IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff, vs ANTONIO RUNNING SHIELD, Defendant.	NO. 27339 Appellant's Brief

Appeal from the Circuit Court of Pennington County

Honorable Wally Eklund, Judge

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Notice of Appeal filed January 29, 2015

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

NO. 27339

State of South Dakota,

Plaintiff/Appellee,

v.

Antonio Running Shield,

Defendant/Appellant.

PRELIMINARY AND JURISDICTIONAL STATEMENT

Throughout this brief, Defendant and Appellant, Antonio Running Shield, will be referred to as Running Shield. Plaintiff and Appellee, State of South Dakota will be referred to as State. Citations to the settled record will be denominated *SR*, followed by the appropriate page number(s).

By Indictment dated August 21, 2013, Running Shield was charged by the State of South Dakota with one count of Possession of a Controlled Substance in violation of SDCL 22-42-5 and one Count of Possession of Marijuana in violation of SDCL 22-42-6. *SR* 1. On July 28, 2014, Running Shield filed a Motion to Suppress the evidence seized statements taken following execution of a search warrant, alleging that the "all persons" provision of the search warrant violated his Fourth Amendment right to be free from unreasonable search and seizure. *SR* 22. Following briefing and hearing the trial Court, by memorandum decision of November 6, 2014, denied Running Shield's Motion to Suppress. *SR* 92.

Pursuant to stipulated facts, *SR* 121, the case was tried to the Court on December 10, 2014. *SR* 222. The trial court found Running Shield guilty of both offenses charged in the Indictment. Running Shield was sentenced on January 13, 2015. Judgment of Conviction was filed with the Court on

January 15, 2015. *SR* 226. Notice of appeal was dated January 27, 2015. *SR 229*. This is an appeal of right under SDCL §§ 23A-32-2 and 23A-32-15.

STATEMENT OF ISSUES

Issue 1

Running Shield was charged with possession of a controlled substance and possession of marijuana following the execution of a search warrant authorizing the search of "any people present at the time the search warrant is executed."

Was the affidavit in support of search warrant sufficient to provide sufficient factual basis to establish probable cause to search "all persons" present at the time of the warrant execution?

The trial court denied Running Shield's Motion to Suppress.

State v. Jackson, 2000 SD 113, 616 N.W.2d 412.

State v. Babcock, 718 N.W.2d 624, 2006 SD 59

State v. Prior, 617 N.W.2d 260 (Iowa 2000)

STATEMENT OF CASE AND FACTS

The facts relative to the search at issue are shown in the search warrant affidavit presented to the issuing Court. On November 6, 2012 a confidential informant in the employ of law enforcement made a controlled purchase of methamphetamine from Travis Maho at the Super 8 Motel on Lacrosse Street in Rapid City. *SR* 38.

On November 29, 2012, the same informant made a second controlled purchase of methamphetamine from Travis Maho. *SR* 38. This controlled buy occurred at 724 Haines Ave. in Rapid City. *SR* 38-39. The informant advised law enforcement that Maho frequently stayed at 724 Haines Ave. and had been living there for 3–4 months. *SR* 38-39. The informant advised law enforcement that Brandi White also lived at 724 Haines Avenue. *SR* 39. The informant advised that Brandi used methamphetamine, but did not sell drugs. *SR* 39. The informant advised that s/he believed that White knew that Maho was selling drugs from the residence in which she resided. *SR* 39.

In his debriefing following the November 29, 2012 controlled purchase, the informant told law enforcement that White opened the door to let him into the residence. *SR* 39. The informant indicated that another unknown person was in the residence, but left prior to the drug deal. *SR* 39. The affidavit does not indicate that White had any involvement at all in the

actual drug transaction, and does not indicate whether she was present during the actual drug transaction.

On December 17, 2012, Travis Maho was arrested in a traffic stop unrelated to the November controlled purchases and was taken into custody. *SR* 39. At the time of his arrest, Maho was found with items of evidence indicative of drug dealing. *SR* 39. On December 18, 2012, the same confidential informant was again interviewed, and advised law enforcement that that Travis Maho had recently moved from the 724 Haines Avenue address. *SR* 39. The informant identified Travis Maho's new residence as 1110 Anamosa Street Apt. 526, Rapid City, SD. *SR* 39-40. On December 18, 2012, Travis Maho was in law enforcement custody at the Pennington County Jail. *SR* 39.

On December 18, 2012, law enforcement prepared a search warrant affidavit requesting permission to search the two residences associated with Travis Maho, 724 Haines Ave. and 1110 Anamosa Street Apt. 526, the residence at which the November 29, 2012 controlled purchase occurred and the residence to which the informant advised that Travis Maho had since moved. *SR* 35-40. The affidavit also stated that:

> I also request to search any people present at the time the search warrant is executed that have a social nexus with TRAVIS ALLAN MAHO and BRANDI STAR WHITE.

SR 36. The affidavit was reviewed and the warrant was signed by the Honorable Craig A. Pfeifle. The search warrant was executed on December 18, 2012.

Travis Maho and Brandi White are the only named targets of the search warrant executed on December 18, 2012. Running Shield was not one of the named targets of the search warrant. His name does not appear anywhere in the search warrant affidavit and there is no indication that law enforcement knew who he was prior to the vehicle stop that resulted in his arrest and ultimate indictment.

Running Shield was stopped, searched, and interviewed during the execution of the search warrant at 724 Haines Avenue on December 18, 2012. The evidence shows that at approximately 6:45pm on December 18, 2012, law enforcement arrived at 724 Haines Avenue to execute the search warrant. *SR* 124. When law enforcement arrived, Running Shield was inside his vehicle in the alleyway behind the residence. *Id.* Law enforcement blocked both exits of the alleyway. *Id.* Running Shield was stopped as he attempted to drive away from the residence. Law enforcement made contact with Running Shield, searched his person, and placed him in handcuffs. *Id.* As a result of the stop, Running Shield's vehicle was searched and he was interviewed. *Id.* There is no indication in the police reports, and no allegation from the State, that

Running Shield's vehicle was stopped for any reason other than as part of execution of the search warrant.

By Motion dated July 28, 2014, Running Shield requested that the trial court suppress the evidence found in the search of his vehicle, as well as all statements by himself following his arrest. *SR* 22. Running Shield alleged that the search warrant failed to establish the probable cause necessary to support the request to search "all persons" at the scene. Following briefing and argument, the trial court, the Honorable Wally Eklund presiding, issued a memorandum decision denying Running Shield's motion to suppress. *SR* 92. The trial court entered findings of fact and conclusions of law and an Order denying Running Shields motion on November 24, 2014. *SR* 103. The trial court concluded that the search warrant affidavit established "a sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause", *SR* 101, thus upholding the validity of the warrant.

ARGUMENT

Issue 1

> Running Shield was charged with possession of a controlled substance and possession of marijuana following the execution of a search warrant authorizing the search of "any people present at the time the search warrant is executed."
>
> Was the affidavit in support of search warrant sufficient to provide sufficient factual basis to establish probable cause to search "all persons" present at the time of the warrant execution?

Standard of Review

The trial court's decision in this matter is subject to de novo review. This Court has concluded that "[o]ur review of the issuing court's decision to grant the search warrant is done independently of the conclusion reached by the suppression court." *State v. Wilkinson*, 2007 SD 79, ¶16, 739 N.W.2d 254, 259 (internal quotation and citations omitted). Such review is appropriate as "[t]he determination of whether an affidavit in support of a search warrant shows probable cause for issuance of the warrant must be based upon an examination of the four corners of the affidavit." *State v. Raveydts*, 2004 SD 134, ¶9, 691 N.W.2d 290, 293 (citations omitted). *See also, State v. Deneui*, 2009 SD 99, ¶ 58, 775 N.W.2d 221, 245.

Although the trial court's decision is reviewed de novo, the issuing court's decision to issue the search warrant is granted deference. Again in

Wilkinson, this Court stated that "'[w]e review challenges to the sufficiency of search warrants in a highly deferential manner, examining the totality of the circumstances to decide if there was at least a "substantial basis" for the issuing judge's finding of probable cause." *Wilkinson* at ¶16 (internal quotations and citations omitted).

The Defendant Running Shield does not contest, and likely has no standing to contest, whether the warrant is valid as it relates to the search of the residence at 724 Haines Avenue. However, Running Shield was stopped in his vehicle under the apparent authority of the warrant, which purported to authorize the search of "all persons" at the residence. Since the stop of a vehicle is a seizure of all of the occupants of that vehicle, *State v. Wilson*, 2004 SD 33, ¶12, 678 NW2d 176, 181, Running Shield does have the authority to challenge this portion of the search warrant. Thus the question before the Court is whether the affidavit in support of law enforcement's request for search warrant presented probable cause to search "all persons" associated with the search warrant targets, Travis Maho and Brandi White.[1]

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[1]Running Shield asserts that the "all persons" warrant was invalid for lack of probable cause. Although not presented as an argument for suppression to the trial court, it is at least questionable whether the language of the "all persons" request in this case provided sufficient

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The analogous provision of the South Dakota State Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized.

S.D. CONST. art. VI, § 11. These provisions support a citizen's right to be free of unreasonable search and seizure. These provisions require "generally the issuance of a warrant by a neutral judicial officer based on probable cause

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particularity to guide law enforcement in its execution, as it left law enforcement broad discretion in assessing who they believed to have a sufficient social nexus to the named targets and thus broad discretion in deciding who to search. Nothing should be left to the discretion of the officers executing the search. *See, Stanford v. State of Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, ___, 13 L.Ed.2d 431, ___ (1965)

prior to the execution of a search or seizure of a person." *State v. Edwards*, 2014 SD 63, ¶12. The warrant must particularly describe the place to be searched and the person or thing to be seized. *State v. Smith*, 344 N.W.2d 505, 507 (S.D. 1983) (*quoting* S.D. CONST. art. VI, § 11).

An "all persons" warrant implicates the particularity with which a search warrant describes persons subject to being searched. This Court's first review of an "all persons" warrant occurred in *State v. Jackson*, 2000 SD 113, 616 N.W.2d 412. The *Jackson* Court found that the warrant's inclusion of authority to search all persons arriving at residence during the search was not overly broad in light of the occupants' history of illicit drug activity. The affidavit in *Jackson* revealed that law enforcement had searched the residence of search warrant targets Scott Mallula and Bobbi Maurer in April 1997. *Id.* at ¶3. That search revealed evidence of the use and sale of drugs. *Id.* In January 1998, another search was executed at a different residence occupied by the Mallula and Maurer. *Id.* Again, this search revealed evidence of drug use and sales. *Id.*

On September 30, 1998, a traffic stop occurred in which the driver was found to possess methamphetamine. *Id.* at ¶2. That driver revealed that he had purchased the methamphetamine from Mallula at a third residence the previous day. *Id.* That same day, law enforcement used the driver to conduct a controlled buy of methamphetamine from Mallula at the search warrant

residence. *Id.* The next day, October 1, 1998, law enforcement applied for, received, and executed a search warrant at the Maurer and Mallula residence. *Id.*

Dawn Jackson, the defendant, was not the target of the search warrant request, but arrived at the targets' home at the time that the search warrant was being executed. *Id.* at ¶6. The search warrant authorized the search

> all persons at the residence when the warrant is executed as well as the vehicles driven by those individuals "if they are parked in the vicinity of the residence," and "[a]ll persons arriving at this residence during the execution of the search warrant and the vehicles that they arrive in."

Id. at ¶5. Jackson was searched pursuant to the "all persons" provision of the search warrant.

This Court concluded that an "all persons" search warrant "will not perforce offend the particularity requirement of the Fourth Amendment." *Id.* at ¶14. However, an "all persons" warrant requires greater factual support than other warrants. *Id.* at ¶23. This Court concluded that "[t]he key to assessing an "all persons" warrant is to examine whether there was a "sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause." *Id.* at ¶15 (internal citation and quotation omitted).

In examining the factors that lead to upholding the validity of the "all persons" warrant in *Jackson*, the court specifically noted:

> (1) proof of the sale of a controlled substance at the residence within twenty-four hours before the warrant was issued; (2) a reliable indication of six earlier purchases of drugs from the same persons by the same informant who made the controlled buy; (3) two law enforcement searches of the suspects' prior residences indicating not only the presence of drugs but also evidence of ongoing drug dealing activity; (4) the search of a private dwelling, rather than a multi-family residence or business where innocent persons would more likely be present; (5) the nature of the criminal activity was such that participants constantly shifted or changed making it practically impossible for law enforcement to predict that any specific person or persons would be on the premises at any given time; (6) the search was conducted at a time of day when it was unlikely that innocent citizens would arrive at the residence; and (7) the subject of the search was illicit drugs which can be easily hidden on a person's body.

Id. at ¶25.

The factors mentioned as important in *Jackson*, and the timing of the events at issue in *Jackson*, are informative in comparison to the facts in this case. In *Jackson*, though there was evidence of past drug dealing by the search warrant targets extending back some period of time, the most recent drug deals occurred one and two days before the execution of the search warrant. This Court noted that first on its list of factors reviewed. In this case, the only evidence of a drug deal at 724 Haines Ave. occurred

approximately 3 weeks prior to the execution of the search warrant. In *Jackson*, there was evidence that the informant had conducted multiple transactions with Mallula and Maurer over time. In this case, there was indication that the informant had purchased drugs in the past, but only from Maho. Additionally, the only specifically described prior sale from Maho took place at a different residence. In *Jackson*, this Court noted that evidence that Mallula and Maurer engaged in drug distribution wherever they lived supported the warrant, rather than detracted from it. That may also be the case in this matter as it relates to Travis Maho. However, it becomes significant at this point that Maho was not at the residence at the time the search warrant was applied for and executed. Law enforcement and the issuing judge knew this. Maho was in law enforcement custody, a fact that was disclosed in the search warrant affidavit. There is no evidence in the affidavit in this case that any other person was involved in drug sales.

In *State v. Babcock*, 718 N.W.2d 624, 2006 SD 59, this Court again addressed the requirements for and propriety of an "all persons" search warrant. In *Babcock*, law enforcement had received several anonymous tips over a several day period of short-term traffic at a residence consistent with drug dealing. *Id.* at ¶2–4. In addition, a search of garbage at the residence, revealing several baggies with white powder and with corners cut out, along with foil strips, syringes, and marijuana, suggested drug dealing and drug

activity at the residence. *Id.* at ¶5. This Court concluded that, based on this information, "a substantial basis existed for the issuing court's determination of a fair probability that [the target] and anyone at her residence would be engaged in the use, sale, or distribution of illegal drugs." *Id.* at 15. Given the evidence of active drug activity at the residence, there was probable cause for the issuance of an "all persons" search warrant for [the target's] residence. *Id.* at ¶14–15.

In making its first assessment of the validity of an "all persons" warrant, this Court appeared to rely in large part on *State in Interest of L.Q.*, 236 N.J.Super. 464, 566 A.2d 223 (Ct.App.Div. 1989). In that case, the search warrant affidavit in support of the "all persons" search warrant stated that a

> reliable confidential source" had reported that cocaine was being sold inside a residence. Sporadic surveillance of the house revealed that persons came to the house and stayed for only a short time, which according to law enforcement experience was typical of houses where narcotics were being sold. A successful controlled cocaine purchase was accomplished at the subject house. Additionally, officers observed a lookout posted to warn those in the house of police presence in the neighborhood. That court upheld the warrant stating that [t]he evidence was sufficient to create a well-grounded suspicion or belief that numerous sales of drugs were being conducted in the premises. Although the affidavit did not exclude the possibility of other activities on the premises, the description of the activity actually observed provided a firm foundation for the suspicion or belief that any person in the private premises was involved in the

> overt unlawful activity of sale and possession of cocaine. Such a suspicion or belief is not limited to persons already there when the police arrive, but reasonably extends to a person who enters the premises during the search.

Jackson at ¶ 18 (internal quotation omitted). None of the persistent drug dealing activities discussed in *Jackson*, which justified the "all persons" warrant, are present in this case.

As opposed to the facts in *Babcock* and *Jackson*, the affidavit in this case does not demonstrate a fair probability that anyone present at 724 Haines Avenue on December 18, 2012 would have been engaged in drug related activity. None of the persistent drug dealing activities which justified the "all persons" warrants in *Babcock* are present in this case. The affidavit in this case does not indicate that there was suspicious activity, such as persons frequenting the residence and staying for short periods of time. The affidavit details two controlled purchases from the search warrant target Travis Maho. Only one of those controlled purchases took place at 724 Haines Ave. The affidavit does not mention drug distribution activities of any other person. There is no indication that the other resident of 724 Haines Avenue was involved in the sale, although there is an implication that White may have been aware of the single transaction that took place 19 days prior. There is no indication in the affidavit of other drug use on the premises. In fact, there no evidence of any other activity at all.

In *State v. Prior*, 617 N.W.2d 260 (Iowa 2000), the Iowa Supreme Court addressed a situation factually similar to that this Court confronted in *Babcock*. In *Prior*, the Iowa Supreme Court addressed the requirements for an "all persons" warrant. In *Prior*, the Court was confronted with a drug investigation based on an anonymous tip. *Prior*, 617 N.W.2d at 261. Subsequent investigation, consisting of a search of the garbage, uncovered several plant stems and plastic baggies. *Id.* at 262. Approximately one month later, law enforcement applied for and was granted a search warrant to search the premises. The search warrant included authorization to search all persons present at the apartment at the time of the search. *Id.*

Although the *Prior* court noted that an "all persons" warrant was not per se unreasonable, it found that the affidavit in this case did not meet the heightened standards required of such a request. *Prior* relied on Iowa precedent rejecting an "all persons" warrant because "[t]he affidavit in question failed to mention the anticipated presence of anyone other than the two named in the warrant, nor specified why any third parties, if present, would be likely to have evidence of a crime on their person." *Id.* at 264. (*citing State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997)). The Court noted that "[o]ur cases reveal the difficulty with "all persons present" warrants is not the lack of particularity to guide the executing officer to locate those covered under the warrant, but the particularity of the warrant in the sense of probable

cause regarding whether all persons in the particular place to be searched are involved in criminal activity in such a manner that they will possess the evidence to be seized." *Id.* at 264-65. "There must be evidence "that give[s] rise to an inference that all persons on the premises would necessarily be involved in th[e] [illegal] activity."" *Id.* at 265. (*citing Gogg*, 561 N.W.2d at 368).

The *Prior* court set out several criteria it examines when ruling on the validity of an "all persons" warrant. These include:

> the application must set out the character of the premises, including its location, size, and public or private character; the nature of the illegal conduct at issue; the number and behavior of persons expected to be present when the warrant is to be executed; whether any persons unconnected with the alleged illegal activity have been seen on the premises; and the precise area and time in which the alleged activity is to take place.

Id. (internal quotation and citation omitted).

The *Prior* Court ruled the "all persons" warrant in this case to be unconstitutional, finding that

> To support an "all persons present" warrant, the police must present the magistrate with facts sufficient to permit a finding that the purpose of the residence was for the promotion of the criminal activity such that any person present is likely to be involved or to have evidence on their person. … Additionally, the warrant must be narrowly tailored to the facts which create the probable

cause to search.

Id. at 267.

In *Prior*, although there was evidence that drugs were associated with the residence approximately a month before the search warrant, there was no sign that the apartment was exclusively or primarily a drug house, and no evidence to suggest that all persons who would be present were involved. *Id.* at 266. The *Prior* decision references numerous cases from other jurisdictions addressing "all persons" warrants. *Id.* at 265-66. The *Prior* court summarized the cases as concluding "that the pivotal inquiry is whether the facts and circumstances as revealed in the application for the search warrant demonstrate probable cause that each person on the premises to be searched will possess, at the time of the search, the evidence sought under the warrant." *Id.* at 266. Running Shield would also suggest that a pivotal inquiry, underlying even the conclusions reached by the *Prior* court and other courts, is whether there is criminal activity on-going at the time the search is executed, and whether there is reason to believe that other persons will be at the scene of the search, and whether those persons will be in possession of the items sought to be seized.

In this case, there was no evidence that criminal activity was on-going at the time of the search warrant. Evidence of criminal activity at the residence was limited to one instance of a drug sale 3 weeks prior to the

search warrant by a person that law enforcement knew not to be present. Without the presence of Travis Maho, there is no evidence that there was any on-going criminal activity at 724 Haines Ave. There was no surveillance or other investigation to suggest that there was any on-going activity at the house apart from the activities of Travis Maho. There was no evidence in the affidavit in this case to suggest that other persons would be present at the residence at all, since the only seller was concededly not there, and no evidence to suggest that all persons present would be in possession of the items sought in the search warrant. The affidavit presented to the issuing judge in this matter fails to show any nexus between the only criminal activity described at the residence and "all persons" who might be at the residence.

CONCLUSION

The affidavit presented to the issuing Judge in this case failed to present evidence that showed any nexus between the criminal activity at the house, the house, and all persons who might be at the house to justify a search of "all persons" at the house. The limited amount of criminal activity shown at 724 Haines Avenue, the known non-presence of the perpetrator of that criminal activity at the time of the search, and the lack of information as to the nature and character of the residence cannot support an inference that all persons present would have been involved in criminal activity. For these reasons, the "all persons" provision of the search warrant under which Running Shield was stopped and ultimately arrested was invalid as to the "all persons" provision, and was issued in violation of Running Shield's right to be free from unreasonable search and seizure.

Running Shield requests that this Court reverse the trial court's decision to deny his motion to suppress, and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED

/s/ Todd A. Love
Todd A. Love
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned does hereby certify that the length of this brief complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2), being comprised of 4,144 words as calculated by the word processing system used to prepare this brief.

/s/ Todd A. Love
Todd A. Love
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the day below, a true and correct copy of a Appellant's Brief was served in the following manner upon the following person(s), pursuant to the service indicated, postage prepaid as applicable, addressed as follows:

Marty J. Jackley South Dakota Attorney General 1302 E. Hwy 14 #1 Pierre, SD 57501	[ ] U.S. Mail (First Class) [ ] Hand Delivery [ ] Facsimile [ ] Overnight Delivery [ ] Electronic Case Filing [X] E-Mail
Mark Vargo Pennington County State's Attorney 300 Kansas City St. #400 Rapid City, SD 57701	[ ] U.S. Mail (First Class) [ ] Hand Delivery [ ] Facsimile [ ] Overnight Delivery [ ] Electronic Case Filing [X] E-Mail

Dated this 23th day of March, 2015.

/s/ Todd A. Love
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27339

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ANTONIO RUNNING SHIELD,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE WALLY EKLUND
Circuit Court Judge

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Notice of Appeal filed January 29, 2015

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STATE OF SOUTH DAKOTA

No. 27339

STATE OF SOUTH DAKOTA,

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ANTONIO RUNNING SHIELD,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Antonio Running Shield, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to documents will be designated as follows:

Settled Record.....SR

Defendant's Brief..... DB

All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appeals from a final Judgment of Conviction entered by the Honorable Wally Eklund, Circuit Court Judge for the Seventh Judicial Circuit, on January 15, 2015. SR 223. Defendant timely filed

a Notice of Appeal on January 29, 2015. SR 229. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

WHETHER THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH "ALL PERSONS" PRESENT AT THE TIME OF THE EXECUTION OF THE WARRANT?

The circuit court denied Defendant's motion to suppress.

State v. Jackson, 2000 S.D. 113, 616 N.W.2d 412.

State v. Babcock, 2006 S.D. 59, 718 N.W.2d 624.

ALTERNATIVELY, WHETHER OFFICERS ACTED IN GOOD FAITH IN EXECUTING THE "ALL PERSONS" WARRANT?

State v. Sorensen, 2004 S.D. 108, 688 N.W.2d 193.

STATEMENT OF THE CASE AND FACTS

On November 6, 2012, a confidential informant (CI) approached Special Agent Preston Patterson (SA Patterson) and indicated that s/he could purchase methamphetamine from an individual s/he knew as Travis Maho. SR 92, 104. The CI told SA Patterson that s/he had purchased illegal narcotics from Maho in the past. SR 92-93, 104. The CI also stated that Maho carried firearms when selling narcotics. SR 93, 104. The CI informed SA Patterson that Maho primarily resided at a residence on Haines Avenue (later identified as 724 Haines Avenue) in Rapid City, South Dakota. SR 93, 104. But the CI

indicated that Maho also stayed in various hotels around the Rapid City area from time to time. SR 93, 104.

On November 6, 2012, the CI participated in a controlled buy of methamphetamine from Maho at the Super 8 Motel on Lacrosse Street in Rapid City. SR 93, 105. About three weeks later, on November 29, 2012, the CI again contacted law enforcement. SR 93, 105. The CI indicated that s/he believed Maho was residing on Haines Avenue (724 Haines Avenue). *Id.* The CI estimated that Maho had been living there for three to four months. *Id.* According to the CI, Maho sold drugs at the residence. *Id.* The CI further informed law enforcement that Maho wanted potential purchasers of illegal drugs to enter the residence from the alley way. *Id.* The CI indicated that s/he always entered from the alley way to purchase drugs from Maho. *Id.* S/he also reiterated that Maho possessed and sold firearms. *Id.* The CI told law enforcement that a female, identified as Brandi White, also lived at the Haines Avenue residence with Maho. *Id.* The CI noted that White used methamphetamine, but did not believe White sold drugs. *Id.* White did know that Maho sold drugs from the Haines Avenue residence. *Id.* The CI also informed law enforcement that White had two children. *Id.*

The CI completed a second controlled buy of methamphetamine from Maho on November 29, 2012, at 724 Haines Avenue. *Id.* The CI entered the residence from the alley way. *Id.* While inside the

residence, the CI observed that White and a small child were present. SR 94, 105. Maho and an unidentified male were also there. *Id.* After the unidentified male left, the CI and Maho discussed the possible purchase of firearms. *Id.* The CI photographed three firearms that were present with her/his cell phone. SR 94, 106. Maho stated that he was willing to sell the guns and that stolen firearms do not sell for as much as firearms that are not stolen. *Id.*

On December 17, 2012, Maho was arrested during an unrelated traffic stop and taken into custody. *Id.* Law enforcement found evidence of drug items and drug sales on Maho, including scales, baggies, and cash. *Id.* Law enforcement also searched Maho's vehicle and discovered a needle and a plastic baggie containing suspected methamphetamine. *Id.* Following the stop of Maho, SA Patterson contacted the CI on December 18, 2012. *Id.* The CI indicated that Maho had moved a week or so prior to the Rapid Creek Apartments at 1110 Anamosa Street in Rapid City. *Id.*

On December 18, 2012, SA Patterson presented the above information in an affidavit to the Honorable Circuit Court Judge Craig A. Pfeifle and requested a search warrant. *Id.* The affidavit submitted by SA Patterson requested permission to search both the Haines Avenue address and the Anamosa Street address. *Id.* The affidavit also contained an "all persons" provision, which stated: "I also request to search any people present at the time the search warrant is

executed that have a social nexus with TRAVIS ALLAN MAHO and BRANDI STAR WHITE." SR 94-95, 106. After reviewing the affidavit, the Honorable Judge Pfeifle signed the search warrant. SR 95, 106.

SA Patterson and other law enforcement executed the search warrant at 724 Haines Avenue at approximately 6:45 p.m. on December 18, 2012. *Id.* Maho was still in the Pennington County jail when the search was executed. *Id.* When law enforcement arrived at the Haines Avenue house, Defendant was inside his vehicle in the alley behind the residence. *Id.* Law enforcement blocked both exits to the alley and stopped Defendant's vehicle. *Id.* As he approached the vehicle, SA Patterson observed a passenger in the vehicle (later identified as Landin Yazzie) make furtive movements and appear to toss something to the back seat of the vehicle. *Id.* When Defendant opened the door, SA Patterson immediately smelled marijuana. *Id.* Defendant was searched and placed in handcuffs. SR 95, 107. A subsequent search of the vehicle revealed several bags of marijuana, a plastic case containing a red straw with residue, and a container with residue. *Id.* The residue on both the straw and the container were later confirmed to be methamphetamine. *Id.*

Defendant was charged by Indictment on August 21, 2013, with one count of Possession of a Controlled Substance (methamphetamine) in violation of SDCL 22-42-5 and one count of Possession of Marijuana in violation of SDCL 22-42-6. SR 1-2.

On July 28, 2014, Defendant filed a Motion to Suppress the evidence seized and statements taken following the execution of the search warrant. SR 22. Defendant alleged that the "all persons" provision of the search warrant violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* Following briefing on the motion, the circuit court entered Findings of Fact, Conclusions of Law, and a Memorandum Decision on November 6, 2014, denying Defendant's motion to suppress. SR 103-10.

The State and Defendant proceeded with a stipulated court trial on December 10, 2014. SR 121-31. The circuit court found Defendant guilty of both offenses charged in the Indictment. SR 223. Defendant was sentenced on January 13, 2015, to three years of probation. *Id.* Defendant timely filed a notice of appeal on January 29, 2015. SR 229.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

A. Standard of Review.

Defendant alleges that there was insufficient probable cause to support the issuance of an "all persons" search warrant. DB 10. Accordingly, Defendant submits that the search and seizure of him violated the Fourth Amendment of the United States Constitution and Article VI, section 11 of the South Dakota Constitution.

To evaluate the sufficiency of the evidence supporting a search warrant, this Court looks "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202 (quoting *State v. Helland*, 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268) (quotation marks omitted). Additionally, this Court has stated:

> Our inquiry is limited to determining whether the information provided to the issuing court in the warrant application was sufficient for the judge to make a common sense determination that there was a fair probability that the evidence would be found on the person or at the place to be searched. On review, we are limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, we review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing.

State v. Gilmore, 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (citations omitted) (internal quotation marks omitted). Finally, in reviewing whether probable cause existed, this Court does not "conduct an after-the-fact de novo probable cause determination; on the contrary, the issuing judge's legal basis for granting the warrant is examined with 'great deference.'" *State v. Jackson*, 2000 S.D. 113, ¶ 9, 616 N.W.2d 412, 416 (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)). Furthermore, this Court "draw[s] every reasonable inference possible in support of the issuing court's

determination of probable cause to support the warrant." *Gilmore,* 2009 S.D. 11, at ¶ 7, 762 N.W.2d at 641-42.

B. The Issuance of an "All Persons" Warrant Was Supported By Probable Cause.

Defendant argues that the affidavit presented to the warrant-issuing court did not establish the requisite probable cause to search all persons present at 724 Haines Avenue when law enforcement executed the search warrant.[1] DB 20. Defendant's sole objection appears to be that there was insufficient probable cause to support the "all persons" provision in the warrant. DB 10. Thus, Defendant alleges that when he was searched and seized pursuant to the "all persons" provision of the search warrant, his Fourth Amendment rights were violated. *Id.*

"The Fourth Amendment's prohibition against unreasonable searches and seizures requires generally the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." *State v. Mohr*, 2013 S.D. 94, ¶ 13, 841 N.W.2d 440, 444. Usually, "before any search warrant may be issued, there must be a finding of probable cause, supported by an affidavit describing with particularity the place and person to be searched." *Jackson*, 2000 S.D. 113, at ¶ 13, 616 N.W.2d at 417. "The Fourth Amendment requires a 'nexus . . . between the item to be

[1] Defendant does not contest whether the warrant was valid as it relates to the search of 724 Haines Avenue. DB 10.

seized and criminal behavior.'" *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967)).

While some courts condemn "all persons" warrants as violating the particularity requirement of the Fourth Amendment, this Court has taken the majority view that "all persons" warrants do not per se "offend the particularity requirement of the Fourth Amendment." *Id.* at ¶ 14; *see also Owens ex rel. Owens v. Lott*, 372 F.3d 267, 276 (4th Cir. 2004) ("We agree that the majority view . . . correctly holds that an 'all persons' warrant can pass constitutional muster . . ."). In adopting this position, this Court stressed that the validity of an all persons warrant "depends on the probable cause offered to support it." *Jackson*, 2000 S.D. 113, at ¶ 14, 616 N.W.2d at 417 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245 (1979)); *see also State v. De Simone*, 288 A.2d 849, 850-51 (N.J. 1972) ("[T]he sufficiency of a warrant to search persons identified only by their presence at a specified place should depend upon the facts.").

Therefore, the ultimate question in evaluating an "all persons" warrant "is whether the affidavit gave sufficient particularity to conclude that there was good reason to believe that anyone present would probably be a participant in the illegal drug activities at [Maho's] house." *Jackson*, 2000 S.D. 113, at ¶ 15, 616 N.W.2d at 418. To assess the "all persons" warrant, this Court examines "whether there was a 'sufficient nexus among the criminal activity, the place of

the activity, and the persons in the place to establish probable cause.'" *Id.* (quoting *People v. Johnson*, 805 P.2d 1156, 1159 (Colo. Ct. App. 1990)). Whether probable cause exists "must rise or fall" on the "four corners of the affidavit" itself. *State v. Babcock*, 2006 S.D. 59, ¶ 13, 718 N.W.2d 624, 628.

In the present case, the affidavit gave sufficient particularity to establish probable cause that anyone present at 724 Haines Avenue would probably be a participant in the illegal drug and firearm activities of Maho. This Court has observed that "probable cause is not a question susceptible to formulaic solutions." *Id.* at ¶ 16, 718 N.W.2d at 629 (citations omitted). "There will often be facts in some cases that are absent in others." *Id.*

The first fact establishing probable cause is that the CI provided law enforcement with reliable information. On two separate occasions, the CI purchased methamphetamine from Maho as part of a controlled buy with law enforcement. SR 104-105. Specifically, the CI purchased methamphetamine from Maho at the 724 Haines Avenue address. SR 105. Contrary to Defendant's position, this was not an isolated purchase from the Haines Avenue residence. DB 17; SR 108. The CI explained that Maho primarily resided at the Haines Avenue residence. SR 105. The CI had informed law enforcement that s/he had purchased drugs from Maho before at the Haines Avenue residence and always entered the house from the alley way. SR 38-39,

105. Prior to entering the residence as part of the controlled buy on November 29, 2014, the CI told law enforcement that Maho would have firearms as well. SR 39, 105. The CI then entered the house through the back alley after confirming with Maho via phone that Maho preferred that the CI enter the house from the alley and through the back door. SR 39. Once inside the house, the CI took pictures of three firearms, thus confirming her/his basis of knowledge that Maho would have firearms. SR 106. The CI also told law enforcement that there was another unidentified male present, along with Brandi White, who the CI indicated used methamphetamine. SR 105.

Thus, the evidence presented by the CI established his/her credibility along with the following important facts: (1) that Maho consistently possessed and sold methamphetamine and firearms at the 724 Haines Avenue residence; (2) individuals could purchase methamphetamine and drugs from the residence by entering the house from the back alley way; and (3) Brandi White also resided there and used and possessed methamphetamine. Additionally, White was aware of Maho's drug activities at the residence. SR 105. These facts established a sufficient nexus that persons at 724 Haines Avenue

would be participating in illegal drug or firearm transactions.[2] *See Jackson*, 2000 S.D. 113, at ¶ 15, 616 N.W.2d at 418.

Another important fact that helped establish probable cause for the "all persons" warrant was that the 724 Haines Avenue residence was a house rather than a tavern or an apartment complex. *Id.* at ¶ 25, 616 N.W.2d at 420 (outlining that a fact supporting the "all persons" warrant was that it was a "search of a private dwelling, rather than a multi-family residence or business where innocent persons would more likely be present"); *see also Commonwealth v. Smith*, 348 N.E.2d 101, 107 (Mass. 1976) (highlighting that the size of the place to be searched is a relevant fact to consider in regard to "all persons" warrants). The affidavit described the residence at 724 Haines Avenue as a "small white house with green trim." SR 38. Given that the Haines Avenue residence was used consistently for drug and firearm transactions, it was less likely someone was there for the innocent reasons one might expect at a public place like a bar or restaurant. It

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[2] Defendant cites a case from Iowa, *State v. Prior*, 617 N.W.2d 260 (Iowa 2000), to support his claim that there was insufficient probable cause to support an "all persons" warrant in this case. But, the facts in *Prior* fall short of the facts in this case. *Prior* did not involve multiple controlled buys by law enforcement through a confidential informant. *See id.* at 261-62. *Prior* involved an anonymous phone call to law enforcement and a subsequent search by law enforcement of discarded trash at an apartment. *Id.* Additionally, the only information law enforcement had about who lived at the apartment was based on police records and a discarded piece of mail. *Id.* This information pales in comparison to the affidavit in support of searching the Haines Avenue residence.

was also unlikely someone would be there without a resident's permission. As the United States Court of Appeals for the D.C. Circuit articulated:

> Common sense suggests that there is a much greater likelihood that a person found in a small private residence containing drugs will be involved in the drug activity occurring there than an individual who happens to be in a public tavern where the bartender is suspected of possessing drugs. Police officers are not blind to these realities and we should not encourage them to be.

United States v. Reid, 997 F.2d 1576, 1578-79 (D.C. Cir. 1993).

Yet another factor supporting the "all persons" warrant in this case is the fact that the search was for drugs as well as items associated with drug transactions. *See Jackson*, 2000 S.D. 113, at ¶ 25, 616 N.W.2d at 420 (outlining that a fact supporting the "all persons" warrant was that "the subject of the search was illicit drugs which can be easily hidden on a person's body"); *see also Smith*, 348 N.E.2d at 107 ("[T]he items specifically described in the warrant as the target of the search are of a size or kind which renders them easily and likely to be concealed on the person."). The nature of the item—drugs—coupled with the fact that drug transactions typically involve participants constantly entering and exiting the residence for brief periods of time makes it "practically impossible for law enforcement to predict that any specific person or persons would be on the premises at any given time." *See Jackson*, 2000 S.D. 113, at ¶ 25, 616 N.W.2d

at 420. These factors further supported the issuance of an "all persons" warrant.[3] *See id.*

Defendant argues, however, that "without the presence of Travis Maho, there is no evidence that there was any on-going criminal activity at 724 Haines Ave." DB 20. First, Defendant's argument ignores that the search warrant also covered a search of Brandi White, whose last known address was 724 Haines Avenue, and who, according to the CI, used methamphetamine at the residence. SR 39; 105. Thus, there clearly was on-going criminal activity at the residence. Second, Defendant's argument assumes that merely one day after Maho's arrest for possession of drugs, there would no longer be any contraband at the Haines Avenue residence, even though the CI had indicated that Maho had repeatedly used the residence to sell drugs and firearms. On the contrary, the fact that Maho had just been arrested for drug possession further confirmed the reliability of the CI and made it reasonable to search the Haines Avenue residence for contraband and all persons having a nexus to it.

Defendant's argument further assumes, however, that suddenly people would only be at the Haines Avenue residence for purely innocent purposes. This defies this Court's discussion in *Jackson* of

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[3] SA Patterson also noted in his affidavit for the search warrant that based on his experience "illegal drug traffickers commonly have people at their residence or arriving at their residence purchasing illegal substances."

the nature of drug transactions at private residences. 2000 S.D. 113, at ¶ 25, 616 N.W.2d at 420 (outlining that it will be "practically impossible for law enforcement to predict that any specific person or persons would be on the premises at any given time"); *see also United States v. Abbott*, 574 F.3d 203, 213 (3d. Cir. 2009) (discussing that a residence with a history of drug-related activities is a probable-cause factor in support of an "all persons" warrant); *De Simone*, 288 A.2d at 850 ("So long as there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant, presence becomes the descriptive fact satisfying the aim of the Fourth Amendment.").[4] Additionally, the "all persons" warrant is especially prescient when drugs are involved, as anyone present at the time the warrant is executed may be able to hide drugs on their person easily. *See Jackson*, 2000 S.D. 113, at ¶ 25, 616 N.W.2d at 420 (outlining that a fact supporting the all persons warrant was that "the subject of the search was illicit drugs which can be easily hidden on a person's body"). Accordingly, the mere fact that Maho was in jail at the time of the search of the Haines Avenue address does not invalidate the probable cause supporting the "all persons" provision.

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[4] Nor does the fact that Maho had recently moved eliminate the probable cause to search all persons at the Haines Avenue residence. Such a result would require the issuing court to ignore the fact that, according to the CI, Maho had a pattern of moving around and selling drugs from a variety of places. SR 93, 104. There is no indication that Maho had cut all ties with the Haines Avenue residence. *Id.*

Based on the totality of the circumstances outlined above, there was good reason to believe that any persons present at 724 Haines Avenue would have a nexus to the illegal drug trafficking occurring there. Thus, all reasonable inferences support granting deference to the issuing court's decision to grant an "all persons" warrant. *See Gilmore,* 2009 S.D. 11, at ¶ 7, 762 N.W.2d at 641-42.

C. Alternatively, if the Search and Seizure of Defendant Violated the Fourth Amendment, the Evidence Should Still Be Admitted Under the Good Faith Exception.

Even if this Court concludes that the search and seizure of Defendant violated the Fourth Amendment, this Court should affirm the denial of Defendant's motion to suppress under the good-faith exception to the exclusionary rule.[5] Law enforcement conducted the search and seizure of Defendant under the authority of a warrant approved by a neutral circuit court judge. SR 106. There was no

[5] The State presented the good-faith argument in its brief to the circuit court. SR 79, 83-85. The circuit court denied the Defendant's motion to suppress by finding that there was probable cause to support the "all persons" warrant. SR 109. Accordingly, this Court may consider the good-faith argument on appeal as an alternative ground to affirm the circuit court's decision. *See State v. Sorensen*, 2004 S.D. 108, ¶ 7, 688 N.W.2d 193, 196. This Court reviews the good-faith exception under the de novo standard of review. *State v. Edwards*, 2014 S.D. 63, ¶ 15, 853 N.W.2d 246, 252.

police misconduct. Thus, the purpose of the exclusionary rule is not fulfilled by suppressing the evidence in this case.[6]

This Court has adopted the good-faith exception to the exclusionary rule, consistent with federal law, whenever the Fourth Amendment is violated. *State v. Saiz*, 427 N.W.2d 825, 828 (S.D. 1988) ("[W]e find the *Leon* case persuasive and adopt its reasoning under the South Dakota Constitution Art. VI, § 11 as far as that case has been applied and limited."). In *United States v. Leon*, the United States Supreme Court outlined the good-faith exception to the exclusionary rule. 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon*, the Court observed that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . ." *Id.* at 906. In fact, the Court made explicit that whether evidence should be suppressed is a separate question from whether the Fourth Amendment was violated. *Id.*

In *Herring v. United States*, the United States Supreme Court articulated the "important principles that constrain application of the exclusionary rule." 555 U.S. 135, 140, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009). The Court emphasized that the exclusion of

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[6] Defendant's suppression motion requested that the circuit court suppress all evidence resulting from the stop and search of Defendant's vehicle on December 18, 2012, as well as all statements made by Defendant to law enforcement after the stop. SR 22.

tangible evidence is a remedy that should be used as a "last resort, not [a] first impulse." *Id.* The most important principle the Court articulated was that the exclusionary rule should apply only where it "results in appreciable deterrence" of Fourth Amendment violations by police in the future. *Id.* at 141 (quoting *Leon*, 468 U.S. at 909). Additionally, the benefits of police deterrence must also outweigh the significant costs of "letting guilty and possibly dangerous defendants go free. . . ." *Id.* ("To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987))). "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Id.* (citation omitted).

Normally, "[w]hen police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant." *Id.* at 142 (quoting *Leon*, 468 U.S. at 922). In *Leon*, the Supreme Court identified four situations where the good-faith exception would not apply when police obtained a warrant. 468 U.S. at 926. This Court also outlined those scenarios in *Sorensen*, 2004 S.D. 108, at ¶ 10, 688 N.W.2d at 197. Those scenarios are:

(1) "The issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false but for the affiant's reckless disregard for the truth."

(2) "The issuing magistrate wholly abandons the judicial role."

(3) "The affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

(4) "A warrant is so facially deficient that the executing officer could not reasonably believe it was valid."

Sorenson, 2004 S.D. 108, at ¶ 10, 688 N.W.2d at 197 (citing *Leon*, 468 U.S. at 922, 923 n. 24).

In his brief to the circuit court, Defendant conceded that the first and second situations from *Leon* that would justify suppressing the evidence did not occur in this case. Defendant acknowledged that the affidavit presented to obtain the warrant contained truthful information. SR 89. Additionally, Defendant conceded that the Honorable Judge Pfeifle maintained his neutral judicial role in issuing the warrant. SR 89.

As to the fourth circumstance from *Leon*, the warrant was not so "facially deficient" in this case so as to justify application of the exclusionary rule. *See Sorensen*, 2004 S.D. 108, at ¶ 12, 688 N.W.2d at 198. Under this circumstance, a warrant may be lacking when it fails "to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923. One example of this might be where the

warrant itself failed to specify the "the type of evidence sought." *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 1289 (2004) (declining to extend qualified immunity where the warrant was "plainly invalid" and failed to describe the evidence sought). Defendant has made no allegation that the warrant itself was facially deficient. Additionally, because this Court has permitted "all persons" warrants on two occasions in *Babcock* and *Jackson*, the inclusion of that language in the warrant would not render it "facially deficient." *See Sorenson*, 2004 S.D. 108, at ¶ 12, 688 N.W.2d at 198 (declining to extend the exclusionary rule to an "all vehicles parked on the property" warrant); *see also United States v. Clark*, 638 F.3d 89, 102-3 (2d. Cir. 2011) (declining to extend exclusionary rule to an "all persons" warrant for a "multi family dwelling").

Defendant maintains, however, that the third circumstance from *Leon* supports suppressing the evidence here. In his brief to the circuit court, Defendant argued that the affidavit "was so wholly lacking in probable cause for the 'all persons' portion of the warrant that it would be unreasonable for a law enforcement officer to believe otherwise." SR 90.

But for a warrant to be "wholly lacking in probable cause" to justify the exclusionary rule, the warrant must effectively have been obtained by a "bare bones" affidavit. *See Sorensen*, 2004 S.D. 108, at ¶ 10, 688 N.W.2d at 197 (citing *Leon*, 468 U.S. at 923 n. 24). In

Sorensen, this Court rejected Sorensen's argument that an "all vehicles" warrant was so wholly lacking in probable cause so as to justify the exclusionary rule. *Id.* at ¶ 13. In determining that the good-faith exception applied, this Court stated:

> [T]here is no indication that the affidavit in support of the warrant was so lacking in indicia of probable cause as to render official belief in the existence of probable cause completely unreasonable. The affidavit in this case is far from what *Leon* envisioned as a affidavit so bereft of probable cause that it could not support issuance of a warrant notwithstanding good faith on the part of the executing officers.

Id. at ¶ 11, 688 N.W.2d at 197-98.

The facts presented in the affidavit to receive the warrant in this case did not amount to "bare bones." Law enforcement did not present a "bare bones" affidavit that relied purely on speculation. *See State v. Wilkinson*, 2007 S.D. 79, ¶ 21, 739 N.W.2d 254, 260 ("This is not a bare-bones affidavit that states only speculation."). Nor is this the type of case where probable cause is so lacking that a "bare bones" affidavit is used as a pretext for a search and seizure. *See Brown v. Illinois*, 422 U.S. 590, 610-11, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J. concurring). Law enforcement used a reliable CI to obtain information that the Haines Avenue residence had been used for drug transactions. *See* SR 105. They confirmed the reliability of the CI by participating in controlled buys, including a controlled buy at the

Haines Avenue residence. *Id.* This controlled buy included photographic evidence of the presence of firearms. *Id.*

Additionally, in his affidavit for a warrant, SA Patterson was candid with the issuing court and disclosed relevant facts regarding who lived at the residence, the fact that Maho moved around and had moved from the residence a week prior, and the fact that Maho had been arrested the day before. SR 39-40. Thus, in disclosing this information, officers did not describe the persons and property in a manner "almost calculated to mislead." *Compare Clark*, 638 F.3d at 103 (discussing that candid advisements to the issuing court support that officers acted in good faith), *with United States v. Reilly*, 76 F.3d 1271, 1280 (2d. Cir. 1996) (declining to apply the good-faith exception where officers provided a "bare bones" description of Reilly's land that was "almost calculated to mislead"). This candor further supports that law enforcement acted in good faith. Because of the probable-cause factors discussed above, officers applied for, and received, an "all persons" warrant. Accordingly, the affidavit in support of the warrant was not so lacking in probable cause so as to justify suppression of the evidence.

Finally, the ultimate remedial question is not whether there was probable cause, but whether the police were sufficiently culpable so that suppressing the evidence can deter Fourth Amendment violations in the future and is worth the price paid by the justice system.

Herring, 555 U.S. at 144. The key inquiry in determining whether to apply the exclusionary rule is to determine who was culpable. *See id.* If the Fourth Amendment was violated in this case, it was not due to law enforcement's actions. After all, "it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 U.S. at 921. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* (quotation marks omitted).

The exclusionary rule is not the appropriate remedy in this case. If this Court concludes that the Fourth Amendment was violated, there is little police conduct that can be deterred by excluding the evidence seized in this case. Law enforcement obtained a warrant. They did not mislead the court in doing so. The warrant was not facially deficient. The police worked with a confidential informant to obtain reliable evidence and then sought for, and received, an "all persons" warrant, which has been permitted by this Court on two prior occasions. As the United States Supreme Court articulated in *Herring*:

> To trigger the exclusionary rule, 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. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

555 U.S. at 144.

The type of conduct that usually calls for the exclusionary rule simply was not present in this case. Law enforcement's conduct was neither sufficiently deliberate nor sufficiently culpable to justify the exclusion of tangible physical evidence of unlawful drug possession. Thus, even if this Court determines that the search warrant did not provide the requisite probable cause to search and seize Defendant, the evidence should be admissible under the good-faith exception to the exclusionary rule.

CONCLUSION

Because there was probable cause to support the "all persons" warrant, or alternatively, because law enforcement acted in good faith in executing the search warrant, the State respectfully requests that Defendant's judgment and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 5,534 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 5th day of May 2015.

/s/ *Jared Tidemann*
Jared Tidemann
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of May 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Antonio Running Shield*, was served via electronic mail upon Mr. Todd A. Love, attorney for Appellant, at toddlove@resultlaw.com.

/s/ *Jared Tidemann*
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Assistant Attorney General

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff, vs ANTONIO RUNNING SHIELD, Defendant.	NO. 27339 Appellant's Reply Brief

APPEAL FROM THE CIRCUIT COURT OF PENNINGTON COUNTY

HONORABLE WALLY EKLUND, JUDGE

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NOTICE OF APPEAL FILED JANUARY 29, 2015

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

NO. 27339

State of South Dakota,

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v.

Antonio Running Shield,

Defendant/Appellant.

ARGUMENT

THE AFFIDAVIT IN SUPPORT OF SEARCH WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH "ALL PERSONS" PRESENT AT THE TIME OF THE WARRANT EXECUTION.

Running Shield does not dispute that an "all persons" warrant can be valid, and does not per se offend the particularity requirements of the Fourth Amendment. *State v. Jackson*, 2000 S.D. 113, 616 N.W.2d 412. Such a warrant may be valid if there exists sufficient probable cause to support such a request.

In *Jackson* this Court concluded that "[t]he key to assessing an "all persons" warrant is to examine whether there is a "sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause." *Id.* at ¶15. This standard assumes that at least three things are shown in the affidavit. First, that there is criminal activity. Second, that there is criminal activity at the place to be searched. Finally, it assumes that there are, or are likely to be people at that place. A search warrant affidavit asking permission to search all persons present at the scene of execution should show all three so that the Court can determine whether a sufficient connection or link between them exists.

Running Shield would submit that the Iowa Court in *State v. Prior*, 617 N.W.2d 260 (Iowa 2000) set forth the rule, consistent with *Jackson*, in very clear terms. The *Prior* Court ruled that

> To support an "all persons present" warrant, the police must present the magistrate with facts sufficient to permit a finding that the purpose of the residence was for the promotion of the criminal activity such that any person present is likely to be involved or to have evidence on their person. … Additionally, the warrant must be narrowly tailored to the facts which create the probable cause to search.

Id. at 267.

In attempting to meet this standard, the State overstates the facts of this case on a number of important issues.

TIMELINE OF CONSISTENT AND ON-GOING ACTIVITIES

According to the affidavit in support of the search warrant, the CI informed law enforcement prior to the first controlled purchase that he had purchased methamphetamine from Travis Maho in the past. *(Settled Record (hereinafter (SR)) 35)*. The State asserts that "The CI had informed law enforcement that s/he had purchased drugs from Maho at the Haines Avenue residence…. *(State's Brief (hereinafter (SB)) 10-11)*. This is not true. The affidavit gives no indication of where these other alleged transactions took place. The affidavit indicates that prior to the second controlled purchase, the

CI informed law enforcement that Maho was located at a house at which he frequently stays. *(SR 35)* That house was 724 Haines Avenue. There is nothing in the affidavit that shows that there was ever any other transaction that took place at 724 Haines Ave, or that any persons other than the CI and Maho were involved.

The State, however, asserts that Maho "consistently possessed and sold methamphetamine and firearms at the 724 Haines Avenue residence." *(SB 11)*. The affidavit simply does not support this assertion. There is no evidence that there was ever another transaction at that address.

State repeats the error, claiming that probable cause is supported by evidence that "the Haines Avenue residence was consistently used for drug and firearms transactions." *(SB12)*. The State asserts yet again that there was "clearly on-going criminal activity at the residence." *(SB 14)*. There is simply no evidence in the affidavit to support these assertions. There is no evidence that any other transactions took place at 724 Haines Avenue or that anything consistently happened at that address. There is no indication that there was any surveillance of activities at the house. There is no indication that law enforcement ever looked at the house after the November 29, 2012 controlled purchase. There is no evidence in the affidavit to show that anything at all was on-going at the residence between November 29, 2012 and the time that the search warrant was executed.

State cites to *U.S. v. Abbott*, 574 F.3d 203 (3rd Cir. 2009) in support of its argument. In *Abbott*, an informant made controlled purchases of narcotics from a residence on three consecutive days, the final being at the time the warrant was executed. *Id.* at 204. In contrast to this case, the facts of *Abbott* show that there was on-going activity at the house at the time that the warrant was executed.

Likewise, in *State v. De Simone*, 288 A.2d 849 (N.J. 1972), law enforcement was investigating an on-going illegal lottery scheme. *Id.* at 323-24. The warrants at issue authorized the search of vehicles involved in the operation and "all persons found therein." *Id.* at 320. The warrants were executed when officers were observing the alleged illegal activities on-going. *Id.* at 324. Again, this is in stark contrast to the facts of this case, where the officers neither made observations nor showed any evidence at all of what was on-going at the residence at the time that the search warrant was executed.

In *State v. Babcock*, 2006 S.D. 59, 718 N.W.2d 624, the Court was presented with evidence indicating that there was on-going activity at the location of the search warrant. *Id.* at 14-15. The facts of *Babcock* are substantially different from the case now before this Court, where there is no evidence at all of any activity whatsoever at 724 Haines Avenue for approximately 3 weeks prior to the execution of the search warrant. Even

State v. Prior, 617 N.W.2d 260, which the State dismisses in a footnote, showed the court evidence that something was going on at the residence near the time the search warrant was executed.

The State minimizes the importance of the timeline in this case. The timeline is intricately related to the evidence, or lack thereof, of consistent activity at the residence. The State argues that "Second, Defendant's argument assumes that merely one day after Maho's arrest for possession of drugs, there would no longer be any contraband a the Haines Avenue residence, even though the CI had indicated that Maho had repeatedly use the residence to sell drugs and firearms." *(SB 14)*. This statement highlights two factual flaws. The first is yet another unsupported statement that there was evidence from the CI of repeated activity at the residence, when in fact there was no such evidence.

The second relates more directly to the timing of the events at issue. The affidavit show that the first controlled purchase from Maho took place at the Super 8 motel on November 6, 2012. *(SR 35)*. The second controlled purchase, the only activity at 724 Haines Avenue, took place on November 29, 2012. The search warrant was executed on December 18, 2012. There is simply no evidence that there was any drug activity on-going at the residence at the time the search warrant was executed. The facts to not support the fact implied by the State's recitation of fact, that being that there was evidence

that there were drugs at the house one day prior to Maho's arrest. In fact, there is no evidence of any activity at all at the residence for nearly 3 weeks prior to the search warrant.

The State's argument about the timing of the search warrant execution in relation to Maho's arrest is irrelevant. What is important is the timing of the warrant in relation to evidence of activity at the house. It is only by showing that there is something going on at the house that State would be able to show that there was any likelihood of persons at the house at the time of the search warrant execution being involved in that activity.

The State goes to great lengths to support and argue for the credibility of its informant, a conclusion that Running Shield is not contesting. However, the State apparently ignores the information from the informant that Maho moved away from the residence a week or two prior to his arrest. This further highlights the fact that there is no evidence of any activity at the residence for 3 weeks prior to the search warrant execution, and no activity at all without the presence of Travis Maho.

BRANDI WHITE

Contrary to the State's assertion, *(SB14)*, Running Shield does not ignore the fact that the search warrant also named Brandi White as a target. However, the State overstates the involvement of Brandi White as it relates

to the all-persons provision of the warrant. First, it is not simply a matter of semantics to differentiate between the CI stating that s/he believed White knew about Maho's activities at the residence and stating that White did in fact know. The State's brief asserts that White in fact knew. *(SB 3)*. The only indication of such knowledge is the CI's "belief." *(SR35 "The CI believed White knew Maho was selling drugs from the residence in which she resided.")*. There is no evidence that White was present for or involved in the one controlled transaction at the residence, or that she had knowledge that the transaction was going on. The affidavit is silent as to these facts.

The State argues that White, "according to the CI, used methamphetamine at the residence. Thus, there was clearly on-going activity at the residence." *(SB14)*. This is an overstatement of the evidence. The CI did not say that White used methamphetamine at the residence. The CI told law enforcement that he believed that White used methamphetamine. The CI did not say that White, or anybody else, used methamphetamine during the time that s/he was at the residence. Furthermore, despite the CI's statement that s/he believed White used methamphetamine, there is no evidence that methamphetamine was used in the house that night by White or anyone else. Nor is there any evidence that there was any methamphetamine in the house that night, aside from the amount that Maho sold to the CI. There is no evidence that White used or possessed methamphetamine at that house at

any time. There is no evidence in the affidavit indicating when or where White "possessed" methamphetamine.

Further, this is another example of the State ignoring the all-important element of time. The CI's information sheds no light at all on what was going on at the residence nearly three weeks after the controlled buy. It does not bolster the unsupported assertion that there was anything "on-going" at the residence at the time of the execution of the search warrant.

The State further uses White's supposed knowledge to bolster its argument that there was probable cause for the warrant. *(SB11)*. Assuming her knowledge of the Maho/CI transaction, and assuming that she did in fact use methamphetamine, the evidence may support a warrant for her residence. But even that is true, that arrow misses the target. It does not, as the State suggests, establish "a sufficient nexus that the persons at 724 Haines Avenue would be participating in illegal drug or firearm transactions." *(SB 11-12)*. It does not show that any other persons would be present at the time the warrant was executed, or that any nexus at all exists between criminal activity, the residence, and other persons to justify the search of those persons for illegal drugs.

In this case, the place to be searched is the person of "all persons" having a sufficient social nexus to Travis Maho and Brandi White. In order to justify an "all persons" warrant, there must be a sufficient showing that

persons would be present because of on-going criminal activity at the residence. The affidavit presented to the issuing court fails in this mission. There is no evidence in the affidavit that there was any consistent activity at the residence or that there was any on-going activity at all at the residence at the time that the search warrant was executed.

In this case, there are no facts in the search warrant affidavit to show that other persons might be present at the scene of the search warrant execution. This is primarily because, as opposed to the State's characterizations in its brief, there is no evidence to show that this residence was consistently and repeated used for drug transactions, and no evidence to show what was going on at the residence at the time the warrant was executed. Without the showing of some consistent or on-going activity, there is no basis to believe that some person who happened to be present might be engaged in any illegal activity. The State's evidence fails to show that there was on-going activity of any kind – much less criminal activity – at the residence. Without some evidence to show that other persons might be present and that they might be engaged in illegal activity, no link or connection – no nexus as required by *Jackson* – can exist.

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT JUSTIFY THE REFUSAL TO SUPPRESS EVIDENCE SEIZED IN THIS CASE.

Running Shield agrees that this Court can determine whether suppression is an appropriate remedy for a Constitutional violation under the good faith exception to the exclusionary rule, even though the trial court did not have to reach that issue. *State v. Sorensen*, 2004 S.D. 108, 688 N.W.2d 193. However, an insufficient warrant cannot be upheld simply because it was signed by a judge. *United States v. Zimmerman*, 277 F3d 426, 437-438 (3dCir 2002). The seizure of evidence seized from Running Shield in this case should not be validated under the good faith exception.

Running Shield concededly does not, as the State notes, allege that the issuing court was misled or that the issuing judge abandoned his judicial role. However, Running Shield does assert that the affidavit was so lacking in probable cause to support the "all-persons" provisions that it should not sanctioned by this Court.

The factual requirements to support such a warrant are not difficult to understand. The officer only has to show that there is evidence of some ongoing activity at the residence sufficient to suggest that all persons present may be involved in that activity. In this case, there was simply no evidence presented. There is not a case where there is some evidence, but arguably insufficient. This is a case where there is simply none.

In *State v. Wright*, 2010 S.D. 91, 791 N.W.2d 791, this Court suppressed evidence resulting from a vehicle stop where the Court determined that the officer improperly stopped a motorist based on his subjective, but mistaken, understanding of the what the law required. In Wright, the Trooper stopped a motorist when he passed the motorist and the motorist failed to dim his bright lights. *Id.*at ¶3-4. South Dakota law did not make this action illegal and this Court determined that the Trooper's mistaken understanding of the law did not insulate his activity, despite the fact that he acted in good faith. *Id.* at ¶21. "Officers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable." *Id.* (citation omitted). The same analysis applies here. When asking for an all-persons warrant, the officers have a basic obligation to understand what factual showing is required. That requires that they demonstrate some kind of link between the on-going criminal activity at the residence and all persons who might be at the residence. An affidavit that fails to present any evidence on either level cannot be said to be sufficient in any respect. Running Shield would submit that, as to the all-persons provision of the warrant, the affidavit was more than simply "bare bones", it was legally and factually insufficient.

Even in its discussion of probable cause in support of its argument that the good faith exception should be applied, *(SB 21-22)*, the State argues that

probable cause exists, but does not describe any facts that show a nexus between any criminal activity on-going at the residence and any persons that might be at the residence at the time of the search warrant execution. The affidavit in this case fails to present any evidence to support the all-persons provision of the search warrant. The probable cause offered to support the warrant is so fatally deficient that good faith should not apply.

CONCLUSION

In its brief, the State overstates the facts on a number of important issues. The Affidavit is support of search warrant in this case does not demonstrate any on-going criminal activity at 724 Haines Avenue at the time that the search warrant was executed. Furthermore, it does not demonstrate any connection or link between any alleged activity and any other persons who might be present. The affidavit fails to meet the standard for issuance of an "all-persons" warrant set forth in *Jackson*. Because of this failure, the trial court erred in denying Running Shield's motion to suppress evidence seized under the apparent authority of that provision. Because the affidavit was so factually deficient, law enforcement was not justified in relying on the warrant and the Constitutional violation should not be ignored under the good faith exception set forth in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. Running Shield requests that this Court reverse the trial court's decision to deny his motion to suppress, and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED

/s/ Todd A. Love
Todd A. Love
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned does hereby certify that the length of this brief complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2), being comprised of 2,909 words as calculated by the word processing system used to prepare this brief.

/s/ Todd A. Love
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the day below, a true and correct copy of a Appellant's Reply Brief was served in the following manner upon the following person(s), pursuant to the service indicated, postage prepaid as applicable, addressed as follows:

Jared Tidemann Assistant Attorney General South Dakota Attorney General's Office 1302 E. Hwy 14 #1 Pierre, SD 57501	[ ] U.S. Mail (First Class) [ ] Hand Delivery [ ] Facsimile [ ] Overnight Delivery [ ] Electronic Case Filing [X] E-Mail

Dated this 20th day of May, 2015.

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