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I. **JURISDICTION STATEMENT**

This case is an appeal from the District Court's denial of the defendant's motion for judgment acquittal. Adams appeals his conviction for driving after having been declared a habitual offender in violation of 46.2-357 of the Code of Virginia (1950 as amended) and for driving while suspended or revoked in violation of 46.2-301 of the Code of Virginia (1950 as amended) and both statutes are assimilated pursuant to 18 USC 13. Jurisdiction of the United States Court of Appeals for the Fourth Circuit is appropriate pursuant to 18 U.S.C. Sec 1291. The District Court entered final judgment on November 2, 2004. Adams filed his notice of appeal on November 4, 2004 pursuant to Rule 3 and Rule 4 of the Federal Rules of Appellate Procedure.

II. **STATEMENT OF ISSUES**

The issues in this appeal are:

- a. Did the Court err in denying the defendants motion for judgment of acquittal when the United States failed, as a matter of law to sufficiently prove that the defendant was operating a motor vehicle on

a highway as defined by Virginia statutory law? (Issue preserved at App. 45-46:1-19)

- b. Alternatively, if the defendant was operating a motor vehicle on a highway open to the public, was the initial motor vehicle stop of the defendant for trespassing by law enforcement without probable cause? (Issue preserved at App. 54:1-6).

III. STATEMENT OF CASE

The defendant was convicted after a trial before the Honorable Jerome B. Friedman on July 8, 2004 of two counts of an indictment charging him with driving after having been declared a habitual offender (felony) in violation of 46.2-357 of the Code of Virginia and driving on a suspended license (misdemeanor) in violation of 46.2-301 of the Code of Virginia (1950 as amended). The events in question occurred on a federal enclave and the defendant was prosecuted under the Crimes Assimilation Act 18 USC 13 in the United States District Court for the Eastern District of Virginia. On November 2, 2004 the District Judge sentenced Adams to serve forty-eight months of incarceration for the convictions of both charges. On November 4, 2004, Adams filed his appeal.

IV. STATEMENT OF FACTS

The facts in the case are generally not in dispute. On January 3, 2004, while working in his capacity as a law enforcement officer for the United States Fish & Wildlife Services, James Red Willett was on routine patrol in the Great Dismal Swamp National Wildlife Refuge, a territory within the special maritime and territorial jurisdiction of the United States (App 20-21). On that date, Officer Willett came into contact with the defendant, Samuel Contreras Adams at 12:50pm while the defendant was operating his motor vehicle on Jericho Ditch lane within the Great Dismal Swamp. (App 22:11-17). The purpose of the patrol by Officer Willett was to “make sure people weren’t in places that they weren’t authorized to be in” due to storm damage from Hurricane Isabel. (App. 22:19-23). Officer Willett noticed the defendant coming out of Jericho Ditch Lane, which is a dead end road, and was stopped by Officer Willett for “trespassing in a closed area because it was closed to storm damage.” (App. 23:11-15). The only probable cause to stop the defendant from operating his motor vehicle was for trespassing. (App. 45:5-7). Jericho Ditch lane is a gravel road that is normally open to the public (App. 26:4; 24:17-18), however it had been closed along with the entire refuge because of storm damage from Hurricane Isabel. (App. 25:17-19).

Several press releases were issued notifying the public that the refuge was closed until further notice. (App. 25:16-22). Additionally, there were posted signs as soon as you enter the refuge property that stated “unauthorized entry prohibited” and that “you have to consult the refuge manager for current regulations.” (App 26:1-2). It was then learned by Officer Willett that the defendant did not have a driver’s license, and subsequent to the encounter the charges in this matter were then indicted by a grand jury in the United States District Court for the Eastern District of Virginia, Norfolk Division in the March 2004 term. (App. 7-8).

V. **SUMMARY OF ARGUMENT**

The Government failed to prove that the road the appellant was operating his motor vehicle on was a highway as defined by Virginia statutory and case law. Alternatively, if the road was a highway and open to the public, then the stop of the defendant for trespassing was without probable cause.

VI. **ARGUMENT**

i. **STANDARDS OF REVIEW**

The issue of whether the government failed to factually prove its case to satisfy all the elements of a particular statute is a question of law, and, therefore,

subject to de novo review by this Court. *United States v. Gray*, 137 F. 3^d 765, 770 (4th Cir 1998) (en banc).

ii. DISCUSSION

The defendant was convicted of driving after having been declared a habitual offender in violation of 46.2-357 of the Code of Virginia (1950 as amended) and driving while suspended or revoked in violation of 46.2-301 of the Code of Virginia (1950 as amended). A primary element for the conviction of both charges was whether the defendant was operating his motor vehicle on a “highway” as defined by the laws of the Commonwealth of Virginia. The prosecution failed to meet its burden beyond a reasonable doubt that the defendant was operating his motor vehicle on a highway, and the District Court was in error to deny the defendant’s motion for judgment acquittal based on this deficiency.

The defining Virginia statutes involved in the conviction of the defendant are as follows:

Va. Code Ann. § 46.2-357 states in part: It shall be unlawful for any person to drive any motor vehicle on the highways of the Commonwealth of Virginia while the order of the court prohibiting such operation remains in effect.

Va. Code Ann. § 46.2-100 defines "highway" as: The entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth of Virginia and, for law-enforcement purposes, the entire width between the boundary lines of all private roads or private streets which have been specifically designated "highways" by the county in which such private roads or streets are located. Section 46.2-100 also defines a "private road or driveway" as: every way in private ownership and used for vehicular traffic by the owner and those having express or implied permission from the owner, but not by other persons.

Va. Code Ann. § 46.2-301B states in part: Except as provided in [§§ 46.2-304](#) and [46.2-357](#), no resident or nonresident (i) whose driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked or (ii) who has been directed not to drive by any court or by the Commissioner, or (iii) who has been forbidden, as prescribed by operation of any statute of the Commonwealth or a substantially similar ordinance of any county, city or town, to operate a motor vehicle in the Commonwealth shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in the Commonwealth until the period of such suspension or revocation has terminated or the privilege has been reinstated.

A clerk's notice of suspension of license for failure to pay fines or costs given in accordance with [§ 46.2-395](#) shall be sufficient notice for the purpose of maintaining a conviction under this section. For the purposes of this section, the phrase "motor vehicle or any self-propelled machinery or equipment" shall not include mopeds.

The facts in this case are quite clear. The probable cause for the stop of the defendant was for trespassing on a closed area on Jerricho Ditch Lane in the Great Dismal Swamp a federal enclave within the boundaries of the Commonwealth of Virginia and the Eastern District of Virginia. (App. 45:5-7). The road the defendant was on was closed due to hurricane damage from Hurricane Isabel. Although it is not in the record, this Court may review the facts in this case *de novo* and therefore this Court may take judicial notice that Hurricane Isabel hit Virginia on or about September 18, 2003 (citing: http://science.nasa.gov/headlines/y2003/18sep_isabel.htm). However, the District Court did make a finding that the road the defendant was on was closed for a “pretty significant period of time.” (App. 56:15-16). The defendant was operating his motor vehicle on or about January 3, 2004, approximately 3.5 months after the storm caused damage to this area of the Great Dismal Swamp. The record reflects that several press releases were issued stating the area the defendant was in was

closed as well as signs posted throughout the area that unauthorized entry was prohibited. (App. 25:16-12).

The Virginia Courts have addressed the definition of a highway on several occasions. The first reported case on point defining the word “highway” was [Kay Mgt. Co. v. Creason, 220 Va. 820, 263 S.E.2d 394 \(1980\)](#) which held that the streets in an apartment complex were highways within the definition of "highway" under the statute regulating the operation of vehicles on highways. The Court stated further that the rules of the road have applied to ways on private property that are open to public use for vehicular travel. The Virginia Supreme Court then expanded the definition of a highway in [Furman v. Call, 234 Va. 437, 362 S.E.2d 709 \(1987\)](#) holding that the evidence of accessibility to the public for free and unrestricted use gave rise to a prima facie presumption that the streets were highways within the definition of the statute. Once this presumption arises, the opposing party has the burden to rebut the presumption by showing that the streets were used for vehicular travel exclusively by the owners and those having either express or implied permission from the owners. The Virginia Court of Appeals followed the [Furman](#) decision and stated in [Flinchum v. Com., 24 Va. App. 734, 485 S.E.2d 630 \(1997\)](#) that the test for determining whether a way is a "highway" depends upon the degree to which the way is open to public use for vehicular

traffic and the Court further stated that lots traversed by defendant were not "highways" within the statutory meaning of that term. The sporting goods' and repair business' parking lots in the Flincham case were held to have not been open to the public at all times, but instead were open to the public upon invitation. This intent as demonstrated by the posted "no trespassing" sign, which clearly served to prohibit the entry of motor vehicles operated by members of the public. Further, either of the businesses could close their doors and bar the public or any person from vehicular travel on all or any part of their premises at will. The Flincham court found that when the defendant in that case was operating his motor vehicle in this "no trespassing" parking lot, that the road for which he was on was not a "highway" under 46.2-100.

The party seeking to establish that a particular way is a highway has the initial burden of presenting evidence of unrestricted access to the public. A sufficient showing of unrestricted access gives rise to the presumption that the way is a highway. Once this presumption is found to be applicable, the opposing party has the burden to rebut the presumption by showing that the area was open only to those with express or implied permission from the owner. [Caplan v. Bogard, 264 Va. 219, 563 S.E.2d 719 \(2002\)](#). The public's free and unrestricted use of a roadway supports the inference that a road is a highway. Evidence that the

roadway's users must obtain either explicit or implicit permission to use the road may refute this inference. Mere inconveniences to free travel on a road, such as checking vehicles at checkpoints or access gates, do not inhibit public use of the roadway to the extent that they divest a road of its character as a highway. A combination of impediments on free and unrestricted travel, private ownership of the way, use reserved for business invites, absence of traffic signs, or the owner's ability to remove people from the premises must exist to categorize a road as private. [Campbell v. Commonwealth, 39 Va. App. 180, 571 S.E.2d 906 \(2002\).](#)

From a review of the Virginia cases noted above, the facts in this case are very similar to both the Campbell and Flinchum decisions. The Virginia Court of Appeals in Flinchum stated that if an area has a “no trespassing sign” which prohibits the entry of a motor vehicle operated by members of the public then the area is not a “highway” as defined by statute. The party seeking to establish that a particular way is a highway has the initial burden of presenting evidence of unrestricted access to the public. This clearly has not been established by the government. The facts in this case are that the defendant was for trespassing on a closed road. Therefore, not only has the prosecution not established their burden to show that the road is open to the public but the defendant argues that even if the burden was met by the government, that he has successfully rebutted the

presumption as defined in Furman by the mere fact that the probable cause for the stop of his vehicle to be trespassing. The government cannot have probable cause to stop someone for operating a vehicle on a closed road for trespassing and then say that it is a highway open to the public so as to convict a defendant under title 46.2-301 or 357 of the Code of Virginia. The defendant did not have express or implied permission by the owners of the Great Dismal Swamp to be operating his motor vehicle within the boundaries of this federal enclave. Since the defendant was trespassing, the road was clearly not open to the public and therefore not a highway of the Commonwealth. Without the “highway” element, the defendant can not be convicted for either statute that he was indicted under.

If this Court were to hold that the road was open to the public, then it would alternatively have to hold that there was no probable cause to stop the vehicle.

At trial, the government created a hypothetical situation that if Interstate 64 were shut down for a brief period of time, that under the defense theory, the interstate would no longer be a highway. This hypothetical clearly does not define the scenario that is at hand. The defendant was operating his motor vehicle on a gravel road in a federal enclave that had been closed for over three months. Additionally, there were no trespassing signs posted and several public announcements had been

made that the area was closed to the public. The defendant was then operating his vehicle on a closed road for which he did not have permission to be on. There was no evidence offered by the prosecution at trial that the defendant had operated his vehicle on any open road within the federal enclave. Virginia case law would support the expansion of the Flinchum decision for a holding by this Honorable Court that a road once considered a highway when used for unrestricted public travel can be later determined a private road or not a highway when it no longer is serving in the public capacity and when the owners of the road restrict access to it for a substantial period of time allowing even the expansion of police powers to conduct traffic stops for trespassing if the public so uses that road. Therefore, the precedence of the Virginia Supreme Court and the Virginia Court of Appeals should be applied in this case for a finding that the road the defendant was operating his motor vehicle was not one open to the public and therefore not a “highway” as defined by 46.2-100 of the Code of Virginia (1950 as amended). Alternatively, if the Court found that the road was a highway open to the public, then the Court should find that there was no probable cause to stop the defendant in this case. Under either theory, this case should be reversed and remanded to the District Court for entry of a judgment acquittal in this matter.

VII. CONCLUSION

The Court erred in denying Adams' motion for judgment acquittal. The case should be remanded for the entry of a judgment acquittal.

VIII. REQUEST FOR ORAL ARGUMENT

The appellant respectfully requests the opportunity to argue this appeal before a panel of judges of this Court.

RESPECTFULLY SUBMITTED

SAMUEL CONTRERAS ADAMS

By: _____
Counsel

Timothy V. Anderson, Esq.
Anderson & Good, PC
2396 Court Plaza Dr, Ste 200
Virginia Beach, VA 23456
Tel. (757) 301-3636
Fax (757) 301-3640
VSB 43803