CAUSE NO. 79,711

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**27th JUDICIAL DISTRICT**
	§	
MARVIN LOUIS GUY	§	**BELL COUNTY, TEXAS**

PRE-TRIAL MOTION NO. 04

MOTION TO SUPPRESS BASED ON LACK OF PROBABLE CAUSE:
Re: The John Moseley Probable Cause Affidavit for Search Warrant of May 8, 2014

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Marvin L. Guy, defendant in the above entitled and numbered cause, by and through his attorney of record, respectfully moves the Court, pursuant to the Fourth and Fourteenth Amendments of the United States Constitution, Article 1, Section 9 of the Texas Constitution, and Article 38.23 and Chapter 18 of the Texas Code of Criminal Procedure, to suppress any and all evidence obtained pursuant to an illegal search warrant not supported by probable cause, and in support thereof would show the Court the following:

I. Obtaining the Search Warrant

That on May 8th, 2014 at 2:30 PM, Agent John A. Moseley prepared an affidavit for a search and arrest warrant (*See* Exhibit 1), seeking a "no knock" entry to Defendant's apartment and 2 vehicles, based solely on a Confidential Informant and minimal independent investigation. Agent Moseley gave the affidavit to Judge Mark Kimball at 4:00 PM[1] and at 4:05 PM Judge Kimball had finished thoroughly analyzing the affidavit and had made an independent determination of probable cause to justify issuing a search and arrest warrant authorizing 20 members of the Killeen Police Department, Tactical Response Unit to conduct a "no knock" raid on the Defendant's apartment and vehicle.

[1] Agent John Moseley's Incident/ Investigation Report from May 9, 2014

II.

That the magistrate is limited to the "four corners" of the affidavit to determine if there is sufficient probable cause and, thus, reviewing courts are given the same limitation when reassessing those findings.[2] Therefore, even if the Affiant was aware of additional information that would be sufficient to establish probable cause, the warrant is invalid if the critical facts were not included within the four corners of the affidavit presented to the magistrate.[3]

A. Applicable Law

III.

That both the United States Constitution and the Texas Constitution provide that a person will be protected from unreasonable search and seizure. Article 1, Section 9 of the Texas Constitution states:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.[4]

The Fourth Amendment of the United States Constitution reads:

> 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.[5]

The Defendant had an expectation of privacy in his apartment and vehicle and therefore has standing to assert a constitutional violation.[6]

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[2] *Wetherby v. State*, 482 S.W.2d 852, 853 (Tex. Crim. App. 1972) ("In determining the sufficiency of such affidavit to reflect probable cause for the issuance of the search warrant, this court is bound by the four corners thereof."). *See also Illinois v. Gates*, 462 U.S. 213, 239 (1983); *Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996)

[3] See generally *Lowery v. State, 98 S.W.3d 398 (Tex. App.—Amarillo 2003, no pet.)*

[4] Tex. Const. art. 1, § 9.

[5] U.S. Const. amend. IV

[6] *Matthews v. State*, 431 S.W.3d 596, 606 (Tex. Crim. App. 2014)

IV.

That the Texas Code of Criminal Procedure mandates:

> No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.[7]

A search warrant can only be issued if the requisite sworn affidavit sets forth sufficient facts to establish probable cause:

> (1) that a specific offense has been committed,
> (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, ***and***
> (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.[8]

The affidavit ***must*** establish probable cause for all three of these elements[9] and only then can a neutral and unbiased magistrate issue a search warrant.

B. Insufficient Probable Cause

V.

That the facts within the four corners of the aforementioned Affidavit do not establish probable cause that would justify a neutral and detached magistrate to issue a "no knock" search and arrest warrant.

VI.

That on some unknown day and time before the Affidavit was prepared, a confidential informant approached Agent Moseley with information "concerning narcotics trafficking." According to

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[7] Tex. Code Crim. Proc. art 18.01(b).
[8] Tex. Code Crim. Proc. art 18.01(c).
[9] *Johnson v. State, 722 S.W.2d 417, 422 (Tex. Crim. App. 1986)*; Bullock v. State, *No. 09-01-469CR, 2002 WL 31662323 (Tex. App. Nov. 27, 2002)*.

Agent Moseley, the Informant alleged "that a black male known only as 'G' frequented the 1100 block of Circle M Drive in Killeen and was trafficking in cocaine." In March 2014, Agent Moseley initiated an investigation into the Informant's claim and "[e]xtensive surveillance was conducted in the area of 1104 Circle M in Killeen during the month of April 2014."

VII.

That according to the Affidavit, on April 24, 2014, Agent Moseley and BOCU Commander Jerry Dugger observed "a large volume of foot and vehicular traffic in the area and on many occasions Guy was observed meeting with individuals that walked or drove up at or near his vehicle." Agent Moseley contends that that innocuous activity is "indicative of an individual involved in the distribution of illegal controlled substance." However, neither Agent Moseley nor Commander Dugger saw any drugs. They never saw any financial transactions. They never saw any firearms. They never overheard any conversation. In fact, they did not see any criminal activity whatsoever. Further, no effort was even made to identify or interview any of the individuals that went near the Defendant's car in an attempt to discern whether drugs were even present. Instead, what was observed was the Defendant sitting in his car talking to friends, yet Agent Moseley opined in a conclusory manner that that action was indicative of narcotics activity.

At approximately 7:00 PM that night, Agent Moseley and Commander Dugger observed a red Chevrolet Impala, driven by Shirley Whittington, park next to the Defendant's car. Shirley Whittington was identified as the Defendant's girlfriend. Then they "observed the trunk open on Guy's Crown Victoria and Guy removing a white bag which he placed into the trunk of the Impala. The female then entered the Crown Victoria and drove the vehicle as Guy rode as a passenger."

Agent Moseley and Commander Dugger then proceeded to follow that car to Jack in the Box where they observed the Defendant have a "short meeting" with a white male. According to Agent Moseley, that "activity is consistent with that of individuals that are involved in the illegal distribution of controlled substances." That behavior is also consistent with meeting a friend at Jack in the Box to ask how his day was. According to the Affidavit, at no point did either Agent

Moseley or Commander Duggar see any drugs. They never saw any money. They never saw a gun. They never saw anything exchange hands. They did not overhear any part of their conversation. And, again, there was no effort made to identify the man the Defendant briefly talked to. The only definitive thing they witnessed at Jack in the Box was a short conversation between two men, one of whom was white. That extensive surveillance conducted on April 24, 2014 uncovered no illegal activity of any kind, only conclusory allegations to justify innocuous behavior.

VIII.

That within 48-hours of observing the Defendant talking to a friend at a fast food restaurant, the Informant allegedly met with the Defendant "in the parking area at 1104 Circle M Drive [and] reported that Guy removed a white bag from the trunk of the red Impala, the bag was observed to contained (sic) cocaine." However, that interaction is in no way substantiated. The Affidavit omits any mention of how or when the Informant came to gather this information. The most precise timeframe Agent Moseley could provide was that it happened within a 48-hour period.

The Affidavit gives no indication how the Informant knew what was in the bag or how he identified it as cocaine. It does not state that the Informant used any drugs, bought any drugs, or that any field test was done to confirm the Informant's unverified sighting. Furthermore, no officer was surveilling the area who can confirm that interaction even transpired.

IX.

That during his extensive surveillance, Agent Moseley made no effort to corroborate that Informant's claim that the Defendant kept drugs in a white bag. Agent Moseley's sole observation of said bag was seeing the Defendant take it out of his car and put it in the trunk of the red Impala. Having already established that the owner of the red Impala was the Defendant's girlfriend, placing a bag in the trunk of her car can easily be attributable to bringing clothes to stay the night at her house. In fact, the only thing that observation confirmed was that the defendant had a bag that was the color white.

In addition, Agent Moseley does not indicate the bags relevance to any of his independent observations, not even to imply that owning a white bag is "consistent with an individual involved in the illegal distribution of controlled substances." Agent Moseley never saw the bag opened. He never saw any items in the bag. He never saw the Defendant take anything out of the bag. In fact, nowhere in the Affidavit is there any attempt to describe the bag. The size, shape, weight, and material are all unknown. There is no inference that can even be drawn to speculate that drugs could be kept in that bag. The color of the bag is the least important descriptor in determining its contents, yet that is all that is provided.

X.

That Agent Moseley and BOCU Agent Joaquin Salazar again conducted surveillance of the Defendant on May 6, 2014. Their sole reported observation was seeing the Defendant and Shirley Whittington get in their respective vehicles and drive to Shirley's residence. The relevance of their ability to drive is made unclear. To be fair, the Affidavit only specifically states that "extensive surveillance was conducted during the month of April 2014."

XI.

That the Affidavit alleges that the Informant observed the Defendant in the possession of cocaine at some unknown place and time within 48 hours preceding the Affidavit. The exact description the Informant provided was that the Defendant was in the "care, custody, and control of ***a quantity*** of cocaine." That vague timeframe and the lacking specificity of the amount present was deemed sufficient to prove the Defendant was in possession of an illegal controlled substance. Agent Moseley provided no corroboration of that observation, not even to verify the Informant was anywhere in the vicinity of the Defendant at some unknown point in a 48-hour span.

It should be pointed out that the Informant never met with the Defendant during any of the surveillances Agent Moseley conducted. Instead, all of the alleged meetings and interactions between the Defendant and the Informant took place at times Agent Moseley was not watching.

C. Affidavit Was Overbroad

XII.

That the search and arrest warrant affidavit was overbroad and lacked probable cause to search the Defendant's apartment. An affidavit must establish a nexus between the place to be searched and evidence of a crime.[10] In other words, the affidavit must allege substantial facts establishing probable cause to believe that the items sought would be located at the place to be searched. The Texas Court of Criminal Appeals, the Texas Court of Appeals, and the Fifth Circuit have all consistently held that:

> Probable cause to believe a person has committed a crime does not automatically supply probable cause to search that person's home for evidence of the crime.[11]

More specifically, an affidavit establishing that a specific offense was committed by the defendant, and that the items sought are evidence of the crime, is ***not*** sufficient if it does not also establish probable cause to believe the items would be located at the defendant's home.[12]

XIII.

Here, the Affidavit makes no mention of drugs ever being in the Defendant's apartment. The Informant never alleged it and Agent Moseley never observed it. The Affidavit does include an unsourced claim that "Guy kept scales, packaging materials and other items commonly associated with the distribution of controlled substances in the apartment." It does not say any drugs were kept in his apartment. There is no overt assertion or even vague insinuation as to whether the Informant learned that information firsthand or whether he heard a stranger allege it.

Furthermore, during his extensive surveillance, Agent Moseley never observed the Informant enter the Defendant's residence and nowhere in the Affidavit does it state the Informant ever claimed to have been in there. Wholly conclusory statements in the affidavit are insufficient to

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[10] *Johnson v. State*, 722 S.W.2d 417, 422 (Tex.Crim.App.1986)(opinion on reh'g).
[11] Lindley v. State, 773 S.W.2d 579, 584 (1989); *U.S. v. Freeman,* 685 F.2d 942, 949 (5th Cir.1982); *Johnson v. State,* 722 S.W.2d 417 (Tex.Cr.App.1986).
[12] *Johnson v. State*, 722 S.W.2d 417, 422 (Tex.Crim.App.1986)(opinion on reh'g).

support a finding of probable cause.[13]

XIV.

That Agent Moseley never saw the Defendant carry ***anything*** from his apartment to or from his car that could even provide an inference that drugs or paraphernalia would be found inside his apartment. The only independent observation about the Defendant's apartment that Agent Moseley made was determining it was where the Defendant resides.

XV.

That probable cause ***must*** be established for the location to be searched and the affidavit in this case provided the magistrate nothing in which that conclusion could be drawn. The sheer observation that the Defendant resides at the apartment and an unsourced allegation that scales and packaging material are in said apartment falls well short of establishing probable cause to justify a "no knock" raid on the Defendant's apartment.

D. Requirements To Establish A Confidential Informant's Credibility

XVI.

That when a search warrant affidavit contains information received from a confidential informant, the Supreme Court set out a totality of the circumstances analysis that focuses on the informant's veracity, reliability and basis of knowledge.[14] Part of the totality of circumstances consideration is "whether an informant's tip contains a range of details relating not only to easily obtained facts and conditions existing at the time of the tip, but also to future actions of third parties ordinarily not easily predicted."[15]

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[13] Parish v. State, 939 S.W.2d 201, 203 (Tex. App. 1997); Illinois v. Gates, 462 U.S. 213, 239 (1983); Carter, 915 S.W.2d at 504; Eisenhauer v. State, 754 S.W.2d 159, 164 (Tex.Crim.App.), cert. denied, 488 U.S. 848, 109 S.Ct. 127, 102 L.Ed.2d 101 (1988).

[14] Parish v. State, 939 S.W.2d 201, 203 (Tex. App. 1997); Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332–33, 76 L.Ed.2d 527 (1983); Rojas v. State, 797 S.W.2d 41, 43 (Tex.Crim.App.1990); Angulo v. State, 727 S.W.2d 276, 278 (Tex.Crim.App.1987).

[15] Smith v. State, 58 S.W.3d 784, 789 (Tex. App. 2001)

Here, the Informant's tip contained no predictive information about future action or behavior. The Informant never once told police when or where the Defendant would allegedly be selling drugs, who he would be selling them to, or any details to confirm inside knowledge or demonstrate reliablity. Everything the Informant relayed was an easily obtainable fact.

> When the tip itself provides no indicia of reliability, such as the prediction of future actions, there must be something more, such as observed activity to elevate the level of suspicion.[16]

XVII.

That the omission of an Informant's name from an Affidavit is acceptable, omitting how the Informant is credible is not. The only evidence of the Informant's veracity and reliability is Agent Moseley saying so.

> Your Affiant believes the information provided by the informant is reliable and credible ***because*** the information has been corroborated through surveillance and other means of independent investigation.

According to Agent Moseley, the reliability of the Informant rests in his corroboration. However, it has been shown above that no relevant information was actually corroborated through surveillance and minimal independent investigation took place. Nothing Agent Moseley observed verified any of the Informant's observations about criminal activity. Simply stating that information was corroborated does not suffice.

In addition, Agent Moseley asserts that "[t]he Informants assistance has led to the seizure of significant amounts of controlled substances and arrest of subjects for miscellaneous drug offenses." This vague and wholly conclusory assertion of past reliability lacks the specificity the Courts require. For starters, it does not specify when the Informant assisted in the past. If it was 30 years ago, that commendation is of little relevance. Further, that threshold for determining an informant's credibility is whether "the informant's past information has led to ***convictions***"[17],

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[16] Parish v. State, 939 S.W.2d 201, 204 (Tex. App. 1997). See Illinois v. Gates, 462 U.S. 213, 245 (1983); Giossi v. State, 831 S.W.2d 887, 889 (Tex.App.—Austin 1992, pet. ref'd); Correll, 696 S.W.2d at 299.

[17] State v. Duarte, 389 S.W.3d 349, 358 (Tex. Crim. App. 2012)(*quoting* 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3(b) at 115, 119 n. 85 (4th ed.2004 & 2010–2011 Supp.))

not arrests.

XVIII.

That there is no background information to independently gauge the Informant's credibility. The Affidavit makes no mention of how the Informant learned the information he relayed to Agent Moseley. The Affidavit provides no insight into the Informant's relationship with the Defendant. There is no explanation as to how they met, if they are related, how long they knew each other, or if there was any ulterior motive to justify any of the Informant's uncorroborated accusations. In addition, it is unknown if the Informant has a criminal record, if he was an informant to get leniency, or if there was any motivation that might undermine his reliability. Texas Courts have held that "informants 'from the criminal milieu' do not enjoy any presumption of reliability."[18] Therefore, the knowledge of the Informants criminal history is extremely relevant in weighing the veracity of his claims.

XIX.

That almost every allegation in the Affidavit attributable to the Informant was "reported":

(1) The informant ***reported*** that a black male known only as "G" frequented the area of the 1100 block of Circle M Drive in Killeen and was trafficking in cocaine
(2) The same informant ***reported*** that Guy often carried a white bag with cocaine and marijuana in it
(3) The informant also ***reported*** that Guy frequently kept large amounts of cocaine in the blue Crown Victoria, his girlfriend's red Chevrolet Impala and an older green pickup
(4) The informant ***reported*** that Guy removed a white bag from the trunk of the red Impala
(5) The informant has ***reported*** that Guy is frequently armed with a handgun

While hearsay of hearsay is arguably acceptable to support probable cause, each level needs to be confirmed and from a reliable source.[19] Here, there is no indication who the actual source was in order to ascertain each level of reliability. It is not clear whether the Informant learned this information firsthand or whether it was overheard or who originated these reports.

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[18] State v. Elrod, 2016 WL 3194808 at *3.
[19] *Arredondo v. State, 656 S.W.2d 664, 665 (Tex. App., Fort Worth 1983, pet. ref.)]*; [*Hennessy v. State, 660 S.W.2d 87, 91 (Tex. Crim. App. 1983)*

XX.

That controlled buys are common practice with confidential informants, yet, according to the Affidavit, there were none. No supervised purchases. No organized drug sales. No field tests to ensure the substance the Informant alleged seeing was, in fact, cocaine. And nowhere in the Affidavit does it even imply the Informant purchased drugs from the Defendant on his own. In fact, there was no mention as to whether the Informant had ever bought or used drugs from anyone, much less the Defendant. The only statement in the affidavit that even addresses the Informant's contact with cocaine is:

> This informant has also demonstrated to your Affiant that he/she is personally familiar with the controlled substance cocaine and the way it is packaged for resale because he/she has personally identified the substance to your Affiant in the past.

As informative and persuasive as that claim is, it does not indicate if the Informant had ever incorrectly identified the substance during his illustrative career as an informant. Agent Moseley never tested or confirmed any illegal substance. Therefore, the probable cause in the Affidavit relies solely on an unknown informant with an unknown relationship to the Defendant claiming to know for certain that a substance is cocaine based solely on an observation.

XXI.

That, of all the allegations made by the Informant in the Affidavit, Agent Moseley's "extensive surveillance" corroborated the following things:

(1) The Defendant is a black male that sometimes goes by "G";
(2) The Defendant drove a blue Ford Crown Victoria;
(3) The Defendant lived at 1104 Circle M Drive in Killeen;
(4) The Defendant's girlfriend is Shirley Whittington; and
(5) The Defendant has a bag that is the color white

Those are the only facts that Agent Moseley confirmed. "Mere corroboration of details that are easily obtainable at the time the information is provided will not support a finding of probable cause."[20] Further, "corroboration of only innocent details is usually insufficient."[21]

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[20] Parish v. State, 939 S.W.2d 201, 203 (Tex. App. Austin 1997); Illinois v. Gates, 462 U.S. 213, 245 (1983); Gilmore v. State, 323 S.W.3d 250 (Tex. App. Texarkana 2010), petition for discretionary review

XXII.

That through "extensive surveillance", Agent Moseley was able to independently uncover all of the following evidence:

(1) The Defendant walked to and from his car to his apartment on multiple occassions;
(2) The Defendant talked to people that were near his car;
(3) The Defendant took a white bag from the trunk of his car and put it in the trunk of his girlfriend's car;
(4) The Defendant and his girlfriend, Shirley Whittington, drove to a Jack in the Box and briefly talked to a white male;
(5) Shirley Whittington frequently spent the night at the Defendant's apartment; and
(6) The Defendant and Shirley Whittington each drove their own cars from the Defendant's apartment to Shirley's house.

That is it. That is everything in the Affidavit that Agent Moseley independently observed. "Extensive surveillence" is to be measured by substance, not duration. Agent Moseley conducted "extensive surveillance" for over a month and did not observe any drugs, weapons, money, or any indicia of illegal activity. The Supreme Court requires considerably more to substantiate the allegations of an informant.[22]

D. Burden For A "No Knock" Warrant Was Not Met

XXIII.

That the Fourth Amendment generally requires officers to knock and announce their presence before entering a person's home or property.[23] The burden of proof is on the State to justify dispensing with the "knock and announce" requisite by showing exigent circumstances.[24] Exigent circumstances do not exist solely because detectives believe people involved with drugs

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refused, (Jan. 12, 2011); Rojas, 797 S.W.2d at 44; Correll v. State, 696 S.W.2d 297, 299 (Tex.App.—Fort Worth 1985, pet. ref'd).
[21] Elardo v. State, 163 S.W.3d 760, 768 (2005)
[22] *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995).
[23] *Price v. State*, 93 S.W.3d 358, 366 (Tex.App.-Houston [14th Dist.] 2002); *Richards v. Wisconsin*, 520 U.S. 384, 394, 117 S.Ct. 1416 (1997); Wilson v. Arkansas, 514 U.S. 927, 934, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958)
[24] *Ballard v. State*, 104 S.W.3d 372, 376 (Tex.App.-Beaumont 2003)

typically carry weapons.[25] The United States Supreme Court made it unmistakably clear that:

> [T]he State's proof of particular exigent circumstances justifying a no-knock entry is 'not high,' but the proof must at least indicate an ***unequivocal knowledge*** on the part of the authorities of the particular exigent circumstance(s) asserted.[26]

According to the Affidavit, Agent Moseley did not have knowledge of any exigent circumstance necessary to be exempt from a constitutional requirement, much less unequivocal knowledge. Instead, Agent Moseley stated that a "no-knock" entry was justified based upon generalities and inferences from his training and experience.

> Your Affiant knows that is not uncommon for individuals who deal in large quantities of controlled substance to employ others to sale and or protect their illegal substances and proceeds from the sale of these substances.

XXIV.

That nowhere in the Affidavit does it specify that the Informant had any personal, first hand knowledge that the Defendant carried a handgun and during his extensive surveillance, Agent Moseley never saw any firearm on or near the Defendant.

> The mere assumption that those in possession of controlled substances are normally also in possession of firearms is insufficient as a matter of law to relieve the authorities of their historical duty to knock and announce their presence.[27]

XXV.

That another exigent circumstance the Courts might consider in determining the necessity of a "no knock" warrant is whether it would be necessary to prevent the destruction of evidence.[28] However, there is no mention in the entire Affidavit that that was a factor for justifying a "no

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[25] *Ballard v. State*, 104 S.W.3d 372, 383 (Tex.App.-Beaumont 2003); see also *Bishop v. Arcuri*, 674 F.3d 456, 464 (Fifth. Cir. 2012)(Circuit held San Antonio's "default mode" of no-knock raids for drug investigations, on the basis that weapons were more likely to be present in drug cases, was not enough to meet the exigent circumstances exception to the Fourth Amendment.).
[26] *Ballard v. State*, 104 S.W.3d 372, 383 (Tex.App.-Beaumont 2003) (*citing Richards v. Wisconsin*, 520 U.S. 384, 394, 117 S.Ct. 1416 (1997).
[27] *Jeffery v. State*, S.W.3d 439, 444 (Tex.App.-Texarkana 2005)(citing *Price v. State*, 93 S.W.3d 358, 367 (Tex.App.-Houston [14th Dist.] 2002).
[28] *Richards v. Wisconsin*, 520 U.S. 384, 394, 117 S.Ct. 1416 (1997).

knock" warrant in this situation. In addition, the only specific place the Informant alleged he observed drugs was in the Defendant's vehicle. Therefore, there was no legitimate concern that a raid on the Defendant's apartment could lead to the potential destruction of evidence.

> The mere fact that drugs are involved does not give the police probable cause to believe that evidence will be destroyed so as to justify an unannounced entry.[29]

XXVI.

That the Affidavit provides no articulable risk that evidence would have been destroyed or that the officers would have faced danger had they knocked and announced their presence or even waited until the Defendant was outside in his car, the only place he was ever observed. According to the Supreme Court of the United States:

> If a *per se* exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.[30]

Therefore, the granting and subsequent execution of a "no knock" warrant violated the Defendant's constitutional and statutory rights.

E. Required Remedy

XXVII.

That the deference afforded to a magistrate's probable cause determination is not absolute. The Supreme Court has held:

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.[31]

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[29] *Price v. State*, 93 S.W.3d 358, 368 (Tex.App.-Houston [14th Dist.] 2002)
[30] *Richards v. Wisconsin*, 520 U.S. 384, 394, 117 S.Ct. 1416 (1997).
[31] *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

XXIII.

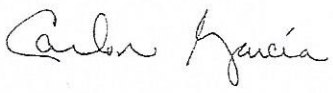
That it is well established that evidence uncovered during an illegal search cannot be used to justify its issuance.[32] Therefore, any potentially incriminating evidence the police may have collected does not vitiate the Defendant's rights being violated.

XXIX.

That, for the aforementioned reasons, the Affidavit falls well short of establishing probable cause to search the Defendant's apartment and vehicle. Pursuant to constitutional and statutory requirements, the only appropriate remedy to cure the harm done is for all evidence seized as a result of the illegal search and arrest to be suppressed

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court order the suppression of all such evidence illegally and unconstitutionally obtained herein in violation of Tex. Const. art. 1, sec. 9; *Tex. Code Crim. Proc. Ann. art. 18.01(b)* and (c); *Tex. Code Crim. Proc. Ann. art. 38.23*; and U.S. Const. Amend. 4 and 14; for a hearing to be had hereon; and for such other and further relief in this Honorable Court as deemed just and proper. The accused further requests that this Court make specific findings of facts and conclusions of law, should the motion to suppress be denied.

Respectfully Submitted,



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[32] *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927)

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document was served upon the attorney for the State on January 4, 2019.

Attorney for Defendant