes, but." But no, these questions were
12 carefully set up. "Based upon the information,
13 did you pass this information on?" "Predicated
14 upon the information that was related to me by
15 my brother officers who were in the field and I
16 was not present at the time, based on what they
17 told me, I said this." That's double talk.

18 Now, compare that to Mr. Ragin who's not a
19 party to the lawsuit, who I notice is so
20 disinterested he's not even still sitting here.
21 Because you want to know who's disinterested,
22 right? Is Mr. Ragin interested in the outcome
23 of this case? No. He'll call his friend and
24 ask later. But is he still here? Does he have
25 to sit over here, hopefully not on company time,

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1 to find out what happens in this case? No. And
2 compare Mr. Ragin's manner and demeanor in
3 recollecting what happened. "No, we did not
4 stop. No, I was" -- the police officers, look
5 at them.

6 Now, you won't get the transcript. But if
7 you can think back, I want you to do this. Did
8 any police officer ever admit to witnessing
9 something that another police officer did? "Was
10 he searched?" "I did not search him, I cannot
11 say." "Was he pulled out of the car?" "I
12 didn't take him out of the car, I can't say."

13 This man got up and said, "I was searched
14 on one side of the car by Mr. Williams." Mr.
15 Williams said, "I don't recall. I didn't do
16 it." Then he was brought around and searched
17 again. And remember, we're talking the side of
18 the van. He's there, Mr. Ragin's there, Mr.
19 English is there, Mr. Williams is there, Mr.
20 Kurisky is there. They're all standing within
21 six feet of each other. "No, no. I searched
22 the guy who's not suing anybody." "Well, who
23 searched him?" "I don't know if anyone searched
24 him. I don't know. I don't know."

25 Now, we know the occupants were searched,

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1 because it says here the occupants were
2 searched. And it says here the occupants were
3 searched. Now, maybe they would like to believe
4 Mr. Smith was searching himself. But isn't it
5 amazing. When you assess credibility, how come
6 no one -- and I'll tell you why. Because if you
7 say something soft that you didn't do yourself,
8 you might contradict someone. And if you limit
9 yourself to what you did and everybody else
10 limits themselves to what they did, there will
11 never be a contradiction. And when it came to
12 Officers Williams and Kurisky and English, there
13 were no contradictions. None. So much for the
14 credibility of the witnesses.

15 If you find that this statement was made
16 knowing it to be false and that it alluded or if
17 it said in words that are reasonable and you
18 could understand that this man participated in a
19 knowing manner in the commission of a felony
20 crime, that is defamation.

21 Now, they have said, "Oh, well, he's a
22 police officer. He has a privilege." One, I
23 would submit that his privilege, if he has one,
24 the Court has ruled communication by the police
25 officer about an issue in which he has interest

1 to another person with that interest is
2 privileged unless it's false. Well, if it's
3 false we don't have to worry about the
4 privilege. Mr. Smith wins. Period.

5 But also while you're at it, if there is a
6 privilege, did Mr. Schnupp -- Mr. Schnupp said,
7 I'm interested in knowing was that vehicle
8 stolen. Did he submit information beyond what
9 was necessary? Did he say, was your vehicle
10 stolen? No. Was Andre Smith supposed to be
11 driving it? Yes. Was he supposed to be in that
12 area? Well, that's not his business anyway.
13 But even if he had, there was no need to discuss
14 drugs available, high profile, deal, searching.
15 There's no need to do that. So if he had a
16 privilege, he went way beyond it. Way beyond
17 it. And as a consequence of this, what
18 happened?

19 Now, did ARA do something wrong? Morally,
20 probably. But that's not the issue. The issue
21 is whether or not Mr. Schnupp put a ball into
22 motion that had a lot of damages and crushed a
23 lot of things on the way across. Period.

24 Remember, it's not bad enough that you
25 think it's defamatory or even that you say it to

1 yourself, but he published it to other people
2 who weren't there. And that's where he went
3 wrong. If they get up here and go, "Well, you
4 got to let police officers do their job." No,
5 no, no. Being a tattletale is not about being a
6 police officer. No, no, no. Investigating is.
7 Snitching is not. So you're not limiting police
8 officers.

9 If you tell police officers by your
10 verdict, look, guys, if you don't convict them
11 in court, don't be telling people they committed
12 crimes except other police officers. Don't go
13 telling your neighbors and that person's
14 neighbors I think he committed a crime. No, no.
15 That doesn't stop police work, because that's
16 not what they're in. They're not the tattler
17 magazine. They're police officers. They do
18 work they just can't talk about. I believe the
19 word used was impression or something to that
20 effect. I've forgotten what he said, but he
21 tried to take it back. But you can't take it
22 back. So the statement he made was false.

23 Now comes the really hard part. By the
24 way, if they can get up here and convince you
25 it's the truth, hey, we lose. If they can

1 convince you that this man decided that day that
2 he was going to drive around and help his friend
3 Mr. Ragin get some drugs, hey, we lose. Fine.
4 It's wrong, but that's fine.

5 Now, if we do prove, however, that that's a
6 false statement, if they can't prove it's not,
7 if they can't prove it's the truth, then comes a
8 really hard problem. If this was an automobile
9 accident, you could look at medical bills and
10 tell what the damages are. But no. In this
11 case you have to put a dollar figure on the
12 value of a person's reputation. You have to put
13 a dollar figure on what is it worth to walk into
14 the place where you work and be heard? What's
15 it worth to be trusted? Because after this
16 statement was made, he wasn't. Every moment he
17 had put into that work, all the time he had
18 spent with those people, was gone.

19 What is it like to want to tell somebody
20 what happened, and they said, "We don't want to
21 hear it. We don't want to hear it. You just
22 sign the paper saying you're being fired for
23 having somebody in your vehicle and you can go
24 your way." "I'm not going to sign it, because
25 that's not the reason." I know that's not the

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1 reason, and Mr. Ramsey told you that wasn't the
2 reason. That was not the reason.

3 So you're going to have to put a value on
4 it. You're going to have to put a value on in
5 this case what was it worth to sit back with
6 your wife at night and think about moving to a
7 bigger house and being in a safer neighborhood
8 and sending your kids to other schools and
9 raising your family. Sit around and talk about
10 that. You can see it. You know it's out there,
11 the light at the end of the tunnel. You know
12 you're going to get there. And then it's gone.

13 What's it worth to come home and help your
14 daughter with her homework? What's that worth?
15 What's it worth to spend time with your
16 children? Because that day is not going to
17 happen again. What's it worth not being able to
18 see your children Monday through Friday? And I
19 know. Those are significant damages.

20 What's it like to feel frustration? What
21 is it like to feel panic if you've never felt it
22 before? "This month because of my situation we
23 can't pay our bills. And we probably won't be
24 able to pay them until I get a job." Even
25 though we're not into this macho stuff, I'm the

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1 man, I'm the provider, we know his income was a
2 valuable impact on these people, his wife and
3 his three children. We know that. And that's
4 gone. And that's important. And that's very
5 important.

6 Now, I'll tell you this and this is going
7 to be hard. People don't like this. If this
8 had been done by some millionaire instead of a
9 police officer who makes \$28,000 a year, I mean
10 if you get hit by a poor person, if you get hit
11 by a rich person, his damages are the same no
12 matter who does it to him. So when you set
13 compensatory damages, when you set a dollar
14 figure on pain, humiliation, embarrassment, when
15 you set the figure on that, you should set the
16 figure based on what he suffered, not on their
17 ability to pay. Don't worry about it.

18 Now, on the issue of punitive damages,
19 damages to punish, those should be predicated on
20 Mr. Schnupp's ability to pay only. And I would
21 submit to you that his damages are significant.
22 And he should be compensated for them.

23 Remember this. Compensation. Interesting
24 word. A lot of people think of a lawsuit like
25 hitting a lottery, but it's not because the

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1 purpose of this is to compensate, to make whole,
2 to fix, all right? I don't believe in arguing
3 figures, but I'll tell you this. As far as
4 compensation, if you find that they cannot prove
5 that that statement was the truth when it was
6 made, if you find that they haven't met their
7 burden of showing truth, to compensate him, you
8 have to give him enough money so when he thinks
9 back on that he won't think, "That was the day
10 that my co-workers told me I was no longer
11 worthy of trust."

12 Remember, they escorted him from the
13 building like some thief. You have to
14 compensate him so when he thinks back, he won't
15 think back, "My God, during those three months I
16 couldn't pay the bills. And I remember how
17 scared I was."

18 You should give so much money that when he
19 thinks back to August the 21st, 1992 he thinks,
20 "That was the day those guys stopped me. But,
21 you know, that was the day I bought my wife the
22 house. That's right. That was the day that I
23 knew the education of my children was
24 guaranteed." I want you to award so much money
25 that it wipes out, it corrects the feelings that

1 were created by that day. And that's what
2 recompense is about.

3 What is the price of a good house? What's
4 the price of a college education for three
5 daughters? That is what you ought to be
6 thinking about. And remember this. Even though
7 today is the only day this will be heard in
8 court, this is it. It will never be heard
9 again. This issue will be resolved today.

10 He still only sees his children on
11 weekends. He still lives in the same house he
12 was trying to sell and buy another one. His
13 wife still has to work, because he's not making
14 as much money as he was making, and he doesn't
15 have enough seniority to even get a decent
16 shift. So while this case may be over today and
17 Mr. Schnupp may go home back to wearing his
18 fatigues and being whatever he is, Rambo or
19 whatever, he still suffers.

20 Now, is that hitting the lottery? No.
21 That's called just trying your best to put
22 things back the way they should be. And I would
23 submit to you that is not unreasonable. And
24 remember, you're not going to be concerned with
25 whether or not he can pay. You just award the

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1 damages. You just award enough money to correct
2 that.

3 Now, I admit, if you don't like the way I
4 try cases, by the way, you can see me afterwards
5 and kick me. However, this person has been
6 injured, and injured by that man. Now, I don't
7 know and I don't have to prove his motives.
8 There's a question of was it ill will. Well, if
9 it's false, it's ill will. If it's a lie, it's
10 ill will. Was it done for the purpose of
11 hurting him? Well, he said he was checking to
12 see if the car was stolen. We know that's -- he
13 went way beyond that. Now, unless he's just
14 gratuitous -- "and did you take time to think
15 this might have negative impact on this man?"
16 "Nope. Nope. I didn't care. Nope. Didn't
17 think about it. Who's he?"

18 Punitive damages. I hope you award
19 punitive damages in this case. I know that with
20 Mr. Schnupp's salary you can't award that much
21 in punitive damages. But I'll tell you one
22 thing. I hope you award so many punitive
23 damages that it makes the newspaper tomorrow.
24 And I hope it makes the newspaper in such a way
25 that it tells people that police officers

1 believe allegations when they have suspicions,
2 because we give them more credibility than most
3 people. And we do. It's like when you entrust
4 something to somebody and they embezzle it.
5 That's wrong.

6 I want you to tell him, look, guys, if you
7 do that, if you make a mistake, live with it.
8 And don't go telling people's lawyers. You
9 don't tell other people the consequence that
10 this is a serious accusation and you don't couch
11 it in terms like "upon searching the occupants
12 and the vehicle for the cocaine, it was
13 determined that the cocaine was destroyed prior
14 to the officers making the stop." That's not
15 conjecture. That is a definitive, laid out,
16 flat out statement. That says coke was in that
17 vehicle, the occupants had it, and someone
18 destroyed it.

19 I hope you give enough punitive damages to
20 stop that, so that doesn't happen again. And
21 believe me, giving it to employers is not
22 necessary to make a conviction. Giving it to
23 employers is not necessary to make an arrest.
24 Giving it to employers is not necessary to
25 stopping drugs or making cases. That's not

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1 necessary. That's just added petty stuff. Why?
2 I don't know. Maybe he wanted to be on the
3 strike force. I don't know what his reason was.

4 Now, my client is entitled to seven jurors.
5 Not six of you. I'm talking a total of seven.
6 Seven individuals. I'll tell you this, ladies.
7 I know it's late and I know you have places to
8 be. So do I. Everybody does. But this is an
9 important case and there will probably be an
10 important decision and important damages. Don't
11 give in because you're tired. You should talk.
12 But if you think someone's bringing something in
13 that jury room that didn't come out of this
14 courtroom, you hang the jury up. We'll try it
15 again. I don't mind. I'll just try it again.

16 This is the most important day probably in
17 this man's life. Probably the most important
18 day of his life. Mr. Benedetti is going to get
19 up here, because he gets to talk next. And I
20 get to go last, because we're the plaintiffs.
21 And I know he's going to talk about how hard the
22 work is of being a police officer, but there's
23 nothing in a police officer's job about being
24 defamatory. There's nothing in a police
25 officer's job as to whether or not that person

1 was taking a nap on company time. That's not
2 about being a police officer.

3 I know that Mr. Benedetti is probably going
4 to tell you that all police officers are heroes.
5 But you know something? A hero is not somebody
6 who straps on a gun and goes down the street. A
7 hero is someone who commits to someone and cares
8 for them all those 16 years. A hero is someone
9 who says I am the father of these children and I
10 will raise them and I will help them and I will
11 study with them and I will care for them. A
12 hero is someone who goes to work every day and
13 works for an hourly wage to support his family.
14 He doesn't take from the government. He
15 supports his family. He does what a husband is
16 supposed to do.

17 I don't think there's anything that Mr.
18 Schnupp does that comes anywhere near that level
19 of heroism. I wish there were more people -- we
20 need more people like Mr. Smith. We don't need
21 more people who do the things that Mr. Schnupp
22 does.

23 There are a lot of instructions here. Read
24 them all. And I've cut to the chase. But don't
25 take my word for it. Read them. But when you

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1 read them, you're going to find out the burden
2 of determining whether or not did Mark Schnupp
3 make the statement knowing it was false or so
4 recklessly as to amount to a willful disregard
5 for the truth. On these issues the plaintiff
6 has the -- oh, is the statement substantially
7 true. On this the defendant has the burden of
8 proof. Is the statement substantially true.

9 If you want to come back and say, Mr.
10 Smith, I know that on August 21st you decided to
11 give up everything that you have obviously been
12 laboring for to help your friend take some drugs
13 to your house, it is going to be difficult. And
14 I know you have been very attentive and you have
15 taken it with the seriousness with which it has
16 been offered. There is probably nothing more
17 important. You have been very conscientious.
18 You and I know you have other commitments other
19 than this case. You have listened to my
20 ravings. You have listened to the evidence.
21 I saw you reacting to every word. I hope that
22 you will continue to give that same degree of
23 attention and that you will give it to Mr.
24 Benedetti during his closing.

25 I am convinced that at the closure of all

1 the argument, you will go back and you will find
2 for Mr. Andre Smith. You will say, Mr. Schnupp,
3 you have not met your burden of showing that
4 what you said was true. And you will award
5 damages of a magnitude such that will compensate
6 Mr. Smith for the pain and the anxiety and the
7 humiliation and the fear that he suffers. And
8 that, further, you will award punitive damages
9 to a degree that it will send a warning to other
10 people that you cannot just throw accusations
11 out there and not care where they hit or hope
12 you can take them back. Thank you.

13 MR. BENEDETTI: Ladies of the jury, comes
14 my chance now to say a few words, one of the
15 last things Mr. Baugh said. Now, I confess
16 there is a great temptation to try to respond to
17 everything he said, but I'm not going to do that
18 except on one or two things. I will say it in a
19 very soft voice and a very persuasive voice, I
20 would ask that probably this is the most
21 important day in this man's life.

22 Well, I'm asking, though, what about the
23 suit that he's got against Officer Williams?
24 What about the suit he's got against Officer
25 Kurisky? And what about the suit that he's got

1 against Officer English? And what about the
2 suit that he says he's contemplating against
3 ARA?

4 MR. BAUGH: Your Honor, I hesitate to
5 rise, but I will. There is no testimony he was
6 contemplating. In fact I believe the testimony
7 is he is not. I'm going to take exception with
8 anyone deviating from the record.

9 MR. BENEDETTI: Well, perhaps I'm wrong.
10 When I was questioning earlier, I heard a voice
11 behind me saying that that suit would be taken
12 care of.

13 This case, I suppose, puzzles me from the
14 very beginning, because perhaps you heard me say
15 from the time we impaneled the jury, some
16 members of the jury said they instinctively
17 would have no reason to disbelieve a police
18 officer. I guess I'm from that school. You
19 know, when I grew up I was taught that police
20 officers were my friends and that I should rely
21 on them, because they were there to protect me.
22 And that's exactly what a police officer does.
23 They're commonly described as the thin blue
24 line.

25 And on this particular day in time it takes

1 a whole lot of courage and it really takes
2 people who are heroic to be a police officer,
3 because when you go into the street today, not
4 unlike other days, but today especially, you put
5 your life on the line. And the reason you do
6 that is because they're trying to protect the
7 public. And they're trying to protect me and
8 you and everybody else in the city of Richmond
9 that falls within their jurisdiction. It's a
10 tough job.

11 And to imagine that somebody who is a
12 member of this strike force would get into a
13 surveillance position and then radio that a
14 particular van went by them, ought to be stopped
15 and checked for drugs without any basis for
16 saying that, just violates everything that I
17 have heard or I ever knew about police officers.

18 Is there a reason why he would have done
19 something like this? I can't think of a reason.
20 He doesn't know Andre Smith. He has never
21 spoken to Andre Smith. He does not know Robert
22 Ragin. He has never spoken to Robert Ragin.

23 You're not only pointing the finger at Mark
24 Schnupp, but you're also pointing the finger at
25 Mark Ambrozy who was there with him who saw the

1 van stopped. He doesn't really know what
2 happened there, because he stated that he was up
3 there in the window, and the van was in the
4 middle of the block so he was looking at the
5 back of the van. You can't see through the back
6 of a van. That's why he was unable to see what
7 was going on around there. But the key is that
8 the van stopped and somebody approached the van
9 from the passenger side. Those are the
10 uncontradicted facts.

11 But let's talk about what the
12 uncontradicted facts are otherwise. And that is
13 that Officer Schnupp was a city of Richmond
14 police officer working in the strike force, that
15 he was located in a surveillance position on
16 August 21st, 1992. He went to a location in the
17 900 block of North 26th Street that he knew very
18 well, that he observed certain activity on the
19 street. And that as a result of what he saw he
20 called the strike force and ordered a takedown.
21 All of that is uncontradicted. And from there
22 it's uncontradicted that he made a telephone
23 call. Andre Smith doesn't know what was said.
24 The only people that know what was said are Mark
25 Schnupp and Cindy Goss.

1 But what really is significant, because as
2 Mr. Baugh pointed out to you several times he
3 published it, what is significant is not
4 necessarily what he said but rather what was
5 heard. And what was heard is what Cindy Goss
6 wrote on that piece of paper, and that is what
7 is in this instruction. You haven't seen this
8 yet, but you'll get a chance to see it and read
9 it. And it goes into some detail about what she
10 did after she had this call.

11 As I pointed out when I was questioning,
12 this piece of paper says that they stopped the
13 van and found nothing. Well, it doesn't say
14 that exactly. It says "to find nothing." They
15 searched the van, they searched the occupants to
16 find nothing. If Mark Schnupp was accusing
17 Andre Smith of a crime, he would not have said
18 "to find nothing." And that's what he said on
19 the 21st day of August 1992. That is the basis,
20 as you will see from these instructions, for the
21 allegation that defamation has occurred.

22 He pointed out to you in his argument, I'm
23 sure you remember that I was upset, because --
24 well, not upset. But I was battling, because
25 the written statement came in, because he makes

1 a whole lot of the fact they said that drugs
2 were destroyed. But that is after the fact,
3 because on the 21st day the statement orally was
4 made to Cindy Goss. On the 24th day, the Monday
5 following, Andre Smith was terminated.

6 On the 25th day, the day after Andre Smith
7 was terminated, Cindy Goss called and spoke --
8 well, perhaps Cindy Goss. Somebody from ARA
9 called and spoke to Mark Schnupp and said they
10 would like to have something in writing for
11 their file. He spoke to Sergeant Bennett. And
12 you will see when you see that so-called
13 investigative report that it is dated on the
14 25th, the day after Andre Smith was terminated,
15 and it was put in the mail. So the earliest it
16 could have been received by ARA was the
17 following day, which is the 26th, and that's two
18 days after Andre Smith has been terminated. So
19 you are limited to determining whether or not
20 this statement is a defamatory statement.

21 Now, let me suggest to you that Mr. Baugh
22 has not told you everything when he said that if
23 you believe that statement is false, then we
24 win, speaking of himself. That's not true.
25 That's not true, you see, because we have to be

1 under the law in a position where my client has
2 charged Andre Smith with the commission of a
3 crime. And he argues that we have shown by this
4 statement that he was aiding and abetting the
5 commission of a crime.

6 But if you look at this statement -- and
7 you'll read it in the instructions -- if you
8 look at this statement also, it's in the
9 handwriting of Cindy Goss, what we said was that
10 the vehicle stopped and a passenger got out and
11 exchanged something and got back in the van and
12 they drove away. He didn't say what they
13 exchanged. It could have been, for all Cindy
14 Goss would know, it could have been that
15 somebody was paying off a gambling debt or
16 somebody was playing the numbers or somebody was
17 buying a stolen watch, or somebody was doing
18 something other than what he said that we have
19 accused him of. And that is the possession of
20 cocaine.

21 In other words, if you agree with me that
22 we did not accuse this man of a crime -- as a
23 matter of fact, Mark Schnupp, the first time
24 that he was on the stand, he was called as a
25 witness for the plaintiff although he was called

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1 as an adverse witness, said, "I never intended
2 to do anything to this guy. I never said he did
3 anything wrong." And he repeated it two or
4 three times today. "I've never accused Andre
5 Smith of doing a thing. It was the passenger."

6 And if you look at the note that D.C.
7 Williams wrote at the time that Mark Schnupp
8 picked up the radio and made the call to take
9 the ARA vehicle down, he said the passenger in
10 the vehicle. And that's written clearly on that
11 sheet of paper at 3:31 on the afternoon of
12 August 21st, 1992.

13 Mr. Baugh read to you, "You are the judges
14 of the facts and the credibility of the
15 witnesses" and so on. And he read you the part
16 up to where it includes the bias, if any has
17 been shown. The part that he didn't read to you
18 is their prior inconsistent statements, or
19 whether they knowingly testified untruthfully to
20 any material fact in this case. The prior
21 inconsistent statements aspect of that comes
22 into play in this case.

23 You saw me offer a tape recording of Andre
24 Smith's voice when he was making his complaint
25 after he had been terminated that Robert Ragin

1 was not in the van on that same morning. Before
2 he was terminated, or as he was terminated, he
3 said Robert Ragin was not in the van.

4 Now, why do you suppose he said that?
5 Well, there are a couple of reasons he could
6 have said it. One, because he knew that he was
7 not supposed to have unauthorized persons who
8 were not ARA employees in the van, and that
9 could cause him to be disciplined or terminated.
10 Obviously he had already been terminated, so
11 that was the net result of that. He admitted
12 that he was getting a haircut and he was on
13 personal business.

14 But there also could be another reason, and
15 that is that Robert Ragin was in fact dealing
16 drugs. And he wanted to remove himself as far
17 as possible from Robert Ragin. I don't know
18 whether that's true or not. But why would he
19 say immediately after he found out that there
20 was to be some activity or some result of the
21 conduct on Friday that he would have said that
22 Robert Ragin was not in the van? "Nobody came
23 in that van. Nobody was near that van. I saw
24 him on the street." Why would he say that?

25 He made a couple other inferences,

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1 inconsistent statements too. I tried very hard
2 to get him to tell me what the difference was in
3 the guidelines for drivers of ARA between what
4 he had signed and what I showed him. And this
5 was the document I showed him when I took his
6 deposition. And he told me during the
7 deposition, well, it was a little bit different.
8 But the only difference was there was nothing
9 said about discharge. In other words,
10 termination. And that was the only difference.
11 And that document says very clearly, passengers
12 that are not ARA employees are unauthorized
13 passengers. No personal use of the vehicle.

14 He also told you that it was after 4:00.
15 Well, D.C. Williams disagrees with that. He
16 says it's 1531. If you look on that note, that
17 is an exhibit in this case, and that's D.C.
18 Williams' writing at the top of it. Down below
19 it says 4:00. And then they discuss this lady
20 with the pink blouse on that was found. That's
21 at 4:00 and this was after the stop of the ARA
22 van. That's a little inconsistent with what
23 Andre Smith has told us.

24 Also he says, and I guess he was partially
25 backed up by the fellow he worked for at ARA at

1 the time, that when he used to drive a truck on
2 service calls, he used to get off early when he
3 finished his work. That's not what Ann Ball
4 said. I think Ann Ball is probably more
5 knowledgeable about what goes on at ARA than
6 anybody else. She's the manager.

7 You saw her on the stand. I think she was
8 very affirmative in the way she presented
9 herself. I think she was very knowledgeable in
10 what she was talking about. I don't think,
11 despite Mr. Baugh's efforts to shake her story,
12 that he was able to do that. If there is a
13 witness who is not directly associated with this
14 case, who has no bias or interest in this case,
15 certainly it's her. And there are other
16 employees who have no bias, who have no interest
17 in this case.

18 I suppose you can say that the police
19 officers, being in their fraternity of police
20 officers or combination of fraternity/sorority
21 of police officers, would be supportive of their
22 own. But you could say just the same for Robert
23 Ragin who has known Andre Smith for many, many
24 years. I found the fact that he had testimony
25 that he hadn't discussed this case with Andre

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1 Smith since the day it happened, although he
2 said that he went to his house a couple times a
3 week, most especially to work on what Mr. Baugh
4 has called the ugly truck. So they spent a lot
5 of time together, so I would expect quite a few
6 discussions occurred about this suit.

7 I didn't ask him if he had read Andre
8 Smith's deposition before he testified in the
9 deposition that he gave to me, or if he read it
10 before he came here. I don't have any idea
11 whether he read it or not and I'm not sure
12 there's any real significance in whether or not
13 you read a deposition. But I think if the
14 police officers can testify in this case they
15 have any interest or bias because of their
16 relationship to Mark Schnupp, certainly there is
17 the same kind of interest and bias existing in
18 Robert Ragin.

19 I know this has been a long case for you.
20 I know that you're tired of listening to all of
21 this, but I do have a few more remarks I want to
22 make and this is basically in response.

23 I want to talk to you a little bit, just a
24 little bit, about the law. And that is Mr.
25 Baugh said anything that he and I might state to

1 you at this point of the case, just like we said
2 in opening statements, is not evidence. And if
3 it didn't happen the way you heard it, don't
4 blame us. It's just in the heat of battle
5 sometimes things are overlooked. Well, people
6 do not hear things exactly the same way. I'm
7 sure at some time in your life you played the
8 game where you pass something on, you make a
9 statement to a person, and by the time it gets
10 to the other end of the line it's an entirely
11 different story.

12 He said that we accused Andre Smith of
13 being involved in a crime. The fact is we did
14 not accuse him of being involved in a crime.
15 The only suggestion is that a crime was
16 committed by the passenger. And you'll see from
17 reading the instructions, and this is a verbatim
18 quote from the law of Virginia, that the fact
19 that you own or you occupy a vehicle and there
20 is contraband there, it raises no presumption
21 that you have possession of it, unless you
22 incite or encourage or help. And there's
23 absolutely no evidence.

24 The evidence is that the target walked up
25 to Andre Smith and then left Andre Smith after

1 some words which could not be distinguished were
2 exchanged. I don't know what the words were.
3 They could have been, "Not me. I've been 16
4 years in the military. I'm still in the Guard.
5 I get periodically checked. I'm not touching
6 that stuff." I don't know what he said, but is
7 it logical that he said that? Maybe he said, "I
8 haven't got ten bucks." I don't know whether he
9 said that.

10 But whatever he said, he left Andre Smith's
11 side and went to the passenger. That is not
12 accusing Andre Smith of committing a crime. As
13 a matter of fact, that's absolving him of
14 committing a crime, because he refused for
15 whatever reason to get involved in the drug
16 transaction.

17 I certainly need to comment on his
18 statement that police officers when they're
19 caught always say "I didn't see it." I don't
20 believe that. I hope you don't believe that
21 either.

22 He says the holes in the back of the van,
23 that Robert Ragin somehow got in the back of the
24 van while it was in motion and took the crack
25 cocaine and put it in those holes in the van.

1 The evidence is that that lining or whatever
2 went in the back of the van all the way up to
3 where the passenger and the driver sat. So if
4 someone came along and flashed their lights
5 behind you and you had something in your hand
6 that might cause you to get in trouble with the
7 authorities, very simple to reach out and put it
8 in the hole and drop it. Nobody could ever get
9 to it. Officer English said several times it's
10 a very difficult place to search with many
11 places to hide that they could not get to.

12 He says Officer Schnupp made up this story
13 why he called after all of this took place,
14 after Andre Smith objected and filed a lawsuit.
15 I disagree with that. The story does make
16 sense. Sergeant Bennett, 24 years on the police
17 force, says it's not unusual in a situation like
18 this. Not only that, but Officer Schnupp came
19 to him and said, "I'm not satisfied with whether
20 or not those people had the authority to be
21 where they were using that van. Check it out."
22 He said sure. Nothing unusual about that. He
23 picked up the phone.

24 The Court has ruled that Officer Schnupp
25 was privileged to do exactly what he did. And

1 that is to make the call. Nothing wrong with
2 what he did in making the call. And why did he
3 do it? One, for the reason I said. Another, he
4 testified on the stand that when the vehicle
5 stopped a crowd gathered. The persons who were
6 in the van were allowed to leave. He wanted to
7 call ARA, because he knew very well that at some
8 point in time that they were going to know that
9 their van got stopped by the police, that their
10 van was searched. He wanted ARA to know the
11 reason why it was stopped and the reason why it
12 was searched. Does that make sense?

13 Can you imagine the telephone call? "This
14 is Officer Schnupp. I'm from the strike force
15 of the Richmond city police and I would like to
16 know whether or not you have a vehicle, license
17 LKA-792." "Yeah, that's our vehicle." "I would
18 also like to know whether or not a person by the
19 name of Andre Smith or Robert Ragin had the
20 authority to be occupying that van." "I never
21 heard of Robert Ragin, but I do know Andre
22 Smith. Why are you asking me these questions?
23 Is my driver hurt? Has there been an accident?
24 Is he at fault in something happening? Why are
25 you calling me asking me these questions?" "I'm

1 calling you and asking these questions, because
2 I was on a drug stakeout in a high crime area."

3 And both Mr. Ragin and Mr. Smith will tell
4 you that Church Hill is just a hotbed of drug
5 dealing. I hope that's not true. I know it's
6 not true all over Church Hill, but it certainly
7 is true in this particular block. "Your van was
8 in a high drug crime area and your guy got out
9 and exchanged something with somebody and they
10 drove away. And I called the dispatcher." And
11 that's what she wrote down. And they stopped
12 the vehicle and searched it and found nothing.
13 The guy was let go. That's why he called.

14 He asked Mark Schnupp, did you take time to
15 think of what may happen to Smith before you
16 made this call? And the answer was no, he said.
17 "No, I didn't take time to think of it." If he
18 is like what Mr. Baugh says he's like, and that
19 is he's lying through his teeth and making this
20 statement, then of course he did consider it.
21 He's blaming him now for saying no, I didn't
22 concern myself with what might happen to Andre
23 Smith. But he says he's lying through his
24 teeth. And obviously he did care what happened,
25 if you take his theory of what happened to Andre

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1 Smith, that he lost his job and wasn't able to
2 buy a house and whatever it is that he wants to
3 do.

4 I want you to read the instruction that
5 says if you believe that the statements that
6 were made -- and that's the statements printed
7 here and that's part of Cindy Goss's written
8 words. And I keep repeating that and I
9 apologize. But if you believe they're true,
10 the case is over. We won.

11 In addition to that, if you don't believe
12 that Mark Schnupp charged Andre Smith with the
13 crime, and I told you what the elements of the
14 crime are, I'm urging you to agree with me that
15 we charged no crime. As a matter of fact, the
16 only person we suggested that did anything wrong
17 was the guy that was in the van, Robert Ragin.
18 We never said a word about Andre Smith except
19 that he was operating the van. That's all that
20 was ever said about it.

21 And further, even if you think that the
22 words that were used are accusatory in the
23 commission of a crime, then you've got to take
24 into consideration the fact that the Court has
25 said we were privileged to make this call. And

1 even though we said something that was not true,
2 even though Mark Schnupp said something that was
3 not true, if you believe that, obviously I don't
4 believe that, then you've got to find under the
5 law that by clear and convincing evidence, and
6 that's defined in here to mean you're certain
7 about it, I mean it's just so clear to you that
8 that's clear and convincing evidence that he
9 knew it was false and that he did it recklessly.
10 And that's the law of this case.

11 You know, when I try cases I always talk
12 about the burden of proof. The burden of proof
13 must be clear and convincing with respect to the
14 situation where there's a purpose. The burden
15 is not quite the same in some other aspects, and
16 I'm sure you'll hear from Mr. Baugh on that.

17 The way I like to talk about it is it's
18 like the scales. The scales in favor of the
19 plaintiff as opposed to the defendant are this
20 way; that is, there's a greater weight on the
21 plaintiff's side. He's told you what his burden
22 was. But if they tip this way, and that is that
23 the preponderance or the weight of the evidence
24 is more in favor of the defendant, then the
25 defendant prevails. And the same is true if the

1 scales are exactly equal.

2 If you think that witnesses who testified
3 on behalf of the defendant in this case are
4 equally credible and believable as opposed to
5 the witnesses that testified on behalf of Andre
6 Smith, then you must find your verdict for the
7 defendant.

8 I call it sometimes the tree of the burden
9 of proof. It's like a tall pine tree. And you
10 cut the pine tree down and all the debris is on
11 the ground. The burden that you've got means
12 you have to pick up all that debris with the
13 exception of a very small amount, so you've got
14 the majority of it up. And that is, I suppose,
15 not a very clever example of what burden is all
16 about.

17 As Mr. Baugh suggested to you, this is my
18 only opportunity to address you. He now gets
19 the opportunity to rebut what I have said to
20 you. But I ask you, and I know it's burdensome,
21 but especially look at the instructions that
22 have to deal with the burden of proof.
23 Instructions that talk about what this statutory
24 law in Virginia is, and that is as I've stated
25 before. The fact that somebody's present at a

1 crime, unless they're aiding and assisting, and
2 that has got to be by positive evidence, then
3 they are not guilty of the crime of being a
4 principal in the second degree.

5 And read the finding, the so-called finding
6 instruction which says "if you find." And read
7 the instruction that has to do with -- and
8 you'll see it, that says "where there is a
9 privilege." And as I've told you, because of
10 the interest that we had in the investigation
11 and the interest that ARA had in knowing where
12 their van was.

13 MR. BAUGH: Read all of them. I agree with
14 Mr. Benedetti's argument with the scales. Even
15 we lose -- but take the scales. Was it a false
16 statement? One, Mr. Ragin's statement. Boom.
17 This man testified. Boom. No drugs were found
18 in the vehicle. Boom.

19 I notice that Mr. Benedetti never came over
20 to this typewritten note. Never mentioned that.
21 Is that evidence? Yes. Look at all the things.
22 Look at this man's reputation. All of those
23 things are things you can put on Mr. Smith's
24 side.

25 And what do you have on the other side?

1 Mr. Schnupp's statement and Mr. Ambrozy's
2 statement that "I saw some of it. I saw the car
3 stop, but I don't know if anyone came up to it."
4 No.

5 In case you don't know, by the way, aiding
6 and abetting, if someone says, "I've just killed
7 someone, can you give me a ride," you're
8 committing a crime if you get away. If someone
9 says, "I want to get some dope, would you pull
10 over here," you've committed a crime. That's
11 aiding and abetting. That's helping. And
12 that's what they're saying happened here.

13 Oh, look. I agree, but this thing about
14 all police officers are great and you should
15 believe everything they say? No. That is not
16 what a democracy is about. I think you ought
17 to -- I think we ought to love everybody. But
18 love is not blindly following everything they
19 say.

20 There's nothing wrong with questioning.
21 And if you question someone and it comes up
22 short, you're not being wrong to not believe
23 them. If they just give you a bunch of garbage
24 when they answer your questions, they're not
25 worthy of belief. And you already swore that

1 when you took this you wouldn't have a
2 preconceived notion about police officers. So
3 if Mr. Benedetti's argument is I have not
4 overcome your prejudice in favor of police
5 officers, then you have cheated. You're not
6 supposed to have a prejudice about police
7 officers telling the truth. You're not supposed
8 to do that, even though they appeal to you.

9 Oh, yes. If the man knew that Robert Ragin
10 had bought drugs and they got that close to
11 getting caught, would he feel happy that he
12 didn't get caught? Yes. Would he go home and
13 say, boy, I dodged a bullet today? Yes. Would
14 he do it again? No. He sued the policeman who
15 did it. Did he just forget about it and say,
16 boy, I sure was lucky? No. He didn't forget
17 it, because he was wronged. And if he wasn't
18 wronged, why is he here?

19 Possession of drugs carries ten years.
20 Aiding and abetting carries ten years. Why is
21 he here? Because he was wronged. And he's
22 proud. Did he run? No. Did he say I'm lucky?
23 No. He fought it. Does he have a job now?
24 Yes, he has a job now. Is it inconvenient?
25 Yes. All that. But it's not like going to

1 prison. But he still fights.

2 Oh, something else. This is more of an
3 issue. "Did you read any depositions to check
4 and make sure the stories match?" "No." He was
5 asked, "Did you see Ms. Goss's notes?" "No."
6 The trick is to keep your witnesses clean. You
7 don't want them sullied by other witnesses'
8 statements.

9 He hasn't seen this yet. He said that.
10 He's credible. And what he says happened comes
11 pretty close to this, like this bit down here
12 about got stopped and they searched the
13 occupants and searched the van. He said that
14 happened. Of course, we don't know who searched
15 them.

16 Now, of course, I know that no one put
17 those transcripts out there. They just happened
18 to drop there and he happened to read them. But
19 you can believe him, because he hasn't checked
20 his story against other people's stories.

21 I'm jumping through this, but it's so
22 important. "Ma'am, do you have an ARA van?"
23 "Yes, I do." "Does Andre Smith work for you?"
24 "Yes, he does. Why? What's wrong?" "We're
25 doing a record check. We're checking to see if

1 the vehicle was stolen."

2 Has anyone mentioned anything about drugs?
3 Has anyone -- that wasn't necessary. It wasn't
4 necessary. "We saw it with a passenger at
5 3:30." Is there an accusation about drugs? No.
6 Would we be here? No. That's all he was
7 allowed to do. He didn't do that. If he has a
8 privilege, he must confine himself. He doesn't
9 have a privilege to make up stuff. He doesn't
10 have a privilege to accuse somebody of things
11 that weren't germane to the investigation.

12 Ladies, you read all of these. I submit
13 that when you weigh the evidence objectively --
14 and if you haven't overcome the prejudice,
15 you're cheating. You're not supposed to do
16 that. But when you keep the prejudice off and
17 you assess these people based on the evidence --
18 the evidence -- you will find for Mr. Smith and
19 you will award compensatory damages. I don't
20 know how much -- 100,000, 200,000. I don't
21 know. I don't know what it takes. Yeah, I do.
22 But I know it's a whole lot of money.

23 If you want to send them to a good school,
24 what does it cost these days to go -- 100,000,
25 150,000? Good. Award it. Because that is what

1 he jeopardized. That is what he decided wasn't
2 worth being concerned about. He just took it
3 and played with it. He didn't care. That's
4 what he jeopardized that day.

5 Now, of course, this guy goes out and does
6 all these job interviews and gets another job.
7 But it's hard finding another job.

8 And punitive damages? Look. I want by
9 your verdict that tomorrow police officers all
10 over the city know, one, to respect me you don't
11 have to do everything that I tell you to do and
12 you don't have to believe I'm supreme. This is
13 a democracy. And I represent Andre. He's not
14 some big powerful lawyer. He's not some hotshot
15 cop with a big badge and a gun. He's an
16 ordinary blue collar worker who feels as though
17 he has been wronged. And in your eyes he should
18 be no less than any other citizen of our
19 country.

20 I hope that you go back there and I hope
21 that you -- not like he says. Oh, yeah, just
22 cut the baby in half. I don't know what
23 happened here and I'm just going to let it go
24 back the way it was. But this won't go back to
25 the way it was. He still can't spend the time

1 with his children that he wants.

2 No, don't take the easy way out. When you
3 go back there, you're supposed to hurt. This is
4 part of being a citizen. You're supposed to
5 hurt. You have to make difficult decisions.
6 And if you make a difficult decision, if you
7 suppress the prejudice, you look at the evidence
8 and if you come back with a verdict, if it's
9 against us, if you object to it based on the
10 evidence, that's fine.

11 But, ladies, I would submit that if you
12 look at the evidence and you do what has to be
13 done and you find, one, that that statement was
14 false; and two, that this man has been defamed;
15 and three, when the officer did that, he did it
16 either with intent to injure him or he didn't
17 care -- and I know he didn't care, because he
18 said he didn't care. He can't get around that
19 one. He said, I didn't think about it. Then
20 you award punitive damages.

21 And then lastly, I swear it's the last one,
22 Mr. Benedetti pointed out very calmly and very
23 correctly that I spoke to you when I accused
24 this man of making a false statement in a very
25 calm and convincing voice and therefore he

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1 cannot be trusted. I am telling you now loudly
2 that that man made a false statement and injured
3 that man. And the validity of that issue does
4 not change because I raise my voice or because I
5 drop my voice and get serious.

6 Look at the facts. And on the facts you
7 will find for Andre Smith. Thank you.

8 THE COURT: Ladies of the jury, it's now
9 time for you to begin your deliberations. You
10 will have with you in the jury room the
11 instructions that were read to you previously.
12 You'll have all the exhibits that were entered
13 into evidence in the case. And, thirdly, you'll
14 have a verdict sheet, a sheet of paper on which
15 you are to indicate your verdict.

16 The first thing you ought to do, once you
17 assemble back there in the jury room, is to
18 choose a person who will act as your forelady.
19 This individual will more or less chair the
20 meeting and guide you in the discussion of the
21 issues as you find them. Your verdict must be
22 unanimous. You must all agree on the outcome.

23 With that, thank you, ladies. I ask you
24 now to step out of the jury box and into the
25 jury room.

1 JURY OUT

2 THE COURT: I wrote in at the top part of
3 the verdict sheet these words, "We also award
4 blank dollars as punitive damages."

5 MR. BAUGH: Could I see it, please?

6 THE COURT: I have no objection to giving
7 the jury the two verdict forms that were given
8 to me originally, one for the plaintiff, one for
9 the defendant.

10 MR. BAUGH: Your Honor, can we just take
11 time to type this -- I mean I can type it, if
12 that's what it takes.

13 THE COURT: Well, let's do this. I'll send
14 them in the two.

15 MR. BENEDETTI: That's what I would prefer.
16 Separate pieces of paper.

17 THE COURT: The only thing I will do is put
18 the case number on.

19
20 JURY IN

21 THE COURT: Ladies, I understand you have
22 a question?

23 MS. PROCIDA: We had a question about
24 compensatory damages and punitive damages. And
25 I believe that Mr. Baugh stated that we were to

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1 consider the salary of the officer on one of the
2 damages, and we're not sure as to which one he
3 stated that.

4 THE COURT: Ladies, step back in the jury
5 room a moment, please.
6

7 JURY OUT

8 THE COURT: What is your reaction to that
9 question?

10 MR. BAUGH: Your Honor, I believe that the
11 jury is supposed to consider the person's
12 ability to pay in considering punitive damages.

13 THE COURT: Mr. Benedetti, any comment?

14 MR. BENEDETTI: I agree with that.

15 THE COURT: I don't know if there's any
16 evidence about ability to pay anything.

17 MR. BAUGH: Well, it came out at the end of
18 something.

19 THE COURT: Well, I think he testified his
20 salary was \$28,000. That's all I recall. But
21 what his balance sheet is or whether he was
22 independently wealthy or anything of that
23 nature, I don't recall there being any evidence
24 about that.

25 But the question was what did that go to,

1 JURY OUT

2 whether that went to compensatory damages or
3 punitive damages, that is to what element of
4 damage did that relate to.

5 MR. BAUGH: Your Honor, as I understand it,
6 based upon the instructions, compensatory
7 damages are to be predicated upon what my
8 client's loss would be, and punitive damages are
9 predicated upon what the defendant's ability to
10 pay would be. Compensatory damages are set by
11 whatever he was injured, the amount. But
12 punitive damages should not be --

13 THE COURT: Well, but the way she framed
14 the question was to what did that relate. To
15 what damages --

16 MR. BAUGH: The ability to pay --

17 THE COURT: Category of damages.

18 MR. BAUGH: -- should be assessed -- or
19 inability to pay should be assessed in
20 determining punitive damages.

21 MR. BENEDETTI: I don't think that's the
22 instruction. I think they ought to follow the
23 instruction and I don't think they should be
24 instructed further.

25 THE COURT: Well, my problem is I don't

1 JURY OUT

2 know if there's enough here for them to decide
3 on ability to pay punitive damages. I mean all
4 we have is the gross salary. That's all I
5 recall, but there's nothing --

6 MR. BAUGH: I believe he also indicated he
7 had no, you know --

8 THE COURT: Who, Mr. Schnupp?

9 MR. BAUGH: Mr. Schnupp did not.

10 THE COURT: Well, gentlemen, I'm going to
11 tell them that they have to follow the Court's
12 instructions. I can't relate it to any evidence
13 or single anything out. Indeed, there's nothing
14 there in my opinion to be singled out.

15
16 JURY IN

17 THE COURT: Ladies, all I can tell you in
18 answer to that question is that you will have
19 to recall the evidence as best you can
20 collectively, and determine and decide the case
21 based on the evidence as you find it from the
22 instructions that have been provided to you.

23 MS. PROCIDA: Thank you.

24
25 JURY OUT

(Brief recess.)

JURY IN

THE COURT: Ladies of the jury, have you reached a verdict?

MS. PROCIDA: Yes, sir, we have.

THE COURT: I see you have some papers in your hand. If you would be kind enough to stand and read the verdict.

MS. PROCIDA: I certainly will. "We, the jury, on the issues joined, render a verdict in favor of the plaintiff, Andre L. Smith, and award him damages as follows. Compensatory damages in the amount of 200,000. Punitive damages in the amount of 100,000."

THE COURT: All right. Thank you.

Are there any motions before the jury is discharged?

MR. BENEDETTI: No motions from the defendant.

THE COURT: All right. Ladies, I want to thank you for your help and your attention and your patience in this case. You performed well and I appreciate your time and effort you devoted to this case. It's been longer than expected, longer than one day as predicted. But

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1 you've been very patient and helpful throughout,
2 and I appreciate that very much.

3 If any of you need any assistance to your
4 cars anywhere, let Mr. Wilkerson go out with
5 you. It's a little past 8:30. Thank you very
6 much for your service in this case and
7 throughout the month.

8
9 (Jury is excused.)

10
11 MR. BENEDETTI: I think there's a small
12 matter that we had not cleared up at the time
13 that the case was submitted to the jury. And
14 that was I understood that the Court still had
15 under advisement our motion to strike
16 plaintiff's evidence. It's useless to renew
17 that motion at this time, but I want to be
18 clear. Either the Court has to -- they ought to
19 make a decision on it.

20 We suggest to the Court that it was a
21 matter of law that the Court should decide that
22 issue as to whether a crime had been committed
23 or not. As it stands now, the record is not
24 complete in that regard.

25 But having said that, our motion, of

1 course, is to set aside the verdict on the
2 grounds that it's contrary to the law and the
3 evidence for reasons that I have previously
4 stated. And they relate, of course, to the fact
5 that there is no proof that the allegation was
6 that a crime had been committed.

7 The Court has decided that the case is a
8 case of privilege and there is not sufficient
9 evidence to show that the defendant knew that
10 the statement was false or that he recklessly
11 failed to ascertain the truth. Certainly there
12 was no basis on which to award punitive damages
13 in this case.

14 For all those reasons -- and in addition I
15 move that the Court set aside the amount of the
16 compensatory damage award as being far in excess
17 of what is reasonable in this particular case
18 under the evidence in this case. And at the
19 same time, to set aside the punitive damages on
20 the grounds that -- there's certainly no hatred
21 or ill will, as the Court instructed the jury,
22 in order to award punitive damages.

23 THE COURT: Mr. Baugh?

24 MR. BAUGH: Very briefly, Your Honor, the
25 instructions as given by the Court, there were

1 no objections that I recollect from the defense.
2 I can tell the Court that with the instruction
3 given to the jury concerning fair interpretation
4 of the words, there is sufficient evidence to
5 support all the findings. There is sufficient
6 evidence to support the finding that by
7 interpreting those words and the meaning of
8 those words as a reasonable person would to
9 believe there was defamation.

10 Additionally, Your Honor, with the degree
11 of -- as we told the jury in opening, it's an
12 either/or situation. We can either lose or win
13 big, because there is an allegation by a police
14 officer knowing they made a false statement or
15 recklessly made a false statement. And that was
16 our position and obviously the jury has
17 concurred.

18 I would suggest that considering the
19 damages that we presented as evidenced by Mr.
20 Smith, \$200,000 is not an unreasonable, in light
21 of the evidence, figure. I would also submit
22 that \$100,000 is not an unreasonable figure,
23 considering the impact of what has happened
24 here. And we argued according to the rules the
25 punitive impact the Court charged as directed

1 by the defense.

2 And there is no instruction in those
3 instructions that there is not evidence to
4 support -- I mean every one of them, everything,
5 is there. So for those reasons, Your Honor, I
6 would ask to deny the motion.

7 THE COURT: What do you mean there's no
8 instruction?

9 MR. BAUGH: Well, what I'm saying, Your
10 Honor, is if you take the instruction of
11 interpretation of the words, I mean the facts --
12 the jury did not have to make up evidence to fit
13 with any of those instructions.

14 There is something in the record to support
15 a finding predicated on each of the instructions
16 you gave, such as interpretation, assessment of
17 damages, all of those things. There is evidence
18 in the record to support every finding they made
19 in response to your instruction.

20 They didn't have to make up anything.
21 There's nothing -- we may disagree with their
22 interpretation or how they may have interpreted
23 the facts, but you can't say that they reached
24 and did something that was not permitted under
25 the instructions. You can't say that they

1 leaped outside the record in order to conform
2 their verdict with the instructions.

3 And absent that, Your Honor, I would submit
4 there is no abuse, there is nothing improper.
5 Their motion should be denied.

6 THE COURT: All right. Mr. Benedetti,
7 anything else?

8 MR. BENEDETTI: I reiterate what I said
9 again. I think Mr. Baugh is incorrect in saying
10 that there is evidence in the record to support
11 every finding that they have made. I have
12 suggested to the Court that the crime is the key
13 to this whole thing.

14 THE COURT: The what?

15 MR. BENEDETTI: Crime. There's an
16 allegation that a crime has been committed.
17 There is no evidence in this record to support
18 any allegation that he had committed a crime.
19 All the attention of Officer Schnupp was
20 directed solely to the passenger. And we
21 suggest to the Court that the case law says that
22 you can't infer from the fact that he was a
23 participant, both under the statutory law and
24 under the case law, that you could not do that.

25 For that reason, I think that they avoided

1 the Court's instruction or didn't properly
2 interpret the instruction in making their
3 decision.

4 And again, on the aspect that there was a
5 privilege (unintelligible), if he told a lie in
6 the telephone call, and I submit that the
7 evidence is totally uncontradicted with the
8 exception of the fact that the vehicle was
9 stopped and the passenger got out and purchased
10 something or exchanged something, that is not
11 any allegation of any crime whatsoever.

12 Notwithstanding the fact that they were in a
13 high drug crime area, which is a fact that was
14 admitted by the witnesses for the plaintiff.

15 So no allegation of any wrongdoing in the
16 statement that was submitted to the ladies of
17 the jury, and therefore there was nothing to
18 support their verdict.

19 THE COURT: Gentlemen, I'm going to take
20 this motion under advisement. And I'm going to
21 ask that you both brief the issue of whether or
22 not qualified privilege has to be overcome by
23 what I understand to be actual malice, malice
24 according to New York Times versus Sullivan.
25 And specifically deal with the question whether

1 or not the evidence in this case shows that the
2 defendant made a statement that was knowingly
3 false or reckless disregard for whether it was
4 true or false. And specifically whether or not
5 he knew or entertained or was aware of its
6 falsity and made these statements anyway, which,
7 as I understand, is required under New York
8 Times versus Sullivan.

9 MR. BAUGH: Am I correct, Your Honor, we
10 are to draft these issues with all reasonable
11 inferences going to the benefit of the
12 plaintiff?

13 THE COURT: Well, at this stage, I suppose
14 that you have that benefit. And the question
15 now is a matter of law whether the evidence in
16 this case supports particularly that issue that
17 I'm concerned about.

18 As I understand it, under the New York
19 Times, in order to constitute actual malice as
20 opposed to common law malice -- common law
21 malice, by the way, is ill will, hatred or
22 whatever. You do something willfully
23 intentional. But above that, for New York Times
24 purposes, you have to be actually aware of the
25 falsity of something and go ahead and do it

1 anyway. And I don't know that that evidence is
2 present in this case.

3 I invite your reaction to it. And perhaps
4 to lead, Mr. Benedetti, you could provide a
5 memorandum in ten days. And you could respond
6 to it ten days thereafter, Mr. Baugh. And in
7 rebuttal you could provide it five days after
8 that.

9 MR. BAUGH: To make sure I understand, Your
10 Honor, you're asking whether or not we need New
11 York Times malice to prevail and whether or not
12 there is evidence in the record upon which a
13 jury could reasonably conclude that New York
14 Times malice was present in the facts of this
15 case?

16 THE COURT: That's correct.

17 MR. BAUGH: Thank you, sir.

18 THE COURT: As well as the other question
19 you raised. I'm not precluding briefing on any
20 other issues that you raised, the crime question
21 and so forth, but I'll just say that that is the
22 point I'm particularly interested in according
23 to the evidence in this case. Thank you.

24
25 (Trial concluded at 9:00 p.m.)

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1
2
3 CERTIFICATE OF COURT REPORTER
4

5 I, Debbie Bleichman, hereby certify that I,
6 having been duly sworn, was the Court Reporter in the
7 Circuit Court of the City of Richmond, Virginia, on
8 October 26, 1993, at the time of the hearing herein.

9 I further certify that the foregoing
10 transcript is a true and accurate record of the
11 testimony and other incidents of the hearing herein.

12 Given under my hand this 25th day of
13 February 1994.
14

15
16 
17 _____

18 Debbie Bleichman
19 Registered Professional Reporter
20

21 My Notary Commission expires:
22 June 30, 1997
23
24
25

INSTRUCTION NO. 1

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

*Given
under*

INSTRUCTION NO. 2

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the Court.

INSTRUCTION NO. 3

When a party has the burden of proving an issue by the greater weight of all the evidence, he must produce the evidence which you find more convincing. This is sometimes called the preponderance of the evidence. The testimony of one witness whom you believe can be the greater weight of the evidence.

*Given
under*

INSTRUCTION NO. 4

When one of the parties testifies unequivocally to facts within his own knowledge, those statements of fact and the necessary inferences from them are binding upon him. He cannot rely on other evidence in conflict with his own testimony to strengthen his case.

However, you must consider his testimony as a whole, and you must consider a statement made in one part of his testimony in the light of any explanation or clarification made elsewhere in his testimony.

INSTRUCTION NO. 5

The plaintiff called the defendant as an adverse witness. The plaintiff is bound by as much of the defendant's testimony given as an adverse witness as is clear, logical, reasonable, and uncontradicted.

The plaintiff is not bound by any of the defendant's testimony given as an adverse witness that conflicts with any of the other evidence in the case.

6
INSTRUCTION NO. _____

During the trial, evidence was introduced that the plaintiff had previously made a statement and/or given testimony that was inconsistent with his testimony at this trial. The only purpose for which that evidence was admitted was its bearing on the witness's credibility. It is not proof that what the witness may have said earlier is true.

*Given
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INSTRUCTION NO. 7

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did the defendant make the following statement or implied its contents:

"that [an ARA] van license LKA 792 with our driver Andre L. Smith was seen at 3:25 p.m. at a high profile drug area on 900 North 26th Street. He was observed pulling up to that location and a passenger got out of passenger side went up to this location gave people something and received something in return, then this person known as Robert B. Regan, Jr., got back in the van and they drove by the officer."

(2) If he did, was it heard by someone other than the plaintiff?

(3) Is the statement about the plaintiff?

(4) Is the statement defamatory?

(5) Did Officer Mark Schnupp make the statement knowing it was false or so recklessly as to amount to a willful disregard of the truth?

On these issues the plaintiff had the burden of proof.

(6) Is the statement substantially true?

On this issue the defendant has the burden of proof.

(7) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue the plaintiff has the burden of proof.

Your instructions on these issues must be governed by the instructions that follow.

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INSTRUCTION NO. 8

The defendant claims that the alleged defamatory statement was substantially true. Truth is a defense to an action for defamation. If the statement was substantially true, then the plaintiff cannot prevail.

*Given
under*

INSTRUCTION NO. 9

A statement is defamatory if people in the community understand the words in it, in their normal usage, to mean that the plaintiff has committed the crime of aiding and abetting in the possession of narcotics, a felony.

INSTRUCTION NO. 16

It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§54.1-3400 et seq.).

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

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[REDACTED]

Given
under

INSTRUCTION NO. 11

You are instructed that to possess narcotic controlled substances, and cocaine is a narcotic controlled substance, is a felony offense.

You are further instructed that a person who commits a crime is a principle in the first degree. A person who is present, aiding and abetting, by helping in some way in the commission of the crime, is a principle in the second degree.

A principle in the second degree is subject to prosecution and conviction as if he or she had committed the actual offense themselves.

INSTRUCTION NO. 12

A proximate cause of an injury or damage is a cause which in natural and continuous sequence produces the injury or damage. It is a cause without which the injury or damage would not have occurred.

INSTRUCTION NUMBER 13

The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendant Officer Mark Schnupp's defamatory statements, if any. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

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If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by clear and convincing evidence that the defendant Officer Mark Schnupp made the statements with actual malice; that is, he knew they were false or he made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for his actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

INSTRUCTION NO. 15

If you find your verdict for the plaintiff, then in determining the amount of damages to which he is entitled, you may take into consideration all of the circumstances surrounding the statements, the occasion on which they were made and the extent of their publication, the nature and character of the insult, the probable and natural effect upon the plaintiff's personal feelings and upon his standing in the community and in business.

Your verdict should be for an amount that will fully and fairly compensate him for:

- (1) any insult to him including any pain, embarrassment, humiliation and mental suffering;
- (2) any injury to his reputation; and

While there is no fixed standard for measuring compensatory damages, they must bear a reasonable relation to the damages sustained.

INSTRUCTION NO. 16

Under certain circumstances a person has a limited privilege to make a defamatory statement about another without being liable for damages.

Under the circumstances of this case, the defendant's statement was privileged because he had an interest or duty in the subject and he made the statement to another person with a similar interest or duty. The defendant's statement is not protected, however, if he abused the privilege.

A privilege is abused when the plaintiff proves by clear and convincing evidence that:

(1) the defendant know the statement was false or made it with reckless disregard of whether it was false or not; or

(2) the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or

(3) the statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.

*Given
with*

INSTRUCTION NO. 17

You shall return your verdict for the plaintiff if he has proved by clear and convincing evidence that:

(1) the defendant made the following statement or inferred the subject of the following statement:

"that [an ARA] van license LKA 792 with our driver Andre L. Smith was seen at 3:25 p.m. at a high profile drug area on 900 North 26th Street. He was observed pulling up to that location and a passenger got out of passenger side went up to this location gave people something and received something in return, then this person known as Robert B. Regan, Jr., got back in the van and they drove by the officer."

(2) it was heard by someone other than the plaintiff;
and

(3) it was about the plaintiff; and

(4) it was defamatory; and

(5) it was made by Officer Mark Schnupp knowing it was false or so reckless as to amount to a willful disregard of the truth?

You shall find your verdict for the defendant if:

(1) the plaintiff failed to prove any one or more of the 5 elements above; or

(2) the defendant proved by the greater weight of the evidence that the statement was substantially true.

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under*

INSTRUCTION NO. 18

When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he had proved the issue.

Given

INSTRUCTION NO. 19

The amount sued for is not evidence in this case; you should not consider it in arriving at the amount of your verdict, if any.

Green
united

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

ANDRE L. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Case No. 76-CL-92U03435-00
)	
MARK SCHNUPP, et al.,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION
TO SET ASIDE THE JURY VERDICT AS CONTRARY
TO THE LAW AND THE WEIGHT OF THE EVIDENCE**

COMES NOW defendant, Officer Mark Schnupp, by counsel, and, in support of his motion made the 26th day of October 1993 for the entry of an order setting aside the jury's verdict as contrary to the law and the weight of the evidence, submits the following Memorandum.

I. PRELIMINARY STATEMENT

Plaintiff Andre' L. Smith ("Smith") brought this defamation action against defendant Officer Mark Schnupp ("Schnupp") for comments allegedly made by Schnupp to Smith's employer, ARA Services ("ARA"), on August 21, 1992. The allegedly defamatory statement communicated to ARA employee Cynthia Goss ("Goss") was essentially that Schnupp had observed an ARA van bearing license plate number 792 stop in a high profile drug area in the 900 block of North 26th Street at 3:25 p.m. on August 21, 1992. According to Goss' testimony, Schnupp further stated that the passenger exited the van, approached a surveillance target, exchanged something for something in return, and got back into the van. She testified that

Schnupp added that a police "take down unit" stopped and searched the van and its occupants, found nothing, and made no arrests.

ARA terminated Smith's employment on August 24, 1992. ARA supervisors Anne Ball, Goss, and Brett Ramsey testified unequivocally that ARA terminated Smith because he had an unauthorized passenger in the van and he was off his route while still on duty. One supervisor, Eric Bowers, who was not involved in making the decision to terminate Smith, testified that he thought that the actual reason for termination was that ARA suspected Smith of participating in a drug transaction. Upon the express request of Goss, Schnupp subsequently provided a written Investigative Report dated August 25, 1992, describing the events he observed on August 21, 1992. This report was admitted into evidence over Schnupp's objection for the limited purpose of determining malice on the part of Schnupp.

Smith and his passenger, Robert Ragin ("Ragin"), testified that the van never stopped in the 900 block of North 26th Street and that the police take down unit stopped and searched them at 4:00 or 4:15 p.m. Schnupp and Officer Mark Ambrosy ("Ambrosy"), who was conducting surveillance from the same location, testified that the van did stop and that one of the surveillance targets approached the vehicle. Schnupp, Ambrosy, and all three of the police officers participating in the take down unit testified that

the time was approximately 3:30 p.m.¹

Based on this evidence, the jury returned a verdict in favor of Smith in the amount of \$200,000 in compensatory damages and \$100,000 in punitive damages. Schnupp's counsel moved to set aside the verdict as contrary to the law and against the weight of the evidence for the following reasons: (1) The statement made by Schnupp on August 21, 1992 did not impute the commission of a crime and therefore could not be defamatory per se; (2) there was insufficient evidence of New York Times malice to establish grounds for the award of compensatory and punitive damages; (3) there was insufficient evidence of common law malice so as to overcome the qualified privilege which attached to Schnupp's statement; and (4) the award of \$200,000 in compensatory damages was clearly excessive, unsubstantiated by the evidence, and not the result of fair and impartial deliberations.

II. ARGUMENT

- A. AS A MATTER OF LAW, THE STATEMENT SUBMITTED TO THE JURY DOES NOT IMPUTE THE CRIME OF POSSESSION OF A NARCOTIC OR PRINCIPAL IN THE SECOND DEGREE TO POSSESSION OF A NARCOTIC, AND INNUENDO CANNOT PROPERLY EXTEND THE MEANING.

Smith's theory of recovery is that Schnupp falsely accused

¹ The testimony of the police officers, which was consistent with statements and notes made by some of them at the time of the incident, is inherently more credible on this point. Smith and Ragin would naturally prefer the time to have been after 4:00 p.m., which is when Smith would have been off duty and not subject to discipline for being off his route during work hours. The officers did not know when Smith was scheduled to be through for the day and, therefore, would have no incentive to place the events prior to or at 3:30 p.m.

Smith of the commission of a crime. Such an accusation constitutes defamation per se.² However, the determination of whether the alleged statement charges the commission of a crime is a question of law:

In determining whether alleged defamatory words input a crime involving moral turpitude, so as to be actionable per se, the trial court must make a determination characterizing the imputed crime as a matter of law. In so doing, the court's ruling is similar to that which must be made to characterize misdemeanors for the purposes of impeachment. We do not agree with Great Coastal's contention that the determination whether the imputed crime involved moral turpitude should be left to the jury's determination.

Great Coastal v. Ellington, 230 Va. 142, 148 (1985).

When Schnupp telephoned ARA, he reportedly stated in pertinent part: "[A] passenger got out of passenger side went up to this location gave people something and received something in return . . . a police officer stopped the van at 3:30 p.m. and proceeded to search van and occupants to find nothing they then were let off with a warning. . . ." Plaintiff's Exhibit No. 1. The fact that the van was stopped by "a police officer" might cause one to believe that the "something" exchanged for money was thought to be illegal contraband. And, since Schnupp had previously related to Goss that he was a Drug and Vice Officer and that the ARA van was

² At common law, defamatory words which are actionable per se include: (i) those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. Great Coastal v. Ellington, 230 Va. 142 (1985).

seen in a high profile drug area, one might infer that "something" was a veiled reference to illegal drugs. Nonetheless, Schnupp told Goss that "nothing" was revealed by the search, and the driver and passenger were "let off" with a warning.

On its face, the statement in its entirety clearly cannot reasonably be said to have imputed a criminal offense to Smith. At most, the only reasonable interpretation of the statement is that Schnupp suspected some illegal act took place when the passenger "received something in return," but that Schnupp may have been mistaken since nothing was found. More importantly, the statement related to conduct on the part of Smith's passenger, not Smith himself.

Smith contends that the meaning of Schnupp's statement can be expanded, by innuendo, to impute commission of a crime. Innuendo is an inference or implication drawn from circumstances beyond the language of the statement itself. Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 7 (1954).

In Virginia, a charge which is not defamatory on its face may, but only under limited circumstances, may be determined to be so through innuendo. See Carwile, 196 Va. at 7-8; Moss v. Harwood, 102 Va. 386, 389-90 (1904). However, usage of innuendo in defamation cases has been strictly limited. Specifically, an innuendo "can not introduce new matter[s], nor extend the meaning of the words used, or make that certain which is in fact uncertain." Carwile, 196 Va. at 8 (citing Guide Pub. Co. v. Futrell, 175 Va. 77, 7 S.E.2d 133 (1940); Payne v. Tancil, 98 Va.

262, 35 S.E. 725 (1900); Moseley v. Moss, 6 Gratt. (47 Va.) 534 (1850)).

The case of Moss v. Harwood, 102 Va. 386 (1904), is the precedent most applicable to the present case. In Moss, the plaintiff ("Harwood") was the chief of police and the defendant ("Moss") was the mayor of Newport News, Virginia. It was undisputed that Moss made a statement, characterized in the Motion for Judgment as follows:

Your complainant [Moss] charges that the said chief of police [Harwood] has within the last past twelve months collected certain fines of Officer Padgett, which fines do not appear by the records of the police court to have been reported.

Id. at 387. Harwood brought suit alleging that Moss' statement was defamatory per se on two grounds: (1) it charged Harwood with the crime of embezzlement, and (2) it tended to injure Harwood's reputation by imputing unfitness to perform duties. The Virginia Supreme Court held that the trial court should have sustained Moss' demurrer and dismissed the claim with respect to the imputation of the crime of embezzlement.

In support of its ruling, the Court first quoted the extensive language of the embezzlement statute, which included specific provisions for public officers and requisite elements of intent. After comparing the language of the statute with the language of the alleged defamation, the Court held that the use of innuendo was not appropriate because "the language employed, construed in its

plain and popular sense, does not impute the crime of larceny or embezzlement to the plaintiff." Id. at 389. The Court went on to explain the limited use of innuendo in determining whether language imputes the commission of a criminal offense:

The words themselves imputing an infamous offence, the innuendo may be rejected as surplusage But if the words do not impute such infamous crime by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover; and, as he cannot enlarge that meaning by an innuendo so as to let in proof of extraneous facts, his action must fail.

Id. at 390 (citing Payne v. Tancil, 98 Va. 262, 35 S.E. 725 (1900); Moseley v. Moss, 6 Gratt. (47 Va.) 534 (1850)).

While the Court held that the allegedly defamatory language fell short of the imputation of a crime and could not be enlarged by innuendo, the opinion did not restrict the use of innuendo with respect to the imputation of a breach of official duty, which was Harwood's second theory of defamation. The Court stated that in the latter context, the innuendo was "operating within the scope of its legitimate functions" Id. at 302. The Court's distinction between the two theories of recovery was based on the degree of objectivity: Imputing breach of an official duty and injury to reputation is less objective, and thus more affected by innuendo, than imputing a criminal offense defined by precise statutory language. If all elements of the crime do not appear in the allegedly defamatory statement, innuendo cannot be used to fill in the gaps.

As in Moss v. Harwood, when one compares the language set forth in Jury Instruction Nos. 7 and 17, as used in its plain and popular sense, with the language of the Code describing the crime of unlawful possession and the law describing principal in the second degree, the statement clearly fails to impute commission of a crime. The referenced criminal offenses are described as follows:

Possession of controlled substances unlawful.
-- A. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

Code of Virginia, as amended, sec. 18.2-250(A) (1950) (emphasis added); accord Jury Instruction No. 10.

A principal in the second degree is one who is not only present at a crime's commission, but one who also commits some overt act, such as inciting, encouraging, advising, or assisting in intent. . . . Mere presence during the commission of a crime and subsequent flight do not constitute sufficient evidence to convict a person as a principal in the second degree.

Moehring v. Commonwealth, 223 Va. 564, 567 (1982) (citations omitted) (emphasis added).

Schnupp's statement on August 21, 1992, falls far short of imputing the elements of either criminal offense with respect to Smith. The statement describes only the actions of the passenger of the van in engaging in some type of suspicious activity, but not Smith. Also, Schnupp never stated that Smith knowingly or intentionally participated in the commission of a crime, or otherwise incited, encouraged, advised, or assisted in the commission of a crime. Schnupp stated only that Smith was present in the vehicle. However, occupancy of a vehicle and mere presence at the scene of a crime are expressly exempted by the law describing possession of a narcotic and principal in the second degree as having no dispositive weight in determining guilt.

Schnupp never stated nor even suggested to Goss that Smith himself purchased drugs, knew that the passenger was purchasing drugs, drove into the 900 block of North 26th Street and stopped the van in order to enable the passenger to purchase drugs, or in any way encouraged the passenger to purchase drugs. Construed in its plain and popular sense, the language simply does not impute the commission of a crime by Smith. Accordingly, this Court must set aside the jury verdict as contrary to law and the evidence.³

³ To the extent this Court continues to have defendant's motion to strike under advisement, it should sustain that motion at this time based on the argument set forth herein.

B. THE AWARD OF COMPENSATORY AND PUNITIVE DAMAGES SHOULD BE SET ASIDE BECAUSE THE EVIDENCE DOES NOT SUPPORT A JURY FINDING, BY CLEAR AND CONVINCING EVIDENCE, THAT SCHNUPP MADE A DEFAMATORY STATEMENT WITH KNOWLEDGE OF FALSITY OR SO RECKLESSLY AS TO AMOUNT TO A WILFUL DISREGARD OF THE TRUTH.

The evidentiary standards required for the jury to award compensatory and punitive damages in this case are identical. Smith had to prove by clear and convincing evidence that Schnupp made the alleged statement on August 21, 1992, with knowledge of falsity or so recklessly as to amount to a wilful disregard of the truth. See Jury Instruction No. 17 (liability for defamation); Jury Instruction No. 14 (punitive damages). This standard of proof is known as New York Times malice, and, in Virginia, it applies to private plaintiffs suing non-media defendants for defamation. See Great Coastal Express, 230 Va. at 151-52 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

Where the evidence is insufficient to establish New York Times malice, the trial court should, as a matter of law, set aside the award of comensatory and punitive damages. See, e.g., Richmond Newspapers v. Lipscomb, 234 Va. 277, 295 (1987), cert. denied, 486 U.S. 1023 (1988) (award of punitive damages reversed where the evidence was insufficient to establish that newspaper reporter recklessly or wilfully disregarded the truth, even though it was sufficient to create a factual issue of whether he was negligent in ascertaining the truth).

In the present action, the evidence regarding falsity or reckless disregard of the truth consists of the conflicting testimony of each party and one corroborating witness apiece. "Ordinarily if two witnesses equally credible testify in contradiction of each other, the evidence, in the absence of other circumstances pointing in one direction or another, is in equipoise and the plaintiff has not proved his case." Zurich Ins. Co. v. Oglesby, 217 F. Supp. 180, 183 (W.D.Va. 1963) (testimony by insurance company employee was not alone sufficient to establish by preponderance of the evidence that testimony of an unimpeached opposing witness was false). The action before this Court differs from principle set forth in Zurich in that plaintiff and his witness are less credible than defendant and his witness, and the burden of proof (clear and convincing evidence) is higher.⁴

Smith and Ragin testified that they never stopped on the 900 block of North 26th Street on August 21, 1992. However, the veracity of Smith is very much in question because on two prior occasions he lied about having Ragin in his van on the day in question. Smith told his employer and a police investigator that he did not have a passenger with him, but later admitted that he did. Furthermore, Smith has every incentive not to tell the truth in order to recover a substantial monetary award pursuant to this suit.

⁴ The jury was instructed that, in order to prove an issue by clear and convincing evidence, Smith had to produce enough evidence to create in their minds "a firm belief or conviction." Jury Instruction No. 18.

With respect to Smith's corroborating witness, Ragin admitted to being friends with Smith for 23 years. This factor alone is sufficient to establish bias on the part of Ragin. In addition, Ragin understandably would dispute Schnupp's account because it was Ragin, not Smith, who was identified as a participant in the transaction.

In contrast, no evidence appears in the record that Schnupp or his corroborating witness, Ambrosy, had any incentive to fabricate the incident as described by them. Both agree that the ARA van stopped in the 900 block of North 26th Street and that a surveillance target approached the van, then went around to the passenger side. Neither officer was ever impeached regarding his veracity.

The jury's verdict is unquestionably against the weight of the evidence, especially since the burden of proof is by clear and convincing evidence. If the burden were simply by greater weight of the evidence, Smith might be heard to argue that the jury could reasonably stretch to accept Smith's version of the facts. However, the more demanding burden of proof, when combined with the essentially unchallenged veracity of Schnupp, demonstrates a total disregard of the evidence by the jury. This Court must therefore set aside the verdict as contrary to the weight of the evidence.

C. THE EVIDENCE DOES NOT SUPPORT A JURY FINDING
THAT SCHNUPP LOST THE PROTECTION OF HIS
QUALIFIED PRIVILEGE.

It is well established in Virginia that a qualified privilege

can be overcome only by clear and convincing evidence that the defendant published a defamatory statement with "common-law malice." Oberbroeckling v. Lyle, 234 Va. 373, 379 (1987); Great Coastal Express, 230 Va. at 154. Both of the cited cases state that "New York Times malice is merely one of the several elements of common-law malice." Great Coastal, 234 Va. at 154. Accordingly, a party loses his qualified privilege upon a showing by clear and convincing evidence that he made a defamatory statement with knowledge of falsity or so recklessly as to amount to a wilful disregard of the truth. New York Times v. Sullivan, 376 U.S. 254 (1964). Other elements of common-law malice include statements that are unnecessarily insulting, language that is stronger or more violent than necessary under the circumstances, and statements made for the purpose of gratifying some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure. Great Coastal, 234 Va. at 153; accord Virginia Model Jury Instruction No. 37.050. Clear and convincing evidence of any of these elements of common-law malice would likewise result in the loss of a qualified privilege.

In the present action, the jury was instructed only on three possible ways to find malice sufficient to defeat Schnupp's qualified privilege:

- (1) the defendant knew the statement was false or made it with reckless disregard of whether it was false or not [which is New York Times malice]; or

- (2) the statement was deliberately made in such a way that it was heard or read by persons having no interest or duty in the subject of the statement; or
- (3) the statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.

Jury Instruction No. 16.

Smith has not proved by clear and convincing evidence any of these incidents of common law malice. First, for the reasons stated at length in the preceding section, the record does not support a finding of New York Times malice. Second, there is no evidence that the statement identified in Jury Instruction Nos. 7 and 17 was heard by anyone other than Goss of ARA and the three police officers of the take down unit working with Schnupp. This Court has already determined as a matter of law in establishing the existence of Schnupp's qualified privilege that all of these individuals had an interest or duty in the subject matter. Finally, there is no evidence whatsoever that Schnupp harbored ill will, desired to hurt, or otherwise hated Smith, either personally or as a member of a particular class. The only evidence approaching any type of ill will was testimony by Smith and Ragin alleging that one of the take down unit police officers made fun of him working for a vending company.

Without sufficient evidence in the record, the jury could not have properly found common law malice. Without proof of such malice, Schnupp's statement remains protected by the qualified

privilege. Therefore, this Court must set aside the verdict as contrary to the weight of the evidence.

D. THE AMOUNT OF COMPENSATORY DAMAGES SHOULD BE SET ASIDE AS EXCESSIVE AND OUT OF PROPORTION WITH THE EVIDENCE OF INJURIES.

The jury returned a verdict against Schnupp in the amount of \$200,000 in compensatory damages. Pursuant to its instructions, the jury was expressly limited to consideration of the following evidence in determining the amount of compensatory damages:

(1) any insult to [Smith] including any pain, embarrassment, humiliation and mental suffering; and

(2) any injury to his reputation.

Jury Instruction No. 15. Any evidence of loss or injury to business and out-of-pocket losses could not be considered. In reviewing the evidence of insult and injury to reputation, it is apparent that \$200,000 is excessive.

Although quantifying actual damages resulting from insult and injury to reputation is difficult, the dollar amount must bear a reasonable relationship to the loss actually sustained. Gazette v. Harris, 229 Va. 1, 48 (1985). If no such relationship exists, it is within this Court's discretion to correct what plainly appears to be an unfair jury verdict. Reel v. Ramirez, 243 Va. 463, 466 (1992). In fact, a trial court has a duty to set aside an award when the amount of the verdict "is so out of proportion to the injuries suffered as to suggest that it is not the product of a

fair and impartial decision." Id. at 467. The jury verdict in the present case falls into this category.

The consolidated opinion of Gazette v. Harris includes the libel action Fleming v. Moore, 229 Va. at 43-51. In Fleming, a University of Virginia professor, W. Bedford Moore, III ("Moore"), sued a real estate developer, James N. Fleming ("Fleming"), for placing an advertisement in the student newspaper calling Moore a racist. The jury awarded Moore \$100,000 in compensatory damages. As in the present case, the award in Fleming was based only on insult and injury to reputation. On appeal, the Supreme Court of Virginia held that the trial court erred in refusing to grant Fleming's post-trial motion to set aside the compensatory award as excessive. Id. at 48. The Court observed that, although Moore undoubtedly suffered a degree of damage to his reputation, embarrassment, humiliation, and mental suffering, the cumulative injury could not possibly have amounted to \$100,000. This is especially true where Moore had no physical manifestation of emotional distress and never sought any kind of medical attention. Id.

Similarly, the evidence in the present case does not support injury to reputation, embarrassment, humiliation, and mental suffering in the amount of \$200,000. Smith showed no physical manifestations or medical problems. Furthermore, the alleged defamation regarding Smith was published to far fewer people than the defamation regarding Moore, which was circulated throughout the University of Virginia in the school newspaper and to the community

in a local newspaper. In fact, the majority of the evidence established by Smith during trial could not be properly considered by the jury in its determination of compensatory damages because it involved pecuniary damages and out-of-pocket expenses. For example, working a lower paying job, not moving to a more expensive house, not saving for college educations, and selling the concession truck are all examples of injury to business and out-of-pocket expenses. To the extent that the jury considered this evidence, and to the extent that the jury intended to place Smith in a financial position equivalent to or exceeding that which Smith may have someday attained had he not been terminated from ARA, the verdict was not the product of a fair and impartial decision. Instead, it was improperly based on sympathy and speculation. This Court should set aside the verdict as excessive and not substantiated by the evidence.

III. CONCLUSION

Based on the foregoing reasons, Defendant Mark Schnupp respectfully moves this Court to enter an Order setting aside the jury verdict as contrary to the law and the evidence and to enter final judgment in his favor.

MARK SCHNUPP

BY Joseph J. Bueche
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing Memorandum in Support of Defendant's Motion to Set Aside the Jury Verdict as Contrary to the Law and the Weight of the Evidence was hand-delivered to David P. Baugh, Esquire, Post Office Box 12137, 223 South Cherry Street, Richmond, Virginia 23241, counsel for the plaintiff, this 5th day of November 1993.

Joseph B. Benedetti

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

John Marshall Courts Building

ANDRE L. SMITH,

Plaintiff,

v.

Case no. 76-CL-92U03435-00

MARK SCHNUPP, et al.,

Defendant.

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S
MOTION TO SET ASIDE THE JURY VERDICT

COMES NOW, ANDRE L. SMITH, by and through his counsel of record and files this, his Memorandum in Response to Defendant's Motion to Set Aside the Jury Verdict. Defendant previously made an oral motion to set Aside the Verdict of the Jury which returned a judgment in favor of Plaintiff in the amount of three hundred thousand (\$300,000.00) dollars: two hundred thousand (\$200,000.00) dollars in compensatory damages and one hundred thousand (\$100,000.00) dollars in punitive damages.

STATEMENT OF THE CASE

Plaintiff brought a suit for defamation against the defendant. Defendant was and is a member of the Richmond Police Department.

It was alleged that on Friday, August 21, 1992 defendant contacted plaintiff's employer and told the employer that the plaintiff had been seen in a "high drug area" in a

company vehicle. That the vehicle was seen to stop in this "high drug area": the 2100 block of North 26th Street, and the passenger in the vehicle was seen to get out and exchange something for money with a target of the police surveillance. It was believed that the target was a narcotics dealer. Defendant told the employer that the vehicle was then stopped by members of the Richmond Police and the occupants and the vehicle searched, but nothing was found and no arrests were made.

The defendant identified himself as a member of the drug and vice unit.

On the following Monday plaintiff was terminated from his job.

During the trial it was developed that plaintiff was not given an opportunity to explain himself. Further the supervisor charged with the actual termination stated that, predicated upon the statements of the officer, she was convinced that the vehicle and the plaintiff driver were involved in some way in a drug transaction.

Brett Ramsey, one of two employees who actually told plaintiff that he was terminated, spoke with the supervisor before the plaintiff was terminated. This employee stated that the "official reason" for termination was unauthorized use of a company vehicle. The same employee went on to state that the "real reason" for the termination was the allegation of drug involvement. The other employee participating in the termination stated that he felt that the official reasons given was "B.S."

and that the only concern was the allegation of drug involvement.

Later, upon request of the supervisor, defendant drafted a written version of the alleged surveillance and the stop. This written report was offered as evidence of intent on the part of the officer in making the oral report and alleged that the written report was an extension and clarification of the original oral statement. Testimony was that the written report was written evidence of the oral conversation and that it was an extension of the original oral conversation. This was testified to by the supervisor receiving the original telephone call from defendant.

Plaintiff and his passenger both testified that the officers statement was totally false. They both testified that the vehicle drove down North 26th Street. The reason given for that route was the plaintiff had been raised on that street and would speak to former neighbors and friends. Both testified that the vehicle never stopped and that no one approached the vehicle and that no one exited the vehicle.

Both testified that they were stopped about two blocks past the 2100 block of North 26th Street and searched by the police. The search involved looking in their mouths, in their shoes and searching the vehicle.

There was disagreement between the plaintiff and his witness and the officers as to the time of the stop, however the issue of credibility was resolved by the jury in favor of plaintiff.

Defendant stated that the reason he wrote, in the written report, that the "drugs were destroyed" before the stop, was predicate upon a statement from one of the "take down" officers that the passenger was seen to make a motion to his mouth which he perceived to be destruction of the evidence. All of the "take down" officers denied seeing such a movement and all denied telling defendant any such version of the facts.

The plaintiff testified that as a consequence of his termination he was out of work for the three months. His wife testified that they had made arrangements to move from their three bedroom one bath house into a larger four bedroom two bath house for themselves and their three daughters. As a consequence of the termination this move for canceled. The defendant testified that he obtained new employment but that he continues to make less money and that his new job's hours necessitate his inability to see his children except on weekends. He and the 13 year old daughter testified as to the effect of his inability to see his children.

The jury returned the verdict in favor of plaintiff for the amounts set forth above.

Defendant made a timely motion to set aside the verdict, for the following reasons:

1. That the statement of defendant did not accuse the plaintiff of a crime and that therefore it could not be defamation per se;
2. That there was insufficient evidence of New York Times malice to establish the requisite predicate for both compensatory and punitive damages;

3. That there was no evidence of common law malice to overcome the assertion of qualified privilege, and

4. That the award of \$200,000.00 in compensatory damages was excessive, unsubstantiated and not the result of "fair and impartial deliberations".

In support of those assertions defendant filed a memorandum to which plaintiff responds.

ISSUES:

THAT THE WORDS OF THE ORAL CONVERSATION OF AUGUST 1, 1992 IMPUTED THE CRIME OF AIDING AND ABETTING IN THE POSSESSION OF A NARCOTIC SUBSTANCE.

It is without disagreement that the defendant's words on August 21, 1992 to plaintiff's employer stated that the vehicle, driven by plaintiff was seen in a "high drug area" and that there were several perceived drugs dealers in the area, known as "targets". Likewise it is not contested by the defendant that he stated that the plaintiff stopped the company van, which he was operating in the "high drug area". There was disagreement as to whether the officer stated that the perceived drug dealer approached the driver and then the passenger or if the passenger got out of the van and went over to the drug dealer.

Common law defamation defines slander per se as defamatory words that :

(1) Impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true may be indicted and punished.

(2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society.

(3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an officer or employment.

(4) Those which prejudice such person in his or her profession or trade.

See *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375, *Burke's Pleading and Practice*, (4th Ed. Boyd 1952), sec. 163, pp 268, 269, 12 Michie's Jurisprudence, Libel and Slander, Sec. 4, pp 40,41 and cited in *Carwile v. Richmond Newspapers*, 196 Va. 1, 82 S.E.2d 588 (1954).

Note that the language states "if the charge is true, may be indicted and punished. There is no requirement that the words make a conviction likely or probable.

Plaintiff would submit that Virginia case law, on all fours with the facts of the instant case, is found in the opinion of *Carwile v. Richmond Newspapers*, *supra*. In *Carwile*, plaintiff, a Richmond lawyer and local radio personality made certain allegations concerning the Richmond Police that lead to a grand jury investigation. The Grand Jury found no evidence to substantiate the allegations. In a later article in the defendant paper a reporter stated that:

The two city officials [interviewed] evaded a direct answer to an inquiry as to whether they were considering a recommendation to the District Committee of

the Virginia State Bar to take action against Carwile for his conduct in leveling the charges which cast a shadow across the entire Police Department.

Safety Director Foster, ...said 'I neither will nor will not state at this time whether I will take action against Carwile.

Under the State Code, the State Bar as an administrative agency of the Supreme Court of Appeals may request a court of competent jurisdiction to disbar an attorney for violation of the ethical code governing the professional conduct of attorneys.

The plaintiff filed action for defamation alleging that the statement was an allegation of his unfitness to conduct his professional affairs which amount to slander per se.

Defendants responded that the words did not accuse plaintiff of slander per se in that there was no actual accusation. The Supreme Court found that: "It is a reasonable implication of this language, read in connection with whole article, that the plaintiff is guilty of unethical and unprofessional conduct which the defendant suggests in a veiled but pointed way that the plaintiff could and should be subjected to disbarment proceedings ...". Further it found that: "While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo, operating within the scope of its legitimate functions, it does impute conduct tending to injure him in his profession." Carwile at 9.

The ruling in Carwile was not some new twist to the interpretation of the law of defamation. Virginia in *Guide Pub. Co. v. Futrell*, 175 Va. 77, 7 S.e.2d 133, *Payne v. Tancil*, 98 Va.

262, 35 S.E. 735; *Mosely v. Moss*, 6 Gratt. (47 Va.) 534 found that, on the question of determination of whether words are reasonably capable of the defamation alleged by the plaintiff, "it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact implication or insinuation." *Carwile* at 7, citing to *James v. Powell*, 154 Va. 96, 152 S.E. 539, *Moss v. Harwood*, 102 Va. 386, 46 S.E. 385, 53 C.J.S. Section s 9, 10, pp 46, 57.

Defendant, in his brief, cites *Moss v. Harwood*, 102 Va. 386 (1904) in support of his position. However the facts in *Harwood* differ drastically with the facts in the instant case and with those in *Carwile*.

In *Harwood* the defendant stated that the chief of police had collected fines which did not appear by the records of the police court to have been reported. The court found that this was not innuendo of a crime, because the allegations could be that the chief of police was a bad administrator or that he did not properly record notices of fines. There was nothing to suggest that he had committed a crime. "[T]he language employed, construed in its most popular sense, does not impute the crime of larceny or embezzlement to the plaintiff". *Id.* at 389. By analogy to state that money is missing is not to impute theft.

In the instant case defendant stated that he observed

the plaintiff stop the van so that a suspected drug transaction could occur. In short, it was stated, by the language used that the plaintiff enabled a drug transaction to occur.

All of the elements necessary to allege the offense of aiding and abetting in the possession of a controlled substance are contained within the language of the statement made on August 21, 1992.

If an objective person could reasonably find that the statements amounted to an accusation of a crime, a finding of defamation per se can be in order.

It must be further noted that plaintiff offered an instruction to the jury concerning innuendo, to which there was no objection from defendant. The instruction given by the court expressly permitted the jury to interpret the words used and to determine if there is an implication of wrongdoing. This instruction was given in conjunction with an instruction defining a principle in the second degree to a crime, also without objection.

Applying these principles to the instant case, the officer identified himself as an officer concerned with drug activities. He further identified the area as a drug area. He then went on to state that the plaintiff, as the driver, intentionally stopped the vehicle so that a suspected drug activity could occur within defendant's presence. The officer then went on to say that whatever he had seen justified, predicated upon his training, that something had occurred which

justified stopping the vehicle and searching them for some illegal substance.

Further it should be remembered that the witness/supervisor recollected that she was asked questions as to whether the plaintiff was suspected of drug use by his employers.

The words used do not, as set forth in *Carwile*, introduce a new matter. All of the language is directed at the events of August 21, 1992 and concerned drug related activity. The words used do not extend the meaning of any other statements.

Plaintiff would assert that these facts could justify a reasonable person to arrive at the conclusion that the words amounted to an accusation of criminal conduct. Using the innuendo permitted in *Carwile* and the instructions given, there is sufficient evidence to sustain a finding that the statements of the officer imputed the commission of a crime: aiding and abetting in the possession of narcotics, to sustain the jury's finding.

The defendant next asserts that the second paragraph of § 18.2-250, Code of Virginia illustrates that no crime was alleged. This language is cited in his brief and was given for consideration to the jury. "Ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance." It must be noted that ownership not creating a presumption of criminal activity and serving as evidence of criminal activity are two

distinct concepts. More importantly, the defendant submitted that instruction containing the language of the section, which was given. The jury considered the language and rejected it as relevant, as evidence by the verdict.

The defendant next asserts that the language of Jury Instruction 10 supports his position that no allegation of crime was made. The language of Instruction number 10 was: "mere presence during the commission of a crime and subsequent flight do not constitute sufficient evidence to convict a person as a principle in the second degree."

The statement made by defendant to the supervisor did more than allege mere presence. The allegation made was that the driver, the plaintiff, stopped the vehicle so that the transaction could occur. Such activity would clearly constitute "some overt act ... assisting in intent ...": part of the definition of a principle in the second degree.

The jury determined, by its verdict, that the vehicle stopping on North 26th Street, and all of the allegations, concerning a drug dealer approaching the car or the passenger approaching a drug dealer to be false and a fabrication of defendant's mind.

THE AWARD OF COMPENSATORY AND PUNITIVE DAMAGES SHOULD BE SET ASIDE BECAUSE THE EVIDENCE DOES NOT SUPPORT A JURY FINDING, BY CLEAR AND CONVINCING EVIDENCE, THAT SCHNUPP MADE A DEFAMATORY STATEMENT WITH KNOWLEDGE OF FALSITY OR SO RECKLESSLY AS TO AMOUNT TO A WILFUL DISREGARD OF THE TRUTH.

Plaintiff asserts that he did not stop on North 26th

Street and that no one approached the vehicle, that no one gave currency for anything and that nothing changed hands. In short plaintiff stated and asserted that defendant was telling a falsehood when he asserted those facts to anyone, and his employer supervisor in particular.

To resolve the issue the parties chose trial by jury.

The jury, by its verdict, found that the defendant and Officer Ambrozy were not telling the truth when the alleged actions on North 26th Street were described. Defendant argues that the finding is erroneous as a matter of law because: (1) "the veracity of Smith is very much in question because on two prior occasion he lied about having Ragin [the passenger] in his van on the day in question." (2) "Smith has every incentive not to tell the truth in order to recover a substantial monetary award pursuant to this suit." (3) That "... Schnupp or ... Ambrozy, had [no] incentive to fabricate the incident as described by them."

Of significant note is that defendant cites not one case in support of his assertion. The issues are issues of fact and there is no law to support his hypothesis.

All of these issues of credibility are jury issues. Each was resolved in plaintiff's favor.

The officers had a significant difference in the facts as they were alleged. One stated more than one drug dealer approached the car and the other said several. They both could not be telling the truth.

That the jury could find that the two police officers told a falsehood and that both were committing perjury on the stand is not so farfetched as to require the fact finder to go outside of the record. The jury was the determiner of the credibility of the witnesses. There is no law or requirement that states that the members must find that the officers were telling the truth in light of the testimony of the plaintiff and the passenger and the information concerning the plaintiff and his demeanor on the stand.

Mr. Smith, the plaintiff, is worthy of belief and no rule of law can remove that entitlement predicated upon the testimony and the demeanor of the plaintiff in contrast to that of the defendant, while in the stand.

**THE EVIDENCE DOES NOT SUPPORT A JURY FINDING
THAT SCHNUPP LOST THE PROTECTION OF HIS
QUALIFIED PRIVILEGE.**

Plaintiff would assert that there is no privilege for the communication from defendant to the employer/supervisor.

However, if arguably a qualified privilege could exist, it must be noted that the privilege is qualified: that is, subject to restrictions.

The court, in its charge to the jury gave an instruction as to privilege. That instruction stated, in pertinent part, that: " ... [a] privilege is abused when the plaintiff proves by clear and convincing evidence that: (1) the defendant knew the statement was false ...".

Thus the question is raised as to whether the jury

could find, in accordance with their duty and the instructions of the court, that the defendant made a false statement when he stated that the vehicle stopped and that someone either approached the vehicle or the passenger exited the vehicle to have some kind of hand to hand transaction.

Likewise, New York Times malice can be proven with evidence of a knowingly false statement. The entire thrust of plaintiff's case was that the officer made a statement knowing it to be false. That determination is not unreasonable given the record.

Such a determination removes any privilege, if one existed, and proves the requisite degree of malice under any standard known to the law.

The finding of falsity by the jury negates any privilege to which the defendant would be entitled.

**THE AMOUNT OF COMPENSATORY DAMAGES SHOULD BE
SET ASIDE AS EXCESSIVE AND OUT OF PROPORTION
WITH THE EVIDENCE OF INJURIES.**

The plaintiff, his wife and his thirteen year (13) old daughter all testified to the plaintiff's damages.

The plaintiff's wife stated that plaintiff had never been fired before in his life. He paced and raged because he was not believed. Plaintiff wondered, aloud, if he was not good enough to obtain employment. His wife gave this statement as an example of his loss of self-esteem, his loss of his belief in his own talent.

Mrs. Smith testified as to the concerns of the family

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FOR PURPOSES OF PAGINATION**

because they could not pay their mortgage and their car note at the same time. There was evidence about the house, so poignantly described by Mrs. Smith in contrast to their three bedroom house with one bath for the two adults and three children, and the purchase of that house which fell through because of the termination.

Lastly, all three of the family members who testified told of plaintiff helping his daughter with her homework and his coming home at a reasonable hour everyday. All spoke about the fact that the opportunity to see his children grow and to aid in that growth is gone due to the termination. Plaintiff's new job prevents his being home while his children are awake. Further, his new job often requires weekend work.

None of these losses are merely "out of pocket expenses". Each is but an example of the pressure that caused the suffering and discomfort as claimed by the plaintiff. Each was offered to assess the value of the loss of confidence and the extent of plaintiff's fear.

There was ample evidence that all of the differences caused a loss to plaintiff. All of these impediments caused discomfort and suffering.

Plaintiff would assert, and did assert at trial, that the value of feeling comfort that a family can be fed and housed is significant. Likewise, plaintiff would assert that the value of spending time with one's family and watching them grow and prosper is genuine.

As correctly pointed out in defendant's brief, citing *Fleming v. Moore*, 229 Va. 43. In that case defendant took out an ad in the newspaper calling plaintiff a bigot. Plaintiff was awarded one hundred thousand (\$100,000.00) dollars. Plaintiff did not lose his job and was not required to seek new employment. There is no evidence in *Fleming* that anyone was prevented from seeing their children or paced the floor, fearful of his ability to feed and shelter his family.

The compensatory damages suffered by *Fleming* pale to gross insignificance in comparison to those suffered and proven by plaintiff in the instant case.

Lastly, the verdict of the jury can only indicate that a jury of Richmond citizens found that Richmond Police officer made up the commission of a crime to justify a police stop and search. He then published that lie to someone who had no interest in a false crime. That same officer then wrote a report that was not required, in the words of the supervisor, memorialize his telephone conversation.

Then, and most tellingly, that same officer and one other officer, took that stand and under oath continued that lie by committing perjury before that same jury. The realization that someone sworn to protect and given elevated credibility and status, used that exalted position to perpetuate a lie and to commit perjury, would justify punitive damages far in excess to the one hundred thousand (\$100,000.00) dollars.

REMITTITUR

The court enjoys the power to reduce any judgment that it finds to be so excessive as to shock the conscience of the court or to compel that the conclusion that the verdict was the product of passion or prejudice or some misunderstanding of the facts or the law. See *Hogan v. Carter*, 226 Va. 361, 310 S.E.2d 666 (1983).

Plaintiff asserts that a judgement of that amount awarded by the jury is not so excessive as to shock the conscience of the court. The plaintiff and his family testified to a period of consternation and concern due to plaintiff's first termination from a job and his tribulations as he worried as to his ability to feed and shelter his family. He further testified that the anguish attributable to defendant's actions continue as he is unable to support his family as he once did, is unable to spend the time as a member of the family as he once did, and that his dreams for a new start have been either dashed or, hopefully, set back. To award judgment of two hundred thousand (\$200,000.00) dollars for such damages is not a consequence of passion or prejudice.

Plaintiff would assert that a trial judge would, if convinced that the officer committed perjury, award such damages. Of course the determination of whether the damages are excessive must be assessed with the premises that the facts prove, as the verdict proves, that falsehood and perjury were shown.

The damages suffered are real and understandable by anyone charged with the responsibility of others.

The amount of two hundred thousand (\$200,000.00) dollars is not excessive when compared with the loss of employment in this day and time and the loss of respect from one's co-workers and the anguish and concerns as a provider.

The amount of one hundred thousand (\$100,000.00) dollars is not excessive as punitive damages.

To reach its verdict the jury had to find that the officer lied when he stated that he observed the vehicle stop in North 26th Street. The maliciousness of the falsehood was further compounded when it was told to the "take down team" and plaintiff's employer.

More importantly the jury had to find that the defendant committed perjury by taking the stand and repeating the statements contained in the telephone call. If perjury could be any more egregious, Officer Ambrozy had to have been found to have committed perjury as well, for the verdict to be returned as it was.

Citizens are entitled to punish for an intentional wrong with punitive damages in an amount that matches the degree of evil intent and to warn others of the impact of their dishonorable ways. The defendant and his witness were both police officers, entrusted with the public good and certain respect as part of their job.

This jury found that the officers has violated that trust and respect for no viable reason other than malice or to punish some stranger for the same reason that a child would

torture an insect.

To have a verdict of one hundred thousand (\$100,000.00) dollars returned for this type of behavior is not excessive.

Lastly, to reduce a verdict of punitive damages for this type of conduct would violate public policy. There can be no benefit to the public to permit a police officer to engage in the type of activity that was proven in this case and to have that punishment reduced.

It is not improper for this court, if it is convinced that the officer did engage in the activity charged, to sustain the amount of punitive damages. To reduce the award, in light of the nature of the allegations and the findings of the jury would be to defeat the very essence of punitive damages and to divorce the court from its disagreement with the acts committed by this officer which lead to the lawsuit and his actions in the courtroom.

The awards should stand.

PRAYER AND CONCLUSION

The verdict of the jury can only be interpreted as a statement that on August 21, 1992 plaintiff did not stop the van on North 26th Street and that no one got out of the van at that time and that no one approached the van at that time. Thus, any statement to any person that these events did occur must be false and they must have been made by defendant knowing them to be false.

Knowing a statement to be false when published is

evidence of malice under every recognized definition of malice in American law: New York Times, common law or, in some states, statutory.

A factual finding of falsity further resolves all issues concerning qualified privilege, in favor of plaintiff.

Likewise, a determination that a false statement was knowing published provides leave to award punitive damages.

In point of fact, a determination of falsity resolves every issue which is the basis of defendant's motion, except credibility, which is a jury issue.

Defendant's motion should be, in all things, denied and the entire verdict of the jury should stand.

Respectfully submitted,

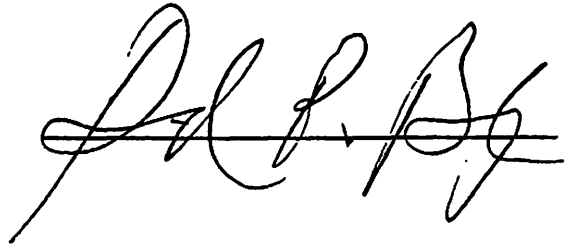
ANDRE L. SMITH

By: 

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that a true and correct copy of the above and foregoing was mailed, postage prepaid to Joseph B. Benedetti, Esq., Durette, Irvin, Lemons & Fenderson, P.C., 20th Floor - Main Street Centre, 600 East Main Street, Richmond, Virginia 23219, this 12th day of November, 1993.

A handwritten signature in black ink, appearing to read "J. B. Benedetti", written over a horizontal line.

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building

ANDRE L. SMITH,

Plaintiff,

v.

MARK SCHNUPP, et al.,

Defendant.

Case No. 76-CL-92U03435-00

**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE THE JURY VERDICT**

In his post-trial submission to this Court, plaintiff Andre' L. Smith ("Smith") attempts to preserve the jury's verdict by mischaracterizing the evidence and invoking flawed arguments. Defendant Mark Schnupp's ("Schnupp") motion to set aside the verdict is well-founded and should be granted.

I. ARGUMENT

- A. AS A MATTER OF LAW, THE STATEMENT SUBMITTED TO THE JURY DOES NOT IMPUTE THE CRIME OF (1) POSSESSION OF A NARCOTIC OR (2) PRINCIPAL IN THE SECOND DEGREE TO POSSESSION OF A NARCOTIC, AND INNUENDO CANNOT PROPERLY EXTEND THE MEANING.

According to Smith, the present action is most analogous to Carwile v. Richmond Newspapers, Inc., 196 Va. 1 (1954), which involves a reporter's written statement regarding unethical conduct by an attorney. Reliance on this decision is misplaced. In Carwile, the Virginia Supreme Court overruled summary judgment in favor of the defendant because the plaintiff's motion for judgment stated a cause of action and a material fact was in dispute. Smith overlooks the Court's very specific language limiting the use of

innuendo, yet acknowledging that for the purposes of summary judgment the plaintiff was entitled to every fair inference to be drawn from his pleading:

[T]he meaning of the alleged defamatory language can not, by innuendo, be extended beyond its ordinary and common acceptance. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it can not introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain.

Carwile, 196 Va. at 8. Applying the above criteria to the evidence in this case, it is clear that the use of innuendo in the instant case is inappropriate.

In his memorandum, Smith repeatedly misrepresents the statement made by Schnupp to Cynthia Goss ("Goss") of ARA on August 21, 1992. Smith argues that "defendant stated . . . he observed the plaintiff stop the van so that a suspect drug transaction could occur." Smith's Memorandum in Response, at 8-9 (emphasis added); see also Id. at 9, 11. In contrast, Schnupp's testimony, Goss' testimony and, most importantly, the jury instructions did not mention a drug transaction or Smith's motivation in stopping the van. See, e.g., Jury Instruction No. 17. Smith's misrepresentation is the perfect example of an inappropriate extension of the "plain and natural meaning" of Schnupp's words. Carwile, 196 Va. at 7.

Furthermore, Carwile is not directly applicable to this case because it addresses innuendo in the context of imputing unfitness

to perform the duties of an office or employment. The Virginia case most on point is Moss v. Harwood, 102 Va. 386 (1904), which specifically addresses innuendo in the context of imputing the commission of a crime. As Schnupp explained in his opening Memorandum, the Moss Court drew a distinction between the scope of innuendo when imputing a crime and when imputing unfitness to perform duties.

The holding in Moss was, in essence, that the defendant in a defamation action based on imputation of a criminal offense must have expressly stated that the plaintiff committed a specific criminal offense, or at least stated that the plaintiff performed all of the requisite elements of the criminal offense.

[I]f the words do not impute such infamous crime by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover; and, as he cannot enlarge that meaning by an innuendo so as to let in proof of extraneous facts, his action must fail.

Moss, 102 Va. at 390 (emphasis added).

Smith clearly recognizes the applicability of the law set forth by the Court in Moss, as evidenced by one of his arguments on brief. "All elements necessary to allege the offense of aiding and abetting in the possession of a controlled substance are contained within the language of the statement made on August 21, 1992." Smith's Memorandum in Response, at 9 (emphasis added). In order to manufacture a distinction between the present case and Moss, Smith simply misrepresents the contents and nature of Schnupp's statement

of August 21, 1992, as discussed above. Smith would have this Court incorrectly recall that Schnupp said Smith stopped the van on the 900 block of North 26th Street "so" that a "drug transaction" could occur. Id. at 9, 11 (emphasis added). This mischaracterization implies that Schnupp included in his statement the intent and illegal activity necessary on the part of Smith to commit the crime of aiding and abetting in the possession of a controlled substance. The statement did not include these additional elements. Without these elements, Schnupp's statement is not defamatory, and any attempt to add these elements requires use of innuendo outside the scope of its legitimate function. See Moss, 102 Va. at 392.

Furthermore, the uncontroverted evidence was that Schnupp specifically told Goss that the ARA van was searched and nothing was found. Although this exculpatory language was not included in Jury Instruction No. 17, it further demonstrates that Schnupp did not impute the commission of a criminal offense. This Court should set aside the jury's verdict and enter final judgment in favor of Schnupp because, as a matter of law, the statement at issue was not defamatory.

B. THE AWARD OF COMPENSATORY AND PUNITIVE DAMAGES SHOULD BE SET ASIDE BECAUSE THE EVIDENCE DOES NOT SUPPORT A JURY FINDING, BY CLEAR AND CONVINCING EVIDENCE, THAT SCHNUPP MADE A DEFAMATORY STATEMENT WITH KNOWLEDGE OF FALSITY OR SO RECKLESSLY AS TO AMOUNT TO A WILFUL DISREGARD OF THE TRUTH.

No reasonable person could have found by clear and convincing

evidence that Schnupp and his corroborating witness Officer Mark Ambrosy ("Ambrosy") intentionally and maliciously fabricated the incident of observing Smith stop at about 3:30 p.m. on the 900 block of North 26th Street. Unlike Smith and his corroborating witness, Robert Ragin ("Ragin"), neither Schnupp nor Ambrosy was ever impeached by prior inconsistent statements or evidence of bias.

In an attempt to divert attention from the jury's blatant disregard of the facts regarding witness credibility, Smith again resorts to mischaracterizing the testimony. According to Smith, Schnupp testified that one drug dealer (the "target") approached the van, while Ambrosy testified that several drug dealers approached that van. Thus, Smith contends that one of the police officers was lying. See Smith's Memorandum in Response, at 12.¹

Actually, Ambrosy testified that several "people" approached the van, and among them was the same target drug dealer whom Schnupp had witnessed approach the van. Therefore, the two officers' testimony with respect to the significant fact was identical: The van stopped and the target drug dealer approached it.

The only written evidence regarding the time of Schnupp's observation, which evidence was admitted as a record made in the

¹ The actual quotation from Smith's Memorandum in Response reads as follows: "One [police officer] stated more than one drug dealer approached the car and the other said several." Id. at 12. Presumably, Smith intended to state that the first police officer stated "one" drug dealer approached the van, rather than "more than one."

ordinary course of business, states that the van was in the area at 3:31 p.m. on August 21, 1992. This writing flatly controverts the self-serving testimony of Smith and Ragin that they were in the area at about 4:00 to 4:15 p.m. The jury improperly disregarded the testimony of a third unimpeached police officer, D.C. Williams ("Williams"), who stated under oath that the document was in his handwriting and that he recorded the time contemporaneously with the incident.²

The veracity of Smith and Ragin is questionable at best. In his Memorandum, Smith fails to attempt to challenge any of Schnupp's arguments addressing the weight of the evidence with respect to witness credibility. The reason is that the evidence is not in dispute. On two previous occasions Smith lied about having Ragin in the van; yet Schnupp's position has been consistent from the beginning. Smith has a personal interest in maintaining that he entered the surveillance area after he was off work at 4:00 p.m; neither Schnupp nor Williams had a personal interest in establishing the time to be 3:30 p.m. when they recorded and communicated it on August 21, 1992. Smith stands to gain a tremendous amount of money by fabricating a story that he never stopped on the 900 block of North 26th Street; Schnupp stood to gain absolutely nothing by fabricating a story (which has never

² Although Williams is a named defendant in a pending action by Smith for unlawful search and seizure, assault, and false arrest, this fact does not establish that Williams was biased because the time of the incident is irrelevant with respect to the case against Williams.

changed) that the van not only stopped, but some sort of transaction took place. Ragin and Smith have been friends for 23 years; Schnupp, Ambrosy, and Williams have worked together for no more than three years. Ragin has a personal interest in maintaining his story because to do otherwise is to admit that he purchased narcotics; Ambrosy has no personal interest regardless of his testimony because he is not the defendant in this or any other action brought by Smith.

It is worth reiterating in this Memorandum the manner by which the jury should weigh matters of credibility. "Ordinarily if two witnesses equally credible testify in contradiction of each other, the evidence, in the absence of other circumstances pointing in one direction or another, is in equipoise and the plaintiff has not proved his case." Zurich Ins. Co. v. Oglesby, 217 F. Supp. 180, 183 (W.D.Va. 1963) (emphasis added).

Zurich applies to an equal number of equally credible witnesses testifying to an issue that must be decided by greater weight of the evidence. In the present case, the jury chose to believe two less credible witnesses over three unimpeached police officers to satisfy a clear and convincing evidentiary standard. The reason is obvious. The jury disregarded the evidence in order to find for Smith. This Court must therefore set aside the verdict as contrary to evidence.

C. THE EVIDENCE DOES NOT SUPPORT A JURY FINDING
THAT SCHNUPP LOST THE PROTECTION OF HIS
QUALIFIED PRIVILEGE.

Smith could defeat Schnupp's qualified privilege only by proving by clear and convincing evidence that Schnupp abused the privilege. Thus, Smith must prove by clear and convincing evidence that Schnupp made the allegedly defamatory statement with common-law malice. Oberbroeckling v. Lyle, 234 Va. 373, 379 (1987); Great Coastal Express v. Ellington, 230 Va. 142, 154 (1985). Both of these cases hold that New York Times malice, which includes knowledge of falsity, "is merely one of the several elements of common-law malice." Great Coastal, 234 Va. at 154. Therefore, the abuse of privilege issue likewise focuses on witness credibility.

As set forth in the preceding section of this Reply Memorandum, no reasonable jury could have found by clear and convincing evidence in favor of Smith regarding the truth of conflicting testimony. This Court must set aside the verdict as contrary to evidence.

D. THE AMOUNT OF COMPENSATORY DAMAGES SHOULD BE
SET ASIDE AS EXCESSIVE AND OUT OF PROPORTION
WITH THE EVIDENCE OF INJURIES.

According to Jury Instruction No. 15, the jury could consider only evidence of insult and injury to reputation in determining the amount of compensatory damages. In Fleming v. Moore, 229 Va. 43 (1985), the Supreme Court of Virginia held that an award of \$100,000 amounted to excessive compensatory damages where the

plaintiff claimed only insult and injury to reputation. See Gazette v. Harris, 229 Va. 1, 43 (1985). Smith attempts to distinguish the Fleming opinion on the ground that the plaintiff, a professor at the University of Virginia, did not lose his job as a result of being branded a racist in the school and local newspapers.

In comparing Fleming with present case, Smith neglects to mention that Schnupp communicated the allegedly defamatory statement contained in Jury Instruction No. 17 to only one person - Cynthia Goss of ARA. In contrast, the published statement in Fleming reached literally thousands of people. Given the sheer magnitude of circulation, it is absurd for Smith to argue that the damages suffered in Fleming "pale to gross insignificance" in comparison with those suffered by Smith. Smith's Memorandum in Response, at 16. What is significant about the Fleming opinion is that, regardless of this tremendous circulation of a false statement, the Court determined that \$100,000 for insult and injury to reputation was excessive.

Smith's evidence of failing to purchase a larger home, spending less time with his family because of his new job, and worrying about paying bills is not relevant to insult and injury to reputation directly resulting from the allegedly defamatory statement. This evidence did serve, however, to evoke sympathy among the jurors. The disproportionate magnitude of the compensatory damages award indicates that Smith's recovery was "not the product of a fair and impartial decision." Reel v. Ramirez,

243 Va. 463, 467 (1985); accord Rutherford v. Zearfoss, 221 Va. 685, 689 (1980) (granting motion for new trial is appropriate where court is satisfied that the jury was influenced by sympathy for plaintiff in determining amount of damages). This Court should set aside the verdict as excessive and unsubstantiated by the evidence.

II. CONCLUSION

Based on the foregoing reasons, and on the reasons set forth in Schnupp's opening Memorandum, Schnupp respectfully moves this Court to enter an Order setting aside the jury verdict as contrary to the law and the evidence and entering final judgment in his behalf.

MARK SCHNUPP

By Joseph B. Benedetti
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing Defendant's Reply Memorandum in Support of Motion to Set Aside the Jury Verdict was hand-delivered to David P. Baugh, Esquire, Post Office Box 12137, 223 South Cherry Street, Richmond, Virginia 23241, counsel for the plaintiff, this 18th day of November 1993.

Joseph B. Benedetti

Circuit Court
OF THE
City of Richmond

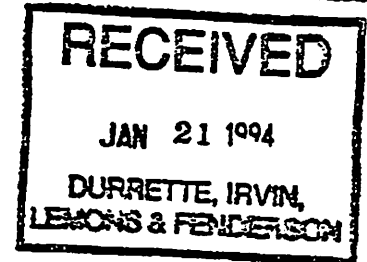
MELVIN R. HUGHES, JR.
JUDGE

January 20, 1994

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Re: Case No. LU-3435-1
Andre L. Smith
v.
Mark Schnupp, et al.

Dear Counsel:

Finding that the defendant, a Richmond city police officer, made defamatory remarks to plaintiff's employer about plaintiff, the jury in this case awarded plaintiff \$200,000.00 compensatory and \$100,000.00 punitive damages. After the verdict the defendant renewed motions to strike the evidence taken under advisement during the trial and moved to set aside the verdict as contrary to the law and the evidence and enter judgment for the defendant. After receiving briefs on the motion from the parties, the Court is ready to decide the outcome.

Having received a favorable jury verdict the plaintiff is entitled to the benefit of all conflicts in the evidence and reasonable inferences from them and the facts must be taken in a light favorable to his position in the case. Loving v. Hayden, et al, 245 Va. 441 (1993), Holland v. Shively, 243 Va. 308 (1992), Graves v. Nat'l Cellulose Corp., 226 Va. 164, 169-170 (1983). Notwithstanding the required favored view, it is helpful to state briefly and highlight the evidence and its conflicts. Indeed, there was much conflict in the evidence concerning the underlying transaction that gave rise to the statement defendant made and its nature and content.

The Evidence

On August 21, 1992, Richmond police conducted operations in an area of the city known to them as a "high drug area." The police detail assigned to these operations consisted of a surveillance component and a "take down" unit. Defendant (Officer Schnupp) was one of two officers stationed in an unoccupied, abandoned building conducting surveillance of activity from above on the street below. The take down unit consisted of from three to four officers who, on getting word from the surveillors of suspected drug activity, would conduct further investigations or make arrests.

The evidence revealed that on August 21 plaintiff (Smith) was employed by ARA, a company that specializes in vending machine and concession services. Smith drove a van for ARA on a route. His duties included fixing coffee machines and supplying coffee for the machines located in places in the Richmond area. According to Schnupp, after he saw the ARA van Smith was driving come in the area and stop, he observed a third person who he had earlier been identified as a drug dealer become involved with Smith's front seat passenger in the van in a suspected narcotics transaction. He notified the take down unit and the unit followed the van to investigate and make any arrests. When the take down unit stopped the van a few blocks away they searched Smith, his passenger and the van, found nothing and let them go. Smith and the passenger both testified that while they were traveling in the van in the vicinity at the time, they never stopped or had contact with anyone until the take down unit stopped them.

That same day, a Friday, Schnupp telephoned ARA, identified himself as a police officer investigating illegal drug activity and reported the incident to Cynthia Goss, a supervisor. Goss testified that Schnupp said the van had been observed stopped in a "high profile drug area" and that the passenger got out of the vehicle and afterwards exchanged something with another person outside before getting back in the vehicle and the van pulled away. Goss testified that Schnupp asked if Smith had ever been suspected as a drug user and she answered no. On the following Monday when Smith reported to work ARA informed Smith he was terminated. There was much evidence on the reasons for the termination. Smith sought to show that he was fired because of Schnupp suggesting he was involved in a drug transaction. Schnupp sought to show Smith was fired

for violating company rules by being in an area off his route and having a non-employee as a passenger.

The evidence further revealed that when Schnupp and Goss spoke Goss requested that she be given something "in writing" about what Schnupp told her. Goss testified that Schnupp complied and provided a written report dated August 25 which she said described things the same way Schnupp had during their earlier conversation, with the exception of the use of word "cocaine."

Schnupp testified he called ARA to inquire whether the ARA van was stolen and to tell ARA why the vehicle had been stopped. He said he inquired whether Goss and ARA knew Smith and his passenger by name, but made no comment about the driver using drugs or doing anything wrong. He stated he reported that no drugs were found or charges lodged against either Smith or the passenger. Concerning his observations that day, Schnupp testified that before spotting Smith's van he had seen a number of suspected drug transactions during his surveillance. He said he saw the suspected drug dealer come to Smith's van and then go around to the passenger when he observed the suspect dumping a white rock substance from a container into the passenger's hand while the passenger remained in the vehicle before the van pulled off.

As mentioned earlier, Schnupp was one of the two officers on station doing surveillance at the time. The other officer testified that he saw the vehicle come into the block and come to a stop, as Schnupp said. This officer also related that the third person went to the passenger side of the vehicle but he could not say what happened thereafter because of his vantage point and because he became occupied with other matters.

While Goss testified that the written report Schnupp provided varied in only one respect from what he told her earlier, compared with her testimony regarding what Schnupp said, there are other differences. First, the written statement, which was received in evidence, states "the target of the surveillance approached the passenger of the car and exchanged cocaine for money." Second, the report states that "[u]pon searching the occupants and the vehicle for the cocaine it was determined that the cocaine was destroyed prior to the officers making the stop." Schnupp testified he concluded that cocaine had been destroyed from what members of the take down unit had told him about the

passenger making a motion to his mouth at the stop scene. The take down officers who testified denied seeing such a movement and also denied telling Schnupp this.

The parties offered and were granted instruction number 7, an issues instruction, setting out the content of the statement alleged to be defamatory as follows:

"that [an ARA] van license LKA 792 with our driver Andre L. Smith was seen at 3:25 p.m. at a high profile drug area on 900 North 26th Street. He was observed pulling up to that location and a passenger got out of passenger side went up to this location gave people something and received something in return, then this person known as Robert B. Regan, Jr., got back in the van and they drove by the officer."

The Court found that because Schnupp said he called ARA to determine if the van was stolen, any statements he made as a part of that inquiry involved police work and thus was entitled to a qualified privilege. The Court instructed the jury accordingly.

By a favored view to which the plaintiff is entitled at this stage plaintiff and his passenger did not do anything. Thus, Schnupp's statement must be examined according to his contentions that the jury verdict is not in keeping with law on the following four grounds he urges: First, the statement Schnupp made on August 21 did not impute the commission of a crime and therefore could not be defamatory per se; second, there was insufficient evidence of New York Times malice to establish grounds for the award of compensatory and punitive damages; third, there was insufficient evidence of common law malice so as to overcome the qualified privilege which attached to Schnupp's statement; and fourth, the award of \$200,000.00 in compensatory damages was clearly excessive, unsubstantiated by the evidence.

Statement Of Criminal Conduct As Defamation Per Se

Schnupp argues that since he told Goss only "something" was exchanged between the passenger and the third person and this concerned only conduct of the passenger, with no

charges brought or drugs found, no crime can be imputed to plaintiff for a case of defamation per se. Smith counters by arguing that by innuendo it can be derived that he was involved in criminal activity and that it is only necessary that the utterance be to the effect that, if true, criminal charges could arise for which he may be indicted and punished.

To relieve a plaintiff of the ordinary requirement to plead and prove special damages to his reputation resulting from slander, in special instances, of which charges of criminal conduct is one, injury to reputation is presumed. Great Coastal v. Ellington, 230 Va. 142 (1985). The determination of whether the alleged statement charges commission of a crime is a question of law. Id. at 148.

In Great Coastal the issue was whether "commercial bribery" is a crime. The Court found the trial court was correct in ruling that "commercial bribery" could be included in Title 18.2 in the Virginia Code under "Bribery and Related Offenses", and thus was a crime. Here, there is no question that sale or possession of illegal drugs is a crime, a felony, in this instance. Rather, the parties dispute whether the facts amount to criminal conduct on the part of plaintiff and thus impute a crime. The Court finds that the facts do impute criminal conduct considering the "plain and natural meaning [of the words]...according to the sense they appear to have been used." Carwile v. Richmond Newspaper, 196 Va. 1, 7 (1954). The Court decides this question on the facts and on innuendo.

In Carwile the Virginia Supreme Court reversed the trial court's ruling sustaining the defendant's motion for summary judgment and remanded the case for trial. There, the plaintiff, a lawyer, had made accusations about the Richmond police that led to a grand jury investigation. The grand jury did not find any criminal conduct. Later, the defendant newspaper published an article quoting a City official who said no decision had been made about any action against Carwile. The article went on to say that the State Bar had authority to initiate disciplinary action against lawyers.

In Carwile, the Court addressed the question of innuendo in a defamation case. The Court found there was a reasonable implication from the statements in the newspaper article that plaintiff was involved in unethical conduct. The Court observed that for purposes of summary judgment:

In determining whether the words and statements complained of in the instant case are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in plaintiff's favor.

Id at 8. Just as here, the Court in Carwile was dealing with a per se category---adverse statements about one's abilities in his or her profession, trade or business---and the case concerned matters of innuendo. If innuendo is to assist this plaintiff to mount a claim of defamation per se, as he contends, "[t]he province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." Id. (citations omitted). Perhaps the words the parties agreed to go in Instruction 7 standing alone would not impute a crime to plaintiff. But the evidence showed from Schnupp's own testimony that not only those words were mentioned when he spoke to Goss about the incident. Schnupp said he told Goss he was a member of a drug strike force investigating illegal drugs and he asked if Smith was ever suspected as a drug user by those who work with him.

The evidence and instruction 7 ascribe that plaintiff drives his vehicle into a "high drug profile area." The statement further ascribes him as conveying his passenger to such a place to permit him to get out and interact with a third party to exchange "something" for "something". While in a criminal trial it could be shown that Smith had no knowledge or intent or that the "something" observed as cocaine exchanged was not contraband, or, if it was, that he was merely present etc., the natural import of the statement when uttered was that Smith is involved in some criminal activity. This would be the case even though upon a criminal trial guilt may not be proved beyond a reasonable doubt. Nevertheless, the intimation or insinuation of a derogatory, criminal involvement is there for the imputation of crime, to support a claim of defamation per se.¹

¹The parties have presented much in the way of argument
(Footnote Continued)

Malice And Qualified Privilege

Next, the second and third grounds of Schnupp's motion. "To recover actual or compensatory damages...a private individual [has] to prove by a preponderance of the evidence that the statements [are] false and that the [defendant] either knew the statements were false or, believing them to be true, lacked reasonable grounds for such belief or acted negligently in failing to ascertain the truth. Gazette v. Harris, 229 Va. 1, 15, 325 S.E.2d 713, 724-725, cert. denied, 472 U.S. 1032 (1985), cert. denied, 473 U.S. 905 (1986), Ingles v. Dively, ___ Va. ___, 435 S.E.2d 641 (1993). As mentioned earlier, the Court ruled that Schnupp was entitled to a qualified privilege when he made his remarks. A statement although qualifiedly privileged can be defamatory nonetheless if it is shown by clear and convincing evidence it was made with common law malice. See Smalls v. Wright, 241 Va. 52, 55 (1991). Here the Court instructed the jury that the qualified privilege could be overcome by a clear and convincing showing of common law or New York Times malice. See Instruction 16. See also New York Times v. Sullivan, 376 U.S. 254 (1964). New York Times' malice is knowledge that the statement was false or reckless disregard as to its truth or falsity. Id. at 279-80. The question that has troubled the Court throughout these proceedings, considering the rules governing the burden of overcoming qualified privilege and the jury's finding, is whether the evidence supports only finding that Schnupp's conduct was merely negligent or mistaken---and thus not malicious---as a matter of law. Accordingly, the evidence in this case must be tested to see if it is legally sufficient to support a finding of malice.

In the case of Southeastern Tidewater Opportunity Project v. Bade, ___ Va. ___, 435 S.E.2d 11 (1993), the Court found that plaintiff there "simply failed to establish common law malice by clear and convincing evidence" and reversed a judgment awarding damages in plaintiff's favor. There plaintiff was employed as comptroller for the Southeastern Tidewater Opportunity Project, Inc. (STOP).

(Footnote Continued)

on the question of defamation per se in this case. The Court will not decide or address whether there is sufficient evidence to support the jury's finding without the aid of per se findings.

Lucas served as executive director of STOP. Lucas published a letter written to plaintiff terminating him which claimed that plaintiff, who was a CPA, had submitted false and improper records and failed to account for expenditures of federal monies. Finding Lucas' statements were privileged, the Court observed that "[t]he record lacks sufficient evidence from which we can infer, by the clear and convincing standard, that Lucas' behavior was actuated by any sinister or corrupt motive." Id. at 435 S.E.2d at 133. (Citation omitted).

Then, there is the issue of whether under New York Times a plaintiff must show that the defendant in fact entertained serious doubts as to the truthfulness of his publication, subjectively, and then went ahead anyway and whether even under New York Times it is enough to show that the defendant acted with spite, hatred, ill will or intent to injure plaintiff to overcome privilege. The answer to these questions, the Court believes, can be found in the evidence in this case according to the view the jury apparently took and the law in this Commonwealth governing the type of malice sufficient to overcome qualified privilege.

First, the Supreme Court has said that the common law malice sufficient to defeat a qualified privilege, must be proof that the speaker uttered defamatory words without believing them to be true, or lacked reasonable or probable grounds for believing them to be true. Great Coastal v. Ellington at 155. Then the Court went on to say in Great Coastal that: "Thus, common law malice, in Virginia, has long included New York Times malice." Id.

Second, it should be remembered that in this case there was much difference in the evidence adduced by the parties over whether the incident of stopping and dealing with a third party ever occurred at all. In the STOP case there was no disagreement over whether the letter was written, its contents etc. Here, the jury had to decide whether the incident occurred at all, what was said, and whether Schnupp's conduct was malicious within the definition provided in the instructions. The jury could find that the transaction did not occur and that Schnupp acted with malice in reporting a suspected drug transaction to his employer with the intent to injure him. Thus, there is a basis under the evidence for the jury to decide malice necessary to overcome qualified privilege.

Damages

As mentioned the jury found in Smith's favor and awarded \$200,000.00 compensatory and \$100,000.00 punitive damages. Schnupp argues the damages are excessive as out of proportion to the things Smith related happened as a result of Schnupp's remarks. The jury was instructed that in determining the amount of compensatory damages it could consider:

(1) any insult to [Smith] including any pain, embarrassment, humiliation and mental suffering and

(2) any injury to his reputation.

See Instruction No. 15. Schnupp's position is that since the jury was confined to considering only these things and not others like business injury, and physical manifestations of emotional distress the \$200,000.00 award is excessive to any injury suffered, as a matter of law.

"The setting aside of a verdict is not warranted if it 'merely appears to be large and more than the trial judge would have awarded had he been a member of the jury'." Murphy v. Virginia Carolina Freight Lines, Inc., 215 Va. 770, 774 (1925) (citations omitted). When, however, the amount of the verdict is so great so as to shock the court's conscience or so out of proportion to the injuries suffered that it is not the product of a fair and impartial decision it is the duty of the trial court to set the award aside. Modabar v. Kelly, 232 Va. 60 (1986), Reel v. Ramirey, 243 Va. 463 (1992).

Smith's evidence related a series of events, beginning with the loss of his employment with ARA that resulted from Schnupp's statements to his employer. Smith's wife and children testified he was worried, upset and irritable about being out of work. There was evidence he did not work regularly for some months and when he did secure regular employment it was at less pay and on irregular hours compared with ARA employment. There was evidence that Smith had planned to purchase a new home but could not with either no or reduced income, which caused him anxiety. There is also the matter of the reason for termination by ARA, which the jury could have concluded diminished Smith in his employer and co-employees' eyes because of the insinuation that he was involved in a drug transaction. All these

matters fit within the damage elements outlined to the jury in Instruction No. 15.

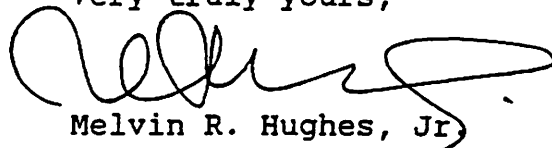
I cannot find that the damages are shocking, entirely out of proportion, or, given the jury's view of the case by deciding for plaintiff, that there is no predicate for them.

As to the punitive damage award, as mentioned earlier, the jury was instructed that the defendant's statements were qualifiedly privileged and that to overcome the privilege it was necessary for Smith to prove actual malice, which is the same proof needed to recover punitive damages for defamation. Gazette v. Harris, 229 Va. 1, 13 (1984), citing Fleming v. Moore, 221 Va. 884, 893 (1981).

Conclusion

For the foregoing reasons the Court finds there is no merit in Schnupp's motion and decides that the motions are overruled and judgment is entered consistent with the jury verdict wherein defendant's exceptions are noted. A copy of the final judgment order is enclosed.

Very truly yours,



Melvin R. Hughes, Jr.

MRH, JR/n
Enclosure

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

ANDRE L. SMITH

PLAINTIFF

v.

Case No. LU-3435-1

MARCH SCHNUPP, ET AL.

DEFENDANTS

O R D E R

Pursuant to the order of this Court dated October 28, 1993, and the jury convened to hear and decide this case: Margaret Byrne, Vickie Crawley, Sharon Dove, Jacqueline Curl, Ellen King, Janet Procida and Delores Smith, and in accordance with the jury's verdict:

We, the jury, on the issues joined, rendered our verdict in favor of the plaintiff Andre' L. Smith, and award him damages as follows:

Compensatory damages in the amount of:
\$200,000.

Punitive damages in the amount of:
\$100,000.

/s/ Janet P. Procida
Date: October 26, 1993.

For the reasons stated in the Court's letter of January 20, 1994, it is ORDERED that judgment be entered in favor of plaintiff and that plaintiff recover of defendants the sum of \$200,000 for compensatory damages and \$100,000 for punitive damages with interest thereon to be computed at the legal rate from the date of this order until paid, plus court costs which plaintiff expended in this suit.

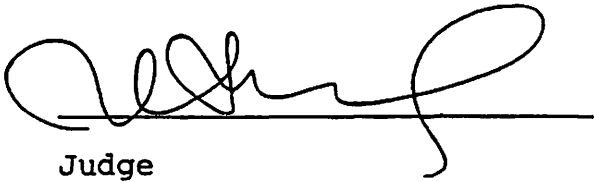
Defendants' exceptions are duly noted.

A copy of this Order is mailed to counsel of record.

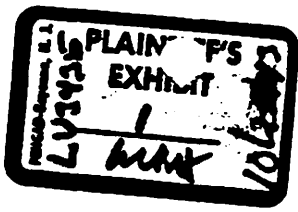
And nothing further remaining to be done herein, it is ORDERED that this matter be stricken from the docket and placed among the ended causes of this Court.

It is so ORDERED.

Enter: 1 / 20 / 94

A handwritten signature in black ink, consisting of a large, stylized 'W' followed by a long horizontal stroke and a large loop at the end, positioned above a horizontal line.

Judge



8/21/92 Friday 5:00 pm

incident "

I Received a call from Mark Schupp a Drug + Vice officer, that our van license LKA 792 with our Driver Andre L. Smith was seen at 3:25 at a high profile drug area on 900 North 26th Street. He was observed pulling up to this location + a passenger got out of passengerside went up to this location gave people something + Received something in Return, then this person known as Robert B. Regan Jr. got back in the van + they drove by the officer Mark Schupp + he released the license plate of van + called in to police dispatcher and a police officer stopped the van at 3:30 p.m. + proceeded to search van + occupants to find nothing. they then were let off with a warning. Officer also asked Andre what he was doing in Company van in this area. Andre Reply by saying he was off the clock at the time. Andre Smith was under Eric Brown

(2)

on this particular day and is scheduled to work from 7-am. to 4 p.m. with $\frac{1}{2}$ hour of lunch.

after:

cl, Cindy Goss took the call at 5:00 p.m. cl called the General Mgr, Anne Ball, which was in the Hospital. She instructed me to call Jim Foley our Area Regions Manager. cl did this, he was not available so cl then left a voice mail message and told him to call me back by 7:30 am on Monday Morning Aug 24, 1992 to let me know his ideas. cl then called Angie Birt from Human Resources to ask what steps to take in this situation, She was on vacation & cl was instructed to call Flo Rowe in Area 2 at 1-816-891-7874 which does same job as Angie Birt. cl explained everything in Detail to her and her reply was: (1) andrew was in area that we do not have business in, (2) andrew had

passenger that was not an
 ana employee with him.

③ he was still on the clock &
 was suppose to be working.

She instructed me that this
 is clearly against Company's
 policy of guidelines for use of
 ana vehicles & agreement of Drivers
 Policies. As a result of all of
 this is her recommendation of
 Company's Vice President's Office
 to terminate Andre R. Smith
 as of August 24, 1992 with no
 room for discussion.

cl then spoke to General Mgr.
 again & told her my steps &
 she agreed that Andre R. Smith
 was to be terminated as of Monday
 August 24, 1992. On Monday
 August 24, 1992, our Region Area
 Manager's reply was also
 to terminate Andre R. Smith as
 we were instructed.

Mark Schupp was also checked
 out thru Police Dept. as being
 a officer by at 780-6718 by
 T. A. Johnson - Dispatch Officer -

8/24/72
10:45am

Page 4 - (after Andre was terminated)

I have left Jim Foley voice mail message that Andre is terminated and that Andre is inquiring about Re-instatement and that we referred him to call Jim Foley or Corporate or Ann Ball as a last result. I then spoke with Ann Ball - Gen. Mgr. and let her know Andre was terminated. At 10:50 Flo Loue called to see how everything went & suggested that we get something in writing if we could by the officer that reported situation or by the officer that actually stopped him. I then called Mark Schupp & he was not available ~~for~~ but his partner answered & told me that there was no police report filed, but that he had their notes and names of all involved and that he would send us copy of his report. His name was Zohar.

This report deals with the investigation of (Suspect) ARA Services van

Date of Investigation - 8-21-92

Location of investigation - 900 North 26th Street

This investigation was conducted by (Officers/Detectives) Strike Force

This report prepared by (Officer/Detective) Schnupp

On 8-21-92 members of Richmond Bureau of Police were conducting a surveillance in the 900 block of North 26th Street. A subject was identified as the target of the surveillance(this subject was dealing crack cocaine). At approx. 1531 hours(3.31pm) a ARA Services van entered the surveillance area and stopped in the 900 block. The van had two occupants,(both black males) and was bearing license plates Lka-792. the target of the surveillance approached the passenger of the van and exchanged cocaine for money. The van then left the area. All the information was relayed to a take down unit which stopped the vehicle in the area of 25th and Venable Street. Upon searching the occupants and the vehicle for the cocaine it was determined that the cocaine was destroyed prior to the Officers making the stop.

All these events occurred North of the James River in an area that is now an active drug spot.

If any further information is needed please don't hesitate to call the Strike Force office at 780-4516 or 8573.

HGV 20 1992

Schnupp Ex. 1 Id ✓ E
CARL W. GIRARD



760



6-18-2354

780-4759

BH 1100

25Q

~~SNAP~~

790-6825
C2H

EMPLOYEE COUNSELING REPORT

I

I

MARKET CENTER ARACORY Ref Ser. COMPONENT # 6057

EMPLOYEE NAME Andre L. Smith DATE 8/24/92

DESCRIPTION OF INCIDENT (3:30 Friday afternoon)

(8/21/92) Andre was in location that was not part of our territory, during business hours and had a passenger with him that was not a employee.

ACTION TAKEN

8/24/92 This is clearly against company's guidelines for use of ARA vehicles and agreement of Drivers policies. It is the company's decision at this time to terminate Andre Smith.

I certify that this report has been discussed with me, and my signature does not necessarily indicate agreement.

Does Not Want To Sign
Employee Signature

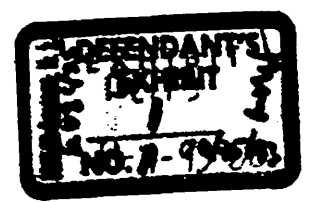
8-24-92
Date

Donald E. Brown
Immediate Supervisor

8-24-92
Date

Ammer Ball per Cindy Moss August 24, 1992
General Manager

Date



WNT India

264-2815 Ann BAI

1531

Mutt Color
Shiet

PASS! APA SERVICES

Truck: LKA-792

226-88-7182

227-86-4322

DEALERS

- BLUE MIAMI DOLPH T-shirt

• white shirt - white shorts

BLUE & PINK VERTICLE SHIRT / DK

4:05 pm

Pink shirt; Glasses - OLDER LADY - Heavy set

Blue shorts shipped 25 + T ST

- White Trunk wood sides

Y. J. Blum

Pass - Proble / White Street

LII - South Yellow Truck

