No. _____

In the Supreme Court of the United States

KELVIN JONES, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

APPENDIX

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ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kelvin Jones, Petitioner.

Appellate Case No. 2020-000653

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28074
Heard September 22, 2021 – Filed December 8, 2021

AFFIRMED IN RESULT

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

JUSTICE HEARN: In this case, we revisit and refine our preservation rules in the context of pretrial criminal hearings. Arguing that a drug raid of his home violated

the Fourth Amendment, Petitioner Kelvin Jones appeals his convictions for trafficking cocaine and possession with intent to distribute cocaine within the proximity of a school. Jones's pretrial motion to suppress was denied and he was convicted following a jury trial. The court of appeals affirmed on the basis the issue was not preserved for appellate review.[1] We hold Jones's argument as to the search warrant is preserved but fails on the merits. Accordingly, we affirm in result the court of appeals' opinion and take this opportunity to clarify our issue preservation rules with respect to pre-trial rulings of constitutional dimension.

FACTUAL/PROCEDURAL BACKGROUND

The investigation into Jones began in April of 2010 when police received complaints of "short-term traffic" frequenting his home on Morgan Street in Aiken. Acting on these tips, the Aiken Department of Public Works was enlisted to conduct a trash pull at Jones's residence. Jones's garbage was collected on its regular trash day and transmitted to the police to be searched. Several items tending to show criminal activity were discovered: twisted and torn baggies, emptied cigar tubes for marijuana use, and burnt remains of cigars that contained leafy green materials that were subsequently confirmed to be marijuana. Based on this evidence, investigators then obtained a search warrant from a magistrate.

Prior to executing the warrant, investigators conducted surveillance from an undercover vehicle parked across the street from Jones's residence. Marty Sawyer, a Captain with the Aiken Department of Public Safety, watched as a man named Ricky Lloyd walked to the door, knocked, and left upon hearing no reply. A few minutes later, Jones and a few others, including Lloyd, approached the residence and went inside together. Jones entered, wearing a heavy blue backpack. Soon thereafter, investigators executed the warrant by breaching the home after announcing their presence. Once inside, investigators seized over a kilogram of cocaine, a pickle jar containing marijuana, more than $5,000 of cash in mostly $20 bills, a Smith & Wesson handgun, and a small amount of ecstasy.[2]

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[1] The court of appeals also decided the case on three ancillary grounds, but this Court only granted certiorari as to issue preservation.

[2] When investigators entered the residence, the blue backpack containing cocaine was found under the couch and Lloyd was discovered attempting to flush his cocaine down the toilet.

At a preliminary hearing, Judge Dickson heard arguments on two defense motions—a motion for change of venue which was granted[3] and a motion to suppress the contents of the search based on an alleged violation of the Fourth Amendment. The circuit court judge disagreed, upholding the search warrant as proper.

The case was subsequently transferred to Dorchester County, where Judge McIntosh presided over the trial. Jones pled guilty to the possession of ecstasy charge and proceeded to trial for the remaining charges of trafficking cocaine and possession of cocaine with intent to distribute within the proximity of a school.

Immediately prior to trial, Jones's counsel renewed his objections to the denial of the motion to suppress by stating, "as you're aware, we will be renewing our objection . . . especially as it relates to the suppression issue." A new suppression hearing was not conducted and the trial judge stated he would "uphold" the prior ruling. During trial, Jones's counsel inconsistently objected to evidence recovered during the raid.[4] At the close of the State's case, Jones's counsel again renewed his objections, which were denied by the trial judge. The jury then convicted Jones of both charges, and the trial court sentenced him to the mandatory minimum of 25 years for the trafficking charge, 10 years on the possession with intent to distribute within the proximity of a school charge, and one year for the possession of ecstasy charge, all to be served concurrently. The court of appeals affirmed in an unpublished decision, holding Jones's objections to the search were not preserved for appellate review. This Court granted Jones's petition for certiorari on the issue of error preservation, and the parties briefed both that issue and the merits of the search.

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[3] Coincidentally, the Solicitor for the Second Circuit, Strom Thurmond, Jr., and one of his assistant solicitors were on a "ride along" with Sawyer when the search occurred.

[4] For example, just before the jury was seated, Jones's counsel renewed his objections to the raid evidence. However, during Officer Sawyer's direct examination, Jones's counsel did not object to testimony about this same raid and the evidence gathered during it. Jones's counsel did not object when the drugs, money, and gun were admitted into evidence, but mentioned his objection again at the close of all the evidence.

STANDARD OF REVIEW

As to the validity of a search warrant, we have noted that "[a] magistrate's determination of probable cause to search is entitled to substantial deference...on review." *State v. Crane*, 296 S.C. 336, 339, 372 S.E.2d 587, 588 (1988). We reverse the denial of a motion to suppress, only upon a finding of clear error. *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).

LAW/ANALYSIS

In order for an issue to be preserved for appellate review, a party must make a "contemporaneous objection that is ruled upon by the trial court." *State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final. *See State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. *Id.* at 156, 679 S.E.2d at 175. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling. *See also State v. Mueller*, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) (holding that pretrial motions are generally not final orders because "the evidence developed during trial may warrant a change in the ruling"). While *Mueller* remains good law, we believe a different approach is warranted where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review.

Here, the pretrial evidentiary ruling was rendered following a full hearing on Jones's motion to suppress. Both sides submitted briefs, presented testimony to the court, and argued their respective positions. Just before trial, although defense counsel noted his continuing disagreement with the prior denial of his motion to

suppress, no new hearing was held, and, during trial, no new facts arose which would have justified another hearing on the matter. While there is no question the trial judge could have changed the prior ruling on the motion to suppress based upon new matter coming to light, requiring attorneys to continue to object when a ruling is clearly final would not serve the purpose of our rules of preservation; rather, it would merely foster a game of "gotcha," where form is elevated over substance. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); and *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021). Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. *See Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Their purpose is not to sabotage attorneys' efforts to bring issues before the appellate courts, particularly where, as here, it was clear to all concerned that Jones's counsel continued to object to the denial of his motion to suppress. Therefore, we hold that Jones's objection to the denial of his motion to suppress was preserved for appellate review.

In the interest of judicial economy and because both sides briefed the issue of the viability of the search warrant, we now proceed to the merits. Being faithful to our deferential standard, we affirm the circuit court's decision to uphold the search warrant.

In order for a search to violate the Fourth Amendment, it must be an arbitrary invasion by government actors. *See Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967). "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). For a search to be unreasonable, generally it must lack probable cause. *See State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). Further, "[p]robable cause, we have often told litigants, is not a high bar . . . ." *See Kaley v. United States*, 571 U.S. 320, 338 (2014) (explaining further that probable cause is defined as a "fair probability" upon which "reasonable and prudent people . . . act").

In *State v. Kinloch*, this Court held that short-term traffic and subsequent surveillance constituted probable cause for the issuance of a warrant. *See* 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014). Similarly, in *State v. Rutledge*, the court of appeals affirmed the magistrate's probable cause finding after reviewing a tip of drug sales combined with a trash pull that yielded marijuana. *See* 373 S.C. 312,

315, 644 S.E.2d 789, 791 (Ct. App. 2007). Even if distinguishable, the facts of Jones's case are *more* supportive of a probable cause finding, not less. Not only did the trash pull at Jones's home yield marijuana residue, but also baggies indicative of narcotics resale, which was consistent with and corroborated by the tips of short-term traffic. Thus, the magistrate's issuance of the search warrant was supported by probable cause.

Accordingly, we **AFFIRM IN RESULT.**

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kelvin Jones, Appellant.

Appellate Case No. 2016-001835

Appeal From Aiken County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2020-UP-018
Submitted January 1, 2020 – Filed January 29, 2020

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell, III, both of Columbia, for Respondent.

PER CURIAM: Kelvin Jones appeals his convictions and consecutive sentences of twenty-five years' imprisonment for trafficking cocaine, ten years' imprisonment for possession with intent to distribute cocaine within proximity of a school, and one year's imprisonment for possession of ecstasy. On appeal, Jones argues the

trial court erred by (1) refusing to suppress drugs seized as the result of a search warrant that lacked probable cause; (2) allowing testimony indicating law enforcement had prior knowledge of Jones; (3) qualifying an investigator as an expert in cocaine valuation and how cocaine is packaged and sold; and (4) failing to grant a new trial based on the State's refusal to provide Jones with a copy of a complaint filed against the detective who obtained and executed the search warrant. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The issue of whether the trial court erred when refusing to suppress the drugs is not preserved for appellate review. *See State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); *State v. Stokes*, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) ("Merely raising an argument in *limine* does not preserve the issue for appellate review."); *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in *limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *id.* at 647, 725 S.E.2d at 733 ("[W]hen the evidence does not immediately follow the motion in *limine*, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review.").

2. The trial court did not abuse its discretion when allowing an officer to testify about his prior knowledge of Jones because the testimony served the purpose of identifying Jones. Therefore, any possible prejudice did not substantially outweigh the probative value of the testimony. *See State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429

(Ct. App. 1998) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989))); *id.* ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993))).

3. The issue of whether the trial court erred when qualifying an investigator as an expert in valuing, packaging, and selling cocaine is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

4. The trial court did not abuse its discretion in denying Jones's motion for a new trial based on the State's refusal to provide Jones with a copy of a complaint filed against the detective who obtained and executed the search warrant because Jones did not meet the requirements set forth in *Brady*.[1] *See State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("The decision whether to grant a new trial rests within the sound discretion of the trial court, and [an appellate court] will not disturb the trial court's decision absent an abuse of discretion."); *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("*Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); *State v. Hutton*, 358 S.C. 622, 632, 595 S.E.2d 876, 882 (Ct. App. 2004) ("Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt."). Further, even if the complaint had been disclosed to Jones the result of the proceeding would not be different because the complaint would have been inadmissible as the detective had not been charged with a crime at the time of trial and the complaint was not probative of the detective's truthfulness or untruthfulness. *See* Rule 608(b), SCRE ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609 [SCRE], may not be proved by extrinsic evidence. They may, however,

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."); *State v. Black*, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012) ("The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility.").

AFFIRMED.[2]

THOMAS, GEATHERS, and HEWITT, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

The Supreme Court of South Carolina

The State, Respondent,

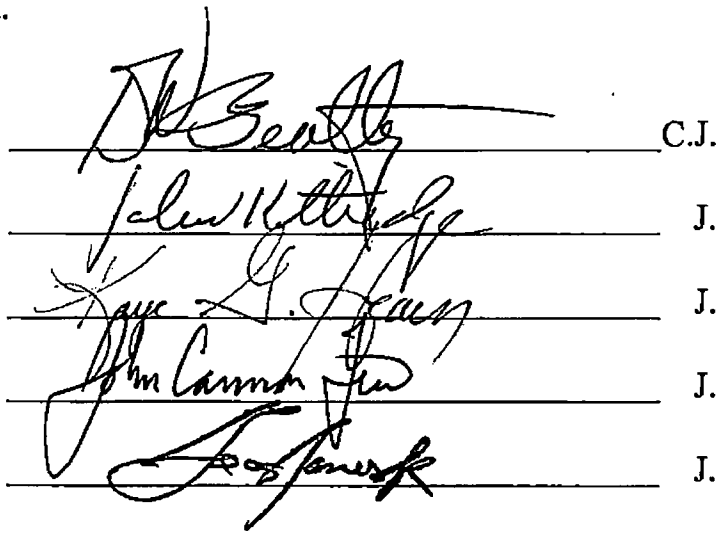
v.

Kelvin Jones, Petitioner.

Appellate Case No. 2020-000653

ORDER

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



C.J.

J.

J.

J.

J.

Columbia, South Carolina

February 3, 2022

cc:

Kathrine Haggard Hudgins, Esquire
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO. 2016-001835

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28074

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Kelvin Jones petitions the Court for rehearing. Counsel submits that this Court correctly found that the pre-trial denial of the motion to suppress drugs seized as a violation of the Fourth Amendment was a final ruling and the issue was preserved for appellate review. Counsel respectfully submits, however, that this Court overlooked the fact, with regard to the merits of the motion to suppress, that the anonymous complaints of "short-term traffic" at a house in the present case are one step removed from anonymous complaints that drugs are being sold or stored at a house, as in State v. Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014) and State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007). The anonymous complaints of

"short-term traffic" in the present case lacked reliability as unverified **and** required an assumption that "short-term traffic" was indicative of drug transactions rather than innocent behavior. Additionally, counsel respectfully submits that this Court overlooked the fact that the burnt remains of a cigar containing marijuana, the torn baggies, empty cigar tube wrappers and torn open cigars found during the single trash pull are consistent with personal use rather than resale. The anonymous, undated, non-specific, and unverified complaints of "short-term traffic" in the present case together with the items found during the trash pull are not sufficient to provide probable cause to believe that drugs would be found inside the house.

Counsel respectfully submits that the complaints of "short-term traffic" and items found from the trash pull in the present case are *less* supportive of probable cause than the complaints and the observations this Court found provided the magistrate with a substantial basis for the probable cause determination in Kinloch, 410 S.C. 612, 767 S.E.2d 153 (2014). Law enforcement officers in Kinloch received numerous complaints about heroin and cocaine transactions at a house. Law enforcement observed the house and saw activity consistent with drug sales including hand to hand transactions, money counting, and an exchange that resulted in law enforcement following one of the men involved in the exchange as he left the house. When approached by law enforcement, the man dropped a bag of heroin.

Importantly, the complaints in Kinloch specifically referenced drug transactions at the house and the complaints were verified by the observations made by law enforcement. The complaints of "short term traffic" in the present case were unverified and did not specifically reference drug transactions. The assumption that "short-term traffic" is indicative of drug transactions is *less* supportive of probable cause than the specific complaints of drug transactions at the house in Kinloch. The verifying observations by law enforcement in Kinloch are far more supportive of probable cause

than the items found in the trash pull in the present case. The observations in Kinloch corroborated the complaints of heroin and cocaine transactions at the house. The items found in the trash pull in the present case do not corroborate complaints of "short-term traffic" or provide probable cause that drug transactions were taking place at the house. The items found in the trash pull are consistent with personal marijuana use rather than marijuana sales. The items only indicate that marijuana had been smoked and disposed of at some point in time. The items do not indicate that marijuana would still be in the house. The anonymous, unverified, undated complaints of "short-term traffic" along with the items from the trash pull did not provide the magistrate with probable cause to issue the search warrant for the house.

Additionally, counsel respectfully submits that in State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the specific anonymous tip that Rutledge was selling marijuana from a house and knowledge by law enforcement that Rutledge had two prior convictions for simple possession of marijuana was *more* supportive of probable cause than the general anonymous complaints of "short-term traffic" in the present case. Importantly, the complaint in Rutledge specifically referenced drug transactions at the house and specifically referenced Rutledge by name. In the present case there was no reference to drug transactions at all, and no names were given. The assumption that "short term traffic" was indicative of drug transactions in the present case is *less* supportive of probable cause than the specific information that Rutledge was selling marijuana from the house in Rutledge.

The specific tip in Rutledge was followed by a trash pull. The affidavit in support of the search warrant included the specific tip that Rutledge was selling marijuana and stated that "officers recovered marijuana, marijuana seeds and marijuana stalks." The affidavit was supplemented by oral testimony about the trash pull. The marijuana, the marijuana seeds and the

marijuana stalks found in the trash pull in Rutledge gave credibility to the specific anonymous tip that Rutledge was selling marijuana. In the present case the items found in the trash pull do not corroborate complaints of "short-term traffic" or provide probable cause that drug transactions were taking place at the house. The items are just as consistent with personal marijuana use and do not provide the magistrate with information to believe that marijuana was being sold at the house or that any marijuana would still be in the house. The items from the trash pull only provided the magistrate with information that marijuana had been smoked and disposed of at some time in the past. Without a reference to specific drug transactions at the house, the tip of "short-term traffic" and the items found during the trash pull are not sufficient to provide probable cause.

The marijuana found in the trash pull in Rutledge substantiated the specific anonymous tip that Rutledge was selling marijuana. In Rutledge, 373 S.C. 312, 318, 644 S.E.2d 789, 791–92 (Ct. App. 2007), the South Carolina Court of Appeals wrote, "The marijuana the officers found in the trash can in front of the residence, and Rutledge's prior convictions for marijuana serve as additional evidence of a crime, while along with the electric bill registered in Rutledge's name, also substantiating the credibility of the informant and the veracity of his statements." The search warrant in Rutledge was based on a specific anonymous tip that Rutledge was selling marijuana, the fact that Rutledge had prior convictions for possession of marijuana and the marijuana, the marijuana seeds and the marijuana stalks found in the trash pull. In the present case the anonymous, undated, non-specific, and unverified complaints of "short-term traffic" and the items found in the trash pull, consistent with personal use, are *less* supportive of probable cause than the information provided to the magistrate in Rutledge. Counsel most respectfully submits that Kinloch and Rutledge are distinguishable on their facts as providing *more* probable cause than the facts in the present case.

This Court's deferential standard of review does not bar a review of the record to determine whether the trial judge's decision was supported by the evidence. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 2015 (2010). The trial judge's finding that probable cause existed for the magistrate to issue the warrant is not supported by the record. The search warrant in the present case lacked probable cause to believe that drugs would be found inside the house. Counsel respectfully seeks rehearing.

The court erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause.

During the pre-trial hearing on August 11, 2014, Petitioner moved to suppress the drugs found as a result of the execution of the search warrant. Petitioner argued that the affidavit in support of the search warrant lacked probable cause. First, the affidavit failed to establish the reliability of the complaints received by Captain Sawyer. (R. p. 3-5). The affidavit failed to indicate the basis for any conclusion that the complaints of short-term traffic were consistent with narcotics sales. (R. p. 5). The affidavit failed to provide a time frame in regard to the short-term traffic. (R. p. 5). Second, the items recovered from the single trash pull did not provide probable cause to believe that narcotics would be found inside the house. (R. p. 5-8). Additionally, Petitioner argued that the good faith exception to the requirement of a warrant based on probable cause did not apply. (R. p. 8-9).

The judge denied the motion to suppress writing, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). There was, however,

no tip to corroborate. The affidavit in support of the search warrant indicates "complaints of short-term traffic at ** Morgan St. NW that is consistent with the sale of narcotics." (R. p. 11). There was not a tip that drugs were inside the house or that drugs were being sold from the house. There was not a tip that anybody ever saw drugs inside the house. The only reference to narcotics with regard to the anonymous complaints is the detective's mere conclusory statement that the short-term traffic is consistent with narcotics sales. The officers did not conduct surveillance to try and verify the complaints of short-term traffic. The magistrate was only presented with anonymous complaints of short-term traffic without a time frame and some baggies and remnants of marijuana cigars collected from the trash pull. The State failed to present the magistrate with a substantial basis for reaching his probable cause determination. The affidavit in support of the search warrant lacked probable cause. Judge Dickson erred in denying the motion to suppress.

Both the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both constitutions provide that search warrants may not be issued except upon "probable cause, supported by oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004); see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause.").

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), this Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.; see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair

probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

"In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Baccus, 367 S.C. at 50, 625 S.E.2d at 221; see also State v. Bellamy, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination)." Kinloch, 410 S.C. at 617, 767 S.E.2d at 155.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

As noted by the Court of Appeals in State v. Gentile, 373 S.C. 506, 514, 646 S.E.2d 171, 174 (Ct. App. 2007), "Although we are cognizant that our decision should be based on the totality of the circumstances, for analytical purposes we find it necessary to separately address each piece

of evidence presented to the magistrate." Addressing the evidence presented to the magistrate in the present case, the affidavit provided that the detective received complaints of short-term traffic that "is consistent with the sale of narcotics." The affidavit failed to establish the veracity or reliability of the complaints of short-term traffic. The complaints were not verified by law enforcement. The affidavit failed to establish a basis of knowledge of short-term traffic. The affidavit failed to provide a time frame in regard to alleged short-term traffic. See State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (In order for an affidavit in support of a search warrant to show probable cause, it must state "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." 68 Am.Jur.2d 724 Searches and Seizures s 70. An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient. Anno., "Search Warrant: Sufficiency of showing as to time of occurrence of facts relied on," 100 A.L.R.2d 527, s 3 (1965). The reason for this rule is that probable cause, with time, dissipates.). Additionally, the affidavit failed to establish how short-term traffic was consistent with narcotics sales. Instead, the affidavit provided that Detective Sawyer received complaints of short-term traffic that is consistent with the sale of narcotics, a conclusory statement that gave the magistrate no basis to make a judgment regarding probable cause.

In Gentile the South Carolina Court of Appeals found that the search warrant was not supported by probable cause. Addressing whether citizen complaints about a high volume of traffic at the defendant's house, without more, was sufficient to establish that narcotics activity was taking place inside the house, the Court of Appeals wrote:

> The narcotics officers' decision to investigate Gentile was precipitated primarily by the receipt of citizen complaints regarding a high volume of traffic at Gentile's residence. Even though the officers verified the pattern of traffic at Gentile's

> residence, this, without additional investigation into the residence, was not sufficient to establish that narcotics activity was taking place. See State v. Hunt, 150 N.C.App. 101, 562 S.E.2d 597, 601-02 (2002) (reversing trial court's decision denying defendant's motion to suppress drug evidence and stating "[a]ll that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion."); Bailey v. Superior Court for County of Ventura (People), 11 Cal.App.4th 1107, 15 Cal.Rptr.2d 17, 19-20 (1992) (finding information from an anonymous informer and an unidentified citizen regarding heavy foot traffic at defendant's residence, without investigation, was insufficient to establish probable cause for the issuance of a search warrant; stating " 'heavy foot traffic' does not necessarily engender criminal behavior. True, under certain circumstances, such activity might raise suspicions, or be one indicator of possible narcotics transactions.").

Gentile, 373 S.C. at 514, 646 S.E.2d at 175.

The affidavit in Gentile did not include information about citizen complaints but was supplemented with oral testimony that the officer told the magistrate that "[T]he Charleston Police Department received citizen complaints regarding suspected narcotics traffic at Gentile's residence. Bradley testified the citizens claimed to have witnessed heavy foot traffic 'in and out of the residence, later in the afternoon up until the wee morning hours.'" In contrast to the **verified** heavy foot traffic in Gentile, the complaints in the present case were not verified. The anonymous, undated and, **unverified** complaints of "short-term traffic" in the present are not sufficient to establish probable cause for the issuance of the search warrant.

The remaining evidence presented to the magistrate in the affidavit involved items discovered during the single trash pull on April 18, 2011. The items found were listed in the affidavit as follows:

> 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana;
> 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers;
> 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;)

5 – mail addressed to 462 Morgan St. NW Aiken SC.

Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence.

(R. p. 588)

The evidence found in the single trash pull failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the case relied upon by the judge in his written order denying the motion to suppress, is distinguished from the present case. In Rutledge the affidavit provided the following information:

> The affiant has received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina. Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.

Rutledge, 373 S.C. at 315, 644 S.E.2d at 790. The confidential informant in Rutledge provided specific information about the crime being committed and the names of the people involved in the crime. The complaints in the present case did not provide information about a crime at all, simply short-term traffic. Additionally, the complaints in the present case did not provide the names of the people involved. The affidavit in Rutledge also included information linking the defendant to the residence and providing the defendant's prior criminal record involving marijuana. No such information was provided in the affidavit in the present case.

In Gentile the Court of Appeals found, under the totality of the circumstances, that the verified high volume of traffic at Gentile's house, the single unverified citizen complaint of smelling marijuana in the vicinity of Gentile's house and the arrest and possession of marijuana by a visitor shortly after leaving Gentile's house did not support a finding of probable cause to search the house. In State v. Kinloch, 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014), this Court found the magistrate had a substantial basis for reaching his probable cause determination and wrote, "We reach this conclusion after acknowledging that independently each fact set forth in the search warrant affidavit is merely suspicious, but the totality of the circumstances—namely, the numerous tips indicating drug activity was probably present at 609 A and the subsequent surveillance of 609 A during which seemingly drug-related behavior was observed—distinguishes this case from Gentile."

Considering the totality of the circumstances in the present case, the affidavit lacked a substantial basis upon which to conclude that probable cause existed to believe that narcotics would be found in the house. The magistrate in the present case had even less basis for a probable cause determination than the magistrate did in Gentile where the Court of Appeals found the search warrant lacked in probable cause. The present case can be distinguished from Kinloch where there were numerous complaints specifically about heroine and cocaine transactions and the police conducted surveillance and observed drug transaction behavior. In the present case there were no specific complaints about drug transactions, just "short-term traffic." There was also no surveillance done in the present case to verify "short-term traffic" and no observation of drug transaction behavior.

The present case is distinguished from State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), where a confidential informant notified SLED that Petitioner

was storing illegal video gambling machines at two specific addresses. In response to the tip, undercover agents posed as potential buyers of a pool table and went to both addresses where they observed the illegal machines. This Court wrote, "Here, the magistrate had a substantial basis for concluding a search would uncover illegal gambling machines. The information provided by the confidential informant was independently corroborated by undercover SLED agents. This verification established probable cause under the totality of the circumstances." Id. 338 S.C. at 192, 525 S.E.2d at 881. In the present case there was no independent corroboration to establish that narcotics would be found inside the house. Neither the complaints of "short-term traffic" nor the items found during the trash pull provide a substantial basis upon which to conclude that narcotics would be found inside the house.

The present case is also distinguished from State v. Bellamy, 336 S.C. 140, 145, 519 S.E.2d 347, 349 (1999), where this Court wrote, "Although the affidavit is weak on the element of reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." As in Bellamy, in the present case the judge noted that "the reliability of the tipsters was never established." (R. p.p. 10-12). In contrast to Bellamy, the complaints in the present case were anonymous, there was no strong showing of specificity, no first-hand knowledge and no corroboration. The case is also distinguished from United States v. Gary, 528 F.3d 324 (4th Cir. 2008), where the anonymous tip prior to the trash pull specifically stated that "Melvin" (Gary's first name) was selling illegal narcotics from his residence. The only complaint in the present case was about "short-term traffic" with no mention of illegal narcotic sales and no mention of Petitioner's name.

In United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018), the Fourth Circuit Court of Appeals found that a trash pull revealing three empty packs of rolling papers, a piece of mail

addressed to the home, and three marijuana stems were insufficient to provide the probable cause needed for issuance of a search warrant for the house. The Court wrote:

> The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in Lyles's home. Well perhaps, but not probably. The government's argument has several shortcomings. This was a single trash pull, and thus one less likely to reveal evidence of recurrent or ongoing activity. And from that one trash pull, as defendant argues, "[t]he tiny quantity of discarded residue gives no indication of how long ago marijuana may have been consumed in the home." Appellee Br. at 21. This case is almost singular in the sparseness of evidence pulled in one instance from the trash itself and the absence of other evidence to corroborate even that. The affidavit thus did not provide a substantial basis for the magistrate to find probable cause to search the home for evidence of marijuana possession.

Lyles, 910 F.3d at 794.

As in Lyles, the trash pull in the present case was a single trash pull less likely to reveal evidence of ongoing activity. This is especially true given there was no time frame given for the complaints of short-term traffic. These complaints do not rise to the level of the tip that proceeded the trash pull in Gary and are more analogous to the complete lack of a tip proceeding the trash pull in Lyles. The baggies and marijuana cigar remnants are only slightly more incriminating than the three packs of rolling papers and three marijuana stems found in the trash pull in Lyles. The results of the trash pull do not provide a substantial basis upon which to conclude that narcotics would be found inside the home. As in Lyles, the affidavit in the present case was insufficient to provide the probable cause needed for the issuance of a search warrant for the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is also analogous to United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016), where the Sixth Circuit Court of Appeals found that a trash pull revealing several marijuana roaches with marijuana residue inside, several plastic vacuumed packed heat sealed bags consistent

to those used to package marijuana for resale containing marijuana residue with T2 markings (T2 is a known strain of marijuana), a USPS certified mail receipts addressed to Jimmy Jail Abernathy [the Defendant] 5809 Tru Long Ct. Antioch TN [sic], a USPS certified mail receipts addressed to [Defendant's girlfriend], and one additional piece of mail addressed to 'current resident' at 5809 Tru Long Ct. Antioch, TN 37013 Davidson County were insufficient, standing alone, to create probable cause to search the Defendant's residence. The Sixth Circuit noted that without additional evidence of drug activity, there was no reliable nexus between the residue and paraphernalia found during the trash pull and the house. Additionally, the Sixth Circuit noted that the small amount of residue and paraphernalia found during the trash pull was insufficient to establish a fair probability that more drugs were inside the house. In the present case there was no additional evidence of drug activity to establish a nexus between the results of the trash pull and the house. The small amount of items found during the trash pull is insufficient to establish a fair probability that more drugs were inside the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

The present case is factually distinguished from United States v. Briscoe, 317 F.3d 906 (8th Cir. 2003), where the Eighth Circuit Court of Appeals found that a trash pull revealing forty marijuana seeds and twenty-five marijuana stems that tested positive for tetrahydrocannabinol, the active component of marijuana were independently adequate to establish probable cause for a search warrant for the house. In Abernathy, cited above, the Sixth Circuit distinguished Briscoe writing:

> Briscoe and the cases the government cites in urging that probable cause was present here are inapposite. In Briscoe, the police found "forty marijuana seeds and twenty-five marijuana stems" in the defendant's garbage. 317 F.3d at 907. A large quantity of drug refuse in a residence's garbage suggests repeated and ongoing drug activity in the residence, and therefore creates a fair probability that more drugs remain in the home. See Elliott, 576 F.Supp. at 1581 ("[A] large quantity of

> discarded contraband ... might indicate its continued presence in the house."). Here, however, Detective Particelli only specified that "several" marijuana roaches and plastic bags were found in Defendant's garbage. The word "several" means "more than one or two but not a lot," indicating that the quantity of roaches and bags found in the trash pull was not large enough to suggest repeated or ongoing marijuana consumption in the residence. Black's Law Dictionary, 1583 (10th ed. 2014).

Abernathy, 843 F.3d at 255. Unlike the large quantity of drug refuse in Briscoe, the small amount in the present case, like the small amount found in Abernathy, does not suggest repeated and ongoing drug activity inside the house.

The present case is also factually distinguished from United States v. Leonard, 884 F.3d 730, 734-35 (7th Cir. 2018), where the Seventh Circuit Court of Appeals found that, "two trash pulls taken a week apart, both testing positive for cannabis, are sufficient standing alone to establish probable cause for a search warrant." The Seventh Circuit, citing Briscoe and Abernathy wrote:

> Both Briscoe and Abernathy support the assertion of probable cause in this case. While one search turning up marijuana in the trash might be a fluke, two indicate a trend. Whether it be a particularly large quantity of drugs, as in Briscoe, or multiple positive tests of different trash pulls within a fairly short time, both tend to "suggest[ ] repeated and ongoing drug activity in the residence," Abernathy, 843 F.3d at 255, and "create[ ] a fair probability that more drugs remain in the home[,]" id. So long as the drugs were contained in trash bags bearing sufficient indicia of residency, this is all that is necessary to establish probable cause and obtain a search warrant.

Leonard, 884 F.3d at 734. The present case involved a single trash pull revealing a small amount of drug refuse. Neither the single trash pull nor the small amount found in the present case suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause to search the house.

As additional persuasive authority, in Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998), the police, after receiving an anonymous tip that residents at Raulerson's address were involved in drug activity, pulled six bags of trash from the curb in front of the home. Inside

the bags the police found two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis. A field test of the pieces tested positive for cannabis. The police obtained a search warrant based on the trash pull and anonymous tip. The Florida Court of Appeals reversed and wrote, "Although the affidavit contained relevant information that the substance found in the one-time trash pull tested positive for cannabis, we believe the affidavit lacked other sufficient material facts to indicate a fair probability that cannabis would be found in Raulerson's home." Raulerson , 714 So. 2d at 537. See also Cruz v. State, 788 So.2d 375 (Fla. Dist. Ct. App. 2001); Serrano v. State, 123 S.W.3d 53 (Tex. App. 2003).

In Gesell v. State, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999), the court found that a single trash pull, revealing the presence of a residual amount of marijuana in a plastic bag, coupled with an anonymous tip of suspected drug activity that is uncorroborated by the officers' observations, was insufficient to constitute probable cause for issuance of a search warrant.

In United States v. Elliott, 576 F. Supp. 1579, 1581 (S.D. Ohio 1984), the court granted the motion to suppress writing:

> We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

Like Elliott, all that can be ascertained in the present case is that a small amount of marijuana cigar remnants and baggies were placed in the garbage at some point in time.

The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause to believe that contraband would be found inside the house. The small amount of contraband in the trash did not indicate the continued presence of

contraband in the house. Instead, it indicated that marijuana was smoked and discarded. The anonymous, unconfirmed, and undated complaints of short-term traffic and the baggies and marijuana cigar remnants found during the single trash pull do not suggest repeated and ongoing drug activity inside the house. The search warrant lacked probable cause.

In finding that the magistrate's issuance of the search warrant was supported by probable cause this Court wrote:

> In State v. Kinloch, this Court held that short-term traffic and subsequent surveillance constituted probable cause for the issuance of a warrant. See 410 S.C. 612, 618, 767 S.E.2d 153, 156 (2014). Similarly, in State v. Rutledge, the court of appeals affirmed the magistrate's probable cause finding after reviewing a tip of drug sales combined with a trash pull that yielded marijuana. See 373 S.C. 312, 315, 644 S.E.2d 789, 791 (Ct. App. 2007). Even if distinguishable, the facts of Jones's case are *more* supportive of a probable cause finding, not less. Not only did the trash pull 75 at Jones's home yield marijuana residue, but also baggies indicative of narcotics resale, which was consistent with and corroborated by the tips of short-term traffic. Thus, the magistrate's issuance of the search warrant was supported by probable cause.

Counsel most respectfully submits that Kinloch and Rutledge are distinguishable on their facts as providing *more* probable cause than the facts in the present case. The anonymous complaints of "short-term traffic" at a house in the present case are one step removed from anonymous complaints that drugs are being sold or stored at a house, as in Kinloch and Rutledge. The anonymous complaints of "short-term traffic" in the present case lacked reliability as unverified **and** required an assumption that "short-term traffic' was indicative of drug transactions rather than innocent behavior.

In Kinloch law enforcement received numerous complaints about heroin and cocaine **transactions** at a house, not anonymous complaints of simply "short-term traffic". In Kinloch law enforcement observed the house and saw activity consistent with drug activity including hand to hand transactions, money counting, and an exchange that resulted in law enforcement following one of the men involved in the exchange as he left the house. When approached by law enforcement, the man

dropped a bag of heroin. Law enforcement in the present case did not make observations of activity consistent with drug activity prior to obtaining the search warrant. The complaints of "short term traffic" in the present case are less supportive of probable cause than the specific complaints of drug transactions at the house in Kinloch. The observations by law enforcement in Kinloch are far more supportive of probable cause than the items found in the trash pull in the present case. The observations in Kinloch corroborated drug transactions at the house. The complaints of "short term traffic" and items found in the trash pull in the present case do not support probable cause that drug transactions were taking place at the house. The burnt remains of a cigar containing marijuana, the torn baggies, empty cigar tube wrappers and torn open cigars found during the single trash pull are consistent with personal use rather than narcotics resale and did not provide the magistrate with probable cause to issue the search warrant.

In Rutledge law enforcement received a specific anonymous tip that Rutledge was selling marijuana from a house and learned that Rutledge had two prior convictions for simple possession of marijuana. This specific tip was followed by a trash pull where law enforcement found marijuana, marijuana seeds and marijuana stalks giving credibility to the anonymous tip that Rutledge was selling marijuana. The scant evidence of marijuana found in the present case does not give credibility to the general complaints of "short-term traffic" when the evidence is consistent with personal use rather than narcotics resale. The specific tip that Rutledge was selling marijuana, the prior convictions and the marijuana, the seeds and the stalks found during the trash pull in Rutledge are *more* supportive of probable cause than the general complaints of "short-term traffic" without a name and the minimal evidence of marijuana remnants and baggies, consistent with personal use, in the present case.

The scant evidence of marijuana from the trash pull coupled with the anonymous, undated, non-specific, and unverified complaints of "short-term traffic" with no mention of drug transactions at the house or that a specific person was involved in drug sales fails to provide the magistrate with probable cause to believe drugs would be found inside the house. While the complaints of "short term traffic" are one factor to be considered in making a probable cause determination, these complaints coupled with the items found in the trash pull, consistent with personal use, do not provide probable cause to believe that drugs would be found inside the house. A probable cause determination based on a single trash pull is suspect.

In State v. Martin, 175 N.E.3d 1004, 1013, (Ct. App. Ohio, 2021), the Ohio Court of Appeals wrote:

> Ohio courts and the Sixth Circuit have repeatedly held that evidence of personal drug use recovered from a trash pull is insufficient, standing alone, to establish probable cause. See, *e.g.*, Goble, 2014-Ohio-3967, 20 N.E.3d 280, at ¶ 10, 16 (finding evidence of "several" marijuana stems and marijuana "roaches" in trash pull insufficient to establish probable cause); State v. Kelly, 8th Dist. Cuyahoga No. 91137, 2009-Ohio-957, 2009 WL 545996, ¶ 20 (finding clear plastic bag with "suspected marijuana residue" insufficient to support probable cause); Abernathy, 843 F.3d at 251 (holding that affidavit did not support probable cause where "the only proper evidence the [a]ffidavit contained * * * was the 'several' marijuana roaches and T2–laced plastic bags the police recovered from the trash pull"). "The waste products of marijuana use do not, of themselves, indicate any continuing presence of contraband in the home." United States v. Elliott, 576 F.Supp. 1579, 1581 (S.D. Ohio 1984).

In Martin the Court of Appeals agreed with the trial court's determination that the affidavit in support of the search warrant lacked probable cause but found the good faith exception did not apply.

As the Fourth Circuit Court of Appeals wrote in United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018):

> Precisely because curbside trash is so readily accessible, trash pulls can be subject to abuse. Trash cans provide an easy way for anyone so moved to plant evidence. Guests leave their own residue which often ends up in the trash. None of this means that items pulled from trash lack evidentiary value. It is only to suggest that the open and sundry nature of trash requires that it be viewed with at least modest circumspection. Moreover, it is anything but clear that a scintilla of marijuana residue or hint of marijuana use in a trash can should support a sweeping search of a residence. The Supreme Court recognized similar dangers in searches incident to traffic stops, where allowing comprehensive searches following minor infractions would create "a serious and recurring threat to the privacy of countless individuals." Arizona v. Gant, 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). That threat, like the threat posed by indiscriminate trash pulls, "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." Id.

In United States v. Morales, 987 F.3d 966, 972 (11th Cir.), cert. denied, 142 S. Ct. 500 (2021), the Eleventh Circuit Court of Appeals wrote:

> On the other hand, some courts have concluded that trash pull evidence can on its own support probable cause when a single pull yields a great volume of evidence that clearly indicates illegal drug activity or when police find a smaller quantity of (perhaps less inculpatory) evidence over the course of two successive trash pulls, thereby establishing a trend. See United States v. Briscoe, 317 F.3d 906, 907–09 (8th Cir. 2003) (single trash pull found "forty marijuana seeds and twenty-five marijuana stems"); United States v. Leonard, 884 F.3d 730, 734–35 (7th Cir. 2018) ("two trash pulls taken a week apart, both testing positive for cannabis, [were] sufficient standing alone to establish probable cause" where the trash contained "sufficient indicia of residency").

In Morales the Eleventh Circuit Court of Appeals did not decide whether the affidavit in support of the search warrant based on law enforcement finding a small amount of marijuana in two separate trash pulls lacked probable cause and instead found that, ". . . suppression of the fruits of the search would be inappropriate under the good faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)." Morales, 987 F.3d at 969. In the present case the trash pull revealed a small amount of marijuana as opposed to the amount found in Briscoe. Unlike in Leonard and Morales, this was a single trash

pull. The warrant in the present case lacked probable cause. Unlike Morales, the good faith exception does not apply.

The good faith exception to the warrant requirement, found in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.ed.2d 677 (1984), does not apply under the facts of this case. In Leon the Court noted great deference to the magistrate issuing the search warrant but wrote:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).[12] Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, supra, 378 U.S., at 111, 84 S.Ct., at 1512. See Illinois v. Gates, supra, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326–327, 99 S.Ct. 2319, 2324–2325, 60 L.Ed.2d 920 (1979).
>
> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S., at 239, 103 S.Ct., at 2332. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Ibid.

468 U.S. at 914–15, 104 S. Ct. at 3416. While the affidavit in the present case does not appear to include false information, the magistrate failed to perform his neutral and detached function and served merely as a rubber stamp for the police when he signed the search warrant that failed to provide a substantial basis for determining the existence of probable cause.

In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), this Court wrote:

> In Leon, the Supreme Court held that "the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a detached and neutral magistrate but ultimately found to be invalid." The dispositive issue here is whether sufficient information was given to the magistrate to perform his "neutral and detached"

> function rather than serve as a "rubber stamp for the police." Leon specifically precludes the application of the good faith exception in this situation. [R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.' 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.'

In Johnson the affidavit in support of the search warrant failed to include any information about the reliability of the informant who provided the information and the information was not corroborated. This Court remanded the case in Johnson to determine if the affidavit was supplemented by sworn oral testimony regarding the reliability of the informant. The affidavit in the present case was not supplemented by sworn oral testimony. In denying the motion to suppress the judge in the present case wrote, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). Pursuant to Johnson, the anonymous, unconfirmed, and undated complaints of short-term traffic with no information in regard to reliability, alone, would not have provided a substantial basis for determining the existence of probable cause. Unlike Johnson, the magistrate in the present was also presented with the evidence from the trash pull. The baggies and marijuana cigar remnants from the single trash pull, however, combined with the complaints, still do not provide a substantial basis to determine probable cause to justify the search of the house. The good faith exception does not apply.

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), this Court found that the affidavit in support of the search warrant did not provide a substantial basis to find probable cause. Finding

that the good faith exception did not apply, this Court wrote, "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' Leon, 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Therefore the good-faith exception would not apply." Weston, 329 S.C. at 293, 494 S.E.2d at 804.

In Weston this Court found that the affidavit failed to set forth any facts as to why police believed that Weston committed the crime. In State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990), this Court found that the affidavit "set forth no facts as to *why* police believed Smith robbed the Master Host Inn." 301 S.C. at 373, 392 S.E.2d at 183. The Smith case, like the Johnson case was remanded to determine if the affidavit was supplemented by sworn oral testimony. Again, the affidavit in the present case was not supplemented by oral sworn testimony. The affidavit in the present case failed to set forth facts to believe that drugs would be found inside the house. Like Weston, the good faith exception does not apply in the present case.

In United States v. Lyles, 910 F.3d 787, 796–97 (4th Cir. 2018), discussed above, the Court found that the good faith exception did not apply writing:

> We decline, however, to apply the good faith exception in the present case. We do not at all impugn the subjective good faith of the officer who ran the warrant application through review, including by his superior and a state prosecutor, before submitting it to the magistrate. The prosecutor's and supervisor's review of an application is often helpful in determining good faith. But those reviewers, unlike a neutral magistrate, share the officer's incentives "in the often competitive enterprise of ferreting out crime." Riley[1], 134 S.Ct. at 2482 (internal quotation marks omitted). The prosecutor's and supervisor's review, while unquestionably useful, "cannot be regarded as dispositive" of the good faith inquiry. Messerschmidt v. Millender, 565 U.S. 535, 554, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). If it were, police departments might be tempted to immunize warrants through perfunctory superior review, thereby displacing the need for "a neutral and detached magistrate"

[1] Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

to make an independent assessment of an affidavit's probable cause, Riley, 134 S.Ct. at 2482 (internal quotation marks omitted).

The affidavit in the present case is lacking any indicia of probable to cause to believe that contraband would be found inside the house. As discussed above, the affidavit failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. The Leon good faith exception does not apply in this case.

The anonymous unconfirmed complaints of short-term traffic, without a time frame combined with the nature of a trash pull, as discussed in Lyles, and the scant evidence of marijuana found in the trash pull did not provide probable cause to search the residence. The trial judge erred in refusing to suppress the drugs found as a result of a search warrant lacking probable cause. Counsel respectfully submits that this Court should find that the search warrant lacked probable cause and reverse the convictions. Counsel respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 22nd day of December, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO. 2016-001835

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Kelvin Jones, #298762, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 22nd day of December, 2021.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000653

The State, Respondent,

v.

Kelvin Jones, Petitioner.

RETURN TO PETITION FOR REHEARING

On December 22, 2021, Petitioner served and filed a Petition for Rehearing of this Court's Opinion, State v. Jones, Op. No. 28074 (S.C. Sup. Ct. Filed December 8, 2021). On December 23, 2021, the State received this Court's request for a Return to the Petition for Writ of Certiorari.

In his Petition[1] for Rehearing, Petitioner seeks to have this Court apply the long-outdated standard of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Instead of looking at the totality of the circumstances, Petitioner implores this Court to parse the various portions of the search warrant affidavit and find fault with individual components—primarily the reliability of the anonymous tips regarding short-term traffic at the residence.

[1] The overwhelming majority of the argument presented by Petitioner is identical to the argument made in his Brief of Petitioner. This argument has already been addressed by the State in its Brief of Respondent, and the State craves reference to its Brief for any additional consideration.

Many courts around the country read Aguilar and Spinelli to require a formalized test to determine whether to even consider anonymous or other tips. The test required the tip or information "first had to adequately reveal the 'basis of knowledge' of the [tipster or informant]—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the 'veracity' of the affiant's informant, or, alternatively, the 'reliability' of the informant's report." Illinois v. Gates, 462 U.S. 213, 228–29, 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527 (1983). Almost forty years ago, the United States Supreme Court expressly rejected the requirement Petitioner now seeks to reinstate, and instead, articulated very clearly the "totality of the circumstances" test utilized correctly by this Court in its analysis of the merits of this case:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, **given all the circumstances** set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238 (emphasis added). Shortly after the United States Supreme Court's rejection of the Aguilar and Spinelli tests and the clear adoption of the totality of the circumstances test, this Court affirmed the test to be applied. State v. Pressley, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986). This Court also reminded: "Determination of probable cause to search made by a neutral and detached magistrate is entitled to **substantial deference.**" Id. (emphasis added).

It would be error for this Court to return to the piecemeal consideration of the search warrant affidavit rejected by the United States Supreme Court. This Court should affirm its use of the totality of the circumstances consideration and its deference given to the neutral and detached magistrate who had a substantial basis to conclude probable cause existed.

This Court correctly utilized the standard set forth by the United States Supreme Court and properly found probable cause existed. This Court properly cited to Kaley v. United States, 571 U.S. 320, 338, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014), for the proposition: "Probable cause, we have often told litigants, is **not a high bar**: It requires only the 'kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" Id. (emphasis added). "[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" Gates, 462 U.S. at 236.

Applying the standard of review giving great deference to the magistrate's determination, as well as the United States Supreme Court's articulation that review should favor upholding a warrant, this Court properly determined probable cause existed when considering the ongoing complaints of short-term traffic at the residence juxtaposed to the trash pull conducted the day before obtaining the warrant in which marijuana and baggies indicative of "packaging of marijuana for resale" were located in the trash outside Petitioner's residence. While the tips presented may not have established probable cause alone, and may even have an innocent explanation, when combined with the very recent trash pull finding evidence of marijuana resale, the magistrate had a substantial basis to believe probable cause existed.[2] As the United States Supreme Court opined:

> As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our

[2] Again, the State craves reference to its Brief of Respondent for any detailed discussion of case law or factual analysis as the analysis conducted by Petitioner in his Petition for Rehearing is identical to that presented previously to the Court.

> citizens demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

Gates, 462 U.S. at 245.

Accordingly, assuming this Court gets to the merits of the validity of the search warrant,[3] the proper test to apply is the totality of the circumstances test applied by this Court. Once properly applied, and given the substantial deference to the magistrate, this Court properly found the low bar of probable cause was met through the combination of the anonymous reports of short-term traffic and the items indicative of marijuana resale found in the trash pull. Therefore, this Court properly affirmed the admission of evidence seized as a result of the search warrant executed at Petitioner's residence.

[3] The State still submits, as it has in its Petition for Rehearing, that any issue is not properly preserved for review on appeal and should be considered waived, especially in light of counsel's repeated statement of "no objection" when the State sought to admit the evidence.

CONCLUSION

For all of the foregoing reasons, the State requests the Court deny Petitioner's Petition for Rehearing and uphold its prior opinion.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

BY: 

William M. Blitch, Jr.
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ATTORNEYS FOR RESPONDENT

January 10, 2022

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Aiken County
Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000653

The State, Respondent,

v.

Kelvin Jones, Petitioner.

PROOF OF SERVICE

I, CAROLINE COLLINS, certify that I have served the within Return to Petition for Rehearing by emailing a copy to Petitioner's counsel of record, Kathrine H. Hudgins, at her primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 10th day of January, 2022.

CAROLINE COLLINS
Administrative Coordinator
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

State of South Carolina

Court of General Sessions

County of Aiken

State	)	
	)	
	)	Transcript of Record
v.	)	2012-GS-02-132, 133, 134
	)	
Kelvin Jones	)	
	)	
Defendant.	)	

August 11, 2014
Aiken, South Carolina

B E F O R E:

The Honorable Edgar Dickson, Judge.

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

Megan Burchstead, Assist. Attorney General
Attorney for the State

Mario Pacella, Esquire
Attorney for the Defendant

Alexandra Benevento, Esquire
Attorney for the Defendant

Bakari Sellers, Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

(The following proceedings were held on August 11, 2014.)

THE COURT: This is *State of South Carolina vs. Kelvin Jones.* There are a number of charges against him. And I've got a motion to seek a change of venue. And we had a brief discussion in chambers and I had indicated to the attorneys involved that that is the motion that I would like to hear now. So Mr. Pacella?

MR. PACELLA: Yes, Your Honor. Thank you, Your Honor. I will go through the bullet points for the Court.

THE COURT: Thank you, sir.

MR. PACELLA: Your Honor, the motion is made pursuant to 15-7-100 of the South Carolina Code of Change of Venue, Section (a)(2), that there is reason to believe that a fair and impartial jury cannot be had there; that is, here in Aiken County. And with respect to this motion, we are asking that the venue be changed to be somewhere outside of this entire judicial circuit.

And the purpose and the basis for that is that there is a material witness in the case who is also the elected solicitor of this judicial circuit, Strom Thurmond, Jr. And we're asking the Court to

change venue. The reason -- the basis for our reasoning is that when we do voir dire, we're going to ask the Court to ask if -- ask each juror if they voted for Mr. Thurmond and, if so, if they voted for Mr. Thurmond, do they believe -- did they vote for him because they believed him to be honest and truthful. We believe that that -- those questions would be necessary for us to make a decision on whether to seat jurors, to seek jurors to be removed for cause, or use preemptory challenges.

But the South Carolina Constitution, Article II, Section (1), The Right of Suffrage, states that elections are to be by secret ballot, and then there's the protection of right of suffrage. And the Constitution says: All elections by people shall be by secret ballot, that the ballots shall not be counted in secret. The right of suffrage, as regulated with this Constitution shall be protected by the laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult or improper conduct.

And that free action --

THE COURT: Hold on one second.

Okay. Go ahead.

MR. PACELLA: And then Section (2) of Article

II says: The free exercise right of suffrage. No power, civil or military, shall at any time interfere or prevent the free exercise of the right of suffrage in the state. And it's our contention that the Constitution would prohibit the Court from actually inquiring of a juror who they voted for, and he's certainly asking for those questions to be asked.

As we noted in chambers, I found an old case out of Nebraska. It's not a criminal case, but the case is *Dean vs. Miller*. And the quotation from the case, I just want to read it to the Court for the record because I think this really lends support to our argument that the Court shouldn't be asking jurors who they voted for.

On the other hand, it is the policy of this country to protect the secrecy of the ballot. The voter cannot be compelled to disclose the nature of his vote and, as said in one of the cases, the protection thus given him implies the right to deceive a prying neighbor who tries to learn his secret. And it has also been said in one of the cases we shall cite: It would be useless to protect the voter from disclosing the nature of his vote if at the same time should be -- he encouraged a system

of extrajudicial espionage to discover the secret. The competency of such evidence has been denied in strong and, to our minds, conclusive opinions. And it cites a number of out-of-state opinions as well.

In this case, there is a danger that we cannot have a fair and impartial jury empaneled. Merely attempting to empanel the jury, have voir dire and then -- would require the Court to ask that specific question, did you vote for Mr. Thurmond, and then ask the question, did you vote for him because you believed him to be honest and truthful, is going to -- is really going to taint the entire jury-selection process and is going to require the venue be changed at that time.

When you're really just kind of weighing this case and weighing the interest of justice, it would be an abundance of caution this Court would transfer this case to a different venue just to preserve and protect the process and make sure there's no appearance of impropriety, as Mr. Thurmond is the chief law enforcement officer, makes decisions on which cases to prosecute and which ones not to prosecute that come from the sheriff's department and other law enforcement entities in the county and as well as the surrounding counties. Thank you,

Your Honor.

THE COURT: Thank you, sir. I appreciate it.

Ms. Burchstead?

MS. BURCHSTEAD: Good morning, Your Honor. Megan Burchstead from the Attorney General's Office. My response will be fairly brief. We did hand up to Your Honor the written opposition to the defendant's request of change of venue.

The State's position is really very simple, Your Honor, relying primarily on *State v. Manning,* 329 SC 1 (1997) and *State v. Woods,* 382 SC 153 (2009) case that really what we need to do here in this case and that the -- the just thing to do would be to attempt to seat a jury before ruling on a motion to change venue.

The defendant has a right to a trial by jury of competent and impartial jury, not any jury of his choosing. And the cases I just cited stand for the proposition, I believe, while they were certainly publicity-type cases following that rationale, the State submits they stand for the proposition of attempting to seat a jury first. And the issue is that we would need to have adequate and appropriate voir dire of the jury panel. And the State's position is that we do not need to ask who they

voted for and all the specifics of what happened or didn't happen in the voting booth, but merely ask, could you be fair and impartial knowing Solicitor Thurmond may be a witness in this case. And really, Your Honor, that's the extent of the State's response.

THE COURT: Okay. Thank you.

MR. PACELLA: Your Honor, I do not intend to make another argument, but I owe you a case, *State v. Sullivan,* Your Honor. If I may pass that up.

THE COURT: Yes.

And, Ms. Burchstead, you've got a copy of this case; is that correct?

MS. BURCHSTEAD: No, sir, I do not. But that's all right.

MR. PACELLA: I can give you a copy.

THE COURT: All right. Thank y'all. I believe y'all told me in chambers that there are no cases directly on point with this. Is that correct?

MS. BURCHSTEAD: Not to my knowledge, as to this specific issue.

THE COURT: All right. Well, I appreciate you being able to decide a novel issue. And I'll get back to y'all. What we'll do is I'm going to think about that this morning and I'll get back to you and

we'll decide where we can go with this in probably about an hour or so. Okay?

MS. BURCHSTEAD: Yes, sir. Would you like our witnesses to come back this afternoon potentially for suppression or would you like them to hang out?

THE COURT: No. If they can come back this afternoon, that would be fine. Just make sure you have phone numbers to call so we can have them come in.

MS. BURCHSTEAD: Thank you, Your Honor.

THE COURT: All right. Thank y'all.

(Hearing reconvened at 3:07 PM.)

THE COURT: All right. Regarding *State of South Carolina vs. Kelvin Jones,* I'm going to go over the Motion to Suppress first. As the reviewing Court, I'm looking at whether or not the Magistrate had a substantial basis for probable cause. And I've looked back over the affidavit and the search warrant. The affidavit provided that there were complaints of short-term traffic and listed all of the different things, the things that I realize you've made the issue about everything according to marijuana about, I believe, the baggies. And the twisted baggies also used indicate other types of narcotics could also be there; there was probable

cause to believe that. Looking at it from a practical and common-sense prospective, I believe that the search warrant was proper in this situation and I'm going to deny your Motion to Suppress.

Now, the other issue is the issue of change of venue. And this is one that has had the Court's attention for most of the day and has taken the Court quite a while to decide. The defendant has the right to be tried in the county where he resides. For the defendant to wish to give up this very basic right because of the defendant's concern about his ability to receive a fair -- to pick a fair and impartial jury is of great concern to this Court. This is a situation where the Solicitor and Assistant Solicitor are taking part in a ride-along. The Court believes this to be a very commendable policy and practice, and the Court additionally believes that is helpful to the solicitors in understanding the duties and problems that are faced by law enforcement in their day-to-day actions.

But, as a result of this ride-along, there's a strong possibility that both the Solicitor and the Assistant Solicitor could be called on to testify in this matter. The dilemma before this Court is whether a fair and impartial jury can be chosen, as

is so crucially important in any criminal case. It also creates a dilemma as to how to fashion a sufficient voir dire if these jurors are to be questioned.

The cases cited by the State all recommend questioning the jurors to determine if they can be fair and impartial before ruling on the motion to change venue. This Court notes that all of these cases involve pretrial publicity and its effects on the jury. These cases note that venue may be changed without questioning the jury although that is not the preferred method.

The main issue, as this Court sees it, is the impact of the Solicitor testifying in the circuit in which he is elected. The Court notes that the Solicitor has run unopposed in both 2008 and 2012, and according to the Court's cursory review of the voting records, the Solicitor has received overwhelming support. To question the jurors effectively would require inquiries into whether the possible juror voted for the solicitor and perhaps additional follow-up questions.

This presents a number of problems: First is, our Constitution protects a person's right to vote in secret. And this Court is aware of no authority

by which this Court could compel one to verify their vote, which leads to the second issue of whether the juror would rightfully refuse to answer or not answer truthfully. The defendant has produced a Nebraska case protecting the secrecy of the ballot which provides supporting cites from other states. Our Constitution, these cases, and this Court's own aversion to questioning voters about their vote leads this Court to conclude that such a voir dire would be improper and unnecessary.

In balancing the rights of both the State and the defendant to an impartial and fair jury, it is apparent to this Court that the State may obtain a fair jury and a fair trial in any other appropriate venue in this state. How the defendant is willing to give up one basic right, the right to be tried in the county of his residence, to secure a basic right, the unquestioned seating of a fair and impartial jury.

Since this case may require the testimony of a popular-sitting solicitor, this Court is inclined to follow the case of *State vs. Sullivan*. There, the sheriff, acting properly in attempting to comply with contingencies not anticipating by statute, was involved in picking a jury in the murder of his

brother, and venue was changed to another county. Here, the Solicitor and Assistant Solicitor have acted properly; but to avoid any appearances of impropriety and to ensure a fair and impartial jury, this Court is changing venue from the Second Judicial Circuit to an appropriate venue as determined by statutes and case law. Okay? Thank you. Any questions?

MS. BURCHSTEAD: Just for clarity, I did not get a copy of the Nebraska case; is that the *State v. Sullivan* case, Judge?

THE COURT: That is -- and I'm sorry --

MS. BURCHSTEAD: If I could just get a copy of that.

THE COURT: -- *Dean vs. Miller.*

MS. BURCHSTEAD: Thank you.

THE COURT: Okay. And as is the other case cited by the Court in this case, *State vs. Sullivan*, we're dealing with 19th Century cases.

MS. BURCHSTEAD: Thank you. And just in terms of jurisdiction, are you inclined to retain jurisdiction or should we get with Judge Early? How should we move -- I don't mean to put you on the spot, Judge, but we would need some guidance on how to proceed from here.

THE COURT: I will do whatever the Administrative Judge for the Second Judicial Circuit and case law wants done. But I'm not by any of it telling you I'm going to retain jurisdiction.

MS. BURCHSTEAD: Understood. Thank you.

THE COURT: Thank y'all.

-- END OF TRANSCRIPT OF RECORD --

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the General Sessions Court for Aiken County, South Carolina, on the 11th of August, 2014.

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

August 22, 2014

/s/Bethanie K. Creppon
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO 2016-001835

Proposed Stipulation

The parties agree that the August 11, 2014, transcript of a motion to suppress heard by the Honorable Edgar Dickson is unavailable. As an alternative to a reconstruction hearing, the parties propose the following stipulation:

1. On April 19, 2011, Detective John C. Medlin of the Aiken Department of Public Safety requested from a magistrate a search warrant for a residence located at 462 Morgan Street NW, in Aiken, South Carolina.

2. The affidavit in support of the search warrant provides:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011, which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and the contents to Det. Medlin at the ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2- numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers; 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5 – mail addressed to 462 Morgan St. NW Aiken SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found. (Exhibit #3 attached).

3. The affidavit was not supplemented with sworn verbal testimony.

4. On August 11, 2014, Appellant submitted a written motion and memorandum in support of motion to suppress. (Exhibit #1 attached).

5. The search warrant and affidavit in support of the search warrant were attached to the motion and memorandum. (Exhibit #2 attached).

6. Appellant argued that the affidavit did not establish probable cause to search the residence because it failed to demonstrate the reliability of Detective Sawyer's sources, failed to demonstrate how the referenced short term traffic was consistent with narcotics sales and failed to provide a time frame regarding the short term traffic so that the magistrate could determine if the complaints were current or stale.

7. Appellant additionally argued that the single trash pull did not establish probable cause to believe that criminal activity was occurring at the residence or that contraband would be found at the residence.

8. Finally, Appellant argued that the good faith exception to the warrant requirement did not apply.

9. In a written order signed on October 20, 2014, Judge Dickson denied the motion to suppress writing, "In this case, probable cause existed for the magistrate to issue the warrant. Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for a search warrant where a trash pull corroborated a tip)." (Exhibit #3 attached).

Exhibit #1

Exhibit #1

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF GENERAL SESSIONS FOR THE SECOND JUDICIAL CIRCUIT
State of South Carolina	)	
v.	)	**DEFENDANT'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS**
Kelvin Jones,	)	
Defendant	)	

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

Defendant, by and through his undersigned counsel of record, file this Motion to Suppress evidence seized in violation of the Fourth and Fourteenth Amendments. In this Motion, Defendant challenged the state's search warrant for 462 Morgan St NW, as the affidavit supporting the search warrant did not establish probable cause to believe that anyone at the premises was currently engaged in criminal activity or that any contraband would be found at said residence.

Statement of the Facts

On April 19, 2011, Detective John C. Medlin of the Aiken Department of Public Safety approached Judge McKinney, a recorder or magistrate in Aiken County, for a warrant authorizing a search of the at 462 Morgan Street NW, in Aiken, South Carolina. The residence was described as a split level home with red brick veneer, gray siding, black shutters, and a gray shingle roof. In a sworn affidavit, Detective Medlin reported to Judge McKinney the following:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect trash from 462 Morgan St NW. Mr. Martin did no on Monday, April 18, 2011, which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and the contents

> to Det. Medlin at the ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1-the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3-empty cigar tube wrappers; 4-cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5-mail addressed to 462 Morgan St NW Aiken, SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found.

(Affidavit and Warrant attached as Exh. A.) Based solely on the information contained in this Affidavit, Judge McKinney authorized a broad search warrant to allow for the search of 462 Morgan Street NW, Aiken SC for the following items:

> All illegal narcotics, to include but not limited to marijuana, cocaine, crack cocaine, methamphetamines, heroin, and ecstasy. All paraphernalia that may be used in the manufacturing, storage, use, or distributions of illegal narcotics. All monies in close proximity to illegal narcotics. Any documentation showing activity of drug use or distribution.

(Affidavit and Warrant attached as Ex. A.)

Discussion and Citation of Authority

Defendant's Motion to Suppress is based on the Fourth Amendment, which provides, in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . .

U.S. Const. amend. IV. The Fourth Amendment protects the reasonable expectation of privacy by prohibiting unreasonable searches and seizures. Rawlings v. Kentucky, 448 U.S. 98, 104,

100 S. Ct. 2556, 2561, 65 L. Ed. 2d 663 (1980). The search and seizure "golden rule" for any law enforcement officer is to obtain a search warrant before conducting any searches or seizures because a search or seizure conducted pursuant to a search warrant is deemed to be reasonable whereas a warrantless search or seizure is considered to be unreasonable under the Fourth Amendment unless a judicially recognized exception applies. Mincey v. Arizona, 437 U.S. 385, 390, 98 S. Ct. 2408, 2411, 57 L. Ed. 2d 290 (1978); Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967).

I. Defendant Has Standing to Challenge the Search Warrant.

Following the decisions of the United States Supreme Court, the South Carolina Supreme Court has definitively held that an overnight guest has a reasonable expectation of privacy, the legal prerequisite to confer standing on an individual. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004) (citing Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). Here, Detective Medlin (identified as Investigator Medline at the preliminary hearing) testified that Detective Sawyer had information that Defendant "either lived there [462 Morgan St NW] or spent lots of time there." (Transcript at 11.) This testimony is sufficient to establish a reasonable expectation of privacy, triggering Defendant's right to challenge the search warrant as unreasonable under the Fourth and Fourteenth Amendment.

II. Detective Medlin's Affidavit Is Deficient Because It Fails to Demonstrate the Reliability of Detective Sawyer's Sources.

All search warrants must (1) be based on facts that establish probable cause; (2) particularly describe the place to be searched; (3) particularly described the things to be seized; and

(4) be issued by a neutral and detached officer. The issuing magistrate must make a practical, common sense decision whether, given all circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in the place. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983). Generally speaking, officers present the facts providing probable cause in an affidavit.

When an officer uses an affidavit citing an unnamed source or confidential informant, the officer must provide the magistrate the circumstances behind why the officer concludes that the confidential informant or unnamed source is worthy of belief. The Supreme Court explained that a magistrate's "practical, common sense decision whether probable cause exists" must include information based upon the "veracity" and the "basis of the knowledge" of persons supplying hearsay information. Gates, 462 U.S. at 238, 103 S. Ct. at 2332. In every case where a police officer relies on a confidential informant, he should allege the following: (1) the facts from which the informant concluded that the thing to be searched for is probably on the person or premises to be searched **and** the facts from which the officer concluded that (i) the informant is credible; or (ii) the information furnished by the informant is reliable. Gates, 462 U.S. at 231, 103 S. Ct. at 2328 (emphasis added). To demonstrate that an informant is reliable, an officer may present evidence that the informant has given reliable information in the past; that the informant is a private citizen known by the officer and the informant has a reputation for truthfulness; that the informer himself participated in criminal activity; or that the information is corroborated by another informant or by police surveillance.

In this case, Detective Medlin failed to identify any facts which show the basis for relying on the confidential statements made to Detective Sawyer sufficient to show a reasonable basis for relying on such statements. Detective Medlin offered no evidence from which the magistrate

could conclude that the anonymous complaints were reliable. Additionally, there is no indication as to whether the complainants stated that the short term traffic was consistent with the sale of narcotics or whether that simply was the conclusion of Detective Medlin. Thus, these alleged statements should be excised from the warrant affidavit in this Court's independent review to determine if probable cause existed.

Moreover, there was no time-frame regarding this short-term traffic for the magistrate to make a determination as to whether those complaints were current or stale. In order for an affidavit to support probable cause, "it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (internal quotation marks omitted). "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient." Id. The lack of any time frame for the alleged complaints of short term traffic, or the number and frequency of the short term traffic, renders this statement inadequate to be considered in the determination of probable cause.

III. The Search Warrant Fails to Establish Probable Cause to Believe that Criminal Activity Was Occurring at 462 Morgan St NW or that Contraband Was Located There at the Time the Search Warrant Was Signed.

A reviewing court's inquiry is whether the magistrate had a substantial basis to conclude that probable cause existed to issue a search warrant. United States v. Blackwood, 913 F.2d 139, 142 (4th Cir. 1990). To determine whether probable cause exists, a magistrate must make a practical determination, based upon the facts presented before him or her, whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983); Robinson v. State, 407

S.C. 169, 190, n. 11, 754 S.E.2d 862, 873 (2014). The facts must "warrant a man of reasonable caution" to believe that evidence of a crime will be found for a magistrate to issue a search warrant. Texas v. Brown, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502 (1983); State v. Geer, 391 S.C. 179, 197, 705 s.E.2d 441, 450 (Ct. App. 2010).

The crucial element is not whether the target of a search warrant committed a crime, but whether it is reasonable under the facts presented to the magistrate that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6, 98 S. Ct. 1970, 1976-77 & n. 6, 56 L. Ed. 2d 525 (1978). In United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988), *cert. denied,* the Court of Appeals adopted the rule that "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." Anderson, 851 F.2d at 729. In United States v. Lalor, this Court held that an affidavit that failed to describe any circumstances from which a magistrate could infer that evidence of drug crimes would be stored at defendant's residence failed for want of probable cause. United States v. Lalor, 996 F.2d 1578, 1582-83 (4th Cir. 1993), *cert denied,* 502 U.S. 833, 112 S. Ct. 111, 116 L. Ed. 2d 80 (1991).

Here, the only evidence that gave rise to the search warrant was discovered in a single trash pull from the trash collector on April 18, 2011, which revealed, as set forth in Detective Medlin's affidavit, the following:

> ...1-the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3-empty cigar tube wrappers; 4-cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5-mail addressed to 462 Morgan St NW Aiken, SC.

(Affidavit and Warrant attached as Exh. A.) With respect to the "numerous twisted and torn

baggies, Detective Medlin fails to identify how many baggies were torn open that were likely used as a supply to smoke marijuana. Moreover, Detective Medlin fails to explain how a single incident of marijuana use on or before April 18, 2011 would indicate that there would be any additional contraband located at the residence at any time thereafter. In Raulerson v. State, 714 So.2d 536, 537 (Fl. App. 1998), the Florida Court of Appeals held that evidence from a single trash pull that found evidence that tested positive for cannabis, without other sufficient material facts, could not result in a fair probability to conclude that cannabis would be found in the home. Likewise, the evidence here is insufficient to conclude that there was a fair probability that marijuana, or any other substance outlined in the affidavit or warrant, would be found upon a search.[1] In Raulerson, the Florida Court of Appeals distinguished cases that involved multiple trash pulls and cases with additional reliable information regarding patterns of continuous drug activity, none of which exists here.

Likewise, the South Carolina Court of Appeals previously concluded that information regarding the names of the people involved in a crime and the specific location of the activity, could be sufficient to support reliability of an informant that could be used in conjunction with a trash pull to satisfy probable cause. State v. Rutledge, 373 S.C. 312, 317, 644 S.E.2d 789, 791 (Ct. App. 2007). Additionally, the Court of Appeals further allowed a search warrant to stand where the evidence consisted of an anonymous tip confirmed by evidence that the defendant lived at the address, defendant's prior marijuana convictions, and marijuana found in a trash pull. State v. Lecroy, 2011 WL 11735691, *1 (Ct. App. 2011). Again, Detective Medlin provided no supplemental information other than a one-time trash pull that exhibited evidence of marijuana use

[1] In his affidavit, Detective Medlin fails to explain how finding a mere trace of marijuana with other evidence consistent with marijuana use gave him or anyone sufficient facts to conclude that he might find cocaine, crack cocaine, methamphetamines, heroin, and ecstasy. In this regard, the warrant is overbroad.

on or before April 18, 2011. Such evidence is insufficient to support probable cause to search the residence, and all evidence recovered should be suppressed.

IV. The Good Faith Exception to the Warrant Requirement Does Not Apply.

The purpose of the exclusionary rule is to deter unreasonable searches and seizures by police and not to punish judges and magistrates. United States v. Leon, 468 U.S. 897, 917, 104 S. Ct. 3405, 3417, 82 L. Ed. 2d 677 (1984). In executing the warrant, an officer is permitted to reasonably rely on a judicial determination that the warrant is supported by probable cause. Leon, 468 U.S. at 923, 104 S. Ct. at 3421. This is the good-faith exception to the exclusionary rule which provides that evidence illegally seized due to an invalid search warrant will only be suppressed if "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." Leon, 468 U.S. at 926, 104 S. Ct. at 3422. In State v. Johnson, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990), the South Carolina Supreme Court interpreted Leon as precluding application of the good-faith exception when an affidavit fails to provide a magistrate with a substantial basis for finding probable cause. In State v. Weston, 329 S.C. 287, 292, 494 S.E.2d 801, 803-04, (1997), the South Carolina Supreme Court explained that "[s]uppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Weston, 329 S.C. at 292, 494 S.E.2d 803-04 (quoting Leon, 468 U.S. at 923, 104 S.Ct. at 3421).

As demonstrated *supra*, Detective Medlin was reckless in preparing his affidavit because he provided no evidence of why Detective Sawyer's sources were reliable and because the only evidence he presented was from a one-time trash pull that indicated, at best, use of

marijuana which had taken place prior to trash collection. Detective Medlin offered no evidence to establish any likelihood that contraband would be present at the time he request the search warrant. In fact, this is basic legal knowledge needed by police officers in applying for a search warrant. Further, instead of vigorously scrutinizing the Detective Medlin's affidavit, Judge McKinney operated merely as a rubberstamp to law enforcement. This Court need only look at the actual search warrant to see that Judge McKinney authorized a search for not only marijuana for personal use, she also authorized a search for cocaine, crack cocaine, methamphetamines, heroin, and ecstasy. If Judge McKinney scrutinized the affidavit and warrant, she would have seen the affidavit and warrant as flawed and lacking in probable cause. Thus, the good faith exception in Leon does not apply to this case.

Conclusion

For the above reasons, the evidence seized and the statements made as a result of the defective warrant application and warrant should be suppressed. Defendant prays for an Order suppressing all evidence as fruit of the poisonous tree stemming from this unlawful search warrant.

RESPECTFULLY SUBMITTED, this 11th day of August, 2014.

Columbia, South Carolina

J. Preston Strom, Jr.
Mario A. Pacella
Bakari T. Sellers
Alexandra M. Benevento
STROM LAW FIRM, LLC
2110 Beltline Boulevard
Columbia, South Carolina 29204
(803) 252-4800
ATTORNEYS FOR DEFENDANT

Exhibit #2

Exhibit #2

ORIGINAL

STATE OF SOUTH CAROLINA

County of Aiken

SEARCH WARRANT

Date April 18, 2011

Officer Det. John C. Medlin

STATE OF SOUTH CAROLINA
COUNTY OF Aiken

AFFIDAVIT

Personally appeared before me, Detective John C. Medlin
one
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

All illegal narcotics, to include but not limited to marijuana, cocaine, crack cocaine, methamphetamines, heroin, and ecstasy. All paraphernalia that may be used in the manufacturing, storage, use, or distribution of illegal narcotics. All monies in close proximity to illegal narcotics. Any documentation showing activity of drug use or distribution.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The location to be searched is a site-built, single-family dwelling with red brick veneer. The residence is a split-level home with a garage on the first floor on the southern end of the residence. It has gray siding, black shutters, and a gray shingle roof. The residence is located at 462 Morgan St NW Aiken, SC and has the numbers "62" affixed to the wall to the right of the front door. The scope of the search is also to include all sheds, outbuildings, and vehicles located on the property. See Attachment A for photographs of the residence.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect the trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011 which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and contents to Det. Medlin at ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1- the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2- numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3- empty cigar tube wrappers; 4- cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly); 5- mail addressed to 462 Morgan St NW Aiken, SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found.

Sworn to and Subscribed before me
this 19th day of Apr, 2011.
Signature of Judge (L.S.)

Affiant

Address 217 Laurens St NW Aiken, SC 29801

Phone 803 642-7620

STATE OF SOUTH CAROLINA
COUNTY OF Aiken

Search Warrant

Form approved by S.C. Attorney General
Section 17-13-160
March 15, 1978

ORIGINAL

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF

Aiken County

It Appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

The location to be searched is a site-built, single-family dwelling with red brick veneer. The residence is a split-level home with a garage on the first floor on the southern end of the residence. It has gray siding, black shutters, and a gray shingle roof. The residence is located at 462 Morgan St NW Aiken, SC and has the numbers "62" affixed to the wall to the right of the front door. The scope of the search is also to include all sheds, outbuildings, and vehicles located on the property. See Attachment A for photographs of the residence.

Now, therefore, you are hereby authorized to search the subject premises described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

All illegal narcotics, to include but not limited to marijuana, cocaine, crack cocaine, methamphetamines, heroin, and ecstasy. All paraphernalia that may be used in the manufacturing, storage, use, or distribution of illegal narcotics. All monies in close proximity to illegal narcotics. Any documentation showing activity of drug use or distribution.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to Judge C. McKinney within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

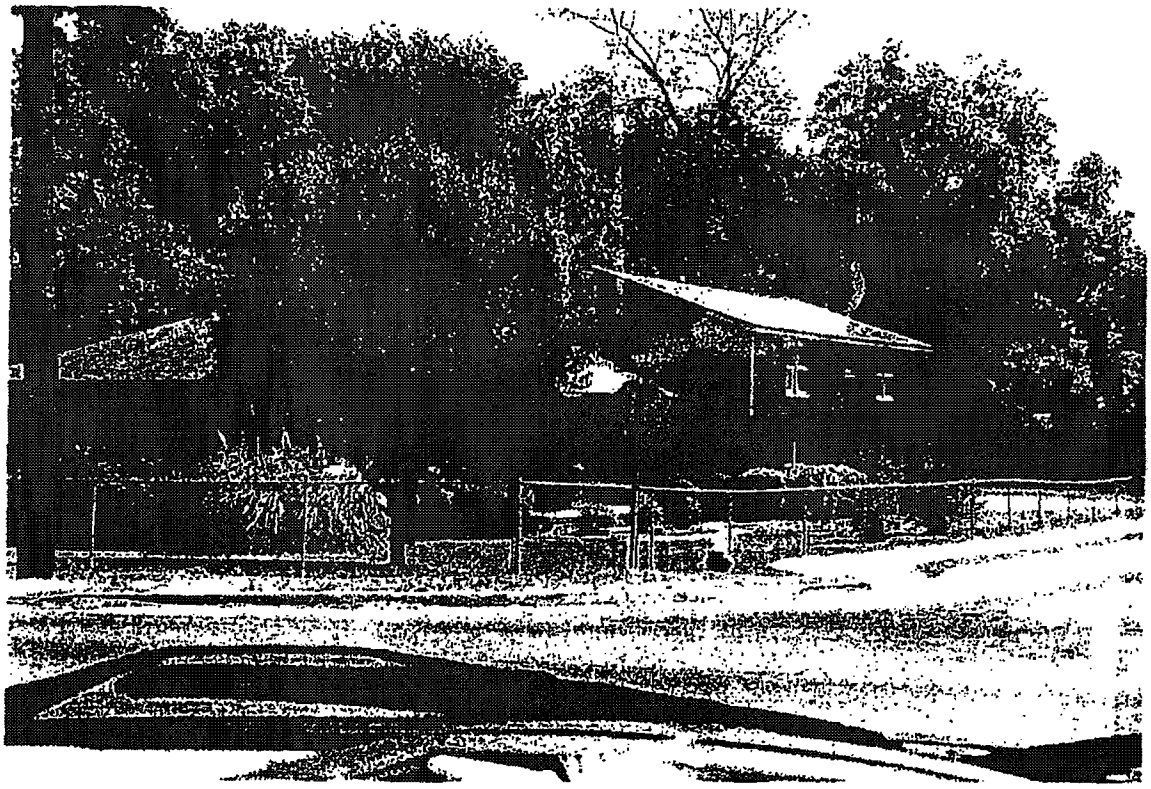
A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such persons as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

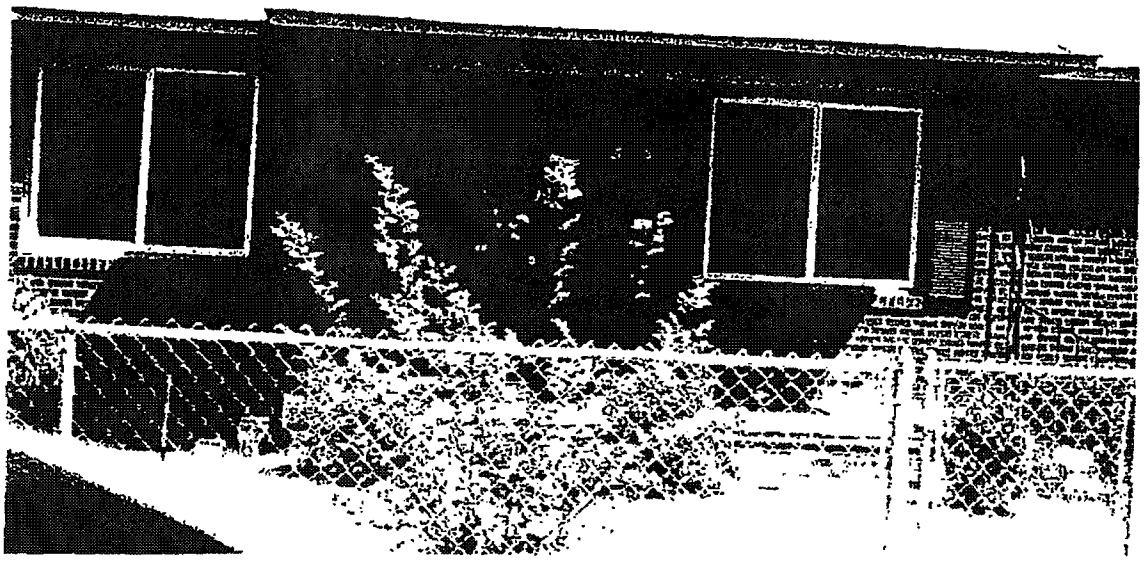
Aiken, S.C.
April 19, 20 11

Capt D McKinney (L.S.)
Signature of Judge

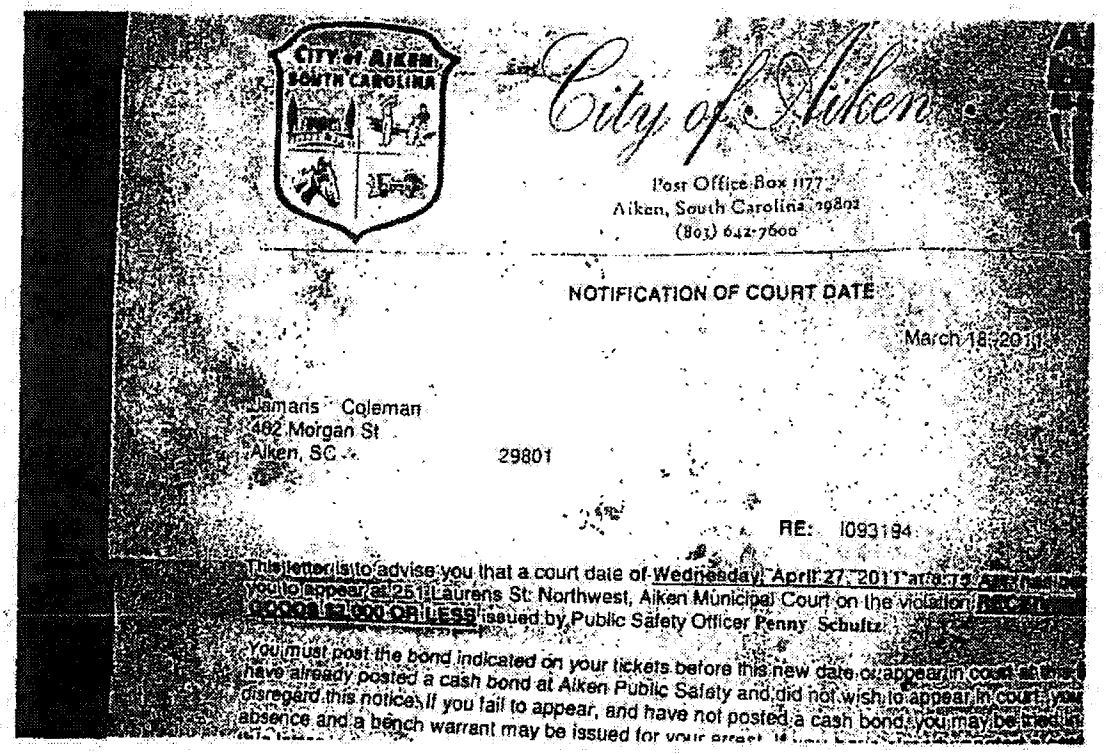
SCCA/513
(3-78)

Attachment A





Attachment B



City of Aiken

Post Office Box 1177
Aiken, South Carolina 29802
(803) 642-7600

NOTIFICATION OF COURT DATE

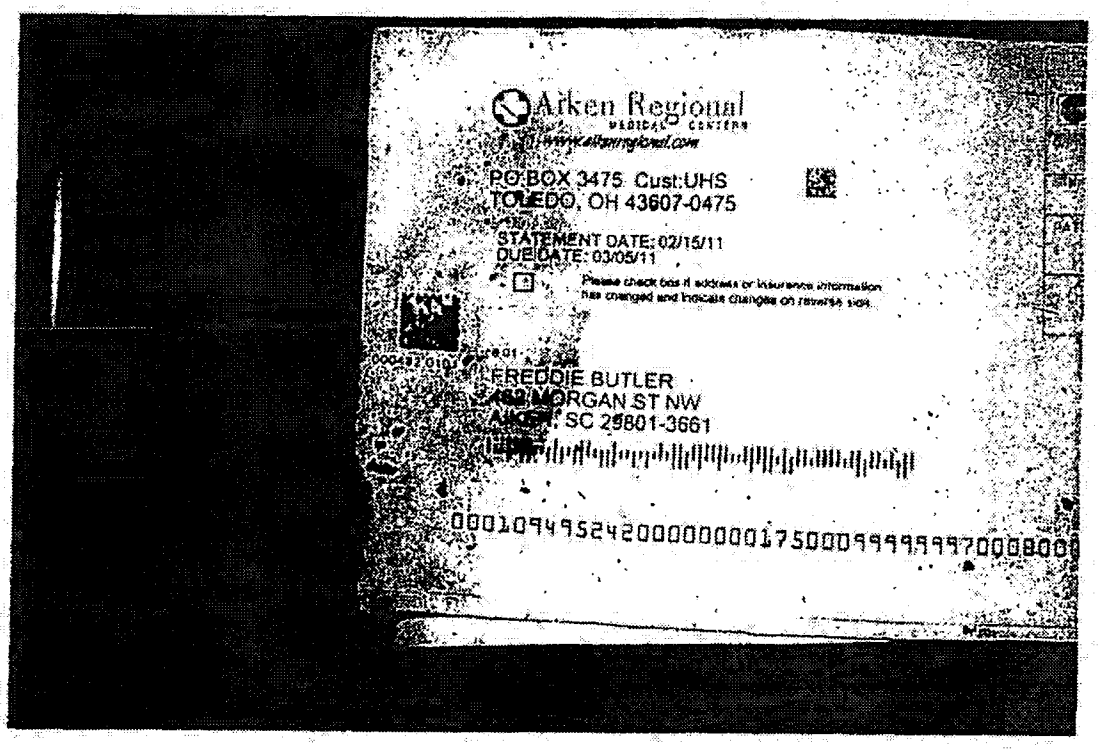
March 18, 2011

Jamans Coleman
492 Morgan St
Aiken, SC 29801

RE: I093194

This letter is to advise you that a court date of Wednesday, April 27, 2011 at 9:15 AM has been set for you to appear at 251 Laurens St Northwest, Aiken Municipal Court on the violation [redacted] issued by Public Safety Officer Penny Schultz.

You must post the bond indicated on your tickets before this new date or appear in court at the time. If you have already posted a cash bond at Aiken Public Safety and did not wish to appear in court, you may disregard this notice. If you fail to appear, and have not posted a cash bond, you may be tried in absence and a bench warrant may be issued for your arrest.



Aiken Regional
MEDICAL CENTERS
www.aikenregional.com

PO BOX 3475 Cust:UHS
TOLEDO, OH 43607-0475

STATEMENT DATE: 02/15/11
DUE DATE: 03/05/11

Please check box if address or insurance information has changed and indicate changes on reverse side.

FREDDIE BUTLER
492 MORGAN ST NW
AIKEN SC 29801-3661

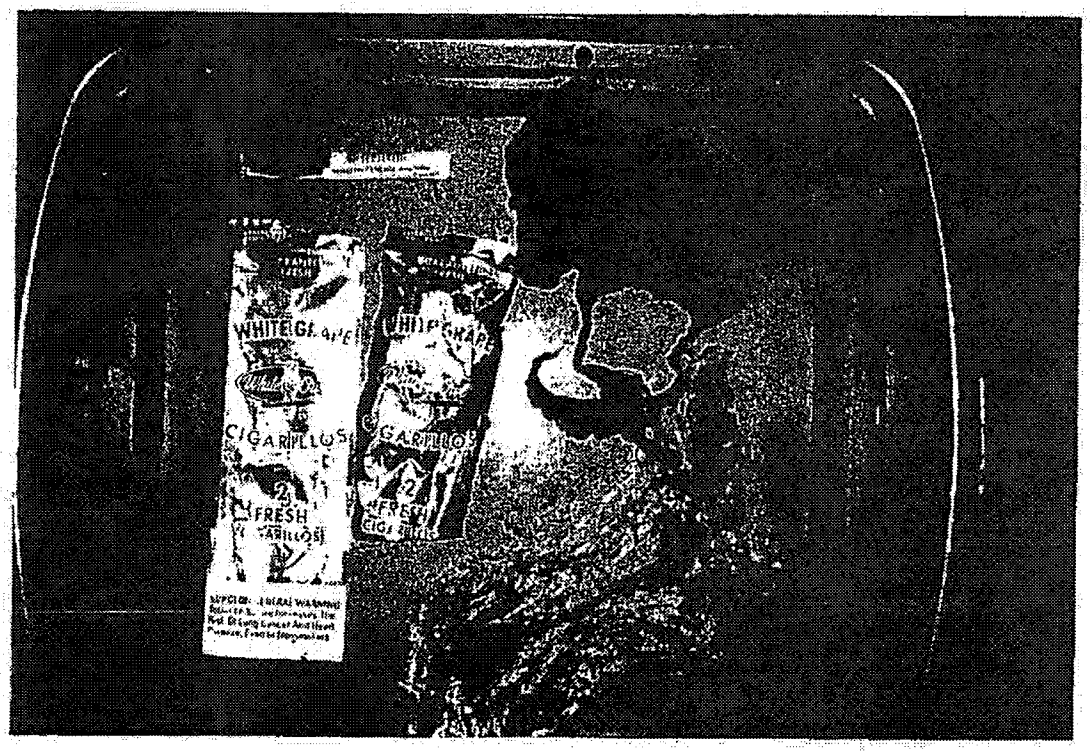

WHITE GL
WHITE RAP
CIGARILLOS
CIGARILLOS
FRESH

Exhibit #3

Exhibit #3

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	Indictment Nos.: 2014-GS-02-01182
	)	2012-GS-02-00133
v.	)	2012-GS-02-00134
	)	
Kelvin Jones,	)	
	)	
Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**
	)	

The Defendant moved to suppress evidence seized pursuant to the execution of a search warrant at a home in Aiken on April 21, 2011. This Court held a pre-trial suppression hearing on August 11, 2014. At the hearing, the Defense argued that the magistrate lacked probable cause to issue the warrant. After considering the evidence and legal arguments presented to the Court, the Defendant's Motion to Suppress is denied for reasons stated below.

FINDINGS OF FACT

In April 2011 narcotics officers with the Aiken Department of Public Safety received tips of short term traffic at 462 Morgan St. Northwest. Acting on these tips, the officers conducted a "trash pull" at the house on April 18, 2011. The trash collector picked up the trash from the curb as usual at the normal time of collection and gave it to the officers to inspect. The officers found torn and twisted baggies, remains of a suspected marijuana cigar, and mail addressed to the home. Later that day, a marijuana analyst confirmed that the cigar did in fact contain marijuana.

After confirming the presence of marijuana, one of the officers, Detective John Medlin, requested a search warrant from a magistrate on April 19, 2011. The affidavit in support of the warrant reads:

1/3

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St. NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect the trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011 which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and contents to Det. Medlin at ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1- the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2- numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3- empty cigar tube wrappers; 4- cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly); 5- mail addressed to 462 Morgan St NW Aiken, SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found.

Detective Medlin did not supplement the affidavit with sworn verbal testimony.

Finding probable cause existed, the magistrate authorized the search warrant. Law enforcement officers executed the search warrant two days later on April 21, 2011 and found a large amount of cocaine and several ecstasy pills.

RULINGS OF LAW

"The task of a magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place." State v. Philpot, 454 S.E.2d 905 (Ct. App. 1995). In this case, probable cause existed for the magistrate to issue the warrant. Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct. App. 2007)(Finding

probable cause for a search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant.

ORDER

For the reasons stated above, the Defendant's Motion to Suppress is hereby respectfully **DENIED.**

AND IT IS SO ORDERED.

~~The Honorable~~ Edgar W. Dickson
Presiding Judge
Court of General Sessions

Aiken, South Carolina,
10/20, 2014.

The South Carolina Court of Appeals

The State, Respondent,

v.

Kelvin Jones, Appellant.

Appellate Case No. 2016-001835

ORDER

The parties' request to submit a stipulation to take the place of the missing transcript of the motion to suppress is granted. Appellant shall file his initial brief and designation of matter within thirty days of this order.

FOR THE COURT

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Kathrine Haggard Hudgins, Esquire

FILED
Nov. 7, 2017

RECEIVED
NOV 07 2017
APPELLATE DEFENSE

WITNESSES

Captain Martin Sawyer, ADPS

FILED July 31, 2014

ARREST WARRANT NUMBER

Direct Indict 1093304

ACTION OF GRAND JURY

true bill

Foreperson of Grand Jury
Date: July 31, 2014

VERDICT

X

Foreperson of Petit Jury
Date: 2-19-15

DOCKET NO. 2014-GS-02-01182

~~(Superseding Indictment)~~

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

~~JULY 31,~~ August 2014 TERM

THE STATE

vs.

KELVIN JONES;
AKA "KJ";
AKA "KEVIN EPPS"

D.O.B. [redacted]

~~Superseding~~ **Indictment for**

TRAFFICKING COCAINE
400 GRAMS OR MORE

S.C. CODE §44-53-370(e)(2)(e)
CDR Code: 0281

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C PLS. AND G.S.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

FEB 12 2015

Liz Godard
C.C.C.P. & G. S., Aiken County, S.C.
Shannon D. Rosenkranz Jodar
Deputy Clerk

A83

APPENDIX F

STATE OF SOUTH CAROLINA)	SUPERSEDING INDICTMENT
)	
)	TRAFFICKING COCAINE
COUNTY OF AIKEN)	400 GRAMS OR MORE

At a Court of General Sessions, convening on ~~July 21~~ August 18, 2014 the Grand Jurors of Aiken County present upon their oath

That Kelvin Jones, AKA "KJ"; AKA "Kevin Epps", did in Aiken County on or about April 21, 2011, knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of four hundred (400) grams or more of cocaine, a controlled substance under provisions of § 44-53-110, *et. seq.*, Code of Laws South Carolina (1976), as amended, such conduct not having been authorized by law. This is in violation of Section 44-53-370(e)(2)(e) of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided

OFFICE OF THE ATTORNEY GENERAL

Alan Wilson

ALAN WILSON (MBB)
ATTORNEY GENERAL

WITNESSES

Aiken Department Of Public Safety

John C Medlin

Law Enforcement Case #: 11-35928

BAY

ARREST WARRANT NUMBER

I093305

FILED January 9 2012
Lisa Godard Jr
LCCP&GS
Shannon M. Rosen Brantley
Deputy Clerk

ACTION OF GRAND JURY

True bill

Foreperson of Grand Jury
Date: January 9, 2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS0200133

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JANUARY TERM 2012

THE STATE
vs.

KELVIN JONES
AKA "KJ"; AKA "KEVIN EPPS"

CDR #: 0107

Indictment for

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE WITHIN PROXIMITY OF A PARK

§ 44-53-0445(B)(1)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Lisa Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, do hereby certify that the foregoing consists of true and correct copies of all documents which are filed in my office in the above case.
15 day Aug 15
Clerk

A85

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	POSSESSION WITH INTENT TO DISTRIBUTE
COUNTY OF AIKEN	)	COCAINE WITHIN PROXIMITY OF A PARK
	)	
		§ 44-53-0445(B)(1)

At a Court of General Sessions, convened on January 9, 2012, the Grand Jurors of Aiken County present upon their oath:

That **KELVIN JONES, AKA "KJ"; AKA "KEVIN EPPS"**, did in Aiken County on or about April 21, 2011, knowingly or intentionally possess with intent to distribute Cocaine, a controlled substance under provisions of Section 44-53-110, et. seq., Code of Laws of South Carolina (1976), as amended, while in, on, or within a one-half mile radius of the grounds of a public school, to wit: Pine Crest School, such possession not having been authorized by law.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. STROM THURMOND, SOLICITOR