STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Aiken County
Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2020-UP-018 (S.C. Ct. App. Filed January 29, 2020)

2014-GS-02-01182

THE STATE,

RESPONDENT,

V.

KELVIN JONES,

APPELLANT

APPELLATE CASE NO 2016-001835

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 27, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the issue of whether the trial judge erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause was not preserved for appellate review?

2. Did the Court of Appeals err in failing to find that the trial judge erred in allowing testimony that indicated law enforcement had prior knowledge of Petitioner when the prior knowledge was not necessary for his identification?

3. Did the Court of Appeals err in finding that the issue of whether the trial judge erred in qualifying an investigator as an expert in cocaine valuation and how cocaine is packaged and sold was not preserved of appellate review?

4. Did the Court of Appeals err in finding that the trial judge did not err in failing to grant a new trial based on the State's refusal to provide Petitioner with a copy of a complaint filed against the detective who obtained and executed the search warrant?

STATEMENT OF THE CASE

In January of 2012 the Aiken County Grand Jury indicted Appellant, Kelvin Jones, for trafficking cocaine, possession with intent to distribute cocaine within proximity of a park and possession of ecstasy, indictments #2012-GS-02-132, 133, 134. In 2014, the State obtained superseding indictment #2014-GS-02-1182 for trafficking cocaine. On August 11, 2014, Appellant appeared before the Honorable Edgar Dickson and moved for a change of venue and moved to suppress drugs seized. Mario Pacella, Alexandra Benevento and Bakari Sellers represented Appellant at the hearing. The case was prosecuted the South Carolina Attorney General's office because of a conflict. Solicitor Strom Thurmond, Jr. and another lawyer from the Second Circuit Solicitor's Office were doing a "ride along" with law enforcement when the search warrant in the present case was executed. Judge Dickson granted the change of venue motion but denied the motion to suppress. (R. p. 10, Order Denying Defendant's Motion to Suppress in Stipulation).

On February 17, 2015, Appellant pled guilty to the possession of ecstasy charge, indictment #2012-GS-02-134, and proceeded to jury trial for the trafficking and proximity charges, indictments #2014-GS-02-1182 and #2012-GS-02-133. Both the plea and the trial took place in Dorchester County before the Honorable R. Lawton McIntosh. Alexandra Benevento and Bakari Sellers represented Appellant at the plea and trial. Megan Burchstead and Michael Ross, both of the South Carolina Attorney General's Office, represented the State. The jury returned verdicts of guilty and Judge McIntosh sentenced Appellant to twenty-five (25) years for trafficking, ten (10) years concurrent for the proximity charge, and one year concurrent for the ecstasy charge.

On February 24, 2015, Appellant timely filed a timely notice of intent to appeal. On February 26, 2015, two days after the notice of intent to appeal was filed, Judge McIntosh contacted Appellant's trial counsel, Bakari Sellers, along with Assistant Attorney General Michael Ross and disclosed to the parties that it had come to his attention that the BEST bag containing the cocaine had been opened during jury deliberations. (R. p. 470-493; R. p. 494). On that same day, defense counsel Sellers filed a motion for a mistrial based on the information disclosed by Judge McIntosh and requested a hearing on the matter.

On April 16, 2015, a hearing was held before Judge McIntosh on Appellant's motion for a mistrial. After hearing from the parties, Judge McIntosh ultimately issued a written order filed June 15, 2015. In his order, Judge McIntosh found there was "a need to further investigate the extent of any actions on the part of the jurors which led to the opening of the 'BEST Kit' containing the drug evidence in this case." The judge indicated that "[s]uch investigation is necessary to determine whether there was any improper influence upon the jurors, or whether there was any resulting prejudice to the defendant." The judge ordered that a qualified individual at SLED examine the drug evidence to determine whether the evidence was accessed, handled, or tampered with by the jury during its deliberations. The judge further ordered that SLED report its findings concerning the drug evidence to the court as soon as such findings became available. (R. p. 494).

On September 18, 2015, Appellant moved to dismiss the direct appeal without prejudice pending the SLED investigation and a ruling on Appellant's motion for a mistrial. On November 25, 2015, the South Carolina Court of Appeals dismissed the appeal without prejudice to allow Judge McIntosh to rule on the post-trial motion. (R. p. 497). On April 4, 2016, Appellant filed a

motion for a new trial based on the State's failure to disclose that a complaint had been filed against the detective who obtained and executed the search warrant. (R. p. 498).

On July 6, 2016, Judge McIntosh held a hearing in Anderson County on the two outstanding motions. In regard to the drug evidence, Judge McIntosh requested that SLED re-weigh the drugs. In regard to the non-disclosed complaint, the judge asked for briefs from both sides. In an order signed July 22, 2016, Judge McIntosh denied both motions. (R. p. 550). A motion for relief from judgment was filed on August 16, 2016, and then denied on August 25, 2016. A timely notice of intent to appeal was served on September 2, 2016, and the direct appeal perfected. On January 29, 2020, the South Carolina Court of Appeals affirmed the convictions. State v. Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020). A timely petition for rehearing was filed and then denied on March 27, 2020. This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because issue one in the petition presents a substantial constitutional issue dealing with the Fourth Amendment that was not addressed by the Court of Appeals, issues one and three present novel questions of law with regard to the rules of error preservation, issue two presents a novel question of law with regard to the proper balancing test provided by Rule 403, SCRE, and issue four presents a novel question of law with regard to the obligation of the prosecution to disclose information provided by Brady v. Maryland, 373 U.S. 83 (1963).

ARGUMENTS

1. **The Court of Appeals erred in finding that the issue of whether the trial judge erred in refusing to suppress drugs seized as the result of a search warrant lacking probable cause was not preserved for appellate review.**

On April 19, 2011, Detective John C. Medlin of the Aiken Department of Public Safety requested from a magistrate a search warrant for a residence located at 462 Morgan Street NW, in Aiken, South Carolina. The affidavit in support of the search warrant in the case was based in large part on a trash pull. The affidavit provides:

> Det. Sawyer received complaints of short-term traffic at 462 Morgan St NW that is consistent with the sale of narcotics. On April 18, 2011 Det. Medlin coordinated with Bill Martin, Solid Waste Supervisor with the Aiken Department of Public Works, to collect trash from 462 Morgan St NW. Mr. Martin did so on Monday, April 18, 2011, which is the normal trash collection day for that residence. Mr. Martin found the can and contents at the curb beside the driveway in a manner consistent with the trash being ready for collection. Mr. Martin brought the can and the contents to Det. Medlin at the ADPS headquarters. Det. Medlin and Det. Sawyer searched the contents of the can and found the following items: 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana; 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale); 3 – empty cigar tube wrappers; 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;) 5 – mail addressed to 462 Morgan St. NW Aiken SC. Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence. See Attachment B for photographs of the items found. (Exhibit #3 attached).

(R. p. 588). The affidavit was not supplemented with sworn verbal testimony. (R. p. 563).

On April 21, 2011, officers with the Aiken Department of Public Safety, including Detective Medlin and Captain Sawyer, executed the search warrant. According to Captain

Sawyer, prior to entering the house, he observed Petitioner enter the house carrying a blue sling backpack. (R. p. 117, lines 13-22). Officers entered the house five to seven minutes later. (R. p. 156, lines 16-20). Once inside the house officers found Ricky Lloyd in the bathroom attempting to flush a white powder substance. (R. p. 247, lines 10-21). Lloyd also had cash and scales. (R. p. 247, lines 23-25). Officers found Petitioner in the kitchen. (R. p. 248, lines 1-7). Captain Sawyer admitted that there were four to five other adults and a few juveniles in the house when the officers entered. (R. p. 157, lines 11-20). In another room under a couch Detective Medlin found a handgun, a pickle jar with a green leafy substance in it, cash and a blue string bag. (R. p. 227, line 17 – p. 228, lines 1-12). Inside the blue string bag officers found three ziplock bags with a white powder material and a set of scales. (R. p. 228, lines 13-19). According to Captain Sawyer, Petitioner was wearing this blue sling bag earlier. (R. p. 140, lines 7-10). The room where officers found the white powder substance under the couch was closer to the bathroom where they found Lloyd than the kitchen where they found Petitioner. (R. p. 160, lines 21-25).

Prior to trial, on August 11, 2014, Petitioner submitted a written motion to suppress. (R. p. 1). On that same day the Honorable Edgar Dickson heard the motion to suppress as well as a motion for change of venue. Judge Dickson granted the change of venue motion but, in a written order, denied the motion to suppress. (R. p. 10, Written Order Denying Motion to Suppress). A portion of the August 11, 2014, hearing was produced and made a part of the record on appeal. (R. p. 14-27). The portion of the transcript dealing with the suppression motion, however, was not available. (R. p. 560-561, Official Letter from Court Reporter). For purposes of the appeal, the parties stipulated as to the arguments made at the suppression hearing. (R. p. 562). The stipulation included nine agreed points, the written motion to suppress

as exhibit #1, the search warrant, affidavit in support and attached exhibits, as exhibit #2 and Judge Dickson's written motion denying the motion to suppress as exhibit. #3. (R. p. 562-586).

Petitioner argued that the affidavit in support of the search warrant lacked probable cause. First, the affidavit failed to establish the reliability of the complaints received by Captain Sawyer. (R. p. 3-5). The affidavit failed to indicate the basis for any conclusion that the complaints of short-term traffic were consistent with narcotics sales. (R. p. 5). The affidavit failed to provide a time frame in regard to the short-term traffic. (R. p. 5). Second, the items recovered from the single trash pull did not provide probable cause to believe that narcotics would be found inside the house. (R. p. 5-8). Additionally, Petitioner argued that the good faith exception to the requirement of a warrant based on probable cause did not apply. (R. p. 8-9).

The judge denied the motion to suppress writing, "Although the reliability of the tipsters was never established, the officers corroborated the tip by finding twisted, torn baggies and the remnants of marijuana cigars in the trash. See State v. Rutledge, 644 S.E.2d 789 (Ct.App. 2007)(Finding probable cause for search warrant where a trash pull corroborated a tip). Therefore, probable cause existed for the magistrate to issue the warrant." (R. p. 10-12). There was, however, no tip to corroborate. The affidavit in support of the search warrant indicates "complaints of short-term traffic at ** Morgan St. NW that is consistent with the sale of narcotics." (R. p. 11). The complaints were not a tip. The complaints were anonymous, there is no indication that the complainants indicated that the short- term traffic was consistent with narcotics sales and there was no time frame given regarding the short- term traffic.

The trial was held six months later on February 17, 2015, before a different judge, the Honorable R. Lawton McIntosh. Judge McIntosh was aware of the previous order by Judge Dickson denying the motion to suppress. (R. p. 37, lines 1-8). Petitioner renewed the objection

to the order denying the motion to suppress. (R. p. 37, lines 11-15). Petitioner again renewed the objection to the evidence and the motion to suppress prior to opening statements. (R. p. 82, line 16 – p. 83, lines 1-7). The judge ruled, "All right. Very Good. I note that objection. The ruling will stand as is." (R. p. 83, lines 8-9). When the State moved to admit the drugs in evidence as State's Exhibit #22, Petitioner did not object. (R. p. 286, lines 8-13). Petitioner renewed the objection at the close of the State's case. (R. p. 344, lines 12-17). The issue is preserved for appellate review even though Petitioner did not object when the drugs were admitted. Judge Dickson's ruling on the motion to suppress was a final ruling. Judge McIntosh did not hear the motion to suppress and would not have changed Judge Dickson's ruling without hearing the motion.

In State v. Atieh, 397 S.C. 641, 646–47, 725 S.E.2d 730, 733 (Ct. App. 2012), the South Carolina Court of Appeals wrote:

> A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). The South Carolina Supreme Court expanded this exception in State v. Wiles, [1]holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review. 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In Wiles, the trial court had commented to the jury about the evidence that was the subject of the motion in limine before any evidence was admitted.Id.

The issue is preserved for appellate review.

In State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct. App. 2004), the South Carolina Court of Appeals wrote:

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[1] 383 S.C. 151, 679 S.E.2d 172 (2009).

> The Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Both state and federal constitutions provide that search warrants may not be issued except upon "probable cause, supported by oath or affirmation," and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; S.C. Const. art. I, § 10; see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant may issue only upon a finding of probable cause.").

"'On appeals from a motion to suppress based on Fourth Amendment grounds, ... this Court [the appellate court] reviews questions of law de novo.' State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). As to a circuit court's finding of fact, we must affirm 'if there is any evidence to support it," and "may reverse only for clear error.' State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). This deferential standard of review does not bar the appellate court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). In this case the trial judge's finding that the officers corroborated the "tip" by finding twisted, torn baggies and the remnants of marijuana cigars in the trash is not supported by the record. There was no tip. Instead, the affidavit only alleged anonymous short-term traffic with no reference to time frame and no reference to narcotics other than the detective's mere conclusory statement. The judge's failure to suppress the drugs seized as a result of the search warrant lacking probable cause constitutes clear error.

In State v. Kinloch, 410 S.C. 612, 616–17, 767 S.E.2d 153, 155 (2014)(fn #4 omitted), this Court wrote:

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A search or seizure does not violate the Fourth Amendment if it is authorized by a warrant that is supported by probable cause. Id.*;* see State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), cert. denied, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair

> probability that contraband or evidence of a crime will be found in a particular place. Baccus, 367 S.C. at 50, 625 S.E.2d at 221 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

In State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003), the South Carolina Court of Appeals wrote:

> A magistrate may issue a search warrant only upon a finding of probable cause. State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003); State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App.2002). "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.' " State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C.Code Ann. § 17–13–140 (1985)).
>
> The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct.App.1995). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct.App.1995).

"When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances. See State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)(citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). 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. See State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)." State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000)(fn #1 omitted).

"In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Baccus, 367 S.C. at 50, 625 S.E.2d at 221; see also State v. Bellamy, 336 S.C. 140, 143–45, 519 S.E.2d 347, 348–49 (1999) (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)." Kinloch, 410 S.C. at 617, 767 S.E.2d at 155.

"An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. "[H]is action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983)." State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

Considering the totality of the circumstances, the affidavit lacked a substantial basis upon which to conclude that probable cause existed to believe that narcotics would be found in the house. The affidavit failed to establish the veracity or reliability of the complaints of short-term traffic. The affidavit failed to establish a basis of knowledge of short-term traffic. It is unclear if the complaints were made confidentially or anonymously. The affidavit failed to provide a time frame in regard to alleged short-term traffic. See State v. Winborne, 273 S.C. 62, 64, 254 S.E.2d 297, 298 (1979) (In order for an affidavit in support of a search warrant to show probable cause, it must state "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." 68 Am.Jur.2d 724 Searches and Seizures s 70. An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient. Anno., "Search Warrant: Sufficiency of showing as to time of occurrence of facts relied on," 100 A.L.R.2d 527, s 3 (1965). The reason for this rule is that probable cause, with time, dissipates.)

Additionally, the affidavit failed to establish how short-term traffic was consistent with narcotics sales. Instead, the affidavit provided that Detective Sawyer received complaints of

short-term traffic that is consistent with the sale of narcotics, a conclusory statement that gave the magistrate no basis to make a judgment regarding probable cause.

The remaining information contained in the affidavit involved items discovered during the single trash pull on April 18, 2011. The items found were listed in the affidavit as follows:

> 1 – the burnt remains of a cigar that contained a green leafy material believed to be marijuana;
> 2-numerous twisted and torn baggies (indicating the packaging of marijuana for resale);
> 3 – empty cigar tube wrappers;
> 4 – cigars that had been torn open to remove the tobacco (a common tactic for smoking marijuana covertly;)
> 5 – mail addressed to 462 Morgan St. NW Aiken SC.
>
> Based on my experience and training, the items listed indicate the use and repackaging of narcotics for resale. Detective Royster, a certified marijuana analyst, tested the plant material found in the trash and confirmed it to be marijuana. This officer verily believes that probable cause exists as to the presence of narcotics at this residence.

(R. p. 588)

The evidence found in the single trash pull failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional contraband would be found in the house. State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct.App. 2007), the case relied upon by the judge in his written order denying the motion to suppress, is distinguished from the present case. In Rutledge the affidavit provided the following information:

> The affiant has received information that William Rutledge and two other subjects only known as Steve and Richie are selling marijuana from 162 Bailey Ave., Rock Hill, South Carolina. Within the past 72 hours officers of the YCMDEU conducted a narcotics investigation focused on 162 Bailey Ave., Rock Hill, SC. As a result of this investigation, officers recovered marijuana, marijuana seeds and marijuana stalks from 162 Bailey Ave. A Criminal Records check of William Rutledge found that Rutledge has prior convictions for marijuana. Officers of the YCMDEU confirmed through Rock Hill Utilities that William Rutledge is drawing power at 162 Bailey Ave.

Rutledge, 373 S.C. at 315, 644 S.E.2d at 790. The confidential informant in Rutledge provided specific information about the crime being committed and the names of the people involved in the crime. The anonymous or confidential tip in the present case did not provide information about a crime at all, simply short-term traffic. Additionally the tip in the present case did not provide names of the people involved. The affidavit in Rutledge also included information linking the defendant to the residence and providing the defendant's prior criminal record involving marijuana. No such information was provided in the affidavit in the present case.

In United States v. Lyles, 910 F.3d 787, 792 (4th Cir. 2018), the Fourth Circuit Court of Appeals found that a trash pull revealing three empty packs of rolling papers, a piece of mail addressed to the home, and three marijuana stems was insufficient to provide the probable cause needed for issuance of a search warrant for the house. As in Lyles, the affidavit in the present case was insufficient to provide the probable cause needed for the issuance of a search warrant for the house. The trial judge erred in refusing to suppress the drugs found pursuant to the search warrant lacking probable cause.

As additional persuasive authority, in Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998), the police, after receiving an anonymous tip that residents at Raulerson's address were involved in drug activity, pulled six bags of trash from the curb in front of the home. Inside the bags the police found two cannabis cigarette butts, stems, seeds, and pieces of suspected cannabis. A field test of the pieces tested positive for cannabis. The police obtained a search warrant based on the trash pull and anonymous tip. The Florida Court of Appeals reversed and wrote, "Although the affidavit contained relevant information that the substance found in the one-time trash pull tested positive for cannabis, we believe the affidavit lacked other sufficient material facts to indicate a fair probability that cannabis would be found in Raulerson's

home." Raulerson , 714 So. 2d at 537. See also Cruz v. State, 788 So.2d 375 (Fla. Dist. Ct. App. 2001); Serrano v. State, 123 S.W.3d 53 (Tex. App. 2003).

In Gesell v. State, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999), the court found that a single trash pull, revealing the presence of a residual amount of marijuana in a plastic bag, coupled with an anonymous tip of suspected drug activity that is uncorroborated by the officers' observations, was insufficient to constitute probable cause for issuance of a search warrant.

In United States v. Elliott, 576 F. Supp. 1579, 1581 (S.D. Ohio 1984), the court granted the motion to suppress writing:

> We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

The affidavit in the present case did not provide the magistrate with a substantial basis for determining the existence of probable cause to believe that contraband would be found inside the house. The evidence in the trash did not render the continued presence of contraband probable.

The good faith exception to the warrant requirement, found in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.ed.2d 677 (1984), does not apply under the facts of this case. In State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), this Court wrote:

> In Leon, the Supreme Court held that "the Fourth Amendment exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a detached and neutral magistrate but ultimately found to be invalid." The dispositive issue here is whether sufficient information was given to the magistrate to perform his "neutral and detached" function rather than serve as a "rubber stamp for the police." Leon specifically precludes the application of the good faith exception in this situation. [R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the

> existence of probable cause.' 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.'

In State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997), this Court found that the affidavit in support of the search warrant did not provide a substantial basis to find probable cause. Finding that the good faith exception did not apply, this Court wrote, "Suppression is appropriate in only a few situations, including when an 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. at 3421, 82 L.Ed.2d at 699. We find the affidavit in this case lacked any indicia of probable cause. Therefore the good-faith exception would not apply." Weston, 329 S.C. at 293, 494 S.E.2d at 804.

In United States v. Lyles, 910 F.3d 787, 796–97 (4th Cir. 2018), discussed above, the Court found that the good faith exception did not apply writing:

> We decline, however, to apply the good faith exception in the present case. We do not at all impugn the subjective good faith of the officer who ran the warrant application through review, including by his superior and a state prosecutor, before submitting it to the magistrate. The prosecutor's and supervisor's review of an application is often helpful in determining good faith. But those reviewers, unlike a neutral magistrate, share the officer's incentives "in the often competitive enterprise of ferreting out crime." Riley[2], 134 S.Ct. at 2482 (internal quotation marks omitted). The prosecutor's and supervisor's review, while unquestionably useful, "cannot be regarded as dispositive" of the good faith inquiry. Messerschmidt v. Millender, 565 U.S. 535, 554, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). If it were, police departments might be tempted to immunize warrants through perfunctory superior review, thereby displacing the need for "a neutral and detached magistrate" to make an independent assessment of an affidavit's probable cause, Riley, 134 S.Ct. at 2482 (internal quotation marks omitted).

The affidavit in the present case is lacking any indicia of probable to cause to believe that contraband would be found inside the house. As discussed above, the affidavit failed to suggest a pattern of continuous drug activity and failed to support a reasonable conclusion that additional

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[2] Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

contraband would be found in the house. The Leon good faith exception does not apply in this case. The judge erred in refusing to suppress based on the search warrant lacking probable cause.

The Court of Appeals found that the issue was not preserved for appellate review writing:

> The issue of whether the trial court erred when refusing to suppress the drugs is not preserved for appellate review. See State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) ("Merely raising an argument in *limine* does not preserve the issue for appellate review."); State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in *limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); id. at 647, 725 S.E.2d at 733 ("[W]hen the evidence does not immediately follow the motion in *limine*, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review.").

State v. Kelvin Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020).

The Court of Appeals overlooked the fact that Judge Dickson's ruling was final. As discussed above, the motion to suppress was heard by Judge Dickson on August 11, 2014, six months before the trial in front of Judge McIntosh on February 17, 2015. Judge McIntosh did not hear the motion and would not have overruled the finding made by Judge Dickson. See Rule 4(b), SCRCrimP (Subsequent Applications for Order After Refusal**.** If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action. If upon such subsequent motion any order be made, it shall be void.). Judge Dickson's ruling was final and the issue is preserved for appellate review.

In State v. Wiles, 383 S.C. 151, 156–57, 679 S.E.2d 172, 175 (2009)(n. 4 omitted), this Court wrote:

> Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. State v. Forrester, 343 S.C. at 642, 541 S.E.2d at 840. There is an exception to this general rule when a ruling on the motion *in limine* is made "immediately prior to the introduction of the evidence in question." *Id.* This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection. *Id.* (citing State v. Mueller, 319 S.C. 266, 268–69, 460 S.E.2d 409, 410 (Ct.App.1995)).
>
> In the instant case, the evidence was not immediately introduced after the motion *in limine.* Nonetheless, by his actions, the trial judge clearly indicated that his ruling was a final, rather than preliminary, one because he commented **to the jury** about petitioner's escape before any evidence was admitted.

Judge Dickson's denial of the motion to suppress was clearly a final ruling and there was no need to renew the objection. The issue is preserved for review. The Court of Appeals erred in finding that the issue was not preserved. This Court should decide the issue on the merits and find that the court erred in refusing to suppress drugs seized as a result of a search warrant lacking probable cause.

2. The Court of Appeals erred in failing to find that the trial judge erred in allowing testimony that indicated law enforcement had prior knowledge of Petitioner when the prior knowledge was not necessary for his identification.

Prior to trial Petitioner objected to the admission of a statement made by Petitioner to Captain Sawyer indicating that law enforcement had prior knowledge of Petitioner. (R. p. 57, line 4 – p. 58, lines 1-2). Captain Sawyer testified that during the execution of the search warrant Petitioner said, "Sawyer, Sawyer, I need to talk to you. I need to talk to you." (R. p. 48, lines 5-7). Petitioner argued that this statement should be excluded because it was the equivalent of admitting prior bad act testimony and, pursuant to Rule 403, SCRE, was more prejudicial than probative. (R. p. 57, line 4 – p. 58, lines 1-2). The State argued that the statement went to identification. (R. p. 58, lines 7-11). The judge asked the prosecutor, "Well, how can you

escape the innuendo of him having a prior record by you having him call him out, and that kind of testimony?" (R. p. 58, lines 12-14). After hearing further argument, the judge withheld ruling. (R. pp. 58-61). Later the judge overruled the objection to the admission of the statement. (R. p. 94, line 14 – p. 95, 96, lines 1-15).

During the trial the State went further asking Captain Sawyer if he knew Petitioner. (R. p. 111, lines 13-16). Captain Sawyer testified that he knew Petitioner and had several interactions with him sometimes lasting 30-45 minutes. (R. p. 111, lines 17-25). Captain Sawyer then testified, before the jury, that during the execution of the search warrant Petitioner said, "Sawyer, Sawyer, Sawyer, I need to talk to you." (R. p. 125, lines 16-17). Petitioner did not contemporaneously object but Captain Sawyer was the first witness to testify after the ruling admitting the statement over objection. (R. p. 94, line 14 – p. 95, 96, lines 1-15). State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved). The objection to the statement is preserved for appellate review.

Captain Sawyer's testimony about interactions with Petitioner and the statement allegedly made by Petitioner indicate that law enforcement had prior knowledge of Petitioner. The clear inference is that the prior interactions and knowledge were the result of Captain Sawyer knowing Petitioner from prior criminal activity. The testimony was the equivalent of improperly admitting prior bad act evidence. The testimony was highly prejudicial and lacking probative value.

In State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), this Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence

> is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed 4 by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

Captain Sawyer's testimony did not meet an exception under rule 404(b). The testimony was not necessary to show identity and was not logically related to the trafficking charge. Captain Sawyer could competently identify Petitioner without referencing the purported statement and prior interactions. Any possible probative value in the testimony was substantially outweighed by the danger of unfair prejudice. The error was not harmless. The State's case against Petitioner was based on constructive possession. The inference that Petitioner was involved in a prior criminal activity was highly prejudicial.

In finding that the trial court did not abuse its discretion in allowing an officer to testify about his prior knowledge of Petitioner the Court of Appeals found that, " . . .[T]he testimony served the purpose of identifying Jones. Therefore, any possible prejudice did not substantially outweigh the probative value of the testimony." State v. Kelvin Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020). The Court of Appeals overlooked the fact that the officer could have identified Petitioner as the person he observed enter the house with the blue sling bag

five to seven minutes prior to the officers executing the search warrant without referencing any prior knowledge of Petitioner. The prior knowledge lacks probative value.

In State v. Tate, 298, S.C. 104, 341 S.E.2d 380 (1986), this Court held the admission into evidence of a six-man photographic array containing a mug shot of the defendant was reversible error. In Tate the Court noted that the photographs in question were typical police photographs taken when a person was arrested. The Court noted that it had held that the introduction of a mug shot was reversible error unless it is shown that: (1) the State had a demonstrable need to introduce the photograph; and, (2) the photographs themselves if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner as to draw attention to the source or implication of the photograph. State v. Robinson, 274 S. C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977). The Court held in Tate that the first two prerequisites were not met in that case. The same is true in this case.

The State did not need the prior knowledge testimony in order for the officer to identify Petitioner. Petitioner was found inside the home when the officers executed the search warrant five to seven minutes after the officer testified that he saw Petitioner enter the house with the blue sling bag. The prior knowledge testimony implied that Petitioner had a prior record. Any possible probative value is substantially outweighed by the danger of unfair prejudice. The trial judge erred in allowing the prior knowledge testimony. The Court of Appeals erred in failing to find that the trial judge erred in allowing testimony that indicated law enforcement had prior knowledge of Petitioner when the prior knowledge was not necessary for his identification.

3. **The Court of Appeals erred in finding that the issue of whether the trial judge erred in qualifying an investigator as an expert in cocaine valuation and how cocaine is packaged and sold was not preserved of appellate review.**

As the final witness in the State's case, the State recalled Captain Sawyer and moved to qualify him as an expert in narcotics investigations. (R. p. 315, lines 23-25). Petitioner objected. (R. pp. 315-331). After hearing arguments from both sides, the judge found Captain Sawyer qualified as an expert in cocaine valuation and how cocaine is packaged and sold. (R. p. 332, lines 2-4). Captain Sawyer testified as an expert subject to the prior objection. (R. p. 331, line 20). The trial judge erred.

Rule 702, SCRE, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to **understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(emphasis added). Captain Sawyer's testimony did not assist the trier of fact to understand the evidence or determine a fact in issue. Valuation and packaging were not issues in this case. Petitioner was charged with trafficking and proximity. There was no evidence, based on the amount of cocaine found, of a lesser included offense and the judge properly did not charge a lesser included offense. Valuation and packaging are not elements of trafficking.

S.C. Code Ann. 44-53-0370(e)(2)(e) provides that:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:

> (e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars;

The statute is silent as to value. Evidence of weight alone elevates the offense to trafficking. Packaging is irrelevant as to the crime of trafficking. The trial judge erred in admitting the expert testimony as to valuation and packaging because it was not necessary. In this trafficking trial, the testimony about valuation and packaging did not qualify as expert testimony because the testimony did not assist the trier of fact to understand the evidence or determine a fact in issue.

In State v. Robinson, 396 S.C. 577, 582, 722 S.E.2d 820, 822 (Ct. App. 2012), aff'd as modified, 410 S.C. 519, 765 S.E.2d 564 (2014), the South Carolina Court of Appeals found that a law enforcement officer was properly qualified as an expert in how crack cocaine is packaged, sold, the going price, the typical intoxicating dose, and the different habits between the typical addict, the user, and the typical drug dealer. The challenge in Robinson went solely to the qualification of the witness. In the present case the expert testimony was improper because testimony about valuation and packaging was irrelevant as to trafficking. An additional distinguishing factor between the present case and Robinson is the fact that Robinson was charged with possession with intent to distribute cocaine rather than trafficking. Valuation and packaging may have been relevant to show intent to distribute in Robinson. In the present case the State did not need to prove intent to distribute to prove trafficking. Additionally, valuation and packaging testimony is not needed to prove the proximity charge based on the instruction given to the jury that, " …[P]ossession of more than one gram of cocaine creates an inference that the defendant possessed the cocaine with intent to distribute it." (R. p. 397, lines 9-12). Petitioner was indicted for trafficking over 400 grams and the amount was not challenged at trial.

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The admission of testimony by an expert when the subject of the testimony did not qualify as expert testimony constitutes an error of law. The error was not harmless.

The Court of Appeals found that the issue was not preserved for appellate review writing:

> The issue of whether the trial court erred when qualifying an investigator as an expert in valuing, packaging, and selling cocaine is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

State v. Kelvin Jones, Op. No. 2020-UP-018 (S.C.Ct.App. filed January 29, 2020).

The Court of Appeals overlooked the fact that the general objection to the "expert testimony" from the officer, after he testified as a lay witness earlier in the trial, imposed upon the trial court a gatekeeping role to determine if the expert testimony met the requirements of Rule 702, SCRE. "We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability **and further find that the proposed evidence will assist the trier of fact**." State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (emphasis added). When Petitioner objected to the testimony, the judge, in his gatekeeping role, should have determined if the proposed evidence would assist the trier of fact.

The issue is preserved for appellate review. The Court of Appeals erred in finding that the issue was not preserved. Valuation and packaging did not assist the jury as triers of fact because, as discussed above, these issues were not relevant to the trafficking over 400 grams and proximity charge. This Court should find that the trial judge erred in allowing the expert testimony.

4. The Court of Appeals erred in finding that the trial judge did not err in refusing to grant a new trial based on the State's refusal to provide Petitioner with a copy of a complaint filed against the detective who obtained and executed the search warrant.

Prior to trial Petitioner moved for production of employment records of certain officers, specifically Detective Medlin among others. (R. pp. 61-66). As discussed in issue one, Detective Medlin obtained and executed the search warrant and found the cocaine. The judge stated, "I'm going to instruct the State to make a review of those records. If there's any type of disciplinary matters . . ." (R. p. 65, lines 19-21). The judge then stated, ". . . that's why I'm asking you to make sure – I want them to turn them into me. I'll look at them in camera. If I feel there may be something that could be used , then I - - I will make sure it's produced over to the defense." (R. p. 65, line 23 – p. 66, lines 1-2). Later, the judge reviewed the employment records provided and found nothing relevant to the case. (R. p. 153, lines 12-18).

On April 4, 2016, after the trial but during the pendency of a motion for a mistrial based on the fact that the BEST bag containing the cocaine was opened during jury deliberations, Petitioner filed a motion for a new trial based on the State's failure to disclose that a complaint had been filed against Detective Medlin on October 3, 2014, prior to the trial held in February of 2015. (R. p. 467). The complaint alleged that Detective Medlin conducted a roadside body cavity search of an individual.

On July 6, 2016, a hearing was held in regard to the motion for new trial. (R. pp. 518-545). During that hearing Petitioner referenced an article from the Washington Post titled "Video Shows White Cops Performing Roadside Cavity Search of Black Man." (R. p. 520, lines 1-6). The article was about Detective Medlin with the Aiken Department of Public Safety. (R. p. 520, lines 8-9). Petitioner argued that the refusal to provide the defense with a copy of the complaint constituted a Brady[3] violation. (R. p. 538, lines 3-17). Petitioner argued that the complaint showed a violation of the policies and procedures of the Aiken Department of Public Safety. (R. p. 538, lines 11-17). The judge commented, "What is ridiculous is that they have an order to disclose information and they unilaterally decided they weren't going to do it. And at no fault of the AG's office." (R. p. 541, lines 1-4).

In an order signed August 25, 2016, Judge McIntosh wrote, "The state clearly should have turned this matter over as impeachment under Brady. Gibson v. State, 334 S.C. 515, 514, 5 SED 320 (1999)." (R. p. 555). The judge, however, denied the motion for new trial based on the Brady violation. (R. pp. 555-559). The judge erred.

In Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999)(fn #3 omitted), this Court wrote:

> A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995); Brady, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); State v. Von Dohlen, supra.

[3] Brady v. Maryland, 373 U.S. 83 (1963).

There are three categories of Brady violations: "(1) cases that include [non-disclosed] evidence of perjured testimony about which the prosecutor knew or should have known, (2) cases in which the defendant specifically requested the [non-disclosed] evidence, and (3) cases in which the defendant made no request or only a general request for Brady material." Gibson v. State, 334 S.C. 515, 524–25, 514 S.E.2d 320, 325 (1999). In the present case Petitioner specifically requested employment records of Detective Medlin. The complaint meets the four requirements of Brady. The complaint was impeachment evidence favorable to Petitioner, in possession of law enforcement,[4] suppressed by the State and material.

In State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010), the South Carolina Court of Appeals wrote:

> Moreover, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); accord Kyles v. Whitley, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also Riddle, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' " (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555)); State v. Hill, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81(2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct.App.1997) ("A defendant shows a Brady violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.' ").

The non-disclosed complaint against Detective Medlin was material. Detective Medlin was one of the State's key witnesses. He obtained and executed the search warrant and found the

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[4] Information known to investigative agencies may be imputable to prosecutor, but prosecutor has no duty to go on fishing expedition to find exculpatory or impeachment evidence. Von Dolen.

cocaine. As argued, Petitioner should have been allowed to question the detective about the complaint as a clear violation of the Department's policies and procedures. There is a reasonable probability that had the complaint been disclosed, the result of the proceeding would have been different. Again, the State's case was based on a theory of constructive possession. The refusal to disclose the complaint, after the specific request to do so, undermines confidence in the verdict. Petitioner did not receive a fair trial based on the Brady violation. The judge erred in failing to grant a new trial.

The Court of Appeals found that the complaint did not meet the requirements of Brady writing:

> The trial court did not abuse its discretion in denying Jones's motion for a new trial based on the State's refusal to provide Jones with a copy of a complaint filed against the detective who obtained and executed the search warrant because Jones did not meet the requirements set forth in Brady. See State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("The decision whether to grant a new trial rests within the sound discretion of the trial court, and [an appellate court] will not disturb the trial court's decision absent an abuse of discretion."); Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); State v. Hutton, 358 S.C. 622, 632, 595 S.E.2d 876, 882 (Ct. App. 2004) ("Exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt.").

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The Court of Appeals overlooked the fact that the trial judge specifically ordered the State to provide the judge with any disciplinary matters and found that the State should have turned the complaint over as impeachment under Brady. (R. p. 65, lines 19-21; R. p. 65, line 23 – p. 66, lines 1-2; R. p. 555). The trial judge correctly found the Brady violation as discussed above. The trial judge, however, erred in refusing to grant a new trial based on the violation.

In finding the complaint would have been inadmissible even if it had been disclosed, the Court of Appeals overlooked the fact that the complaint is probative of truthfulness pursuant to Rule 608(b), SCRE, as it goes to the detective's willingness to violate the Department's policies and procedures. The trial judge erred in failing to grant a new trial based on the State's refusal to provide Petitioner with a copy of a complaint filed against the detective who obtained and executed the search warrant. The Court of Appeals erred in finding that the trial judge did not err in failing to grant a new trial based on the State's refusal to provide Petitioner with a copy of a complaint filed against the detective who obtained and executed the search warrant.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

s/Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2020.