

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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**STATE OF SOUTH CAROLINA,**

*Petitioner,*

vs.

**ANTONIO MILLER,**

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether this Court should reverse the South Carolina Supreme Court where it knowingly ignored this Court's precedent and automatically vacated Respondent's convictions for murder, burglary, and kidnapping arising from a heinous killing and ordered a new trial, based only a Fourth Amendment violation:

- a. without conducting the required balancing analysis where there was no flagrant police misconduct or recurring systemic negligence to invoke the exclusionary rule based on *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419 (2011), *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695 (2009), and *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006),
- b. without conducting an analysis of whether the "good faith" exception as required by *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) and it does when officers acting in objectively reasonable reliance on a search warrant issued by a neutral magistrate but later found to invalid for lack of probable cause;
- c. and without conducting a harmless error analysis pursuant to *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991); *Chambers v. Maroney*, 339 U.S. 42, 90 S.Ct. 1975 (1970); and *Chapman v. California*, 386 U.S. 18, 887 S.Ct. 824 (1967) where there was other overwhelming evidence of guilt?



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- I. Certiorari is warranted where the South Carolina Supreme Court failed to consider the applicable “good faith” exception upon request in the instant appeal in light of *U.S. v. Leon* where the evidence was admissible at trial under the exception and a new trial is inappropriate, particularly where Court of Appeals judges, trial judge and magistrate opined that there was “probable cause” shown in the affidavit. The Supreme Court instead deferred its appellate obligation to a new trial setting rather than apply it in the appeal based upon a clear showing of its applicability on the present record or alternately remand it to a lower court to conditionally determine whether it applied in the first instance. ....16
  
- II. Certiorari is warranted where the South Carolina Supreme Court acknowledged that the exclusionary rule may not apply where the record supported that it should not apply. Simply put, it awarded the windfall of a new trial without even determining whether the exclusionary rule would apply and instead held for a new trial judge “to [determine whether] the evidence seized pursuant to the

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of South Carolina respectfully petitions this Court for a Writ of Certiorari to the South Carolina Supreme Court. This petition is based upon the complete failure of the Supreme Court of South Carolina to address issues of the “good faith” exception, the exclusionary rule and “harmless error” based upon its finding of an inadequate search warrant prior to directing a new trial and then conclude “should the State seek to retry petitioner, it will be permitted to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.”

## CITATION TO OPINIONS BELOW

The order of the Honorable Doyet A. Early, III, Circuit Court Judge admitting evidence from a search and finding of probable cause in State v. Antonio Miller, is unpublished. The *per curiam* order of the Court of Appeals of South Carolina in *State v. Antonio Miller*, Appellate Case No. 2012-208640, 2014 – UP-409, 2014 WL 6488693, (S.C.Ct.App. filed November 19, 2014) in unpublished and is reproduced at App. 2-6. The order of the Court of Appeals denying the petition for rehearing by Antonio Miller dated January 26, 2015 is unpublished and reproduced at App.7. The order of the Supreme Court of South Carolina

granting the petition for writ of certiorari on May 20, 2015 is unpublished and reproduced at App. 8. The opinion of the Supreme Court of South Carolina reversing the conviction and sentence is cited as *State v. Antonio Miller*, Appellate Case No. 2015-000365, Memorandum Opinion No. 2016-MO-009, 2016 WL 1244403 ( S.C.Sup.Ct. filed March 30, 2016) and reproduced in the Appendix at App. 9-11. The order denying the timely petition for rehearing on May 18, 2016 is unpublished and reproduced in the Appendix at App. 12. The remittitur was issued on May 18, 2016.

### JURISDICTIONAL STATEMENT

The opinion of the Supreme Court of South Carolina reversing the conviction and sentence and noting “should the State seek to retry petitioner, it will be permitted to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause,” *State v. Antonio Miller*, Appellate Case No. 2015-000365, Memorandum Opinion No. 2016-MO-009, 2016 WL 1244403 ( S.C.Sup.Ct. filed March 30, 2016) was filed on March 30, 2016. App. 9-11. The Supreme Court of South Carolina denied the timely petition for rehearing by the State of South Carolina on May 18, 2016. App. 12.

The action is timely filed, and this Court has jurisdiction under 28 U.S.C. § 1257 (a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause; 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.

## STATEMENT OF THE CASE

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 indicted Miller for murder, burglary in the first (1<sup>st</sup>) degree, kidnapping, and possession of a weapon during a violent crime. (*Ind. #s 2010-GS-02-1526, 1527, 1529, & 1578*). Miller proceeded to a jury trial on February 14, 2012 before Circuit Court Judge Doyet A. Early, III. At the conclusion of the trial on February 17, 2012, the jury found Miller guilty as charged. Judge Early sentenced Miller to life imprisonment for murder, life imprisonment for burglary 1<sup>st</sup> degree, thirty (30) years for kidnapping, and five (5) years imprisonment for weapon charge. (R. 1-31, 33-118, 129-223, 229-87, 289-333, 338-404,

408-67, 469-94, 582, 501-02).

*The Appeals to the South Carolina  
Appellate Courts*

*a. The South Carolina Court of  
Appeals*

Miller appealed to the S.C. Court of Appeals arguing the trial judge erred in finding the affidavit contained sufficient probable cause for the search warrant's issuance. The State argued: (1) the affidavit contained sufficient probable cause for its issuance; (2) even if the affidavit failed to do so, the "good faith" exception to the search warrant requirement would apply; (3) inevitable discovery may apply; (4) the exclusionary rule is not automatic and should not apply in this case where there was no police misconduct, and (5) the admission of the fruits of the search warrant was harmless beyond a reasonable doubt given the other overwhelming evidence of Miller's guilt independent of that found in his residence. The Court of Appeals affirmed in an unpublished opinion finding the search warrant affidavit contained sufficient probable cause for the issuance of the search warrant. The Court of Appeals stated: "[W]e find the trial court did not err in denying Miller's motion to suppress the evidence located in a residence because given all the circumstances set forth in the search warrant affidavit, there was a fair probability evidence of a crime would be found in the residence identified. Thus, the trial court correctly found the magistrate had a substantial basis for concluding probable cause existed to issue the warrant. [cites

omitted].” *State v. Antonio Miller*, Appellate Case No. 2012-208640, 2014-UP-409, 2014 WL 6488693, (S.C.Ct.App. filed November 19, 2014).<sup>1</sup>App. 2-7. Miller’s petition for rehearing was denied.

***b. The South Carolina Supreme Court***

Miller appealed to the S.C. Supreme Court arguing the Court of Appeals erred. Miller filed a Petition for Writ of Certiorari raising the search warrant issue on which the Court of Appeals affirmed. The South Carolina Supreme Court granted certiorari and allowed briefing on the following question:

Whether the Court of Appeals erred by affirming the refusal to suppress evidence located within the North Main Street home where the seized cocaine and guns were located in automobiles in the yard of that address, the search warrant affidavit did not provide the Magistrate with a reliable sufficient nexus to provide probable cause that this was petitioner’s home, and if it was his house, that he was secreting drugs, weapons, or the fruits of the Aiken murder within that home?

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<sup>1</sup> The Court of Appeals vacated the sentence on the kidnapping indictment pursuant to S.C. Code Ann. Sections 16-3-910 and 16-3-20.

The State filed a responsive brief arguing: (1) the Court of Appeals did not err, (2) even if the Court of Appeals erred, the “good faith” exception would apply, (3) inevitable discovery may apply, (4) the exclusionary rule should not apply under the facts of this case where there was no flagrant police misconduct or systemic negligence, and (5) the admission of the evidence was harmless beyond a reasonable doubt in light of the overwhelming evidence of Miller’s guilt independent of that found in his residence.

The S.C. Supreme Court reversed the Court of Appeals and vacated Miller’s convictions in an unpublished memorandum opinion, summarily finding: “[W]e find the affidavit, which was not supplemented with oral testimony, failed to establish probable cause that evidence of a crime may be contained within the residence sought to be searched.” *State v. Antonio Miller*, Appellate Case No. 2015-000365, Memorandum Opinion No. 2016-MO-009, 2016 WL 1244403 ( S.C.Sup.Ct. filed March 30, 2016). App. 9-11. The lower court did not address whether the “good faith” exception applied, whether the exclusionary rule should even apply under the facts of this case, or whether the admission of the evidence was harmless beyond a reasonable doubt given the other evidence of Miller’s guilt. *Id.* Instead, the South Carolina Supreme Court stated, after reversing and vacating Miller’s convictions and granting him a new trial,

“note should the State seek to retry petitioner, it will be permitted to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.” *Id.* App. 11.

### ***The State’s Petition for Rehearing and Denial***

Respondent filed a Petition for Rehearing on separate grounds arguing: (1) the Court of Appeals did not err in its conclusion that probable cause existed in the warrant affidavit; (2) the S.C. Supreme Court failed to address whether the “good faith” exception applied and that it should apply; (3) the Court failed to address whether the exclusionary rule even applied under the facts of this case and it should not be applied; (4) the Court failed to address whether inevitable discovery may apply; (5) as a proper alternative, the Court should have remanded the case to the trial judge for these determinations instead of vacating Miller’s convictions and granting a new trial; and (6) the Court failed to address whether the admission of the evidence from Miller’s residence was harmless beyond a reasonable doubt given the other overwhelming evidence of Miller’s guilt independent of the fruits of the search. *State v. Miller, Petition for Rehearing.* The S.C. Supreme Court denied the Petition for Rehearing without opinion. **App. 12.**

### **The Crime**

Antonio Miller ("Miller"), and two (2) co-defendants, dressed in all black, burglarized the home of Fred Tucker ("the victim") in Aiken County, S.C. on Monday morning, September 15, 2008, to rob Tucker. Another co-defendant, Melvin Cummings ("Cummings"), acting as "the wheel man," waited nearby operating a green Ford Taurus rented earlier by Miller and his wife Diedre King Miller in Columbia, S.C. (R. 162-184, 297-355, 394-400). Once inside the victim's home, Miller, Marquis Redfield ("Redfield"), and Ronald Grooms ("Grooms") beat, shot, and stripped the victim naked, and then bound his hands and feet with duct tape. The victim was tortured with a screwdriver heated using a kitchen stove unit. The three (3) burglars then ransacked the victim's home looking for money and/or drugs and stole a bag of crack cocaine. Before leaving the home, Miller shot the victim with a handgun to leave no witnesses. R. 129-95, 256-288, 297-404. 408-508. The three (3) perpetrators then fled out the home's back door and ran in the direction of where Cummings was waiting with the rented Taurus.

The victim crawled or dragged himself to his front door where he died as a result of the last gunshot wound. When police arrived, they found the victim's body still nude with his hands and feet still bound with tape. Police also found a bloody shoe impression, fired bullets and bullet fragments, and fired shell casings.

Cummings, driving the green Taurus, picked up the three (3) perpetrators near the victim's home

almost immediately after the crimes, and all of the men rode together back to Columbia, S.C. where all of the men lived. Cummings was dropped off at a book store where his girlfriend worked, and Grooms was dropped off at another location. Miller and Redfield returned to Miller's residence at 5520 North Main Street in Columbia, S.C. in the rental car.

While the crimes were being committed in Aiken County, police in Columbia, S.C. responded to the car rental agency where Miller and his wife had rented the Taurus, because the car had not been returned in a timely fashion, i.e. a breach of trust or failure to return rental property. Columbia police were unaware the crimes were being committed in Aiken. Unknown to Miller and his co-defendants, the car was equipped with a Global Positioning System (GPS) and a kill switch that allowed the rental agency to determine where the car was at any time and to turn off the car wherever located. At that time, the GPS showed the car was in Aiken County, and the responding officer instructed the rental agency not to turn off the car until it returned to Columbia.

After Miller and Redfield returned to Miller's residence in the rental car, the rental agency checked their computer again and noted the car was in the vicinity of Miller's residence. R. 12. Columbia police were contacted and responded to a location near Miller's residence and saw the car backed up to the back porch of Miller's home.

### *The Search of the Green Taurus*

Police drove to Miller's residence to recover the car for the rental agency, and Cummings turned into the driveway in front of police in his own car. Cummings was arrested for driving under suspension. A gun was found under Cummings' driver's seat, and he was charged with this as well. Miller fit the description given police by the rental agency as the person who made the last several payments on the car; a black male with dreadlocks and a deformed right arm. Miller denied to Columbia police he was Antonio Miller, giving a false name. Police determined almost immediately the name was a false identity.

Police conducted an inventory of the green Taurus which belonged to the rental agency and had not been returned in a timely fashion. In the driver's door, police found a bag of over ten (10) grams of crack cocaine. Unknown to police, this was the crack cocaine stolen from the victim's home in Aiken. Miller admitted this bag of crack was his, and was charged with trafficking in crack. In the glove box, police found a copy of the car rental contract that showed the residence at which police found the car was Miller's wife's residence. In the trunk, police found two (2) black t-shirts. Miller's fingerprints were also found in the green Taurus. Police also found a gun in the back seat of Cummings' car, which Miller admitted was his. Cummings also told police this gun was Miller's and not his. Redfield, who was standing on the back porch, was found in possession of a small bag of cocaine. Redfield's clothes later tested positive for the victim's DNA.

Miller's wife then arrived at her residence and spoke with police. Miller attempted to signal her to not tell police who he was. Eventually, she told police Miller's real name. She was arrested for failure to return rental property.

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, 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 he did not know Cummings, but asked Brown if he had heard 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. (R. 37-62; 224-55).

### ***The Challenged Search Warrant for 5520 North Main Street***

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 Inv. 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 police had learned earlier from the manager] and what police had found there at 5520 N. Main St. 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. Although police had already determined the residence was that of Miller and his wife, Crane failed to include this in his affidavit. **App. 13-17.**

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, etc. (R. 37-62, 195-212, 212-23, 224-87, Court's Ex. 1 for Suppression Hearing [Search Warrant]). **App. 13-17. R. 596-599.**

***The Seizure From the 5520 North Main Street 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 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) pairs 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.<sup>2</sup> When Aiken County investigators arrived at Miller's residence, they inspected the shoes that had been placed on the patrol car outside the residence. They noticed one (1) of the two (2) pairs 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. Miller admitted to Richland County authorities the

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2 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. (R. 1-31; 39-100, 195-225, 224-87, 427-28, 447-49, 455-56).

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. (R. 37-69, 195-212, 212-23, 224-87, 290-97).

Miller was questioned about who drove the car that morning. Miller admitted he drove the green Taurus that morning but only to Charleston, S.C. and back to Columbia. (R. 39-40, 227-28). Miller denied he had driven the car to or that it had been in Aiken. Cummings claimed he had driven the green Taurus but only to Augusta. (R. 162-89, 227-28, 431-34).

Two (2) of the guns were eventually determined to have fired either projectiles or fired shell casings found in the crime scene in Aiken. The tennis shoes and one (1) gun also contained the victim's DNA. (R. 456-508). A copy of the search warrant and the return were provided to Miller's wife, Diedre King Miller.

### *The Suppression Hearing*

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. Supp. R. p. 1-7. The motions argued that the warrant affidavit [App. 13-17] failed to mention the relevance of the home at 5520 North Main Street or who resided there, failed to mention any connection between Miller and the car where the crack cocaine was located and the 5520 North

Main Street residence. *Id.* 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. (R. 1-31, 33-118, 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].

(R. 117-18).

**REASONS WHY THE PETITION FOR  
CERTIORARI SHOULD BE GRANTED**

I. Certiorari is warranted where the South Carolina Supreme Court failed to consider the applicable “good faith” exception upon request in the instant appeal in light of *U.S. v. Leon* where the evidence was admissible at trial under the exception and a new trial is inappropriate, particularly where Court of Appeals judges, trial judge and magistrate opined that there was “probable cause” shown in the affidavit. The Supreme Court instead deferred its appellate obligation to a new trial setting rather than apply it in the appeal based upon a clear showing of its applicability on the present record or alternately remand it to a lower court to conditionally determine whether it applied in the first instance.

Rather than address the issues before it, the South Carolina Supreme Court stated, after reversing and vacating Miller’s convictions solely based upon the alleged lack of probable cause in the search warrant and automatically granting him a new trial, the Court concluded “should the State seek to retry petitioner, it will be permitted to

argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause." *Id.* (emphasis added). App. 11. Although a close question on probable cause for the affidavit, it is not a close question on the applicability of the "good faith" exception. It refused, upon the State's request in briefing and the petition for rehearing to address the good faith exception. Certiorari is needed to correct this failure.

A state court cannot deprive a litigant of a federal right by omitting to pass upon basic questions of fact. Where a state court fails to pass on evidence or make findings of fact because under their respective views the fact referred to are immaterial, the United States Supreme Court is not relieved from the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 703, 65 S. Ct. 895, 900, 89 L. Ed. 1296 (1945). Of course, in constitutional cases, the Supreme Court has the power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that the Court will re-examine, as a court of first instance, findings of

fact supported by substantial evidence. *Norton Co. v. Dep't of Revenue of State of Ill.*, 340 U.S. 534, 538, 71 S. Ct. 377, 380, 95 L. Ed. 517 (1951). In *United States v. Hastings*, 461 U.S. 499, 512, 103 S. Ct. 1974, 1982, 76 L. Ed. 2d 96 (1983), the Court reversed the order of a new trial and remanded to the lower court “because other contentions were advanced by respondents that were not treated in the court’s opinion, we remand to allow the Court of Appeals to consider such other claims if respondents elect to press.” In *Hedgpeth v. Pulido*, 555 U.S. 57, 62, 129 S. Ct. 530, 533, 172 L. Ed. 2d 388 (2008), the Court remanded an appeal to the 9<sup>th</sup> Circuit to apply the appropriate harmless error standard under *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) in the first instance when the 9<sup>th</sup> Circuit had previously reversed automatically on an erroneous conclusion that the particular error was a structural error not subject to harmless error consideration. *Skilling v. United States*, 561 U.S. 358, 414, 130 S. Ct. 2896, 2934, 177 L. Ed. 2d 619 (2010). In *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), for example, the Supreme Court did not hesitate to remand a case for “a detailed explanation based on the record” when the lower court failed to undertake an explicit analysis supporting its “cryptic,” one-sentence conclusion of harmless error. *Id.*, at 753, 110 S.Ct., at 1451.

The State recognizes that seeking review of the “good faith” exception when the lower court failed to do so is a significant step. In *Tuggle v. Netherland*, 516 U.S. 10, 14, 116 S. Ct. 283, 285–86, 133 L. Ed.2d 251 (1995), the Court held because it customarily does not address harmless error in the first instance, the Court vacate the judgment of the Court of Appeals and remanded the case for further proceedings. However, the State notes that while a remand for this assessment would be appropriate, the South Carolina Supreme Court failed to do so prior to its conclusion and inconsistent mandate.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held even when a search warrant affidavit fails to contain probable cause, the fruits of that warrant will not be suppressed where the officers who executed the warrant relied on the search warrant in good faith. *Id.* The South Carolina Supreme Court has previously recognized the “good faith” exception. *State v. Robinson*, 415 S.C. 600, 785 S.E.2d 355 (2016); *State v. Herring*, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009).

Certiorari is needed to address the abdication in this case of its appellate responsibility to avoid unnecessary trials. It is revealed that the lower court completely failed to do what it is suggesting a new trial court do: “to [determine] the evidence seized pursuant to the invalid search

warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.” The South Carolina Supreme Court implicitly held that it had not performed any assessment under whether the exclusionary rule should apply, whether there was a “good faith” exception applicable and did not assess the record for harmless error. In its order, it is silent about whether the exclusionary rule or good faith would even apply by the breath of the language in its new trial directive. Certiorari is warranted to either direct the lower court to make this “good faith” exception assessment or for this Court to make it on the available record.

The evidence recovered from Miller’s residence is admissible under the “good faith” exception to the warrant requirement. *Herring v. United States*, 555 U.S. 135 (2009); *Leon*, 468 U.S. 897; *United States v. Williams*, 548 F.3d 311 (4<sup>th</sup> Cir. 2008).<sup>3</sup> As the Court made clear in *Herring v. United States* 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

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<sup>3</sup> Judge Early also did not reach the “good faith” exception issue because he found the search warrant affidavit contained sufficient probable cause. R. 117-118.

subsequently invalidated warrant. 468 U.S., at 922, 104 S.Ct. 3405. *Herring, supra* at 142 (emphasis added). The Fourth Circuit addressed the “good faith” exception in *Leon* at length in *Williams*, 548 F.3d 311 and found the deterrence purpose of the exclusionary rule was not served “by an officer acting with objective good faith’ within the scope of a search warrant issued by a magistrate” and “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.’” *Williams, supra* at 317.

*Leon* admonished 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 (internal quotation marks omitted). An officer’s reliance on a warrant would not qualify as “objectively reasonable,” however, in four 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.*

*Williams*, 548 F.3d at 317. See *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975); *State v. Herring*, 387 S.C. 201, at 215, 692 S.E.2d 490.

The test for whether the good faith exception applies is **not** whether there was a substantial basis in the affidavit for the magistrate to find probable cause. *United States v. Williams*, 548 F.3d 311 (4<sup>th</sup> Cir. 2008); *United States v. Bynum*, 293 F.3d 192 (4<sup>th</sup> Cir. 2002). Good faith “is a less demanding showing than the ‘substantial basis’ threshold

required to prove the existence of probable cause in the first place." *Bynum*, 293 F.3d at 195.

The correct standard is whether a reasonably well trained officer, in light of all the circumstances, would have known that the search was illegal despite the magistrate's authorization. And, good faith will not apply when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 92-23; *Bynum* at 195.

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 warrant police searched Miller's residence for drugs and items related to drug trafficking or distribution and recovered the weapons and the counterfeit tennis shoes. The affidavit was *not based on an informant's information*, but on facts developed in a joint investigation by **Richland County and Columbia police officers**. Corroboration was not necessary. *Illinois v. Gates*.<sup>4</sup>

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<sup>4</sup> See *United States v. Ventresca*, 380 U.S. 102, 108 (1965)(an affiant seeking a search warrant can base

Police had been informed earlier in the morning that the car rented by Miller and his wife had not been returned in a timely fashion. Police were informed Miller made the last several payments on the rental car in person, and Miller most probably would be driving the car. Police were informed Miller was an African-American male with dreadlocks and a deformed arm. Officer Day was shown the rental agreement by the rental agency manager that morning prior to the car's recovery. (R. 180, 197, 216). The rental agreement states Miller's wife initially rented the car and resided at *5520 N. Main St., Columbia* (R. 442, ll. 2-15, 514,601, State's Ex. 58). Later in the day, police were contacted by the rental agency and informed the car was located in the vicinity of *5520 N. Main St.*, and police confirmed the car was parked in that residence' yard. Police went to the location and seized the un-returned rental car. Miller was there within 2 feet of the car standing on the back porch. Miller's wife was not there. Miller gave police a false identity. Miller matched the description of Antonio Miller, the person who should be operating the car. A lawful inventory search of the car, which belonged to the rental agency, discovered 22 grams of crack cocaine in the driver's door and a copy of the rental agreement was found in the glove

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his information on information in turn supplied to him by fellow officers in a joint investigation).

compartment. (R. 389).<sup>5</sup> Miller admitted the 22 grams of crack was his and a gun found in Cummings' vehicle was his. Miller's wife then appeared at their residence and eventually confirmed Miller's true identity. The record shows police determined who the homeowner was before getting the search warrant. (R. 257, ll. 10-19).

On this record, none of the four 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 *State v 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

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<sup>5</sup> The rental agency also gave police a signed consent to search the vehicle.

something was located in the room which he did not want police to discover). Given the undisputed facts known by the officers, officers had probable cause to search the residence. *United States v. Angulo*, 791 F.2d 1394, 1399 (9<sup>th</sup> Cir. 1986). And, the officers' actions show they relied in good faith on the search warrant. Officers served Miller's wife with the warrant and return.

The Fourth Circuit has rejected arguments similar to those made by Miller in this case, finding the good faith exception applied. *United States v. McKenzie-Gude*, 671 F.3d 452 (4<sup>th</sup> Cir. 2011)(applying good faith where officers failed to include residence was defendant's); *United States v. Lalor*, 996 F.2d 1578 (4<sup>th</sup> Cir. 1993)(applying good faith exception); *United State v. Johnson*, 629 Fed. Appx. 478, 2015 WL 6467907 (4<sup>th</sup> Cir. 2015)(Unpublished)(applying good faith even though illegal activity was not directly linked to the residence).

In this case, this was Miller's actual residence, and Miller was arrested immediately adjacent to his residence for the crack cocaine found immediately adjacent to Miller and the residence in the *green Taurus that he made the last several payments on and admitted he was driving that day*. Miller admitted this crack cocaine was his. In such

a situation, the good faith exception applies. *Davis, supra; United States v. Herring; Leon.*

Further, as recognized by the Supreme Court and the Fourth Circuit, disagreement among judges as to the existence of probable cause indicates that the officers' reliance on the warrant was objectively reasonable. *Leon*, 468 U.S. at 926; *United States v. Lator*, 996 F.2d 1578, 1583 (4<sup>th</sup> Cir. 1993). Here, five (5) different judges passed on this warrant and found this warrant contained sufficient probable cause: the state court magistrate, Judge Early, and an entire panel of the South Carolina Court of Appeals. If five (5) different trained jurists passed on the sufficiency of this warrant and found probable cause, how can the South Carolina Supreme Court say a police officer looking at this warrant, **and** knowing the undisputed facts discussed above, would have realized the warrant was invalid and he was acting illegally. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel between the Court of Appeals and Supreme Court make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is

inappropriate. The good faith exception applies. Miller's convictions should be affirmed upon a grant of certiorari.

**II. Certiorari is warranted where the South Carolina Supreme Court acknowledged that the exclusionary rule may not apply where the record supported that it should not apply. Simply put, it awarded the windfall of a new trial without even determining whether the exclusionary rule would apply and instead held for a new trial judge "to [determine whether] the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause."**

Miller is not entitled to a new trial because the "windfall" remedy of a new trial is not "appropriate to the violation." The grant of relief of a new trial in this setting is an unentitled windfall and not in the public interest. There was no showing or finding by the South Carolina Supreme Court that the alleged constitutional violation affected the outcome of the trial or the exclusionary rule required the exclusion of any seized evidence. In the appeal, the South Carolina Supreme Court gave

Miller a new trial based solely on its new conclusion that the search warrant affidavit lacked probable cause. It made no determination that any evidence admitted from the search was inadmissible. In the absence of any deference to the trial court or Court of Appeals, it relinquished that responsibility and blindly directed a new trial without ever determining whether the exclusionary rule even applied. Instead, the state court implicitly opined it was not considering the applicability of the exclusionary rule by declaring at the new trial the State will be permitted “ to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.” *State v. Miller, supra.* App. 11.

The State submits that the exclusionary rule would not apply to this case. The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. *Davis v. United States*, 131 S.Ct. 2419 (2011). The 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 Fourth 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.* Again, although a close question on probable cause for the affidavit, it is not a close question on the inapplicability of the exclusionary rule.

The “Supreme Court has narrowly interpreted the scope of the exclusionary rule in recent years.” *Hudson v. Michigan*, 547 U.S. 586 at 591-94 (2006) (noting exclusionary rule generates “substantial societal costs”). The fact that a Fourth Amendment violation was found to occur – i.e. a search or arrest was unreasonable – does not mean the exclusionary rule applies or that a new trial is automatically warranted. *Herring*, 555 U.S. 135, citing *Gates*, 462 U.S. at 233. “Indeed, exclusion ‘has always been our last resort, not our first impulse,’ [*Hudson*, 547 U.S. at 591], and our precedents establish important principles that constrain application of the exclusionary rule.” *Herring*, at 140. The Supreme Court “has repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.” *Id.*, citing *Leon*, 468 U.S. at 905-906. 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 (1974); *Stone v.*

*Powell*, 428 U.S. 465, 486 (1976). The exclusionary rule applies only where it “result[s] in appreciable deterrence.” *Herring, supra, quoting Leon, supra*, at 909, (*quoting United States v. Janis*, 428 U.S. 433, 454 (1976)).

In addition, the benefits of deterrence must outweigh the costs. *Herring, supra, citing Leon, supra* at 910. “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” *Id.* at 141, *citing Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 368 (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.” *Id., quoting Illinois v. Krull*, 480 U.S. 340, 352-53 (1987)(internal quotation marks omitted).

When police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for 4<sup>th</sup> Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Davis*, at 2427, *citing Herring*, 555 U.S. at 144. But when the police act with an objectively “reasonable good-faith belief” their conduct is lawful, *Leon, supra*, at 909 (internal quotation marks omitted), or when their conduct involves only simple, “isolated” negligence, *Herring, supra* at 137, the “deterrence rationale

loses much of its force,” and exclusion cannot “pay its way.” *Davis*, at 2427-28 citing *Leon*, *supra* at 919, 908, n. 6 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (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.” *Leon*, 468 U.S. at 918. “In analyzing the applicability of the [exclusionary] rule, *Leon* admonished that we must consider the actions of the police officers involved.” *Herring*, 555 U.S. at 140, citing *Leon*, 468 U.S. at 923, n. 24.

**Under the circumstances of this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. *Id.*; See *Gates*, 462 U.S. 213 (recognizing 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. *See United States v. Angulo*, 791 F.2d 1394, 1399 (9<sup>th</sup> Cir. 1986) ("In the case of drug dealers, evidence is likely to be found where the dealers live."). *See Illinois v. McArthur*, 531 U.S. 326 (2001). Additionally, after officers executed the search warrant they served a copy of the warrant and return on Miller's wife. At most, officers either failed to communicate to the investigator/affiant the residence belonged to Miller and his wife, or the investigator/affiant 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*. The evidence seized from Miller's residence should not be excluded.

Certiorari is warranted to determine the applicability of the exclusionary rule. After conducting the appropriate balancing test, the Supreme Court must find the exclusionary rule should not apply.

**III. The South Carolina Supreme Court failed to assess the effect of the alleged violation and complete a harmless error evaluation before awarding a new trial, particularly when it concluded that the seized evidence may be admissible under an exception.**

Even if Judge Early erred in admitting the fruits of the search of Miller's North Main Street residence pursuant to the search warrant, particularly the murder weapons and the counterfeit tennis shoes with the victim's DNA on them, the admission of this evidence was harmless because the evidence of Miller's guilt was overwhelming. The harmless error principle specifically requires "the beneficiary of a constitutional error to *prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.*" *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (emphasis added). See *Chambers v. Maroney*, 399 U.S. 42, 52-53, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (applying harmless-error analysis to evidence

allegedly admitted in violation of the Fourth Amendment). See 4 LaFare, Search and Seizure, A Treatise on the Fourth Amendment (2 Ed. 1987) 531-537. The South Carolina Supreme Court in this case performed no harmless error assessment before it granted a new trial because it refused to even resolve whether any seized evidence would have even been excluded.

At Miller's trial, Melvin Cummings testified as a State's witness describing how Miller hatched the plan to rob the victim and how they "cased" the victim's home over several days before committing the crimes. Cummings admitted he was "the wheel man" in the crimes, and the men had stayed at his mother's home in Aiken for several days preceding the murder. Cummings testified to admissions made by Miller, Grooms, and Redfield upon returning to the getaway car after the crimes, including that they had killed the victim and had also tortured him with a heated screwdriver. Cummings eventually led police to a screwdriver discarded from the car during the flight from the crime scene. Cummings admitted he drove all of the men back to Columbia, immediately after the crimes, where he was dropped off at a book store where his girlfriend worked. He then drove to Miller's residence in his own car to assist with the return of the green Taurus, when he was blocked in and arrested by Columbia police. R. 297-355.

Cummings mother also testified, consistent with the statement she gave police shortly after her

son's arrest, placing Miller at her home in the days leading up to the murder and on the morning of the murder. She also incriminated her son by placing him in the company of Miller and his two (2) other co-defendants. She also identified the green Taurus as the car the four (4) men arrived at her home in and the car they were using while at her home. R. 190-95.

A neighbor of the victim testified that on the morning of the murder, she heard several gunshots coming from the victim's home, and she then saw three (3) men, dressed in all black, flee from the back door of the victim's home one (1) at a time. She testified one (1) of these men had dreadlocks. She also testified the men fled in the direction away from her residence, which was in the direction where Cummings was waiting with the green Taurus. (R. 143-56).

Another neighbor, who lived on the other side of the victim's home, testified she was standing with Cummings looking at a car she had for sale in her yard, when several gunshots were fired in the victim's home. She testified when she turned around, Cummings had gotten into the green car he was driving, and he pulled down her driveway and stopped, and appeared to waiting on someone. (R. 156-62)

The manager of the car rental agency testified Miller's wife initially rented the green Taurus, and Miller made the last several rental payments in person and was in possession of the car. He also testified Miller had dreadlocks at the time,

and he had given Columbia police a description of Miller: a black male with dreadlocks and a deformed right arm. R. 163-185. The rental contract was also introduced through the manager which showed 5520 N. Main Street, Columbia, S.C. was the residence of Miller's wife, Diedre King Miller. R. 601.

The State also introduced the GPS computer program from the rental agency which showed: (1) the car rented by Miller was in close proximity to the victim's home in Aiken at the time of the murder; (2) the green Taurus then drove from the area of the victim's home back to Columbia, near the location of the bookstore at which Cummings' girlfriend worked; and (3) the car then returned to Miller's residence. Finally, the GPS showed the car rented by Miller had not been to Charleston that day but only to Aiken and back to Columbia. (R. 162-88, 195-212).

The State also introduced a surveillance video from the bookstore which showed Miller and Cummings together in the store shortly after the murder but with sufficient time to have driven from Aiken to Columbia after committing the murder. In the video, Miller can be seen wearing the gold counterfeit Nike tennis shoes police confiscated. (R. 327-32).

The State introduced Miller's incriminating statements made at his residence, the rental contract found in the glove box of the green Taurus, Miller's fingerprints found in the car, and the two (2) black t-shirts found in the trunk. The State also

introduced the fact that the victim's DNA was found on Redfield's clothing, which he was wearing when apprehended on Miller's back porch.

The State also introduced evidence the green Taurus, used in the crime, was discovered by police backed up to Miller's residence. Within the green Taurus, was a bag of over ten (10) grams of cocaine which was linked to the victim's murder through a co-defendant. Miller, Cummings, and Redfield were all arrested together in close proximity to the green Taurus and Miller's residence.

Petitioner offered no testimony or evidence at trial. State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)(in determining on appeal whether an error was harmless this Court may consider the fact the defendant did not contravene or dispute the state's evidence with any testimony or evidence).

The evidence of Miller's guilt was overwhelming *independent of what was found in his residence*. As a result, based on the South Carolina Supreme Court's own precedent, even if the admission of the fruits of the search of Miller's home was erroneous, its admission was harmless given the evidence of Miller's guilt introduced at trial independent of that found in Miller's home. As a result, certiorari should be granted and Miller's convictions must be affirmed.

## CONCLUSION

For the reasons set forth above, the State of South Carolina submits that certiorari should be granted and the opinion of the South Carolina Supreme Court be reversed or vacated. Alternately, The State asserts that the judgment should be vacated and the matters remanded to the South Carolina Supreme Court for it to address the existence of the "good faith" exception, the exclusionary rule and whether harmless error exists in the record.

Respectfully submitted,

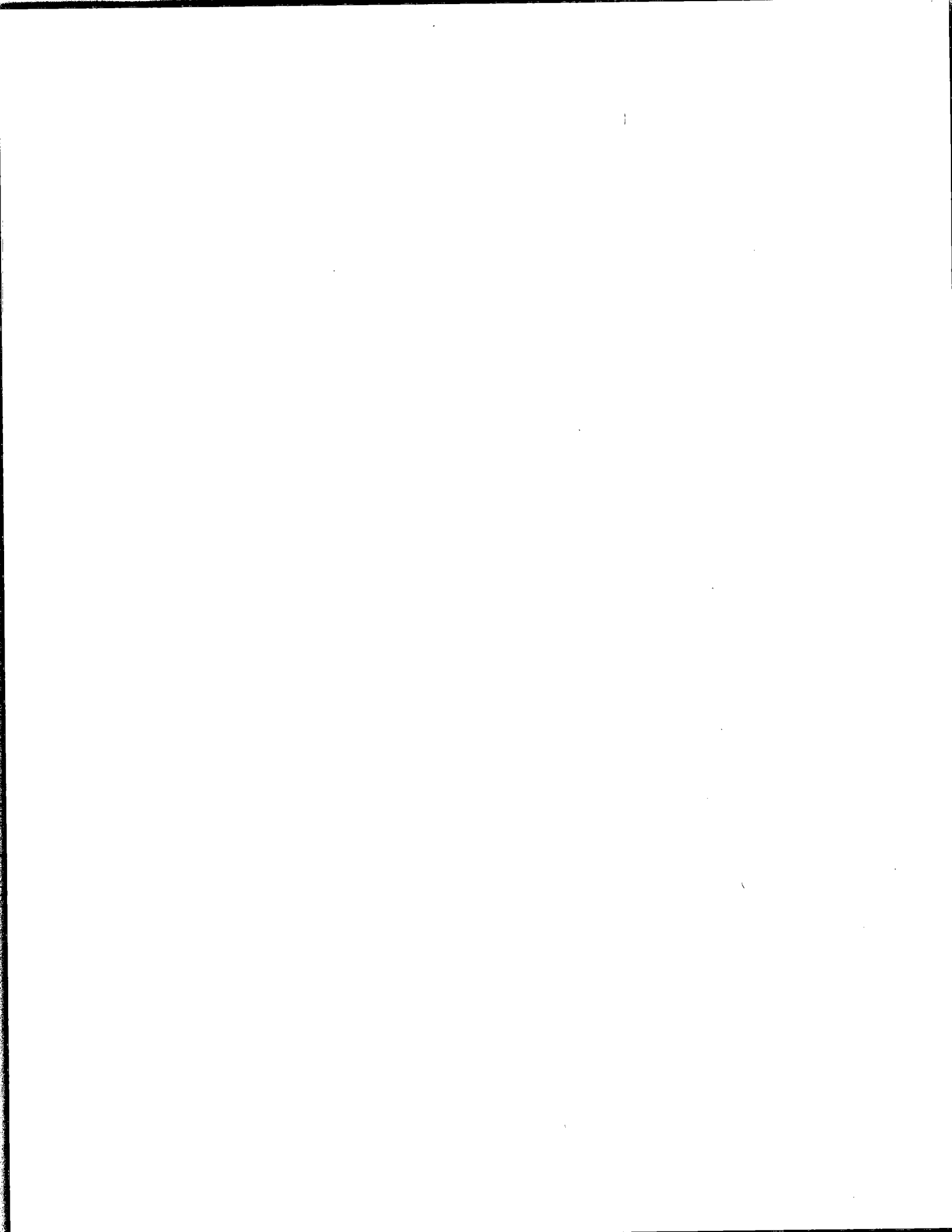
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August 16, 2016



APPENDIX

- A. *State v. Antonio Miller*, Appellate Case No. 2012-208640, 2014-UP-409, 2014 WL 6488693, (S.C.Ct.App. filed November 19, 2014).....App. 2
  
- B. *State v. Antonio Miller*, Appellate Case No. 2012-208640, Order Denying Rehearing (S.C.Ct.App. filed January 26, 2015),,, .App. 7
  
- C. *State v. Antonio Miller*, Appellate Case No. 2015-000365, Order Granting Certiorari (S,C,Sup,Ct. filed May 20, 2015).....App. 8
  
- D. *State v. Antonio Miller*, Appellate Case No. 2015-000365, Memorandum Opinion No. 2016-MO-009, 2016 WL 1244403 (S.C.Sup.Ct. filed March 30, 2016).....App. 9
  
- E. *State v. Antonio Miller*, Appellate Case No. 2015-000365, Order Denying Petition for Rehearing (S.C.Sup.Ct. filed May 18, 2016).....App. 12
  
- F. Search Warrant Affidavit, Search Warrant, 5520 North Main Street, September 15, 2008 - Court Exhibit One, .....App. 13

**The South Carolina Court of Appeals**

**The STATE, Respondent,**

**v.**

**Antonio MILLER, Appellant.**

**Appellate Case No.2012-208640.**

**No. 2014-UP-409.**

Heard Oct. 6, 2014.

Filed Nov. 19, 2014.

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

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Mabry, all of Columbia, and Solicitor James Strom  
Thurmond, Jr., of Aiken, for Respondent.

Opinion

**PER CURIAM:**

Antonio Miller appeals his convictions of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. Miller argues (1) the trial court erred in denying his motion to suppress the evidence located in a residence because the search warrant affidavit did not provide the magistrate with a reliable sufficient nexus to provide probable cause that the residence was his home and he was hiding drugs, weapons, or the fruits of a murder within the home and (2) his sentence for kidnapping should be vacated because it was improper due to his sentence for murder. We affirm in part and vacate in part.

1. We find the trial court did not err in denying Miller's motion to suppress the evidence located in a residence because given all the circumstances set forth in the search warrant affidavit, there was a fair probability evidence of a crime would be found in the residence identified. Thus, the trial court correctly found the magistrate had a substantial basis for concluding probable cause existed to issue the warrant. *See State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct.App.2003) ("A magistrate may issue a search warrant only upon a finding of probable cause."); *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) ("The South Carolina General Assembly has enacted a requirement that search warrants may be issued

'only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant.' " (quoting S.C.Code Ann. § 17-13-140 (1985)); *Dupree*, 354 S.C. at 684, 583 S.E.2d at 441 ("The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause."); *id.* ("The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued."); *id.* at 685, 583 S.E.2d at 442 ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, 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 the particular place to be searched."); *State v. Sullivan*, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) (providing affidavits should be viewed in a common sense and realistic fashion because they are not meticulously drawn by lawyers); *id.* ("Search warrants are constitutionally preferred and in determining whether they should issue, magistrates are concerned with probabilities and not certainties."); *Dupree*, 354 S.C. at 683, 583 S.E.2d at 441 ("The appellate court should give great

deference to a magistrate's determination of probable cause."); id. at 684, 583 S.E.2d at 441 ("In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention."); id. at 683, 583 S.E.2d at 441 ("Our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed."); id. (stating the term "probable cause" does not import absolute certainty); id. at 683-84, 583 S.E.2d at 441 ("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.").

2. We find Miller's sentence for kidnapping was improper due to his sentence for murder and should be vacated. See S.C.Code Ann. § 16-3-910 (2003) ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20 ." (emphasis added)); *State v. Vick*, 384 S.C. 189, 201, 682 S.E.2d 275, 281 (Ct.App.2009) ("Our courts have long held, where an appellant has been sentenced for murder of a victim,

this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated.”); *id.* at 202, 682 S.E.2d at 282 (“[O]ur courts have, in the past, ‘summarily vacated’ sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute.”); *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (noting the appellate courts have “summarily vacated” sentences for kidnapping when the defendant received a concurrent sentence under the murder statute). Therefore, we affirm Miller’s conviction for kidnapping, but vacate his sentence for kidnapping. *See Vick*, 384 S.C. at 203, 682 S.E.2d at 282 (affirming Vick’s convictions, but vacating the clearly erroneous kidnapping sentence in the interest of judicial economy “because the State concedes the kidnapping sentence was erroneously imposed” and “our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand”).

AFFIRMED IN PART AND VACATED IN PART.

HUFF, SHORT, and KONDUROS, JJ., concur.

**The South Carolina Court of Appeals**

**The STATE, Respondent,**

**v.**

**Antonio MILLER, Appellant.**

**Appellate Case No.2012-208640.**

**ORDER**

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

s/ Thomas E. Huff

s/ Paul E. Short, Jr.

s/ Aphrodite Konduros

Filed : January 26, 2015

**The Supreme Court of South Carolina.**

**The STATE, Respondent,**

**v.**

**Antonio MILLER, Petitioner.**

**Appellate Case No. 2015-000365.**

**No. 2016-MO-009.**

**ORDER**

We grant the petition for writ of certiorari to review the Court of Appeals' decision in *State v. Miller*, Op. No.2014-UP-409 (S.C.Ct.App. filed Nov. 19, 2014). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

May 20, 2015

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**The Supreme Court of South Carolina.**

**The STATE, Respondent,**

**v.**

**Antonio MILLER, Petitioner.**

**Appellate Case No. 2015-000365.**

**No. 2016-MO-009.**

Heard Jan. 12, 2016.

Decided March 30, 2016.

**ON WRIT OF CERTIORARI TO THE COURT  
OF APPEALS.**

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

Chief Appellate Defender Robert Michael Dudek, of  
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief  
Deputy Attorney General John W. McIntosh, Senior  
Assistant Deputy Attorney General Donald J.  
Zelenka, and Assistant Attorney General J.  
Anthony Mabry, all of Columbia, and Solicitor  
James Strom Thurmond, Jr., of Aiken, for  
Respondent.

**PER CURIAM:**

We granted certiorari to review the Court of Appeals' decision affirming the trial judge's finding that the affidavit supporting the search warrant issued for petitioner's residence established the requisite probable cause. *See State v. Miller*, Op. No.2014-UP-409 (S.C. Ct.App. filed Nov. 19, 2014). We find the affidavit, which was not supplemented with oral testimony, failed to establish probable cause that evidence of a crime may be contained within the residence sought to be searched. *See State v. Kinloch*, 410 S.C. 612, 616, 767 S.E.2d 153, 155 (2014) (applying the fair probability standard and stating the duty of a reviewing court is to ensure the magistrate had a substantial basis for its probable cause determination (*citing State v. Bellamy*, 336 S.C. 140, 143-45, 519 S.E.2d 347, 348-49 (1999))); *State v. Tench*, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) (asserting the magistrate must make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched (citation omitted)); *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a

finding of probable cause.” (citation omitted); *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding mere conclusory statements which give a magistrate no basis to make a judgment regarding probable cause are insufficient as the magistrate’s actions “cannot be a mere ratification of the bare conclusions of others” (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983))); *State v. Viard*, 276 S.C. 147, 149, 276 S.E.2d 531, 532 (1981) (noting the affidavit supporting a search warrant must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause); *State v. Owen*, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981) (“[I]n passing upon the validity of the warrant, a reviewing court may consider only the information brought to the magistrate’s attention.”). Accordingly, we reverse petitioner’s convictions, and note should the State seek to retry petitioner, it will be permitted to argue the evidence seized pursuant to the invalid search warrant may be admissible on some basis independent of our finding that the affidavit did not establish the requisite probable cause.

**REVERSED**

**PLEICONES, C.J., BEATTY, KITTREDGE,  
HEARN, JJ., and Acting Justice JAMES E.  
MOORE, concur.**

**The Supreme Court of South Carolina.**

**The STATE, Respondent,**

**v.**

**Antonio MILLER, Petitioner.**

**Appellate Case No. 2015-000365.**

**No. 2016-MO-009.**

**ORDER**

The Petition for Rehearing filed in the above  
entitled matter is denied.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ James E. Moore A.J.

Columbia, South Carolina

**May 18, 2016**

*The Search Warrant Affidavit Court Exhibit One,*

*App. 597-599.*

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Affidavit

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,**

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#### 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 curtilage.

#### 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.

Sworn to and Subscribed before me  
This 15<sup>th</sup> day of September, 2008

Harold A. Cuff (L.S)      Robert Crane  
Signature of Judge              Affiant

**Richland County Sheriffs Department  
5623 Two Notch Road,  
Columbia, S.C. 29223  
Phone (803)576-3000**

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