STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2012-208640

THE STATE,

Respondent,

v.

ANTONIO MILLER,

Appellant.

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Whether the court erred, thereby, violating the Fourth Amendment and appellant's right to privacy, by failing to suppress evidence located within the North Main Street home because the evidence seized cocaine and guns were located in automobiles in the yard of that address, and the search warrant affidavit did not provide the Magistrate with a reliable sufficient nexus to provide probable cause that this was appellant's home and that he was secreting drugs, weapons, or the fruits of the Aiken murder within that home?

II. Whether appellant's thirty year sentence for kidnapping should be vacated in the interests of judicial economy since that sentence was improper where appellant was also sentenced for murder?

STATEMENT OF THE CASE

Appellant, Antonio Miller, murdered Fred Tucker on September 15, 2008 in Aiken County. Prior to murdering Tucker, Miller and several co-defendants burglarized Tucker's home armed with firearms and kidnapped the victim. Miller was arrested for Tucker's murder on the same date, September 15, 2008. The Aiken County grand jury subsequently indicted Miller for murder, burglary in the first (1st) degree, kidnapping, and possession of a weapon during a violent crime. (Indictment Numbers 2010-GS-02-1526, 1527, 1529, and 1578). Miller was represented on the charges by Ola A. Johnson, Esquire. The case was prosecuted by Assistant Solicitors Elizabeth B. Young and Kevin Molony. Miller proceeded to trial on February 14, 2012 before the Honorable Doyet A. Early, III., Circuit Court Judge, and a jury. At the conclusion of the trial on February 17, 2012, the jury found Miller guilty of murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime. Judge Early sentenced Miller to life imprisonment for murder, life imprisonment for burglary 1st degree, thirty (30) years for kidnapping, and five (5) years imprisonment for possession of a weapon during a violent crime. (Tr. February 13, 2012 , pp. 1-31, Tr. February 14, 2012, pp. 45-130, 148-245, February 15-17, pp. 5-68, 70-114, 119-85, 190-249, 251-94, 373, 283-84). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

Appellant Antonio Miller ("Miller") lived with his wife Diedre King Miller at *5520 North Main Street* in Columbia, S.C. One (1) of Miller's co-defendants in this case, Melvin Cummings ("Cummings"), also lived in Columbia, but Cummings was originally from Aiken, S.C. At the time of the victim Fred Tucker's murder, Cummings' mother still resided in Aiken. (Tr. February 15-17, 2012, pp. 78-136, Tr. February 14, 2012, pp. 209-214, State's Ex. 58).

Several months before the victim was murdered, Miller asked Cummings about whether they should rob the victim. The victim lived on Old Barnwell Road in Aiken County, not far from Cummings' mother's residence, and the victim was known to be a drug dealer. Miller believed the victim would have money and/or drugs in his residence. After several months of discussing the idea, Miller decided to go forward with the plan to rob the victim. Cummings agreed to be the driver only. On September 12th, 13th, and 14th, 2008, Miller and Cummings, who were staying temporarily at Cummings' mother's residence, and several other individuals rode by the victim's home in an automobile "casing" the victim's residence. (Tr. February 15-17, 2012, pp. 78-136, Tr. February 14, 2012, 209-214).[1]

[1]The individuals who accompanied Miller and Cummings to case the victim's residence differed on each of the dates approaching the date of the crimes. Some of those individuals were not involved in the commission of the substantive crimes. On the morning of the substantive crimes, it was determined Marquis Redfield and Ronald Grooms would be the individuals who assisted Miller in committing the burglary and armed robbery of the victim's home. (Tr. February 15-17, 2012, pp. 78-136).

On the morning of Monday, September 15, 2008, Miller, Cummings, Marquis Redfield, and Ronald Grooms left Cummings' mother's residence, where the men had stayed overnight, riding in a *green Ford Taurus* rented by Miller's wife, Diedre King Miller.[2] The four (4) men rode together to a graveyard near the victim's residence, where Miller, Redfield, and Grooms got out of the car and headed toward the victim's residence dressed in all black clothing. Cummings, who was driving *the Taurus* as planned, remained in the vehicle in the cemetery. The three (3) men returned shortly without having committed any crime. The four (4) men then returned to Cummings' mother's residence and slept until later in the morning. The four (4) men then drove to the victim's residence again, and one (1) of the men approached the home and knocked on the victim's front door, but there was no answer. Miller then stated out loud that they were not returning to Columbia empty handed; so, the same three (3) men got out of the *green Taurus* as earlier at the cemetery. Cummings, who was still driving the vehicle, drove to a nearby residence, pulled around back and acted as if he were interested in purchasing another car displayed in that residence' yard. (Tr. February 14, 2012, pp. 181-214, Tr. February 15-17, 2012, pp. 78-136, 175-181).

[2]The *green Taurus* had been rented several weeks earlier by Miller's wife in Columbia, S.C., and Miller had physically gone to the rental car agency and made the last several rental payments. (Tr. February 14, 2013, pp. 181-208).

Miller, Redfield, and Grooms approached the back door of the victim's residence. One (1) of the three (3) men shot through a window in the victim's back door and then all three (3) entered the residence without consent. Either when the first shot was fired, or during the entering and remaining in the victim's home, a fired bullet grazed the victim's forehead. Miller, Redfield and Grooms then forced the victim to remove all his clothing and bound the victim's hands behind his back and his ankles with duct tape. The victim was beaten and tortured by the three (3) men, including being burned with a screwdriver blade heated on a stove unit. The three (3) men also ransacked the victim's home looking for drugs or money. As they were leaving the residence, Miller fired one (1) shot into the victim's side. The three (3) men then fled out the back door of the victim's residence. A neighbor of the victim saw three (3) men dressed in black flee one (1) at a time from the victim's back door. The victim, who was still alive but remained bound and nude, was somehow able to crawl or drag himself to his front door, where he died from blood loss due to the gunshot wound to his side. (Tr. February 14, 2008, pp. 148-214, Tr. February 15-17, 2008, pp. 37-69, 78-136, 137-185, 190-290).

Miller, Redfield, and Grooms ran from the victim's residence in the direction of where Cummings had parked the *green Taurus*. They eventually found Cummings, who had pulled off from the neighbor's residence, and the three (3) men got into the *green Taurus*. Miller told Cummings to drive away from the scene. The four (4) men then fled to Columbia, S.C. in the *green Taurus*. (Tr. February 14, 2012, pp. 148-214, Tr. February 15-17, 2008, pp. 78-136).

Once in Columbia, the men dropped Cummings off at a "Books-A-Million" store where Cummings' girlfriend worked. Miller instructed Cummings to meet him later at his home, so Cummings could assist Miller in dropping off the *green Taurus* at the rental car agency. Miller, Redfield, and Grooms then left the parking lot, and after dropping of Grooms at another location,

Miller and Redfield eventually went to Miller's residence at *5520 North Main Street*, Columbia in the *green Taurus*. (Tr. February 15-17, 2012, pp. 78-136).

When emergency personnel and police in Aiken responded to the victim's residence, they found that a back door window to the residence had been shot out and the bullet had traveled through the home lodging in a front wall. They also found a trail of the victim's blood from the kitchen area of the house, where the victim had originally been shot, to the front door of the residence. There they found the deceased victim nude and on his stomach with his hands and ankles still bound with duct tape. The victim had a grazing gunshot wound to the forehead and a gunshot wound to his side. Police also found that the entire home had been ransacked by someone looking for something. Police also found a footwear impression in the victim's blood on the floor of the residence. A surface unit to the victim's stove was also still on and still hot. Police also found what appeared to be burn marks on the victim's body. Police also recovered fired shell casings, a fired bullet, and fired bullet fragments inside the victim's home. (Tr. February 14, 2012, pp. 148-162, Tr. February 15-17, 2012, pp. 137-185, 190-238).

At approximately the same time as the perpetrators were getting out of the *green Ford Taurus* to commit the crimes in Aiken, S.C., Jeff Day, the manager of U-Save Auto Rentals on Two Notch Road in Columbia, S.C., was reporting to police in Richland County that the *green Ford Taurus* rented by Miller and his wife had not been returned in a timely fashion, i.e. a breach of trust or use of vehicle without owner's consent. The car had not been returned even though it should have been returned several days before. Richland County Deputy Frank Ham responded to the rental car company, and after receiving this information issued a nationwide BOLO for the missing vehicle. Deputy Ham was also informed by the manager the *Taurus* was equipped with a global positioning system ("GPS") and a kill switch, which allowed the rental car company to

determine where the car was located at any given time and allowed the rental car company to prevent the car from being started wherever the car was located. Deputy Ham was also informed that Miller had made the last several payments on the *green Taurus* before it was not returned in a timely fashion, and Miller would be driving the vehicle. Mr. Day also gave Deputy Ham a description of Miller, a black male with long dreadlocks and a deformed or disfigured arm. When Deputy Ham was informed the rental car company's computer showed *the Taurus* was located in Aiken County at that time [the approximate time of the murder], Deputy Ham informed Mr. Day, the manager, he should wait until the car was back in Richland County before activating the kill switch. (Tr. February 13, 2012, 7-30, Tr. February 14, 2012, pp. 181-207, 214-231).

Later that day, after Miller, Cummings, Redfield, and Grooms had returned to Columbia in the *green Taurus*, Mr. Day checked the rental company's computer again and found the vehicle was in the city limits of Columbia. Mr. Day determined the vehicle was located at 5520 North Main Street and activated the kill switch. Day then called Deputy Ham and informed him of where the *green Taurus* was located. (Tr. February 14, 2012, pp. 181-207, 214-31).

At approximately 1:30 p.m., Richland County and Columbia City police responded to 5520 North Main Street in an attempt to locate the *green Taurus* for Mr. Day. Upon arriving at a location adjacent to the residence, police saw the *green Taurus* parked behind the residence. Deputy Ham then drove to Miller's residence, and a red Taurus driven by Cummings turned into the residence' driveway in front of the police officer. Deputy Ham then pulled into the residence behind Cummings. In front of Cummings red Taurus was the *green Taurus* police were looking for. The *green Taurus* was parked two (2) feet from the back porch of 5520 North Main Street as if whoever parked the vehicle was trying to hide it from the view of those passing by on North Main Street in front of the house *or* had backed the car up to the porch to load or unload the

vehicle. Standing on the back porch were three (3) men including Miller and Redfield. (Tr. February 13, pp.. 1-31; Tr. February 14, 2012 pp. 46-112; pp. 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68).

Deputy Ham asked for identification from each of the individuals. All of the men denied being Antonio Miller. Miller stated his name was "Eric Hughey," gave a date of birth, but could not provide an identification card. Deputy Ham noticed "Hughey" fit the description given him by Mr. Day as the driver of the breach of trust vehicle, a black male with dreadlocks and a deformed arm. The alias Miller provided was run through the S.C. driver's registration by police and determined to be false. When Cummings provided his identification, it was determined he was driving under suspension, and he was immediately arrested and placed in a patrol car. During this time, Miller went to Cummings' red Taurus, entered it, and was instructed by police to get out of that vehicle. When an officer searched Cummings' red Taurus, he found two (2) pistols, one (1) under the front seat, and one (1) in the back seat floor board where Miller had just been. Miller's wife then arrived at the residence. Miller tried to signal his wife not to inform police who he was. Miller's wife eventually informed police of Miller's real name. Cummings informed police the gun under the front seat of his car was his, but the gun found in the back seat floorboard of the red Taurus was Miller's. (Tr. February 13, pp.. 1-31; Tr. February 14, 2012 pp. 46-112, 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, 97-101).

Police conducted an inventory of the *green Taurus*, which belonged to the car rental company and had not been timely returned. In the passenger door compartment, police found a large bag of crack cocaine. Upon questioning, Miller admitted this crack cocaine was his, and one (1) of the guns found in the red Taurus [the one in the back seat floorboard] also belonged to him. Redfield also volunteered and removed a bag of powder cocaine from his pocket. Miller

was arrested for trafficking in cocaine more than ten (10) grams for the crack cocaine found in the door compartment of the *green Taurus* and for possession of a pistol for the gun found in the back seat floorboard of the red Taurus. Miller's wife was arrested for use of vehicle without owner's consent. Cummings was also charged with the pistol found under the front seat of his red Taurus. (Tr. February 13, pp.. 1-31; Tr. February 14, 2012 pp. 46-112, 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, 97-101).

At approximately this time, Richland County narcotics Investigator Marcus Brown was called to the North Main Street location to see about getting a search warrant for the residence. Investigator Brown, who was originally from Aiken, S.C., realized Cummings was also from Aiken. Investigator Brown contacted a known informant in Augusta, whom Brown had previously used when working as a police officer in Aiken, and asked the informant if he knew Cummings, and whether Cummings was a large, medium, or small drug dealer. The informant informed Brown that he did not know Cummings, but asked Brown if he had heard that Fred Tucker had been murdered in Aiken. The informant stated Tucker's murder was on the local news in the Aiken area. Investigator Brown then asked Cummings if he knew Tucker, and Cummings stated he did, and stated Tucker was "after" one (1) of his cousins. The Aiken County Sheriff's Office was subsequently contacted about what Columbia authorities had come upon when locating the unreturned *green Taurus*, and Aiken County dispatched homicide investigators to Columbia. (Tr. February 14, 2012, pp. 48-74; Tr. February 15-17, 2012, pp. 5-36).

Richland County investigators at Miller's residence contacted one (1) of their own investigators, and asked him to prepare a search warrant for the residence at *5520 North Main Street,* **for drugs and drug distribution related items**. The search warrant was prepared by Investigator Robert Crane, who received information directly from Investigator Brown *at Miller's*

residence regarding the information police had received from the car rental agency manager [the manager or one of his employees was now at Miller's residence to retrieve the *green Taurus*, and Brown confirmed what Deputy Ham had learned earlier from the manager] and what police had found there at *5520 North Main Street.* Crane also conducted some of his own investigation regarding the residence itself and Miller's criminal record. Crane then drafted and presented his sworn affidavit and the search warrant to a Richland County magistrate. Magistrate Cuff, after reviewing the search warrant affidavit, determined there was probable cause to issue the search warrant for Miller's residence, *5520 North Main Street, Columbia, S.C.* and the surrounding curtilage, **for drugs and drug distribution related items, including guns, scales, baggies, cell phones, ect..** (Tr. February 14, 2012, pp. 48-74, 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, Court's Ex. 1 for Suppression Hearing [Search Warrant]).

Investigator Crane then brought the magistrate approved search warrant to Miller's residence for Richland County investigators to execute. Upon searching Miller's residence, *5520 North Main Street*, pursuant to the search warrant, Richland County investigators found another bag of crack cocaine in a drawer in a chest of drawers in Miller's bedroom. Police also found three (3) more firearms [pistols] in the top of Miller's bedroom closet. Police also confiscated two (2) sets of scales, a razor blade, and a bullet proof vest found under a couch. Police also confiscated two (2) pair of tennis shoes *because they appeared to be counterfeit Nike tennis shoes.* These items were placed on the top of a Richland County or Columbia City Police patrol car at the scene. The Aiken County homicide investigators arrived at Miller's residence while Richland County police were executing the search warrant for drugs and drug related items inside Miller's residence. When Aiken County investigators arrived at Miller's residence, they inspected the shoes which had been placed on the patrol car outside the residence. They noticed that one (1) of

the two (2) pair of shoes, a pair of gold and black shoes, appeared to have human blood on them. They also noticed one (1) of the guns retrieved from inside the residence by Richland County also appeared to have blood on it.[3] Miller admitted to Richland County authorities the drugs found in his residence were his and the guns in the closet were his as well. He also told police exactly where police found each item. (Tr. February 14, 2012, pp. 48-81, 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, 71-78).[4]

Police subsequently interviewed Cummings and Redfield, one (1) of whom admitted the crack cocaine found in the *green Taurus* came out of the victim's residence in Aiken. (Tr. February 15-17, 2012, p. 226). Police also pulled a surveillance video from the *Books a Million* store, which was shown to the jury, which showed Cummings and Miller leaving the store together around lunch time of September 15, 2008, the day of the victim's murder. In the video, Miller could be seen wearing one (1) of the pair of *counterfeit tennis shoes* confiscated from Miller's residence by Richland County, the same pair of shoes which contained what appeared to be blood stains on them. (Tr. February 15-17, 2012, pp. 108-113).

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[3]Both the Richland County officers and the Aiken County investigators testified Aiken County was not involved in the search of Miller's home pursuant to the search warrant. Aiken County detectives did not enter the residence until after Richland County officers had finished their search and removed the above listed items from the residence. The Aiken County investigators then walked through the residence but did not seize anything. (Tr. February 13, pp.. 1-31; Tr. February 14, 2012 pp. 46-112, 214-44, February 15-17, 2012, pp. 5-78, 209-10, 229-31, 237-38).

[4]A copy of the Return to the search warrant was provided to Miller's wife, Deidre King Miller. In addition to the guns and tennis shoes, it reflects that police also seized another bag of white powder substance believed to be cocaine from the top dresser drawer of Miller and his wife's bedroom, a set of black digital scales, a professional mini-scale, assorted bullets, and a razor blade from the kitchen, assorted paperwork with Miller's and his wife's name on the mail, and a bullet proof vest under the couch in the living room. (See Search Warrant, Return).

Subsequent forensic testing by the South Carolina Law Enforcement Division (S.L.E.D.) revealed one (1) of the guns found in Miller's closet that Miller admitted was his, a 9mm pistol, fired a bullet and a shell casing recovered from the murder scene in Aiken. Forensic testing also showed additional fired shell casings found inside the crime scene in Aiken were fired by another of the weapons found in Miller's closet, a .40 caliber semi-automatic pistol. Forensic testing also revealed there was human blood containing DNA consistent with the victim's DNA on one (1) of the pistols belonging to Miller. Forensic DNA testing also revealed the tennis shoes recovered from Miller's residence contained human blood on them, which contained the victim, Fred Tucker's, DNA. Police also searched the trunk of the *green Taurus* before returning it to the rental car company and found two (2) *black* shirts. One of these shirts also contained the victim Fred Tucker's DNA. (Tr. February 15-17, 2012, pp. 238-290).

At trial, the manager of the car rental agency testified Miller's wife initially rented the *green Taurus*; however, appellant Miller made the last several payments on the rental contract, including the last payment made the Wednesday before the car was reported as missing. Miller made these payments at the car rental agency. The manager also authenticated the car rental contract which was introduced into evidence. The contract showed the residence of Diedre King Miller was *5520 North Main Street, Columbia.* A copy of the car rental contract was also found in the *green Taurus* when inventoried by police. Also introduced through the manager was a computer print-out showing the location of the *green Taurus* at different times during the day of the victim's murder. (Tr. February 14, 2012, pp. 181-208).

Investigator J.D. Sanders, who was familiar with various areas in Aiken County, including the victim's residence, testified and introduced an exhibit showing the various locations of the *green Taurus* during the morning of September 15, 2008, the day of the murder, including the fact

the vehicle was in close proximity to the victim's residence around 6:30 a.m. *and* also just moments after the murder when the 911 call came in. (Tr. February 14, 2012, pp. 181-208, Tr. February 15-17, 2012, pp. 213-16).

At Miller's trial, Cummings testified to the planning and execution of the crimes against the victim. Cummings testified it was Miller who came up with the idea of robbing the victim. Cummings also testified that when Miller returned to the vehicle after the burglary of the victim's home, Miller stated he shot the victim on the way out of the residence because either Grooms or Redfield told Miller they could not leave the victim there at the scene alive. Cummings also testified Miller admitted to him that he, Grooms, and Redfield tortured the victim by heating the tip of a screwdriver with a unit on the stove and burning the victim with the screwdriver. Cummings testified one (1) of the other co-defendant's, not Miller, threw the screwdriver out the window of the green Taurus as the perpetrators fled from the crime scene headed for Columbia. (Tr. February 15-17, 2012, pp. 78-136).

Police returned to the crime scene with Cummings several weeks after the murders and recovered a yellow and black flat head screwdriver in the ditch where Cummings stated one (1) of his co-defendant's threw the screwdriver as they were fleeing the scene. (Tr. February 15-17, 2012, p. 212). Police also fingerprinted several CD's found inside *the green Taurus*. Fingerprints matching those of Miller were found on the CD's located on the passenger seat of *the green Taurus*. (Tr. February 15-17, 2012, p. 173).

Cummings mother also testified at Miller's trial. She testified that in 2008 she lived at 121 Gregg Avenue in Aiken, S.C. She testified she had met Miller several times before the weekend and day of the victim's murder. She testified she saw appellant Miller the Saturday before the victim was murdered when he came to her home with her son, Melvin Cummings, along

with Ron Goode [sic] and Marquis Redfield. She testified that the men came to her house in the *green Ford Taurus* and stayed there from the Saturday before victim was murdered until the Monday that the victim was murdered, September 15, 2008. Mrs. Cummings testified that when she came in from work at 7:30 a.m. [after working the third shift] the morning the victim was murdered, the four (4) men were sleeping in her living room, and she went to her bedroom to sleep, which was her normal routine. When she awoke around 1:00 p.m. the four (4) men, including appellant Miller, were gone from her residence. That was the last time she saw Miller. (Tr. February 14, 2012, pp. 209-14).

On the afternoon after the murder, at his residence, *5520 North Main* Street, Miller told police he was driving the *green Taurus* that morning but he had been in Charleston, S.C. before returning to Columbia and had not been with Cummings or Redfield. (Tr. February 14, 2012, pp. 51-52, Tr. February 15-17, 8-9). Cummings told police he had been driving the *green Taurus* earlier that day and had been in Augusta. The GPS records from the car rental agency did not show the car was in Charleston on the day of the victim's murder, as Miller claimed, but only in Aiken, and then returned to Columbia. (Tr. February 14, 2012, pp. 181-208, Tr. February 15-17, 2012, pp. 8-9, 213-16).

ARGUMENT

Judge Early did not err in denying the motion to suppress the fruits of the search of Miller's home conducted with a search warrant; and even assuming *arguendo* he did err in admitting this evidence, its admission was harmless given the overwhelming evidence of Miller's guilt independent of the fruits of the search of Miller's residence.

What Occurred Below

Prior to the beginning of the trial, Miller moved to suppress the fruits of the search of his residence pursuant to the search warrant obtained by Richland County authorities, i.e. the murder weapons and the *counterfeit* tennis shoes with the victim's DNA on them. Judge Early conducted a suppression hearing regarding the circumstances of the issuance of the search warrant and whether the search warrant issued in this case was supported by probable cause. (Tr. February 13, 2012, pp. 1-31, Tr. February 14, 2012, pp. 45-130, Court's Ex. 1 [Search Warrant]). At the conclusion of the hearing, Judge Early found:

> I'm going to respectfully deny your motion. I find that under the totality of the circumstances that the Magistrate in this case had a substantial basis for concluding that probable cause existed. And, I'm citing State verses Dupree, State verses Bellamy, State verses Keith, and respectfully deny [the motion to suppress].

(Tr. February 14, 2012, pp. 129-130).

Standard of Review

(General Appellate Standard)

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the discretion of

the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id.

Standard of Review

(Circuit Court's Affirmation of Probable Cause)

The standard of review of Fourth Amendment search and seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000))(holding whether a search violated Fourth Amendment depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and appellate court must affirm if there is "any evidence" to support the ruling); State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005)(deferential standard of review applies in a challenge to a trial court's fact-driven affirmation of probable cause.). "On appeal from a suppression hearing, the appellate court will give deference to the circuit court's findings and only reverse if there is clear error." State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2007), *quoting* Brockman, 339 S.C. at 66, 528 S.E.2d at 666. As a result, if there is any evidence to support the trial judge's ruling as to the validity of a search with a warrant, it will be affirmed on appeal. Taylor, *supra*; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012); State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012). The appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling. Davis, *supra, citing* State v.

Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law. Tynes, *supra*, *citing* State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

Standard of Review

(Magistrate's Issuance of a Search Warrant)

Search warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(other numerous citations omitted). When determining the propriety of the issuance of a search warrant, the duty of the appellate courts is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009); State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). In making such a decision, an appellate court must consider the totality of the circumstances. Jones, *supra* (stating under the totality of the circumstances test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed to issue a search warrant); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued

except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. "The Fourth Amendment by its terms prohibits [only] unreasonable searches and seizures." McHam v. State, ___ S.C. ___, ___ S.E.2d ___, 2013 WL 3723690 (2013), *quoting* New York v. Class, 475 U.S. 106, 116, 106 S.Ct. 960 (1986). The touchstone of an analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *See* Pennsylvania v. Mimms, 434 U.S. 106, 108-09, 98 S.Ct. 330 (1977), *quoting* Terry v. Ohio, 392 U.S 1, 19, 88 S.Ct. 1868 (1968). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" Id. at 109, 98 S.Ct. 330 (citation omitted).

"A search warrant may issue only upon a finding of probable cause." Weston, 329 S.C. at 290, 494 S.E.2d at 802, *citing* State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981). Under S.C. Code Ann. Section 17-13-140 (1985), a search warrant may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Dupree, *supra*. For an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. Owen, *supra*; State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). "[T]he duty of a reviewing court is simply to ensure that the

magistrate had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* State v. Sachs, 264 S.C. 541, 555, 216 S.E.2d 501, 508 (recognizing all that is necessary to justify issuance of a search warrant is probable cause).

Probable Cause

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978); State v. Williams, 262 S.C. 186, 203 S.E.2d 436 (1974). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983). Probable cause is a fluid concept-turning on the assessment of probabilities in a particular factual context–nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, *supra*; Gates, *supra*. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169, 69 S.Ct. 1302, (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). South Carolina has adopted the "totality of the circumstances" of Illinois v. Gates, *supra*, in determining whether sufficient probable cause exists to issue a search warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); Martin, *supra*. In Gates, the United States Supreme Court held:

The task of the issuing magistrate is simply to make a practical, common sense

> decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is **a fair probability** that contraband or evidence of a crime will be found in a particular place.

Gates, 464 U.S. at 238, 103 S.Ct. at 2332 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting the Gates totality-of-circumstances test); Spears, *supra*; State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742, 103 S.Ct. at 1535. "Under this formula, veracity and basis of knowledge are treated 'as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Gates, 462 U.S. at 230, 103 S.Ct. at 2328; Weston, 329 S.C. at 290-91; 494 S.E.2d 802-03; State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. Ap. 1995). Again, in determining whether a search warrant should be issued, magistrates are concerned with probabilities not certainties. Bowie, *supra, citing* Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. Sullivan, 267 S.C. at 614-15, 230 S.E.2d at 623 (finding a search warrant can be supported by information given to the affiant by other officers); *see* Jones v. Unites States, 362 U.S. 257, 80 S.Ct. 725 (1960), *overruled on other grounds* United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980); Morris v. State, 62 S.W.3d 817 (Tex. App. 2001)(information with which magistrate is supplied in affidavit for search warrant may be hearsay). Probable cause for a search warrant can be supported by information given to the affiant by other officers. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741

(1965)(it is well settled that an affiant seeking a search warrant can base his information on information in turn supplied to him by fellow officers); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(affidavit for search warrant may be based on hearsay information); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974). Observations by fellow law enforcement officers engaged in a common investigation with the search warrant affiant are a reliable basis for a warrant applied for by one of their number. Ventresca, 380 U.S. at 111, 85 S.Ct. at 747; State v. Hage, 568 N.W.2d 741 (N.D. 1997). *See also* United States v. Morales, 238 F.3d 952 (8th Cir. 2001)(probable cause may be based on collective knowledge of all law enforcement officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some degree of communication).

Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the first-hand knowledge of the officer who executes the affidavit. State v. Stickelman, 207 Neb. 429, 299 N.W.2d (1980); *see also* Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002)(probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole). A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002).

It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from another, which, in turn, is based on other information gathered by that person. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Hence, when a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information. Id.. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the

information was gained in a reliable way. Sullivan, 230 S.E.2d at 623-24.

As the United States Supreme Court recognized in Illinois v. Gates, *supra*, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no proper place. *See* Ventresca, 380 U.S. 102, 85 S.Ct. 741. "Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." State v. Bowie, *supra*, *citing* Sullivan, *supra*; Dupree, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The decision to issue a search warrant should include consideration of the veracity of the person supplying the information and the basis of the affiant's knowledge. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). Mere conclusory statements, without sufficient underlying facts, are insufficient to justify the issuance of a search warrant. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990). "The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" Dupre, 319 S.C.at 459, 462 S.E.2d at 282, *quoting* United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983). *See also* State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013)(recognizing well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training), *citing* United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004).

The Fourth Amendment evidences a "strong preference for searches conducted pursuant to a warrant. Gates, 462 U.S. at 236, 103 S.Ct. 2317. Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a

realistic standard of probable cause. Bowie, *supra*, *citing* State v. Bennett, 256 S.C. 234, 241, 182 S.E.2d 291, 294 (1971); State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

The Search Warrant Affidavit

The Affidavit presented to the magistrate who issued the search warrant in this case stated as follows:

> Personally appeared before me, one R. Crane who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this Court:
>
> DESCRIPTION OF PROPERTY SOUGHT
>
> The controlled substance known as crack cocaine and marijuana, cellular phones, pagers and hand held "PDA type digital storage devices. Paraphernalia, paperwork and other items associated with the manufacture, sale, storage and distribution of said controlled substance. Weapons, US currency and articles of personal property tending to establish the identity of persons in control of areas where the aforementioned items are found.
>
> DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED
>
> The location to be searched is located at 5520 North Main St. The location is described as a single story single family dwelling that is white in color with white in color front porch and black in color shutters. The location has a brick foundation that is painted gray. The location has cement steps leading to the front door. The numbers 5520 appear over the front door. The search is to include all persons at the premise, vehicles owned or operated by persons at the premise and outbuilding on the curtiledge.
>
> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
>
> On September 15, 2008 U-Save Auto rentals notified the Richland County Sheriff's Department that they had a 2006 Ford Taurus SC tag 2903CF that was rented by Deidra Miller and it had not been returned. An incident report was taken RCSD case number 08091449-15. During the course of the investigation U-Save advised that they had a GPS tracking unit on the said vehicle. U-Save advised Richland County Sheriff's Department that the vehicle appeared to be in the 5520 Main St. Area. Deputies

> responded to the location and observed the said vehicle parked in front of the incident location. Upon approaching the said vehicle Deputies made contact with Antonio Miller, who was placed into investigative detention. Moments later Deidra Miller arrived on the location and was placed under arrest for Use of motor vehicle without owners consent. A search of the vehicle prior to giving the vehicle back to U-Save rentals revealed approximately 22 grams of an off white rocklike substance that field tested positive for cocaine. At that time, Antonio Miller was placed under arrest for Trafficking crack cocaine. Also a search of Antonio Miller's criminal history revealed that he had been arrested on at least 12 occasions for illegal narcotics. Based on the totality of the circumstances the affiant believes that additional narcotics will be recovered from inside of the location to be searched. Through the affiant's and other Richland County Sheriff's Department Narcotic officers experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession commonly have drugs in their possession and control or stored in their vehicles. Through the Affiant' and other RCSD Narcotics officer's experience in drug investigation and enforcement, it is known that there is a common connection between drug activity and weapons. Those engaged in illegal drug activity often carry or have weapons ranging from razors to firearms for protection of themselves or their drugs. Additionally, through the Affiant's and other RCSD Narcotics experience in drug investigation and drug enforcement, it is known that persons located in and around drug sales location commonly carry drugs and/or weapons concealed on their person. Even those not directly selling illegal drugs are used to conceal or hold illegal drugs for those engaged in selling them. It is also known through the Affiant's experience in drug investigation and enforcement that vehicles owned or operated by those present at drug sales locations are commonly used to transport and store illegal drugs and that illegal drugs are commonly stored in and around outbuildings within the curtilage of illegal drug sales locations. Through the Affiant's and other RCSC Narcotic Officers experience in drug investigation and enforcement, it is known that cellular phones, pagers and held-held "PDA's" are commonly used to store phone numbers of other individuals involved in illegal drug activities.

(Search Warrant Affidavit, 2 pages). The Affidavit was sworn to by the Affiant, before the Olympia Magistrate. (Search Warrant Affidavit, 2 pages). The Affidavit was also signed by the Magistrate.

Miller contends that because the affidavit did not set forth that Miller and his wife resided at the residence, there was no probable cause to believe drugs would be found inside the residence. Miller is wrong. Judge Early's determination is supported by the record and the magistrate's determination of probable cause in this case was proper.

The Affidavit presented before the Magistrate sets forth that Deidre Miller, Petitioner's wife, rented the vehicle [*the green Taurus]* police were looking for. The Affidavit sets forth that the vehicle was not returned on time to the car rental agency. The Affidavit sets forth that the rental car company that owned the vehicle reported it was in the area of *5520 North Main Street* area. The Affidavit sets forth that when police arrived there, Miller and the vehicle were located at the residence, *5520 North Main Street,* and Miller's wife was not at the residence. The Magistrate could conclude from these facts Miller was operating the vehicle [*the green Taurus*], not his wife, and Miller was in possession and control of the vehicle. Further, the Affidavit sets forth that twenty-two (22) grams of crack cocaine were found in the door of *the green Taurus*, which Miller was in possession and control of. The Magistrate could conclude from these facts that Miller was in constructive or actual possession of the crack cocaine located in the *green* Taurus. Further, the Affidavit sets forth Miller was arrested for this crack cocaine, not his wife, further substantiating the police investigation determined Miller was the one in possession and control of the vehicle and the drugs. Further, the Affidavit informed the magistrate that Miller had previously been arrested twelve (12) times for narcotics violations. State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003), *citing* United States v. Harris, 403 U.S. 573, 583, 91 S.Ct. 2075 (1971)(holding " a policeman's knowledge of a suspect's reputation ... is ... a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely." (single quotation marks and parentheses as in original)); *cf.* State v. Dupree, 319 S.C. 454, 459, 462 S.E.2d 279, 282 (1995)("The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" (*quoting* United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983)). The Magistrate could find from these facts that Miller was trafficking in crack cocaine in violation of S.C. Code Ann. Section 44-53-375 or possessing with intent to distribute crack cocaine in

violation of S.C. Code Ann. Section 44-53-375. Further, the Magistrate could find Miller was trafficking in crack cocaine or possessing crack cocaine with the intent to distribute *at the location of 5520 North Main Street.* Further, the Affidavit sets forth that Miller's wife, Diedre Miller, who rented *the green Taurus,* then appeared at the residence, further establishing her, her husband's, and the vehicle's connection to the residence, *5520 North Main Street*, Columbia, S.C. Further, based on the above, and the officer's [affiant's] experience and knowledge in narcotics investigations, as set forth in the Affidavit, he believed additional narcotics, weapons, and paraphernalia would be found inside the residence and in the curtilage.[5] *See* State v. Dupree, 354 S.C. 676, 681, 583 S.E.2d 437, 439-440 (Ct. App. 2003)(evidence of a sale of drugs supports an inference that more will be found at the place of operation). The Affidavit does not contain mere conclusory statements, as Miller alleges, but facts on which the magistrate could make a practical, common sense determination, that probable cause existed to search the residence.

Based on the totality of the circumstances outlined in the affidavit and considering the nature of the evidence sought (narcotics, drugs, guns, drug paraphernalia, and records of drug activity), the type of offense involved (trafficking in crack cocaine or possession of crack cocaine with intent to distribute), and the experience of the officer involved, the magistrate, made a practical, common sense decision that **a fair probability** existed that additional evidence regarding Miller's drug dealing activities could be found in the residence. *See* State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003)(where defendant' s home was under surveillance,

[5]The record shows what the affiant averred would be found in the residence and vehicles in the curtilage was exactly what police found. In the residence, police found more crack cocaine, cash, a razor blade, two (2) sets of scales, a bullet proof vest, the rental agreement for 5520 North Main Street signed by Miller and three (3) firearms. Additionally, police had already found two (2) pistols in the red Taurus.

and officers stopped the defendant's vehicle after leaving his residence for an expired tag, the vehicle being driven by the defendant, and found a distinctive marijuana bud in the ashtray and a pipe containing marijuana residue in the glove box, such evidence standing alone established sufficient probable cause for issue of search warrant for the defendant's residence, even though the remainder of the search warrant affidavit may have contained conclusory statements by unreliable sources); State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991)(affidavit was sufficient to establish probable cause for search of defendant's residence where officers had warrant for defendant's arrest for distribution of cocaine and defendant was observed leaving residence and stopped and found in possession of 20 grams of white powder field tested for cocaine; in the case of drug dealers, evidence is likely to be found where the dealers live); State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990)(magistrate is to make practical, common sense, decision whether under the totality of the circumstances there is a fair probability evidence of a crime will be found in a particular location); State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007)(where narcotics detective, who was the search warrant affiant, received information from an anonymous informant that defendant and two other subjects were selling marijuana from 167 Bailey Ave, Rock Hill, S.C., the information that defendant lived at the address in question which was correct, made it more likely than not that the information concerning illegal activity was also correct; further, the search was based on additional information that officers found marijuana in trash can in front of defendant's residence and the defendant's prior convictions for marijuana); *See also* State v. Dupree, 354 S.C. 676, 681, 583 S.E.2d 437, 439-440 (Ct. App. 2003)(evidence of sale of drugs supports an inference that more will be found at the place of operation); United States v. Severance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 2047 (2005)(recognizing "that the nexus between the place to be searched and the items to be seized

may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.") (internal quotation marks omitted); United States v. Suarez, 906 F.2d 977, 979 (4th Cir. 1990)(noting that search warrant application was based, inter alia, on officer's surveillance of defendant during day before search, when he was seen walking to targeted residence of his girlfriend).

A practical, common sense, and logical interpretation of the affidavit accompanying the search warrant in this case, along with the deference which must be accorded a magistrate, overcomes any deficiency alleged by Miller. State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d, 129, 132 (1984); Keith, *supra.*

Miller further argues that Judge Early should have suppressed the fruits of the search warrant because there was no showing of reliability of the information in the affidavit, i.e. the investigator who filled out the sworn affidavit did not have direct knowledge of facts set forth in the affidavit. As previously shown, this contention has no basis in the law. Probable cause for a search warrant can be supported by information given to the affiant by other officers. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741 (1965)(it is well settled that an affiant seeking a search warrant can base his information on information in turn supplied to him by fellow officers); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(affidavit for search warrant may be based on hearsay information); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974); State v. Dunbar, 603 S.E.2d 615 (Ct. App. 2004). Observations by fellow law enforcement officers engaged in a common investigation with the search warrant affiant are a reliable basis for a warrant applied for by one of their number. Ventresca, 380 U.S. at 111, 85 S.Ct. at 747; State v. Hage, 568 N.W.2d 741 (N.D. 1997). *See also* United States v. Morales, 238 F.3d 952 (8th Cir. 2001)(probable cause may be based on collective knowledge of all law enforcement officers

involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some degree of communication).

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. State v. Sullivan, 267 S.C. 610, 614-15, 230 S.E.2d 621, 623 (1976))(finding a search warrant can be supported by information given to the affiant by other officers); *see* Jones v. Unites States, 362 U.S. 257, 80 S.Ct. 725 (1960), *overruled on other grounds* United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980); Morris v. State, 62 S.W.3d 817 (Tex. App. 2001)(information with which magistrate is supplied in affidavit for search warrant may be hearsay).

Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the first-hand knowledge of the officer who executes the affidavit. State v. Stickelman, 207 Neb. 429, 299 N.W.2d (1980); *see also* Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002)(probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole). A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002).

It is not unusual for an affidavit of a law enforcement officer to contain hearsay information from another, which, in turn, is based on other information gathered by that person. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Hence, when a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information. Sullivan, 267 S.C. at 615, 230 S.E.2d at 623. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the information was gained in a reliable way. Sullivan, 230 S.E.2d at

623-24.

Further, this was not a search warrant based a confidential informant or even a concerned citizen. The search warrant was based on information gathered by police officers and investigators in the midst of a criminal investigation who gathered facts they directly observed. Reliability or corroboration was not necessary. *See* Gates. Our appellate courts have recognized "[t]he 'experience of a police officer is a factor to be considered in the determination of probable cause.'" Dupre, 319 S.C.at 459, 462 S.E.2d at 282, *quoting* United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983). In State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), our Supreme Court recognized the well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training. Id. *citing* United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004). As a result, there is no merit to this argument either.

The record shows the Richland County and Columbia City Police were working together in a joint criminal investigation. Investigators at the scene, *2250 North Main Street*, reported to Investigator Crane information and facts developed by criminal investigators at the scene and during the investigation, and Crane did some investigation regarding Miller's background / criminal history and the location on his own. These facts, those related by other criminal investigators, and those obtained by Crane, were included in the warrant and accompanying affidavit which Crane provided to the magistrate. There was no confidential informant involved in this investigation. There was no requirement that Crane corroborate the information provided by other officers in the affidavit. The salient facts in the affidavit were provided criminal investigators engaged in a joint criminal investigation. The magistrate could rely on this fact in determining the reliability and credibility of the information averred to in the affidavit. Taylor; Dupree. There is no merit to Miller's argument. This ground of Miller's appeal must be

dismissed. State v. Sullivan.

Miller further argues this was merely a fishing expedition by Aiken County authorities to find evidence related to the homicide. The record before Judge Early showed the opposite. Both the Richland County investigators and the Aiken County investigators testified the Aiken County investigators came upon the scene as Richland County authorities were conducting their search of the residence for drugs and drug distribution related items. The guns were seized because they were particularly described in the search warrant. The tennis shoes were seized because it was readily apparent to one (1) Richland County investigator, with special training and experience, that the tennis shoes were *counterfeit*. (Tr. February 14, 2012, pp. 96-98). *See* State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1987)(during the execution of a lawful search, an officer may seize items that are in plain view that are clearly contraband). Aiken County investigators first saw the guns and tennis shoes after they had been removed from the residence by Richland County and placed on the top of a patrol car. There is no merit to this argument.

The Exclusionary Rule Should Not Apply

Even if this Court determines Judge Early erred in finding the magistrate's determination of probable cause was supported by substantial evidence, the exclusionary rule should not apply. "The Fourth Amendment itself provides no remedy for a violation of the warrant requirement." Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419 (2011). The United States Supreme Court fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the 4th Amendment. Id. at 2423. "Exclusion is not a 'personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.'" Id. at 2426 (citations omitted). "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth

Amendment violations." Id.

This Court and our state Supreme Court have recognized the same principle. "[T]he exclusionary rule was not designed to apply to every violation of the Fourth Amendment." State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012); *See* Weston, 329 S.C. at 293, 494 S.E.2d at 804 ("Suppression is appropriate in only a few situations. . ."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987)("Exclusion of evidence is not the only means available to insure that warrants are properly issued."), *citing* Sachs 264 S.C. 556, 216 S.E.2ad at 509.). In Sachs our Supreme Court observed "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where deterrence is subserved." 264 S.C. at 566, 216 S.E.2d at 514.

Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the United States Supreme Court and our state Supreme Court have stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. Davis. at 2427; State v. Brown, *supra.* "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis., *citing* Hudson v. Michigan, 547 U.S. 586, 596, 126 S.Ct. 2159 (2006).

"[T]he United States Supreme Court has narrowly interpreted the scope of the exclusionary rule in recent years." State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), *citing* Hudson, 547 U.S. at 591-94 (noting exclusionary rule generates "substantial societal costs"). The fact that a Fourth Amendment violation occurred – i.e. that a search or arrest was unreasonable – does not mean that the exclusionary rule applies. Herring, 555 U.S. 135, 129 S.Ct. 695, *citing* Illinois v. Gates, 462 U.S. at 233, 103 S.Ct. 2317. "Indeed, exclusion 'has always been our last resort, not our first impulse,' Hudson v. Michigan, 547 U.S. 586, 591, 126 S.Ct. 2159 (2006), and our precedents establish important principles that constrain application of the exclusionary rule."

Herring. The U.S. Supreme Court "has repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Id. at , *citing* Leon, *supra* at 905-906, 104 S.Ct. 3405. Instead, the Court has "focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." Id., *referencing* United States v. Calandra, 414 U.S. 338, 347-55, 94 S.Ct. 613 (1974); Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037 (1976). The exclusionary rules applies only where it "'result[s] in appreciable deterrence.'" Herring, *supra*, *quoting* Leon, *supra*, at 909, 104 S.Ct. 3405(*quoting* United States v. Janis, 428 U.S. 433, 454, 96 S.Ct. 3021 (1976).

In addition, the benefits of deterrence must outweigh the costs. Herring, *supra*, *citing* Leon, *supra* at 910, 104 S.Ct. 3405. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." Herring, *citing* Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 368, 118 S.Ct. 2014 (1998). "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." Herring, *quoting* Illinois v. Krull, 480 U.S. 340, 352-53, 107 S.Ct. 1160 (1987)(internal quotation marks omitted). "The principal costs of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free – something that 'offends basic concepts of the criminal justice system.'" Id., *quoting* Leon, *supra*, at 908, 104 S.Ct. 3405. "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." Davis, *supra*, *citing* Stone, 428 U.S. at 490-91, 96 S.Ct. 3037. "And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Id., *citing* Herring, *supra*, at 141, 129 S.Ct. 695. "Our cases hold that society must swallow this bitter pill when necessary, by only as a 'last resort.'" Id., *citing* Hudson, *supra* at 591, 126 S.Ct. 2159.

"[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application" Id., *quoting* Scott, *supra*, at 364-65, 118 S.Ct. 2014 (internal quotation marks omitted); *see also* United States v. Havens, 446 U.S. 620, 626-27, 100 S.Ct. 1912 (1980); United States v. Payner, 447 U.S. 727, 734, 100 S.Ct. 2439 (1980). For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs. Davis, *supra*; Herring, *supra* at 141, 129 S.Ct. 695; Leon, *supra* at 910, 104 S.Ct. 3405.

The Supreme Court has abandoned the old reflexive application of the exclusionary rule and imposed a more rigorous weighing of its costs and deterrence benefits. Davis, *supra*, *citing* Arizona v. Evans, 514 U.S. 1, 13, 115 S.Ct. 1185 (1995)(other citations omitted). In a line of cases beginning with Leon, the Court recalibrated their cost-benefit analysis in exclusion cases to focus the inquiry on the "flagrancy of the police misconduct" at issue. Davis, *citing* Leon, at 909, 911, 104 S.Ct. 3405. The basic insight of this line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. Davis, *citing* Herring, 555 U.S. at 143, 129 S.Ct. 695. When police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. Davis, *citing* Herring, 555 U.S. at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, Leon, *supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, Herring, *supra* at 137, 129 S.Ct. 695, the "deterrence rationale loses much of its force,'" and exclusion cannot "pay its way." Davis, *citing* Leon, *supra* at 919, 908, n. 6, 104 S.Ct. 3405 (*quoting* United States v. Peltier, 422 U.S. 531, 539, 95 S.Ct. 2313 (1975).

If a warrant is found to be defective, the evidence obtained from the warrant should be

suppressed "only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. United States v. Leon, 469 U.S. 897, 918, 104 S.Ct. 3405 (1984). "In analyzing the applicability of the [exclusionary] rule, Leon admonished that we must consider the actions of the police officers involved." United States v. Herring, 555 U.S. 135, 129 S.Ct. 695 (2009), *citing* Leon, 468 U.S. at 923, n. 24, 104 S.Ct. 3405. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" Davis, *quoting* Herring, 555 U.S., at 144, 129 S.Ct. 695. The conduct of the officers here was neither of these things.

Under the circumstances of this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(recognizing that the main purpose of the exclusionary rule is deterrence of police misconduct). *See* Gates, 462 U.S. 213, 103 S.Ct. 2317 (recognizing that affidavits are drafted by non-lawyers in the midst and haste of a criminal investigation). The conduct of the investigators here did not violate Miller's Fourth Amendment rights deliberately, recklessly, or with gross negligence. Herring, *supra*. Nor has Miller shown this case involves any "recurring or systematic negligence" on the part of law enforcement. Id. In fact, exclusion would only punish the Aiken County investigators, not the Richland County officers who obtained the search warrant in this case. *See* Herring, *supra* (no evidence Coffee County investigators committed misconduct where they relied on neighboring counties database showing outstanding warrant existed in arresting and searching defendant and fruits of search should not be suppressed).

Further, under the facts of this case, suppression of the evidence would make no sense where there is no evidence of police misconduct, there is no question the residence searched was

that of Miller and his wife, officers had probable cause to search the residence, and obtained a search warrant before entering Miller's residence. "In the case of drug dealers, evidence is likely to be found where the dealers live." State v. Scott, 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991), *quoting* United States v. Angulo, 791 F.2d 1394, 1399 (9th Cir. 1986).

Richland County and Columbia City authorities were there investigating the breach of trust or use of vehicle without owner's consent. They were not there initially to search Miller's residence.

Miller admitted to police he had driven *the green Taurus*, rented by his wife, that day. Miller admitted the twenty-two (22) grams of crack cocaine found in the *green Taurus* rented by his wife and driven by him were his. The *green Taurus* and Miller were found immediately adjacent to Miller's residence. Miller admitted the firearm found in the rear of the red Taurus was his. The rental agreement clearly reflects the residence that was searched was Miller and his wife's residence. Miller and his wife were both at the residence prior to police obtaining the search warrant. Police did not search the residence without a warrant but waited until after they obtained from a neutral and detached magistrate a search warrant. *See* Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946 (2001). Furthermore, the evidence found inside the residence further confirmed the residence was that of Miller and his wife. At most, officers either failed to communicate to Investigator Crane the rental agreement indicated the residence belonged to Miller and his wife, or Investigator Crane forgot to include this fact in the affidavit. The application of the exclusionary rule would make no sense under the facts of this case. Davis, *supra*; Brown, *supra*. The evidence seized from Miller's residence should not be excluded. Id.

In addition, judicially created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. Id. Brown.

The Evidence is Admissible under the Good Faith Exception

Further, the evidence recovered from Miller's home is admissible under the "good faith" exception to the warrant requirement. Herring v. United States, 555 U.S. 129 (2009); United States v. Leon, 469 U.S. 897, 104 S.Ct. 3405 (1984); United States v. Williams, 548 F.3d 311 (4th Cir. 2008); State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In Leon, the United States Supreme Court held that the Fourth Amendment exclusionary rule does not ban evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but later found to be invalid for lack of probable cause. Id. As the United States Supreme Court made clear in Herring v. United States:

> These principles are reflected in the holding of Leon: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated warrant. 468 U.S., at 922, 104 S.Ct. 3405. We (perhaps confusingly) called this objectively reasonable reliance "good faith." Ibid., n. 23, 104 S.Ct. 3405. In a companion case, Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed. 2d 737 (1984), we held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make "clerical corrections" to it. Id., at 991, 104 S.Ct. 3424.

Herring, *supra* at ___. The Fourth Circuit addressed the "good faith" exception in Leon at length in United States v. Williams, 548 F.3d 311 (4th Cir. 2008).

> As the Supreme Court instructed in Leon, "a court should not suppress the fruits of a search conducted under the authority of a warrant, even a 'subsequently 'invalidated' warrant, unless 'a reasonable well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" United States v. Byrum, 293 F.3d 192, 195 (4th Cir. 2002) (*quoting* Leon, 468 U.S. at 922, n. 23, 104 S.Ct. 3405). The Leon Court explained "that the deterrence purpose of the exclusionary rule is not achieved through the suppression of evidence obtained 'by an officer acting with objective good faith' within the scope of a search warrant issued by a magistrate." United States v. Perez, 393 F.3d 457, 461 (4th

> Cir. 2004)(*quoting* Leon, 468 U.S. at 920, 104 S.Ct. 3405, 82 L.E.2d 677). "Hence, under Leon's good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if the officer's reliance on the warrant was 'objectively reasonable.'" Id. (*quoting* Leon 468 U.S. at 922, 104 S. Ct. 3405, 82 L.E.2d 677).

United States v. Williams, *supra.* The Leon Court admonished that searches conducted "pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." 468 U.S. at 922, 104 S.Ct. 3405, 82 L.E2d. 677 (internal quotation marks omitted). An officer's reliance on a warrant would not qualify as "objectively reasonable," however, in the following four (4) circumstances:

> (1) Where "the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Id. at 923. 468 104 S.Ct. 3405.
>
> (2) Where "the magistrate acted as a rubber stamp for the officers and so 'wholly abandoned' his detached and neutral 'judicial role,'" Bynum, 293 F.3d at 195, *quoting* Leon at 468 U.S. at 923, 104 S.Ct. 3405.
>
> (3) Where a supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923, 104 S.Ct. 3405 (internal quotation marks omitted); and
>
> (4) Where "a warrant is so facially deficient - - - i.e., in failing to particularize the place to be searched or the things to be seized - - - that the executing officers cannot reasonably presume it to be valid." Id.

United States v. Williams, 548 F.3d 311.

South Carolina also recognizes a good faith exception to evidence seized pursuant to a warrant that is defective under S.C. Code Ann. Section 17-13-140, if the officers made a good faith attempt to comply with the affidavit requirement under S.C. Code Ann. Section 17-13-140. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975). *See also* State v. McKnight, 291 S.C. 110,

112-13, 352 S.E.2d 471, 472 (1987)(refusing to apply the good faith exception where the officers failed to attempt to comply in good faith to the affidavit requirements), *and* State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *Toal, C.J. concurring in result.* South Carolina, like the United States Supreme Court and the Fourth Circuit, refuses to apply the "good faith" exception when one of the four (4) circumstances listed above apply. *See* State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997)(finding reliance on warrant was not objectively reasonable where there was no indicia of probable cause in the affidavit); State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(finding magistrate abandoned his neutral and detached role when affidavit contained no indicia of reliability of informant and no police corroboration); State v. Adolphe, 314 S.C. 89, n. 5, 441 S.E.2d 832 (Ct. App. 1994)(explaining holding in Johnson and finding similarly good faith did not apply because there was no indicia of reliability of informant or corroboration of police in affidavit or in supplemental testimony); State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991)(officer could not have objectively relied on search warrant in good faith because there was no evidence of reliability of informant or police corroboration of the same in affidavit and officer testified he actually knew the affidavit was insufficient). Recently, the South Carolina Supreme Court again recognized a good faith exception to the search warrant requirement and the requirements of Section 17-13-140 in State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). In Herring, the South Carolina Supreme Court made clear its recognition of a "good faith" exception to the requirements of Section 17-13-140:

> Recently, however, we recognized that there is a "'good faith'" exception to the statute's [S.C. Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures." State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* McKnight.[fn 6] [In Covert, we left open the question of whether a good faith exception applies when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." Id.

> at 209, 675 S.E.2d at 743. Given our recognition of an exception for an officer's good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, Such that the search should be upheld.]

State v. Herring, 387 S.C. at 215.

In the present case, police did not search Miller's residence without a warrant, but obtained what they believed to be a valid search warrant from a neutral and detached magistrate, who independently determined probable cause existed, and in reliance on that search warrant police searched Miller's residence for drugs and items related to drug trafficking or distribution and recovered the murder weapons and the counterfeit tennis shoes, which both contained the victim's DNA. The affidavit was not based on an informant's information, but on facts developed in a joint investigation by Richland County and Columbia City Police officers. On this record, none of the four (4) circumstances listed above barring the application of the "good faith" exception apply: (1) There is no evidence the magistrate was misled by knowingly false or recklessly false information; (2) There is no contention the magistrate was not neutral and detached or acted as a rubber stamp; (3) The affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." [*See* Dupree, 354 S.C. at 681, 583 S.E.2d at 439-440 (evidence of a sale of drugs supports an inference that more will be found at the place of operation)]; (4) The warrant particularly describes the place to be searched and the items to be searched for. Leon. Further, Miller gave police a false name upon police approaching him at his own residence. *See* State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003)(defendant's subterfuge provided a reasonable inference that something was located in the room which he did

not want police to discover). The Fourth Circuit has rejected arguments similar to those made by Miller in this case, finding the good faith exception applied. *See* United States v. Harris, 215 Fed. Appx. 262, 272 (4th Cir. 2007)(unpublished)(applying Leon good faith exception, despite officer's omission from affidavit (1) that defendant resided in targeted premises and (2) their grounds for believing that defendant lived there, because "[t]he apartment to be searched is prominently identified in the affidavit, and it is easy to read the affidavit and not realize that the officers failed to connect the final dots specifically linking the defendant to the apartment."), *citing* United States v. Procopio, 88 F.3d 21, 28 (1st Cir. 1996). *See* United States v. Williams, 548 F.3d 311 (4th Cir. 2008)(applying good faith exception); United States v. Lelor, 996 F.2d 1578 (4th Cir. 1993)(apply good faith exception). In this case, this was Miller's residence, and Miller was arrested immediately adjacent to the residence for crack cocaine found immediately adjacent to the residence in the *Green Taurus*. In such a situation, the good faith exception should apply and the exclusionary rule should not be enforced or applied. Davis, *supra*; United States v. Herring; Leon; State v. Herring.

Inevitable Discovery

Furthermore, even if this Court were to find Judge Early erred *and* the good faith exception did not apply, the evidence in question could or would have been inevitably discovered. At the suppression hearing, Investigator J. D. Sanders of Aiken County testified a 2nd search warrant was issued or obtained for Miller's residence. (Tr. February 14, 2012, pp. 107-111). According to Sanders, this warrant was obtained by Richland County investigators. While nothing was seized in Miller's residence pursuant to this search warrant, Sanders was informed by Richland County investigators the warrant was issued, and Aiken County investigators did inspect the interior of Miller's residence for any evidence of the murder committed in Aiken. (Tr. February 14, 2012, pp.

107-111). As a result, if this information is true, this Court or the trial court could conclude the murder weapons and the tennis shoes would have inevitably been discovered. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998); United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown (recognizing inevitable discovery is an exception to the exclusionary rule); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(remanding to determine if inevitable discovery doctrine applied); State v. Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013)(recognizing exception but finding exception not met on the record before the Court); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted "if the government can prove the evidence would have been obtained *inevitably*." (emphasis added). *See* Herring v. United States, *supra* (No evidence Coffee County police committed any misconduct but mistakenly relied in good faith on neighboring county's database, which mistakenly showed outstanding warrant for defendant's arrest; therefore exclusionary rule was not applicable to fruits of defendant's arrest). Judge Early did not reach this issue because he found the original search warrant contained sufficient probable cause. To the extent this Court determines Judge Early erred in not suppressing the fruit of the first search warrant, this Court should find the evidence would have been inevitably discovered, or this Court should remand this matter to the circuit court to develop a full record to determine whether the evidence would have been inevitably discovered through other means such as by a second search warrant, Aiken County's reasonable reliance on Richland County's communicating a second search warrant had been obtained, or whether the a valid consent to search was executed by Miller and/or his wife. *See* Jenkins, *supra* (remanding for a determination of whether the evidence would have been inevitably discovered).

Harmless Error

Regardless, even if Judge Early erred in admitting the fruits of the search of Miller's home pursuant to the search warrant, the admission of this evidence was harmless because the evidence of Miller's guilt was overwhelming despite this evidence. Herring, *supra* (finding even if search of defendant's home was illegal any error was harmless given the overwhelming evidence of the defendant's guilt independent of the evidence seized in the defendant' home), *citing* State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991)(holding improperly admitted evidence harmless error given overwhelming evidence of guilt). *See also* State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006).

The evidence of Miller's guilt independent of the results of the search of his residence

At trial, Cummings' mother established Miller's presence in Aiken on the morning of the murder of the victim. She testified Miller arrived at her residence on Saturday, along with her son, Redfield and Grooms. She testified the four (4) men arrived at her residence on the Saturday before the murder in a *green Ford Taurus*. She identified the *green Ford Taurus* later seized by police as the vehicle they arrived in. She testified all four (4) men stayed at her residence until Monday morning, the day of the victim's murder, when she last saw them asleep in her living room at approximately 7:30 a.m., when she arrived home from work, before she went to her room to sleep. She awoke around 1:00 p.m. and Miller, her son, and the two (2) other men were gone. **(Tr. February 14, 2008, pp. 209-14).**

Cummings testified at trial and explained to the jury how the plan to rob the victim unfolded over several months. Cummings testified it was Miller who came up with the idea to rob the victim, and Cummings agreed to be the driver of the getaway vehicle. Cummings testified

Miller believed, because the victim was a known drug dealer, that he would have drugs and/or cash in his residence. Cummings testified he and Miller arrived in Aiken several days before the murder, staying at his mother's residence, and they "cased" the residence with several other men over the days preceding the murder. Cummings testified it was finally determined that Miller, Redfield, and Grooms would commit the armed robbery, while he waited in the car. Cummings testified he dropped the three (3) men off first at a cemetery, and the three (3) men returned without committing the crime. They then returned to his mother's residence where they slept. Cummings testified they tried again later in the morning. He dropped Miller, Redfield, and Grooms off at the victim's residence while he waited next door pretending to look at an automobile that was for sale. **(Tr. February 15-17, 2012, pp. 78-136).**

A neighbor of the victim, who heard the gunshots at the time of the victim's murder, testified three (3) separate men, one with dread-locks [Miller had dread-locks], all wearing black clothing, left out of the victim's home one (1) at a time after the shots were fired. She testified the three (3) men ran in the direction away from her home, toward where Cummings testified he was waiting. **(Tr. February 14, 2012, pp. 162-75).**

Another neighbor corroborated Cummings' testimony by informing the jury that at the time the gunshots were fired at the victim's residence, Cummings was at her residence standing with her looking at a car she had for sale. As a result, Cummings could not have been one (1) of the three (3) men who actually entered the victim's home and committed the murder, armed robbery, and kidnapping. This neighbor also testified that after she and Cummings heard the gunshots from the victim's residence, Cummings immediately left her yard in the *green car* he was driving, but in leaving her driveway, he appeared to be stopped waiting for someone. **(Tr. February 14, 2012, pp. 175-81).**

Cummings testified that after he heard the gunshots and left the neighbor's yard driving the *green Taurus*, he saw Miller, Redfield, and Grooms coming through some bushes, and he picked them up. Miller told Cummings to drive fast, and Miller told Cummings they had tortured the victim with a heated screwdriver and that he shot the victim before he left the house to leave no witness. **(Tr. February 15-17, 2012, pp. 78-136).** Cummings testified one (1) of the co-defendant's discarded a screwdriver out the window of the car, and police corroborated that Cummings led them exactly to where they recovered a screwdriver as he described. **(Tr. February 15-17, 2012, pp. 78-136).** Cummings testified the four (4) men then drove to Columbia, S.C. where they went to a *Books A Million* store where his fiancé worked, and he obtained the keys to the red Taurus from his fiancé. Cummings testified he and a female left from there to get something to eat, and he eventually went to Miller's residence shortly after lunch, because Miller summoned him there to help return the rental car [*the green Taurus*]. **(Tr. February 15-17, 2012, pp. 78-136).**

The GPS tracking system established the *green Taurus* rented by Miller and his wife was located near the victim's residence around 6:00 a.m.. The GPS tracking system also established the *green Taurus* rented by Miller and his wife was on Gregg Avenue, in Aiken, near Cummings' mother's residence at around 9:30 a.m. on the date of the murder. The GPS tracking system also established that the *green Taurus* rented by Miller and his wife was in close proximity to the victim's residence, in Aiken, at the time the 911 call came in regarding the victim's murder. The testimony at trial established not only that Miller's wife had rented the vehicle, but that Miller made the last payment on the vehicle in person the Wednesday before the car was not returned to the rental agency. Further, Miller admitted to police he was driving the *green Taurus* on the morning of the murder; however, he falsely informed the police he was in Charleston not Aiken

the morning of the murder. The GPS tracking system also showed the *green Taurus* had only been to Aiken and Columbia on the date of the murder, not Charleston. **(Tr. February 14, 2012, pp. 181-207, 214-31).**

The GPS tracking system tracked the *green Taurus* rented by Miller from Aiken to Columbia, S.C. immediately after the victim's murder. And, then the GPS tracking system tracked the *green Taurus* used in the murder to Miller's own residence, *5522 North Main Street*, Columbia where it was found in the back yard backed up to the back porch of the house. Miller was there, next to the car, when police arrived looking for the vehicle. **(Tr. February 14, 2012, pp. 181-207, 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68).**

A surveillance video from *Books A Million* established that Miller and Cummings were together at *Books a Million* exactly as Cummings testified. They were there together shortly after the murder of the victim, but after sufficient time had passed for them to have driven from Aiken to Columbia. **(Tr. February 15-17, 2012, pp. 108-113).**

Cummings testimony was further corroborated by what occurred at Miller's residence. Police testified the *green Taurus* was already at Miller's residence with Miller when Cummings pulled into the drive-way and was blocked in by the first responding officer. Cummings was driving the red Taurus and a female was in the car with him. **(Tr. February 14, 2012, pp. 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68).**

An inventory search of *the green Taurus* rented by Miller, and beside which Miller was standing, revealed 22 grams of crack cocaine. **(Tr. February 14, 2012, pp. 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, 97-101).** The victim was a known drug dealer, and his house had been burglarized and ransacked by three (3) men dressed *in black* who entered his residence and bound, tortured and murdered him. **(Tr. February 14, 2008, pp. 148-214, Tr. February**

15-17, 2008, pp. 37-69, 78-136, 137-185, 190-290). Testimony was admitted at trial that this crack cocaine, the twenty-two (22) grams, came from the victim's residence. **(Tr. February 15-17, 2012, p. 226).** Miller admitted to police the crack cocaine found *in the green Taurus* was his. **(Tr. February 14, 2012, pp. 214-31, 231-242, Tr. February 15-17, 2012, pp. 5-68, 97-101).** Miller's fingerprints were found inside the *green Taurus*. **(Tr. February 15-17, 2012, p. 173).** Further, found in the trunk of the *green Taurus* rented by Miller, were two (2) *black* shirts, one (1) of which contained the DNA of the victim, Fred Tucker, from Aiken, S.C. **(Tr. February 15-17, 2012, pp. 238-290).** The evidence of Miller's guilt was overwhelming independent of what was found in his residence.

Even if the admission of the fruits of the search of Miller's home was erroneous, its admission was harmless given the overwhelming evidence of Miller's guilt introduced at trial independent of that found in Miller's residence. Herring; Gillian; Garner; Baccus. This ground of Miller's appeal must be dismissed.

Conclusion

Judge Early did not err in finding the magistrate had a substantial basis for finding probable cause existed to issue the search warrant for Miller's residence. Even assuming *arguendo* Judge Early somehow erred in finding the magistrate had a substantial basis for finding probable cause existed, the exclusionary rule should not apply. Further, the evidence was still admissible because the officers relied in good faith on the search warrant issued by the Magistrate in searching Miller's residence. Further, even assuming *arguendo* the good faith exception does not apply, the evidence would have been inevitably discovered where police obtained a second search warrant and inspected Miller's residence pursuant to the same. Finally, the admission of the evidence was harmless given the other overwhelming evidence of Miller's guilt independent of that recovered

from Miller's residence. As a result, Miller's convictions for murder, burglary in the 1st degree, and kidnapping must be affirmed and this appeal dismissed.

ARGUMENT TWO

Appellant's thirty (30) year sentence for kidnapping should be vacated in the interests of judicial economy since that sentence was improper where Miller was also sentenced for murder, or the matter should be remanded to the circuit court for vacation of the sentence of thirty (30) years.

As previously set forth, Miller was sentenced to life imprisonment for murder and thirty (30) years for kidnapping. It is error to sentence a defendant for kidnapping of a victim when he is also convicted of murdering the victim and sentenced on the murder indictment, and any sentence for kidnapping of the victim should be vacated in those circumstances. *See* State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009); State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999). As a result, even though this issue is not preserved, this Court may vacate the thirty (30) year *sentence* for kidnapping only, but not the conviction, or remand to the Circuit Court with instructions that the Circuit Court vacate the thirty (30) year sentence for kidnapping. Id.; Owens v. State, 331 S.C. 582, 503 S.E.2d 462 (1998); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983); State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991).

CONCLUSION

For the above stated reasons, Miller's convictions for murder, armed robbery, kidnapping, and possession of a weapon during a violent crime should be affirmed along with the sentences for murder, armed robbery, and possession of a weapon during the commission of violent crime. The sentence of thirty (30) years for kidnapping should be vacated or the matter should be remanded to the Circuit Court with instructions to vacate the sentence of thirty (30) years for kidnapping pursuant to S.C. Code Ann. Sections 16-3-910 and 16-3-20.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
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J. ANTHONY MABRY
Assistant Attorney General

J STROM THURMOND
Solicitor, 2nd Judicial Circuit

By: _____
Anthony Mabry

December 20, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2012-208640

THE STATE,

Respondent,

v.

ANTONIO MILLER,

Appellant.

RESPONDENT'S DESIGNATION OF MATTER

The Respondent proposes the following to be included in the Record on Appeal:

State's Ex. # 58 (Rental Agreement);
Court's Ex. 1 for Suppression Hearing (Search Warrant);
Tr. February 13, 2012, pp. 1-31 (Suppression Hearing);
Tr. February 14, 2012 pp. 45-130 (Suppression Hearing);
Tr. February 14, 2012, pp. 148-242;
Tr. February 15, 2012, pp. 5-114;
Tr. February 15, 2012, pp. 119-185;
Tr. February 15, 2012, pp. 187-249;
Tr. February 15, 2012, pp. 251-291;
Tr. February 15, 2008, pp. 301-end;

I certify that this Designation contains no matter which is irrelevant to the appeal.

This 20th day of December, 2013.

ANTHONY MABRY
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Initial Brief of Respondent and Designation of Matter*** in the foregoing action by depositing copies in InterAgency Mail to Susan B. Hackett, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, SC 29201 this 20th day of December, 2013.

ANTHONY MABRY
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

December 20, 2013

Honorable Jenny A. Kitching
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Antonio Miller
Appellate Case No. 2012-208640

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent and Designation of Matter** in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc: Susan B. Hackett, Esquire
J. Strom Thurmond, Solicitor
Sandi Wofford, Victims Assistance

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