

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of General Sessions

SC SUPREME COURT

THE HONORABLE J. DERHAM COLE, Circuit Court Judge

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Appellate Case No. 2015-002221

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The State, Respondent

v.

Alphonso Chaves Thompson, Petitioner

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**PETITIONER'S BRIEF**

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Michael Patrick Scott  
NEXSEN PRUET, LLC  
1230 Main Street, Suite 700  
Columbia, SC 29201  
PHONE: 803.540.2157

Robert M. Dudek  
Chief Appellate Defender  
South Carolina Commission on Indigent  
Defense, Appellate Division  
1330 Lady Street, Suite 401  
P.O. Box 11589  
Columbia, SC 29201-1589  
PHONE: 803.734.1330

Attorneys for Petitioner

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in upholding the trial court's denial of Petitioner's suppression motion where the affidavit established Petitioner likely sold drugs but did not provide a substantial basis to conclude that drugs would be found at River Street on the day of the search?

## INTRODUCTION

Any unbiased reader of the affidavit in this case would conclude that Petitioner Alphonso Thompson was probably a drug dealer. Whether that same reader would find a substantial basis to conclude that cocaine would be in his parents' house on May 13, 2010 is another matter entirely. Then—Chief Judge Few would not. The trial court, and two Judges of the Court of Appeals, did.

In so doing, the panel majority committed a critical error. Instead of searching the affidavit for a substantial, timely nexus between the particular evidence sought—cocaine—and the particular place to be searched—Petitioner's parents' house—, the panel majority incorrectly focused on more generalized statements supporting the assumption that Petitioner likely sold drugs. Numerous courts, both state and federal, have rejected this approach. For the reasons that follow, this Court should as well and reverse Petitioner's convictions in their entirety.

## STATEMENT OF THE CASE

### I. BACKGROUND

In May of 2010, Petitioner Alphonso Chaves Thompson, aka “Pooh Bear” was arrested and later charged with drug and gun crimes after both were found at his parents’ home at 121 River Street (“River Street”)<sup>1</sup> in the Drayton community of Spartanburg. (App. p.8, ll.10–15; p.35, ll.14–23). At the time of his arrest, and for several years prior, Petitioner lived in Fountain Inn, Greenville County. (App. p.35, ll.16–17; p.43, ll.6–10; p.235, l.3 – p.236, l.4).

### II. THE INVESTIGATIONS

*\*As this is a search warrant case, these facts are drawn primarily from the Spartanburg County Narcotics Division’s (SCND) warrant affidavit.*

#### A. The First Investigation: 2007-2009

In June of 2007, two confidential informants told Investigator Chris Raymond of the SCND they were buying cocaine from Petitioner. (App. p.4). In 2008, an informant told Investigator Raymond that Petitioner resided “at the end of River St.” In January of 2009, “two more different” informants identified Petitioner as a cocaine supplier. (App. p.4).

In February of 2009, Jose Luis Diaz-Arroyo was arrested while transporting a kilogram of cocaine. (App. p.4). According to Investigator Raymond, after Diaz-Arroyo was arrested he (Diaz-Arroyo) stated that his brother-in-law, Alejandro Sosa-Galvan, was supplying Petitioner with cocaine “at this River St.” address. (App. p.4).

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<sup>1</sup> At trial, the home was alternatively referred to as River “Drive” and River “Street.” The Court of Appeals used River “Street” and Petitioner does the same here.

In July of 2009, task force officers<sup>2</sup> had an unknown informant conduct a “controlled buy” that did not involve River Street. Petitioner was not arrested or charged. (App. p.5).

**B. The Second Investigation: 2010**

On May 11, 2010, officers bought cocaine from a man named Arthur Jones. When Jones was subsequently arrested, he told the officers he was buying cocaine from Petitioner and agreed to cooperate. (*Id.*) The following day, May 12, Jones called Petitioner’s cell phone. (*Id.*) Petitioner later arrived at Jones’s home, took money from Jones, and left—no drugs were exchanged. (*Id.*; p.45, ll.1–12). Notably, the affidavit does not say Petitioner left for Jones’s home from River Street or that he visited River Street when he departed.

**III. THE WARRANT**

That same day, Investigator Raymond applied to Circuit Court Judge Hayes for a warrant to search River Street.<sup>3</sup> The affidavit was the only basis for the River Street search because Investigator Raymond did not present any sworn testimony. (App. p.12, l.19 – p.13, l.2; p.52, ll.3–4; p. 3-5p.51, l.17 – p. 52, l.5).

Conspicuously absent from this affidavit—the vast majority of which details an investigation that took place two to three years prior to the search—is any indication as to

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<sup>2</sup> This case arose from a joint federal/state task force investigation and included officers from the SCND and the Drug Enforcement Administration.

<sup>3</sup> Curiously, Investigator Raymond sought and obtained an arrest warrant for Petitioner on the same day but from a different judge—Spartanburg magistrate Charles Jones. (App. p.86, ll.3–5; App. p.1).

how or why the informants were supposedly reliable.<sup>4</sup> In particular, it does not explain who Sosa-Galvan—the only informant who specifically linked drugs to River Street—is, let alone explain why he was allegedly reliable. Indeed, the only Sosa-Galvan “statement” in the affidavit is not even his statement. Instead, it is a hearsay statement from Diaz-Arroyo about Sosa-Galvan delivering drugs to River Street—a year and a half before the search.<sup>5</sup>

Of equal importance, the affidavit provides virtually no explanation of what the officers were doing between February 2009—when Diaz-Arroyo told them about River Street—and May 13, 2010—when they actually executed the search warrant. In sum, the affidavit does not establish with any specificity why drugs were going to be found at River Street that day.

#### IV. MAY 13, 2010

##### A. The Searches

On May 13, 2010, officers simultaneously executed search warrants at Petitioner’s home on Larchwood Drive in Greenville; his girlfriend’s home on Tamara

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<sup>4</sup> Investigator Raymond creatively referred to the informants as “Confidential Reliable Informants” or “CRIs.” Calling someone reliable does not make it so. *Compare U.S. v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996) (affidavit describing informant as “concerned citizen,” “mature person,” and as having a “truthful demeanor” does not cover for fact that no evidence of reliability has been provided); *with U.S. v. Bynum*, 125 F.Supp.2d 772, 787 (E.D. Va. 2000) (label of “Confidential Reliable Informant” acceptable where affidavit showed: (1) informant had given information for eight years; (2) past information had led to seizure of guns, drugs, and convictions; (3) information had been verified by independent sources such as the DMV, criminal history checks, and other warrants and arrests) *overruled on other grounds by U.S. v. Bynum*, 293 F.3d 192 (4th Cir. 2002)).

<sup>5</sup> *See, e.g., State v. Sullivan*, 267 S.C. 610, 615-16, 230 S.E.2d 621, 623-24 (1976) (although “double-hearsay” statements not “categorically” barred from warrant affidavits, each statement must be evaluated to determine “whether it can be reasonably inferred that the informant had gained his information in a reliable way”).

Way; and River Street in Spartanburg. (App. p.7, ll.12–22; p.8, ll.4–9). No drugs or any other contraband were found at Larchwood Drive or Tamara Way.

### **B. The Arrest and Confession**

With the searches underway, but before anything was found, officers arrested Petitioner at his body shop, Ridiculous Rides, and transported him to River Street. (App. p.84, l.21 – p.85, l.19; p.86, ll.19–21; p.145, l.24 – p. 146, l.13). He was arrested pursuant to a separate warrant based on the Jones “transaction” that did not actually involve any drugs. (App. p.52, l.14 – p.53, l.13; p.85, ll. 3–11; p.88, l.17 – p.89, l.6).

During a four-hour interrogation at River Street, Investigator Raymond and DEA Special Agent Russell Davis told Petitioner they found drugs and weapons on the property. (App. p.245, ll.6–7; p.247, ll.2–15). When Petitioner denied any knowledge of either, both repeatedly told him they would arrest his parents if he did not confess. (App. p.247, l.13 – p.248, l.9). Petitioner believed his elderly father could not survive in jail so he confessed to the drugs; he did not confess to owning, or even mention, any weapons. (App. p.74, l.3 – p.75, l.17; pp. 2-5).

## **V. THE FEDERAL CASE<sup>6</sup>**

### **A. The Conspiracy Charge**

In October of 2010, Petitioner was indicted for the federal crime of conspiracy to distribute narcotics. (App. p.8, l.25 – p.9, l.3). Greenville County, where Petitioner resided, commenced asset forfeiture proceedings and seized currency found at Petitioner’s house on Larchwood Drive. (App. p.9, ll.7–9).

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<sup>6</sup> This section is drawn from trial counsel’s background recitation to the trial court during the state court suppression hearing.

## **B. Charge Dismissed**

Three months later, after voluminous discovery and several motions, the U.S. Attorney dismissed the conspiracy charge. (App. p.9, ll.10–13). According to trial counsel—who represented Petitioner in federal and state court—assistant U.S. Attorney Mormon stated that he (Mormon) had misgivings about the probable cause for River Street from the beginning, which the discovery process did not alleviate. (App. p.9, ll.14–20).

Again, according to Mr. Mormon, prior to Judge Hayes issuing the search warrant, two federal magistrates rejected the affidavit and Mormon did not believe there was probable cause for the search. (App. p.10, ll.13–18). Greenville County withdrew forfeiture proceedings and returned Petitioner’s money, indicating that they could not carry their burden of proof. (App. p.11, ll.12–16).

## **VI. THE STATE’S CASE**

Following the federal dismissal, Petitioner was indicted in Spartanburg County for the same drugs on charges of trafficking cocaine 400 grams; possession of marijuana with intent to distribute; and possession of a weapon during the commission of a violent crime. (App. p.11, ll.5–11; pp. 356-59).

### **A. Suppression Hearing**

During an extensive pre-trial suppression hearing, Petitioner argued the affidavit: (1) did not establish that drugs were likely to be found at River Street on the day of the

search;<sup>7</sup> (2) failed to demonstrate the informants' reliability; (3) provided stale information; and (4) was filled with conclusory statements.<sup>8</sup> (App. p.60, l.12 – p.89, l.17). Petitioner's motion was denied. (*Id.*).

## B. Trial

Not a single witness testified Petitioner owned or exercised dominion and control over River Street and the State did not produce fingerprints or any other link between Petitioner and the drugs. (App. p.226, l.22 – p.229, l.20). Nonetheless, Petitioner's directed verdict motion was denied. (App. p.230, ll.6–9; p.230, l.15 – p.231, l.8).

Following Petitioner's testimony, where he again denied knowledge of the drugs and weapons, the jury found him guilty on all three counts. (App. p.259, ll.12–14; p.327, l. 7 – p.328, l.24). The trial court sentenced Petitioner to concurrent terms of twenty-five, five, and five years' imprisonment, respectively. (App. p.330, ll.5–21).

## VII. THE COURT OF APPEALS

On appeal, Petitioner argued, *inter alia*, that: (1) the trial court erred in denying his suppression motion; (2) all evidence at River Street should have been suppressed as fruit of the poisonous tree; (3) the good faith exception did not apply; and (4) the trial court's error was prejudicial and not harmless. (App. pp. 391-401; pp. 456-468).

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<sup>7</sup> No one disputes that Petitioner did not reside at or own River Street. Petitioner's mother was purchasing the home from Ernest Grant, the homeowner, via a lease-to-own contract. (App. p.93, l.23 – p.96, l.25; p.101, l.21 – p.102, l.7; p.239, l.14 – p.240, l.14; pp. 346-49). An officer on the search team testified Petitioner did not live there and the arrest warrant listed Petitioner's address as 110 Larchwood Dr. Simpsonville, SC. (App. p. 1; p.135, ll.18–23). The trial court found, and the State has not disputed, that Petitioner had a reasonable expectation of privacy in the home. (App. pp. 30-44).

<sup>8</sup> The State argued that an informants' reliability does not "ha[ve] to be corroborated" or "identified as reliable" and asked the trial court to place "great weight" on the fact that another circuit court judge, instead of a magistrate, issued the warrant. (App. p.45, ll.21–24; p.47, ll.14–19). The State provided no support for these theories because there is none.

### A. The Panel Majority

By published opinion, a panel majority for the Court of Appeals disagreed. Although the majority agreed “the affidavit fail[ed] to set forth information as to the veracity, reliability or basis of knowledge of several of the informants referenced” and that both Jeter’s and Meadows’s statements and the critical Diaz-Arroyo double-hearsay statement (the only specific link between drugs and River Street) were “somewhat stale,” the majority ultimately concluded there was a “fair probability that contraband or evidence of a crime would be found at 120 River Street, and the judge therefore had a substantial basis upon which to conclude that probable cause existed for issuance of the search warrant.” (App. p.482, 484).<sup>9</sup> Accordingly, the trial court’s ruling and Petitioner’s convictions were affirmed. (App. p.489).

### B. The Dissent

Then—Chief Judge Few dissented. He focused on the fact that River Street was not Petitioner’s house and that the affidavit contained “no specific facts showing any connection between [Petitioner’s] drug-related activity and the River Street home after February 11, 2009 [the date of Diaz-Arroyo’s statement about Sosa-Galvan].” *Thompson*, (App. p.490) (Few, C.J., dissenting). Chief Judge Few recognized that the officers’ “conclusory descriptions” of Petitioner’s activities between July 2009 and May 2010 compared with their specific detail of his pre-July 2009 activities raised “serious questions” as to why that detail was lacking. (App. p.491). Because the affidavit “did not provide the judge with a substantial basis for a finding of probable cause that

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<sup>9</sup> The opinion in this case can be found at 413 S.C. 590, 776 S.E.2d 413, (Ct. App. 2015). All citations herein are to the opinion reproduced in the Appendix.

evidence of [Petitioner's] drug-related activity would be found at River Street[,]” Chief Judge Few would have reversed Petitioner’s convictions in their entirety. *Id.*

The Court of Appeals denied Petitioner’s timely Petition for Rehearing. Petitioner timely filed a Petition for Certiorari to the Court of Appeals and, on June 16, 2016, this Court—Justice Few not participating—granted the Petition.

This appeal followed.

## ARGUMENT

### **I. THE AFFIDAVIT DID NOT PROVIDE A SUBSTANTIAL BASIS TO BELIEVE DRUGS WOULD BE AT RIVER STREET ON THE DAY OF THE SEARCH.<sup>10</sup>**

Because “[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought,” *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, a suspect’s status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in his home. *United States v. Brown*, --- F.3d ----, 2016 WL 3584723, at \*5 (6th Cir. 2016). Thus, “if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant’s home—even if the defendant is a known drug dealer.” *Id.* at \*6.

Rather, courts require evidence supporting three preliminary premises: (1) that the person suspected of drug dealing is actually a drug dealer; (2) that the place to be searched is possessed by, or the domicile of, the dealer; and (3) that the home contains contraband linking it to the dealer’s activities. *U.S. v. Stearn*, 597 F.3d 540, 559 (3d. Cir. 2010); *see also Brown*, 2016 WL 3584723, at \*5 (requiring “some reliable evidence

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<sup>10</sup> Before the Court of Appeals, Petitioner argued the affidavit was defective pursuant to the Fourth Amendment, Article I, section 10, of the South Carolina Constitution, and section 17-13-140 of the South Carolina Code. (App. p.427). Petitioner continues to press all three as independent bases to reverse his convictions here. The Federal Constitutional standard creates a floor, not a ceiling, when it comes to protecting individual rights, leaving states free to provide greater protections. *Brigham City v. Stuart*, 547 U.S. 398, 409 (Stevens, J., concurring). South Carolina has done so here. *See State v. Weaver*, 374 S.C. 313, 321-22, 649 S.E.2d 479, 483 (2007) (South Carolina constitution offers higher level of privacy protection); *State v. Herring*, 387 S.C. 201, 214-15, 692 S.E.2d 490, 497 (2009) (code section imposes stricter requirements than Fourth Amendment). The affidavit here does not reach the floor, let alone the ceiling. Therefore, Petitioner focuses primarily on cases involving the Fourth Amendment.

connecting the known drug dealer's ongoing criminal activity to the residence" including timely facts showing the residence had been used in drug trafficking, such as an informant who observed drug deals or drug paraphernalia in or around the residence); *U.S. v. Burton*, 288 F.3d 91, 104 (3d. Cir. 2002) (magistrate may not infer probable cause to search a defendant's residence solely from evidence suggesting he is a drug dealer); *State v. Allman*, 781 S.E.2d 311, 316 (N.C. 2016) (upholding suppression because affidavit included facts establishing defendant was a drug dealer but did not indicate that affiant "observed or received information that drugs were possessed or sold" at the residence in question); *State v. Thein*, 138 Wash.2d 133, 148, 977 P.2d 582, 589 (Wash. 1999) (en banc) ("We reiterate that probable cause to believe that a man has committed a crime does not necessarily give rise to probable cause to search his home.").

Investigator Raymond's affidavit showed—at best—that Petitioner sold drugs. It did not establish a timely link between drugs and a residence that all agree was not even his own.

#### A. Standard of Review

On appeals from a motion to suppress, this Court applies a deferential standard of review and will reverse if there is clear error. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision was supported by the evidence. *Id.*

In conducting its own review, this Court must ensure the issuing judge had a substantial basis upon which to conclude that probable cause existed. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In so doing, this Court can consider only

information brought to the magistrate's attention. *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct. App. 2007).

### B. Totality of the Circumstances Test

This Court's review of the affidavit is governed by the totality of the circumstances test under which all circumstances, including status, basis of knowledge and veracity of the informants ("reliability"), the timeliness of the informants' information ("staleness"), and whether the *things to be searched for* were likely to be found *in the residence in question*, at the *time of the search* ("nexus"). *Illinois v. Gates*, 462 U.S. 213, 230 (1983); *Zurcher*, 436 U.S. at 556; *State v. Weston*, 329 S.C. 287, 290-91, 494 S.E.2d 801, 802-803 (1997).

### C. The Majority Erred

Reprinted in full by the Court of Appeals, the affidavit spans more than 2 pages with 53 sentences. (App. p.3-5). River Street is referenced a sum total of 4 times. The affidavit generally, and the 4 pieces of information cited by the majority specifically, *Thompson*, (App. p.483), did not provide the issuing judge a *substantial basis* from which to conclude that drugs would be *at River Street* on the *day of the search*. In sum, the informants provided unreliable stale information that barely mentioned River Street.

**2007 and 2008:** In June of 2007 Investigators from the Spartanburg County Sheriff's Office Narcotics Division had two different Confidential Reliable Informants (CRI) give information that they had been buying large amounts of cocaine from a black male that they only knew as "POO BEAR." These two CRI's stated that several large cocaine transactions took place [sic] over the course of several months. These CRI's furnished information that was able to be corroborated such as vehicle descriptions and photo identifications. Both CRI's stated that they knew POO BEAR to drive a gray in color Honda Accord Station wagon when he would conduct these deals. It was learned through this Investigation that "POO BEAR"

was positively identified as Alfonso [sic] Thompson and he also had an F350 Ford Dually blue and Gold in color.

The panel majority correctly ignored this section. It contains information from two unidentified informants concerning drug transactions two and three years before the search and does not refer to River Street at all.

**Jeter and Meadows:** In **August of 2007** the SCSO Narcotics Division arrested Keith Jeter who stated that he was being supplied 4 1/2 - 9 oz. of cocaine at a time from Alfonso [sic] Thompson aka "POO BEAR." Jeter further stated that "POO BEAR" would bring the cocaine to his residence on Huxley St. in Spartanburg City. In **September of 2008** the SCSO Narcotics Division interviewed a [sic] individual named Fred Meadows who stated that he was being supplied cocaine from "POO BEAR" and that "POO BEAR" drove a blue and gold Ford F-350 Dually. Meadows further stated that he grew up with "POO BEAR" in the city and has known him for a long time. Meadows stated that "POO BEAR" would deliver the cocaine to his house on Virginia St.

For several reasons, the majority erroneously relied on the information from Jeter and Meadows. *See Thompson*, (App. p.483) (identifying this information as supporting probable cause and listing Jeter and Meadows as two of four "named sources").

As an initial matter, although Jeter and Meadows referenced two *other* addresses, they did not mention River Street a single time. Thus, their information adds nothing to the nexus equation. *See United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993) ("In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.").

Furthermore, nothing in the affidavit explains who these two were or why they were supposedly reliable. The affidavit does not state that either had provided reliable information in the past; that either made a statement against his penal interest; or that the

*SCND* had independently corroborated anything they said. *See, e.g., U.S. v. Walker*, 319 Fed. App'x 307, 310 (4th Cir. 2009) (setting forth reasons why informant might be considered reliable); *see also supra*, n. 4 (explaining that simply calling someone reliable is not sufficient).

The panel majority also incorrectly focused on the fact that Jeter and Meadows were “eyewitnesses.” *Citizen* eyewitnesses are, in most instances, presumptively reliable. *See Gates*, 462 U.S. at 233-34 (“[I]f an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—. . . rigorous scrutiny of the basis of his knowledge [is] unnecessary.”); *State v. Driggers*, 322 S.C. 506, 510-11, 473 S.E.2d 57, 59 (Ct. App. 1996) (deference due to a citizen roommate of robber who had no involvement in crime).

Neither Jeter nor Meadows fit the bill. The only information they provided was that they were purchasing cocaine from Petitioner and having him deliver it to their homes. In other words, both were drug dealers driven by self-serving ulterior motives—the expectation of lighter (or no) criminal charges—and the majority’s heavy reliance on the presence of their names in the affidavit was misplaced. *Compare Sullivan*, 267 S.C. at 616, 230 S.E.2d at 624 (absence of ulterior motives sufficient to constitute reliability) *with State v. Bellamy*, 323 S.C. 199, 206, 473 S.E.2d 838, 842 (Ct. App. 1996) (Cureton, J., dissenting) (“Here, there is no indication [the informant] was known to either Agent Vaught or the magistrate. . . [f]rom the standpoint of the issuing magistrate, the name John Doe would have been just as meaningful.”); *cf. United States v. Smith*, 182 F.3d 473, 483 (6th Cir.1999) (“[i]f the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required”).

Finally, even if Jeter and Meadows were reliable *and* had actually mentioned River Street, even the panel majority agreed their information was “somewhat stale.” (App. p.482). Information from 2-3 years prior to a search is more than “somewhat” stale—it is irrelevant. *See State v. Corns*, 310 S.C. 546, 550, 426 S.E.2d 324, 326 (Ct. App. 1992) (information in affidavit must be “so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time”). Indeed, if this information is not constitutionally stale, it would be difficult to conceive of information that would be.

At best, these first two sections support the conclusion that Petitioner was selling drugs in 2007 and 2008. They do not provide any basis—let alone probable cause—to believe that drugs would be in his parents’ house 2 and 3 years later.

**First River St. Reference:** Also in late 2008 Spartanburg City Police Narcotics had an informant who came forward and state the [sic] “Poo Bear” had a residence at the end of River St. on the left hand side and that “Poo Bear” was a large scale cocaine Trafficker.

This first River Street reference is irrelevant and the panel majority correctly ignored it. It is both extremely stale (roughly 2 years before the search) and wholly unreliable (unnamed unidentified informant). Notably, Investigator Raymond did not even identify this individual as a “Confidential Reliable Informant.” *See State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995) (“We have reviewed both the affidavit and written statement and find absolutely no showing of the confidential informant’s reliability.”). As such, it correctly played no role in the panel majority’s analysis and should play no role here.

**Second River Street Reference:** On February 11, 2009 [,] The [sic] [SCND] arrested Jose Luis Diaz-Arroyo with a kilo of cocaine. During the interview with Arroyo he stated that his

brother in law Alejandro Sosa-Galvin was supplying a black male named "Poo Bear." Arroyo further stated that Sosa Galvan had multiple Kilos of cocaine delivered to "Poo Bear" at this River St. address on several occasions.

The double-hearsay Diaz-Arroyo statement about Sosa-Galvan is the *only* statement in the affidavit in which a specific individual (said another individual) actually saw cocaine (well over a year before the search) at River Street. Thus, this section played a significant role in all of the decisions below. *See Thompson*, (App. p. 483-84) (listing Diaz-Arroyo and Sosa-Galvan as the other two "named" informants and giving credence to this reference). It should not have.

#### *Reliability*

Nothing in the affidavit provides any reason to believe Diaz-Arroyo or Sosa-Galvan. As an initial matter, Sosa-Galvan was not really an informant at all. Although his name is in the affidavit, the *only* thing in the affidavit attributed to him is not even his own statement. Indeed, the affidavit does not state or even imply that Investigator Raymond or anyone else on the task force *had ever even met* Sosa-Galvan. Instead, the statement is a double-hearsay statement from Diaz-Arroyo about Sosa-Galvan delivering drugs to River Street. In other words, Diaz-Arroyo "heard it from a friend, who heard it from a friend, who heard it from another." *State v. Robinson*, 454 S.W. 3d 428, 439 (Mo. Ct. App. 2015) (quoting REO SPEEDWAGON, *Take It On The Run*, on HI INFIDELITY (Epic Records 1980)).

The fact that information provided in an affidavit is double-hearsay is relevant to its value in determining probable cause. *State v. Dunbar*, 361 S.C. 240, 255, 603 S.E.2d 615, 623 (Ct. App. 2004). Although double-hearsay does not "per se, invalidate the

resulting search warrant,” the hearsay upon hearsay statement will support the warrant only so long as the “underlying circumstances indicate there is a *substantial basis* for crediting hearsay *at each level.*” *Id.* (emphasis added); *Accord. Robinson*, 454 S.W. 3d at 439 (rejecting supposed reliability of double-hearsay statement because “[w]hile it may be the case that more specific details were provided to [the officer] or that particular source indeed had proven reliable in the past, [the officer] failed to communicate any basis of past reliability or how, if at all, the first source learned of drug sales at [defendant’s] home so as to provide a substantial basis—the constitutional minimum—for probable cause.”).

Plainly, where an informant is not even mentioned anywhere else in the affidavit and the investigating officers do not even indicate they have ever met him; his portion of the double-hearsay statement is worthless. *See Franks v. Delaware*, 438 U.S. 154, 165 (1978) (“If an informant’s tip is the source of information, the affidavit must recite . . . some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable.”).

Furthermore, Diaz-Arroyo did not personally witness anything. His statement does not say *he* delivered drugs to River Street, that he *saw* Sosa-Galvan deliver to River Street, or that he otherwise had any reason to believe that drugs would be found there on May 13, 2010. *See Dunbar*, 361 S.C. at 248, 603 S.E.2d at 619 (“Generally, affidavits must be made on the affiant’s personal knowledge of the facts alleged in the petition. The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness.”). Remarkably, the affidavit does not even imply that Diaz-Arroyo had *ever even met* Petitioner.

Moreover, Diaz-Arroyo, like Jeter and Meadows, was not a *citizen* informant. He was a drug dealer cooperating after his arrest and nothing about his past history or any other indication of reliability is present.

Finally, nothing in the affidavit indicates that—in February 2009—the officers independently corroborated Diaz-Arroyo’s statement. *See United States v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005) (“While independent corroboration of a confidential informant’s story is not a *sine qua non* to a finding of probable cause, in the absence of any indicia of the informants’ reliability, courts insist that the affidavit contain substantial independent police corroboration.”); *State v. Dupree*, 354 S.C. 676, 690, 583 S.E.2d 437, 444 (Ct. App. 2003) (“Where the affidavit is based in part on information provided by an informant of unknown reliability, police corroboration of details provided in the tip may establish probable cause.”).

Consequently, the issuing judge had no basis to rely on the single statement by Diaz-Arroyo about something his brother-in-law allegedly did.

#### *Timeliness*

Even if the double-hearsay statement is credited with a providing a reliable nexus to River Street—it was far from timely. *State v. Hensley*, 298 Kan. 422, 429, 313 P.3d 814, 821 (Kan. 2013) (“Stale information is information that no longer informs where there is a fair probability that evidence of a crime will be found at a particular place because sufficient time has elapsed between when the informant acquired the information . . . and when officers act on the information.”) There is “no fixed standard or formula establishing a maximum allowable interval between the date of events recited in an affidavit and the date of a search warrant.” *State v. Thompson*, 363 S.C. 192, 206, 609

S.E.2d 556, 564 (Ct. App. 2005). However, information regarding drug crimes has a very short shelf life. *See U.S. v. Brooks*, 594 F.3d 488, 493 (6th Cir. 2010) (“In the context of drug crimes, information goes stale very quickly because drugs are usually sold and consumed in a prompt fashion.”); *U.S. v. Kennedy*, 427 F.3d 1136, 1142 (8th Cir. 2005) (“[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation.”).

*456 days (or 15 months)*—the time between Diaz-Arroyo’s double-hearsay statement and the search at River Street—cannot be and is not “so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.” *Compare U.S. v. Grant*, 108 F.Supp.2d 1172, 1176 (D. Kan. 2000) (evidence of two sales of drugs that occurred six months and four-and-a-half months prior to application for warrant did not establish continuous and ongoing activity); *State v. Probst*, 247 Kan. 196, 203, 795 P.2d 393, 398 (Kan. 1990) (15 months “undoubtedly” too long); *U.S. v. Brown*, 958 F.2d 369, \*4 (4th Cir. 1992) (stale information where affidavit based on statements from four months prior); *State v. Baker*, 251 S.C. 108, 110-11, 160 S.E.2d 556, 557 (1968) (42 days between issuance of warrant and search too long); *with U.S. v. Washington*, 139 Fed. App’x 479, 482 (4th Cir. 2005) (3 weeks not stale); *Thompson*, 363 S.C. at 206, 609 S.E.2d at 564 (72 hours not stale); *State v. Clifton*, 302 S.C. 431, 433-34, 396 S.E.2d 831, 832-33 (Ct. App. 1990) (same).

**Third River Street Reference:**

Over the past 6 months the [SCND] has conducted surveillance on 120 River St. and on several occasions has seen Thompson driving different vehicles to include the Ford F-350 Dually blue and

gold in color and the white in color Honda Civic to and from this location. Investigators have also seen the gray in color Honda Accord station wagon come and go from this residence.

This very detailed passage reveals that Petitioner visited his parents' house.

**Fourth River Street Reference:** Over the past 6 months Investigators have witnessed Thompson visit this River St. address just before making cocaine deliveries throughout Spartanburg City.

This passage influenced the panel majority but is problematic for several reasons. Initially, it begs several questions. For one, if the investigators were witnessing Petitioner make cocaine deliveries, why not simply catch him in the act and arrest him? Furthermore, the investigators clearly intended to arrest Petitioner at Arthur Jones's house and were foiled when Petitioner did not bring any drugs. But why was the attempted controlled buy even necessary if the officers had already seen Petitioner delivering drugs?

Regardless, as Chief Judge Few recognized, this conclusory description, contrasted with the rest of the detailed affidavit, "raise[d] serious questions as to why that specific detail [wa]s lacking . . . ." (App. p.491). Moreover, like the Diaz-Arroyo statement, this statement is plainly not based on Investigator Raymond's personal observations. *See Dunbar*, 361 S.C. at 248, 603 S.E.2d at 619 (affiants' personal knowledge necessary). Finally, this passage does not indicate when during the "past 6 months" the officers allegedly saw Petitioner making cocaine deliveries. Thus, without more, this information is also stale. *Marcilis v. Township of Redford*, 693 F.3d 589, 601 (6th Cir. 2012) (because drugs are consumed very quickly, "information goes stale very

quickly”); *Cf. U.S. v. Joubert*, 778 F.3d 247, 252 (1st Cir. 2015) (allegations regarding photos and video do not suffer from the staleness problems arising in drug context).

**Arthur Jones “Transaction”:**

On May 11, 2010 Investigators bought ½ ounce of cocaine base from Authur Jones. When Jones was approached he started cooperating with the SCSO Narcotics Division. Jones stated that he was buying his cocaine from Alfonzo Thompson aka “POO BEAR.” Jones stated that “POO BEAR” was fronting him about 9 ounces of Powder Cocaine a month. Jones stated that he would take the powder and then turn it into cocaine base and then sell it. When it was all gone he would call “POO BEAR” and tell him that he was ready for him. Jones stated that he was paying \$1000 an ounce for the cocaine. On 05-11-2010 Jones placed a recorded telephone call to Thompson stating that he was ready to re-up. Thompson agreed to come by. Jones stated that Thompson's M.O. was to come by in the next couple of days. On 05-12-2010 Jones called “POO BEAR” again with no response. At approximately 6:30 PM Jones received a telephone call from “POO BEAR” ... asking Jones if he was going to be home. Jones stated yes and hung up. Jones knew this to mean that “POO BEAR” was coming shortly. At Approximately [sic] 7:19 PM Thompson pulled into Jones [sic] driveway driving the white Honda Civic. Thompson exited the vehicle and came inside. Once inside Jones handed Thompson \$9000.00 in recorded funds. Thompson stated that he would bring the package in the morning. Jones knew this to mean that Thompson would bring the cocaine to him the next day. Investigators were inside the residence watching the transaction take place as well as the transaction being Video and Audio recorded. There was [sic] also outside surveillance units near the scene. Thompson was loosely followed in the Honda Civic after the transaction.

Controlled buys, if properly conducted, can provide facts sufficient for probable cause. *Dupree*, 354 S.C. at 689, 583 S.E.2d at 444. For several reasons, this controlled buy contributes nothing to the totality of the circumstances analysis and the panel majority erred in giving it any weight.

As an initial matter, notably absent from this passage is any mention of River Street. The affidavit does not say Petitioner left *for* Jones's house *from* River Street or that Petitioner *visited* River Street after leaving. Certainly, had Investigator Raymond observed any link between the Jones transaction and River Street, he would have included it in the affidavit. The rest of the transaction is described in painstaking detail. Regardless, whether Investigator Raymond observed any connection to River Street or—he did not put it in the affidavit.

Furthermore, the majority's reliance on *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005), to support the "logical" conclusion that Petitioner had to "retrieve the drugs from *some location* in order to complete the transaction," was misplaced. See *Thompson*, (App. p.484). The conclusion that the drugs would be found in "some location" is not probable cause that they would be found at River Street on May 13, 2010. See *Stearn*, 597 F.3d at 559 (warrant must show home possessed by drug dealer or that he lives there); *id.* (demanding "some evidence that the home contains contraband linking it to the drug dealer's activities" and recognizing "the search of a drug dealer's home would be unreasonable if the affidavit suggested no reason to believe contraband would be found there").

Regardless, although the *Grossman* court did uphold a residential search of a home that was not the defendant's and explained that "the searches [were] not invalid merely because he splits his time among several different homes," the first home searched in *Grossman* was searched *after* a detective relayed *specific* observations from himself *and* a *reliable* informant about *that house*. *Grossman*, 400 F.3d at 217-18. Not so here. Here, no informant—reliable or otherwise—provided any link to River Street

after February 2009. And, Petitioner was not “splitting his time” between any homes, he lived on Larchwood Drive in Greenville.

Additionally, in *Grossman*, the other homes were searched (via two subsequent affidavits) only *after* drugs were found in the *first home* because “each [search] built upon the prior ones.” *Id.* at 218. Again, not so here. Here, all three searches were executed simultaneously. Consequently, Investigator Raymond’s affidavit should have—but did not—include *at least* one specific and direct link establishing that cocaine would be at River Street on May 13, 2010. There were none. Instead, he included a generic, undated reference that Petitioner visited his parents’ house.

Finally, even the task force found it far from “probable” that drugs would be at River Street that day. Recall that May 13, 2010, featured three simultaneous raids: one at Petitioner’s house; one at his girlfriend’s house; and one at River Street. Only the River Street house contained any evidence of any drugs indicating that the officers themselves were, at best, guessing. *Compare Allman*, 781 S.E.2d at 361 (inference that person is a drug dealer “while perhaps suggestive that drugs might be present at their actual residence, does not make the drugs’ presence probable”) *with State v. Sinapi*, 359 N.C.

394, 610 S.E.2d 362, (N.C. 2005) (affiant performed inventory of trash bag located on curb of suspect residence that revealed eight marijuana plants).<sup>11</sup>

In sum, the Arthur Jones transaction—in which no drugs were even exchanged and River Street was not mentioned—did not provide a substantial basis to believe that drugs were being stored at River Street.

#### D. Summary

Only one passage in the affidavit is even arguably helpful to the State—the officers’ “observation” that Petitioner visited River Street before making cocaine deliveries. As noted, that observation is extremely suspect. But, regardless, that single passage cannot and does not provide a “substantial basis” to conclude that drugs would be at River Street on the day of the search. Instead, the affidavit supports the general conclusion that Petitioner sold drugs. That distinction matters. The “whys” are critically important to a probable cause inquiry. *See State v. Smith*, 301 S.C. 371, 372-73, 392 S.E.2d 182, 183 (1990) (affidavit defective for failing to set forth *why* police believed defendant robbed particular place); *Weston*, 329 S.C. at 291-92, 494 S.E.2d at 803 (affidavit defective for failing to show *why* defendant’s car contained contraband);

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<sup>11</sup> Compare *U.S. v. Jones*, 159 F.3d 969, 974–75 (6th Cir. 1998) (finding probable cause to issue a warrant where confidential informant made drug purchases from defendant, was at defendant’s residence during monitored drug transactions, and observed defendant in possession of cocaine), *United States v. Ellison*, 632 F.3d 347, 349 (6th Cir. 2011) (inference was proper because reliable confidential informant had “observed someone come out of [the defendant’s] residence, engage in a drug transaction, and then return into the residence”), and *U.S. v. Berry*, 565 F.3d 332, 339 (6th Cir. 2009) (“Although a defendant’s status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant’s home, there is support for the proposition that status as a drug dealer plus observation of drug activity near defendant’s home is sufficient to establish probable cause to search the home.” (internal citation omitted)), with *U.S. v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005) (inference was not proper because affidavit failed to establish informants’ reliability and informants had not “witnessed [the defendant] dealing drugs from his [new] residence,” just his old residence).

*Baccus*, 367 S.C. at 51-52, 625 S.E.2d at 221-22 (affidavit failed to show *why* defendant committed crime).

The affidavit in this case fails to set forth “why” cocaine would be at River Street on May 13, 2010 and the Court of Appeals erred in holding otherwise.

## II. SUBSIDIARY QUESTIONS

Although they were not analyzed by the majority because the Court upheld the trial court's denial of the suppression motion, Petitioner briefly addresses here the exclusionary rule and fruit of the poisonous tree; the good faith exception; and harmless error. *See* Rule 242(d)(2), SCACR ("A question presented will be deemed to include every subsidiary question fairly comprised therein.").

### A. The Exclusionary Rule and Fruit of the Poisonous Tree

The purpose of the exclusionary rule is to deter Fourth Amendment violations. *State v. Brown*, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012). It "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing incentive to disregard it." *State v. Jenkins*, 398 S.C. 215, 229, 727 S.E.2d 761, 768 (Ct. App. 2012). The fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police and the evidence that has been obtained by the exploitation of that illegality. *Hutto v. State*, 376 S.C. 77, 81, 654 S.E.2d 846, 848 (Ct. App. 2007).

Neither party disputes that the police only gained access to River Street pursuant to the search warrant. Thus, no independent grounds exist to permit introduction of the drugs or weapons or of Petitioner's confession, which was made at River Street only after the drugs were found. Accordingly, the exclusionary rule applies and all evidence found at River Street, including Petitioner's confession, should have been suppressed.<sup>12</sup> *See In*

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<sup>12</sup> In dissent, Chief Judge Few noted the "vast majority of the drugs for which Petitioner was convicted were seized from the River Street home." *Thompson*, (App. p.490). That statement is factually incorrect. All of the drugs and weapons were seized at River Street—nothing was found anywhere else.

*re Jeremiah W.*, 361 S.C. 620, 624 n.2, 606 S.E.2d 766, 768 n.2 (2004) (taint of an illegal search can only be removed if the items or facts were obtained independent of the illegal act).

### **B. The Good Faith Exception**

Before the Court of Appeals, the State argued that its officers acted in good faith such that even if the warrant was deficient, the evidence should not be suppressed. (App. pp. 433-436); *see generally United States v. Leon*, 468 U.S. 897, 913 (1984) (suppression may not be mandated if evidence is obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate). The trial court heard arguments regarding good faith but, naturally, the Court of Appeals did not reach the issue because it found the affidavit sufficient. However, Investigator Raymond's judge shopping was the antithesis of good faith.

An officer's belief must be objectively reasonable in order for the good faith exception to apply, meaning a court's "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. "In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered." *Id.* (emphasis added).

Investigator Raymond's conduct in obtaining the search warrant was by no means objectively reasonable. Having been denied by not one but two federal magistrates, he knew, or should have known, the affidavit was deficient. Yet he and his team continued to search until they found a judge willing to approve their request. This was not a

“responsible law-enforcement officer[]” taking care to “learn what [wa]s required of [him] under the Fourth Amendment” and then “conforming” his “conduct to those rules.” *Davis v. U.S.*, 131 S.Ct. 2419, 2429 (2011); *see also U.S. v. Stephens*, 764 327, 345 (4th Cir. 2014) (Thacker, J., dissenting) (“The good faith exception at its core requires officers to act with an objectively reasonable good-faith belief that their conduct is lawful.” (internal quotation marks omitted)).

Even setting aside the apparent judge shopping, the affidavit was not objectively reasonable on its face. *See United States v. Savoy*, 889 F.Supp.2d 78, 90 (D.D.C. 2012) (no good faith where warrant “failed to explain why the affiant believed evidence of criminal activity would be found at the location [and] failed to explain why evidence would be present long after officers received relevant information to support the affidavit”).

### C. Harmless Error

Although Constitutional errors can be harmless, *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (Ct. App. 2005), the only evidence at trial were the drugs and weapons themselves and Petitioner’s confession—all of which were obtained solely as a result of the search warrant. Thus, the failure to exclude this evidence could not be considered an “insubstantial error not affecting the result.” *State v. Covert*, 368 S.C. 188, 196-97, 628 S.E.2d 482, 487 (Ct. App. 2006). Had the trial court correctly granted Petitioner’s suppression motion, there would not have been a trial.

### CONCLUSION

For these reasons, Petitioner’s convictions should be **REVERSED**.

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME  
COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of General Sessions

THE HONORABLE J. DERHAM COLE, Circuit Court Judge

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Appellate Case No. 2015-002221

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The State, Respondent

v.

Alphonso Chaves Thompson, Petitioner

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that Petitioner's Brief complies to the extent possible with  
Rule 208(b), SCACR.



Michael Patrick Scott

August 8, 2016

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME  
COURT

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SC SUPREME COURT

THE HONORABLE J. DERHAM COLE, Circuit Court Judge

Appellate Case No. 2015-002221

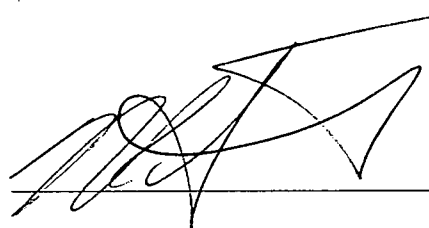
The State, Respondent

v.

Alphonso Chaves Thompson, Petitioner

CERTIFICATE OF SERVICE

I, Michael P. Scott, hereby certify that have served Petitioner's Brief in the foregoing action by depositing a copy of same in the United States Mail to Mark R. Farthing, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211, on this 8<sup>th</sup> day of August, 2016.



Michael Patrick Scott