No. 16-231

In The

Supreme Court of the United States

October Term, 2016

THE STATE OF SOUTH CAROLINA,
Petitioner,

V.

ANTONIO MILLER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Antonio Miller respectfully requests that this Court deny the petition for writ of certiorari.

To summarize what follows: Even if this Court has jurisdiction, which is questionable given its procedural posture, the present case is not ripe for this Court's consideration since the South Carolina Supreme Court, when it reversed respondent's conviction, invited the State to develop the record on suppression as the remedy in the lower trial court if it chose to retry respondent. In addition, the State does not challenge the South Carolina Supreme Court's holding that the search warrant did not provide probable cause for the search -- the reason for the reversal of respondent's convictions -- it only asserts it was a "close question." Further, South Carolina's search warrant statute and its underlying state jurisprudence provides "a stricter" probable cause standard, and a less generous "good faith" excuse exception than the Federal

Constitution. Moreover, the South Carolina Supreme Court decided this case on adequate and independent state grounds. App. 10-11.

In addition, despite the State's confident assertion otherwise, it is not clear South Carolina ever incorporated the *United States v. Leon*, 468 U.S. 897 (1984) "good faith" exception into state law as it applies to defective search warrants that do not provide probable cause to search on the face of the affidavit, warrant, or by supplemental testimony -- all reasons of federalism for this Court not to intervene in South Carolina's state "good faith" statutory exception.

Finally, the State seems to misunderstand *Chapman v. California*, 386 U.S. 18, 24 (1967) inasmuch as it argues a harmless error analysis is mandatory when an appellate court finds constitutional error. Certiorari petition at 34. Chapman held that constitutional error could be harmless if a court found it harmless "beyond a reasonable doubt." The State also asks this Court to take the extraordinary step of commanding a State court to set forth its reasons why an error is harmless, as if it were a mere scrivener. The error in this case is so obviously not harmless that it is likely the South Carolina Supreme Court believed further elaboration unnecessary.

The South Carolina Supreme Court has given the State a road map for arguing against suppression as the remedy on remand, and to develop a record on these issues. The State should avail itself of that opportunity rather than asking this Court to grant certiorari on an undeveloped record, in a case that is not ripe, and where this case, in its present posture, presents a poor vehicle for this Court to decide these issues.

JURISDICTION

The State asserts that this Court has jurisdiction pursuant to 28 U.S.C. §1257(a). However, as stated, this case was decided by the South Carolina Supreme Court case on adequate and independent state grounds. App. 10-11. This Court therefore would not have jurisdiction to review the decision. *See Republican National Committee v. Burton*, 455 U.S. 1301 (1982). Further, respondent questions if this case constitutes "a final judgment or decree" in a case rendered "by the highest court of a State in which a decision could be had" since in reversing respondent's convictions the South Carolina Supreme Court remanded this case to the trial court inviting the State to make a proper suppression motion record if it chose to retry respondent. App. 1-11. *See* 28 U.S.C. § 1257(a). In addition, the South Carolina Supreme Court did not address any of the three issues presented by the State in its petition for certiorari to this Court, and it remanded this case to the lower court for a new trial with instructions that the State could present these "good faith" arguments as to why the evidence should not be suppressed, and why the exclusionary rule should not apply. Finally, the State also does not challenge the South Carolina Supreme Court's holding before this Court in its certiorari petition that the search warrant was illegal because it was issued without "probable cause."

STATEMENT OF THE CASE

Introduction

The State asserts that: "Antonio Miller murdered Fred Tucker on September 15, 2008 in Aiken County." Certiorari petition at 3. That bold assertion, as well as its claim that: "The South Carolina Supreme Court has previously recognized the [federal] `good faith' exception [in the present defective search warrant context]" is surely disputed herein. In fact, at oral argument

before the South Carolina Supreme Court in this case, when present counsel answered that he was not sure that Court had ever adopted *Leon*, one Justice asked undersigned counsel to "assume" South Carolina had adopted it for the sake of discussing that exception in this case. The fact that the South Carolina Supreme Court reversed in this case, and invited the State to develop a record on these issues if it chose to retry respondent in this case is hardly surprising. *See*, e.g. *United States v. Julius*, 610 F.3d 60 (2d Cir. 2010) (remanding to trial court to determine whether, if that court maintains that the search at issue violated defendant's Fourth Amendment rights, the exclusionary rule should apply in this case). This is a very fact bound case, the record is undeveloped, and it surely is not worthy of this Court's certiorari power.

The defective search warrant

The State, at oral argument before the South Carolina Court of Appeals, contended that contraband being found in a car, on a citizen's property, or in front of a house for that matter, automatically justified the issuance of a search warrant for the citizen's house. As argued below, that position is reckless and dangerous under the South Carolina search warrant statute, South Carolina search warrant precedent, and the Fourth Amendment.

There was nothing before the issuing Magistrate that established a proper nexus between the vehicle in which the contraband was located, and the house searched. In fact, there was no nexus established between respondent and the house, App. 13-16, and the South Carolina Supreme Court properly held: "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." App. 10.

At trial, defense counsel filed three separate motions to suppress. The relevant one in this case involved drugs, guns, and counterfeit tennis shoes found within a North Main Street

residence in Columbia, South Carolina where a green Taurus rental car, that had not been timely returned, was located. Respondent asserted the search violated his Fourth Amendment right against unreasonable searches and seizures, and his right to privacy under Article I § 10 of the South Carolina Constitution. See Defendant's exhibits 1-3; Defense exhibit 3 at 1-3. Supp. R. 5.

The murder in this case occurred on the morning of September 15, 2008 in Aiken, South Carolina. Co-defendant Cummings, who turned State's witness against the other men, was the local man from Aiken. This case was rather unremarkable in that it was unclear which of the men involved did exactly what, but to boldly conclude "Antonio Miller murdered Fred Tucker" (Certiorari petition at 3) is not even supported by the testimony of the State's witness, who knew the local lay of the land, and who was saving his own skin. There was evidence the decedent was a rather wealthy drug dealer in Aiken.

A GPS with a "kill switch" was attached to the rental car, which had been rented by respondent's girlfriend, Deidre King, in Columbia. On September 15, 2008, Officer Franklin Ham of the Richland County Sheriff's Department was dispatched to U-Save Auto Rentals on Two Notch Road. He met manager Jeff Day who informed him that a green Taurus he had rented had not been returned. Day told Ham that the GPS showed the vehicle was in Aiken, South Carolina. He did not want to hit the "kill switch" and disable the vehicle while it was in Aiken. R. 7-9.

The GPS revealed that later in the day the car had returned to shopping center just outside the Columbia city limits. This was shortly after noon. The car was then traced to 5520 North Main Street in Columbia. R. 12.

In the motion to suppress, defendant's exhibit #3, the defense argued "the search warrant contained insufficient information for the Magistrate to find probable cause to issue the warrant."

Motion at p. 2; Supp. R. 6. The motion noted that the police had a report that the stolen car - - a rental car rented by Deidra Miller - - was located at 5520 North Main Street. The affidavit to the search warrant stated that respondent was arrested for trafficking in crack cocaine when crack cocaine was discovered in the vehicle. The affidavit also asserted that respondent had twelve prior arrests for illegal narcotics. R. 598.

A search of the North Main residence resulted "in the seizure of weapons that the state alleges to be linked to the scene of the murder [in Aiken] through a ballistics match as well as DNA evidence. The state also recovered shoes that the state alleges to be linked to the crime. The state also alleged that money and crack cocaine seized are from the home of the victim." Supp. R. 5. Again, the fact the South Carolina Supreme Court did not put pen to paper on a harmless error analysis in this case should not be shocking.

The motion noted that the affidavit failed to "list any information about the relevance of the home at 5520 North Main Street or who resided there." (emphasis added). It alleged the Magistrate could not make a practical, common sense decision of whether, given the totality of the circumstances put forth in the affidavit, including the veracity and basis of knowledge of the person supplying information, that there was a fair probability that contraband or evidence of a crime will be found in a particular place. Supp. R. 6.

Respondent further argued the affidavit failed to mention any connection between respondent and the car where the crack cocaine was located, and the residence at 5520 North Main Street. It was undisputed that no additional information outside of the affidavit was presented to the Magistrate. Supp. R. 6.

The motion demonstrated that the police only made conclusory statements in the affidavit for the search warrant. Thus, pursuant to the Fourth Amendment to the United States

Constitution, and Article I, § 10 of the South Carolina Constitution, the search was unreasonable and a violation of respondent's right to privacy. Supp. R. 6. As will be seen infra, the trial judge summarily rejected these arguments -- without any meaningful discussion or argument -- in ruling this incriminating evidence was admissible in this murder case.

The trial theory of the crime

The State's theory of the case was that respondent and three other men, including the State's star witness, co-defendant Melvin Cummings, from Aiken, targeted the Aiken decedent because he was a drug dealer. The state tracked the green Taurus, through the rental car agency, to Aiken at about the time the decedent's house was burglarized, and he was killed. The state essentially asserted it was "luck" that the GPS tracked the green Taurus to Aiken, and back to North Main Street in Columbia. North Main Street is a heavily populated African-American part of Columbia, South Carolina. Present counsel argued to the state Court of Appeals and the South Carolina Supreme Court that issuing a search warrant for a residence in an affluent neighborhood without any nexus between the nearby automobile containing contraband, and the house would not have happened.

Once Cummings and respondent arrived back in Columbia in the green rental Taurus, and they went by Books a Million in Forest Acres, South Carolina where Cumming's girlfriend worked. From there, Cummings got in his girlfriend's red Taurus and eventually made his way to the North Main Street address. Cummings was stopped as he pulled into the North Main Street driveway where the police knew the green Taurus was already located. Cummings was arrested for driving under suspension, and removed from the vehicle. Shortly thereafter, the police found a gun in the red Taurus. Cummings asserted respondent planted this weapon after he was arrested and while the police were distracted. Crack cocaine was then discovered during

search of the green Taurus. During this time, the police only had vague information from a "confidential informant" in Aiken. They knew Cummings was from Aiken, and that the decedent had been killed in Aiken around the time the green Taurus was tracked to Aiken. The police certainly did not have probable cause to believe that respondent or Cummings were involved in the Aiken murder at the time the cocaine was found inside the rental vehicle, which gave rise to the search warrant for 5520 North Main Street.

Other evidence

Deputy Ham testified that Cummings was arrested for driving under suspension when he turned the red Taurus into the yard at 5520 North Main Street where the green rented Taurus was already located. R. 11-15. Ham said respondent gave him the name "Eric Huey" when asked for his identification. Ham later found out that was false when respondent's girlfriend arrived in the yard, and told him respondent's real name. Ham also said respondent went inside the red Taurus where the police suspected him of planting a gun. Crack cocaine was also found inside the green Taurus after it was searched as well. R. 17.

Richland County Investigator Stephen Dauway testified that on September 15, 2008 he was called to the North Main Street yard after the gun was found inside the red Taurus. R. 22-26. Dauway was asked, on cross-examination during the suppression hearing, if respondent was free to leave when he arrived at the North Main Street where two Taurus vehicles were located in the yard. Dauway answered: "When I initially got there, he was free to leave. And as the investigation went on, I found a gun in one car and crack in the other car. At that time, he wasn't free to leave at that time." R. 34, ll. 14-19.

After the crack cocaine was found Dauway acknowledged: "I called some [other] officers. . . and that led to a search warrant." Dauway estimated the green Taurus was about two feet from the residence they wanted to search. R. 36, l. 14 – 37, l. 24.

Narcotics Investigator Marcus Brown was then called to the North Main Street location. He testified: "Dauway called me and stated they were out with a guy who had a large quantity of crack cocaine and a couple of guns, and they wanted me to see if I could get a search warrant for the residence." R. 36, l. 18 – 37, l. 11.

When Brown heard that Cummings was from Aiken, (as was he), "I texted an informer that I had been using on several occasions that knew Mr. Cummings. And they said that they didn't know him, but did I know that Fred Tucker had been killed this morning [in Aiken]." Brown then asked Cummings about Tucker "and he said Fred was after his cousin." R. 39, ll. 2-13. Brown recalled that Cummings told him he was in Augusta that morning, and respondent told Brown that he was in Charleston. R. 39, ll. 16-24.

When the pistol was found inside the red Taurus, Brown thought respondent actually planted it there "because we observed him in the back seat." R. 41, ll. 1-10. Cummings denied the weapon was his and told Brown "he had no idea how it got into the back seat, the other weapon, and he stated it had to be Antonio Miller's weapon." R. 41, ll. 16-21.

Brown testified he told respondent at the time that "it's kind of messed up that you're putting this other gun in here on your friend when it's pretty obvious that the gun belonged to you." R. 42, ll. 5-22. Respondent told Brown he was worried about picking up his child at school while all of this was transpiring. Brown responded that they could call his wife or "we'll call DSS [Department of Social Services] to take control of the child until we get the situation

taken care of." R. 42, l. 23 – 43, l. 7. (emphasis added). It was at that time of this DSS threat, Brown acknowledged, respondent agreed to talk to him. R. 43, ll. 8-11.

Brown maintained he read respondent his *Miranda*[1] warnings and respondent admitted he placed the gun in the back seat "of the vehicle while the officer's attention was diverted." When Brown asked respondent about the crack cocaine in the green rented Taurus, he said respondent responded: "Yes, it's mine, too. And that's when I told him at that time that he was being placed under arrest. And someone placed handcuffs on him." R. 46, ll. 17-25.

Respondent was charged for possession of the drugs and the weapon. Brown said he had learned that Melvin Cummings was a person of interest in the Aiken County murder earlier that day. R. 46, l. 17 – 47, l. 20.

Brown remembered that Deidre King or Deidre Miller returned to the scene in the North Main Street yard where the Tauruses were located. Brown said Ms. Miller had outstanding arrest warrants. He told Manager Day of the rental car lot that as soon as they finished processing the scene, they would return the green Taurus.

Brown recalled: "At that time, a call was made to Richland County Investigator Robert Crane, and I asked him was he still at the office. And I asked him if he would type a search warrant for me." R. 49, ll. 8-18. Brown identified the search warrant and affidavit that Crane signed for him. R. 50, ll. 13-15. Forty-five minutes to an hour later, Crane returned with the search warrant signed by the Magistrate, "and then we made entry into the residence." R. 51, ll. 2-17.

Brown testified that crack cocaine was found in the master bedroom dresser drawer "and some weapons were found in the closet." R. 51, ll. 20-24. Two other weapons were found

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966)

inside the residence and Brown remembered there appeared to be blood on one of the weapons and blood on some tennis shoes inside the residence. R. 52, ll. 2-14.

Brown told respondent: "If you don't tell us about the drugs," that he was going to "charge you and your wife with trafficking in crack cocaine and weapons charges because it was in the master bedroom." Respondent stated: "Okay, I'll claim it." Brown maintained another investigator told respondent he could not just "claim it." Brown testified that respondent then stated "that the drugs found in the top dresser drawer and the guns found in the closet" belonged to him. R. 53, ll. 2-16. Three guns were found in the residence as a result of the search. R. 61, ll. 15-20.

Investigator Crane acknowledged that he drafted the search warrant for 5520 North Main Street on September 15, 2008 as requested. Crane said he "ran" respondent's criminal history and discovered respondent had "at least twelve occasions for illegal narcotics," and therefore he swore out the search warrant affidavit before Judge Cuff. Crane took the search warrant to 5520 North Main Street and gave it to Investigator Marcus Brown. R. 64, l. 14 – 65, l. 12.

On cross-examination, Crane admitted the search warrant did not state who lived at 5520 North Main Street, nor did it contain any information about respondent ever entering that house. R. 65, l. 22 – 66, l. 5. The following occurred on cross-examination of Crane:

> Mr. Johnson: Is there any information about confidential informants saying that drugs are being sold out of 5520 North Main Street or the presence of illegal drugs within that location?
>
> Mr. Crane: No. sir.
>
> Mr. Johnson: Was the Magistrate informed of any connection all through that search warrant between Antonio Miller or Ms. Miller and that location?

Mr. Crane: Just like the affidavit said, that Mr. Miller, *the vehicle he had rented, was at the residence, you know, in the yard of the location.*

Mr. Johnson: Is that what it says?

Mr. Crane: It says that the GPS tracking unit put the green Taurus *or the said vehicle at 5520 North Main Street.*

Mr. Johnson: Does it say that, or does it say to be in the 5520 Main Street area?

Mr. Crane: *Deputies responded and observed the said vehicle parked in front of the location, the incident location.*

Mr. Johnson: Where are you at?

Mr. Crane: I'm on the third line from the bottom, or second line from the bottom. Deputies respond to location and observed the said vehicle parked in front of the incident location. And upon approaching the said vehicle, deputies made contact with Mr. Miller.

Mr. Johnson: Okay. *And it says nothing about Mr. Miller being inside of the vehicle or being inside of the location, correct?*

Mr. Crane: That's correct.

Mr. Johnson: Or Ms. Miller, or Deidre King, as she was known?

Mr. Crane: That's correct.

R. 66, l. 6 – 67, l. 14. (emphasis added).

Investigator Antony Branham remembered helping with the search warrant and finding a pair of counterfeit Nikes with blood on the inside of the searched residence. R. 84, l. 12 – 85, l. 14. Aiken County Investigator Jack Sanders also assisted in the search of the residence. He testified "the tread pattern on these shoes looks similar to the ones we found on the [Aiken County Murder] scene." R. 95, l. 6 – 97, l. 13.

Argument on Suppression

During the argument on suppression of the evidence, defense counsel noted there was "no linkage between that crack cocaine and Fred Tucker's [the Aiken murder victim's] house." The trial judge observed "the crack cocaine simply is a basis for getting a search warrant." R. 110, l. 24 – 111, l. 5. Defense Counsel Johnson responded that the law required "a finding of probable cause that some evidence of a crime is located within that location."

> At no point on the search warrant affidavit or anywhere does it say anybody lives at 5520 North Main. It doesn't identify that as anybody's residence. It also doesn't say anything about Mr. Miller or Ms. Miller entering the green Taurus, which is the breach of trust vehicle, I believe, where they found the suspected crack cocaine. Now, if there's no linkage to 5520, it's impossible to see how a Magistrate, without additional sworn testimony, could discover that there's probable cause to go into 5520 [they would] locate drugs or some illegal substance or evidence of a crime.

R. 111, l. 22 – 112, l. 10. (emphasis added).

Defense counsel argued "the search warrant affidavit says nothing about anybody going into 5520, coming out of 5520, or living there. And it's impossible - - in my argument, I would say it's impossible to have that linkage that's required for just basic probable cause." R. 113, ll. 3-8. (emphasis added). Defense counsel noted there was no confidential informant saying that anybody was inside the residence or had contraband which would support a search warrant, and that "it's just a bad search warrant, and basically all the items should be excluded as a result." R. 113, ll. 9-16.

Defense counsel also told the judge that the report reflected Aiken County investigators participated in the search where three guns and the shoes were discovered and there was no probable cause to believe that fruit of that murder would be found inside and because "they

didn't get a special search warrant" for the items involving the murder scene, and they had to be suppressed. R. 113, l. 3 – 114, l. 8.

The solicitor argued briefly against suppression, and stated that respondent present in the yard with the rental car, and he was arrested there. She maintained the police acted upon their instincts or "education" regarding what might be found in the nearby house. The police wanted to give the rental car back to "the rightful owner, they found these drugs, and things proceeded from there." R. 115, l. 18 -116, l. 116-23.

Defense counsel repeated there was no confidential informant providing information to the police and the state's argument was simply if someone was "arrested and they're near a car that has drugs in it, well, you can go search that house. And that's basically what they're arguing, because there's nothing left. There's nothing else in addition to the affidavit." R. 117, ll. 1-24. (emphasis added).

The judge summarily ruled that he believed the Magistrate had a substantial basis for concluding probable cause existed to search the residence, and he denied the motion to suppress. R. 117, l. 25 – 118, l. 6.

Repeated trial objections to the fruits of the search

The defense repeatedly objected to evidence of the shoes found inside the residence with blood on them, which SLED DNA analyst Stephanie Stanley, testified was a match to the Aiken decedent's blood. R. 456, l. 1 – 464, l. 25.

The defense would also repeatedly object to the fruits of the search, or any item bearing any resemblance to it. R. 224, l. 11 – 225, l. 14 (reference to the crack cocaine); R. 260, l. 3 – 261, l. 18 (photographs of 5520 North Main Street); R. 278, ll. 2-14 (purported paraphernalia found in the house); R. 291, l. 14 – 293, l. 9 (the shoes with the blood stain); R. 393, l. 3 – 394, l.

17 (photographs and other evidence about the shoes): R. 477, l. 23 – 479, l. 8 (gun evidence); R. 484, ll. 1-18 (gun evidence); R.490, l. 6 – 491, l. 22 (gun evidence); R. 493, l. 21 – 494, l. 23 (gun evidence); R. 500, l. 18 – 501, l. 8 (gun evidence); R. 501, l. 16 – 502, l. 11 (gun evidence); R. 505, ll. 16-25 (gun evidence).

Melvin Cummings was allowed to plead guilty to involuntary manslaughter, armed robbery, and possession of a weapon during a violent crime for his role as the driver in the death of the decedent. He received a twenty-year prison term even though he was originally charged with murder. R. 297, l. 22 – 298, l. 3.

Cummings strikes a deal – claims Respondent was involved

Cummings maintained he was involved in the decedent's murder in Aiken with respondent, Marquise Redfield, and Ronald Grooms. R. 298, l. 25 – 299, l. 4. Cummings was living on Fairfield Road in Columbia on September 15, 2008 while petitioner was living on North Main Street at the time of the Aiken crime. R. 299, ll. 17-22. Cummings testified the men began talking about the robbery of the decedent drug dealer "a couple of months before it happened." R. 299, l. 23 – 300, l. 1.

Over an objection, and a motion for a mistrial, Cummings claimed respondent said he knew the decedent because they had done time in the federal prison system together. R. 301, 19 – 303, l. 21. Cummings told the jury that on the day of the robbery he parked in an Aiken cemetery and fell asleep. The other men, including respondent, were all dressed in black, and returned to the green Taurus after walking somewhere. They drove to the decedent's house, and Cummings maintained that respondent knocked on the decedent's door but no one answered. He claimed respondent stated: "We're not going back empty-handed." Cummings maintained that

the other men got out of the car, and he drove to a nearby neighbor's, "Mrs. Jennifer's house." Cummings said as he was knocking on her door "I heard a shot." R. 308, l. 16 – 311, l. 13.

He saw co-defendant Grooms shoot out the back window of the house, and then: "I went and got back in the car. And as I was pulling off, Mrs. Glover came out the back door and flagged me down. I backed up, got out of the car, and we started talking about the cars that was in her front yard. While me and her was talking about the cars that was in her yard we heard gunshots, me and Mrs. Glover heard a gunshot. I heard someone yell. I didn't know who was yelling or anything, but I heard someone yell. I got in the car and I pulled off. I rode around for a little while trying to figure out what was going on." R. 308, l. 16 – 311, l. 25.

Purportedly, he saw respondent, Redfield, and Grooms running through the bushes and they jumped into the green Taurus. R. 312, ll. 1-14. Cummings testified that he drove the men back to Columbia, and they went by the Books A Million bookstore where his girlfriend worked. R. 314, l. 11 – 315, l. 7. Once they left the bookstore, Cummings got into his girlfriend's red Taurus and they went to lunch at Wendy's. The other men followed him in the green Ford Taurus. Respondent told Cummings to come by his North Main house so he could go with him to return the green Taurus rental car. R. 315, l. 1 – 317, l. 4.

As Cummings entered the driveway at 5520 North Main Street, "Richland County pulled in behind me [Cummings]. Miller, Redfield, and some other guy was sitting on the back porch." Cummings said the deputy asked him "Where was Antonio Miller?" and asked for his ID. Cummings was arrested for DUS. R. 316, l. 1 – 317, l. 22.

While he was talking with police, Cummings said respondent got into the red Taurus and a police officer later told him they had found a gun in the red Taurus. Cummings protested that the gun did not belong to him. He said respondent admitted putting the gun in his red Taurus and

he said respondent told the police "that the guns and the drugs and everything was his." R. 318, l. 19 – 320, l. 19.

Narcotics agents Stephen Dauway and Brown essentially recounted their suppression hearing testimony about finding the cocaine and gun in the green Taurus, red Taurus, and obtaining the search warrant for the residence, resulting in the discovery of the evidence. R. 196 – 220; R. 224.

Court of Appeals

The Court of Appeals held, in a summary opinion, that there was probable cause to issue the search warrant for the house, because "there was a fair probability evidence of a crime would be found in the residence identified." App. 2.

Rehearing

Respondent continued to argue on rehearing to the Court of Appeals that the fact drugs and a gun were found in a vehicle in the yard of a residence did not of itself establish probable cause for a warrant to search the residence. The state's position at oral argument was in concert with the solicitor's assertion at trial that contraband being found in a vehicle in the yard automatically established probable cause to search the house. This position demonstrated a "recklessness with [petitioner's] Fourth Amendment rights in his house, his Castle." App. 4; app. 5-10.

Respondent again reminded the Court that trial counsel had argued that "the search warrant affidavit says nothing about anybody going into 5520, coming out of 5520, or living there. And it's impossible - - in my argument, I would say it's impossible to have that linkage that's required for just basic probable cause." R. 113, ll. 3-8. (emphasis added). Counsel also noted there was no confidential informant saying that anybody was inside the residence or had

contraband which would support a search warrant, and that "it's just a bad search warrant, and basically all the items should be excluded as a result." R. 113, ll. 9-16.

Defense counsel had also noted that the report reflected Aiken County investigators participated in the search where three guns and the shoes were discovered and there was no probable cause to believe that fruit of that murder would be found inside. R. 113, l. 3 – 114, l. 8. The state's argument was simply if someone was "arrested and they're near a car that has drugs in it, well, you can go search that house. And that's basically what they're arguing, because there's nothing left. There's nothing else in addition to the affidavit." R. 117, ll. 1-24. (emphasis added). Rehearing was denied. App. 51.

Again, it was undisputed the affidavit was not supplemented by any oral testimony from investigator Crane or otherwise. See, e.g. *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). This was it. There was nothing in this affidavit tying respondent to the residence. Drugs and a gun were found in the rental car. The state's strongest assertion, although very weak, was that, allegedly, "illegal drugs are commonly stored in and around outbuildings within the curtilage of illegal drug sales locations." R. 598-599. (emphasis added). The nearby house was not an outbuilding.

Further, there is no allegation in the affidavit to support the assertion that this was an "illegal drug sales location." The rental car was traced to this location, and drugs were found inside it. Illegal drugs are often found inside rental cars, it did not establish probable cause to search whatever house or building is close to the rental car.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for several jurisdictional reasons. First, the opinion in this case shows the South Carolina Supreme Court decided this case upon adequate and independent state grounds. The opinion cited seven South Carolina cases pertaining to search warrants, and probable cause. App. 10-11. As will be seen *infra* the South Carolina Supreme Court has made it clear that its search warrant jurisprudence is markedly different than the minimum required under the federal constitution. In short, given the adequate and independent state grounds this Court does not have jurisdiction. *See Republican National Committee v. Burton*, 455 U.S. 1301 (1982).

Second, this case is not ripe for review in this Court. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (explaining the ripeness doctrine in the context of whether a party's request for declaratory and/or injunctive relief regarding an administrative order is "ripe" for review in a district court). As this Court has stated in reference to the ripeness doctrine, "[t]he problem is best seen in a twofold aspect, requiring [the Court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.*

Considering "both the fitness of the issues for judicial decision [by this Court] and the hardship to the parties of withholding [this Court's] consideration," *id.*, it is clear that the issues raised by the State are not fit for judicial decision in this Court and that the parties would not suffer any hardship if this Court withholds consideration of the issues until the proper time -- that is, after the state courts have evaluated the issues. The issues should first be developed and ruled upon in State court to prevent wasting this Court's time on issues that have not been decided finally in the lower courts, so those issues are not currently fit for decision in this Court.

Additionally, neither party would suffer any hardship--apart from the time it would take to argue the suppression motion in lower court, and for the state to appeal with a developed record if the evidence is suppressed, and if its case is substantially destroyed by suppression. In the alternative, the State can retry the case -- if the State decides to do so—whether the evidence is suppressed or admitted in the lower court.

Under either scenario, the case would then be ripe for meaningful appellate review. The procedural posture of this case is not in any meaningful way different than if the South Carolina Supreme Court had remanded the case with instructions to the trial court to make findings of fact and conclusions of law on whether there was probable cause for the search warrant. If there was not probable cause, then the lower court would consider whether suppression was the proper remedy or whether the "good faith exception" applied, or some other exception saved the evidence from the exclusionary rule. *See United States v. Julius*, 610 F.3d 60 (2d Cir. 2010) (remanding to trial court to determine whether, if that court maintains that the search at issue violated defendant's Fourth Amendment rights, the exclusionary rule should apply in the case).

Here, the South Carolina Supreme Court reversed because it found there was not probable cause to issue the search warrant. It relied on South Carolina law. As seen above, the Court specifically ruled that the State of remand could "[a]rgue 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." App. 11.

The State's complaint that it is entitled to have this Court intervene now by granting certiorari, or summarily remanding the case to the South Carolina Supreme Court for further fact findings and conclusions of law should be unavailing given the procedural posture of this case. The South Carolina Supreme Court obviously was not comfortable ruling on the issues raised by

the State in its certiorari petition to this Court, and it instead invited the State to raise these argument against suppression in the lower court if it chose to call this case for trial again. By not finding the search warrant error harmless the South Carolina Supreme Court correctly recognized the fruits of the illegal search warrant – the seized evidence pertaining to the **murder** -- was very incriminating and likely contributed to the jury's guilty verdict.

While judicial economy is a valid factor to consider, judicial efficiency trumps economy and mandates that these issues be fully developed in the State courts before this Court takes the issues under consideration. 28 U.S.C. § 1257(a).

Accordingly, this Court should deny the State's petition and revisit these issues if they cannot be worked out on the remand ordered by the South Carolina Supreme Court. This will allow the State trial court, and then the State appellate courts, to make the requisite factual findings and legal rulings relevant to these issues that the State wants resolved on certiorari to this Court without them being addressed by the State courts.

It would plainly be a waste of this Court's resources to grant certiorari and address these issues prematurely, or to remand to the South Carolina Supreme Court for fact findings and conclusions of law where that Court has already instructed the State to raise the suppression arguments on remand. Finally, the State's petition failed to raise as a question presented the issue the South Carolina Supreme Court ruled on in this case. App. 10-11. Certiorari is not warranted in this case for these reasons, and the reasons below.

1. **The State asks this Court to rule on several issues which have not been properly developed in the State Court. Such a practice would leave Respondent prejudiced by his inability to make a valid record on these issues which were not brought developed at the trial level, and it would constitute an unnecessary intervention by the nation's highest court into issues which have not been developed in the lower courts.**

As the State succinctly states in its petition, the issues before this Court can be summarized as follows: "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 . . . ." Petition for Writ of Certiorari at 1.

The trial court, Judge Jack Early, summarily ruled the incriminating evidence found in the house was admissible during this murder trial after considerable argument from the defense, and little argument from the State. This is a classic case of conclusory argument by the State that probable cause existed for the search warrant, and the trial judge summarily ageing. The South Carolina Supreme Court gave the State an open invitation to raise the good faith, the exclusionary rule policy arguments, and any other arguments against suppression on remand when it found the search warrant in this case did not provide probable cause to search the house. This Court, most respectfully, should allow the record to be developed in the state court before leaping in to intervene.

2. *Chapman v. California*, 386 U.S. 18 (1967), does not mandate that a state appellate court conduct an on-the-record "harmless error" analysis if it finds constitutional error. It only holds that constitutional error can be harmless if found harmless beyond a reasonable doubt. The State's argument in this case turns *Chapman* on its head. (State's Certiorari petition at 16-27)

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. This Court further held in that case that comments on the failure of the defendants to testify was not harmless error where the state prosecutor's argument and trial judge's instruction to the jury continuously and repeatedly impressed the jury that from refusal of defendants to testify, to all intents and purposes, the inferences from facts in evidence had to be drawn in the state's favor. This Court found that the state failed to

demonstrate beyond a reasonable doubt that such comments and instructions did not contribute to defendants' convictions.

This Court in *Chapman v. California*, 386 U.S. 18, 24 (1967), wrote: "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, *casts on someone other than the person prejudiced by it a burden to show that it was harmless*. It is for that reason that the original common-law harmless-error rule put the burden *on the beneficiary of the error either to prove that there was no injury or to suffer a reversal* of his erroneously obtained judgment.

Respondent was the person prejudiced by the admission of evidence seized as the result of an illegal search warrant that did not provide probable cause to search the house. The State was the beneficiary of that error. The fact that the South Carolina Supreme Court did not find the error in the admission of very incriminating evidence seized as the result of the illegal search warrant harmless beyond a reasonable doubt was not surprising. *Chapman* did not require the State appellate court to explain why it found an error harmful, or to explain why it was not harmless beyond a reasonable doubt.

The South Carolina Supreme Court is quite capable of finding constitutional error harmless beyond a reasonable doubt. *See, e.g. State v. McDonald*, 412 S.C. 133, 771 S.E.2d 840 (2015); *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690 (2009). The State seeks to take the South Carolina Supreme Court to task because it did not rule with the State in finding the error harmless beyond a reasonable doubt in this particular case. The State's argument attempts to twist the holding of *Chapman* on its head. *See* Certiorari petition at 34-35. Certiorari is not warranted.

3. South Carolina applies a "stricter standard" than the federal constitution when it comes to excusing defective search warrants under a "good faith" exception. It is also not clear that the South Carolina Supreme Court has ever adopted the *United States v. Leon*, 468 U.S. 897 (1984) "good faith" exception as it pertains to statutorily defective search warrants. (State's ertiorari petition at 34-38).

S.C. Code §17-13-140 states, in pertinent part as to a search warrant, that "a warrant issued hereunder shall be issued *only upon affidavit sworn* to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned *is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.* In the case of a warrant issued by a magistrate or a judge of a court of record, it shall be directed to any peace officer having jurisdiction in the county where issued, including members of the South Carolina Law Enforcement Division, and shall be returnable to the issuing magistrate." (emphasis added).

In *State v. McKnight*, 291 S.C. 110, 112-113, 352 S.E.2d 471-473 (1987), the South Carolina Supreme Court noted that search warrants that may survive under the Federal Constitution may not survive stricter state standards:

> "The Constitutions of the United States and the State of South Carolina require that search warrants be "supported by oath or affirmation." U.S. Const. Amend. IV; S.C. Const. Art. I, Section 10. This is a minimum standard, and state legislatures are free to enact stricter requirements for the issuance of search warrants. *See, State v. York*, 250 S.C. 30, 156 S.E.2d 326 (1967). 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." S.C. Code Ann. Section 17–13–140 (1985). A search warrant that would survive constitutional scrutiny may still be defective under the statute. . . . The State argues the seized items should be admitted despite the defective warrant, under the good faith exception to the exclusionary rule adopted by the United States Supreme Court in

> *United States v. Leon*, 468 U.S. 897 (1984). However, the evidence in this case was not excluded on constitutional grounds, but on the basis of a statutory violation. The *Leon* rule applies only when a search warrant is defective on Fourth Amendment grounds. The State has not argued, *and we do not decide, whether evidence seized pursuant to a search warrant which is defective under Section 17–13–140 may be admitted when the officers who execute the search act with objectively reasonable reliance on a warrant ultimately found to be invalid. Even if this Court were inclined to adopt a good faith exception akin to Leon for violations of Section 17–13–140, the exception would not apply here.* Both officers were aware of the defect in the warrant when they executed the search, negating any argument of good faith."

(emphasis added – internal citations deleted).

The Court in *State v. McKnight*, 291 S.C. 110, 112-113, 352 S.E.2d 471-473 (1987), also explained that standing to challenge a defective search warrant in South Carolina is likely broader than that required under the Federal Constitution: "The Fourth Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches and seizures. One who seeks to have evidence suppressed on this basis must establish that his own Fourth Amendment rights were violated. *United States v. Salvucci*, 448 U.S. 83 (1980). These are personal rights which may not be asserted vicariously. *Rakas v. Illinois*, 439 U.S. 128, (1978). See also, *United States v. Nabors*, 761 F.2d 465 (C.A. 8th 1985), cert. den., 474 U.S. 851. The defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search. *United States v. Salvucci*, supra; *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Combs v. United States*, 408 U.S. 224 (1972). See, e.g., *State v. Daniels*, 252 S.C. 591, 167 S.E.2d 621 (1969). The federal courts have promulgated a sizeable body of law developing and refining the concept of standing. See, 90 West's Federal Practice Digest 3d, Searches and Seizures, Key Nos. 161–165; Annot. 4 ALR 4 th 1050. *On the other*

hand, the rights afforded by Section 17–13–140 are not dependent upon a showing of an expectation of privacy in the searched premises. The primary purpose of the statute is to insure the timely recording of the testimony upon which the judicial officer relied in issuing the warrant. *State v. Sachs*, supra. However, *the primary benefit of the statute "is to the person arrested or searched." 216 S.E.2d at 510. Therefore, one contesting the legality of a search because of a defect under Section 17–13–140 need only show that the State is attempting to introduce the evidence against him.* (emphasis added – internal citations deleted).

In *State v. Covert*, 382 S.C. 205, 209 675 S.E.2d 740, 742-743 (2009), the South Carolina Supreme Court again noted the strict requirements of state law: "We consider also whether the unsigned warrant can be upheld in the face of § 17–13–140, the general search warrant statute. The statute contains requirements different from those mandated by the Fourth Amendment, and is in some ways "more strict" than the federal constitution. *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). While we have recognized a "good faith" exception to the statute's requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures, McKnight, supra, explaining *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975), *we have left open the question whether a good faith exception would be applied where "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.*" *McKnight*, supra. Here, we do not reach the question whether there exists a good faith exception to the statute where a defective warrant is issued, since under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17–13–140. See also *Davis*[2], supra (officers good faith irrelevant

[2] *Davis v. Sanders*, 40 S.C. 507, 19 S.E.2d 138 (1894).

where warrant is not signed). The circuit court erred in refusing to suppress the evidence seized pursuant to the unsigned "warrant." (emphasis added).

Again, at oral argument in the present case, counsel was asked to assume that the South Carolina Supreme Court had adopted *Leon* as to "good faith." The answer remains the same in this Court that law enforcement did not include any evidence of a nexus between respondent and the house in the affidavit, and there was no supplemental testimony before the Magistrate. This case unfolded in a disadvantaged part of town where the search warrant affidavit did not provide a bare bones nexus between respondent and the house or the drugs and guns found in the automobile and the house. If a "good faith" exception existed – it would not apply here – and the South Carolina Supreme Court was not obligated by federal constitutional law to analyze this case under a "good faith exception" in its opinion despite the State's protests to this Court to the contrary. The Magistrate did not have any evidence before him showing this was respondent's house. He recklessly issued the search warrant anyway. *See 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.")

State v. Herring, 387 S.C. 201, 215, 692 S.E.2d 490, 497 (2009) cited by the State does not change the fact that South Carolina law is "stricter" than the Fourth Amendment when it pertains to search warrants. In *Herring* it was 4:00 in the morning when state law enforcement was attempting to obtain a warrant to investigate the shooting by county law enforcement of a prominent Columbia attorney. This case could not be more different. There was time aplenty in mid-afternoon in this case for law enforcement to avoid its glaring error in failing to present the Magistrate with probable cause for the search warrant for the house, and that is undoubtedly why

the South Carolina Supreme Court chose not to address a state "good faith" statutory warrant exception or *Leon*.

4. The South Carolina Supreme Court decided this case based on adequate and independent state grounds. It has granted the state leave to argue against suppression as the proper remedy – the exclusionary rule -- on remand should it choose to call this case for trial again. There is respectfully no need for this Court to exercise its certiorari power where this issue will be resolved in the State Court in the future. (State's certiorari petition at 28-33).

In reversing respondent's conviction based on the affidavit not providing probable cause for the search warrant the Court cited *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. App. 10. *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)); App. 10. *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 judgement regarding probable cause are insufficient as the magistrate's actions "cannot be a mere ratification of the bare conclusions of others"). App. 10.

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,

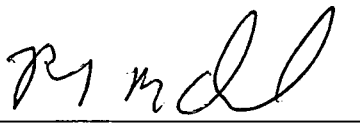
274 S.E.2d 510, 511 (1981)("[I]n passing upon the validity of the warrant, a reviewing court may consider only the information brought to the magistrate's attention.") App. 11 (internal citations omitted).

The South Carolina Supreme Court concluded: "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." App. 11. As argued above, this Court should respectfully not accept jurisdiction of this case given the adequate and independent state grounds apparent here. *See Republican National Committee v. Burton*, 455 U.S. 1301 (1982).

The record in this case was insufficiently developed for the South Carolina Supreme Court to rule on whether suppression -- the application of the exclusionary rule – was the proper remedy in this case. That was why that Court invited the State to make those arguments if and when it chose to retry respondent. It would seem the follow that if the record was insufficiently developed for a State Supreme Court to consider, then certiorari to this Court is also premature.

CONCLUSION

The petition for writ of certiorari should be denied.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 21st day of November, 2016.

No. 16-231

In the Supreme Court of the United States
October Term, 2016

THE STATE OF SOUTH CAROLINA,

PETITIONER,

V.

ANTONIO MILLER,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mr. Antonio Miller #114731 at the Aiken County Detention Center, 435 Wire Road, Aiken, SC, 29801 this 21st day of November, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 21st day of November, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.