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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161676

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JAMES WILLIS CAMPBELL, SR.

Appellee.

BRIEF FOR THE COMMONWEALTH

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RECORD NO. 161676

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JAMES WILLIS CAMPBELL, SR.,

Appellee.

BRIEF FOR THE COMMONWEALTH

A police investigator obtained a search warrant after learning from a confidential informant that James Willis Campbell, Sr., intended to manufacture methamphetamine. Unbeknown to the police investigator, the magistrate's copy of the search warrant affidavit was not transmitted to the clerk's office in its entirety. When the police investigator and other law enforcement officers went to serve the search warrant, they were contemporaneously receiving communications from the confidential informant regarding the ongoing manufacture of the methamphetamine and law enforcement officers observed smoke coming from the shed where the methamphetamine was being produced.

This appeal asks whether the Court of Appeals incorrectly held that the failure to file the search warrant affidavit in the clerk's office necessitated the suppression of the evidence seized when law enforcement entered the shed with probable cause and in the presence of exigent circumstances; whether the Court of Appeals erred in holding that Code § 19.2-54 required suppression for the magistrate's noncompliance with that statute's filing requirements; and whether the Court of Appeals erred in holding that an otherwise valid search was unlawful when law enforcement officers relied in good faith on a warrant that was defective under Code § 19.2-54 due to the magistrate's failure to ensure the affidavit was properly transmitted to the clerk's office.

STATEMENT OF THE CASE

Following the execution of a search warrant on August 6, 2014, Campbell was charged in Amherst County with manufacturing methamphetamine, in violation of Code § 18.2-248. Prior to trial, Campbell moved to suppress the evidence obtained during the search. (App. 4-6). The circuit court preliminarily held that the search warrant was not valid and that the good faith exception to the warrant requirement did not apply. (App. 152-54). Ultimately, however, the circuit court ruled that, even assuming the warrant was defective, exigent circumstances would have justified law enforcement's warrantless search of the defendant's property. (App. 154-55, 328-30). Thereafter, following a bench trial,

the circuit court found Campbell guilty of manufacturing methamphetamine. (App. 339-40, 344-46).

The Court of Appeals reversed the judgment of the circuit court in a published opinion dated October 25, 2016. Campbell v. Commonwealth, 66 Va. App. 677, 791 S.E.2d 351 (2016) (App. 347-56). The Court of Appeals held that suppression was statutorily required by Code § 19.2-54, and that whether the Fourth Amendment also required suppression was irrelevant. The Court of Appeals further held that the circuit court's warrantless search analysis was erroneous because a warrant, albeit a deficient one, was issued in this case.

On April 17, 2017, this Court awarded both the Commonwealth and Campbell an appeal of their assignments of error.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred in rejecting the trial court's ruling that even if the search warrant was deficient, the fruits of the search were admissible because the police had probable cause and exigent circumstances to support a lawful warrantless search. (Preserved in the Commonwealth's Court of Appeals Brief at 18-23).

II. The Court of Appeals erred in holding that Code § 19.2-54 required suppression for noncompliance with that statute's recording requirements. (Preserved in the Commonwealth's Court of Appeals Brief at 15-18).

III. The Court of Appeals erred in holding that an otherwise valid search was unlawful because the officers executing the search relied on a warrant that

was defective under Code § 19.2-54. (Preserved in the Commonwealth's Court of Appeals Brief at 23-29).

ASSIGNMENTS OF CROSS-ERROR

I. The Court of Appeals erred in not ruling that the trial court committed error in denying a motion to suppress evidence obtained from police entry and search of the appellant's property and outbuilding where the affidavit for search warrant was constitutionally insufficient, the resulting search warrant was invalid, and the good faith exception to the exclusionary rule did not apply because of exigent circumstances.

II. The Court of Appeals erred in not ruling that the trial court committed error in denying a motion to suppress evidence by holding that exigent circumstances were present to justify the entry and search of the appellant's property by the police without a valid search warrant.

STATEMENT OF FACTS[1]

In August of 2014, Investigator James Begley of the Amherst County Sheriff's Office was contacted by Kevin Lockhart, a confidential informant who had been working with Begley "on and off" for two years. (App. 65, 215-16). Lockhart had assisted in police investigations by making "purchases of illicit narcotics" in exchange for payment. (App. 163-64). Lockhart informed Begley

[1] On appeal, this Court considers the entire record in determining whether the trial court properly denied a motion to suppress. See Carroll v. United States, 267 U.S. 132, 162 (1925); Elliott v. Commonwealth, 61 Va. App. 48, 51, 733 S.E.2d 146, 148 (2012).

that Campbell was trying to arrange a "meth cook," but he could not obtain all of the necessary ingredients, pseudoephedrine in particular. (App. 164, 186). On August 6, 2014, Lockhart contacted Begley "mid-day, maybe early afternoon" and told him it appeared that "a cook" was going to occur at Campbell's property. (App. 84-85, 164-65, 189). Begley told Lockhart to keep him "apprised." (App 164, 165).

At that time, Lockhart had no pending criminal charges and he had never "lied" to Begley, "ripped [him] off," or "cheated" him. (App. 163-64, 193-94, 195-96). Begley recalled that Lockhart was paid $100 for his assistance in the investigation of Campbell. (App. 164).

After speaking to Lockhart, Begley contacted the Virginia State Police, who had a unit trained to secure and make safe hazardous methamphetamine labs. (App. 165). Begley also informed the Sheriff's Office that he required additional "personnel" in the future. (App. 165). During these preparations, Lockhart informed Begley that Campbell had obtained the necessary ingredients to create methamphetamine and he was "preparing the stuff in the shed." (App. 165). At one point, Lockhart specifically stated that Campbell's daughter Ashley Campbell ("Ashley") and a man named Timothy Birch were "rolling up" "balls of aluminum foil" and Campbell was "crushing up the Sudafed," i.e., the pseudoephedrine,

which was a precursor of methamphetamine. (App. 167, 186, 200, 202, 204, 233, 307, 310-11, 314).

These cell phone conversations and text messages between Lockhart and Begley occurred while Lockhart was in the vicinity of the shed where Campbell was preparing to manufacture the methamphetamine. (App. 165-66).

Thereafter, Begley drafted an affidavit and made three original copies of it. (App. 86, 165). Begley planned to retain one copy of the affidavit, attach one copy to the search warrant he expected to obtain from the magistrate, and leave one copy with the magistrate to file in the circuit court clerk's office. (App. 86). Begley went to the magistrate to obtain a search warrant. (App. 165). During Begley's discussion with the magistrate, the magistrate directed him to clarify the target location by adding "Madison Heights" to the affidavit's paragraph describing the location.[2] (App. 89). Begley made the amendment on the copy of the affidavit he left with the magistrate, but not on the copy that he retained ("Begley's affidavit). (App. 88; Addendum 1).[3]

Begley averred in the affidavit:

> A confidential, reliable informant has observed a methamphetamine lab in a shed within the curtilage, beside the residence listed in

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[2] Madison Heights is in Amherst County. (App. 250).

[3] Begley's affidavit, which was an exhibit to the Second Motion to Suppress filed April 30, 2015 (App. 50-53), was inadvertently omitted from the Appendix. It is attached to this Opening Brief as an addendum.

> paragraph 2 [of the affidavit] within the past 72 hours. The confidential, reliable informant is familiar with how methamphetamine is manufactured and is familiar with the precursors used to manufacture methamphetamine. The confidential, reliable informant has observed both the precursors and the residents processing the precursors to make the methamphetamine product in the shed beside [redacted] Drive. This officer knows that manufacturing methamphetamine is in violation of the Code of Virginia and that it is a felony offense listed under [Code § 18.2-248].

(App. 168; Addendum 1-2). During the trial, defense counsel elicited from Begley that he "testified" to the information contained in the affidavit before the magistrate. (App. 188). Begley elaborated: "I stated exactly what's in there . . . ." (App. 188-89). Begley also explained he stated in the affidavit he had received the information from the confidential informant during "the past 72 hours" in order to protect Lockhart's identity: "If I came in and said in the last 24 minutes a confidential reliable informant had observed a meth lab being cooked on scene . . . it would . . . blow my informant's cover." (App. 189, 195).

When Begley left the magistrate's office, he had two copies of the affidavit, the original search warrant, and a copy of the search warrant. (App. 90). The affidavit that Begley retained ("Begley's affidavit") bore the magistrate's original signature in blue ink and indicated that Begley had "subscribed and sworn to" the affidavit at 10:50 p.m.[4] (App. 110, 128; Addendum 1-2). Begley gave the State

[4] The Commonwealth provided defense counsel a copy of Begley's affidavit in early 2015. (App. 22, 64, 98).

Police the original search warrant for execution by their tactical team. (App. 90, 165, 173).

Campbell was manufacturing the methamphetamine in a 10 x 12-foot shed across the driveway from his mobile home. (App. 174, 211). Campbell's brother's home was approximately 30 yards from the shed and other mobile homes were between 75 and 100 yards from the shed. (App. 174, 192).

After the search warrant was issued, but before it was executed, other officers arrived at the scene. (App. 172, 192). Investigator Brandon Hurt, a narcotics investigator and member of the Amherst County Sheriff's Office tactical team, positioned himself 25 to 30 yards from the shed. (App. 172, 250). He observed the shed for approximately 45 to 60 minutes before the search warrant was executed and during that time he witnessed Ashley take a roll of aluminum foil from Campbell's home to the shed and a man take a short hose to the shed. (App. 250-51). He could also hear multiple people talking "either in front of the shed or inside the shed." (App. 251). Shortly before the State Police arrived to execute the warrant, he observed "a lot of smoke" coming from the shed. (App. 251).

Lockhart testified that he called Begley after Campbell and his companions had mixed the ingredients in bottles. He said, "[W]here y'all at, where y'all at, they're starting to make this thing, man[.] . . . [T]hey've already got the product

loaded in the bottle, and it's starting to boil, it's starting to bake." (App. 206-07). He further testified that once the methamphetamine started "cooking," it released "a gas fume," "awful, awful fumes," which forced Campbell to open the shed's door. (App. 208). Campbell said, "[I]t's going to ignite, man, we've got to open the door to let this out." (App. 208-09). Lockhart estimated that the police drove into the driveway and announced their presence 60 to 90 seconds after Campbell opened the door to allow the fumes to escape. (App. 209).

The search warrant was executed at approximately 11:00 p.m. (App. 189). When the police arrived, Campbell, Birch, and Ashley either hid in the shed or attempted to run; however, law enforcement officers apprehended them within 45 minutes and recovered evidence of the manufacture of methamphetamine from the shed. (App. 173, 175-82, 209, 254). The officers also recovered what appeared to be a "jar" of produced methamphetamine. (App. 180).

At trial, Begley, who was qualified as an expert in the manufacture of methamphetamine, explained that manufacturing methamphetamine involved "a lot of volatile chemicals" that are "highly combustible." (App. 172). He testified that if methamphetamine is cooked too long, it can produce "extremely carcinogenic" and potentially lethal gases. (App. 172). Begley concluded: "I mean it would kill [Campbell], basically." (App. 172). He testified during

cross-examination that he could not say what the "largest blast radius would be on a meth cook of this size." (App. 192).

Virginia State Police Special Agent Glen Phillips was also qualified as an expert in the manufacture of methamphetamine at trial. (App. 302). He testified that ingredients for manufacturing methamphetamine were "poisonous" and manufacturing methamphetamine creates gaseous byproducts that can cause respiratory difficulties, blindness, and death. (App. 302). According to Phillips, the manufacture of methamphetamine could create an explosion risk or fire hazard; a methamphetamine manufacturing apparatus could essentially be an "incendiary device" that caused a "plume" and "a big fire ball." (App. 302-03, 311). He indicated that Campbell had "carried completely out" the manufacture of methamphetamine. (App. 305-06, 310).

Material Proceedings in the Circuit Court

Campbell filed a motion to suppress and an amended motion to suppress on March 26 and April 2, 2015, respectively. (App. 4-6, 7-9). In the amended motion to suppress, Campbell argued that the circuit court should suppress all of the evidence recovered pursuant to the search warrant because the affidavit that provided the basis for the search warrant was never filed by the magistrate in the circuit court as required by Code § 19.2-54. (App. 8-9).

Specifically, Campbell alleged that only one page of the affidavit (the first) had been filed in the circuit court. (App. 8). He argued that the filing of only one page of the affidavit did not constitute a filing under Code § 19.2-54 and therefore the affidavit was "defective"; the search warrant "invalid"; and the fruits of the search warrant inadmissible. (App. 8).

At the hearing on Campbell's motions, Campbell acknowledged that the Commonwealth had previously provided him with Begley's affidavit and stated that he did not "contest[] that the copy of the affidavit that the prosecution gave to [him] contained statements that would have been enough to constitute probable cause and establish the reliability and credibility of the informant." (App. 23). But he argued that the magistrate had never filed Begley's affidavit in the circuit court as required by statute. (App. 23). In fact, the record showed that only the first page of an affidavit was filed in the circuit court on August 7, 2014. (App. 23, 104). The magistrate filed the affidavit by facsimile and the only page of the affidavit filed in the clerk's office contained approximately one half inch of the second page of the affidavit along a border of the affidavit's first page.[5] (App. 23, 104, 150-52). The page that was filed with the circuit court did not contain any of

[5] At a later hearing, Campbell's trial counsel surmised, "It looks like the fax picked up some . . . parts" of the second page of the affidavit. (App. 67). The trial judge described the filed affidavit as having "a first page superimposed on the second page where literally the numbers on the second page showed up as the numbers of the paragraph on the first page." (App. 151-52).

the statements that addressed the probable cause for the issuance of the search warrant. (App. 23).

The circuit court held that the "filing of the affidavit [was] a procedural issue . . . that may but is not required to invalidate the search or the search warrant." (App. 32). The circuit court then indicated it was ready to proceed on a Franks v. Delaware[6] determination of whether "there [was] no probable cause or reliability of the confidential informant to go forward to give rise to the search warrant in this case." (App. 34-35). Campbell asked for a continuance to conduct further research on "what effect the single page affidavit has on going forward." (App. 39).

On April 30, 2016—a year and eight months after the search—Campbell filed a Second Amended Motion to Suppress, wherein he raised two arguments. (App. 50-52). First, he argued that the affidavit filed with the circuit court did not comply with Code § 19.2-54 because the second page of the affidavit was not filed in the circuit court within 30 days of the search warrant's issuance. (App. 51).

[6] 438 U.S. 154 (1978). Based on the context of the attorneys' colloquy with the circuit court and later proceedings, it is apparent that references to Jencks in the transcript should be references to Franks. (App. 35-44). In Franks, the United States Supreme Court held that where a defendant "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and the statement was necessary to the finding of probable cause, the defendant is entitled to a hearing under the Fourth Amendment. 438 U.S. at 155-56.

Second, he argued that "[t]he affidavit as filed" was "substantively defective" because it did not provide facts that gave rise to probable cause or provide circumstances sufficient to determine that the informant's information was reliable or that the informant was credible. (App. 51). He also argued that the affidavit as filed did not contain "the affiant's signature, [the] acknowledgement by the magistrate," or any "evidence that the statements made on the first page of the affidavit were under oath." (App. 51).

The circuit court held a hearing on Campbell's Second Amended Motion to Suppress on June 3, 2015. (App. 60). At the hearing, Campbell asserted he was "not making a Franks challenge" and reiterated the statutory arguments made in the Second Amended Motion to Suppress. (App. 61-62). After further argument by the parties, the circuit court held that the filing of the affidavit was a "procedural issue." (App. 74). It found that "there was an effort made to file the affidavit by fax, which the statute allows" and

> Code § 19.2-54 does not say the Court must invalidate the search warrant if the affidavit in support of a warrant is filed more than thirty days [after the issuance of the search warrant]. It says simply the failure of the officer to file the affidavit shall not invalidate the search unless the failure shall continue for more than thirty days, but it doesn't say the Court has to do that.
>
> I still believe that this is a procedural issue rather than a substantive issue under the statute.

(App. 74-75). Accordingly, the circuit court overruled "the portion of the Motions to Suppress on the failure to file the full affidavit within the thirty day period." (App. 75).

The circuit court then asked for argument on "the issue of whether the search warrant makes the proper statement of facts that would support probable cause to issue the search warrant." (App. 75). After hearing testimony from Campbell, Begley, and Phillips and further argument from the parties, the circuit court suppressed the evidence because there was no evidence that "the full affidavit was filed." (App. 100). The circuit court held that because Begley's affidavit did not have the handwritten notation "Madison Heights" present in the filed affidavit, it was unresolved whether the second page of the affidavit, which was not transmitted to the circuit court, contained further differences. (App. 101).

The circuit court continued, "I have no doubt that Investigator Begley filed something under oath. I have no doubt that the magistrate issued a search warrant based upon a full affidavit, but I don't have the full affidavit that I can feel confident in." (App. 101). The circuit court granted Campbell's motion to suppress and then continued the case to allow the Commonwealth to determine whether it wished to proceed to trial in light of the suppression of the evidence. (App. 101-02).

The Commonwealth filed a motion for reconsideration on June 8, 2015. (App. 106-15). The Commonwealth argued *inter alia* that even if the search warrant were defective, the law enforcement officers relied on it in good faith under United States v. Leon, 468 U.S. 897 (1984), because "Investigator Begley had no way of knowing what the magistrate would do with the original search warrant affidavit once he left the magistrate's office and therefore performed every act legally required of him and in good faith." (App. 110-12).

On June 17, 2015, the circuit court heard argument on the Commonwealth's motion for reconsideration. After hearing argument, the circuit court held that Virginia's appellate courts

> are willing to relax the requirements of . . . the last paragraph of Code § 19.2-54 [when] there was adequate notice given to the defendant of the contents of the affidavit notwithstanding the fact that the affidavit had either not been correctly filed, not correctly certified, or not correctly signed as long as the defendant had notice of what the affidavit said.

(App. 150-51). The circuit court then held that it could not "have certainty that the defendant had notice of the second page because we don't have it. It's never been filed." (App. 152). Therefore, the circuit court found that the search warrant was invalid under the last paragraph of Code § 19.2-54. (App. 152-53).

The circuit court declined to apply the good faith exception due to the unavailability of the magistrate's copy of the affidavit. (App. 153-54). The circuit

court determined that it could not "make any real determination as to whether or not the magistrate was misled…." (App. 153-54). The circuit court continued:

> I know what Officer Begley testified to. I know the copy of the affidavit he had, but we don't have the real item here for the Court to make a real determination as to whether or not that was done. If the Court cannot make that determination, then the Court cannot make a ruling on good faith.

(App. 154). The circuit court also found that "Virginia" had restricted the application of the good faith exception in Code § 19.2-54. (App. 154).

After making this ruling, the circuit court held it would take under advisement the question of whether probable cause and exigent circumstances justified a warrantless search of Campbell's property. (App. 154-55). After the trial, the circuit court revisited the issue it had taken under advisement and held *inter alia* that Lockhart's communications with Begley gave the officers probable cause to investigate; that the methamphetamine could "blow up," "be hidden, poured out, [or] disposed of," which created an "urgent" situation; and that Campbell and his companions could have run given that the raid occurred at night. (App. 329-30). Thus, the circuit court held that exigent circumstances supported the search. (App. 328-30). Thereafter, the circuit court found Campbell guilty of the manufacture of methamphetamine. (App. 339-40).

On appeal, the Court of Appeals held that the evidence should have been suppressed because the warrant affidavit was not properly recorded as required by

Code § 19.2-54. The Court of Appeals noted that the statute was "no model of clarity" and that, to date, "no known Virginia case law has concluded that Code § 19.2-54 requires exclusion of evidence if the requirement for filing a search warrant affidavit was not met." Campbell, 66 Va. App. at 687, 685, 791 S.E.2d at 356, 355. Nevertheless, the Court of Appeals concluded that the final paragraph of Code § 19.2-54 "provides implicitly that a search is invalid" under these circumstances, and that suppression was the appropriate remedy. Id. at 687, 791 S.E.2d at 356. The Court of Appeals further held that because suppression under Code § 19.2-54 is a statutory remedy, "whether the search and seizure of evidence also violated the Fourth Amendment is irrelevant." Id. at 687-88, 791 S.E.2d at 356. The Court of Appeals further held that the warrantless seizure analysis conducted by the circuit court was inappropriate because a search warrant, albeit a deficient one, was obtained in this case. Id. at 688 n.2, 791 S.E.2d at 356 n.2.

ARGUMENT

I. The trial court correctly ruled that even if the search warrant was deficient, the fruits of the search were admissible because the police had probable cause and exigent circumstances to support a lawful warrantless search.[7]

A. Standard of Review

A claim that evidence was obtained in violation of the Fourth Amendment "presents a mixed question of law and fact" that an appellate court reviews *de novo* on appeal. Brooks v. Commonwealth, 282 Va. 90, 94-95, 712 S.E.2d 464, 466 (2011) (citation omitted). The Court gives deference to the trial court's factual findings but independently determines the lawfulness of the manner in which the evidence was obtained. See Jones v. Commonwealth, 277 Va. 171, 177, 670 S.E.2d 727, 731 (2009). "The defendant has the burden to show that, considering the evidence in the light most favorable to the Commonwealth, the trial court's denial of his suppression motion was reversible error." Id. at 177-78, 670 S.E.2d at 731 (citations omitted).

[7] In this argument section, the Commonwealth will address Campbell's arguments (encompassed by both his first and second assignments of cross-error) challenging the trial court's finding that the existence of probable cause and exigent circumstances rendered the search reasonable. (Br. in Opp. and Assignments of Cross-Error 20-27).

B. The determination that the warrant was invalid does not end the suppression analysis.

"Searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment, subject to exceptions allowed when exigencies require warrantless searches." McCary v. Commonwealth, 228 Va. 219, 227, 321 S.E.2d 637, 641 (1984) (citations omitted). In this vein, a defective warrant does not invalidate a subsequent search or seizure when the court finds that the warrant was ultimately not necessary. It was proper, therefore, for the circuit court to engage in a warrantless search analysis after finding the warrant itself defective. See United States v. Poole, 718 F.2d 671, 675 (4th Cir. 1983) ("We hold that any defects in the warrant are irrelevant and that exigent circumstances justified the warrantless search of Poole's car.");[8] see also Chambers v. Maroney, 399 U.S. 42, 52 (1970) ("For constitutional purposes, we see no difference between on the one

[8] Other jurisdictions have also followed this approach. See, e.g., Graves v. Mahoning Cnty., 821 F.3d 772, 775 (6th Cir. 2016) (noting in a 42 U.S.C. § 1983 case, "[t]he plaintiffs may not prevail merely by showing that they were arrested with a defective warrant; they must show that they were *unreasonably seized*"); White v. United States, 448 F.2d 250, 254 (8th Cir. 1971) ("While the defendant has attacked the validity of the search warrant in this case, we do not find it necessary to pass on this question, because we believe that the search can be justified as a warrantless search . . . ."); State v. Bradley, 227 S.E.2d 776, 779 (Ga. Ct. App. 1976) ("the fact that a defective warrant has issued between the time of the seizure and the search will not destroy the validity of that search as a 'reasonable' warrantless search."); Adkins v. State, 717 S.W.2d 363, 365 (Tex. Crim. App. 1986) ("We hold that the actual procuring of a warrant does not preclude the use of exigent circumstances to justify a search should the warrant fail.").

hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.”).

This procedure also comports with the plain language of Code § 19.2-54, which provides that the failure to file the affidavit appropriately “shall not invalidate any search made ***under the warrant***.” (Emphasis supplied). When the Commonwealth proceeds on a warrantless search theory, the suppression provision of Code § 19.2-54 does not apply. Code § 19.2-54 only invalidates a search made “***under the warrant***” and does not invalidate a search that is justified by other circumstances.

Under these circumstances, the Court of Appeals’ holding that the exigent circumstances analysis was “inapposite” because “[t]here was no warrantless search or seizure in this instance” was error. Campbell, 66 Va. App. 688 n.2, 791 S.E.2d at 356 n.2. Under a proper analysis, the judgment of the trial court should be affirmed.[9]

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[9] To the extent the Court of Appeals held as a general matter that Fourth Amendment law is inapposite in this setting, this conclusion is also error. The protections of Virginia’s Constitution and statutes are substantially the same as those contained in the Fourth Amendment. Lowe v. Commonwealth, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 275 n.1 (1985). Indeed, this Court has applied Fourth Amendment jurisprudence to cases arising under Code § 19.2-54. See McCary, 228 Va. at 231-32, 321 S.E.2d at 643-44 (holding search warrant challenged for

C. Even absent a search warrant, exigent circumstances justified a warrantless search.

Because the officers in this case had sufficient information separate from the execution of the warrant to give rise to probable cause and exigent circumstances, the evidence obtained through their search was admissible. See Hudson v. Michigan, 547 U.S. 586, 592 (2006) (quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)) (holding that in determining whether evidence is inadmissible for being "fruit of the poisonous tree" the question is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint").

A warrantless search is reasonable when it is supported by probable cause and exigent circumstances. Robinson v. Commonwealth, 273 Va. 26, 34, 639 S.E.2d 217, 221 (2007). The circuit court found that probable cause existed at the time the officers conducted the search, and Campbell did not challenge that determination in the Court of Appeals. (App. 329) (Def. Court of Appeals Br. 15-16). Rather, he argued that exigent circumstances did not exist. (Def. Court of Appeals Br. 15-16).

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non-compliance with Code § 19.2-54 valid under the "good faith" exception to the exclusionary rule); Quintana v. Commonwealth, 224 Va. 127, 136, 295 S.E.2d 643, 646 (1982) (Code § 19.2-54 must be read "[h]aving in mind the Fourth Amendment purposes the statute was designed to foster").

This Court has provided a non-exhaustive list of exigent circumstances that may justify a warrantless entry by officers who have probable cause to believe a crime is being committed:

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.

Verez v. Commonwealth, 230 Va. 405, 411-12, 337 S.E.2d 749, 753 (1985). The Verez Court noted that this list is not exhaustive and that these are merely relevant factors in the determination of whether sufficient exigent circumstances exist. Id.

In this case, Begley received real-time communications from Lockhart—a reliable informant—regarding Campbell's methamphetamine manufacturing. (App. 165-67). Investigator Hurt, who was dispatched before the warrant issued, saw people take supplies into the shed, heard voices in the vicinity of the shed, and saw "a lot of smoke" coming from the shed. (App. 251). Additionally, other mobile homes were relatively close to the shed. (App. 174, 192). Volatile chemicals are involved in the manufacture of methamphetamine and the manufacturing process poses an explosion and fire risk. (App. 172, 301-03, 312).

Additionally, the exposure to fumes from the manufacture of methamphetamine can cause respiratory difficulties, blindness, or death. (App. 302).

As the circuit court found, a reasonable officer could have believed that the presence of smoke at the shed indicated an impending fire or explosion, which would have caused the evidence of the manufacturing of methamphetamine to be lost or destroyed. (App. 329). Similarly, a reasonable officer could have believed that Lockhart or other individuals in the vicinity of the shed were in danger of being injured either by noxious smoke or a potential explosion or fire. (App. 172, 174, 192, 301-03, 312). Finally, the circuit court appropriately held that methamphetamine and its ingredients are easily disposable and that it was possible the perpetrators could escape under the cover of night. (App. 329-40).

When the circumstances of this case are compared to Robinson, 273 Va. 26, 639 S.E.2d 217, it is clear that exigent circumstances existed. In Robinson, an officer observed minors drinking alcohol at a party. Id. at 42, 639 S.E.2d at 226. This Court concluded that exigent circumstances existed:

> Had Officer Cox left the property to obtain a warrant after the juveniles began to run from the yard, there is a high probability that evidence of the crimes would have been destroyed by the time he returned. Moreover, given the number of cars parked on the street and in the driveway, Officer Cox could reasonably have believed that a number of juveniles in attendance may have been inebriated and could have injured themselves or others, either by running into the woods at night or by attempting to drive away from the residence. These factors constituted exigent circumstances and justified Officer Cox's warrantless entry into the backyard.

Id. The presence of smoke, coupled with the explosive volatility of the ingredients and manufacturing process, are surely comparable to the dangers posed by inebriated minors. When combined with other reasonable concerns regarding destruction of evidence and flight, exigent circumstances clearly existed in this case. Accordingly, the circuit court properly found that exigent circumstances existed and it properly denied the motion to suppress.

II. The Court of Appeals erred in concluding that Code § 19.2-54 required suppression.

A. Standard of Review

This Court applies a "*de novo* standard of review when addressing a question of statutory construction." Courtney v. Commonwealth, 281 Va. 363, 366, 706 S.E.2d 344, 345 (2011) (citation omitted). "The primary objective of statutory construction is to ascertain and give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). Furthermore, "[this] Court presumes that the legislature has purposefully chosen the precise statutory language, and [it is] bound by those words when [it] appl[ies] the statute." David v. David, 287 Va. 231, 240, 754 S.E.2d 285, 290-91 (2014) (internal quotation marks and citations omitted).

B. An implicit suppression remedy is contrary to principles of statutory construction and this Court's established case law.

Relying on the final paragraph of Code § 19.2-54, the Court of Appeals held that the General Assembly intended suppression as a consequence for failure to comply with the recording requirement of the statute. This portion of Code § 19.2-54 provides:

> Failure of the [judicial] officer issuing such warrant to file the required affidavit shall not invalidate any ***search made under the warrant*** unless such failure shall continue for a period of 30 days. If the affidavit is filed prior to the expiration of the 30-day period, nevertheless, evidence obtained in any such search shall not be admissible until a reasonable time after the filing of the required affidavit.

(Emphasis added.)

"Historically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression unless the statute supplies that right." Troncoso v. Commonwealth, 12 Va. App. 942, 944, 407 S.E.2d 349, 350 (1991). This Court "has steadfastly refused to [exclude] evidence seized pursuant to statutory violations, absent an express statutory provision for suppression." Id. And the violation of a state constitution or state statutory scheme is not *per se* indicia that a federal constitutional violation has occurred. See Virginia v. Moore, 553 U.S. 164, 172 (2008) (quoting California v. Greenwood, 486 U.S. 35, 43 (1988)) ("While '[i]ndividual States may surely construe their own constitutions as

imposing more stringent constraints on police conduct than does the Federal Constitution,' state law does not alter the content of the Fourth Amendment.").

As noted above, Code § 19.2-54 only explicitly invalidates searches made "***under the warrant***." The plain language of Code § 19.2-54 does not invalidate otherwise reasonable searches that do not rely on the warrant, i.e., searches justified by probable cause and exigent circumstances. The Court of Appeals improperly rendered the phrase "under the warrant" "meaningless" when it held that reasonable warrantless searches were also invalidated by a failure to comply with Code § 19.2-54. See Porter v. Commonwealth, 276 Va. 203, 230, 661 S.E.2d 415, 427 (2008) (citations omitted) (stating that "it is well established that every act of the legislature should be read so as to give reasonable effect to every word" and no part of a statute "will be considered meaningless unless absolutely necessary").

Moreover, although the plain language of Code § 19.2-54 states that a "search made under the warrant" shall not be invalidated unless the failure to file the search warrant continues for a period of 30 days, it does not state the inverse: that a search must be deemed invalid when the affidavit is not filed pursuant to the statute.

If the General Assembly wished to mandate the suppression of warrantless searches, it could have done so. See David, 287 Va. at 240, 754 S.E.2d at 290-91.

When the legislature intends a suppression remedy, it knows how to spell that out. For example, Code § 19.2-68(H), regarding intercepted communications, provides:

> Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the Commonwealth, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom…

Code § 19.2-68(H) then lists grounds for suppression and details procedures for detailing and arguing such motions. See Code § 19.2-68(H). This clear suppression remedy stands in stark contrast to the language at issue in Code § 19.2-54.

Especially in light of the General Assembly's language permitting suppression in other contexts, this Court must presume the General Assembly acted deliberately when it failed to include an express suppression remedy in Code § 19.2-54. See Kiser v. A.W. Chesterton Co., 285 Va. 12, 19 n.2, 736 S.E.2d 910, 915 n.2 (2013) ("When interpreting and applying a statute, we 'assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words.'") (internal citation omitted). Likewise, this Court should not interpret the statute to ***imply*** a suppression remedy in the absence of an express one. See Holsapple v. Commonwealth, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003) ("Courts cannot 'add language to the statute the General Assembly has not seen fit to include.'"). Indeed, as a general matter, this Court has declined

to exclude evidence on purely statutory grounds "where no deprivation of the defendant's constitutional rights occurred." Horne v. Commonwealth, 230 Va. 512, 519, 339 S.E.2d 186, 191 (1986).[10]

Practically, the Court of Appeals' interpretation of Code § 19.2-54 provides a perverse incentive to law enforcement officers to forego obtaining a warrant where circumstances suggest that a search would be reasonable without a warrant. Under the Court of Appeals' interpretation of Code § 19.2-54, forgoing the warrant protects the law enforcement officers' reasonable warrantless search from being later determined invalid. This Court should reject the Court of Appeals' analysis. See Evans v. Chalmers, 703 F.3d 636, 663-64 (4th Cir. 2012) (noting "the Supreme Court has instructed lower courts to eschew rulings that would discourage resort to judicial process and instead incentivize the invocation of exceptions to the warrant requirement").

Finally, as this Court has noted, the requirements of Code § 19.2-54 are intended to provide the defendant sufficient notice of the contents of the probable cause affidavit so that he can challenge the magistrate's findings. Quintana, 224 Va. at 136, 295 S.E.2d at 646-47. For example, in Quintana, the probable cause affidavit was not certified by the magistrate prior to being filed with the circuit

[10] This is consistent with this Court's interpretation of the protections of Virginia's Constitution and related statutes. See supra at note 9.

court and that failure was not remedied within 30 days, as permitted by statute. Id. at 136, 295 S.E.2d 646. Quintana argued that, under these circumstances, the final paragraph of Code § 19.2-54 "necessarily impli[ed]" that the search was invalid. Id.

Quintana rejected that argument. The Court noted that Code § 19.2-54 must be read "[h]aving in mind the Fourth Amendment purposes the statute was designed to foster." Id. at 136, 295 S.E.2d 646. The Court reasoned that the magistrate's signature was not constitutionally required. Further, the omission of the magistrate's signature did not prejudice the defendant because at the suppression hearing the affiant identified the affidavit that was subscribed and sworn to before the magistrate. The Court concluded the trial judge properly overruled the motion to suppress.[11]

Likewise, in this case, the search warrant affidavit was not constitutionally defective. Indeed, the defendant expressly noted that he did not "contest[] that the copy of the affidavit that the prosecution gave to [him] contained statements that would have been enough to constitute probable cause and the reliability and credibility of the informant." (App. 23). Campbell was likewise clear that he was

[11] The General Assembly is presumed to be aware of this Court's interpretation and has made no attempt to amend the statute to expressly require suppression. See Barson v. Commonwealth, 284 Va. 67, 74, 726 S.E.2d 292, 296 (2012). The General Assembly's silence is deemed acquiescence and approval. Id.

not raising a Franks challenge. (App. 61-62). Instead, he argued that the affidavit was improperly filed with the circuit court. (App. 8). This procedural defect, however, did not prejudice the defendant. As in Quintana, the omission was cured by live testimony. Begley testified under oath and was subjected to cross-examination regarding the contents of the probable cause affidavit at the suppression hearing and at trial. He testified that his affidavit, a copy of which the Commonwealth had provided to the defendant well in advance of the suppression hearing, was a duplicate original. During the trial, defense counsel elicited from Begley that ***he "testified" to the same information before the magistrate*** and Begley further testified at trial that he "stated exactly what [was] in [the affidavit before the Court]" to the magistrate. (App. 188-89). Because the defendant had a full opportunity to challenge the probable cause finding, and the sufficiency of the affidavit upon which that finding was based, the statutory purpose of Code § 19.2-54 was satisfied. Accordingly, as in Quintana,[12] the statutory violation in this case did not mandate suppression.

[12] The Court of Appeals opinion distinguished Quintana on the basis that, in this case, the Commonwealth never produced the magistrate's original copy. This distinction is not material. The statutory purpose of Code § 19.2-54 was served when the Commonwealth produced the investigator's duplicate original and the investigator testified regarding the warrant process.

III. Suppression was not warranted because the "good faith" exception applies.[13]

Although the argument was rejected by the trial court, the good faith exception to the warrant requirement was also a valid basis for overruling the suppression motion. Cf. Perry v. Commonwealth, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010) ("When the trial court has reached the correct result for the wrong reason, but the record supports the right reason, [the appellate court] will assign the correct reason and affirm that result.") (quotation marks and citation omitted).

A. Standard of Review

Whether the good faith exception announced in Leon applies to a particular set of facts is a legal conclusion this Court reviews *de novo*. Adams v. Commonwealth, 275 Va. 260, 268, 657 S.E.2d 87, 91 (2008). To the extent the application of this exception involves disputed facts arising from the motion to suppress, this Court gives deference to the trial court's factual findings. Jones, 277 Va. at 177, 670 S.E.2d at 731.

B. The good faith exception applies to excuse the magistrate's noncompliance with Code § 19.2-54.

Contrary to the Court of Appeals' holding, Fourth Amendment law is applicable in this setting. Indeed, this Court has applied the good faith exception

[13] In this argument section, the Commonwealth will address Campbell's first assignment of cross-error arguments challenging the application of the good faith exception. (Br. in Opp. and Assignment of Cross-Error 14-19).

to cases arising under Code § 19.2-54. See McCary, 228 Va. at 231-32, 321 S.E.2d at 643-44 (finding the requirements of Code § 19.2-54 were not met, but noting that "the search was valid for another reason. We embrace the recently announced 'good faith' exception to the exclusionary rule"); Drumheller v. Commonwealth, 223 Va. 695, 292 S.E.2d 602 (1982) (Poff, J., concurring) (disagreeing with majority that requirements Code § 19.2-54 were met, but concurring in the result because suppression was inappropriate under the good faith exception to the exclusionary rule). The Court of Appeals' rejection of this argument was error. Under a proper analysis, the judgment of the trial court should be affirmed.

Suppression of evidence is a remedy of "last resort" because "[t]he exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large." See Hudson, 547 U.S. at 591 (citations and internal quotations omitted). Given the "costly toll upon truth-seeking and law enforcement objectives" that the rule imposes, id., there must be some "culpable" action to trigger its application. Herring v. United States, 555 U.S. 135, 141-42 (2009). Thus, the challenged police conduct "must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. As pertinent to this case, the appropriate "deterrent is

absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant." Derr v. Commonwealth, 242 Va. 413, 422, 410 S.E.2d 662, 667 (1991) (citing Leon, 468 U.S. at 916).

Indeed, "[a]n officer's decision to obtain a warrant is prima facie evidence that he or she ***was*** acting in good faith." Adams, 275 Va. at 273, 657 S.E.2d at 95 (citing United States v. Koerth, 312 F.3d 862, 868 (7th Cir. 2002) (emphasis added); Leon, 468 U.S. at 921 n.21). The Supreme Court of the United States has gone so far as to say that "[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." Leon, 468 U.S. at 922 (quoted with approval in Adams, 275 Va. at 273-74, 657 S.E.2d at 95).

In this case, Begley sought and executed the search warrant in good faith. Begley prepared and presented a probable cause affidavit, in triplicate, to the magistrate. He testified that the affidavit that he retained was the affidavit that he "testified to before the magistrate." (App. 188). He further testified that he "stated exactly what [was] in [the affidavit]" to the magistrate. (App. 188-89). The magistrate signed the affidavit that Begley retained and returned it to him with the search warrant. (Addendum 1-2; App. 90). Indeed, Begley's copy bore the

magistrate's original signature in blue ink. The magistrate then faxed the affidavit to the circuit court clerk's office in compliance with Code § 19.2-54. Due to a technological error in the fax transmission, however, the pages overwrote and the full affidavit was not received. (App. 67, 151-52).

Given those circumstances, Begley relied on the warrant in good faith because "a reasonably well trained officer would [not] have known that the search was illegal despite the magistrate's authorization." See Leon, 468 U.S. at 922 n.23 (quoted with approval in Adams, 275 Va. at 276, 657 S.E.2d at 96). There was no way Begley could have anticipated that a ministerial or technological error related to the magistrate's transmission of the affidavit required under the statute would prevent the magistrate's copy of the affidavit from being filed in the clerk's office. The magistrate's error in recording the affidavit is not attributable to Begley. Because the exclusionary rule is not designed "to punish the errors of judges and magistrates," it does not apply here. Leon, 568 U.S. at 916; accord Herring, 555 U.S. at 142-43. In Arizona v. Evans, 514 U.S. 1 (1995), the Supreme Court of the United States applied the

> good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding. [The Supreme Court] held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and "most important, there [was] no basis for believing that application of the exclusionary rule in [those]

> circumstances" would have any significant effect in deterring the errors.

Herring, 555 U.S. at 142-43 (citing Arizona, 514 U.S. at 15).

Although Campbell argues that the good faith exception does not apply because the magistrate "totally abandoned his judicial role" (Br. in Opp. and Assignments of Cross-Error 18), that assertion is not supported by the record. To the contrary, the circuit court found that the magistrate attempted to fax the affidavit to the circuit court, but every page was not properly transmitted.[14] (App. 151-52). Also, there is no evidence to suggest that the magistrate "abandoned his detached and neutral role." See Corey v. Commonwealth, 8 Va. App. 281, 289, 381 S.E.2d 19, 23 (1989) (citing Leon, 468 U.S. at 923). While there may have been a ministerial error that led to only the partial filing of the affidavit, this ministerial error did not rise to the level of a deliberate act or total abandonment which might require suppression of evidence.

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[14] The circuit court found:

> [T]he statute allows the magistrate to fax the affidavit to the Clerk's Office, sadly, and so that's what was done. And we've got . . . a first page superimposed on the second page where literally the numbers on the second page showed up as the numbers of the paragraph[s] on the first page.

(App. 151-52).

CONCLUSION

This Court should reverse the Court of Appeals' decision and affirm the judgment of the Circuit Court for Amherst County convicting James Willis Campbell, Sr., of manufacturing methamphetamine.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellant herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 30, 2017, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to Robert C. Goad, III, counsel for the appellee, at mail@shradergoadlaw.com In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 8445 words and is 40 pages long (including the addendum), which is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

/s/
KATHERINE QUINLAN ADELFIO
Assistant Attorney General
Criminal Appeals Section

Courtesy copies: The Honorable J. Michael Gamble
Assistant Commonwealth's Attorney Timothy Griffin

ADDENDUM

AFFIDAVIT FOR SEARCH WARRANT

Commonwealth of Virginia VA. CODE ANN. § 19.2-54

The undersigned Applicant states under oath:

1. A search is requested in relation to an offense substantially described as follows:

   Manufacture Methamphetamine as defined in 18.2-248 of the Code of Virginia.

☐ CONTINUED ON ATTACHED SHEET]

2. The place, person or thing to be searched is described as follows:

   The residence at [redacted] The residence is a crème colored, single wide mobile home trailer with a gravel drive leading to the residence from [redacted] The trailer has the number [redacted] posted near the front door. The mobile home trailer has a wooden front porch with a tin roof. Any and all out buildings within the curtilage of the residence. All persons present and all vehicles at the residence at the time of execution of the search warrant. JEB JEB

☐ CONTINUED ON ATTACHED SHEET]

3. The things or persons to be searched for are described as follows:

   Methamphetamine, baggies, scales, money, pay ledgers, any and all precursors that can be used together to produce methamphetamine, methamphetamine salts, and methamphetamine isomers. Any equipment used to manufacture methamphetamine such as filters, glassware, pill grinders, heating sources, etc.

☐ CONTINUED ON ATTACHED SHEET]

CASE NO. . .

AFFIDAVIT FOR SEARCH WARRANT

APPLICANT:

J.E. Begley
NAME

Investigator
Title (If Any)

115 Taylor Street/P.O. Box 410
Address

Amherst, Virginia 24521

Certified to Clerk of

..... Circuit Court
City or County

on .....
Date

....
Title Signature

Original Delivered ☐ in person ☐ by certified mail
☐ by electronically transmitted facsimile

to Clerk of ..... Circuit Court
City or county where executed

on .....

....
Title Signature

Complete only if different than above:

Copy delivered ☐ in person ☐ by certified mail
☐ by electronically transmitted facsimile

to Clerk of ..... Circuit Court
City or county where executed

on .....

....
Title Signature

4. The material facts constituting probable cause that the search should be made are:
A confidential, reliable informant has observed a methamphetamine lab in a shed within the curtilage, beside the residence listed in paragraph 2 within the past 72 hours. The confidential, reliable informant is familiar with how methamphetamine is manufactured and is familiar with the precursors used to manufacture methamphetamine. The confidential, reliable informant has observed both the precursors and the residents processing the precursors to make the methamphetamine product in the shed beside [redacted]. This officer knows that manufacturing methamphetamine is in violation of the Code of Virginia and that it is a felony offense listed under the statute provided in paragraph 1 of this affidavit.

☐ CONTINUED ON ATTACHED SHEET]

5. The object, thing or person searched for constitutes evidence of the commission of such offense.

6. ☐ I have personal knowledge of the facts set forth in this affidavit OR

☒ I was advised of the facts set forth in this affidavit, in whole or in part, by an informer.
This informer's credibility or the reliability of the information may be determined from the following facts:
The confidential, reliable informant is familiar with the precursors used to make methamphetamine. The informant is also familiar with the process that takes place with the precursors to produce methamphetamine. The confidential, reliable informant has made numerous controlled drug purchases under the supervision of law enforcement in the past and has given sworn testimony in court that led to felony convictions for these controlled drug purchases. The confidential informant is willing to testify in court to the material facts provided in paragraph 4 of this affidavit.

☐ CONTINUED ON ATTACHED SHEET]

The statements above are true and accurate to the best of my knowledge and belief.

Investigator
TITLE OF APPLICANT (IF ANY)

J.E. Begley
APPLICANT

Subscribed and sworn to before me this day.

8-6-2014 @ 10:50PM
DATE AND TIME

Jack C. Creasy
☐ CLERK ☒ MAGISTRATE ☐ JUDGE