

NO. 17-

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL SPRENG

Petitioner

v.

SUPT. MERCER SCI, et al

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Where the trial Court excised significant portions of warrant recitals, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); the Pennsylvania appeals Courts reviewed the matter as if those portions of the warrant had not been excised; and the federal Courts evoked the authority of *Stone v. Powell*, 428 U.S. 465 (1976) to deny habeas review even though that case requires state Courts to use proper Fourth Amendment standards, was due process denied when the federal Courts did not permit review of the state court proceedings?
- 2) Given the facts above, should this Court grant a summary remand and direct the Third Circuit to grant a Certificate of Appealability and review the merits of this due process violation?
- 3) Is it time for this Court to re examine *Stone v. Powell* where there appears to be a variety of interpretations of that case's "full and fair

consideration” requirement among the Circuit Courts of Appeal?

LIST OF PARTIES TO THE PROCEEDINGS

This Petition stems from a habeas corpus proceeding in which Petitioner, Paul Spreng, was the movant before the United States Court of Appeals for the Third Circuit. The Philadelphia District Attorney’s Office is the opposing party in this proceeding.¹

¹ Note, while the caption reflects the Superintendent of SCI Mercer, Mr. Spreng is no longer incarcerated there.

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Petitioner, Paul Spreng, respectfully prays that a Writ of Certiorari issue to review the Order of the Third Circuit Court of Appeals entered in the above-captioned matter on November 1, 2017, denying the request for rehearing to issue a Certificate of Appealability.

OPINIONS BELOW

The Orders of the Court of Appeals for the Third Circuit denying the request to issue a Certificate of Appealability was not officially reported. These Orders have been attached at Appendix “A” and “B”. The decision of the Honorable Lawrence F. Stengel denying relief under 28 U.S.C. §2254 is attached at Appendix “C”.

BASIS FOR JURISDICTION

Since this Petition seeks relief from a decision of the en banc Third Circuit Order, which denied a request for the grant of a Certificate of Appealability, the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C.

§2254 (d)(1), which states in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

CITATIONS TO THE COURTS BELOW

An application for Reargument and Reargument en banc was denied on November 1, 2017, which is attached hereto at Appendix “A”. A Petition for Certificate of Appealability was denied by the Third Circuit on June 2017, and is attached hereto at appendix “B”. The Opinion of the Honorable Lawrence F. Stengel (now Chief Judge) in the Eastern District of Pennsylvania denying the §2254 petition is attached hereto

at Appendix “C”. A Petition for Allowance of Appeal in the Pennsylvania Supreme Court was denied on May 24, 2013. An Application for Reargument and Reargument en banc was denied in the Pennsylvania Superior Court on November 18, 2011. The Opinion of the Panel of the Pennsylvania Superior Court affirming the conviction on September 13, 2011, is attached hereto as Appendix “D”. None of these Opinions are published.

CONCISE STATEMENT OF THE CASE

This matter originated after Paul Spreng was arrested in a marijuana growing conspiracy. Search warrants were executed at various locations in Philadelphia, Pennsylvania.

Pretrial motions to suppress the marijuana at all locations were litigated before the Honorable Rose Marie DeFino-Nastasi in the Philadelphia Court of Common Pleas. In the Court's findings of fact and conclusions of law, it excised significant portions of the warrant's recitals finding multiple, material misstatements therein, pursuant to the procedures set forth in *Franks v. Delaware*, 438 U.S. 154, 164-171 (1978).

Those excisions included a finding that the confidential informant was unreliable; that all reference to a co-defendant having been previously involved in a marijuana growing operation when he was actually arrested only for possession and placed in a diversionary program materially misstated that person's prior criminal history; that there was no

evidence that agricultural materials purchased by Petitioner were actually used in a marijuana “grow” operation; and that the police provided misleading information about electrical usage for one of the suspect premises. See Appendix “E”.

After taking the matter under advisement, the Court denied the motions to suppress finding sufficient probable cause as to the searches where the bulk of the growing and dried marijuana was found.

After being convicted, Petitioner appealed to the Pennsylvania Superior Court. In affirming the conviction, a Panel of that Court reviewed the matter under a “four corners” analysis, reviewing all the recitals in the warrant as if there had not been significant portions excised therefrom, and a *Franks* hearing had not occurred. See Appendix D37-D44.

Petitioner then sought federal habeas relief, pursuant to 28 U.S.C. §2254 (D)(1), asserting that the decisions of the Pennsylvania Courts involved an unreasonable application of *Franks*. The Honorable Lawrence Stengel interpreted this petition as an improper request to relitigate the suppression issues,

which is not permitted under *Stone v. Powell*, 428 U.S. 465 (1976). See, Appendix “C”. The Court also denied the issuance of a certificate of appealability.

Petitioner then applied for a certificate of appealability to the Third Circuit asserting the Pennsylvania Courts had not “afforded [him] the opportunity for full and fair consideration” of his Fourth Amendment claims **on direct review** as required by *Stone v. Powell*, at 489. See, Appendices “A” and “B”. Petitioner specifically sought to have the matter sent back to the Pennsylvania appellate Courts wherein he would have the matter reviewed with the trial Court’s findings considered.

**CONCISE STATEMENT OF REASONS FOR
GRANTING THE WRIT OF CERTIORARI**

**ALL PRIOR COURTS DENIED DUE PROCESS
AND MEANINGFUL ACCESS TO THE COURTS**

It is respectfully submitted that the federal Courts erred in finding that Petitioner was merely trying to relitigate his suppression issues in the federal Courts, as opposed to having a fair review in the Pennsylvania appellate Court as *State v. Powell*, requires. In so doing those Courts have denied Mr. Spreng due process.

In denying the Certificate of Appealability, the Third Circuit found that under *Stone v. Powell, supra*, Fourth Amendment matters cannot be relitigated in a federal habeas corpus motion. While that precept is generally true, Petitioner has never sought to relitigate his case in the federal Courts. Rather, he has requested that his matter be sent back to the Pennsylvania Courts for meaningful appellate review on the merits, which would include consideration of Judge DeFino-Nastasi's findings and excisions.

Petitioner recognizes that in *Stone v. Powell*, this Court found there is minimal justification for granting federal habeas corpus relief where it “is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial **and** on direct review.” 428 U.S. at 486 (emphasis added). Thus, this decision contemplated relief only in those rare circumstances where the state courts have not provided an opportunity for full and fair litigation of a Fourth Amendment claim, through the appellate process. *Id.* at 481-482.

During the Pennsylvania appellate process, only the Superior Court ruled on the merits and improperly considered the material misstatements the trial Court excised per *Franks*. It also failed to follow its own appellate standard for reviewing suppression motions.

Instead, the Panel utilized all of the warrant’s recitals, as if the two-day suppression hearing was never held nor the trial Court had excised significant portions from the warrant. See, Appendix “C” at

D37-D44. Indeed, the Panel stated:

“Accordingly, we must examine the affidavit of probable cause offered in this case to obtain a search warrant for each of the aforementioned locations.”

Appendix D22.

The Superior Court did not accept, nor explain why it did not accept, the findings of fact that Judge DeFino-Nastasi issued from the Bench in accordance with *Franks*. Thus, it is respectfully submitted that when the Panel utilized this “four corners” analysis, and wholly ignored the findings of the Suppression Court, it did not meet the requirements of *Stone v. Powell*, and denied both procedural and substantive due process.

Consistent with the *Franks* approach, the following standard of review of a suppression Court’s decision has been utilized by the Pennsylvania Courts for **decades**:

When we review the ruling of a suppression Court, we must **determine whether the factual findings are supported by the record...** Assuming there is support in the record, **we are**

bound by the facts as are found, and we may reverse the suppression Court only if the legal conclusions drawn from those facts are in error.

Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, 112 (1985)(emphasis added); see also, *Commonwealth v. Stafford*, 451 Pa. 95, 101, 301 A.2d 600 (1974); *Commonwealth v. Sharpe*, 449 Pa. 35, 44, 296 A.2d 519, 524 (1972); *Commonwealth v. Tabb*, 433 Pa. 204, 249 A.2d 546 (1969).

Here, the Superior Court Panel abandoned that standard when it reviewed the trial Court decision, and the Pennsylvania Supreme Court did not grant Allowance of Appeal to review this flawed procedure, which constituted both a structural defect and unconscionable breakdown in the process, violating *Stone v. Powell's* dictates.

Article 5, Section 9 of the Pennsylvania Constitution provides a right of appeal. Hence, there is a substantive due process right to an appeal.

In *Logan v. Zimmerman Brush Company*, 455 US 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), this

Court discussed the procedural parameters of the due process clause. The Court stated the following:

“[T]he Fourteenth Amendment’s Due Process Clause has been interpreted as preventing states from denying potential litigants use of **established adjudicatory procedures**, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed right[s].’ *Boddie v. Connecticut* 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971). Fn5

Fn5.....In ***Boddie***, the Court established that, at least where interests of basic importance are involved, “absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process **must be given a meaningful opportunity to be heard.**” 401 U.S., at 377, 91 S.Ct. at 785.

Id. at 429-30 & n.5, 102 S.Ct. at 1154 & n.5

(emphasis added).

In addition, the *Logan* Court stated the Fourteenth Amendment’s Due Process Clause requires that the litigant be given the opportunity for the presentation of claims in a meaningful time and in a meaningful manner. *Id.* at 437, 102 S.Ct. 1159

(Citation omitted). See also *Bell v. Burson*, 402 U.S. 535, 542 (1971).

In *Swarthout v. Cooke*, 131 S.Ct. 859, 861 (2011), *reh'g denied*, 131 S.Ct. 1845 (2011), this Court instructed:

“When, however, a state creates a liberty interest, the Due Process Clause requires fair procedures for its vindication- and federal Courts will review the application of these constitutionally required procedures.”

Id. at 862.

Thus, it appears the manner in which the Pennsylvania appellate Courts adjudicated this case denied both substantive and procedural due process as well as meaningful appellate review.

Chief Judge Stengel, however, viewed this matter as barred by *Stone v. Powell*. It determined there was a full and fair opportunity to litigate in the state Courts since Petitioner was granted a two-day suppression hearing and had an appeal in the Pennsylvania Courts, there was neither structural error nor an unconscionable breakdown in that system.

Memorandum at C-10-C11, *citing Boyd v. Mintz*, 631 F.2d 247, 250 (3d Cir. 1980).

Moreover, citing *Marshall v. Hendrix*, 307 F.3d 36, 82 (3rd Cir. 2002), the Court noted that a litigant has a full and fair opportunity to litigate Fourth Amendment claims except where the state system contains a structural defect that prevents meaningful review. The Court found no structural defect. *Id.*

The Court also sidestepped the question of whether the Pennsylvania Superior Court failed to adhere to the proper standard of review, by utilizing the findings of the trial Court under *Franks*, deeming it a question for the Pennsylvania Supreme Court and not for the federal courts in a habeas proceeding. *Id.* at C10-C12.

However, it bears noting that the Third Circuit in *Marshall* cited to *Gilmore v. Marks*, 799 F.2d 51, 57 (3rd Cir. 1986), which stated that the state’s “failure to give at least colorable application of the correct Fourth Amendment constitutional standard” could amount to a denial of that critical opportunity for full and fair litigation.

Here, the Pennsylvania appellate Courts failed to give colorable application of the correct Fourth Amendment standard when it considered the **excised** portions of the warrant, in violation of *Franks*, to determine there was sufficient probable cause.

It is respectfully submitted that what occurred here was no mere erroneous or summary disposition, as Judge Stengel found. *Id.* at C10-C11. Rather, *Franks* provides a bedrock principle of Fourth Amendment jurisprudence, which has been part of the legal landscape for nearly 40 years.

Indeed, as noted in *Franks*:

Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

Id. at 165. One can think of no stronger statement in support of the proposition that this was a structural error or unconscionable breakdown in the state Court's decision-making process.

Since Petitioner did not have a full and fair

opportunity to litigate his suppression claim in the Pennsylvania appellate Courts, as required by *Stone v. Powell*, he was denied meaningful review and due process, and there has been a substantial showing of the denial of a constitutional right as required by 28 U.S.C. §2253(c) and a procedure that was contrary to clearly established precedents of this Court, meeting the standard under 28 U.S.C. §2254(d)(1).

Accordingly, reasonable jurists would find the District Court's assessment of the Constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and a certificate of appealability should have issued.

**THERE IS A SPLIT IN THE CIRCUITS AS TO
HOW STONE HAS BEEN IMPLEMENTED
BY THE COURTS OF APPEALS**

It is further respectfully submitted that the decisions of various Courts of Appeal have rendered decisions in conflict with the decision in this case. Those Courts have also entertained diverse interpretations of *Stone v. Powell*, which requires this Court's supervision to harmonized the procedures throughout the Circuits.

The Third Circuit approach embodies the “opportunity” interpretation of *Stone v. Powell*. Under that interpretation, where the accused has had a full and fair opportunity to litigate claims at the trial Court level, and there exists a mechanism for the state appellate Court to review the Fourth Amendment claim, there is no violation. See, *U.S. exrel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3rd Cir. 1978), *Marshall v. Hendrix, supra*.

This approach is consistent with that of several Circuits. For example, in *Capellan v. Riley*, 975 F.2d 67, 70 (2nd Cir. 1992), the Second Circuit held that review

of Fourth Amendment claims may only be undertaken where the state has provided no procedure by which the petitioner could raise a Fourth Amendment claim or the petitioner was foreclosed from raising this claim by an unconscionable breakdown in the underlying process. 975 F.2d at 70. An unconscionable breakdown occurs when a state court fails to conduct “‘a reasoned method of inquiry into relevant questions of fact and law.’” *Id.* at 71. This approach was specifically adopted by the Eighth Circuit in *Willett v. Lockhart*, 37 F.3d 1265, 1273 (8th Cir. 1994) (en banc).

The Ninth Circuit requires in warrant challenges for a litigant to be granted the right to have a suppression hearing, the ability to present evidence and examine witnesses, and appellate review of that determination. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir.1996).

The First Circuit has stated in *Sanna v. Dipaolo*, 265 F.3d 1 (1st Cir. 2001), that once similar procedures are in place and made available to the accused, there is no reason to question a state court decision. See also, *Good v. Berghuis*, 729 F.3d 636, 639

(6th Cir. 2013) (same).

However, several Courts have focused on both the the adequacy and application of the state procedure, which have led to actual analysis of Fourth Amendment claims, most notably in the Tenth and Seventh Circuits.

In *Miranda v. Cooper*, 967 F.2d 392, 401 (10th Cir.), *cert. denied*, 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992), the Court reviewed whether the state Courts had properly handled a *Franks* claim, as well as a determination as to whether there had been sufficient probable cause, and concluded that the petition was *Stone*-barred after it “carefully examined the record relative to the [Fourth Amendment] challenge”. Here, no such review was granted.

In *Gamble v. State of Oklahoma*, 583 F.2d 1161, 1165 (C.A.Okl., 1978), the Court interpreted the term opportunity differently from the Circuit decisions cited above:

“Opportunity for full and fair consideration” includes the full and fair evidentiary hearing contemplated by **Townsend**. Furthermore, it

contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from considering Fourth Amendment claims in habeas corpus proceedings where the state court wilfully refuses to apply the correct and controlling constitutional standards. Deference to state court consideration of Fourth Amendment claims does not require federal blindness to a state court's wilful refusal to apply the appropriate constitutional standard.

Id. at 1165.

In *Miranda v. Leibach*, 394 F.3d 984 (7th Cir. 2005), the Seventh Circuit stated:

A petitioner has had the benefit of such an opportunity so long as (1) he clearly apprised the state court of his Fourth Amendment claim along with the factual basis for that claim, (2) the state court carefully and thoroughly analyzed the facts, and (3) the court applied the proper constitutional case law to those facts.

Id. At 997. The Court then proceeded in that case to analyze the claim.

The Seventh Circuit also took this approach in *U.S. ex rel. Bostic v. Peters*, 3 F.3d 1023,1027 (7th Cir. 1993), where the Court stated:

The presentation of a claim is frustrated by a failure in the state procedural mechanism if there has been no “meaningful inquiry by the state courts” into the Fourth Amendment claim, either because the state courts did not carefully and thoroughly address the factual basis of the petitioner’s claim or because the state courts did not apply the proper constitutional case law to the facts as developed.

Id. at 1027.

The Court then found that the failure to permit the defendant to present evidence based on an unanticipated and unforeseeable application of a constitutional rule on appeal, prevented the state courts from properly considering the merits of the petitioner’s claim and the Court directed the District Court to hear the matter on the merits.

In *Riley v. Gray*, 674 F.2d 522, 526 (6th Cir.) *Cert. denied*, 459 U.S. 948 (1982), the Court found the state appellate procedure was applied in a way that deprived the petitioner of the opportunity to litigate his claim fully.

In *Doescher v. Estelle*, 616 F.2d 205 (5th Cir.1980), the Court held that there was not “full

and fair litigation” because the state trial court adjudicated the petitioner’s Fourth Amendment claims under a procedure that was subsequently found unconstitutional. *Id.* at 207.

In *Anderson v. Calderon*, 232 F.3d 1053, 1068 (9th Cir. 2000), the Court reviewed a Fourth Amendment claim because the constitutional claim did not exist at the time of the appeal, and the Court was “persuaded on these facts and circumstances that this kind of review falls short of the quality of litigation opportunity described in *Stone*.”

Other Courts have also analyzed factual findings of the state courts when considering whether the petitioner *in fact* had full and fair litigation of his Fourth Amendment claim in state court, rather than whether he had the *opportunity* for full and fair litigation. *See, e.g., Andrews v. Collins*, 21 F.3d 612, 631 (5th Cir.1994) (finding petitioner’s claim *Stone*-barred “[a]fter reviewing the record” and finding “that the material facts were adequately developed in state court”); *Terrovona v. Kincheloe*, 912 F.2d 1176, 1178 (9th Cir.1990) [*cert. denied*, 499 U.S. 979, 111 S.Ct.

1631, 113 L.Ed.2d 726 (1991)]; (recognizing that the Ninth Circuit had applied the *Townsend* test, along with other factors, to determine whether there was full and fair consideration under *Stone*), *Tukes v. Dugger*, 911 F.2d 508, 514, 516 n. 12 (11th Cir.1990), *cert. denied*, 502 U.S. 898, 112 S.Ct. 273, 116 L.Ed.2d 225 (1991)(“The trial court’s failure to make explicit findings on matters essential to the fourth amendment issue, combined with the fact that the state appellate court issued only a summary affirmance, precludes a conclusion ... that ... [there is] a *Stone v. Powell* bar to our review of the claim.”); *Weber v. Murphy*, 15 F.3d 691, 694 (7th Cir.1994), *cert. denied*, 511 U.S. 1097 (1994)(Court analyzed whether factual determinations lack support in the record in determining whether the state courts carefully and thoroughly analyzed the facts.)

Thus, while the Circuits generally follow the dictates of *Stone v. Powell*, the fact remains that many of these Courts, even those who generally take a “hands-off” approach to reviewing state Court Fourth Amendment decisions, have reviewed these claims,

especially where the correct constitutional standard has not been applied correctly.

Here, the state Courts did not correctly apply *Franks* when adjudicating this case, and there was an unconscionable breakdown in the underlying process. This breakdown denied a full and fair opportunity to litigate Mr. Spreng's Fourth Amendment claims and denied due process.

Accordingly, it is respectfully requested that this Honorable Court grant the writ for the reasons stated above, especially given the split in the Circuits when applying *Stone v. Powell*, and further to harmonize the multiple approaches taken under that case.

Respectfully submitted,

/ Jerome M. Brown

Jerome M. Brown

APPENDICES

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 17-1445

PAUL SPRENG,
Appellant

v

SUPERINTENDENT MERCER SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civ No. 2-13-cv-02904)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE,
AMBRO, CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, JR., VANASKIE, SHWARTZ,
KRAUSE, RESTREPO, and SCIRICA*, Circuit
Judges

The petition for rehearing filed by appellant
in the above-entitled case having been submitted to

*As to panel rehearing only.

the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
/s/Anthony J. Scirica
Circuit Judge

Dated: November 1, 2017
tmm/cc: Jerome M. Brown, Esq.
Susan E. Affronti, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 17-1445

PAUL SPRENG, Appellant
vs.
SUPERINTENDENT MERCER SCI; ET AL.
(E.D. Pa. Civ. No. 2:13-cv-02904)

Present: AMBRO, GREENAWAY, Jr., and
SCIRICA, and, Circuit Judges

Submitted is Appellant's Request for a Certificate of
Appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/BPM/tmm

----- ORDER -----

Spreng' s request for a certificate of appealability
is denied. See 28 U.S.C. § 2253(c). Jurists of reason
would not debate the District Court's decision to
deny Spreng's habeas petition. See Slack v. McDan-
iel, 529 U.S. 473, 484 (2000). Because Spreng was

afforded "an opportunity for full and fair litigation of a Fourth Amendment claim," his Fourth Amendment claim is not cognizable on federal habeas review. See Stone v. Powell, 428 U.S. 465, 494 (1976).

By the Court,

/s/Anthony J. Scirica

Circuit Judge

Dated: September 7, 2017
tmm/cc: Jerome M. Brown, Esq.
Susan E. Affronti, Esq.
Date Filed: 09/07/2017



Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

PAUL SPRENG,	:	CIVIL ACTION
Petitioner	:	
	:	
vs.	:	NO.13-2904
 SUPT.	 :	
BRIAN THOMPSON,	:	
et al.,	:	
Respondents	:	

MEMORANDUM

STENGEL, J.

February 8, 2017

Paul Spreng brings this counseled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that the Pennsylvania appellate courts denied him procedural and substantive due process and access to those courts. Upon referral, the Honorable Marilyn Heffley, United States Magistrate Judge, issued a Report and Recommendation, recommending that the petition be denied. Mr. Spreng filed Objections to the Report and Recommendation. For the following reasons, I will overrule the Ob-

jections, approve and adopt the Report and Recommendation, and deny the petition with prejudice.

I. BACKGROUND¹

In its decision affirming the conviction and judgment of sentence, the Superior Court of Pennsylvania provided the following facts as summarized by the trial court:

On April 13, 2004, at approximately 7:50 p.m., Officer Sarris and his partner, Officer Elliot, observed [Mr. Spreng] exit his residence and drive off in a Ford Escape vehicle. Wearing plain-clothes and driving an unmarked vehicle, the officers followed [Mr. Spreng] to a warehouse located at 2847 North C Street, in the City and County of Philadelphia. The warehouse “had a large steel roll-up gate” and a “walk-through door” located “just to the north of . . . gate.” Attached to the south wall of the warehouse - at 2945 North C Street - was a house.

When Kane pulled in front of the warehouse, its outer gate “opened up by itself” and he parked inside next to a

¹ The facts and procedural history are taken from the relevant decisions of the Court of Common Pleas of Philadelphia County and the Superior Court of Pennsylvania.

White Plymouth Voyager. After the outer gate closed again, Officers Sarris and Elliot joined fellow officers in “setting up a perimeter” around the premises.

At approximately 9:00 p.m., the White Plymouth Voyager “backed out” of the warehouse and left in a southbound direction. Officers Sarris and Elliot followed, and pulled alongside the Voyager to obtain a closer look at the driver, who later was identified as [Mr. Spreng]. While Officers Sarris and Elliot subsequently returned to the warehouse, other officers followed [Mr. Spreng] to a residence located at 419 South 43rd Street, in the City and County of Philadelphia, Pennsylvania.

On May 4, 2004, several members of Officer Sarris’ unit again conducted surveillance at 2847 North C Street. This time, they observed [Mr. Spreng] exit the warehouse in his Plymouth Voyager and followed him to a store named “Garden Indoors,” which is located in Bucks County, Pennsylvania. One plain-clothes officer followed [Mr. Spreng] inside the store while others, including Officer Sarris, watched from their vehicles. Another officer videotaped [Mr. Spreng] and recorded him and store employees loading several large, white boxes into the back of his Voyager, after which he returned to the warehouse on 2847 North C Street.

Early the next morning, while it was still dark, Officer Sarris collected some “trash” that “was left at

the curbside in front of [413 South 43rd Street].” Having previously learned from the Bureau of Motor Vehicles that [Mr. Spreng] owned this property, the officer retrieved the following items from his curbside trash:

a letter from Plummer Realtors addressed to [Mr. Spreng] at 413 South 431 Street; (2) a letter from Plummer Realtors addressed to [Mr. Spreng] at 419 South 43rd Street; and (3) a letter addressed to Defendant Ruh at 413 South 43rd Street.

See, Commonwealth v. Spreng. 2990 EDA 2009, *2-3 (Pa. Super. September 13, 2011).

The Superior Court further noted that the investigation prompted the issuance of five search warrants for five properties which were executed on May 11, 2004. Id. at *4. From each of these properties, the police confiscated sizeable amounts of marijuana, various forms of drug paraphernalia, and other drug-related materials. Significantly, the police also found sophisticated growing equipment and substantial stockpiles of live marijuana plants. Id. Mr. Spreng and his two co-defendants were subsequently arrested and charged with numerous

drug-related offenses. After unsuccessfully moving to suppress the physical evidence,² all three defendants proceeded to a joint trial which began on May 19, 2009.

The trial court provided the following procedural background upon appeal in accordance with the requirements of Pennsylvania Rule of Appellate Procedure 1925:

On June 2, 2009, a jury found [Mr. Spreng] guilty on charges of possessing/manufacturing marijuana with the intent to manufacture and/or deliver, Criminal Conspiracy, and possessing drug paraphernalia. On August 21, 2009, this Court sentenced him to five to ten years' incarceration for possessing/manufacturing marijuana with the intent to deliver, and two and one-half to five years' incarceration on the charge of Criminal Conspiracy. These sentences are to run concurrently, and no further sentence was imposed on the charge of possessing drug paraphernalia.

[Mr. Spreng] filed post-sentence motions, which this Court denied on

² I note that the trial court granted a motion to suppress some of the evidence based upon a violation of the "knock and announce" rule. The Commonwealth appealed, and the Superior Court reversed and remanded the case for trial. See Commonwealth v. Kane, 940A.2d483 (Pa. Super. 2007)

September 16, 2009. [Mr. Spreng] then filed a timely Notice of Appeal on October 9, 2009, following which this Court ordered him to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.C.P. 1925(b). Counsel for [Mr. Spreng] timely complied.

Commonwealth v. Spreng, Trial Court Opinion, November 5, 2010 at 3-5 (footnotes omitted)

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, a petition for habeas corpus may be granted only if (1) the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1)-(2). Factual

issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (citing 28 U.S.C. § 2254(e)(1)).

Where a petition for writ of habeas corpus has been referred to a magistrate judge for a report and recommendation, the district court “shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made[T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” See 28 U.S.C. § 636(b)(1).

III. DISCUSSION

Mr. Spreng objects to Judge Heffley’s determination that he is attempting to re litigate the suppression issues in a federal *habeas* setting. He insists that his petition was not brought under the Fourth Amendment. He argues, instead, that the Pennsylvania appellate courts denied him procedural and sub-

stantive due process and access to the courts. I must disagree.

A careful review of the petition and Mr. Spreng's Objections indicates that Mr. Spreng is dissatisfied with the Superior Court's decision on appeal. He argues that "the Superior Court panel erred in not utilizing the proper standard of review denying substantive and procedural due process and meaningful access to courts." See Objections at 9. Although characterized as rooted in due process, Mr. Spreng's claim is in essence asking me to review the correctness of the Superior Court of Pennsylvania's analysis of his suppression claim. He has argued extensively throughout these habeas proceedings that the affidavit of probable cause did not satisfy the standard for probable cause, making his due process claim indistinguishable from the underlying challenge of the search warrants issued in his criminal case.

Pursuant to Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), a federal habeas court cannot review a Fourth Amendment

claim if the petitioner had a full and fair opportunity to litigate the claim in the state courts. Id.; see also Wrightv. West, 505 U.S. 277, 293, 112 S.Ct. 2482, 120 L. Ed. 2d 225 (1992). A petitioner is considered to have had a full and fair opportunity to litigate such claims if the state has an available mechanism for suppressing evidence seized in or tainted by an illegal search or seizure, irrespective of whether the petitioner actually availed himself of that mechanism. See U.S. ex rel. Hickey v. Jeffes, 571 F.2d 762, 766 (3d Cir. 1978); Boyd v. Mintz, 631 F.2d 247, 250 (3d Cir. 1980). Conversely, petitioner has not had a full and fair opportunity to litigate a Fourth Amendment claim, and therefore, avoids the Stone bar, if the state system contains a structural defect that prevented the state court from fully and fairly hearing that Fourth Amendment argument. See Marshall v. Hendricks, 307 F.3d 36, 82 (3d Cir. 2002). Significantly, erroneous or summary resolution by a state court of a Fourth Amendment claim does not overcome the [Stone] bar.” Id.

Mr. Spreng cannot show that the state courts failed to provide a corrective mechanism, or that they

precluded him from using it. Indeed, the court held a two-day hearing on the motion to suppress where it heard testimony on the issues raised, and even excised portions of the affidavit of probable cause. Then, the Superior Court reviewed the sufficiency of the affidavit of probable cause on direct appeal and concluded that the issuance of the search warrants was justified. Mr. Spreng raised this issue again in his petition for a rehearing en banc, and even presented the claim to the Supreme Court of Pennsylvania in a petition for allowance of appeal. He was afforded ample opportunity to litigate this Fourth Amendment claim in state court. There was no structural error in the state system or an unconscionable breakdown in that system. Boyd v. Mintz, 631 2d247, 250 (3dCir.1980). Whether the Superior Court adhered to its own precedents is not a question for this court to decide, but for the Supreme Court of Pennsylvania, which denied Mr. Spreng's petition for allowance of appeal of the Superior Court's decision. See Commonwealth v. Spreng 47A.3d847 (Pa.2012). Accordingly, I will overrule Mr. Spreng's Objections, approve and adopt Judge Heff-

ley's well-reasoned Report and Recommendation, and deny Mr. Spreng's petition for writ of habeas corpus with prejudice.

Finally, Judge Heffley recommended that I decline to issue a certificate of appealability. Under the Antiterrorism and Effective Death Penalty Act, a certificate of appealability may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The showing required to satisfy § 2253(c) is straight forward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel, 529U.S.473,484(2000). No reasonable jurist would make such a finding in this case. Accordingly, I will decline to issue a certificate of appealability.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

PAUL SPRENG,	:	CIVIL ACTION
Petitioner	:	
	:	
vs.	:	NO.13-2904
 SUPT.	:	
BRIAN THOMPSON,	:	
et al.,	:	
Respondents	:	

ORDER

AND NOW, this 8th day of February, 2017,
upon careful and independent consideration of the
petition for writ of *habeas corpus*, and after review of
the thorough and well-reasoned Report and Recom-
mendation of United States Magistrate Judge Mar-
ilyn Heffley, IT IS HEREBY ORDERED, in accor-
dance with the accompanying Memorandum, that:

1. Upon de novo review, the petitioner's Objections are OVERRULED.
2. The petition for writ of habeas corpus is DENIED with prejudice.

3. The Report and Recommendation is APPROVED and ADOPTED.
4. There is no probable cause to issue a certificate of appealability.

The Clerk of Court is directed to mark this case CLOSED for all purposes.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.

**NON-PRECEDENTIAL DECISION —
SEE SUPERIOR COURT I.O.P. 65.37**

**COMMONWEALTH : IN THE SUPERIOR
OF : COURT OF
PENNSYLVANIA, : PENNSYLVANIA**

Appelle :

v. :

PAUL E. SPRENG, :

Appellant : No. 2990 EDA 2009

**Appeal from the Judgment of Sentence entered
August 21, 2009
in the Court of Common Pleas of Philadelphia
County Criminal Division at
No(s): 10405121811; CP-51-CR-0609022-2004**

**BEFORE: LAZARUS, MUNDY, and
FREEDBERG, JJ.**

**MEMORANDUM*:
FILED SEPTEMBER 13, 2011**

Appellant, Paul E. Spreng, appeals from the judgment of sentence entered on August 21, 2009, imposed following the conclusion of a joint trial¹ in

*Memorandum By: MUNDY, J.

which a jury found Appellant guilty of possession with intent to deliver (PWID) (marijuana), possession of drug paraphernalia, and criminal conspiracy.² On appeal, Appellant alleges that the trial court erred in failing to suppress the evidence obtained pursuant to a search warrant executed in this case. Additionally, Appellant contends that the jury's verdict was not supported by the weight of the evidence. After careful review, we affirm.

The facts, as gleaned from the certified records, follow. Officer Peter Sarris, a veteran of the Philadelphia Police Department, led the investigation that ultimately resulted in the arrests of Appellant and co-defendants, Michael el Kane and Richard Ruh. In early April of 2004, acting on information secured from a confidential informant (CI), Officer Sarris and

¹ Appellant was jointly prosecuted alongside co-defendants, Michael Kane and Richard Ruh. Kane and Ruh separately appealed the August 21, 2009 judgment of sentence, at docket numbers 3053 EDA 2009 and 3048 EDA 2009, respectively. We have disposed of the issues raised by Kane and Ruh in separate memoranda at journal numbers J . A23030-11 and J. A2302.9-11, respectively.

² 35 P.S. §§ 780–113(30) and 780–113(32), and 18 Pa.C.S.A. § 903(a)(1), respectively.

his unit conducted surveillance of Kane's residence at 538 Tyson Avenue. According to the CI, an individual named Michael Levinson was selling marijuana from a warehouse in Philadelphia. Once police learned that the suspect's name was actually Michael Kane, they began to monitor Kane's residence.

The trial court aptly summarized the pertinent observations made by police during the surveillance.

On April 13, 2004, at approximately 7:50 p.m., Officer Sarris and his partner, Officer Elliot, observed Appellant exit his residence and drive off in a Ford Escape vehicle. Wearing plainclothes and driving an unmarked vehicle, the officers followed Appellant to a warehouse located at 2847 North Street, in the [C]ity and [C]ounty of Philadelphia. The warehouse "had a large steel roll-up gate" and a "walk-through door" located "just to the north of the ... gate." Attached to the south wall of the warehouse – at 2945 North C Street – was a house. ([N.T., 5/20/09), pp. 21-24). When Kane pulled in front of the warehouse, its outer gate "opened up by itself" and he parked inside next to a White Plymouth Voyager. After the outer gate closed again, Officers Sarris and Elliot joined fellow officers in "set[ting] up a perimeter" around the premises. (id., pp.

25-27).

At approximately 9:00 p.m., the White Plymouth Voyager “back[ed] out” of the warehouse and left in a southbound direction. Officers Sarris and Elliot followed, and pulled alongside the Voyager to obtain a closer look at the driver, who later was identified as [Appellant]. (Id., pp. 27-29). While Officers Sarris and Elliot subsequently returned to the warehouse, other officers followed Appellant to a residence located at 419 South 43rd Street, in the [C]ity and [C]ounty of Philadelphia, Pennsylvania. (N.T., 5/22/09, pp. 11-12).

On May 4, 2004, several members of Officer Sarris’ unit again conducted surveillance at 2847 North C Street. This time they observed Appellant exit the warehouse in his Plymouth Voyager and followed him to a store named “Garden Indoors,” which is located in Bucks County, Pennsylvania. One plainclothes officer followed Appellant inside the store while others, Including Officer Sarris, watched from their vehicles. Another officer videotaped Appellant, and recorded him and store employees loading several large white boxes into the back of his Voyager, after which he returned to the warehouse on 2847 North C Street. (N.T., 5/21/09, pp. 32,34,41-44).

Early the next morning, while it was still dark, Officer Sarris collected some “trash” that “was left at the curbside in front of [413 South 43rd Street].” Having previously learned

from the Bureau of Motor Vehicle[s] that Appellant owned this property, the officer retrieved the following items from his curbside trash: (1) a letter from Plummer Realtors addressed to Appellant at 413 South 431 Street; (2) a letter from Plummer Realtors addressed to Appellant at 419 South 43rd Street; and (3) a letter addressed to Defendant Ruh at 413 South 43rd Street. (N.T., 5/20/09, pp, 45-52; Exhibit C29)

Trial Court Opinion, 11/5/10, at 3-5 (footnotes omitted); Certified Record (C.R.) at D23.

Based on the aforementioned investigation, as well as the information provided by the CI, five search warrants were issued on May 10, 2004 for the following properties: 538 Tyson Avenue, 2847 North C Street, 2845 North C Street, 413 South 43rd Street, and 419 South 43rd Street.³ Then, on the morning of May 11, 2004, officer Sarris and other members of the Philadelphia Police Department simultaneously executed the five search warrants. The warrants authorized the officers to search the properties for controlled substances and evidence of drug dealing. C.R. at D7, Exhibit A (Affidavit of Probable Cause,

Appendix “A”).

From each of the five properties, police confiscated sizeable amounts of marijuana, various forms of drug paraphernalia, and other drug-related materials. Significantly, police found sophisticated growing equipment and substantial stockpiles of live marijuana plants. The trial court details the extensive amount of physical evidence recovered by police from the aforementioned properties.

Officer Sarris participated in searching the properties at 2845 and 2847 North C Street, which were, respectively, Defendant Ruh’s residence and the above-referenced warehouse. The officers videotaped Ruh’s home before seizing any items and Street property and recorded numerous marijuana plants, marijuana buds, marijuana leaves, and equipment used to grow marijuana. The video shows that Ruh’s basement contained drying marijuana buds that “hung ... on [a] clothes line” apparatus,

³ Michael Kane owned the 538 Tyson Avenue property, where he resided with his wife, Deborah Levinson. Appellant and Nancy Hoffner owned the 2847 North C Street property and the 2845 North C Street property, where Richard Ruh resided. Appellant also owned the 413 South 43rd Street property and the 419 South 43rd Street property, where Stephen Morrison resided.

as well as “racks” of marijuana at various stages of growth. (N.T., 5/20/09, pp. 89-104).

The officers confiscated numerous items from Ruh’s residence, including “twenty-seven (27) marijuana plants;” “one clear plastic jar [with a] white lid containing alleged marijuana;” “one clear plastic container with [a] black lid containing bulk marijuana;” “one clear plastic container with [a] white plastic lid with bulk marijuana;” “one clear plastic container with [a] blue lid containing bulk marijuana;” “one clear plastic Ziploc bag containing bulk marijuana;” a “magnetized wooden box containing a green weedy substance alleged marijuana,” two 600 watt grow lamps, and a generator. (See Exhibits C34 and C35), Officer Sarris field tested several of these Items and concluded that they contained marijuana. (*Id.*, pp. 116-117; Exhibit C34).

Inside the warehouse, the officers discovered a stockpile of marijuana plants, buds, and sophisticated growing equipment. As shown in the police videotape, the warehouse contained drying racks, planting beds, plant nutrients, heat lamps, fans, humidifiers, PH charts, microscopes, instructional books on growing marijuana, timers, scales, deodorizers, and tanks of carbon dioxide. (N.T., 5/20/09, pp. 89-96). It also was equipped with a “ventilation and air filtering system,” as well as an irrigation

system that pumped water and nutrients through the marijuana plants. (*Id.*, pp. 97-98).

In one room, the officers recovered three large bales of marijuana that had been “compressed and dried.” From other rooms they recovered 171 marijuana plants, as well as 28 grow lamps, 28 electrical generators, 3 mini-fans, 9 odor eliminators, 2 silver bullet air deodorizers, 3 On storm deodorizers, one book entitled “The Cannabis Grow Bible,” one book entitled “Indoor Marijuana Horticulture,” “one blue covered account book with various tally work for various Items including equipment used for growing marijuana,” website printouts for hydroponic gardening, numerous charts with instructions for regulating fertilizer and growing agents, and one receipt from Garden Indoors for a Uvonair deodorizer. (N.T., 5/20/09, p. 92, 109–116; 5/21/09, pp. 6–7; Exhibits C40 through C45).

While Officer Sarris searched the properties at North C Street, other officers, including Officer Schmidheiser, executed the warrant for Defendant Kane’s residence at 538 Tyson Avenue. As with the properties on North C Street, the officers videotaped Kane’s home before seizing any items and recorded buckets and bags of marijuana, drawers filled with marijuana, and a “drying table where you put marijuana out to dry.” The “drying apparatuses” were similar to those recovered from

the warehouse. (N.T., 5/22/09, pp. 33-52).

From Kane's residence, the police confiscated sixty-four (64) clear plastic bags of marijuana, one Ziploc bag "with weed/seed along with 27 partially charred packets in cigar form," one black trashbag containing marijuana, one clear plastic bag containing "Psilocybin mushrooms," several scales, "unused zipper bags," two 12-gauge shotguns, a rifle, a .40 caliber handgun loaded with seven live rounds, two loaded .9mm. handguns, one .22 caliber handgun loaded with seven live rounds, and several shotgun shells. All of these items were turned over to the lead investigator, Officer Sarris. (N.T., 5/22/09, pp. 33-52; Exhibits CB through C14).

Officer Anthony Floyd was a member of the unit that executed the warrant for 413 South 43rd Street, where Appellant resided. Here, the officers recovered marijuana from a tan plastic container located inside a basement refrigerator. Although this was the only marijuana recovered from Appellant's home, the police additionally confiscated \$31,850.00 (316 one hundred dollar bills and 5 fifty-dollar bills) from the second-floor front bedroom, and approximately \$20,000.00 in various locations throughout the premises. (N.T. 5/26/09, pp. 66-69; Exhibits C30 and C31). They also confiscated Instructions on growing marijuana,

photographs of marijuana plants in various stages of growth, “tally sheets,” notebooks, PECO and water bills addressed to Appellant for both 413 and 419 South 43rd Street, and PGW bills addressed to Appellant for the warehouse at 2847 North C Street. (N.T., 5/26/09, pp. 63-64, 72-75, 89 92; Exhibits C27, C28, and C32).

Officer Carolyn Williams was a member of the unit that executed the warrant for 419 South 43rd Street. (N.T., 5/22/09, pp. 159-171). This property had three floors and was divided into separate apartments, two of which were occupied by Stephen Morrison and William Riley — both of whom were arrested and charged with possessing and manufacturing marijuana with the intent to manufacture and/or deliver. (N.T., 5/26/09, pp. 141-144).

The police discovered “numerous marijuana plants in two rooms (on) the third floor,” as well as a “nursery down in the basement ... with smaller [marijuana] plants in little pots.” No plants were discovered on the first or second floors, but the plants on the third floor grew taller than Officer Williams, so much so that she described one room as a “jungle.” Similar to the warehouse, the plants were “hooked up to a water irrigation system [with] timers,” heat lamps, and fans. (N.T., 5/22/09, pp. 159-171; Exhibits C19 and C20).

From this location, the police confiscated 441 marijuana plants, 73

Ziploc “sealed plastic quart size bags” of marijuana, one clear plastic bag containing mushrooms, 24 brown paper bags of marijuana, and 2 clear plastic bags of marijuana. (N.T., 5/22/09, pp. 159-171; Exhibits C19 and C20).

The officers also recovered \$711.00 in cash, numerous “grow lamps,” an air purifier, glass jars with gold metal lids, an Ohaus triple beam balance scale, two “tally books,” several books relating to growing marijuana, two invoices from Garden Indoors, and one invoice from HYDROFARM East. All of these items were turned over to Officer Sarris. (N.T. 5/22/09, pp. 166-176).

Trial Court Opinion, 11/5/10, at 5..9 (footnotes omitted).

Appellant and co-defendants, Kane and Ruh, were subsequently arrested and charged with numerous drug-related offenses. After unsuccessfully moving to suppress the physical evidence confiscated as a result of the searches detailed above,⁴ all three defendants proceeded

to a joint trial that commenced on May 19, 2009. Members of the Philadelphia Police Department, who participated in the above-detailed surveillance and investigation, testified at the trial. Along with the testimony of police officers and the substantial physical evidence confiscated as a result of the searches, the Commonwealth offered the testimony of another co conspirator, Stephen Morrison. Morrison agreed to cooperate with the prosecution in exchange for the possibility of a reduced sentence.

On June 2, 2009, following the conclusion of the joint trial, a jury found Appellant guilty of PWID, criminal conspiracy, and possession of drug paraphernalia.⁵ *Id.* at 11. On August 21, 2009, Appellant was sentenced to five to ten years' imprisonment on his conviction for PWID, and concurrently to two and one-half to five years' imprisonment on his conviction for criminal conspiracy,⁶ N.T., 8/21/09, at 22-23. Appellant filed post-sentence motions, which the trial court denied on September 16, 2009. C.R. at D14. Thereafter, on October 9, 2009, Appellant filed a timely notice of appeal.⁷ C.R. at D16.

On Appeal, Appellant raises four issues for our review.

1. Where the Affidavit of Probable Cause did not provide sufficient probable cause for the issuance of the warrant and the search of a warehouse at 2847 N. “C” Street in Philadelphia, did the lower Court err in denying the suppression (m)otion?
2. As regards the property located at 419 S. 43rd Street, where there was a similar lack of probable cause; there was no nexus to those premises showing any criminal activity therein; and the police failed to meet the particularity requirement by showing probable cause for a particular apartment in a multiple dwelling unit; did the [trial c]ourt err in denying the suppression motion?
3. Where the Affidavit of Probable Cause failed to show any nexus between criminal activity and the property located at 413 S. 43rd Street and there was a

4 The trial court granted a motion to suppress evidence based upon a violation of the “knock and announce” rule, which occurred during the execution of the search warrants on 2845 North C Street and 2847 North C Street. The Commonwealth appealed, and this Court reversed the order and remanded the case for trial. *Commonwealth v. Kane*, 940 A.2d 483 (Pa. Super, 2007), appeal denied, 951 A.2d 1161 (Pa. 2008).

similar general lack of probable cause, did the [trial c]ourt err in denying the suppression motion?

4. Where the evidence shocked the conscience, did the [trial c]ourt err in not granting a new trial on the weight of the evidence claim?

Appellant's Brief at 4 (footnote omitted),

In the first three issues raised by Appellant, he challenges the legitimacy of the search warrants executed in this case for the properties located at 2847 North C Street, 419 South 43rd Street, and 413 South 43rd Street. We must determine whether the single affidavit, presented to the issuing authority in support of the warrants, offered sufficient probable cause to permit the search of the properties specified. Therefore, we address Appellant's first three issues concurrently.

An appellate court's standard of review of an

⁵ According to the trial court, "[I]n response to Special Interrogatories, the jury found that [Appellant] Possessed with Intent to Manufacture [and/or] Deliver [the] Marijuana seized from 2847 North C Street, 2845 North C Street, 419 South 43rd Street, and 413 South 43rd Street." Id. (Internal quotation marks and citation omitted). Conversely, the jury determined that Appellant "did not possess with the intent to manufacture and/or deliver the marijuana recovered from Defendant Kane's residence, at 538 Tyson Avenue. Id. (Internal quotation marks and citation omitted; emphasis in original),

order denying a motion to suppress is well established.

Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Otterson, 947 A.2d 1239, 1244 (Pa. Super. 2008) (citation omitted), appeal

⁶ For a conviction of PWID (marijuana), a defendant may be sentenced to a term of incarceration not to exceed 5 years. 35 P.S. § 780--113(f)(2), Appellant, however, had a prior conviction for PWID, permitting the trial court to sentence him "[to] be imprisoned for a term up to twice the term otherwise authorized" 35 P.S. § 780-113(a). In addition, the Commonwealth sought imposition of a mandatory minimum of 5 years' incarceration based on the amount of marijuana in Appellant's possession. See 18 Pa.C.S.A. § 7508(a)(1)(HI).

⁷ Appellant and the trial court complied with Pa.R.A.P. 1925. C.R. at D17, D18, D20, and D21.

denied, 958 A.2d 1239 (Pa. 2008), cert. denied, ***Otterson v. Pennsylvania***, 129 S.Ct. 2402 (U.S. 2009). “The suppression court does not conduct a de nova review of the issuing authority’s determination that probable cause existed for issuance of a warrant; instead, the suppression court’s function is to ensure that the issuing authority’s probable cause determination had a substantial basis.” ***Commonwealth v. Gutierrez***, 969 A.2d 584, 588 (Pa. Super. 2009) (citation an internal quotation marks omitted), appeal denied, 983 A.2d 726 (Pa. 2009}. The issuing authority must, however, base its determination on the facts contained within the four corners of the supporting affidavit. ***Commonwealth v. Smith***, 784 A.2d 182, 184 (Pa. Super. 2001). Thus, “[i]n reviewing the ruling of a suppression court, our task is to determine whether the factual findings are supported by the record.” ***Commonwealth v. Powell***, 994 A.2d 1096, 1101 (Pa. Super. 2010) (citation omitted), appeal denied, 13 A.3d 477 (Pa. 2010). If the record supports the suppression court’s findings of fact, then we must

affirm. *Id.* “An appellate court, of course, is not bound by the suppression court’s conclusions of law.” *Common wealth v. Russo*, 934 A.2d 1199, 1203 (Pa. 2007) (citation omitted). However, “[i]t is within the suppression court’s sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony.” *Commonwealth v. Dutrieville*, 932 A.2d 240, 242 (Pa. Super. 2007) (citation omitted).

“In determining whether an affidavit supporting the issuance of a search warrant established probable cause for the search, the ‘totality of the circumstances’ approach as set forth by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 (1983), is utilized.” Gutierrez, *supra* at 588. Our Supreme Court has interpreted the Pennsylvania Constitution as applying the same standard. *Otterson, supra* at 1244; see *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985). This standard requires the issuing authority ‘to make a practical, common sense assessment whether, given all 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.” ***Commonwealth v. Murphy***, 916 A.2d 679, 682 (Pa. Super. 2007), appeal denied, 929 A.2d 1161 (Pa. 2007). These circumstances “includ[e] the veracity and basis of knowledge of persons supply[ng] hearsay information[.]” ***Commonwealth v. Gindlesperger***, 706 A.2d 1216, 1219 (Pa. Super. 1997) (citation and internal quotation marks omitted), affirmed, 743 A.2d 898 (Pa. 1999), cert. denied, ***Pennsylvania v. Gindlesperger***, 533 U.S. 915 (U.S. 2001). “[W]e stress that probable cause exists where there is a probability of criminal activity, not a prima facie showing of such activity.” ***Commonwealth v. Dukeman***, 917 A.2d 338, 341 (Pa. Super. 2007) (citation omitted), appeal denied, 934 A.2d 72 (Pa. 2007).

“[T]he totality of the circumstances test permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip[.]” ***Commonwealth v. Torres***, 764 A.2d 532,

537 (Pa. 2001) (citation and quotation omitted). Our Supreme Court has explained, “where ... an affidavit supporting the issuance of a search warrant lacked a reference to the credibility of the informants or the reliability of the information provided, such a violation [does] not assume constitutional dimensions or result in substantial prejudice to the defendant warranting suppression of evidence where the affidavit provides probable cause to support the warrant independent of the questionable source.” *Dukeman, supra* at 342, citing *Commonwealth v. Ruey*, 892 A.2d 802, 811 (Pa. 2006).

Accordingly, we must examine the affidavit of probable cause offered in this case to obtain a search warrant for each of the aforementioned locations. On May 7, 2004, Officer Peter Sarris of the Philadelphia Police Department, the affiant, filed an affidavit of probable cause to obtain search warrants for the previously referenced properties. The affidavit of probable cause presented to the issuing magistrate contained the following pertinent information.

1. I [Peter Sarris] am a Police Office employed by the Philadelphia Police Department and presently assigned to the Narcotics Intelligence and Investigation Unit (Intensive Drug Investigation Squad) in the Narcotics Bureau of the Philadelphia Police Department. I have been a sworn law enforcement officer since 1996.

In my capacity as a Police Officer, I have been involved in well over one thousand arrests and five hundred investigations for violations of the Controlled Substance, Drug Device, and Cosmetic Act of 1972. I am empowered to conduct investigations of and make arrests for offenses involving the manufacture, delivery or possession with the intent to manufacture or deliver controlled substances within the meaning of Section 780- 133(a)(30) of Title 35 P.S., conspiracy within the meaning of Section 903 of Title 18 Pa.C.S.A., and utilization of communications facilities within the meaning of Section 7512 of Title 18 Pa.C.S.A.

2. In addition to this experience, I have been certified to conduct the Becton - Dickinson and N.I.K. field tests on suspected substances. I have received additional training in the field of narcotics investigations from the Philadelphia a Police Department, United States

Army, Pennsylvania State Police, United States Environmental Protection Agency, United States Drug Enforcement Administration and the Pennsylvania Office of Attorney General.

3. I have been qualified as an “expert” witness relating to narcotics investigations. These qualifications have been in the Philadelphia Municipal, and Pennsylvania Common Pleas Courts.

4. During my tenure as a police officer, I have participated in the preparation and execution of numerous search and seizure warrants resulting in the seizure of large quantities of Controlled Substances (cocaine, cocaine base “crack”, marijuana, heroin etc.), packaging implements, concealed compartments used to conceal and/or transport drugs and other paraphernalia involved in the distribution of Controlled Substances such as firearms used by drug dealers to protect their drugs and/or proceeds, large amounts of United States currency, other assets of wealth (including automobiles), drug records, customer lists and other documents relating to the ordering, purchasing, and distribution of Controlled Substances. I have also conducted numerous investigations involving indoor marijuana growing operations, having done so, I am knowledgeable in the methods, materials and equipment used to grow and cultivate marijuana plants.

II PROBABLE CAUSE.

1. On 04-01-04, your affiant received information from a reliable confidential Informant regarding an individual who is growing marijuana. The C/I stated that she/he knows a W/M named Mike Levinson who lives at 538 Tyson Ave. in Philadelphia. The C/I stated that Mike is also known as "OM" (old man). The C/I further stated that Mike lives at 538 Tyson Ave. with his wife Debra Levinson. The C/I stated that Mike is in charge of maintaining a large warehouse in the West Philadelphia area which is used to grow large amounts of high quality marijuana. The C/I states that others are involved in the growing operation but she/he does not know who they are. The C/I stated that Mike does not own the warehouse but he is one of the person(s) in charge of operating and maintaining the growing operation.

2. The C/I further stated that in addition to the warehouse, Mike is also growing a large amount of marijuana in the basement of his residence at 538 Tyson which the C/I has seen personally. Mike is also known to own numerous firearms[,] which he keeps inside of his residence at 538 Tyson Ave. The C/I provided a phone number for Mike of (215) 342- 4932.

3. Your affiant identified "Mike" as Michael Kane, W/M, DOB 03-26-48, OLN#14056410 538 Tyson Ave. Phil-

adelphia PA 19111. Kane's identity was confirmed by the C/I.

4, On 04-05-04, surveillance was conducted at 538 Tyson Ave. At approx 9:45 am, Kane exited 538 Tyson Ave and entered his silver colored Ford Escape with handicap tags and was followed by Police to Wal-Mart at Adams Ave and Roosevelt Blvd. Kane was followed inside by P/O Schmidheiser #4619. While inside, Kane purchased 3-4 oscillating fans in addition to pruning shears [sic] and spray bottle nozzles. Kane put the items inside of his vehicle and was followed back to 538 Tyson Ave. where he entered, leaving the items inside of his vehicle. At approx 12:00 pm, Kane exited with his wife and was followed to various locations in and around Philadelphia. At approx 3:10 pm Kane returned to 538 Tyson Ave.

5. At approx 3:20 pm, P/O Elliott #6712 and P/O Millan #4322 observed Kane receive a package from UPS at 538 Tyson [A]ve. At approx 3:50pm, P/O Elliott and P/O Millan observed a green Honda Accord arrive and park in the driveway behind Kane's vehicle. The W/M operator went inside 538 Tyson Ave. At approx 4:30 pm, Kane and the W/M from the green Honda [A]ccord exited 538 Tyson Ave. The W/M was carrying a large lamp (believed to be

a heat lamp) and placed this lamp into the green Honda Accord. This W/M then left the area. Kane left the location again and was followed by police. The surveillance was terminated at approx 5:30 pm.

6. On 04-13-04, your affiant and P/O Elliott set up surveillance at 538 Tyson Ave. At approx 6:30 pm, Kane arrived with his wife in his Ford Escape. Both enter [sic] the location. At approx 6:50 pm, a green Chevy Astrovan arrived and parked in front of 538 Tyson Ave. [T]he W/M driver and W/F passenger exited the vehicle and went inside of 538 Tyson Ave after knocking. At approx 7:00 pm, a neighbor carrying a brown box (believed to be another package delivery) arrived at 538 Tyson Ave and knocked on the door. After getting no response, the neighbor placed the package inside the outer door and left. At approx 7:30 pm, the W/M and W/F exited 538 Tyson. As they exited, Kane retrieved the package in the door. The green Chevy Astrovan left the area and was not followed.

7. At approx 7:50 pm, Kane left 538 Tyson Ave and was followed to a warehouse at 2847 "C" St. as Kane's Ford Escape approached the front roll-up gate of the warehouse, the warehouse gate opened. Your affiant believes that Kane opened the warehouse door automatically with a remote. Kane drove

his vehicle into the bay area of the warehouse. As the door was closing, your affiant and P/O Elliott observed a white Plymouth Voyager already parked in the bay area of the warehouse. Your affiant and P/O Elliott also observed a second large warehouse gate just inside the bay area of the outer warehouse gate. Once inside the bay area of the outer gate, it appeared that there was only enough space for 2-3 vehicles to park. It appeared that, to go any further into the warehouse, person(s) must go through the inner gate past the bay area.

8. At approx 9:00 pm P/O Millan #4322 and P/O Williams #2933 were parked across the street from 2847 "C" St. at that time, the outer gate opened and the white Plymouth Voyager, PA TAG# DYN-1226 backed out of the warehouse. As it did so, P/O Millan and P/O Williams could see inside the warehouse and observed Kane's vehicle parked just inside the outer gate. The outer door rolled down and closed after the vehicle cleared the door. They also observed light coming from behind the inner gate. The driver of the Plymouth Voyager was later Identified as [Appellant], W/M, DOB 08-13-48, OLN#13483539, 413 So. 43rd St. Phila. PA 19104. It is believed that [Appellant] also closed the door using a remote. [Appellant] was followed by police and was observed entering 413

So. 43rd St[.] by P/O Schmidheiser. At approx 10:00 pm, Kane exited 2847 “C” St. closing the gate by remote. Kane was followed back to 538 Tyson Ave.

9. Your affiant believes that 2847 “C” St. is, in fact, the location of the warehouse that Kane is using to grow large amounts of marijuana. It was later found that [Appellant] is the owner of the warehouse at 2847 “C” St. along with Nancy Hoffner.

10. On 05-03-04, surveillance was conducted at 2847 “C” St. by P/O Schmidheiser and P/O J. Quinones #4778. At approx 2:15 pm, [Appellant] exited the warehouse in his Plymouth Voyager. [Appellant] was followed to 413 So. 43rd St. and observed entering by P/O Bethea #1141. At approx 2:30 pm, P/O J. Quinones observed a red Subaru Legacy, PA TAG#DFS-0889 exit and was followed to 419 So. 43rd St. by P/O Coyne #2070 and P/O M. Quinones #7019. P/O Bethea observed the driver enter 419 So. 43rd St. carrying a backpack. The driver was later identified as Stephen Morrison, W/M, DOB 09-27-65, OLN# 24134547, 419 So. 43rd St. Phila[delphia] PA 19104.

11. At approx 3:25 pm, P/O Schmidheiser and P/O J. Quinones observed a W/M later identified as Richard Ruh, W/M, DOB 03-24-04, OLN 18632172, PPN 914585, exit the warehouse car-

rying a large bag and enter 2845 \“C” St. Investigation revealed that Richard Ruh was arrested in reference to a marijuana Investigation in which Ruh was arrested along with numerous co-defendants. Large amounts of bulk marijuana were confiscated along with heat lamps and other indoor marijuana growing equipment (refer to DC#00-01-035546). Your affiant was a part of the aforementioned investigation in which Ruh was arrested. Your affiant participated in the arrest of a co-defendant and the execution of search and seizure warrants at numerous locations associated with the above investigation. Your affiant recovered a large amount of indoor marijuana growing equipment including high power heat lamps, planters, lava rocks and irrigation equipment during the execution of the search and seizure warrants.

12. On 05-04-04, surveillance was conducted at 2847 “C” St. At approx 9:20 am, P/O Schmidheiser and P/O J. Quiñones observed Ruh exit 2845 “C” St. and enter the warehouse at 2847 “C” using a remote door opener. After entering, the door rolled down and closed behind him. At approx 9:30 am, Morrison arrived in the red Subaru. Upon arriving outside, the door automatically opened and closed behind him after he entered. It is believed that Morrison also has an automatic door opener for the warehouse. At approx 10: 10 am,

[Appellant] arrived in his Plymouth Voyager and entered the warehouse closing the door behind him. After entering with his vehicle, Spreng came out on foot and taped a U.S. Postal service slip on the walk through door next to the warehouse garage door. [Appellant] went back inside.

13. At approx 10:45, [Appellant] left the warehouse and was followed by police to "Garden Indoors" located at 208 Rt. 13, Bristol PA 19007. Garden [I]ndoors is a retail store that sells indoor growing and hydroponics equipment and supplies. Garden Indoors is a distributor of "HYDROFARM" equipment whose products are popular with persons growing marijuana. HYDROFARM manufactures hydroponics equipment and grow lamps, both high intensity sodium vapor and halide lamps.

14. [Appellant] was followed inside Garden Indoors by P/O Millan #432. While inside, [Appellant] was inquiring about a product called "Ona Storm" which is an odor control device which provides odor neutralization to a room up to 10,000 square feet.

15. P/O Coyne videotaped [Appellant] as he exited the store. [Appellant] backed his mini-van up to the front door of the store. Employees exited the store with push carts which con-

tained large white boxes (believed to be high intensity grow lamps) approx 4- 6 boxes. [Appellant] also purchased two large blue containers[,] which appeared to contain liquid (believed to be liquid fertilizer) along with other items which he loaded into the rear of his vehicle. [Appellant] left the store and was followed back to 2847 "C" St. where he drove his vehicle into the warehouse.

16. While [Appellant] was purchasing supplies, at approx 11:30 am, Morrison left the warehouse, closing the garage door behind him automatically. At approx 12:00 pm, Ruh left the warehouse on foot and entered a locked gate south of 2845 "C" St. At approx 12: 10 pm, Morrison returned and drove his vehicle into the warehouse. Shortly after, Ruh backed out of the lot next to 2845 "C" in a dark colored minivan, PA TAG# HP 91585. Morrison exited on foot on the 2845 "C" St. side of the warehouse and got into the passenger side of Ruh's vehicle. Both left the area.

17. At approx 12:35 pm, [Appellant] arrived back at 2847 "C" St., opened the door automatically and drove his vehicle into the warehouse to unload it. Shortly after, Ruh returned to 2845 "C" St. and took bags inside 2845 "C" St. Morrison arrived on foot walking northbound on "C" S. Morrison went inside 2845 "C", then came back out

and retrieved a large bag from Ruh's vehicle and took the bag inside 2845 "C" St.

18. On 05-05-04, your affiant and P/O Elliot recovered trash from the curbside of 413 So. 43rd St. [R]ecovered from the discarded trash of 413 So. 43rd St. ([Appellant]'s residence) was one letter addressed to [Appellant] at 413 So. 43rd St., a second letter addressed to [Appellant] at 419 So. 43rd St. (Morrison's residence) and a third letter addressed to Richard Ruh at 413 So. 43rd St. ([Appellant]'s residence). These items were placed on Philadelphia Police [D]epartment property receipts.

19. On 05-05-04, at approx 7:30 am, your affiant and P/O Elliot conducted a surveillance of Kane's residence at 538 Tyson Ave... [sic] Kane's silver Ford Escape was not on location. There was a gold colored Mercury Sable station wagon (Enterprise Rental) parked in the driveway. At approx 10:20 am, Kane and his wife Debra Levinson left 538 Tyson in the station wagon. Kane was followed to the area of the train station in the 1100 block of Filbert St. Kane parked at 1100 Filbert St. Levinson exited vehicle carrying a large backpack which was bulging full and a second nylon multicolored shopping type bag with handles which was also bulging full. Levinson walked towards

the train station. Kane then went back to 538 Tyson Ave.

20. Your affiant conducted a search of PECO Energy records for wattage use at 2847 "C" St... [sic] Your affiant found that since September 2003, the wattage usage at 2847 "C" St. had been between 9,000 and 11,000. Your affiant compared this wattage usage with other properties in the immediate area and found the average to be between 900 and 1200. The extremely high wattage usage for 2847 "C" St. would be consistent with the use of high intensity discharge heat/grow lamps (such as Sodium Vapor and Metal Halide) which could consist of 250 to 1,000 watt bulbs.

Affidavit of Probable Cause for Search Warrant, 5/7/04, at 1-9; C.R. at D7, Exhibit A (Affidavit of Probable Cause).

Herein, Appellant challenges the sufficiency of the affidavit to support the search warrants for the warehouse located at 2847 North C Street, and for the properties located at 413 and 419 South 43rd Street. Appellant's Brief at 16 ..15, 22, 29, 34,

36. Specifically, Appellant contends that the affidavit reproduced above is insufficient because “the informant was unreliable, the Affidavit is silent as to [the informant’s] basis of knowledge, the information was a year old, and the police corroboration showed either innocent activity, or activity that had nothing to do with any of the searched premises.” *Id* at 16. In addition, Appellant argues the affidavit offered a dearth of information establishing a nexus between the criminal activity that allegedly occurred at the warehouse, and the buildings located at either 413 or 419 South 43rd Street. *Id.* at 29, 34-35.

We begin by recognizing that, contrary to Appellant’s argument, the four corners of the affidavit herein provide the basis of the CI’s knowledge as to the illicit-growing operation at issue in this case. The affidavit expressly states that the CI “ha[d] seen personally” the sizeable amount of marijuana that Michael Kane was growing in the basement of his residence at 538 Tyson Avenue. Affidavit of Probable Cause for Search Warrant, 5/7/04, at

3, ¶ 2. The CI referenced a growing operation that was directed from a warehouse located somewhere in Philadelphia; however, the CI was unable to provide any detailed information regarding this warehouse. As such, the primary Information supplied by the CI was in regard to 538 Tyson Avenue, and the affidavit unequivocally denotes that this knowledge was based on personal observation.

Furthermore, through independent investigation and surveillance, Police officers corroborated the information provided by the CI. . Thus, while the affidavit does not contain the basis for the CI's knowledge regarding the illicit-growing operation housed in a warehouse in Philadelphia, we determine that "the affidavit provides probable cause to support the warrant independent of th[is] questionable source." *Dukeman, supra* at 342 (citation omitted). The affidavit details the firsthand observations of Officer Sarris and other members of the Philadelphia Police Department as they conducted their investigation. As the affidavit plainly indicates, the surveillance of 538 Tyson Avenue quickly led police to

identify Appellant and Ruh as suspected accomplices of Kane. The affidavit also shows that, by monitoring Kane's activities and transactions, police discovered the likely locations housing the illicit-growing operation. Thus, as our review has revealed, the affidavit sets forth facts demonstrating a significant connection between the illicit-growing operation in this case and the properties for which police requested a search warrant.

Specifically, the affidavit documents that officers followed Kane to the warehouse located at 2847 North C Street, after they observed him purchase growing equipment. Affidavit of Probable Cause for Search Warrant, 5/7 /04, at 4-5, ¶ 7. There, officers watched as a meeting took place between Kane and Appellant. *Id.*, at 5, ¶ ¶ 8-9. Additionally, on two separate occasions, police witnessed Ruh moving unrestricted between the warehouse at 2847 North C Street and the attached residence at 2845 North C Street. *Id.* at 6, ¶ ¶ 11-12. On one of the two occasions, police observed Ruh "carrying a large bag" as he traveled between the two premises. *Id.*, at 6,

¶ 11. The affidavit further specifies that police officers learned of the residence located at 413 South 43rd Street when they followed Appellant to this location, after he left the warehouse at 2847 North C Street. *Id.* at 5, ¶ 10. The affidavit describes a search of the trash discarded from 413 South 43rd Street. *Id.* at 8, ¶ 18. From that search, Police recovered mail addressed to Appellant at both 413 South 43rd Street and 419 South 43rd Street, the residence of Stephen Morrison. *Id.* During the surveillance of the warehouse, police watched Morrison interact and cooperate with Appellant, Ruh, and Kane in furtherance of their joint endeavor. *Id.* at 7-8, ¶ ¶ 16-17.

Officer Sarris, the affiant, reasoned that “2847 ‘C’ St. is, in fact, the location of the warehouse that Kane ts using to grow large amounts of marijuana[.]” *Id.* at 5, ¶ 9. According to the affidavit, Officer Sarris based his conclusion upon his personal observations and his substantial experience. The affidavit notes that Officer Sarris possesses significant narcotics and law enforcement experience, providing that he has been “qualified as an ‘ex-

pert’ witness relating to narcotics investigations” and that he has “participated in the preparation and execution of numerous search and seizure warrants resulting in the seizure of large quantities of Controlled Substances[.]” *Id.* at 2, ¶ ¶ 3-4. Moreover, the affidavit notes that Officer Sarris identified Ruh because he had previously arrested him, on a separate occasion, in regard to a substantial illicit marijuana growing operation. *Id.* at 6, ¶ 11 *see Otterson, supra* at 1247 (recognizing that the mention of an appellant’s prior arrest in the affidavit of probable cause is a relevant consideration in determining the affidavit’s sufficiency).

Furthermore, the affidavit contains specific observations of police, which strongly suggest that Appellant and co-defendants, Ruh and Kane were engaged in an illicit-growing operation rather than innocuous indoor gardening activities. The affidavit reveals that on one occasion Appellant left the warehouse and traveled to Garden Indoors, “a retail store that sells indoor growing and hydroponics equipment and supplies” that are frequently pop-

ular with individuals engaged in illicit marijuana growing operations. Affidavit of Probable Cause for Search Warrant, 5/7/04, at 7, ¶ 13. According to the affidavit, based on their observations, the officers believed that Appellant purchased four to six boxes of high intensity grow lamps and two large containers of liquid fertilizer from Garden Indoors before returning to the warehouse. *Id.* at 7, ¶ 15. At Garden Indoors, police also heard Appellant inquire about an odor control product, “which provides odor neutralization to a room up to 10,000 square feet.” *Id.* at 7, ¶ 14. The affidavit also denotes that, pursuant to their investigation, officers searched the PECO Energy records, which revealed an extremely high wattage usage at 2847 North C Street “consistent with the use of high intensity discharge heat/grow lamps[.]” *Id.* at 9, ¶ 20.

Therefore, upon review, we determine that the information contained within the four corners of the affidavit provided sufficient support to justify issuing each of the search warrants challenged by Appellant. From a common sense and practical

reading of the affidavit, it is reasonable to infer the Appellant and his co-defendants were involved in an illicit-growing operation that was housed at the properties specified within the affidavit. As noted above, the affidavit sets forth the basis for the CI's knowledge of Michael Kane and the marijuana growing practices that took place at 538 Tyson Avenue. In addition, the independent investigation and surveillance of the Philadelphia Police Department uncovered facts that evince a substantial marijuana growing operation, thus corroborating all the information supplied by the CI. Accordingly, we conclude the affidavit established a fair probability that marijuana and other contraband would be located on the premises of 2847 North C Street, as well as on the premises of 413 and 419 South 43rd Street. Thus, based upon the totality of the circumstances, we further conclude that the affidavit provided a substantial basis for the issuing authority's finding of probable cause to search each of the specified properties. As a result, each of Appellant's separate challenges to the sufficiency of the affidavit must fail.

In his fourth issue, Appellant alleges that the jury's verdict was against the weight of the evidence and therefore shocked the conscience.⁸ In reviewing a claim pertaining to the weight of the evidence, it is well settled that this Court will not usurp the authority of the finder of fact. "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact." ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted), cert. denied, ***Champney v. Pennsylvania***, 542 U.S. 939 (U.S. 2004). "After the trial court has ruled on the weight claim, however, our role, as an appellate court, is not to consider the underlying question of whether the verdict is against the weight of the evidence, but is limited to determining whether the trial court abused its discretion In ruling on the weight of the evidence claim." ***Commonwealth v. Wall***, 953 A.2d 581, 5B6 (Pa. Super. 2008), appeal denied, 963

A.2d 470 (Pa. 2008). Further, we may only reverse the verdict if it “is so contrary to the evidence as to shock one’s sense of justice.” *Commonwealth v. Cruz*, 919 A.2d. 279, 282 (Pa. Super. 2007), appeal denied, 928 A.2d 1289 (Pa. 2007).

This Court has long recognized that “[u]nlike the challenge of legal sufficiency of the evidence, the complaint that the verdict was against the weight of the evidence requires an assessment of the crediblility of the testimony offered by the Commonwealth.” *Commonwealth v. Tapper*, 675 A.2d 740, 742 (Pa. Super. 1996) (citations omitted). Specifically, as to an inquiry into the credibility of trial testimony, we are bound by the following standard.

When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court’s decision Is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review.

Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009), appeal denied, 3 A.3d 670 (Pa. 2010), quoting *Commonwealth v. Trippett*, 932 A.2d 188, 198 (Pa. Super. 2007) (internal citations omitted).

In the case sub judice, Appellant attacks the credibility of Morrison, arguing “there was no evidence that [Appellant] was ever involved in any illegal activity ... or anything placing him within the conspiracy, except for the testimony of Mr. Morrison which was suspect and heavily impeached.” Appellant’s Brief at 15. Appellant also argues that the evidence seized from his home “was suspect as the chain of custody did not match[.]” *Id.* Appellant contends that there was a discrepancy of five pounds, between the marijuana purportedly seized and the lab report that recorded the weight of the evidence. *Id.* at 39–40. In addition, according to Appellant, “[his] premises did not have a speck of marijuana in it,” except for a container of marijuana located in the basement refrigerator. *Id.* at 40 (emphasis in original). Appellant further points out

that he “never was observed doing anything overtly illegal[,]” and that he only “was observed at the warehouse on a few occasions” for short periods of time. *Id.* Citing the testimony of Robin Landry who stated that the equipment purchased from Garden Indoors was for legal purposes, Appellant maintains that “the testimony was equivocal as to whether or not [he] was actually involved in this conspiracy.” *Id.* at 41.

After thoroughly reviewing the record before us, we conclude that Appellant’s weight claim lacks merit. Although Appellant may disagree with the jury’s decision to accept the testimony of Morrison, the jury was permitted to make this credibility determination and find Appellant guilty of the charged offenses. See *Champney, supra* at 408. As the trial court notes, “Mr. Morrison testified that he, Appellant, and the co-defendants harvested and grew marijuana out of the warehouse, and that Appellant packaged and weighed the product, set the prices, and distributed proceeds from sales.” Trial Court Opinion, 11/5/10, at 17, citing N.T., 5/26/09,

at 173-178). Appellant offers no salient reason for disturbing the credibility determination of the jury.

Moreover, although Appellant may argue that discrepancies exist in the chain of evidence and that the evidence presented does not strongly demonstrate his involvement in the illicit conspiracy to grow marijuana for distribution, the jury “[was) free to believe all, part, or none of the evidence” offered by the Commonwealth. See *Champney, supra* at 408. During Appellant’s joint trial, the Commonwealth introduced the physical evidence confiscated by police from the five properties housing the illicit-growing operation. The Commonwealth also offered the testimony of those officers who investigated and monitored the five properties, prior to executing the search warrants. Despite any minor discrepancies, based upon the magnitude of the evidence presented by the Commonwealth, we agree with the trial court that Appellant’s weight claim fails to establish that the jury’s verdict shocks one’s sense of justice. Trial Court Opinion, 11/5/10, at 15–18.

Furthermore, the trial court dispels any

challenge to the jury's verdict based upon an alleged breakdown in the chain of custody. A videotape made before police seized any items from Appellant's warehouse shows the slew of marijuana and other items that were confiscated from [Appellant]'s property, including the three bales of marijuana, the multiple marijuana plants, buds, drying racks, [and] planting beds[.]” Trial Court Opinion, 11/5/10, at 16. In addition, the trial court explained that the weight and quantity of the marijuana had “no bearing” on the jury's guilty verdict because this consideration “is relevant only to the mandatory minimum sentence that [the trial court] imposed on Appellant[.]” *Id.* Thus, the trial court found that the jury properly convicted Appellant of PWID and criminal conspiracy.

As the trial court's reasoning makes clear, the evidence adduced at trial strongly supports the jury's decision to find Appellant guilty of PWID and criminal conspiracy. As the trier of fact, the jury determined the appropriate weight to afford the evidence

⁸The record reflects that, in accordance with Pa.R.Crim.P. 607(A), Appellant properly preserved his weight claim in a post-sentence motion. C.R. at D13.

presented. The jury considered all evidence of record and found Appellant guilty as charged. We, as the reviewing court, may not re-weigh the evidence or substitute our own judgment for that of the factfinder. ***Champney, supra*** at 408. Therefore, we conclude that Appellant failed to demonstrate the jury's verdict "is so contrary to the evidence as to shock one's sense of justice." ***Cruz, supra*** at 282. As such, we further conclude that the trial court did not abuse its discretion in denying Appellant's weight claim. ***Wall, supra*** at 586.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

SEP 13 2011

Date: _____

Summary of Excisions

by Judge DeFino-Nastasi

The following are, in summary, the portions of the warrant recitals which Judge DeFino-Nastasi excised from the consideration of probable cause, which the Superior Court Panel did not review or consider when determining whether there was sufficient probable cause:

1. That co-defendant Richard Ruh's prior arrest occurred when he was present where a search warrant was executed; was arrested with less than a quarter-ounce of marijuana; and received an ARD disposition, a diversionary disposition. He was not at the premises where growing equipment was seized. The lower Court found that this was an intentional misstatement. Moreover, the warrant made it appear that Ruh had been part of a major growing operation when there was absolutely no evidence that he was ever previously involved in such an operation. N.T. 3/15/05, 79.

2. As regards the informant, he was found not to be reliable and was treated as an anonymous tipster. N.T. 3/15/05, 72-73. The informant's information involved a small marijuana "grow" at Kane's house

at 538 Tyson Street, at least, *one year* earlier. Id. at 16, 73.

3. The alleged purchase of indoor gardening supplies was utilized to find that this was an illicit growing operation rather than an innocuous indoor gardening activity. However, Judge DeFino-Nastasi found that there was no information that what Spreng bought from Garden Indoors was material to be used in a "grow" operation. Id. at 80-81.

4. Finally, the warrant reflects that the police compared the usage of electricity in this warehouse to other properties in the immediate area and found it to be a significantly higher than would be expected. Affidavit at ¶20. Judge DeFino-Nastasi found this information to be misleading and excised this allegation from the warrant. N.T. 3/15/05, 82.