IN THE TENTH JUDICIAL DISTRICT
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,

Plaintiff,

vs. Case No. 12CR00XX
Division 6

JOHN D. DOE,

Defendant.

MOTION TO SUPPRESS EVIDENCE

COMES NOW Defendant, John D. Doe, by and through his attorney, Paul D. Cramm, and moves this Court for its order pursuant to K.S.A. 22-3216 suppressing evidence illegally obtained during the course of the police investigation of the above-referenced matter. In support of his motion, the Defendant states and alleges as follows:

FACTUAL BACKGROUND

1. On April 8, 2011, Olathe Police executed a search warrant for the residence located at 11921 South Troost Street in Olathe Kansas. During the course of the search, police discovered marijuana plants and items and accessories associated with indoor plant cultivation.

2. The Affidavit for Search Warrant submitted by Olathe Police Detective Nicholas Stein states in pertinent part:

> On 04/04/11, the affiant attended a meeting hosted by Missouri State Highway Patrol Narcotics Unit Supervisor Sergeant Jim Wingo in reference to possible indoor marijuana grow houses located inside the city limits of Olathe, Johnson County, Kansas. During the meeting, Sergeant Wingo provided information that indicated a young white male (identity unknown) was observed purchasing an unknown quantity of perlite soil conditioner and liquid fertilizer from the Green Circle Garden Center. This transaction occurred on 02/08/2011 at approximately 1235 hours. Sergeant Wingo also advised the young white male was observed driving a 2007 Toyota Rav4 (271ADJ-KS). A records check on this license plate revealed the registered owner was Mai Lin Doe of 11921 South Troost Street, Olathe, Johnson County, Kansas.

3. The Affidavit continues:

> On 04/07/2011, the affiant responded to 11921 South Troost Street, Olathe, Johnson County, Kansas, in reference to curbside trash. Upon arrival the affiant recovered the trash from the residence. The trash was placed curbside in one grey City of Olathe plastic garbage can. The affiant later sorted through the trash at the station. Inside the trash the affiant recovered the following items: three suspected marijuana plants, a glass pipe that contained a small quantity of suspected marijuana and other burnt residue, an empty one gallon jug of General Hydroponics brand Diamond Nectar, three red plastic cups (two labeled "OG" and one labeled "church") with potting soil, two seedling starter plugs each containing one suspected marijuana stem that had been cut, and a University of Central Missouri mailer addressed to Melissa Sayer of 11921 South Troost Street, Olathe, Kansas 66061. ***The indicia was not found in the same bag as the contraband***. However, the bags searched were all recovered from the same address. The affiant field tested a small amount of the green vegetation from the pipe using the department's Duquenois-Levine Marijuana field test kit. The test was witnessed by Detective Mielke and was positive for marijuana. It is presumptive for the presence of marijuana, ***but not conclusive for the presence of marijuana***, and similar to the type of test conducted by the Johnson County Kansas Crime Lab. (Emphasis added)

4. During the execution of the above-referenced warrant, police observed tattoo equipment in the basement of the residence. Specifically, Officer David Schroeder reports: "I was informed the resident, John Doe, did not have a Kansas License to tattoo and that he had told Officers on scene that he does not do tattoos at his house." Officer Schroeder continues: "Due to all the equipment being set up and readily available to tattoo customers, it was decided to recover the equipment as evidence of tattooing without a license." Of note, neither the Affidavit nor the Warrant made *any* reference *whatsoever* to the alleged offense of Tattooing without a License or evidence thereof. At no Johne prior to seizure of the tattoo equipment did law enforcement submit a separate Affidavit or otherwise seek to obtain a secondary search warrant authorizing seizure of the tattoo equipment.

ARGUMENTS AND AUTHORITIES

5. Under the Fourth and Fourteenth Amendments to the United States Constitution, a search conducted without a warrant is "*per se* unreasonable... subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. *Mincey v. Arizona*, 437, U.S. 385, 390-91, 98 S.Ct. 2408, 2412-13 (1978); *State v. Schur*, 217 Kan. 741, 743, 538 P.2d 689 (1975). See also: K.S.A. §22-3216(2); *State v. Houze*, 23 Kan.App. 2d 336, 337, 930 P.2d 620, rev. denied 261 Kan. 1088 (1997).

6. The foregoing well-established principles of law are codified by K.S.A. §22-3216 which provides:

> "(1) Prior to the trial a defendant aggrieved by an unlawful search and seizure may move for the return of property and to suppress as evidence anything so obtained.
>
> (2) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were lawful shall be on the prosecution. If the motion is granted then at the final conclusion of the case, the court shall order the suppressed evidence restored to the party entitled thereto, unless it is otherwise subject to lawful detention.
>
> (3) The motion shall be made before trial, in the court having jurisdiction to try the case, unless opportunity therefore did not exist or the defendant was not aware of the ground for the motion, but the court in its discretion may entertain the motion at the trial.
>
> (4) A motion to suppress illegally seized evidence may be made before or during a preliminary examination. If the motion is granted the suppressed evidence shall be held subject to further order of the magistrate. If the defendant is bound over for trial, the suppressed evidence shall thereupon become subject to the orders of the district court. If the defendant is not bound over and if no further proceedings are instituted on the particular charge or involving the particular suppressed evidence within ninety (90)

> days after the granting of the order, then the magistrate shall order the suppressed evidence restored to the party entitled thereto, unless it is otherwise subject to lawful detention."

I. The Affidavit Herein Fails to Provide Probable Cause to Support the Subject Warrant.

7. K.S.A. 22-2502 provides in pertinent part:

> "A search warrant shall be issued only upon the oral or written statement, including those conveyed or received by electronic communication, of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been or is being committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized."

8. In interpreting and applying the foregoing statutory language, the Kansas Court of Appeals has held: "A search warrant shall be issued upon oral or written application which states facts sufficient to show probable cause that a crime has been or is being committed and which particularly describes the person, place, or means of conveyance to be searched. Before a search warrant may be issued, there must be a finding of probable cause by a neutral and detached magistrate." (*Internal Citation Omitted*.) *State v. Hendricks*, 31 Kan.App.2d 138, 141, 61 P.3d 722 (2003).

9. On review, a court's determination of the sufficiency of a search warrant affidavit *must be determined from the four corners of the affidavit*. (Emphasis added) *State v. Bowles*, 28 Kan.App.2d 488, 492, 18 P.3d 250 (2001). A magistrate may not simply ratify the suspicions of police when reviewing an affidavit for search warrant. *State v. Lum*, 27 Kan.App.2d 113, 120, 998 P.2d 137, rev. denied 269 Kan. 938 (2000). "Bald conclusions, mere affirmations of belief, or suspicions are not enough ... there must be sufficient affirmative allegations of fact as to an affiant's personal knowledge to provide a rational basis upon which a magistrate can make a judicious determination of probable cause." *State v. Probst*, 247 Kan. 196, 202, 795 P.2d 393 (1990).

A. Contraband Recovered From Trash Does Not Provide Independent Support for a Warrant to Search the Associated Residence.

10. In *California v. Greenwood*, 486 U.S. 35, 37, 108 S.Ct. 1625 (1988), the United States Supreme Court held that the Fourth Amendment to the United States Constitution does not prohibit warrantless searches of trash left by the curb for collection. The Kansas Supreme Court has endorsed the rationale set forth in *Greenwood* in *State v. Kimberlin*, 267 Kan. 659, 666, 984 P.2d 141 (1999) stating: "Once defendant placed his trash out for collection, adjacent to a public thoroughfare, he defeated any reasonable expectation of privacy in the garbage."

11. However, although seizure of trash left for collection does not violate the 4th Amendment, merely locating contraband therein does not provide independent support for the issuance of a warrant to search the associated residence. In order for contraband recovered from trash to provide the necessary probable cause to issue a search warrant, an affidavit must contain sufficient information to establish a fair probability that contraband or evidence of a crime will be found *in the residence named in the search warrant application*. See: *State v. Morris*, 27 Kan.App.2d 155, 159, 999 P.2d 283, rev. denied 269 Kan. 938 (2000). In other words, the affidavit must establish a nexus between the items discovered during the trash pull and the suspected residence. See *United States v. Griffith*, 362 F.Supp.2d 1263, 1268 (D.Kan.2005).

12. The Kansas Court of Appeals addressed the issue of probable cause arising from contraband and indices of residency discovered in residential trash in the unpublished opinion *State v. Dickerson*, 92 P.3d 613 (2004). Although not favored for citation pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions *may* be cited as persuasive authority on a material issue not addressed by a published Kansas Appellate Court opinion. Attached hereto is a copy of the written opinion in *State v. Dickerson*, supra. Consistent with the analysis set forth in *Kimberlin, Morris* and *United States v. Griffith*, the *Dickerson* Court concluded that probable

cause did exist to issue the search warrant for the subject residence based on the contents of the trash. Specifically, drug residue was found in a single trash bag which *also* contained Defendant Dickerson's work schedule and a prescription medication sack bearing his name.

13. The following year, the Kansas Court of Appeals again addressed the validity of a search warrant premised upon contraband evidence discovered in residential trash. In the unpublished opinion *State v. Droge*, 106 P.3d 513 (2005), the Court upheld the trial court's decision to suppress evidence recovered pursuant to a warrant issued as the result of a 'trash pull' by law enforcement because *nothing in the affidavit conclusively linked the contraband or the trash to the defendant or his residence*. Attached hereto is a copy of the written unpublished opinion in *State v. Droge*, supra.

14. In its opinion, the *Droge* Court cited with favor the opinion of the Illinois Court of Appeals in *People v. Burmeister*, 313 Ill.App.3d 152, 728 N.E.2d 1260 (2000). There, the Court upheld suppression of evidence seized pursuant to a residential search warrant predicated upon recovery of contraband from trash left at the curbside of the suspect residence. Because there was no direct observation of the suspect personally placing the trash at the curbside of his residence, *and because there was nothing in the trash conclusively linking it or the contraband to the defendant or his residence*, the trial court found insufficient probable cause to support the search warrant for the subject residence.

15. On appeal, the People argued that refuse taken from the front of a home should be 'presumed' to be the refuse of that particular residence. The Court disagreed, stating: "When a resident terminates his privacy interest in his trash by placing it on the curb for collection, anyone may rummage through it and deposit incriminating items ... the police may not presume that the evidence they discovered originated from the nearest residence." 313 Ill.App.3d at 155.

The Court further noted that if it were to endorse the People's position, "anyone could deposit contraband in the trash, alert the police, and watch as the vicJohn's residence was searched." Id. at 158.

16. In its opinion, the *Burmeister* Court included analysis of situations where law enforcement does not directly observe the suspect placing the trash to be seized on the curbside. In such cases, the Court held that evidence obtained from said refuse *may* still support issuance of a search warrant for the residence if the trash contains contraband items as well as "indices of residency" linking the contraband to the residence. 313 Ill.App.3d at 157, quoting *State v. Erickson*, 496 N.W.2d 555 (N.D.1993). By way of explanation, in *Erickson*, police seized trash from a dumpster containing evidence of marijuana trafficking along with several objects linking the garbage and contraband to the defendant's residence. Specifically, officers located a letter addressed to the defendant and a traffic ticket issued to him in the same bag as the contraband evidence. The North Dakota Supreme Court concluded that the "indices of residency" found in the trash bag established a sufficient nexus between the contraband recovered from the trash and the residence to justify issuance of a search warrant for the subject residence. Id. at 559.

17. The Illinois Court of Appeals has consistently applied the "indices of residency" analysis set forth in *Burmeister* - and adopted by the Kansas Court of Appeals - in subsequent appellate case law. In *People v. Balsey*, 329 Ill.App.3d 184 (2002), the Illinois Court of Appeals reversed the trial court's order suppressing evidence seized pursuant to a search warrant issued based upon contraband evidence recovered from defendant's trash. Specifically, the Illinois Court of Appeals noted that the contraband evidence recovered from the trash was found *in the same bag* as two pieces of mail addressed to the defendant at the listed address. This result is entirely consistent with the outcome in *Burmeister*, where failure to discover indices of residency

in the same trash bag as the contraband resulted in a determination by the Court that there was insufficient probable cause to support issuance of the subject warrant.

18. Later in 2005, the Kansas Court of Appeals again addressed the sufficiency of probable cause to support a search warrant issued following discovery of contraband in residential trash in the unpublished opinion *State of Kansas v. Bennett*, 113 P.3d 274 (2005). Attached hereto is a copy of the written opinion. There, the affidavits in question failed to state whether or not police actually observed the defendants take the trash from their residences and place it out for collection. Thus, the sufficiency of the probable cause and validity of the warrants depended upon the discovery of 'indices of residency' associated with the contraband recovered from the trash. In suppressing the evidence recovered pursuant to the challenged search warrants, the Court noted that the "affidavits failed to mention whether the indices of residency were found *in the same trash bag* as the contraband." Id. (Emphasis in Original Opinion) The Court found this to be "important because the trash outside each residence was accessible to the public where anyone could have passed by and deposited contraband." Id. This decision is entirely consistent with the analysis and results all of the foregoing cases.

19. By comparing the Court's analysis and resulting conclusions in *Dickerson, Droge* and *Bennett*, it is evident that when considering the validity of a search warrant issued after discovery of contraband in residential trash, the location of the contraband in relation to the location of any indices of residency is dispositive to the validity of the warrant. Where "indices of residency" are found *in the same trash bag* with contraband evidence – as was the case in *Dickerson* – the subject warrant is deemed to be supported by valid probable cause. However, where "indices of residency" are not found *in the same trash bag* with contraband evidence – as

was the case in *Droge* and *Bennett* – the subject warrant is unsupported by probable cause and deemed invalid.

B. Affidavit in the Case at Bar

20. The affidavit in the case at bar provides the following information: On February 8, 2011, a Missouri Highway Patrol Officer observed an unidentified male purchase an unknown quantity of 'perlite' soil conditioner at the Green Circle Garden Center. The unidentified male was driving a vehicle registered to 'Mai Lin Doe' at 11921 South Troost in Olathe, Kansas. On April 7, 2011, affiant Nicholas Stein recovered ***2 separate trash bags*** (Emphasis added) from the listed residence. In one trash bag, Stein recovered 3 suspected marijuana plants, a glass pipe containing a small quantity of suspected marijuana and burnt residue, and a 1 gallon jug of General Hydroponics brand Diamond Nectar. No 'perlite' soil conditioner was found. Testing of the residue in the glass pipe yielded a presumptive – but not conclusive – indicator for the presence of marijuana. *The suspected marijuana plants were not tested.*

21. In the second, *separate* trash bag, affiant Stein recovered a University of Central Missouri mailer addressed to 'Melissa Sayer' at the listed address. Affiant Stein concedes "***[t]he indicia was not found in the same bag as the contraband***." Moreover, the indicia recovered from the separate bag did not bear the name of the registered owner of the vehicle observed 2 months earlier at the Green Circle or the address associated with the vehicle registration – Mai Lin Doe. Additionally, the name associated with the vehicle – Mai Lin Doe – and the name on the lone indicia of residency – Melissa Sayer – are clearly female names and do not provide any additional information about the 'unidentified male' observed purchasing the 'perlite' brand soil conditioner 2 months prior to the issuance of the search warrant.

22. Because the bag containing the contraband contained *no* 'indicia of residency' *whatsoever* and because the only indicia of residency listed in the affidavit was recovered in a *separate bag*, the affidavit fails to establish valid probable cause to support the subject warrant herein. This analysis and result is entirely consistent with *Dickerson*, *Droge*, *Bennett*, *Burmeister*, *Erickson* and *Balsey*, supra. Moreover, the only 'indicia of residency' discovered in the second trash bag – separate from the contraband evidence – did not name the *current* resident of the listed address or the registered owner of the subject vehicle. This disparity further attenuates any basis for issuance of the warrant herein.

II. The Tattoo Equipment is Inadmissible

A. The Tattoo Equipment Constitutes "Fruit of the Poisonous Tree"

23. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the United States Supreme Court held that evidence discovered incidental to or derivative from an unlawful search is inadmissible as "fruit of the poisonous tree." Here, officers observed and elected to seize tattoo equipment based solely on their presence in the subject residence pursuant to an *unlawful* search warrant. But for the unlawful warrant, unsupported by valid probable cause, incidental observation of the tattoo equipment would not have occurred. As observation and seizure of said equipment arises exclusively from execution of the *unlawful* search warrant, introduction of said equipment as evidence against Defendant Doe must be prohibited.

B. Seizure of the Tattoo Equipment Exceeds the Scope of the Underlying Warrant.

24. Assuming *arguendo* that the underlying search warrant is valid – an assumption unsupported by the Kansas Court of Appeals – seizure of the tattoo equipment impermissibly exceeded the scope of the underlying search warrant. Both the Fourth Amendment to the United States Constitution and §15 of the Kansas Constitution Bill of Rights provide that "no warrants

shall issue, but upon probable cause, supported by oath or affirmation, *particularly describing* the place to be searched *and the persons or property to be seized*." (Emphasis added). U.S. Const. amend. IV; Kan. Const. Bill of Rights, §15. K.S.A. 22–2502(a) also requires a search warrant to 'particularly' describe a person, place, or means of conveyance to be searched and things to be seized.

25. "The purpose of the constitutional requirement that search warrants particularly describe the place to be searched and the person or property to be seized is to prevent general searches and the seizure of items at the discretion of the officer executing the warrant." *State v. LeFort*, 248 Kan. 332, Syl. 1, 806 P.2d 986 (1991.) "It is constitutionally required that a search warrant shall 'particularly' describe the place to be searched. Thus general or blanket warrants which give the executing officers a roving commission to search where they choose are forbidden." (Emphasis added.) 248 Kan. at 335, 806 P.2d 986 quoting *State v. Gordon*, 221 Kan. 253, 258, 559 P.2d 312 (1977). In *State v. Dye*, 250 Kan. 287, 293, 826 P.2d 500 (1992), the Kansas Supreme Court held that the particularity requirement of search warrants is equally applicable to the specificity in the items to be seized.

26. Pursuant to *U.S. v. Gahagan*, 865 F.2d 1490, 1496 (1989) "an unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant." However, "[w]hen law enforcement officers *grossly* exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *U.S. v. Medlin* (Medlin II), 842 F.2d 1194, 1199 (10th Cir.1988). See *U.S. v. Foster*, 100 F.3d 846, 849 -50 (10th Cir.1996). Thus, although "flagrant disregard for the terms of the warrant" is required to result

in exclusion of all evidence seized pursuant thereto, seizure of items *not* described with particularity in the warrant does result in exclusion of said items from admissibility. See *Waller v. Georgia*, 467 U.S. 39, 43 n. 3, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *U.S. v. Medlin* (Medlin I), 798 F.2d 407, 411 (10th Cir.1986). Consistent with the foregoing, the Kansas Supreme Court held in *State v. Kleypass*, 272 Kan. 894 (2001) that seizure of items outside scope of the search warrant and accompanying affidavit did not require suppression of *all* items seized, but did require suppression of the items *not mentioned in the warrant or affidavit*. 272 Kan. 894 HN 14.

27. Here, law enforcement observed tattooing equipment in the basement of the subject residence while executing the primary warrant. Neither the primary warrant *nor* the affidavit in support thereof made any mention whatsoever of the alleged offense of tattooing without a license or tattooing equipment. At no Johne did officers seek or obtain a supplemental, secondary or "piggyback" warrant proffering their observations of the tattooing equipment to a neutral and detached magistrate. Thus, seizure of this equipment exceeded the scope of the initial warrant and was unlawful. Said items must be excluded from admissibility against Mr. Doe.

28. Moreover, seizure of the tattooing equipment cannot be justified under the 'plain view' exception to the warrant requirement. Unlike illegal narcotics and drug cultivation paraphernalia or counterfeit U.S. currency and counterfeiting equipment, possession of tattooing equipment is not *per-se* unlawful. Only the *performance* of tattoo services to a customer in the state of Kansas without a valid license is unlawful. Thus, in the absence of a verified 'vicJohn' who was receiving or had received a tattoo from defendant Doe within the jurisdiction, mere possession of the tattoo equipment does not constitute a per-se violation of the law sufficient to justify seizure under the plain view exception.

WHEREFORE, for the above and foregoing reasons, the Defendant respectfully requests that this Court issue an order suppressing all illegally obtained evidence from these proceedings.

Respectfully submitted,

BY _____
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Overland Park, KS 66213
Telephone: 913-322-3265
Facsimile: 913-322-4371
PAUL D. CRAMM, CHARTERED
ATTORNEY FOR DEFENDANT

NOTICE OF HEARING

Take notice that the above motion will be called up for hearing before the Honorable James Davis, Division No. 6 of the District Court of Johnson County, Kansas, on the 5th day of April, 2013 at 2:00 of said day.

BY _____
Paul D. Cramm
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on this 1st day of March, 2013 a copy of the above and foregoing was hand delivered to: Assistant District Attorney R.W. Mozingo, Johnson County District Attorney's Office, P.O. Box 728, Olathe, KS 66051, Clerk's Box #317.

BY _____
Paul D. Cramm
ATTORNEY FOR DEFENDANT