No. _____

In The

Supreme Court of the United States

PETER PIERO SOLOMON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Peter Piero Solomon was found guilty of drug and firearm related offenses. A firearm, ammunition and drug paraphernalia were found at his home during a search that took place at night. Even though a search warrant had been obtained, nighttime execution was neither requested nor permitted.

The questions presented are:

1. Were nighttime residential searches regarded as unreasonable by the Framers?

2. Is the exclusionary rule consistent with early remedies for constitutional violations?

3. Did *Jones v. United States*, 357 U.S. 493 (1958) establish that an unauthorized nighttime residential search constitutes a Fourth Amendment violation?

LIST OF PARTIES

The name of the Petitioner is:

Peter Piero Solomon

The name of the Respondent is:

People of the State of California

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

APPENDICES

CALIFORNIA COURT OPINIONS AND ORDERS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner, Peter Piero Solomon, petitions the Court for a Writ of Certiorari to review a final judgment of the Court of Appeal of the State of California, First Appellate District, Division Two, affirming Mr. Solomon's convictions that were based on evidence seized during a nighttime search of petitioner's home. Although a search warrant was obtained, nighttime service of a search warrant had neither been requested nor approved. The California Supreme Court declined to review the appellate court's decision.

OPINIONS BELOW

The California Court of Appeal opinion entered on July 16, 2012, is reprinted in the Appendix at App. 1-14.

The trial court's transcript on the motion to quash and traverse the search warrant, held on June 1, 2010, is included in the Appendix at App. 15-25.

The California Supreme Court's Order denying petitioner's application for review entered on October 24, 2012, is included in the Appendix at App. 26.

JURISDICTION

The California Supreme Court denied review on October 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV:

> 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.

Constitution of the United States, Amendment XIV:

"[N]or shall any State . . . deprive any person of life, liberty, or property, without due process of law."

California Penal Code § 1533:

> Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m.

STATEMENT OF THE CASE

This case presents a pressing constitutional issue concerning the unreasonableness of a nighttime search undertaken without permission from a judge or magistrate.

Law enforcement officials had obtained a search warrant but they neither sought nor obtained judicial approval for a nighttime search. The state appellate court recognized that a state statute requiring judicial approval for a nighttime search had apparently been violated but did not view this to have been of a constitutional magnitude.

In rendering its decision, the California court failed to apply this Court's holding in *Jones v. United States*, 357 U.S. 493 (1958), that established that an unauthorized nighttime residential search constitutes a violation of the Fourth Amendment. The lower court referenced the lack of authority citing *Jones* as a constitutional holding.

Separate and apart from the *Jones* decision, unauthorized nighttime searches violate the Fourth Amendment because they were regarded as unreasonable at the time of the amendment's framing. This Court has held that the meaning of the term "unreasonable" is properly guided by what the term meant at that time.

An historical analysis demonstrates that nighttime searches were banned in twelve of the thirteen original States. Therefore, the conclusion may be

drawn that unauthorized nighttime searches violated the Fourth Amendment from its inception.

Historically, the remedy for a constitutional violation during the early years of our republic included the dismissal of the criminal charge. The present-day exclusionary rule is consistent, to say the least, with the dismissal remedy of the early American period.

This case presents the Court with the opportunity to affirm that the *Jones* holding was a constitutional ruling and that it comports with the Framers' belief that nighttime searches were not allowed and that exclusion of evidence is the proper remedy when such search takes place in unauthorized fashion.

A. Factual Background

On January 2, 2010, Mr. Solomon was observed conducting a drug transaction at a gas station and was arrested shortly thereafter. Methamphetamine was found at the station where it had been secreted by the attendant to whom Mr. Solomon had given the drugs. A subsequent search of Mr. Solomon's residence, conducted at night pursuant to a warrant but without authorization that its execution take place at night, yielded evidence of his illegal possession of methamphetamine and items forbidden to him as a convicted felon, such as ammunition and a gun. App. 1, 3-4.

B. Procedural History

The district attorney's office for Contra Costa County charged Mr. Solomon with four felonies: Count 1, possession of a firearm by a felon in violation of California Penal Code section 12021(a)(1); Count 2, possession of ammunition by a felon in violation of California Penal Code section 12316(b)(1); Count 3, sale of methamphetamine in violation of California Health & Safety Code section 11379(a); and Count 4, possession for sale of methamphetamine in violation of California Health & Safety Code section 11378. Two misdemeanor charges were dismissed prior to trial. Mr. Solomon was also alleged to have suffered one prior felony drug conviction pursuant to California Health & Safety Code section 11370.2(c); two prison priors pursuant to California Penal Code section 667.5(b); and two separate probation ineligibility priors pursuant to California Penal Code sections 1203(e)(4) and 1203.07(a)(11). App. 72.

Mr. Solomon's motion to quash and traverse the search warrant that had issued for the search of his home, was denied. The motion was not based on the search having been an unauthorized nighttime search. Trial was by jury. Mr. Solomon was found guilty of the four felony charges. The court found the priors to be true. The trial court sentenced him to an aggregate prison term of three years, eight months. App. 72-73.

On appeal, Mr. Solomon argued that the evidence obtained during the nighttime search should have been suppressed, and that his trial counsel had been

ineffective in not advancing the nighttime search issue, requiring the reversal of his convictions. App. 71-122. The Court of Appeal disagreed and affirmed the judgment of conviction. App. 1-14.

Mr. Solomon filed a timely petition for review with the California Supreme Court. The California Supreme Court denied review on October 24, 2012. App. 26.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Question Presented Is Of Imperative Public Importance, And Review By This Court Is Essential To Establish That Nighttime Searches Without Judicial Approval Are Constitutionally Prohibited As They Were Deemed Unreasonable At The Time Of The Framing Of The Fourth Amendment

In 1995, this Court set forth the analytical parameters that guide us in this case. "'Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,' our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

In investigating the status of nighttime searches at the time of the framing and what remedies existed then, petitioner relies on three sources that have

explored either or both of these issues: William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602-1791 (Oxford University Press 1990) [hereinafter Cuddihy];[1] Roger Roots, The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 Gonzaga L.Rev. 1 (2010) [hereinafter Roots]; and *State v. Jackson*, 742 N.W.2d 163 (Mn.2007).

The Fourth Amendment to the United States Constitution proscribes unreasonable searches and requires warrants to be based on probable cause. It was ratified on December 15, 1791. The language of the Fourth Amendment was first proposed by the first U.S. Congress on September 25, 1789. Richard Labunski, James Madison and the Struggle for the Bill of Rights (Oxford University Press 2006), at 278-279. The first draft had been proposed by James Madison on June 8, 1789, worded slightly differently:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Id., at 265-266.

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[1] Justice O'Connor described Cuddihy's work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Conner, J., dissenting).)

By that time, every state except Delaware had enacted statutes banning nighttime searches. Cuddihy, *supra*, at 747-748 & n. 294 [listing statutory examples in Massachusetts,[2] New Hampshire,[3] Connecticut,[4] Rhode Island,[5] New York,[6] Pennsylvania,[7] New Jersey,[8] Maryland,[9]

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[2] Mass. Resolution 1776-77, c. 1176 (7 May 1777), *Mass. Acts and Resolves*, vol. 19 (Resolves: 1775-76), p. 935. Mass. St., c. 51 (10 Mar. 1783), *Mass. Acts and Laws, 1782-83*, pp. 131-32. For an act allowing nocturnal search: Mass. St., 1776-77, sess. 4, c. 45, secs. 1, 2 (9 May 1777), *Mass. Acts and Resolves*, vol. 5 (1769-80), p. 641.

[3] N. H. St. 2nd Gen. Assemb., sess. 3, c. 1 (19 June 1777), *N. H. Laws*, vol. 4 (1776-84), p. 98.

[4] "An Act for Laying an Excise," Ct. St., 1783, Jan. sess., Ct. Laws, Stats., *Acts and Laws*, 1783, Jan. sess., p. 622.

[5] "An Act in Amendment of and Addition to the Laws Already in Force for Collecting Duties Upon Imported Goods," R. I. St., 1785, Oct. sess., *R. I. Acts* (1747-1800), [vol. 13], *1784-85*, 1785, Oct. sess., p. 43.

[6] N. Y. St., sess. 5, c. 39, sec. 3 (13 Apr. 1782), *N. Y. State Laws*, vol. 1 (1777-84), p. 480. N. Y.St., sess. 8, c. 7 (18 Nov. 1784), *ibid.*, vol., 2 (1785-88), p. 17.

[7] Pa. St., c. 1161, sec. 3 (5 Apr. 1785), *Pa. Stats.*, vol. 11 (1782-85) p. 577. Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *ibid.*, vol. 12 (1785-87), p. 421.

[8] N. J. St., 5th Gen. Assemb., 2nd Sitting, c. 44, sec. 3 (28 June 1781), N. J. Laws, Stats., *Acts, 1780-81*, May sess., pp. 115 at 116-17, N. J. St., 6th Gen. Assemb., 2nd Sitting, c. 32, sec. 18 (24 June 1782), *ibid.*, *1781-82*, May sess., pp. 95, 105 at 101.

[9] Md. St., 1784, c. 84, sec. 7, *Laws of Maryland*, . . . *1784*, unpaginated.

Virginia,[10] North Carolina,[11] South Carolina,[12] and Georgia[13]].

One of the two Pennsylvania examples cited by Cuddihy provided that:

> And be it further enacted by the authority aforesaid, That any justice of the peace within the limits of the said city and the adjacent county within two miles of the said city on demand made by such superintendent or keeper of the said magazine showing a reasonable cause on oath or affirmation may issue his warrant under his hand and seal empowering such superintendent or keeper of the said magazine to search in the day time any house, store, shop, cellar or other place or any boat, ship or other vessels for any quantity of gunpowder forbidden by this act to be kept in any place or places and for that purpose to break open in the day time any such house, store, shop or other places aforesaid or any boat, ship or other vessel if there be occasion and the said

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[10] Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.*, vol. 12 (1785-88), p. 308.

[11] N. C. St., 1784, sess. 1 (Apr.), c. 4, sec. 7, *Laws, 1774-88*; *N. C. State Recs.*, vol. 24, p. 50.

[12] S. C. St., no. 1196, sec. 23 (13 Aug. 1783), *S. C. Stats.*, vol. 4 (1752-86), pp. 581-82.

[13] "An Act to Revise and Amend an Act for Regulating the Trade Laying Duties Upon All Wares," Ga. St., 13 Aug. 1786, *Statutes, 1774-1805*; *Ga. Col. Recs.*, vol. 19, p. 2, pp. 507-08, Graydon, *Justices and Constables Assistant* (1805), p. 269.

> superintendent or keeper of the said magazine on finding such gunpowder may sieze and remove the same in twelve hours from any such place or places, boats, ships or vessels to the said magazine and therein detain the same until it be determined in the proper court whether it be forfeited or not, by virtue of this act and the said superintendent or keeper of the said magazine shall not in the mean time be sued for seizing, keeping or detaining the same nor shall any writ of replevin issue therefore until such determination as aforesaid be made but all such suits are hereby declared illegal, erroneous and abated.
>
> Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *Pa. Stats.*, vol. 12 (1785-87), pp. 421-422; cited in Cuddihy, *supra*, at 747, n. 294.

The Virginia example cited by Cuddihy reads in part:

> IX. *And be it enacted*, That it shall be lawful for the searchers, as well as for the naval officers, and for any other person, having good cause to suspect that any goods, wares, or merchandises, on which duties have not been paid, are stored or secreted in any house, warehouse, or storehouse, to apply to a justice of the peace, or alderman of the corporation, for a warrant (which warrant shall not be granted but on information upon oath) and being accompanied with a constable, to break open in the day time, such suspected house, warehouse, or storehouse,

> when it may be necessary; and any goods so found, on which the duties have not been paid, or secured to be paid, may be seized and carried away, and together with the vessel from which the same were delivered, shall be forfeited. . . .
>
> Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.*, vol. 12 (1785-88), p. 308; cited in Cuddihy, *supra*, at 747, n. 294.

Cuddihy conducted a thorough review of the early statutes and described the fruits of his research:

> An occasional wartime measure had allowed nighttime searches, while Delaware's legislation after 1776 ignored them, neither allowing nor prohibiting. Otherwise, the overwhelming preponderance of American statutes after 1776, and even more so after 1782, when hostilities concluded, forbade house searches, and even mere entrances to arrest, at night.
>
> This extinction of nocturnal house searches was incremental and incidental rather than topical and global, for no state abolished them categorically. Rather, the extinction was incidental to the multitude of applications that characterize routine legislation, such as excises, imposts, game poaching, smuggling, ammunition storage, and the like. In other words, the states annihilated the nocturnal house search by assuming rather than announcing its unreasonableness. The effect was the same, however, for

> assumptions are no less authoritative reflectors of belief than declarations.
>
> Second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding. In the 1780s, American law rejected nighttime searches even more than general ones. Even the jurisdictions that retained general warrants denounced searches at night in most circumstances [citing New York, South Carolina and Georgia], and the authors of the Fourth Amendment left no doubt on the issue.
>
> Affirming state tradition, the [federal] Collection and Excise Acts of 1788-91 restricted all searches of buildings and search warrants that they permitted to the day time, even warrantless searches of distilleries.[14] The creators of the amendment did not renounce all searches without warrant, but they impliedly renounced all searches on land at night, whether by warrant or without.

Cuddihy, *supra*, at 747-748; footnotes omitted.

Comparing British search and seizure practices with that of America, Cuddihy states that "[p]erhaps the most dramatic divergence of the American law of search from the British pattern, therefore, was

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[14] In footnote 296, Cuddihy cites: "U. S. St., 1st Congr., 1st sess., c. 5, sec. 24 (31 July 1789), *U.S. Stats.*, vol. 1 (1789-99), pp. 29 at 43." Cuddihy, *supra*, at 748, fn. 296.

the American rejection of the nocturnal search." *Id.*, at 661.

The American practice was not the subject of congressional protests, pamphlets or newspaper articles as were the warrantless house searches and general warrants that marked British rule. *Id.*, at 781.

> A different foundation, that of unspoken assumption, had also established the unconstitutionality of nocturnal searches. Although Americans often denounced general warrants and warrantless, door-to-door searches in the 1770s and 1780s, they said nothing regarding nocturnal entrance of their dwellings, either for or against. Nonetheless, the statutes that they enacted on the subject, both federal and state, palpably assumed the unconstitutionality of nocturnal entrance into the domicile in the decade before the amendment's framing. No state permitted such entrance; Delaware ignored it; the rest voted against it by assumption, yielding, in effect, a *de facto* 12-0-1 mandate against the entry of dwellings after the sun set.
>
> *Ibid.*

The aversion to nighttime searches that motivated the early statutes was reflected in some of the writings by the Founders. For instance, as early as 1774, John Adams described the unique status occupied by the home at night:

> Every English[man] values himself exceedingly, he takes a Pride and he glories justly

> in that strong Protection, that sweet Security, that delightfull Tranquility which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave.
>
> 1 Legal Papers of John Adams 137 (L. Kinvin Wroth & Hiller B. Zobel eds., The Belknap Press 1965) (republished from the 1774 original); cited in *State v. Jackson*, *supra*, 742 N.W.2d, at 169-170.

The historical evidence demonstrates that at the time of the Framing, nighttime searches were constitutionally unreasonable. This evidence may not be ignored. This Court has held that the "Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted. . . ." *Carroll v. United States*, 267 U.S. 132, 149 (1925).

Justice Scalia warned against applying modern concepts of what police officers should be allowed to do. "It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness 'is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted – even if

a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Richards v. Wisconsin*, 520 U.S. 385, 392, fn. 4 (1997); quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

Review is proper under this Court's Rule 10(c) as this case raises an important question of federal constitutional law with respect to nighttime searches that has not been, but should be, settled by the Court in the context of the historical evidence of the meaning of the Fourth Amendment.

The California Court of Appeals acknowledged the historical evidence but found it unimportant to its decision that Mr. Solomon's trial counsel had made an acceptable tactical decision in not challenging the nighttime aspect of the search of Mr. Solomon's home. App. 7-8.

II. Review Is Warranted Because Historical Evidence Compels The Conclusion That The Exclusionary Rule Is Consistent With The Remedies That Were Available At The Time Of The Framing

A. Exclusion Is An Ancient Remedy

The exclusionary rule was created by this Court as a "prudential doctrine" to "compel respect for the constitutional guaranty." *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 2426 (2011). Its origin dates to 1914 in the case of *Weeks v. United States*, 232 U.S. 383 (1914). Evidence seized in violation of the Fourth

Amendment cannot be used against a defendant at trial. *Id.*, at 398. It was applied to state court practice under the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Although the *Davis* Court pointed out that the "Fourth Amendment . . . is silent about how this right is to be enforced," (*Davis v. United States*, *supra*, 131 S.Ct., at 2423) recent research has revealed that "exclusion is an ancient remedy" (Roots, *supra*, at 1). Roots's research establishes that "the Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period." Roots, *supra*, at 1.

"During the late eighteenth century, when the Constitution was debated and ratified, there were no professional police officers to enforce criminal laws." *Id.*, at 11; footnote omitted. "Initiation and investigation of criminal cases was the nearly exclusive province of private persons. . . . The courts of that period were venues for private litigation – whether civil or criminal – and the state was rarely a party." *Ibid.*; citation omitted.

Of course, the Bill of Rights limited the Federal Government only, not private parties. *Id.*, at 12; see *Barron v. City of Baltimore*, 32 U.S. 243 (1833). Moreover, initially this Court did not have appellate jurisdiction in criminal cases. *United States v. More*, 7 U.S. 159, 172-174 (1805). Congress did not enact its first Supreme Court criminal appellate review statute until 1874 (specified Utah Territory cases only) and

did not provide for such review in capital cases until 1889; and finally to all federal criminal defendants convicted of "infamous crimes" until 1891. Alan G. Gless, Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion, 45 Am. J. Legal History 391, 394 (2001); 3 C. Warren, The Supreme Court in United States History 54, n. 1 (1922) [hereinafter Warren].

This explains why it took until 1886 before this Court first delved into the exclusion of evidence issue in a search and seizure case. Roots, *supra*, at 12-13; referring to *Boyd v. United States*, 116 U.S. 616, 622-623 (1886). In that earliest decision to construe the Fourth Amendment's applicability to physical evidence, the *Boyd* Court applied an exclusionary rule.

"Nonetheless, the broad principles upon which exclusion of physical evidence is grounded were certainly ever-present in the Founders' constructions of search and seizure protections." Roots, *supra*, at 13.

Three sources of potential remedies are explicitly stated in the Constitution and a fourth is suggested by Alexander Hamilton in The Federalist No. 83 (Pocket Books ed. 2004), 596-598. The three explicit constitutional remedies are: (1) the habeas corpus[15] clause, article I, section 9, clause 2; (2) the Seventh

[15] This Court did not have criminal appellate jurisdiction but did possess various degrees of appellate habeas jurisdiction over federal circuit cases. Warren, *supra*, at 187.

Amendment right to civil jury trials; and (3) the Fifth Amendment's description of an exclusionary rule in the context of self-incrimination (a coupling of Fourth and Fifth Amendments as done in *Boyd*, *supra*, 116 U.S. 616).

The fourth possibility – suggested by Hamilton – is the bringing of criminal charges against officials who violate the Fourth Amendment protections, as was done in *State v. Brown*, 5 Del. (5 Harr.) 505, 506 (1854) (officer indicted and convicted for entering an occupied dwelling at night without a warrant while chasing a fleeing felon). Roots, *supra*, at 13 & n. 69.

A case published in the first volume of the first case reporter ever printed in the United States, suggests that courts would impair criminal proceedings when a Fourth Amendment illegality had been found. *Id.*, at 17-18.

The case was *Frisbie v. Butler*, 1 Kirby[16] 213 (Conn.Super.1787), wherein appellant Frisbie had been found guilty of stealing pork from Butler, who had obtained a search warrant from a justice of the peace. *Ibid.* Three of the six appellate issues dealt with the lack of the warrant's legality. The Connecticut

[16] Legal historian John Langbein referred to Kirby's Reports as America's first case reports. Roots, *supra*, at 15, n. 81. "[A]ppellate courts of the late eighteenth and early nineteenth centuries often had little or no jurisdiction over criminal cases. . . . Thus, appellate criminal opinions on evidentiary matters were rare even when decisions in criminal trial courts were otherwise recorded." *Ibid.*

reviewing court reversed the conviction for reasons unrelated to the warrant but had this to say about the warrant:

> And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal; yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine; as also the sufficiency of several of the other matters assigned in error.

Id., at 215.

In his in-depth study, Roots interprets the *Frisbie v. Butler* "vitiates the proceedings" language as a major statement supporting Fourth Amendment exclusion. Roots, *supra*, at 18. Roots points out that courts in our Republic's early years employed "ultimate exclusionary sanction" for Fourth Amendment violations: "discharge," using pretrial habeas corpus as the procedural vehicle to effect it (*ibid.*):

> Lost in the modern discussion of Fourth Amendment remedies is the fact that one ancient remedy – the pretrial writ of habeas corpus – once operated as something of an exclusionary rule in search and seizure cases but has since been stripped of its Founding-era substance. Today we know habeas corpus as a narrow, post-conviction remedy applied mostly as a sentence-review mechanism. But the Framers viewed habeas corpus as

> primarily a pretrial remedy that was often applied in search and seizure cases.

Id., at 20-21; footnotes omitted.

An early example of that in the United States Supreme Court was *Ex parte Burford*, 7 U.S. 448 (1806), a habeas corpus case wherein Chief Justice John Marshall wrote the Court's opinion holding that a warrant of commitment by justices of the peace must state "some good cause certain, supported by oath." *Id.*, at 453. The *Burford* Court decided the case based on the constitutional clauses against excessive bail (Eighth Amendment), guaranteeing confrontation (Sixth Amendment) and what we now call the Fourth Amendment, referred to by Marshall as "the 6th article of the amendments to the constitution of the United States."[17] *Ex parte Burford*, *supra*, 7 U.S., at 451-452. Because the warrant on the basis of which Burford was detained was found lacking in that regard, the proceedings were found to be irregular and the prisoner discharged. *Id.*, at 453. The Court noted that a proper case could proceed *de novo*, provided the courts took "care that their proceedings are regular." *Ibid. Burford* is an example where proceedings were "vitiated."

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[17] On September 25, 1789, Congress submitted twelve articles to the States for ratification. The first two were not ratified, hence the different numbering system in *Burford*. See Labunski, *supra*, at 278-280.

A second case illustrates even more clearly how this Court used the habeas writ to dismiss proceedings in pretrial fashion. Chief Justice Marshall examined the legality of a commitment for treason to determine "whether the accused shall be discharged or held to trial." *Ex parte Bollman*, 8 U.S. 75, 125 (1807). Finding that "the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged." But the Court left open the possibility that "fresh proceedings against them" might be properly instituted, implying necessarily that the current proceedings were vitiated by way of habeas discharge. *Id.*, at 136-137.

In other cases, a demurrer was the procedural vehicle to defeat the criminal case. One such example was a civil action wherein the justice of the peace who issued an illegal warrant and the constable who served the warrant that was illegal on its face were both held civilly liable in trespass, after the criminal case was defeated by way of demurrer. *Grumon v. Raymond*, 1 Conn. 40 (Conn.1814).

The existence of the second potential remedy, a civil suit, was not in lieu of a criminal case dismissal, but in addition. For instance, in *Murray v. Lackey*, 6 N.C. 368 (N.C.1818), the perjury defendant's criminal case had been commenced by warrant taken out by the civil defendant in the later civil action; after discharge in the criminal action, the criminal defendant then sued the warrant taker for malicious prosecution. Although the plaintiff lost the civil suit, the case shows the availability of the civil suit option

in addition to termination of criminal proceedings, not instead thereof. *Ibid.*

The modern doctrines of immunity for police, prosecution and the judiciary were unheard of in early America. Roots, *supra*, at 36, n. 229; citing *Burlingham v. Wylee*, 2 Root 152, 152-153 (Conn.Super.1794) (justice of the peace and officer held liable), and *Percival v. Jones*, 2 Johns.Cas. 49, 50-51 (N.Y.Supr.1800) (justice of the peace found liable for false imprisonment).

The North Carolina Supreme Court defined "discharge" as meaning "where proceedings are at end and cannot be revived." *Murray v. Lackey*, *supra*, 6 N.C., at 368. Along the same lines, a habeas discharge of the prisoner spelled the end of criminal proceedings against that prisoner. Roots calls a habeas corpus discharge "a form of exclusion by another name – . . . thought to be required under the Fourth Amendment." Roots, *supra*, at 30. "Prior to the Civil War, habeas corpus was invoked mostly to attack pretrial proceedings, and search and seizure issues were among the most common matters that were remedied by the Great Writ." *Ibid.*

B. This Court's Decision Not To Apply The Exclusionary Rule In The Context Of The Knock-And-Announce Rule Is Inapplicable To Nighttime Searches

"Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue

separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984); quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983). "The rule's sole purpose . . . is to deter future Fourth Amendment violations." *Davis v. United States*, *supra*, 131 S.Ct., at 2426.

In *Hudson v. Michigan*, 547 U.S. 586 (2006), this Court held that the exclusionary rule does not apply to violations of the knock-and-announce rule. But the interests involved in the bar against nighttime searches are significantly different from the interests protected by police announcing their presence.

> At the core of Hudson is the Supreme Court's determination that a knock-and-announce violation does not require suppression was that the police in Hudson would have discovered the evidence whether they had knocked and announced or not. In contrast, in the context of a nighttime search, if the police do not search and seize evidence at night, there is no guarantee that it will be there the following day. The Court's reliance on the inevitability of discovery in Hudson is inapplicable here.
>
> *State v. Jackson*, *supra*, 742 N.W.2d, at 178; citations and footnote omitted.

This Court has noted that the exclusionary rule applies "only where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. of*

Probation and Parole v. Scott, 524 U.S. 357, 363 (1988). The Minnesota Supreme Court concluded that prohibited nighttime entry by police "is capable of repetition and that application of the exclusionary rule will have an appreciable deterrent effect." *State v. Jackson*, *supra*, 742 N.W.2d, at 179.

"The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *United States v. Ceccolini*, 435 U.S. 268, 279 (1978). Because the nighttime security of one's home is such a vital interest, the best way to prevent police officials from violating the nighttime entry ban is to preclude the use of any evidence derived from such entry.

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson v. Michigan*, *supra*, 547 U.S., at 596. "'[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule. Similarly, in *Krull* we elaborated that 'evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring v. United States*, 555 U.S. 135, 143 (2009); quoting *United States v. Leon*, *supra*, 468 U.S., at 911, and *United States v. Peltier*, 422 U.S. 531, 542 (1975). In Mr. Solomon's case, there can be no question that the officers conducting the search of his home had knowledge that

the search was without nighttime approval, and therefore contravened the Fourth Amendment.

"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." *Herring v. United States*, *supra*, 555 U.S., at 144. This concept is apt in Mr. Solomon's case. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, *supra*, 367 U.S., at 659.

"Since the warrant was 'legally invalid' the officers' entry into the defendant's apartment was on the same plane as an entry without any warrant at all and as such was an unlawful 'invasion' within the proscription of the Fourth Amendment." *United States v. Merritt*, 293 F.2d 742, 743 (3d Cir.1961).

California Penal Code section 1533 protects persons from unauthorized police invasion 9 out of 24 hours of the day, "whereas the rule against unannounced searches protects individuals for 10 to 15 seconds during which the police must wait before they can enter a home." See *State v. Jackson*, *supra*, 742 N.W.2d, at 176; citing *United States v. Banks*, 540 U.S. 31, 38-40 (2003) (knock-and-announce case involving the length of time officers should wait after announcing themselves before seeking entry of a home pursuant to a warrant).

This Court noted in *Hudson* that the knock-and-announce rule "is not easily applied." Exceptions exist (threat of physical violence and likely destruction of evidence with advance notice). *Hudson v. Michigan*, *supra*, 547 U.S., at 589. The ban on nighttime entries does not have any such exceptions. The ban is an easily applied bright-line rule.

Once the knock-and-announce rule is held to apply, a court's task becomes difficult:

> . . . it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time standard," see *United States v. Banks*, 540 U.S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs – but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.*, at 40-41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante*, police officers about to encounter someone who may try to harm them will be uncertain how long to wait.

Hudson v. Michigan, *supra*, 547 U.S., at 590.

A court's task in determining whether a nighttime entry ban was violated is simple: at what time was entry gained?

Adherence by police officers of the knock-and-announce rule may have negative consequences if exclusion is the remedy for a violation of the rule. "If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires – producing preventable violence against officers in some cases, and the destruction of evidence in many others." *Id.*, at 595. The nighttime entry ban never suffers such nefast consequences. Hence, there is no social cost associated as there is when officers in the field have to gauge how much knock-and-announce time is sufficient or whether an exception applies.

That Mr. Solomon may not have been home at the time of the search is of no import. The interest protected is not just that of the intrusion of the person but rather the person's interest in maintaining a secure home, whether he is home or not. *State v. Jordan*, 742 N.W.2d 149, 154 (Mn.2007).

The good-faith exception to the exclusionary rule does not apply because the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." *Herring v. United States*, *supra*, 555 U.S., at 145; citing *United States v. Leon*, *supra*, 468 U.S., at 922, fn. 23. The answer to that question is a resounding 'yes,' rendering that the good-faith exception does not apply.

The exclusionary rule is properly applied to remedy unauthorized nighttime searches.

III. The Court Should Grant Review To Affirm That Its 1958 *Jones* Decision Was A Constitutional Holding In Regards To Nighttime Searches, In Light Of The Fact That Lower Courts Have Not Cited It

A. Nighttime Searches Without Judicial Approval Violate The Constitution, Requiring Exclusion Of Evidence So Obtained, As Held By *Jones v. United States*

In *Jones v. United States*, a federal agent obtained a daytime search warrant to search Joy Jones's house, based on the officer's belief that the home sheltered an illicit distillery. Late in the afternoon when the warrant had been obtained, but still in daylight, officers returned to the house. But rather than execute the search warrant, they decided to make further observations. *Jones v. United States*, 357 U.S. 493, 494-495 (1958).

At about 9 p.m., after darkness had set in, the officers noticed a truck enter the house's yard out of sight of the lawmen. When a short time later, the truck tried to leave, it got stuck in the driveway. The truck's two occupants were arrested and 413 gallons of liquor on which no taxes had been paid, were seized. *Id.*, at 495.

About that time, Jones's wife returned home with the kids. She rushed to the house and blocked entry to the door. When an agent identified himself, she demanded to see a warrant. The agent told her that no warrant was needed and brushed past her. From the hands of her young son, the agent took a shotgun which the young boy was brandishing in an attempt to prevent entry. Jones was arrested about an hour after the search was completed upon his return home. *Ibid.*

The search by the officers yielded distilling equipment, which Jones moved to suppress for use as evidence at trial. The prosecution conceded that the daytime warrant had expired but urged that the search was reasonable because the crime was being committed in the presence of the officers who assumed they had probable cause, obviating the need for a nighttime search warrant. *Id.*, at 496.

This Court held that the Fourth Amendment had been violated. *Id.*, at 497. The Court stated that "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance." *Id.*, at 498. The Court reversed the judgments of the courts below it because "the evidence obtained through this unlawful search was admitted at the trial." *Id.*, at 500.

Mr. Solomon's case is akin to *Jones*: a daytime search warrant had been approved by a judicial officer; the officers decided not to search during the day; the suspect was not home during the search; and

the search occurred at night. The only distinction was that in *Jones*, the officers observed nighttime activity at the home consistent with criminality immediately prior to the search. In this case, there was no such home activity. Yet, the *Jones* Court found the nighttime search action to have violated the Fourth Amendment. In other words, the facts in *Jones* were more in favor of admitting the evidence yet that argument did not prevail.

The *Jones* Court left no doubt that it issued a constitutional ruling when it held that the lower court judgments "cannot be squared with the Fourth Amendment to the Constitution of the United States." *Id.*, at 497.

B. Court Of Appeal's Treatment Of *Jones* Is Suspect Because It Relied On The Wrong *Jones v. United States* Case That Arose Two Years After The 1958 *Jones v. United States* Case

The California Court of Appeal below agreed that "a violation of Penal Code section 1533 appears to have occurred." App. 6. But the court erred on the constitutional status of *Jones*:

> And while it is true that *Jones* did involve a nighttime search not authorized by the magistrate's warrant, and the Supreme Court did conclude that the conviction "cannot be squared with the Fourth Amendment" (*Jones v. United States*, *supra*, at p. 497), the court has subsequently made it clear that the sole

> constitutional dimension of *Jones* concerned the issue of standing to challenge the legality of a search. Otherwise *Jones* was only applying Rule 41. (*Rakas v. Illinois* (1978) 439 U.S. 128, 132-133, fn. 2; *Alderman v. United States* (1969) 394 U.S. 165, 173, fn. 6.)
>
> App. 7.

The California court erred in a major way: *Rakas* and *Alderman* both refer to *Jones v. United States*, 362 U.S. 257 (1960), a standing case (or better a legitimate expectation of privacy case), not the 1958 decision by the same name.

The California Court of Appeal never cited the 1960 *Jones* case. The opinion jumps from discussing the 1958 *Jones* case to the 1960 *Jones* case while still believing that it was discussing the 1958 *Jones* case. Instead, it described the 1960 case, which was indeed a standing case under Rule 41. The 1960 case and its "automatic standing" rule, was later overruled in *United States v. Salvucci*, 448 U.S. 83, 84-85 (1980), a fact that went unnoticed by the California Court of Appeal.

The mention of the nighttime search portion of Rule 41 (not the portions on standing at issue in the 1960 case) in the correct *Jones* decision (1958) makes clear that it was not based on Rule 41 but that Rule 41 was cited in support of the Court's constitutional holding:

> The decisions of this Court have time and again underscored the essential purpose of

> the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant.
>
> *Jones v. United States*, *supra*, 357 U.S., at 498; citations omitted.

The constitutional aspect was not lost on Justice Marshall, who was unambiguous about *Jones* having been a constitutional holding:

> Mr. Justice Harlan observed in holding a nighttime search unconstitutional in *Jones v. United States*, 357 U.S. 493, 498 (1958): "(I)t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."
>
> *Gooding v. United States*, 416 U.S. 430 (1974) (Marshall, J., dissenting.)

The California Court of Appeal's confusion between two distinct cases bearing the same name renders that no credit can be given to the decision's discussion of the correct *Jones* holding. Because the California Court of Appeal's analysis is so clearly contrary to the *Jones* holding, and other courts elsewhere seem not to be aware of the constitutional implications of the *Jones* decision, the Court may

simply grant the petition and vacate the judgment below.

CONCLUSION

The California Court of Appeal's decision is inconsistent with this Court's decision in *Jones* and the historical evidence surrounding the meaning of the Fourth Amendment. Accordingly, this Court should grant, vacate, and remand this for consideration in light of the *Jones* decision. Alternatively, this Court should grant review to resolve important questions concerning the right to be free from unauthorized nighttime searches and the remedy available for a transgression of that right.

Respectfully submitted,

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**NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PETER PIERO SOLOMON, Defendant and Appellant.	A129352 (Contra Costa County Super Ct. No. 5-100197-3) (Filed Jul. 16, 2012)

A search of the residence of defendant Peter Piero Solomon, conducted pursuant to a warrant, yielded evidence of his illegal possession of methamphetamine and items forbidden to defendant as a convicted felon. After the trial court denied defendant's motion to quash or traverse the search warrant, a jury found him guilty of being a past-convicted felon in possession of a firearm and ammunition (Pen. Code, former §§ 12021, subd. (a)(1), 12316, subd. (b)(1)), possession

of methamphetamine for the purpose of sale (Health & Saf. Code, § 11378), and the actual sale of that controlled substance (Health & Saf. Code, § 11379). The trial court found true enhancement allegations that defendant had two prior felonies (Pen. Code, § 667.5, subd. (b)), and then sentenced him to state prison for an aggregate term of three years and eight months.

Defendant advances three contentions on this appeal. First, defendant argues that his trial counsel was constitutionally incompetent for not seeking suppression of the evidence on the additional ground that the search was improperly conducted at night, which requires reversal of all defendant's convictions. Second, defendant argues the jury was improperly instructed on the principles of accomplice credibility, which assertedly requires reversal of the two drug-related convictions. Concerning his second contention, defendant faults the trial court for neglecting its duty to instruct the jury on the applicable principles of law; if this approach fails, defendant again wants to have responsibility placed on his trial counsel. Third, on the assumption that his first and second contentions are valid, defendant asserts his trial counsel prejudicially failed to move for acquittal on all charges at the close of the prosecution's evidence. We see no reversible error and affirm.

BACKGROUND

Michael Renschler was an employee of a gas station, a long-time user of methamphetamine, and a friend of defendant, who sold him methamphetamine. On the evening of January 2, 2010, defendant was on his way to the station to deliver some methamphetamine to Renschler when he was spotted by Deputy Sheriff Pliler driving a vehicle without current registration. At Pliler's request, Deputy McDevitt began observing defendant.

When defendant got to the station, he exchanged a small bindle for cash from Renschler. Defendant also asked Renschler to retrieve "something" from the car ashtray, "hang on to it and he will pick it up later." Renschler reached inside the car and pulled out of the dashboard ash tray a sandwich baggie containing what Renschler assumed was methamphetamine. When defendant left the station, Deputy McDevitt radioed what he had seen, namely, "a drug transaction," to Deputy Pliler.

Deputy Pliler stopped defendant's car. Deputy McDevitt then arrived with a dog trained to detect the smell of methamphetamine. The dog "alerted," signaling the smell of a controlled substance. However, although defendant had a considerable amount of cash, no "contraband" was found on him or in his car.

The deputies believed defendant was under the influence of a controlled substance. After he was arrested for that offense, the deputies took defendant

back to the gas station. After a fair amount of questioning of Renschler, the deputies concluded that he, too, was under the influence. Renschler refused permission to search the gas station office, where he'd secreted the baggie taken from defendant's car. After the dog "alerted" in the station office, Renschler admitted to have methamphetamine on him. The bindle defendant sold him was found in Renschler's wallet, and Renschler too was arrested. After he and defendant were taken to a police station, Renschler told the deputies that he "bought the meth" from defendant. He also revealed the location of the baggie he took from defendant's car. The baggie contained a lump of white crystal substance that Deputy McDevitt described as being of "golf-ball size."

Deputy McDevitt applied for a warrant authorizing a search of defendant's apartment. The search, conducted the next day, January 3, 2010, with the dog, produced the following: in the living room, a scale with methamphetamine residue, a glass pipe for smoking methamphetamine, and "a single .25 caliber unexpended bullet"; in the bedroom, "a .25 caliber handgun with a magazine"; and in the kitchen, another scale and packaging that matched that used in the bindle found on Renschler. Expert testimony established that the substances seized were in fact methamphetamine. The testimony of another expert constituted a basis for the jury concluding that defendant possessed methamphetamine for the purpose of selling it.

Defendant did not testify or present evidence on his behalf.

REVIEW

I

Defendant's first contention is that his trial counsel was constitutionally incompetent because, although he did move to suppress evidence generated by the search, he did not do so on the ground that the warrant did not authorize nighttime service of the warrant, and thus the search was conducted in violation of Penal Code section 1533. Ordinarily, appellate review of a suppression motion that was not made is problematic. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [no direct review of counsel's failure to challenge legality of search].) Here, however, a motion was made, and the factual basis for defendant's contention is uncontradicted. In these somewhat unusual circumstances, we will address the merits of that contention.

Penal Code section 1533 provides in pertinent part: "Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m." There is no dispute that the warrant, which was issued at 4:10 a.m. on January 3, 2010, did not authorize nighttime service, and that defendant's apartment was searched approximately

50 minutes later at 5:00 a.m. Thus, a violation of Penal Code section 1533 appears to have occurred.

However, that is a matter of state law, and suppression is required only if mandated by federal law. (Cal. Const., art. I, § 28, subd. (d); *People v. McKay* (2002) 27 Cal.4th 601, 608; *People v. Hines* (1997) 15 Cal.4th 997, 1043-1044.) Following adoption of the cited constitutional provision, California accepts the rule that a violation of Penal Code section 1533 does not constitute a federally-required rule of exclusion if the search was otherwise reasonable. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1467-1470; see *People v. Glass* (1976) 56 Cal.App.3d 368, 372-373.)

The only federal counterpart to Penal Code section 1533 is Rule 41(e)(2)(A)(ii) of the Federal Rules of Criminal Procedure. Federal courts have not treated a violation of Rule 41 as compelling suppression. (E.g., *United States v. Spencer* (8th Cir. 2006) 439 F.3d 905, 913; *United States v. Schoenheit* (8th Cir. 1988) 856 F.2d 74, 76-77; *United States v. Comstock* (5th Cir. 1986) 805 F.2d 1194, 1205-1206.)

Defendant aims to trump this body of precedent with a decision of the United States Supreme Court, claiming that *Jones v. United States* (1958) 357 U.S. 493 establishes that an unauthorized nighttime residential search is a Fourth Amendment violation. Defendant's claim is immediately suspect because *Jones* involved a federal prosecution, did not mention

state law, and occurred three years before the exclusionary rule was made applicable to the states in *Mapp v. Ohio* (1961) 367 U.S. 643. Moreover, defendant is unable to point to any decision by a state or federal court squarely holding that *Jones* states a constitutional rule that is applicable to state prosecutions. And while it is true that *Jones* did involve a nighttime search not authorized by the magistrate's warrant, and the Supreme Court did conclude that the conviction "cannot be squared with the Fourth Amendment" (*Jones v. United States, supra,* at p. 497), the court has subsequently made it clear that the sole constitutional dimension of *Jones* concerned the issue of standing to challenge the legality of a search. Otherwise *Jones* was only applying Rule 41. (*Rakas v. Illinois* (1978) 439 U.S. 128, 132-133, fn. 2; *Alderman v. United States* (1969) 394 U.S. 165, 173, fn. 6.) Defendant does not argue that the search of his residence, notwithstanding the issue of timing, was otherwise constitutionally unreasonable. (See *Rodriguez v. Superior Court, supra,* 199 Cal.App.3d 1453, 1470.)

Defendant has marshaled an impressive amount of material to substantiate his claim that residential searches conducted at night were regarded as unreasonable by the Framers. Whether we find it persuasive of defendant's thesis is unimportant. What is important is whether defendant's trial counsel could make a reasonable tactical decision not to seek suppression on the ground appointed appellate counsel has developed. Assuming that he did not have had

the benefit of the scholarship evident in defendant's opening brief, trial counsel could make that decision, based on the absence of any authority interpreting *Jones* as defendant now reads it, and counsel's anticipation that if this new basis for suppression was advanced the trial court would reject it on the basis of *Rodriguez*. Trial counsel could sensibly decide a better chance of success rested with a suppression motion focused on a single issue. Such a decision would be a reasonable tactical choice, and thus insufficient to compel reversal. (E.g., *Yarborough v. Gentry* (2003) 540 U.S. 1, 8; *People v. Gutierrez* (2009) 45 Cal.4th 789, 804-805; *People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

II

Renschler testified only with the benefit of a grant of immunity. His situation clearly obligated the trial court to instruct the jury with CALCRIM 334, which it did, as follows:

"Accomplice testimony must be corroborated.

"Before you may consider the statement of Michael Renschler as evidence against the defendant regarding the crime of possession of methamphetamine for sale, you must decide whether Michael Renschler was an accomplice to that crime. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

"One, he or she knew of the criminal purpose of the person who committed the crime;

"And, two, he or she intended to and did, in fact, aid, facilitate, promote, encourage or instigate the commission of the crime, or participate in a criminal conspiracy to commit the crime.

"The burden is on the defendant to prove that it is more likely than not that Michael Renschler was an accomplice.

"An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of the crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

"A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who may commit that crime is not an accomplice.

"A person may be an accomplice even if he or she is not actually prosecuted for the crime.

"If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her testimony as you would that of any other witness.

"If you decide the witness was an accomplice, then you may not convict the defendant of possession for sale of methamphetamine based on his or her

statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"One, the accomplice's statement or testimony is supported by other evidence that you believe;

"Two, that supporting evidence is independent of the accomplice's statement or testimony.

"And, three, that supporting evidence tends to connect the defendant to the commission of the crime.

"Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crimes, and it does not need to be enough by itself to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may [not], however, arbitrarily disregard it. You should give that testimony or statement the weight you think it deserves after examining it with care and caution and in light of all of the other evidence."

Renschler's testimony has nothing to do with the possession of an illegal firearm and ammunition. But defendant contends the instruction was erroneous in limiting Renschler's status as a possible accomplice to the possession for sale charge, and not including the sales charge. Defendant further contends that the jury should have been instructed with CALCRIM 335 that Renschler was an accomplice as a matter of law.

"The buyer of narcotics cannot be prosecuted for selling them to himself or herself, hence is not an accomplice of the seller. (*People v. Hernandez* (1968) 263 Cal.App.2d 242, 247." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 98, p. 135.) In his brief, defendant cites five other decisions supporting this rule, and only one (*People v. Ramirez* (1952) 113 Cal.App.2d 842) opposing it. From this supposed conflict, defendant offers that we should choose "which decisional line to follow." We already have. One of the five decisions cited by defendant, *People v. Freytas* (1958) 157 Cal.App.2d 706, is from this court, and the most recent opinion on the point, following *Hernandez,* is from another Division of this District. (*People v. Label* (1974) 43 Cal.App.3d 766.) More significantly, our Supreme Court appears to agree with us. (See *People v. Lein* (1928) 204 Cal. 84, 86 [in liquor possession case, court stated that "The later possession of the purchaser is not the possession of the seller."].) We cannot fault the trial court for not ignoring *Freytas, Label,* and *Lein sua sponte.* Nor can we fault trial counsel for not asking the court to flout these binding authorities and ask that the jury be

instructed that Renschler was an accomplice as a matter of law to both of the drug charges.

III

Defendant's final contention is that his trial counsel should have moved for directed acquittal on all counts pursuant to Penal Code section 1118.1, and was incompetent in not doing so. The obvious predicate for this contention is defendant's assumption that his other contentions will succeed. The preceding discussion demonstrates that the predicate fails.

The sole surviving particular is that a motion for acquittal would have to have been granted because the prosecution closed its case-in-chief without submitting proof of defendant's status as a convicted felon, an element of the gun and ammunition charges. The record shows that the prosecution's final witness left the stand during the morning session on June 7, 2010, and the prosecution rested. When the afternoon session commenced, the court advised the jury: "The People have rested. [¶] Mr. Lepie [defense counsel], I understand that you have a stipulation that you would like to read into the record?" Defense counsel then told the jury "Ladies and Gentlemen, Mr. Solomon and the prosecution have stipulated or agreed that Mr. Solomon was previously convicted of a felony." It is a reasonable inference that defendant's ex-felon status was deemed unworthy of the jury's time because there was no question of the prosecution's ability to prove it, and both sides agreed to put

the information before the jury in the form of a stipulation. It is also reasonable to assume that such an agreement had been reached before the prosecution rested its case-in-chief. Thus, if the motion for acquittal defendant now embraces had been made, it might have evoked an outraged accusation of bad faith by the prosecution. And the trial court could have frustrated such a motion by simply permitting the prosecution to reopen its case to establish what nobody denied, least of all trial counsel, who was reasonably trying to avoid having the jury informed that defendant had *five* felony convictions, among which were three drug convictions and one for the identical weapons charge. Acting to prevent that damaging information brought to the jury's attention would obviously qualify as a reasonable tactical objective.

All the advanced instances of incompetent conduct have justifications within the range of reasonable professional choice. For this reason, and because we see no reasonable probability of a more favorable result had trial counsel acted differently, all of the present attacks on trial counsel's competence must fail. (See, e.g., *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Maury* (2003) 30 Cal.4th 342, 389.)

DISPOSITION

The judgment of conviction is affirmed.

_____

Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

HONORABLE **CLARE M. MAIER,**
JUDGE, PRESIDING

DEPARTMENT 36

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PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiffs,

vs. CASE NO. **100197-3**

PETER PIERO SOLOMON,

Defendant.
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REPORTER'S TRANSCRIPT OF
MOTION TO QUASH AND TRAVERSE

JUNE 1, 2010

COURTHOUSE, MARTINEZ, CALIFORNIA

APPEARANCES

FOR THE PEOPLE: ROBERT KOCHLY,
DISTRICT ATTORNEY
BY: **KRISTINA McCOSKER**
DEPUTY DISTRICT ATTORNEY
CONTRA COSTA COUNTY

FOR THE DEFENDANT: ROBIN LIPETSKY,
PUBLIC DEFENDER
BY: **MICHAEL LEPIE**
DEPUTY PUBLIC DEFENDER
CONTRA COSTA COUNTY

REPORTED BY: JAN PELLETIER, CSR #11687

DEPARTMENT 36 JUNE 1, 2010

PROCEEDINGS

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THE COURT: In the matter of Peter Solomon. May I have appearances, please.

MS. McCOSKER: Kristina McCosker for the People.

MR. LEPIE: Michael Lepie on behalf of Mr. Solomon. He appears in court in custody.

THE COURT: All right. Prior to this hearing I read and reviewed Mr. Lepie's moving papers, his motion to quash and traverse the search warrant; and Ms. McCosker's reply.

Mr. Lepie, did you have anything further that you wished to have the Court consider?

MR. LEPIE: Nothing further; but if the Court is inviting argument, I have a couple of points.

THE COURT: Certainly.

MR. LEPIE: Thank you. I think our position is pretty clearly laid out in the moving papers,

specifically the two areas of either the Court quashing the warrant or at least traversing the warrant.

I want to address my comments to some of the arguments made in the District Attorney's reply. Specifically the District Attorney argues that the officer's observations of Mr. Solomon on the day in question somehow made fresh or obviated the argument that the information provided by the confidential informants was somehow stale.

In support of their position the Prosecution cited the *Mikesell* case. I think that doesn't really apply to the facts here. In *Mikesell* there were two different periods of investigation – one in 1992 and one in 1994. The Court ruled that the reference to the 1992 investigation helped bolster the argument that there was possible cause to search the Mikesells' residence in 1994.

But what is different in that case is that in 1994 there was additional independent police investigation of possible drug transactions occurring at the Mikesells' residence. What we have in this case is some vague references – in the last paragraph of the statement of probable cause authored by Officer McDevitt – that there has been some information provided by both tested and untested informants and observations of people coming and coming and going from Mr. Solomon's apartment.

What is significant is that there is no date attached to any of those observations. So those could have happened a week ago or they all could have

happened four years ago. And the only unstale information, if you will, gathered by the police was the observations of the supposed hand-to-hand transaction that occurred at the Chevron gas station on the day in question.

That transaction I think is ambiguous, particularly given and considering the omissions made in the statement of probable cause by Officer McDevitt, specifically that he actually did not see any drugs change hands and that the statements made by the gas station attendant, Mr. Renschler, were inconsistent and self serving such that I don't think that they are of sufficient veracity or reliability for the officer to conclude that there was probable cause that Mr. Solomon both possessed the drugs in the gas station, let alone had any further drugs at his residence.

So I think that's what is significant in terms of the stale information contained within the warrant. If the Court – and I am not sure if the Court has had an opportunity to do this – but keycites the *Mikesell* opinion, there is a case distinguishing that. It's *People vs. Hirata,* a 2009 case, 175 Cal.App. 4th, 1499. And there they distinguish *Mikesell* on the grounds that there was additional police investigation. Whereas in the *Hirata* case there was some investigation on June 14, 2007; and then the warrant wasn't executed until September 4, 2007 with no intervening facts that would kind of keep the information from going stale.

So I think that's particularly relevant. As to also the District Attorney's argument that the *Leon* good faith exception applies in this case, I think given the omissions made by Officer McDevitt about Mr. Renschler's own involvement in this case, Mr. Renschler's own incondistent and self serving statements, that the officer should have known that it was ambiguous as to who possessed the drugs at the gas station. Further, the officer should have known that providing vague references to prior information about Mr. Solomon being involved in the sales of narcotics was not sufficient to get a warrant, that he needed to provide a date.

I think it's clear that in order to get a warrant to search a house there needs to be present information that contraband will be found in that location at that time, not just based on some prior activities. So any other argument I will respond as necessary.

THE COURT: And Ms. McCosker?

MS. McCOSKER: With regard to the confidential informant information, I think that just explains why they were there, watching the defendant in particular; why they would be doing surveillance. And it also explains why they would see it as more suspicious that the clerk was going into the defendant's car.

In terms of that alone providing probable cause to get a search warrant, no it doesn't. It just kind of puts everything in context. And the Defense is confusing – again, quashing and traversing the warrant.

They're two different things for a motion to quash; you have to be within the four corners of the document. For a motion to traverse, then you can bring in affidavits, sworn witness statements, to go outside the warrant and say there were misstatements made. But Defense is confusing the two issues.

So basically I don't think the Defense has made a proper showing to traverse the warrant because there isn't any affidavit of otherwise reliable statement of witnesses furnished as required by *Franks vs. Delaware.*

And with regard to probable cause, the officer did see a transaction of – he saw a drug deal. And that was supported by the clerk who purchased the drugs and received drugs from a larger bag of drugs from the defendant. And it was corroborated by the dog and the money, the physical evidence, the money, that is sitting there.

So based on seeing an actual drug sale and furnishing of drugs, that provides probable cause to get the search warrant to search the house. Based on that the People submit.

THE COURT: Mr. Lepie, submitted?

MR. LEPIE: Just in terms of the distinguishing between the motion to quash and traverse. It's correct that obviously the motion to quash rests on the four corners of the document. I think the Court can consider the affidavit in its entirety and see that

there is some stale information and base its ruling on that.

As to the motion to traverse, I think there is reliable information for the Court to consider in traversing the warrant, specifically the sworn statement by the affiant, Officer McDevitt, and his sworn testimony at the preliminary hearing, which is contrary to some of his observations as specified in the warrant.

So the Court actually can consider traversing the warrant based on that, and the Court can take judicial notice of Officer McDevitt's testimony at the preliminary hearing, including a specific statement that he did not actually see any drugs changing hands and that he obtained contradictory statements from Mr. Renschler about his involvement and participation in at the very least possession of illegal drugs.

And based on that, the Court can excise the disallowed statements, the kind of self serving statements if you will from the warrant affidavit and then based on that, quash the warrant. So I think maybe I wasn't particularly clear in my motion about the approach that I think the Court can follow. And I do recognize the distinction. Submitted.

THE COURT: With that, and in particular it does appear that in the moving papers the motion to quash and the motion to traverse were argued simultaneously; but I will separate them for purposes of ruling.

The basic standard for probable cause to issue a search warrant is whether, given all the circumstances set forth in the affidavit, there is a fair probability that the contraband or evidence of a crime will be found in a particular place. And that's the *Illinois vs. Gates* standard.

The totality of circumstances included the defendant being arrested for being under the influence of a controlled substance. He had the objective signs. He was seen by an officer participating in what appeared to be hand-to-hand sales of methamphetamine with a gas station attendance.

After the defendant's arrest the officer noted that the clerk displayed objective signs of being under the influence. The clerk admitted he was in possession of methamphetamine, which he had just purchased from the defendant. And the clerk further admitted that the defendant saw the surveillance officers, said "This place is crawling with cops," and that the defendant instructed him to remove a one-ounce plastic sandwich bag of methamphetamine from the defendant's center console.

The officer gave his expert opinion that based on these facts, contraband would be found at the defendant's residence. The line of cases I actually looked at with regard to the face of the warrant starts with *People vs. Cleland* – and that was Judge Arneson of our court – who denied a motion to suppress. And in that an affiant to a search warrant detailed his training and experience in the enforcement of narcotics

offenses; and he said that the amount of cash, and the weight and value of the marijuana found on the subject at the time caused him to conclude that the subject had drugs on him.

Officers here determined that 9.5 grams seized at the gas station was more than a user normally possesses. Judge Arneson made the argument that if the defendant had been found with two dozen freshly baked chocolate chip cookies, wouldn't it be reasonable to assume that the defendant had the ingredients at his house to make the cookies? He thought so. And the Court of Appeal agreed.

The *Cleland* court gave special weight to the fact that the affiant had special training in narcotics enforcement. And this affiant does have similar training. The law since *Cleland* has become more nuanced; and in *Pressy,* a 2002 case – didn't follow *Cleland,* but it was a user case. Clearly not a sales case. And in that there is a distinction.

With regard to staleness, the information about defendant's arrest for possession of sales of drugs in 2004 is stale; but there is a leading case, *People vs. Cammarella,* a 1991 case, 54 Cal. 3d, 592, in which the officer received an anonymous tip that the defendant was selling Cocaine from his home, and then got substantial corroborating information that while stale, it was sufficient to make the probable cause determination – sufficient for an objectively reasonable and well trained officer. So stale information can be used.

Moreover, this warrant is not based solely on the stale information. In fact, if the stale 2004 information was excised, the remaining facts amply support probable cause. And the same is true with regard to the tested and untested informants.

Now with regard to the request to traverse, the defendant is constitutionally entitled to a post-search evidentiary hearing on the veracity of the warrant affidavit, but only after he first makes a quote "substantial preliminary showing that the affidavit included a false statement made knowingly and intentionally or with reckless disregard for the truth."

The two areas in which I find there is a problem is the officer said he witnessed a hand-to-hand transaction as opposed to he believed it to be a hand-to-hand drug transaction. He actually didn't physically see the drugs change hands.

The second is whether or not the clerk's comments were reliable. And he had some additional inconsistent statements that were not included. However, it's clear to me that the officer was a trained officer, witnessing what he believed to be drug sales. And the way he characterized it was not misleading.

Moreover, I find that the officer wrote down pertinent information with regard to what the clerk had to say, and that he wasn't deliberately excising, misleading – or making statements that were showing a knowing disregard or reckless disregard for the truth.

And therefore the defendant has made an insufficient showing to require the traverse of the search warrant. So I am denying both the motion to quash and the motion to traverse the warrant.

Where are we with this case?

MR. LEPIE: Jury trial is trailed to tomorrow. It will be back in Department 1.

THE COURT: Thank you.

MS. McCOSKER: Thank you.

(Whereupon the proceedings were concluded).

Court of Appeal, First Appellate District,
Division Two – No. A129352

S204941

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PETER PIERO SOLOMON, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

OCT 24 2012

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

IN THE SUPERIOR COURT, STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

BEFORE THE HONORABLE
JOHN T. LAETTNER, JUDGE

DEPARTMENT 25

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PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff,

vs. No. 100197-3

PETER PIERO SOLOMON,

Defendant.
----------/

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, JUNE 7, 2010

COURTHOUSE, MARTINEZ, CALIFORNIA

APPEARANCES

FOR THE PEOPLE: ROBERT KOCHLY,
DISTRICT ATTORNEY
BY: SAMANTHA KIM
Deputy District Attorney
Contra Costa County

FOR THE DEFENDANT:	ROBIN LIPETSKY, PUBLIC DEFENDER BY: MICHAEL LEPIE Deputy Public Defender Contra Costa County
REPORTED BY:	JENNIFER A LENT, RPR, CSR #11152

[230] SCOTT PLILER,
called on behalf of the ***People***,
having been first duly sworn,
was examined and testified as follows:

* * *

[255] THE COURT: Mark those.

And there are a couple of questions that the jurors have, if you want to come and look at these.

(Sidebar conference.)

* * *

[256] THE COURT: And then the next question, when was the search made of Mr. Solomon's home?

THE WITNESS: You want a specific time or the –

THE COURT: Time and date. Do you remember?

THE WITNESS: I would have to –

THE COURT: This is in relation to the time of arrest.

THE WITNESS: I would have to look at my report.

[257] THE COURT: Would you do that?

THE WITNESS: The car stop was on the 2nd at 9:00 o'clock, approximately 9:00 o'clock at night. The search was conducted on the 3rd at approximately 5:00 in the morning.

THE COURT: So that's convenient for you since you work until 6:00 anyway?

THE WITNESS: Correct.

* * *

ROBIN LIPETZKY, Public Defender
Contra Costa County, California
Michael R. Lepie, Deputy Public Defender
(SBN 247840)
800 Ferry Street
Martinez, CA 94553
Telephone: (925) 335-8000

Counsel for Defendant

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. PETER SOLOMON, Defendant.	No. 5-100197-3 NOTICE OF MOTION AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH THE SEARCH WARRANT, TO TRAVERSE THE SEARCH WARRANT, AND TO SUPPRESS EVIDENCE PURSUANT TO PENAL CODE SECTION 1538.5 (Filed May 17, 2010) **DATE: June 1, 2010** **TIME: 1:30 P.M.** **DEPT: 39**

TO: THE DISTRICT ATTORNEY, CONTRA COSTA COUNTY, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter can be heard, the defendant, Peter Solomon, through counsel, will move the court for an order to quash, traverse and set aside search warrant No. W10-006, issued on January 3, 2010. The defendant also moves to suppress, pursuant to Penal Code section 1538.5, all evidence seized pursuant to said warrant and any fruits thereof on the grounds that it was obtained by an illegal arrest or search and seizure in violation of the Constitutions of the State of California and of the United States.

The evidence to be suppressed consists of any and all tangible and/or intangible evidence seized during the execution of the search warrant including, but not limited to, the defendant's arrest and any fruits thereof, all contraband found during the search as well as all the fruits of the search, including observations and statements that the police gathered as a result of the illegal search. This includes, but is not limited to, all evidence listed on the return of the above-referenced search warrant.

This motion will be based on the attached memorandum of points and authorities, all other papers

and pleadings on file herein, and any evidence, oral or documentary, to be adduced at the hearing.

Dated: May 17, 2010 Respectfully Submitted,

/s/ Michael R. Lepie
Michael R. Lepie
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

By Information filed March 4, 2010, the prosecution charged Peter Solomon with violating the following: (Count 1) Penal Code section 12021(a)(1); (Count 2) Penal Code section 12316(b)(1); (Count 3) Health and Safety Code section 11379(a); (Count 4) Health and Safety Code section 11378; (Count 5) Health and Safety Code section 11550(a); (Count 6) Health and Safety Code section 11364. Several additional enhancements were also alleged.

The sole evidence supporting Counts One, Two, and Six, and some circumstantial evidence supporting Counts Three and Four was obtained during the execution of a search warrant on January 3, 2010, at Mr. Solomon's residence at 3661 Mount Diablo Boulevard, Apartment #1, Lafayette, California. (A copy of the warrant is attached hereto as "Exhibit A.") Officer McDevitt of the Contra Costa Sheriff's Department authored the search warrant on January 2, 2010,

after Mr. Solomon was arrested. (A copy of the affidavit and statement of probable cause is attached hereto as "Exhibit B.") Mr. Solomon now moves to quash the warrant, traverse the warrant, and suppress any and all evidence, including the fruits thereof, obtained during the search of his residence.

STATEMENT OF FACTS

On January 2, 2010, Officer Pliler of the Contra Costa Sheriff's Department noticed Peter Solomon driving with expired vehicle registration. As Mr. Solomon pulled into a gas station, Officer Pliler asked Officer McDevitt to conduct surveillance on Mr. Solomon. Officer McDevitt watched Mr. Solomon from a half-block away. Mr. Solomon got out of his car and cleaned his windows. As he was doing this, Michael Renschler, a clerk at the store, approached Mr. Solomon and had a brief conversation. Mr. Renschler then leaned into Mr. Solomon's car, where his body was partially obscured from Officer McDevitt. When Mr. Renschler came out of the car, he was holding something in his hand. Mr. Renschler then placed his hand in his pocket and walked back into the gas station office.

Officer McDevitt believed he had just witnessed a drug transaction, and he notified Officer Pliler of his observations. After Mr. Solomon left the gas station, Officer Pliler stopped Mr. Solomon for the expired registration. Mr. Solomon was subsequently arrested for a violation of Health and Safety Code section

11550 as he appeared to be under the influence of a central nervous stimulant. The police searched Mr. Solomon and his car and found no contraband. The police did discover several hundred dollars in cash in Mr. Solomon's wallet as well as $35 dollars in cash on the floorboard of the car behind the driver's seat. In addition, a police K-9 alerted, i.e. detected the presence of indeterminate narcotic odors, to several areas inside the car. The odors could have been twenty-four or more hours old.

After the police arrested Mr. Solomon they returned to the gas station to speak with Mr. Renschler. Mr. Renschler also appeared to be under the influence of a central nervous stimulant. Mr. Renschler said he could not perform any drug abuse recognition tests for several contradictory reasons. Specifically, Mr. Renschler said he would not be able to pee because he was on medication, but then he said that his medication caused him to urinate. Mr. Renschler also claimed to be physically unable to do the tests.

As this was happening, the police K-9 alerted to Mr. Renschler's backpack and hat. Despite previously denying that he had anything illegal in his possession, Mr. Renschler changed his story and admitted to having a bag of methamphetamine on him. The police searched Mr. Renschler and found the drugs as well as a narcotics pipe. The police then arrested Mr. Renschler.

At the Lafayette police station, Officer McDevitt questioned Mr. Renschler. Mr. Renschler was nervous

and evasive. Only after Officer McDevitt told him that he knew Mr. Renschler purchased drugs from Mr. Solomon did Mr. Renschler say that he had purchased $20 worth of methamphetamine from Mr. Solomon. At the time, Mr. Renschler made no reference of any other drugs. After he interrogation was over and as the police were preparing to escort Mr. Renschler to the Martinez Detention Facility, Mr. Renschler became agitated. He indicated he was afraid of losing his wife and family, and he said, "This is it for me. I can't let anyone else get in trouble. He [Mr. Solomon] gave me a bag to hide." Mr. Renschler explained that Mr. Solomon had seen the police at the gas station and asked Mr. Renschler to hide a bag of suspected methamphetamine. After telling the police where he secreted the bag, the police returned to the gas station and found a bag of suspected methamphetamine weighing approximately 9.5 grams, with packaging.

Officer McDevitt then authored the search warrant for Mr. Solomon's residence. Included in the affidavit of probable cause were the above-mentioned facts with several significant omissions. First, Officer McDevitt indicated that members of the Lafayette police department had actually witnessed a hand-to-hand sale of methamphetamine. In fact, Officer McDevitt only saw Mr. Renschler lean into Mr. Solomon's car and emerge with some indeterminate object in his hand. Second, the statement of probable cause omitted the fact that Mr. Renschler was evasive and changed his story several times both during his

initial questioning at the gas station and during his subsequent questioning under *Miranda* at the police station. Third, the warrant affidavit failed to mention the context in which Mr. Renschler informed the officers of where the larger bag of methamphetamine was hidden.

While omitting the details which cast doubt on Mr. Renschler's credibility, Officer McDevitt also averred that Mr. Solomon had been arrested before for possession of methamphetamine for sale; that some reliable and some unreliable sources have provided information regarding Mr. Solomon being involved in drug sales, that some known drug users and convicts have frequented Mr. Solomon's apartment; and that people have been arrested for having methamphetamine after leaving Mr. Solomon's apartment. Officer McDevitt provided no specifics of who these informants were, who the drug users were, or who had been arrested outside Mr. Solomon's place of residence. Further, Officer McDevitt made no mention of when any of this was alleged to have occurred. In fact, much of this information was old. According to Officer Pliler, Mr. Solomon's arrests date from 2004. Officer McDevitt also acknowledged in his police report that it has been over a period of several years where he obtained information regarding Mr. Solomon's possible drug sales.

Officer McDevitt obtained authorization to search Mr. Solomon's apartment in the early morning hours of January 3, 2010. While executing the search warrant, the police discovered a handgun,

several bullets, a digital scale, a narcotics pipe, and a plastic bag with an end torn off. The police believed that the end missing from the bag was used to wrap the narcotics found at the gas station.

ARGUMENT

Because the affidavit does not contain information from which the magistrate could reasonably conclude, under the totality of the circumstances, that there is a fair probability that the area to be searched contained contraband, the search warrant must be quashed. Moreover, because Officer McDevitt could not have reasonably believed this affidavit was adequate, the *Leon* "good faith" exception does not apply. In addition, Officer McDevitt knowingly, intentionally, and with reckless disregard for the truth excluded the facts from his affidavit which would have case doubt on Mr. Renschler's credibility. Therefore, the search warrant should be traversed.

I. THE WARRANT SHOULD BE QUASHED BECAUSE IT IS TOTALLY LACKING IN PROBABLE CAUSE.

The Fourth Amendment requires that a search warrant be supported by an affidavit establishing probable cause to believe that the objects of the search will be located in the place to be searched. (*Steagald v. United States* (1981) 451 U.S. 204, 213.) The affidavit must also set forth sufficient facts to establish probable cause to believe that the evidence

to be seized is still on the premises to be searched when the search warrant is sought. (*People v. Mesa* (1975) 14 Cal.3d 466, 470.)

Probable cause that an individual has committed, or is involved in, suspicious activities does not justify searching the person's residence. (*People v. Ramos* (9th Cir. 1991) 923 F.2d 1346, 1351 [citing *United States v. Flores* (9th Cir.1982) 679 F.2d 173, 175].) Rather, there must be a sufficient showing that incriminating items are located on the property for which entry is sought. (*Ramos, supra,* 923 F.2d at 1351 [citing *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556].) A finding of probable cause must be based on a judge's or magistrate's examination of the "totality of circumstances" set forth in the affidavit. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) Part of this examination includes evaluating the "'veracity' and 'basis of knowledge' of persons supplying hearsay information." (*Id.*)

In order for a search warrant to be validly issued, "sufficient information must be presented to the magistrate to allow that official to determine probable cause exists; his (or her) actions cannot be a mere ratification of the bare conclusions of others." (*People v. Moore* (1988) 47 Cal.3d 63, 82; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1112 [both cases citing *Illinois v. Gates, supra,* 462 U.S. at 239].) To avoid abdicating this responsibility, courts must conscientiously review the sufficiency of affidavits in support of search warrants. (*Id.*) In this case, the inadequate facts presented by the affiant did not

amount to probable cause, and the judge should not have concluded that a search warrant should be issued.

A. The Affidavit In Support Of The Warrant Lacked Sufficient Facts To Establish Probable Cause.

In reviewing the validity of the search warrant, the court must only look at the information contained within the "four corners" of the underlying affidavit; the court may not consider information not contained within the affidavit or evidence uncovered as a result of the search. (*United States v. Taylor* (9th Cir. 1983) 716 F.2d 701, 705.) Here, the information contained within the "four corners" of the search warrant affidavit was insufficient to amount to probable cause for several reasons: (1) the information observed by the police at the time of Mr. Solomon's arrest was insufficient to give the police probable cause to believe there was contraband or other evidence at Mr. Solomon's residence; (2) the information about the informants and drug activity at Mr. Solomon's residence was both stale and uncorroborated.

1. Mr. Solomon's arrest and the discovery of contraband at the gas station did not provide probable cause to search Mr. Solomon's apartment.

"The critical element in a reasonable search is not that the owner of the property is suspected of

crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." (*Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556.) In the present case, Mr. Solomon was initially arrested only for being under the influence of a controlled substance in violation of Health and Safety Code section 11550. No contraband was found on his person or in his car. The mere fact that Mr. Solomon was under the influence of a drug does not support probable cause to search for evidence of additional contraband at his residence. (See *People v. Pressey* (2002) 102 Cal.App.4th 1178 [holding that discovery of a small amount of methamphetamine for personal use does not give probable cause to search the arrestee's house].)

Officer McDevitt stated in his affidavit that he believed Mr. Solomon had sold drugs to Mr. Renschler prior to his arrest. However, Officer McDevitt was clear that he never saw any drugs or money actually change hands. He only saw Mr. Renschler lean into Mr. Solomon's car and come out with something in his hand. In order to establish that the 9-plus grams of methamphetamine found at the gas station was Mr. Solomon's, Officer McDevitt relied on Mr. Renschler's self-serving statements that he purchased methamphetamine from Mr. Solomon and that he hid the larger bag of methamphetamine in the gas station at Mr. Solmon's request.

In his affidavit, Officer McDevitt failed to mention all of Mr. Renschler's inconsistent statements.

First, Mr. Renschler lied about medication when asked to perform tests related to his being under the influence of drugs. He said he was on medication that made it difficult for him to pee, and then he said he took medication that made him urinate frequently. Second, Mr. Renschler lied about having drugs in his possession. He initially denied having any drugs before ultimately admitting that he had a bag of methamphetamine on him. Third, Mr. Renschler's demeanor during his entire interaction with the police was evasive and dishonest. Only when Officer McDevitt said that he believed Mr. Solomon was responsible for the drugs did Mr. Renschler change his story. He then claimed Mr. Solomon sold him the narcotics in his possession. Also, Mr. Renschler provided the further details about where the larger bag of drugs was hidden only when he was being led into jail.

These statements show that Mr. Renchler's version of events was unrelieable and wholly self-serving. As such, they cannot support probable cause to believe that further narcotics evidence would be found in Mr. Solomon's residence. While the discovery in a car of a quantity of narcotics suggestive of sales may be sufficient to uphold a search of a residence (see *People v. Cleland* (1990) 225 Cal.App.3d 388), that is not the situation here. Instead, Mr. Solomon was found with nothing on him. He had apparently used methamphetamine recently based on the objective signs he was showing of being under the influence of a central nervous system stimulant. The

unreliable statements of Mr. Renschler were the he only evidence linking Mr. Solomon to the larger quantity of drugs. Thus, the evidence actually observed and gathered by the police was insufficient to establish the requisite probable cause to support a search of Mr. Solomon's residence.

2. The information gleaned from the informants was both stale and uncorroborated.

The statement of probable cause included mention that Mr. Solomon had been arrested before for possession of methamphetamine for sale; that some reliable and some unreliable sources had provided information regarding Mr. Solomon being involved in drug sales, that some known drug users and convicts had frequented Mr. Solomon's apartment; and that people had been arrested for having methamphetamine after leaving Mr. Solomon's apartment. While this may have been true, the affidavit contained no information about when any of these acts were alleged to have occurred.

"The element of time is crucial to the concept of the probable cause." (*People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.) Generally, information remote in time is stale and "unworthy of weight in a magistrate's consideration of an affidavit supporting an application for a search warrant." (*People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718.) To avoid being stale, an affidavit to support a search warrant must contain probable cause to believe the material

to be seized is still on the premises to be searched when the warrant is sought. (*People v. Mesa* (1975) 14 Cal.3d 466, 470; *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1464.) If the affidavit does not provide probable cause to believe the material to be seized is still on the premises, the affidavit fails to demonstrate probable cause to search. (*People v. Cleland* (1990) 225 Cal.App.3d 388, 393.)

Although there is no bright line rule indicating when information becomes stale (*People v. Brown* (1985) 166 Cal.App.3d 1166, 1169), delays of more than four weeks are generally insufficient to demonstrate probable cause. (*Hulland v. Superior Court* (2003) 110 Cal.App.4th 1646, 1655; *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 434.) In both *Hulland* and *Hemler,* the court held that the affidavit for the search warrant was insufficient to establish probable cause because the evidence underlying the affidavit was obtained more than four weeks prior the police procuring the warrant.

Here, the crucial element of time is lacking. Officer McDevitt made no mention of when he received information from the informants, when he had seen drug users enter Mr. Solomon's apartment, or when people had been arrested leaving Mr. Solomon's apartment. As admitted to in his police report and at preliminary hearing, some of this information clearly was old. According to Officer Pliler, Mr. Solomon's arrests date from 2004. Officer McDevitt also acknowledged in his police report that it has been over a period of several years where he obtained information

regarding Mr. Solomon's possible drug sales. Because of this, the affidavit's statements were "unworthy of weight and consideration" in determining probable cause.

Further, while Officer McDevitt made mention of informants telling him that Mr. Solomon was involved in selling drugs, their reliability cannot be presumed. "[I]nformation from police contacts is to be viewed with extreme caution. An affidavit which relies on information from a tipster must set forth underlying facts justifying the conclusion that the source is reliable or the information itself is credible." (*People v. Kurland* (1980) 28 Cal.3d 376, 392.) The rule that the affiant must demonstrate a tipster's reliability or credibility arises not only from the usual distrust of hearsay evidence but also from an assumption that informants frequently have criminal records, that they have a history of contact with the police, that they are often free only on probation or parole, and that they themselves are the focus of pending criminal charges or investigations. (*Ibid.*) Therefore, "all familiar with law enforcement know that the tips they provide may reflect their vulnerability to police pressure or may involve revenge, braggadocio, self exculpation, or the hope of compensation." (*Ibid.*)

Even if the court were to consider the informants reliable, the information provided by them is necessarily suspect. No informant explained the basis of their knowledge, whether it was hearsay or witnessed first-hand. No informant ever said they were inside

Mr. Solomon's house or car and observed contraband in those places. There is no information that any reliable witness ever saw Mr. Solomon take drugs into his house, store drugs in his automobile, or manufacture drugs. This is a perfect example of the "bare conclusions" cautioned against in *Gates.*

Neither the police nor the informants have supplied the basis of knowledge necessary to prove their statements reliable. In *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, the Court of Appeals found an affidavit lacking in probable cause. The basis for the search warrant affidavit was a confidential reliable informant's statement that he was present at defendant's residence, two days prior to the preparation of the affidavit, when heroin was sold. The court held that this statement was "nothing more than a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." *(Id.* at 1464 [quoting *Gates, supra,* at 462].) The Court further found that "the statement contained no facts that might establish the basis of the confidential informant's knowledge. It does not indicate the informant was in the house; it states only he was at the residence. It reflects no facts upon which the informant, and consequently the affiant, could conclude heroin was being sold." (*Id.* at 1464.)

The Court in Rodriguez ultimately held that the good faith exception in *United States v. Leon* (1984) 468 U.S. 897, saved the evidence from exclusion. However, as will be discussed below, the case here is

distinguishable and the invalid search and seizure should not be saved by the good faith exception. In other respects, the case is analogous to *Rodriguez*. There was no confidential reliable informant, nor can any informant claim that they actually saw drugs sold. Further, there was no controlled buy was made to corroborate the informants' accusations. (*People v. Hall* (1971) 3 Cal.3d 992, 996-997 [noting that a controlled buy is an approved method for testing an untested informant].)

Because the informants provided unspecific and uncorroborated information, their information cannot be used to support the search. Given the totality of the circumstances in this case – the lack of contraband found on Mr. Solomon, the dishonest and self-serving statements of Mr. Renschler, the stale information, and the lack of current, reliable information from the informants – the affidavit did not set forth sufficient facts to establish probable cause that contraband would be located at Mr. Solomon's residence. For this reason the warrant should be quashed and the evidence suppressed.

B. The *Leon* Good Faith Exception To The Search Warrant Requirement Does Not Apply In This Case.

Suppression is the appropriate remedy where the officers executing a warrant lacking probable cause could not have harbored an "objectively reasonable belief" in the existence of probable cause to search

the area authorized by the warrant. (*United States v. Leon* (1984) 468 U.S. 897, 923). The objective standard adopted in *Leon* requires that the officers have reasonable knowledge of what the law prohibits. (*People v. Maestas, supra,* 204 Cal.App.3d at 1208).

An officer cannot manifest an objective good faith belief in the validity of a warrant if the warrant is supported by an affidavit so lacking indicia of probable cause as to render official belief in its existence entirely unreasonable. (*Leon, supra,* 468 U.S. at 923). Therefore, objective good faith and probable cause are inextricably linked: the lesser the indications of probable cause, the more tenuous becomes a claim of objective good faith.

In *Leon,* the Court's conclusion that the officers acted in good faith rested primarily on its repeated emphasis that the officers involved undertook and completed extensive investigation in order to corroborate the information they had received. (*See Leon, supra,* 468 U.S. at 901-02). Among other things, they conducted surveillance on all locations in which informants claimed drugs were being sold. (*Id.*) They observed a number of persons with drug histories arrive at the residence and subsequently leave with small packages. The officers also tracked the suspects to Miami and back to Los Angeles, bringing back small amounts of drugs.

In contrast to the police conduct in *Leon,* the officers here rested their conclusions on stale, uncorroborated information, and, even though they did

not see any drugs change hand, they relied on Mr. Renschler's self-serving statements. Because Officer McDevitt should have known that his affidavit was lacking in probable cause, the *Leon* good faith exception should not apply, and the warrant should be quashed.

II. BECAUSE THE AFFIDAVIT EVIDENCED RECKLESS DISREGARD FOR THE TRUTH, THE SEARCH WARRANT IS INVALID AND SHOULD BE TRAVERSED.

Should the court not be ready to quash the search warrant outright, it should at least investigate the immoderate treatment of the facts in Officer McDevitt's affidavit. When the defense casts reasonable doubt on the veracity of material statements made by an affiant seeking a search warrant, or on the informant's reliability, the court may hold an in camera hearing to investigate. (*People v. Brown* (1989) 207 Cal.App.3d 1541.) If the court finds that false statements were included in the affidavit, they must be excised from the affidavit (*Franks v. Delaware* (1978) 438 U.S. 154, 156; *People v. Luttenberger* (1990) 50 Cal.3d 1, 10). After excising the disallowed statements, if insufficient probable cause to support the search warrant remains, then the warrant must be invalidated. (*Id.*)

Here, the defense avers that Officer McDevitt intentionally omitted and misstated information about his observations. Officer McDevitt said that

he actually observed a hand-to-hand sale of methamphetamine. In fact, he only saw Mr. Renschler get out of Mr. Solomon's car holding something in his hand. Further, as discussed in detail above, Officer McDevitt omitted all of Mr. Renschler's inconsistent and untruthful statements in his affidavit, and Officer McDevitt failed to mention the context in which Mr. Renschler claimed Mr. Solomon had given him the drugs to hide. Taken together, these are material omissions which would bear on the magistrate's decision to sign the warrant, and Officer McDevitt was remiss in excluding them from his affidavit. Thus, the court should excise this information from the warrant and suppress the evidence found at Mr. Solomon's apartment. Further, to the extent the court is relying on the statements about the informants to uphold the warrant, the court should investigate whether these informants exist, whether they are credible, and what and when they observed drug sales at Mr. Solmon's residence. The court should take this step because Officer McDevitt's selective presentation of facts raises a reasonable doubt about the veracity of his statements and allegations.

CONCLUSION

For the foregoing reasons, the defense asks this Court to grant the motion to quash the warrant, to traverse the warrant, and to suppress evidence.

Dated: May 17, 2010 Respectfully Submitted,

/s/ Michael R. Lepie
Michael R. Lepie
Counsel for Defendant

AFFIDAVIT OF PERSONAL SERVICE

(C.C.P. 1012, 1013a, 2015.5)

I, Michael R. Lepie, the undersigned, declare that I am over the age of eighteen years, employed in the County of Contra Costa, State of California, and not a party to the cause described in the affixed document. My business address is 800 Ferry Street, Martinez, California 94553.

On May 17, 2010, I personally served a true copy of the attached:

NOTICE OF MOTION AND MOTION TO QUASH AND TRAVERSE THE SEARCH WARRANT AND TO SUPPRESS EVIDENCE PURSUANT TO PENAL CODE SECTION 1538.5

Re: 5-100197-3

On:
District Attorney
Contra Costa County 900 Ward Street
Martinez, CA 94553

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 17, 2010, at Martinez, California.

Michael R. Lepie
(*signature*)

EXHIBIT A

COUNTY(IES) OF Contra Costa County, STATE OF CALIFORNIA

SEARCH WARRANT

No. W10-003

The **People of the State of California**, to any sheriff, constable, marshall, police officer or peace officer in the County(ies) of Contra Costa County: PROOF by affidavit having been made before me this day by Officer Brian McDevitt that there is probable cause to believe the **property** and/or **thing(s)** and/or **person(s)** described herein may be found at the location(s) set forth and that the following provisions of California Penal Code Section 1524 are applicable:

☐ the property was stolen or embezzled – Penal Code 1524(a)(1).

☒ the property or thing(s) were used as the means of committing a felony – Penal Code 1524(a)(2).

☒ the property or thing(s) are in the possession of any person with the intent to use it as a means of committing a public offense; OR are in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing it from being discovered – Penal Code 1524(a)(3).

☒ the property or thing(s) consist of any item or constitutes any evidence that tends to show a felony has been committed or tends to show that a particular person has committed a felony – Penal Code 1524(a)(4).

☐ the property or things consist of evidence which tends to show that sexual exploitation of a child in violation of Section 311.3, or possession of matter depicting sexual conduct of a person under the age of 18 years in violation of 311.11, has occurred or is occurring – Penal Code 1524(a)(4).

☐ an arrest warrant is outstanding for the person to be seized – Penal Code 1524(a)(5).

☐ because this is a search for documentary evidence which is in the possession or under the control of a lawyer, physician, psychotherapist or clergyman who is not a suspect in the criminal activity to which the documentary evidence being sought relates, the Special Master provisions are applicable – Penal Code 1524(c).

YOU ARE THEREFORE COMMANDED TO SEARCH:

THE PREMISES located at and described as:

3661 Mt Diablo Blvd Apartment #1 Lafayette California 94549.

Further described as: A single family appartment dwelling located on the second floor above over hanging parking stalls. The appartment building has the numbers "3661" on the North facing wall on the second story. The front door to the appartment is the first door on the second floor on the north end of the appartment and closest to Mt Diablo Blvd. The front door faces to the west overlooking the asphalt/ concrete driveway vehicle entrance. The building is a light tan stucco with white painted doors that have a

decorative window inlayed. The appartment number is marked with the number “1” at the top and center of the door above the decorative inlayed window by a black sticker. To the left of the front door is a window, a potted plant on a stand and a folding, metal chair. To the right of the front door is a metal outdoor shelf of potted plants and a white resin chair. Including attics, storage spaces, all containers theirin and thereon which could contain any of the items sought.

including basements, attics, storage spaces, appurtenant buildings, the surrounding grounds, and all containers therein and thereon which could contain any of the items sought. Strike out inapplicable words

THE CONTAINER(S) located at and described as:
N/A

THE VEHICLE(S) described as:

Any vehicle registered to or under the control of Peter Solomon including passenger compartment, storage areas such as trunk and glove box, and any containers within the vehicle(s) which could contain any of the items sought.

including the passenger compartment, storage areas such as trunk and glove box, and any containers within the vehicle(s) which could contain any of the items sought. Strike out inapplicable words

THE PERSON(S) of:
N/a

FOR THE FOLLOWING **PROPERTY**, **THING(S)** and/or **PERSON(S)**

☐ listed in Exhibit # , attached.

☒ listed below:

1. Methamphetamine in any form.

2. Paraphernalia associated with the sales of Methamphetamine including but not limited to scales, cutting agents, grinders/sifters, and packaging materials such as plastic bags.

3. Paraphernalia associated with the use of Methamphetamine including, but not limited to mirrors, razor blades, straws, snorting devices, glass smoking pipes, and hypodermic needles or syringes.

4. Documentary evidence of drug-related transactions including, but not limited to ledgers, receipts, record books, lists of buyers and sellers, pay/owe sheets, price lists and IOU's, homemade videos and telephone recordings on voice recorders.

5. Containers in which any of the above listed items are located

6. Indicia in the form of personal property, including but not limited to, identification, cancelled mail envelopes, photographes, keys, latent finger prints, utility bills, and receipts which tend to prove identity of the persons in possession of any of the above items which are found or which tendc to prove the knowledge of such persons of the contraband nature of such items which are found.

7. Incoming communications – Officers executing this warrant are permitted to answer any incoming telephone or pager calls without identifying themselves as police officers while serving this warrant. Said communications shall be for the purpose of further police investigations.

8. Any firearms and/or dangerous weapons.

and to seize such person(s), and/or property and/or things or any part thereof and to retain such property and/or thing(s) in your custody subject to order of a competent court pursuant to Penal Code section 1536.

NIGHT-TIME Service: Good cause having been shown by Affidavit, you may serve this warrant at any time of the day or night when my initials are here – [ ]

GIVEN under my hand this 3rd day of Jan, ~~19~~ 2010, at 4:10 AM – PM.

Charles "Steve" Treat	Judge of the	Superior	Court
Magistrate's Signature		Name (level) of Court	

Judicial District if Applicable

EXHIBIT B

COUNTY(TIES) OF Contra Costa County, STATE OF CALIFORNIA

AFFIDAVIT FOR SEARCH WARRANT and AFFIDAVIT FOR RAMEY ARREST WARRANT (817 P.C.)

No. W10-003

On the basis of his/her personal knowledge and on the basis of other information contained in the attachments hereto, Officer Brian McDevitt (Affiant(s) being duly sworn, deposes and says that there is probable cause to believe the **property** and/or **thing(s)** and/or **person(s)** described herein may be found at the location(s) set forth and that the following provisions of California Penal Code Section 1524 are applicable:

☐ the property was stolen or embezzled – Penal Code 1524(a)(1).

☒ the property or thing(s) were used as the means of committing a felony – Penal Code 1524(a)(2).

☒ the property or thing(s) are in the possession of any person with the intent to use it as a means of committing a public offense; OR are in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing it from being discovered – Penal Code 1524(a)(3).

☒ the property or thing(s) consist of any item or constitutes any evidence that tends to show a felony has been committed or tends to show that a

particular person has committed a felony – Penal Code 1524(a)(4).

☐ the property or things consist of evidence which tends to show that sexual exploitation of a child in violation of Section 311.3, or possession of matter depicting sexual conduct of a person under the age of 18 years in violation of 311.11, has occurred or is occurring – Penal Code 1524(a)(4).

☐ an arrest warrant is outstanding for the person to be seized – Penal Code 1524(a)(5).

☐ because this is a search for documentary evidence which is in the possession or under the control of a lawyer, physician, psychotherapist or clergyman who is not a suspect in the criminal activity to which the documentary evidence being sought relates, the Special Master provisions are applicable – Penal Code 1524(c).

and requests the issuance of a warrant to search:

THE PREMISES located at and described as:

3661 Mt Diablo Blvd Apartment #1 Lafayette California 94549.

Further described as: A single family appartment dwelling located on the second floor above over hanging parking stalls. The appartment building has the numbers “3661” on the North facing wall on the second story. The front door to the appartment is the first door on the second floor on the north end of the appartment and closest to Mt Diablo Blvd. The front door faces to the west overlooking the asphalt/ concrete driveway vehicle entrance. The building is a

light tan stucco with white painted doors that have a decorative window inlayed. The appartment number is marked with the number “1” at the top and center of the door above the decorative inlayed window by a black sticker. To the left of the front door is a window, a potted plant on a stand and a folding, metal chair. To the right of the front door is a metal outdoor shelf of potted plants and a white resin chair. Including attics, storage spaces, all containers theirin and thereon which could contain any of the items sought.

including basements, attics, storage spaces, appurtenant buildings, the surrounding grounds, and all containers therein and thereon which could contain any of the items sought. Strike out inapplicable words

THE CONTAINER(S) located at and described as: N/A

THE VEHICLE(S) described as: Any vehicle registered to or under the control of Peter Solomon including passenger compartment, storage areas such as trunk and glove box, and any containers within the vehicle(s) which could contain any of the items sought.

including the passenger compartment, storage areas such as trunk and glove box, and any containers within the vehicle(s) which could contain any of the items sought. Strike out inapplicable words

THE PERSON(S) of: N/A

FOR THE FOLLOWING **PROPERTY**, **THING(S)** AND/OR **PERSON(S)**

☐ listed in Exhibit # , attached.

☒ listed below:

1. Methamphetamine in any form.

2. Paraphernalia associated with the sales of Methamphetamine including but not limited to scales, cutting agents, grinders/sifters, and packaging materials such as plastic bags.

3. Paraphernalia associated with the use of Methamphetamine including, but not limited to mirrors, razor blades, straws, snorting devices, glass smoking pipes, and hypodermic needles or syringes.

4. Documentary evidence of drug-related transactions including, but not limited to ledgers, receipts, record books, lists of buyers and sellers, pay/owe sheets, price lists and IOU's, homemade videos and telephone recordings on voice recorders.

5. Containers in which any of the above listed items are located

6. Indicia in the form of personal property, including but not limited to, identification, cancelled mail envelopes. photographes, keys, latent finger prints, utility bills, and receipts which tend to prove identity of the persons in possession of any of the above items which are found or which tendc to prove the knowledge of such persons of the contraband nature of such items which are found.

7. Incoming communications – Officers executing this warrant are permitted to answer any incoming

telephone or pager calls without identifying themselves as police officers while serving this warrant. Said communications shall be for the purpose of further police investigations.

8. Any firearms and/or dangerous weapons.

The Attachments indicated below are incorporated into this Affidavit by reference and by physical attachment as though set forth here word-for-word; probable cause contained in:

☒ Narrative Statement Of Probable Cause.

☒ The following listed official police reports and records; and documents, exhibits and photographs: Strike out inapplicable words attached

☒ Statement(s) of expertise and opinion: attached

I/we have reasonable cause to believe that grounds exist for the issuance of a search warrant based on the content of this affidavit which includes the above-referenced attachments, and pray that a search warrant be issued.

I/we certify (or declare) under penalty of perjury under the laws of the State of California that the Information in this Affidavit is true and correct:

/s/ Brian McDevitt

Affiant

Affiant

Subscribed to and sworn before me this 3rd day of Jan ~~19~~ 2010, at 4:10 AM – PM.

Charles "Steve" Treat	Judge of the	Superior	Court
Magistrate's Signature		Name (level) of Court	

_____

Judicial District if Applicable

STATEMENT OF PROBABLE CAUSE

Summary

This affidavit is in support of a search warrant to search the residence in Lafayette, for evidence of methamphetamine sales. The suspect who lives at the residence, Peter Solomon, has been selling and/or furnishing methamphetamine.

The Affiant

Your affiant, Officer Brian McDevitt, has been a Sworn Peace Officer for the past 11 years with the Contra Costa County Sheriff's Office. I am currently assigned to the Lafayette Police Dept. A statement of my expertise appears elsewhere in this affidavit.

Arrest of Peter Solomon

On 1-2-10, Peter Solomon was arrested by the Lafayette Police Department for being under the influence of a controlled substance, possession of dangerous drugs and possession/transportation of dangerous

drugs. Solomon was seen by uniformed officers conducting surveillance conduct a hand to hand sale of methamphetamine with a gas station attendant. The gas station attendant leaned in to Solomon's vehicle while Solomon was washing his windows, removed items from the vehicle, placed the items in his pocket and walked directly in to the Chevron gas station. Solomon entered his vehicle and drove away where he was stopped a short distance away for expired registration. Solomon displayed objective signs of being under the influence of a controlled substance. Solomon was sweating in 40 degree weather, was fidgety and spoke with rapid speech. A narcotics trained K-9 was on scene to sniff Solomon's vehicle and alerted to the presence of narcotic odor on the drivers door, the center console and Solomon's jacket in the rear seat. A $20, $10 and $5 dollar bill was found lying on the rear seat next to Solomon's jacket. Solomon was placed under arrest for being under the influence of a controlled substance. Solomon was found to be in possession of $340.00 cash and a cell phone. Solomon told me he was unemployed and lived on disability pay.

Immediately after Solomon's arrest, officers returned to the Chevron gas station and confronted the clerk who was doing the hand to hand transaction and leaning into Solomon's vehicle. The Chevron clerk displayed objective signs of being under the influence of a controlled substance. The gas clerk admitted that he was in possession of methamphetamine which he just purchased from Solomon. The clerk was also

found to be in possession of a glass smoking pipe. The clerk admitted under Miranda, that Solomon handed him some methamphetamine while he was washing his windows. The gas station clerk told officers that he paid Solomon $35 dollars in the denominations officers located in Solomon's vehicle. The gas station clerk further admitted that Solomon saw surveillance officers and stated "this place is crawling with cops" and instructed the gas station clerk to remove a 1 oz plastic sandwich bag of methamphetamine from Solomon's center console and hide it in the gas station. The gas station clerk later informed officers where he hid the 1 oz bag of methamphetamine in the Chevron gas station vehicle repair bay. Officers responded to the Chevron gas station and located the 9 grams of methamphetamine exactly where he stated it was. The gas station clerk admitted under Miranda two hours prior to the hand to hand transaction, he called Solomon on his home phone number and requested to purchase a small amount of methamphetamine.

The weight and manner in which the methamphetamine located in the gas station clerks pocket and the 9grams hidden in the gas station vehicle bay, were consistent with amounts and packaging for used in sales of narcotics. Based on my training and experience, the amount of methamphetamine located, is more than a typical user of methamphetamine would possess. A presumptive test was conducted on the methamphetamine which indicated positive for the presence of amphetamine. The quantity of

methamphetamine, packaging, materials and money indicated that the methamphetamine was possessed for sales.

Solomon has previous arrests for possession of methamphetamine for sales. Several tested/reliable and untested/unreliable sources have independently told me similar information regarding Solomon being involved in the sales of narcotics. Additionally, I have seen on several occasions, known drug users frequent Solomon's apartment during all hours of the night. Several of these persons have been arrested/convicted of property crimes, which in my training and experience, go hand in hand with narcotic use and sales of narcotics. Moreover, persons have been stopped and arrested for being in possession of methamphetamine after leaving Solomon's apartment.

Confirmation of Solomon's residence

On 1-2-10 at the time of Solomon's arrest, he indicated that his address is 3661 Mt Diablo Blvd apartment #1 in Lafayette. Solomon's CDL indicates his current address is 3661 Mt Diablo Blvd in Lafayette. In addition, I have personal knowledge from previous contacts with Solomon that this is his address.

Expert Opinion

Based upon the information that is contained in the affidavit, it is my opinion that Peter Solomon is

involved in selling and/or furnishing methamphetamine.

It is my opinion that persons who sell and/or furnish controlled substances will possess additional controlled substances at their homes, in their vehicles, and upon their person. Various storage locations serve to conceal the total amount of drugs that they posses should they be arrested, searched or robbed. Specific storage locations often include hiding places within the aforementioned locations.

People involved in the sales and/or furnishing of methamphetamine will also posses items used in the consumption, including but not limited to glass pipes/ tubes, razor blades,

Narcotics

Handler/Officer Brian McDevitt

Contra Costa County Sheriff's Department/
City of Lafayette
Patrol Division

NARCOTICS ENFORCEMENT EXPERIENCE

- I have made and assisted in numerous arrests of suspects that were in possession of narcotics and possession with the intent for sales of cocaine, methamphetamine, marijuana and ecstacy.
- I have participated in over 50 hours of surveillance resulting in arrests for possession of illegal narcotics.

- During my career as a peace officer, I have made and assisted in over 100 arrests of subjects for possession of controlled substances and possession of dangerous drugs. I have participated in more than 30 search warrants, which resulted in the seizure of controlled substances and stolen property. I have personally conducted no less than 50 parole and probation searches where illegal drugs and or drug paraphernalia were found. In the course of working in the jails, I have discussed with convicted drug dealers and manufacturers about methods they used to conceal/hide narcotics, drug labs, transport and sell narcotics and drug usage.
- I have participated in undercover narcotics surveillance of persons/structures where search warrants were obtained and illegal narcotics were seized from those locations.
- As a K9 handler, I have conducted no less than 200 narcotic sniffs where hidden narcotics were located in vehicles and structures. Two search warrants have been written behind my K9's alerts. At times, these hidden narcotics were in false compartments designed to elude law enforcement
- I have over 600 hours of combined On the Job Training and formal schools for K9 narcotics detection, drug identification, drug trafficking patterns, false compartments, K9 narcotics maintenance training, annual P.O.S.T K9 certifications, mandatory monthly K9 training, ongoing daily training and

discussions of the related topics with officers, K-9 officers, detectives and supervisors more experienced than myself.

- I testified as an Expert Witness in Pittsburg Superior Court (10/06, Department 15 Judge Fenstermacher, People v. Rafael Mercado) in the area of Narcotics Detection with a Canine.
- I testified as an Expert Witness in Richmond Superior Court (4/09, Department 31 Judge Brady, People v. Parodi), Pittsburg Superior Court (8/09, Judge Stark, People v. Martinez) in the area of Possession of Methamphetamine and Possession of Methamphetamine for Sales.
- I subscribe and regularly read articles and legal updates published by Terry Fleck (K9fleck.org/CNCA Instructor) and Ken Wallentine (Xiphos/CNCA Instructor), "Point of View" (published by D.A Thomas J. Orloff, Alameda County District Attorney's Office), "Police" magazine "Police K9" Magazine, "American Police" magazine, "Law Officer" magazine, and read weekly training bulletins disseminated through department literature.

Updated 8-5-09

Narcotics
CANINE DOC
Handler/Officer Brian McDevitt

Contra Costa County Sheriff's Department/
City of Lafayette
Patrol Division

NARCOTIC TRAINING:

Canine Doc's basic training was completed 4/08. It consisted of 64 hours of training, which was provided by Dan Moore of Moore K-9 Services. Doc is a German Shepherd Dog that was trained to detect the odors of marijuana, methamphetamine, heroin and cocaine. Doc is passive alert canine, meaning he will exhibit a change of behavior when he locates one of the listed odors he is trained to detect. This change of behavior will often lead to him sitting, staring, scratching or biting at or near the source of the odor.

CERTIFICATION HISTORY:

4/06 Certified 100% positive under P.O.S.T standards for the four above listed odors by Heidi Stephensen, Concord Police Department, who is certified P.O.S.T evaluator.

5/07 Certified 100% positive under P.O.S.T standards for the four above listed odors by Kirt Sullivan, Pittsburg Police Department, who is certified P.O.S.T evaluator.

6/08 Certified 100% positive under P.O.S.T standards for the four above listed odors by Kirt

Sullivan, Pittsburg Police Department, who is certified P.O.S.T evaluator.

To date, Doc has completed approximately 500 hrs of maintenance training which includes over 3,000 training finds.

Doc has completed over 200 narcotic sniffs in Contra Costa County and Alameda County, where approximately 100 were made. Two search warrants have been written based on Doc's alerts.

Updated 4/09

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

PETER PIERO SOLOMON,

Defendant-Appellant. /

No. A129352

Appeal From the Judgment of the Superior Court
Of Contra Costa County, No. 5-100197-3
The Honorable John T. Laettner, Judge

APPELLANT'S OPENING BRIEF

(Filed Jul. 18, 2011)

PAUL F. DeMEESTER (SBN 148578)
1592 Union Street #386
San Francisco, California 94123
415.305.7280

ATTORNEY FOR APPELLANT
PETER PIERO SOLOMON
Under the First District Appellate Project
Independent Case System

* * *

[Table Of Contents Omitted In Printing]

[Table Of Authorities Omitted In Printing]

Statement of the Case

On March 4, 2010, the District Attorney for Contra Costa County filed an information charging appellant with having committed four felonies and two misdemeanors on January 2 and 3, 2010: possession of a firearm by a felon (count 1 – Pen.Code, § 12021, subd. (a)(1)); possession of ammunition by a felon (count 2 – Pen.Code, § 12316, subd. (b)(1)); sale of methamphetamine (count 3 – Health & Safety Code, § 11379, subd. (a)); possession for sale of methamphetamine (count 4 – Health & Safety Code, § 11378); misdemeanor being under the influence of a controlled substance (count 5 – Health & Safety Code, § 11550, subd.(a)); and misdemeanor possession of drug paraphernalia (count 6 – Health & Safety Code, § 11364). One prior felony drug conviction (Health & Safety Code, § 11370.2, subd. (c); two prison priors (Pen.Code, § 667.5, subd.(b)); and two separate probation ineligibility priors (Pen.Code, §§ 1203, subd. (e)(4) and 1203.07, subd. (a)(11)) were alleged as sentencing enhancements. (CT 101-105.)

At the March 8, 2010 arraignment, appellant pled not guilty. (CT 106.) Appellant's motion to quash and traverse the search warrant that had issued for the search of appellant's home, was denied. (CT 113-142, 144-156.) Trial was by jury and lasted five days. (CT 172, 177, 182, 185, and 196.) At the outset, the misdemeanor counts were dismissed and appellant waived jury on the priors. (CT 177; RT 33-35.) On June 8, 2010, the jury found appellant guilty of all felony charges. (CT 265-270.)

On July 23, 2010, the court found the prior conviction allegations to be true. (RT 465, 467.)

The court sentenced appellant to an aggregate prison term of three years, eight months, consisting of the midterm of three years on the methamphetamine sales conviction (count 3) and eight months consecutive on the felon in possession of a firearm conviction (count 1). Concurrent two-year sentences were imposed for the other two convictions. The court stayed all sentence enhancements. Appellant was awarded 406 days credit for time served. (SCT[1] 3-4.)

Statement of Appealability

A notice of appeal was timely filed on July 26, 2010. (CT 355.) This appeal follows pursuant to Penal Code sections 1237, subdivision (a), and 1538.5, subdivision (m).

Statement of the Facts

Appellant Drove Car with Expired Registration into Gas Station

On January 2, 2010, around 9 p.m., Contra Costa County sheriff's deputy Scott Pliler was driving his patrol car in the city of Lafayette when he noticed a tan Toyota with an expired registration tab. Pliler

[1] "SCT" refers to the Supplemental Clerk's Transcript.

confirmed that the registration had expired. It had, on December 12, 2009. (RT 231-234.)

Appellant drove the car into a Chevron gas station. Pliler asked a colleague to surveil the premises and to signal when the Toyota left so Pliler could stop the car. (RT 234-236.)

Immunized Gas Station Attendant Testified to Buying Meth

Michael Renschler, age 59, was working as the gas station cashier. He had been friends with appellant for six years. They would talk just about every other day. They lived near each other. Before testifying, Renschler was given use immunity pursuant to Penal Code section 1324. (RT 58, 90-94; CT 180-181.)

Renschler, an admitted meth user, testified that he called appellant to ask him for $10 to $15 worth of meth. Appellant promised to stop by. (RT 94-96.)

When appellant arrived, Renschler went out to meet him by the gas pump. While appellant cleaned his windshield, Renschler stood near the driver's side. The two of them talked for a couple of minutes. (RT 96-98.)

Appellant placed a package of drugs on the hood of his car. Renschler palmed it and put about $25 cash on the passenger seat of the vehicle. Appellant went on to ask Renschler if the latter could retrieve something from the car and hold it at the station; appellant would come back for it later. Appellant

explained that he was nervous having it because he had seen many cops in the area. Renschler grabbed the sandwich baggie and put it in his right coat pocket. Once inside the store part of the gas station, Renschler hid the baggie. (RT 99-103.)

Renschler smoked about half of the amount of methamphetamine that he had obtained for himself. The rest he put in his wallet. He put the pipe which he used to smoke in his inside pocket. (RT 103.)

Appellant's Traffic Stop Led to his Arrest

Deputy Brian McDevitt observed the activity at the gas station using binoculars. He saw appellant talk with Renschler, who then leaned into the car, went inside it and when he pulled back from the vehicle, appeared to be holding something in his right hand that he put directly into his jacket pocket. Renschler then walked toward the service desk at a fast pace. (RT 148, 156-161.)

McDevitt informed deputy Pliler that he had observed a hand-to-hand drug transaction at the gas station involving the Toyota and a Chevron employee. When the car left, McDevitt tipped off Pliler who effected a traffic stop. (RT 162, 234-235.)

Upon first contact, Pliler found it unusual that appellant was sweaty and had damp hair, given that it was cold out. When Pliler searched appellant's person, he found no contraband but did find about $300 cash in various denominations, including a

hundred dollar bill. The deputy also found $35 cash on the floorboard behind the driver's seat. (RT 236-237.)

McDevitt conducted a K-9 search of appellant's car. Doc, a police dog trained to detect narcotic odors including that of methamphetamine, alerted to the door handle, the center console and a leather jacket on the backseat. A search of the car by the deputies did not yield any narcotics. (RT 78-83, 88-89, 168-170, 210.)

McDevitt also conducted a drug abuse recognition test on appellant, concluding that he was under the influence of a central nervous stimulant. Appellant was arrested and placed in the back of Pliler's patrol car. (RT 170-171, 238.)

Deputies Returned to Gas Station to Confront Renschler

After their encounter with appellant, McDevitt and Pliler returned to the gas station. They found Renschler to be cheery and confident. But his demeanor soon changed when the officers questioned him about appellant giving him drugs. He became nervous and averted his eyes. Renschler refused McDevitt's request to search his person. McDevitt noticed classic symptoms of being under the influence of a stimulant in Renschler's fidgety behavior and his rapid, fragmented and animated speech pattern. (RT 171-173, 196.)

Pliler noticed that Renschler was sweaty. He denied having used meth that day, stating it had been three years since he last smoked. The attendant admitted having reached into appellant's car earlier but that the purpose was to retrieve $10 that appellant owed him. Pliler only found $3 on Renschler, who initially denied having anything illegal on him. (RT 197, 239-240.)

Renschler was sweating, his pupils were constricted, he constantly clinched his jaw and ground his teeth. Pliler believed him to be under the influence of a central nervous stimulant. But when Pliler attempted to administer a drug recognition test, Renschler claimed to be unwell. The deputy permitted Renschler to sit down outside. (RT 240-241, 266.)

Meanwhile, a K-9 sweep of the Chevron station resulted in Doc alerting to a baseball cap behind the clerk's desk, the cash register keys and Renschler's backpack. (RT 173-174, 241.)

At that point, Renschler told the deputies that he had smoked meth recently and possessed a five-dollar bag on him. Pliler retrieved a white piece of plastic, similar to garbage bag material, tied with a knot, from Renschler's wallet. Inside of it was a white crystal substance that Pliler recognized as methamphetamine. Pliler asked Renschler where his pipe was to smoke the meth. Renschler directed the officer to his jacket or backpack. Pliler located the pipe in the left jacket pocket. A search of the backpack revealed no contraband. Renschler was arrested. He

and appellant were taken to the Lafayette police station. (RT 177, 198, 241-244.)

Renschler Implicated Appellant in Stationhouse Interview

When interviewed at the police station, Renschler told McDevitt that he had bought the meth found in his wallet from appellant for either $20 or $25 – Renschler could not remember which. Aside from paying for the drugs, Renschler added the $10 that he owed appellant to the amount he put on the center console of appellant's Toyota. Renschler paid using a 20, a 10 and one or two five dollar bills. (RT 175-176, 245, 270.)

After a restroom break, Renschler returned and told Pliler that appellant had noticed police when the latter had pulled into the station. Appellant had asked Renschler to hold and hide a bag for him. Renschler did not know what was in the bag but he directed Pliler to its location at the gas station, where the deputy recovered it. It was a clear plastic bag containing a golf-ball size of a white, crystal substance that Pliler believed to be methamphetamine. Including packaging, it weighed 9.5 grams. (RT 246-247, 258.)

Warrant Search of Appellant's Home Revealed Gun and Bullet

The morning following the arrests, appellant's Lafayette apartment was searched pursuant to a

search warrant. In the living room, Pliler observed a glass pipe commonly used to smoke methamphetamine. Pulling open the coffee table drawer yielded a precision scale containing several pieces of white crystal substance that did not constitute a usable amount. (RT 181, 216, 248-249, 257.)

McDevitt recovered a single .25 caliber bullet and a small semiautomatic .25 caliber handgun. The gun was unloaded. In the kitchen, McDevitt came across a small digital scale in a bowl. The bowl had a white plastic trash bag on top. The bag had a small portion of the plastic torn off. This caught McDevitt's attention as the white plastic matched the packaging of the package taken from Renschler the night before. (RT 183-184.)

McDevitt also seized a measuring cup containing residue and a cotton-tip swab from the coffee table, and syringes elsewhere in the apartment. To McDevitt, this was indicative of someone who heats up meth in order to inject it. (RT 189, 217.)

Suspected Nature of Substances Confirmed to be Methamphetamine

Sheriff's criminalist Danielle Roberts testified that the substance taken from Renschler weighed 0.36 grams net (without packaging). The usable amount tested positive for methamphetamine. The substance taken from the bag found hidden at the gas station weighed 8.18 grams net, a usable amount,

and tested positive for methamphetamine. (RT 277-286.)

Expert Testimony that Methamphetamine was Possessed for Sale

Sheriff's Narcotics Detective Howard Shiells, testified as an expert regarding the possession for sale and sales of methamphetamine. Answering a hypothetical, Shiells opined that the methamphetamine found at the gas station was possessed for the purpose of sales. (RT 290-295, 304-305, 314.)

Stipulation regarding Prior Conviction

Both parties stipulated that appellant had previously been convicted of a felony. (RT 320.)

ARGUMENT

Introduction

A search warrant was obtained for appellant's apartment. The magistrate who approved it did not authorize nighttime service of the warrant, nor did police request such service. The search was conducted at night, in violation of appellant's search and seizure rights. This Fourth Amendment issue was not raised by trial counsel. In light of its merit, the failure to raise the issue constitutes ineffective assistance of counsel. The evidence seized at the apartment should have been suppressed. Without that evidence, appellant's convictions must be reversed.

The drug counts were dependent on the testimony of accomplice Renschler, which required corroboration to tie appellant to the offenses. The corroboration was lacking, requiring reversal of the drug convictions.

Trial counsel's failure to move for judgments of acquittal cost appellant judgments of acquittal on all four counts. Counsel's ineffectiveness requires reversal of all convictions.

I. NIGHTTIME SEARCH EVIDENCE SHOULD HAVE BEEN SUPPRESSED, REQUIRING THE REVERSAL OF ALL CONVICTIONS DESPITE TRIAL COUNSEL'S FAILURE TO RAISE THE ISSUE, WHICH CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

A. Night Service Was Neither Sought Nor Granted But Search Took Place at Night

Deputy McDevitt prepared a search warrant application for the search of appellant's apartment setting forth the following facts known to him on January 2, 2010: appellant's traffic stop for expired vehicle registration; his arrest for being under the influence of a controlled substance and drug possession and transportation; surveillance of hand-to-hand sale of methamphetamine with gas station attendant; the attendant leaning into appellant's car and removing something which the attendant put in his pocket

before briskly walking into the station; objective symptoms of being under the influence of drugs displayed by appellant (sweating in cold weather, fidgety behavior, rapid speech) and the gas station attendant; the K9 dog alerting to narcotic odor on the driver door, center console and backpack in backseat of appellant's car; the money found in appellant's car ($35); the money found on appellant ($340); appellant's statement to police that he was unemployed and lived off disability; the gas station attendant's admissions that he purchased meth from appellant for $35 after phoning appellant for same and that he had been asked to hold a bag for appellant because the latter told the attendant that "this place is crawling with cops"; the glass smoking pipe found in the attendant's possession; police finding the bag referred to by the attendant, which bag contained about 9 grams of meth (a presumptive test showed it to be positive for methamphetamine); appellant previously having been arrested for possession of methamphetamine for sale; several sources having informed police that appellant was engaged in the sale of narcotics; past police observations of known drug users frequenting appellant's home at all hours of the night; and the past arrests of persons leaving appellant's apartment for methamphetamine possession. (CT 138-139.)

The search warrant application did not claim to set forth any good cause for nighttime service of the warrant. (CT 135-142.) The magistrate who approved the search warrant at 4:10 a.m. on the morning of

January 3, 2010, did not allow service of the warrant at night. (CT 133.) The search was approved for the following items at appellant's apartment or car: methamphetamine and associated sales and use paraphernalia; documentary evidence of drug-related transactions; indicia to prove identity; incoming communications; and any firearms and/or dangerous weapons. (CT 131-133, 135-137.)

The search was conducted at approximately 5 o'clock on the morning of January 3, 2010, within about 8 hours of the traffic stop on appellant. (RT 256-257.)

B. Standard of Review

"'An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its

> ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.'" [Citation.]

(*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

Appellant's trial counsel moved to quash and traverse the search warrant and suppress the evidence yielded by the search but it was not based on the nighttime service of the warrant. (CT 113-142; RT 1-10.)

But the facts relating to the nighttime service of the warrant are undisputed: McDevitt did not set forth any facts to establish good cause to request nighttime service (CT 138-139); the magistrate did not authorize nighttime service of the warrant (CT 133); yet the search took place at night at about 5 a.m. on January 3, 2010, during winter (RT 257).

These facts need neither trial court resolution nor further development. No further information is needed before this Court selects the applicable rule of law and applies that rule to those facts. If the end result yields the conclusion that the evidence should have been suppressed, as is advocated here, then this Court must determine whether trial counsel's failure to raise the issue constituted ineffective assistance of counsel.

C. Nighttime Warrant Service Requires Good Cause and Magistrate's Approval

Penal Code section 1533 provides that:

> Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m.
>
> When establishing "good cause" under this section, the magistrate shall consider the safety of the peace officers serving the warrant and the safety of the public as a valid basis for nighttime endorsement.

(Pen.Code, § 1533.)

In this case, deputy McDevitt did not request nighttime service, his affidavit did not set forth any facts establishing any good cause to allow nighttime service, and the magistrate did not approve nighttime service of the search warrant. (CT 131-142.)

"The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." (*Sgro v. United States* (1932) 287 U.S. 206, 210.)

D. Exclusion of Evidence Required Only When Compelled by Federal Law

In 1982, Proposition 8 added article I, section 28, subd. (d) to the California Constitution, mandating that relevant evidence shall not be excluded in any criminal proceeding. The Supreme Court explained its legal effect in the context of suppression issues in *In re Lance W.* (1985) 37 Cal.3d 873, 886-887: "What Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."

E. Nighttime Searches without Judicial Approval Violate the Federal Constitution, Requiring Exclusion of Evidence so Obtained

1. United States Supreme Court *Jones* Decision Controls

In *Jones v. United States,* a federal agent obtained a daytime search warrant from a federal commissioner to search Joy Jones's house, based on the officer's belief that the Jones home sheltered an illicit distillery. Late in the afternoon when the warrant had been obtained, but still in daylight, officers returned to the house. But rather than execute the search warrant, they decided to make further observations. (*Jones v. United States* (1958) 357 U.S. 493, 494-495.)

At about 9 p.m., after darkness had set in, the officers noticed a truck enter the house's yard out of sight of the lawmen. When a short time later, the truck tried to leave, it got stuck in the driveway. The truck's two occupants were arrested and 413 gallons of liquor on which no taxes had been paid, were seized. (*Id.* at 495.)

About that time, Jones's wife returned home with the kids. She rushed to the house and blocked entry to the door. When an agent identified himself, she demanded to see a warrant. The agent told her that no warrant was needed and brushed past her. From the hands of her young son, the agent took a shotgun which the young boy was brandishing in an attempt to prevent entry. Jones was arrested about an hour after the search was completed upon his return home. (*Ibid*.)

The search by the officers yielded distilling equipment, which Jones moved to suppress for use as evidence at trial. At the suppression hearing, the prosecution conceded that the daytime warrant had expired but urged that the search was reasonable because the crime was being committed in the presence of the officers who assumed they had probable cause, obviating the need for a nighttime search warrant. (*Id.,* at 496.)

The Supreme Court held that the Fourth Amendment had been violated. (*Id.,* at 497.) The Court stated that "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private

home that occurred in this instance." (*Id.,* at 498.) The Court reversed the judgments of the courts below it because "the evidence obtained through this unlawful search was admitted at the trial." (*Id.,* at 500.)

The case at bench is akin to *Jones*: a daytime search warrant had been approved by a judicial officer; the officers decided not to search during the day; the suspect was not home during the search; and the search occurred at night. The only distinction was that in *Jones,* the officers observed nighttime activity consistent with criminality immediately prior to the search. In this case, there was no such activity. Yet, the *Jones* Court found the nighttime search action to have violated the Fourth Amendment. In other words, the facts in *Jones* were more in favor of admitting the evidence yet that argument did not prevail.

The Supreme Court left no doubt that it issued a constitutional ruling when it held that the lower court judgments "cannot be squared with the Fourth Amendment to the Constitution of the United States." (*Id.,* at 497.)

Although *Jones* preceded the "reasonable expectation of privacy" analytical framework formulated in cases in the decade after *Jones*, the *Jones* decision fully comports with the newer model of Fourth Amendment reasoning.

In *Warden, Md. Penitentiary v. Hayden* (1967) 387 U.S. 294, 304, the Supreme Court "recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property." Later

that year, Justice Harlan's concurring opinion established the "reasonable expectation of privacy" test that has become the hallmark to determine whether the Fourth Amendment is implicated in a particular case: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" (*Katz v. United States* (1967) 389 U.S. 347, 361 (Harlan, J., concurring); for an example of how the test has become the accepted standard, see *United States v. Jacobson* (1984) 466 U.S. 109, 113 ["search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed"].)

Without citing the Harlan test, the Supreme Court has ruled that the Fourth Amendment is implicated in searches of one's home:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States* (1961) 365 U.S. 505,

> 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
>
> (*Payton v. New York* (1980) 445 U.S. 573, 589-590.)

Once the Fourth Amendment is implicated, the *Camara* balancing test is applied to determine whether the nighttime search was unreasonable, wherein the government's need to search is balanced against the invasion which the search entails. Only if the government's need outweighs the intrusion, is the search reasonable. (See *Camara v. Municipal Court of City and County of San Francisco* (1967) 387 U.S. 523, 536-537.)

What is the government's need in a nighttime search? Penal Code section 1533 provides part of the answer: officer safety and public safety. (Pen.Code, § 1533.) Other needs unstated in the statute, but widely known governmental needs that behoove no citation are the destruction of evidence, the potential escape of a suspect, or pursuit of a fleeing felon.

In appellant's case, as in *Jones,* that need was missing and no such need was ever set forth in the search warrant affidavit. But the nighttime intrusion was great, as is discussed in greater detail below. Hence, per *Camara*-balancing, the nighttime search in this case was unreasonable.

This governmental need "requires additional justification beyond the probable cause required for a daytime search." (*State v. Jackson* (Mn.2007) 742 N.W.2d 163, 177 [nighttime search held to be unconstitutional under the Fourth Amendment].)

Once so found, the exclusionary rule is applied, which is fully discussed below. (See *Weeks v. United States* (1914) 232 U.S. 383; and *Mapp v. Ohio* (1961) 367 U.S. 643.)

The *Jones* decision is fully integrated within the *Katz*/*Camara*/*Weeks*-*Mapp*-framework of Fourth Amendment analysis.

2. Nighttime Searches Banned at Time of Framing

Although the *Jones* Court did not engage in any analysis of historical evidence regarding the original meaning of the Fourth Amendment, the Court, in its 1995 *Wilson* decision, set forth the analytical parameters that guide us in the case at bench. "'Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,' our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." (*Wilson v. Arkansas* (1995) 514 U.S. 927, 931; citing *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 337.)

In investigating the status of nighttime searches at the time of the framing and what remedies existed

then, this brief relies largely on three sources that have explored either or both of these issues: William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (Oxford University Press 1990) [hereinafter Cuddihy][2]; Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule,* 45 Gonzaga L.Rev. 1 (2010) [hereinafter Roots]; and *State v. Jackson, supra,* 742 N.W.2d 163.

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 Fourth Amendment was ratified on December 15, 1791. The language of the Fourth Amendment was first proposed by the first U.S. Congress on September 25, 1789. (Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press 2006), at 278-279.) The

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[2] Justice O'Connor described Cuddihy's work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 669 (O'Connor, J., dissenting).)

amendment had first been proposed by James Madison on June 8, 1789, worded slightly differently:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

(Id., at 265-266.).

By the time Madison first proposed his version, every state except Delaware had enacted statutes banning nighttime searches. (Cuddihy, *supra,* at 747-748 & n. 294 [listing statutory examples in Massachusetts,[3] New Hampshire,[4] Connecticut,[5] Rhode Island,[6]

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[3] Mass. Resolution 1776-77, c. 1176 (7 May 1777), *Mass. Acts and Resolves,* vol. 19 (Resolves: 1775-76), p. 935. Mass. St., c. 51 (10 Mar. 1783), *Mass. Acts and Laws, 1782-83,* pp. 131-32. For an act allowing nocturnal search: Mass. St., 1776-77, sess. 4, c. 45, secs. 1, 2 (9 May 1777), *Mass. Acts and Resolves,* vol. 5 (1769-80), p. 641.

[4] N. H. St. 2nd Gen. Assemb., sess. 3, c. 1 (19 June 1777), *N. H. Laws,* vol. 4 (1776-84), p. 98.

[5] "An Act for Laying an Excise," Ct. St., 1783, Jan. sess., Ct. Laws, Stats., *Acts and Laws,* 1783, Jan. sess., p. 622.

[6] "An Act in Amendment of and Addition to the Laws Already in Force for Collecting Duties Upon Imported Goods," R. I. St., 1785, Oct. sess., *R. I. Acts* (1747-1800), [vol. 13], *1784-85,* 1785, Oct. sess., p. 43.

New York,[7] Pennsylvania,[8] New Jersey,[9] Maryland,[10] Virginia,[11] North Carolina,[12] South Carolina,[13] and Georgia[14].)

One of the two Pennsylvania examples cited by Cuddihy provided that:

> And be it further enacted by the authority aforesaid, That any justice of the peace within the limits of the said city and the adjacent county within two miles of the said city on demand made by such superintendent or keeper of the said magazine showing

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[7] N. Y.St., sess. 5, c. 39, sec. 3 (13 Apr. 1782), *N. Y. State Laws,* vol. 1 (1777-84), p. 480. N. Y.St., sess. 8, c. 7 (18 Nov. 1784), *ibid.,* vol., 2 (1785-88), p. 17.

[8] Pa. St., c. 1161, sec. 3 (5 Apr. 1785), *Pa. Stats.,* vol. 11 (1782-85) p. 577. Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *ibid.,* vol. 12 (1785-87), p. 421.

[9] N. J. St., 5th Gen. Assemb., 2nd Sitting, c. 44, sec. 3 (28 June 1781), N. J. Laws, Stats., *Acts, 1780-81*, May sess., pp. 115 at 116-17, N. J. St., 6th Gen. Assemb., 2nd Sitting, c. 32, sec. 18 (24 June 1782), *ibid., 1781-82,* May sess., pp. 95, 105 at 101.

[10] Md. St., 1784, c. 84, sec. 7, *Laws of Maryland, . . . 1784,* unpaginated.

[11] Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.,* vol. 12 (1785-88), p. 308.

[12] N. C. St., 1784, sess. 1 (Apr.), c. 4, sec. 7, *Laws, 1774-88; N. C. State Recs.,* vol. 24, p. 50.

[13] S. C. St., no. 1196, sec. 23 (13 Aug. 1783), *S. C. Stats.,* vol. 4 (1752-86), pp. 581-82.

[14] "An Act to Revise and Amend an Act for Regulating the Trade Laying Duties Upon All Wares," Ga. St., 13 Aug. 1786, *Statutes, 1774-1805; Ga. Col. Recs.,* vol. 19, p. 2, pp. 507-08, Graydon, *Justices and Constables Assistant* (1805), p. 269.

> a reasonable cause on oath or affirmation may issue his warrant under his hand and seal empowering such superintendent or keeper of the said magazine to search in the day time any house, store, shop, cellar or other place or any boat, ship or other vessels for any quantity of gunpowder forbidden by this act to be kept in any place or places and for that purpose to break open in the day time any such house, store, shop or other places aforesaid or any boat, ship or other vessel if there be occasion and the said superintendent or keeper of the said magazine on finding such gunpowder may sieze and remove the same in twelve hours from any such place or places, boats, ships or vessels to the said magazine and therein detain the same until it be determined in the proper court whether it be forfeited or not, by virtue of this act and the said superintendent or keeper of the said magazine shall not in the mean time be sued for seizing, keeping or detaining the same nor shall any writ of replevin issue therefore until such determination as aforesaid be made but all such suits are hereby declared illegal, erroneous and abated.
>
> (Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *Pa. Stats.,* vol. 12 (1785-87), pp. 421-422; cited in Cuddihy, *supra,* at 747, n. 294.)

The Virginia example cited by Cuddihy reads in part:

> IX. *And be it enacted,* That it shall be lawful for the searchers, as well as for the

> naval officers, and for any other person, having good cause to suspect that any goods, wares, or merchandises, on which duties have not been paid, are stored or secreted in any house, warehouse, or storehouse, to apply to a justice of the peace, or alderman of the corporation, for a warrant (which warrant shall not be granted but on information upon oath) and being accompanied with a constable, to break open in the day time, such suspected house, warehouse, or storehouse, when it may be necessary; and any goods so found, on which the duties have not been paid, or secured to be paid, may be seized and carried away, and together with the vessel from which the same were delivered, shall be forfeited. . . . (Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.,* vol. 12 (1785-88), p. 308; cited in Cuddihy, *supra,* at 747, n. 294.)

Cuddihy conducted a thorough review of the early statutes and described the fruits of his research:

> An occasional wartime measure had allowed nighttime searches, while Delaware's legislation after 1776 ignored them, neither allowing nor prohibiting. Otherwise, the overwhelming preponderance of American statutes after 1776, and even more so after 1782, when hostilities concluded, forbade house searches, and even mere entrances to arrest, at night.
>
> This extinction of nocturnal house searches was incremental and incidental rather

than topical and global, for no state abolished them categorically. Rather, the extinction was incidental to the multitude of applications that characterize routine legislation, such as excises, imposts, game poaching, smuggling, ammunition storage, and the like. In other words, the states annihilated the nocturnal house search by assuming rather than announcing its unreasonableness. The effect was the same, however, for assumptions are no less authoritative reflectors of belief than declarations.

Second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding. In the 1780s, American law rejected nighttime searches even more than general ones. Even the jurisdictions that retained general warrants denounced searches at night in most circumstances [citing New York, South Carolina and Georgia], and the authors of the Fourth Amendment left no doubt on the issue.

Affirming state tradition, the [federal] Collection and Excise Acts of 1788-91 restricted all searches of buildings and search warrants that they permitted to the day time, even warrantless searches of

> distilleries.[15] The creators of the amendment did not renounce all searches without warrant, but they impliedly renounced all searches on land at night, whether by warrant or without. (Cuddihy, *supra,* at 747-748; footnotes omitted.)

Comparing British search and seizure practices with that of America, Cuddihy states that "[p]erhaps the most dramatic divergence of the American law of search from the British pattern, therefore, was the American rejection of the nocturnal search." (Id., at 661.)

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[15] In footnote 296, Cuddihy cites: "U. S. St., 1st Congr., 1st sess., c. 5, sec. 24 (31 July 1789), *U.S. Stats.,* vol. 1 (1789-99), pp. 29 at 43." (Cuddihy, *supra,* at 748, n. 296.)

The American practice was not the subject of congressional protests, pamphlets or newspaper articles as were the warrantless house searches and general warrants that marked British rule. (Id., at 781.)

> A different foundation, that of unspoken assumption, had also established the unconstitutionality of nocturnal searches. Although Americans often denounced general warrants and warrantless, door-to-door searches in the 1770s and 1780s, they said nothing regarding nocturnal entrance of their dwellings, either for or against. Nonetheless, the statutes that they enacted on the subject, both federal and state, palpably assumed the unconstitutionality of nocturnal entrance into the domicile in the decade before the amendment's framing. No state permitted such entrance; Delaware ignored it; the rest voted against it by assumption, yielding, in effect, a *de facto* 12-0-1 mandate against the entry of dwellings after the sun set.
>
> (Ibid.)

Yet, the aversion to nighttime searches that motivated the early statutes was reflected in some of the writings by the Founders. For instance, as early as 1774, John Adams described the unique status occupied by the home at night:

> Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquility which the Laws have thus secured to him in his own

> House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave.
>
> (1 Legal Papers of John Adams 137 (L. Kinvin Wroth & Hiller B. Zobel eds., The Belknap Press 1965 (republished from the 1774 original); cited in *State v. Jackson, supra,* 742 N.W.2d, at 169-170.)

The historical evidence demonstrates that at the time of the Framing, nighttime searches were constitutionally unreasonable. This evidence may not be ignored. The Supreme Court has held that the "Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted. . . ." (*Carroll v. United States* (1925) 267 U.S. 132, 149.)

Justice Scalia warned against applying modern concepts of what police officers should be allowed to do. "It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness 'is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" (*Richards v. Wisconsin* (1997) 520 U.S. 385,

392, fn. 4; quoting *Minnesota v. Dickerson* (1993) 508 U.S. 366, 380 (Scalia, J., concurring).)

3. Exclusionary Rule is Consistent with Early Remedies

The exclusionary rule was created by the United States Supreme Court as a "prudential doctrine" to "compel respect for the constitutional guaranty." (*Davis v. United States* (2011) ___ U.S. ___, 131 S.Ct. 2419, 2426.) Its origin dates to 1914 in the case of *Weeks v. United States, supra,* 232 U.S. 383. Evidence seized in violation of the Fourth Amendment cannot be used against a defendant at trial. (*Id.,* at 398.) It was applied to state court practice under the Fourteenth Amendment in *Mapp v. Ohio, supra,* 367 U.S., at 655.

Although the *Davis* Court pointed out that the "Fourth Amendment . . . is silent about how this right is to be enforced," (*Davis v. United States, supra,* 131 S.Ct. at 2423) recent research has revealed that "exclusion is an ancient remedy" (Roots, *supra*, at 1). Roots's research establishes that "the Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period." (Roots, *supra*, at 1.)

"During the late eighteenth century, when the Constitution was debated and ratified, there were no professional police officers to enforce criminal laws." (Id., at 11; footnote omitted.) "Initiation and investigation of criminal cases was the nearly exclusive

province of private persons. . . . The courts of that period were venues for private litigation – whether civil or criminal – and the state was rarely a party." (Ibid.; citation omitted.)

Of course, the Bill of Rights limited the Federal Government only, not private parties. (Id., at 12; see *Barron v. City of Baltimore* (1833) 32 U.S. 243.) Moreover, the United States Supreme Court did not have appellate jurisdiction in criminal cases. (*United States v. More* (1805) 7 U.S. 159, 172-174.) Congress did not enact its first Supreme Court criminal appellate review statute until 1874 (specified Utah Territory cases only) and did not provide for such review in capital cases until 1889; and finally to all federal criminal defendants convicted of "infamous crimes" until 1891. (Alan G. Gless, Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion, 45 Am. J. Legal History 391, 394 (2001) [hereinafter Gless]; 3 C. Warren, The Supreme Court in United States History 54, n. 1 (1922) [hereinafter Warren].)

This explains why it took until 1886 before the Supreme Court first delved into the exclusion of evidence issue in a search and seizure case. (Roots, *supra,* at 12-13; referring to *Boyd v. United States* (1886) 116 U.S. 616, 622-623.) In that earliest decision to construe the Fourth Amendment's applicability to physical evidence, the *Boyd* Court applied an exclusionary rule.

"Nonetheless, the broad principles upon which exclusion of physical evidence is grounded were certainly ever-present in the Founders' constructions of search and seizure protections." (Roots, *supra,* at 13.)

Three sources of potential remedies are explicitly stated in the Constitution and a fourth is suggested by Alexander Hamilton in *Federalist* No. 83. The three explicit constitutional remedies are: (1) the habeas corpus[16] clause, article I, section 9, clause 2; (2) the Seventh Amendment right to civil jury trials; and (3) the Fifth Amendment's description of an exclusionary rule in the context of self-incrimination [a coupling of Fourth and Fifth Amendments as done in *Boyd, supra,* 116 U.S. 616].

The fourth possibility – suggested by Hamilton – is the bringing of criminal charges against officials who violate the Fourth Amendment protections, as was done in *State v. Brown* (1854) 5 Del. (5 Harr.) 505, 506 [officer indicted and convicted for entering an occupied dwelling at night without a warrant while chasing a fleeing felon]. (Roots, *supra,* at 13 & n. 69.)

A case published in the very first volume of the very first case reporter ever printed in the new United States, clearly suggests that courts would

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[16] The Supreme Court did not have criminal appellate jurisdiction but did possess various degrees of appellate habeas jurisdiction over federal circuit cases. (Warren, *supra,* at 187.)

impair criminal proceedings when a Fourth Amendment illegality had been found. (Id., at 17-18.)

The case was *Frisbie v. Butler* (Conn.Super. 1787), 1 Kirby[17] 213, wherein appellant Frisbie had been found guilty of stealing pork from Butler, who had obtained a search warrant from a justice of the peace. (*Ibid.*) Three of the six appellate issues dealt with the lack of the warrant's legality. The Connecticut reviewing court reversed the conviction for reasons unrelated to the warrant but had this to say about the warrant:

> And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal; yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine; as also the sufficiency of several of the other matters assigned in error.
>
> (*Id.,* at 215.)

In his in-depth study, Roots interprets the *Frisbie v. Butler* "vitiates the proceedings" language as a major statement supporting Fourth Amendment exclusion.

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[17] Legal historian John Langbein referred to Kirby's Reports as America's first case reports. (Roots, *supra*, at 15, n. 81.) "[A]ppellate courts of the late eighteenth and early nineteenth centuries often had little or no jurisdiction over criminal cases. . . . Thus, appellate criminal opinions on evidentiary matters were rare even when decisions in criminal trial courts were otherwise recorded." (Ibid.)

(Roots, *supra,* at 18.) Roots points out that courts in our Republic's early years employed "ultimate exclusionary sanction" for Fourth Amendment violations: "discharge," using pretrial habeas corpus as the procedural vehicle to effect it (ibid.):

> Lost in the modern discussion of Fourth Amendment remedies is the fact that one ancient remedy – the pretrial writ of habeas corpus – once operated as something of an exclusionary rule in search and seizure cases but has since been stripped of its Founding-era substance. Today we know habeas corpus as a narrow, post-conviction remedy applied mostly as a sentence-review mechanism. But the Framers viewed habeas corpus as primarily a pretrial remedy that was often applied in search and seizure cases.
>
> (Id., at 20-21; footnotes omitted.)

An early example of that in the United States Supreme Court was *Ex parte Burford* (1806) 7 U.S. 448, a habeas corpus case wherein Chief Justice John Marshall wrote the Court's opinion holding that a warrant of commitment by justices of the peace must state "some good cause certain, supported by oath." (*Id.,* at 453.) The *Burford* Court decided the case based on the constitutional clauses against excessive bail (Eighth Amendment), guaranteeing confrontation (Sixth Amendment) and what we now call the Fourth Amendment, referred to by Marshall

as "the 6th article of the amendments to the constitution of the United States."[18] (*Ex parte Burford, supra,* 7 U.S., at 451-452.) Because the warrant on the basis of which Burford was detained, was found lacking in that regard, the proceedings were found to be irregular and the prisoner discharged. (*Id.,* at 453.) The Court noted that a proper case could proceed *de novo,* provided the courts took "care that their proceedings are regular." (*Ibid.*) *Burford* is an example where proceedings were "vitiated."

A second United States Supreme Court case illustrates even more clearly how the highest court used the habeas writ to dismiss proceedings in pretrial fashion. Chief Justice Marshall examined the legality of a commitment for treason to determine "whether the accused shall be discharged or held to trial." (*Ex parte Bollman* (1807) 8 U.S. 75, 125.) Finding that "the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged." But the Court left open the possibility that "fresh proceedings against them" might be properly instituted, implying necessarily that the current proceedings were vitiated by way of habeas discharge. (*Id.,* at 136-137.)

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[18] On September 25, 1789, Congress submitted twelve articles to the States for ratification. The first two were not ratified, hence the different numbering system in *Burford.* (See Labunski, *supra,* at 278-280.)

In other cases, a demurrer was the procedural vehicle to defeat the criminal case. One such example is found in the 1814 Connecticut Supreme Court case entitled *Grumon v. Raymond, a* civil action wherein the justice of the peace who issued an illegal warrant and the constable who served the warrant that was illegal on its face, were both held civilly liable in trespass, after the criminal case was defeated by way of demurrer. (*Grumon v. Raymond* (Conn.1814) 1 Conn. 40.)

The existence of the second potential remedy, a civil suit, was not in lieu of a criminal case dismissal, but in addition. For instance, in *Murray v. Lackey* (N.C.1818) 6 N.C. 368, the perjury defendant's criminal case had been commenced by warrant taken out by the civil defendant in the later civil action; after discharge in the criminal action, the criminal defendant then sued the warrant taker for malicious prosecution. Although the plaintiff lost the civil suit, the case shows the availability of the civil suit option in addition to termination of criminal proceedings, not instead thereof. (*Ibid.*)

The modern doctrines of immunity for police, prosecution and the judiciary were unheard of in early America. (Roots, *supra,* at 36, n. 229; citing *Burlingham v. Wylee* (Conn.Super.1794) 2 Root 152, 152-153 [justice of the peace and officer held liable], and *Percival v. Jones* (N.Y.Supr.1800) 2 Johns.Cas. 49, 50-51 [justice of the peace found liable for false imprisonment].)

The North Carolina Supreme Court defined "discharge" as meaning "where proceedings are at end and cannot be revived." (*Murray v. Lackey, supra,* 6 N.C., at 368.) Along the same lines, a habeas discharge of the prisoner spelled the end of criminal proceedings against that prisoner. Roots calls a habeas corpus discharge "a form of exclusion by another name – . . . thought to be required under the Fourth Amendment." (Roots, *supra,* at 30.) "Prior to the Civil War, habeas corpus was invoked mostly to attack pretrial proceedings, and search and seizure issues were among the most common matters that were remedied by the Great Writ." (Ibid.)

4. *Hudson* Decision Not Applicable to Nighttime Searches

"Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" (*United States v. Leon* (1984) 468 U.S. 897, 906; quoting *Illinois v. Gates* (1983) 462 U.S. 213, 223.) "The rule's sole purpose . . . is to deter future Fourth Amendment violations." (*Davis v. United States, supra,* 131 S.Ct., at 2426.)

In *Hudson v. Michigan* (2006) 547 U.S. 586, the Supreme Court held that the exclusionary rule does not apply to violations of the knock-and-announce rule. But the interests involved in the bar against

nighttime searches are significantly different from the interests protected by police announcing their presence.

> At the core of Hudson is the Supreme Court's determination that a knock-and-announce violation does not require suppression was that the police in Hudson would have discovered the evidence whether they had knocked and announced or not. In contrast, in the context of a nighttime search, if the police do not search and seize evidence at night, there is no guarantee that it will be there the following day. The Court's reliance on the inevitability of discovery in Hudson is inapplicable here.
>
> (*State v. Jackson, supra,* 742 N.W.2d, at 178; citations and footnote omitted.)

The Supreme Court has noted that the exclusionary rule applies "only where its deterrence benefits outweigh its 'substantial social costs.'" (*Pennsylvania Bd. of Probation and Parole v. Scott* (1988) 524 U.S. 357, 363.) The Minnesota Supreme Court concluded that prohibited nighttime entry by police "is capable of repetition and that application of the exclusionary rule will have an appreciable deterrent effect." (*State v. Jackson, supra,* 742 N.W.2d, at 179.)

"The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." (*United States v. Ceccolini* (1978) 435 U.S. 268, 279.) Because the

nighttime security of one's home is such a vital interest, the best way to prevent police officials from violating the nighttime entry ban is to preclude the use of any evidence derived from such entry.

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." (*Hudson v. Michigan, supra,* 547 U.S., at 596.) "'[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule. Similarly, in *Krull* we elaborated that 'evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" (*Herring v. United States* (2009) 555 U.S. 135, 129 S.Ct. 695, 701-702; quoting *United States v. Leon, supra,* 468 U.S., at 911, and *United States v. Peltier* (1975) 422 U.S. 531, 542.) In appellant's case, there can be no question that the officers conducting the search of his home had knowledge that the search was without nighttime approval, and therefore contravened the Fourth Amendment.

"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." (*Herring v. United States, supra,* 129 S.Ct., at 702.) This concept is apt in appellant's case. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws,

or worse, its disregard of the charter of its own existence." (*Mapp v. Ohio, supra,* 367 U.S., at 659.)

"Since the warrant was 'legally invalid' the officers' entry into the defendant's apartment was on the same plane as an entry without any warrant at all and as such was an unlawful 'invasion' within the proscription of the Fourth Amendment." (*United States v. Merritt* (3d Cir.1961) 293 F.2d 742, 743.)

Penal Code section 1533 protects persons from unauthorized police invasion 9 out of 24 hours of the day, "whereas the rule against unannounced searches protects individuals for 10 to 15 seconds during which the police must wait before they can enter a home." (See *State v. Jackson, supra,* 742 N.W.2d, at 176; citing *United States v. Banks* (2003) 540 U.S. 31, 38-40 [knock-and-announce case involving the length of time officers should wait after announcing themselves before seeking entry of a home pursuant to a warrant].)

The *Hudson* Court noted that the knock-and-announce rule "is not easily applied." Exceptions exist (threat of physical violence and likely destruction of evidence with advance notice). (*Hudson v. Michigan, supra,* 547 U.S., at 589.) The ban on nighttime entries does not have any such exceptions. The ban is an easily applied bright-line rule.

Once the knock-and-announce rule is held to apply, a court's task becomes difficult:

> . . . it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time standard," see *United States v. Banks,* 540 U.S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs – but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.,* at 40-41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante,* police officers about to encounter someone who may try to harm them will be uncertain how long to wait.
>
> (*Hudson v. Michigan, supra,* 547 U.S., at 590.)

A court's task in determining whether a nighttime entry ban was violated is very simple: at what time was entry gained?

Adherence by police officers of the knock-and-announce rule may have negative consequences if exclusion is the remedy for a violation of the rule. "If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires-producing preventable violence against officers in some cases, and the destruction of

evidence in many others." (*Id.,* at 595.) The nighttime entry ban never suffers such nefast consequences. Hence, there is no social cost associated as there is when officers in the field have to gauge how much knock-and-announce time is sufficient or whether an exception applies.

That appellant may not have been home at the time of the search is of no import. The interest protected is not just that of the intrusion of the person but rather the person's interest in maintaining a secure home, whether he is home or not. (*State v. Jordan* (Mn.2007) 742 N.W.2d 149, 154.)

The good-faith exception to the exclusionary rule does not apply because the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." (*Herring v. United States, supra,* 129 S.Ct., at 703; citing *United States v. Leon, supra,* 468 U.S., at 922, fn. 23.) The answer to that question is a resounding 'yes,' rendering that the good-faith exception does not apply.

5. California Cases Fail to Follow *Jones* and Overlook History

Prior to the passage of Proposition 8 in 1982, appellate decisions in *People v. Watson* (1977) 75 Cal.App.3d 592 and *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320 had held that the Fourth Amendment required suppression of evidence seized in

nighttime searches when good cause for night service had not been shown as required by Penal Code section 1533. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1468.)

The *Rodriguez* court construed federal law not to require the exclusion of evidence seized in a nighttime search that violated the requirements of section 1533, based on our Supreme Court's discussion of a federal appeals decision. (*Rodriguez v. Superior Court, supra,* at 1469-1470.) The Supreme Court upheld a magistrate's approval of a nighttime search based on facts submitted in the warrant affidavit. (*People v. Kimble* (1988) 44 Cal.3d 480, 494.) The federal Sixth Circuit opinion cited in *Kimble* held that federal agents did not comply with the federal rule requiring the issuing authority to approve nighttime warrant service, but that exclusion was not necessary because the search was "reasonable." (*United States v. Searp* (1978) 586 F.2d 1117; cited in *Kimble, supra,* 44 Cal.3d, at 1467-1468.) Decisions of the lower federal courts interpreting federal law are persuasive but not binding on state courts. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.)

Kimble upheld a nighttime search that had been sought and approved based on facts in the affidavit. *Kimble* did not address the issue within: should evidence be excluded when a nighttime search is conducted without a magistrate's approval and without good cause therefore having been shown in the search warrant affidavit. Our state's Supreme Court has not spoken on that issue. The *Rodriguez* appellate

decision does not bind this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Totally absent from any discussion in the California nighttime search cases is any mention of *Jones v. United States, supra,* 357 U.S. 493. California courts[19] may have overlooked *Jones,* but the United States Supreme Court has not. The seminal *Katz* decision cites *Jones* as authority for the proposition propounded in the paragraph quoted below that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." (*Katz v. United States, supra,* 389 U.S., at 357, fn. 18.)

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," (*Agnello v. United States* (1925) 269 U.S. 20, 33) for the Constitution requires "that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police." (*Wong Sun v. United States* (1963) 371 U.S. 471, 481-482. "Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes," (*United States v. Jeffers* (1951) 342 U.S. 48,

[19] Aside from *Watson, Tuttle, Rodriguez,* and *Kimble,* other nighttime search cases that overlooked *Jones* are: *People v. Glass* (1976) 56 Cal.App.3d 368; *People v. Lopez* (1985) 173 Cal.App.3d 125; *People v. Swan* (1986) 187 Cal.App.3d 1010; and *People v. Ramirez* (1988) 202 Cal.App.3d 425.

> 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.
>
> (*Katz v. United States, supra,* 389 U.S., at 357; footnotes omitted.)

Of course, in *Jones,* as in the case at bench, a daytime warrant had been obtained upon probable cause therefore but no judicial approval of a nighttime search had been either sought or obtained. In both cases, good cause was lacking as to the propriety of a nighttime search. The *Jones* court held the nighttime search to have violated the Fourth Amendment and reversed the judgment of conviction because the evidence obtained in the nighttime search was admitted against the defendant at trial. The *Jones* Court unambiguously held its ruling to be a constitutional one when it stated that "the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States." (*Jones v. United States, supra,* 357 U.S., at 497.)

"[T]he procedure of antecedent justification . . . is central to the Fourth Amendment." (*Katz v. United States, supra,* 389 U.S., at 359; quoting *Osborn v. United States* (1966) 385 U.S. 323, 330.)

Because no antecedent justification was made or approved by a neutral magistrate, the nighttime search of appellant's home was unconstitutional. The

Jones Court reversed the judgment because "the evidence obtained through this unlawful search was admitted at the trial." (*Jones v. United States, supra,* 357 U.S., at 500.) This case requires the same outcome.

F. Trial Counsel Ineffective in Failing to Pursue Nighttime Search Issue

Appellant's trial counsel moved to quash and traverse the search warrant but never sought to suppress any evidence based on an unlawful nighttime search. (CT 113-142, 144-156; RT 1-10.)

Although our Supreme Court has expressed its preference for ineffective assistance of counsel issues to be joined with a direct appeal by way of a habeas corpus petition, for the reason "that '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; citations omitted.)

Appellant's situation presents the latter of the two "unless" scenarios. If appellant is right that the nighttime search was unconstitutional and that exclusion of evidence would have been the proper remedy, then "there simply could be no satisfactory explanation" for counsel's failure to litigate the nighttime search issue.

Another concern expressed by the *Mendoza Tello* Court is that "facts necessary to a determination of that issue are lacking," proffering as example what an officer might say he would have done had he been asked at a suppression hearing. (*Ibid.,* at 266-267.) Again, appellant's case presents that unusual exception that the record is fully developed, allowing this Court to decide the issue.

The facts on that issue are all part of the record on appeal: the search warrant application did not set forth any facts constituting good cause for nighttime service (CT 135-142); the magistrate who approved the search warrant did not check the nighttime service box (CT 133); and the search of appellant's home was conducted at about 5 a.m. (RT 256-257).

The time of the search was established in answer to a question from one of the jurors, who were permitted to forward written questions. The trial court followed up on the 5 a.m. answer by querying the deputy why he had conducted the search at that particular time: "So that's convenient for you since you work until 6:00 anyway?" Deputy Pliler responded affirmatively: "Correct." (RT 256-257.)

The record is complete to allow resolution of the claim on appeal. The specific claim is that appellant's right, under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, to the effective assistance of counsel, was violated. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

"The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 374; citing *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) The essence of the claim is "that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." (*Kimmelman v. Morrison, supra,* 477 U.S., at 374-375; citations omitted.)

"The test for determining whether a criminal defendant received ineffective assistance of counsel is well-settled." (*People v. Jones* (2010) 186 Cal.App.4th 216, 234.) "In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Kimmelman v. Morrison, supra,* 477 U.S., at 375; citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; accord, *People v. Bennett* (1998) 17 Cal.4th 373, 383.)

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." (*Kimmelman v. Morrison, supra,* 477 U.S., at 375.)

A Fourth Amendment claim is subject to review under the harmless-beyond-a-reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, 23, the applicable test when the error in admitting evidence was due to a violation of the Fourth Amendment. (See *Chambers v. Maroney* (1970) 399 U.S. 42, 53; cited in *Arizona v. Fulminante* (1991) 499 U.S. 279, 307.)

A Sixth Amendment claim is subject to review under the above-cited *Strickland* test, which is the standard to use when the claimed ineffectiveness relates to the failure to pursue a meritorious suppression motion under the Fourth Amendment. (*People v. Howard* (1987) 190 Cal.App.3d 41, 43.) The use of the *Strickland* standard puts appellant at a disadvantage:

> Furthermore, when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman v. California,* 386 U.S. 18 (1967), which requires the State to prove that the defendant was not prejudiced by the error. By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted.
>
> (*Kimmelman v. Morrison, supra,* 477 U.S., at 382, fn. 7; citation omitted.)

"Counsel's competence, however, is presumed, and the defendant must rebut this presumption by

proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." (*Id.,* at 384.) The standard of proof is a preponderance of the evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 449.)

In appellant's case, this presumption is easily overcome. There can be no explanation why trial counsel did not bring a motion to suppress the evidence obtained from the nighttime search of appellant's home. Trial counsel's failure to litigate the issue was unreasonable.

The prejudice analysis follows. Appellant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S., at 694.)

The nighttime search of appellant's home yielded a glass pipe, a precision scale with some crystal substance residue on it, another small digital scale, a white plastic trash bag missing a small portion of plastic at the top – that the deputy believed matched the white plastic from the package of meth taken from the gas station attendant – a measuring cup containing residue, a cotton-tip swab, several syringes, a .25 caliber handgun and bullet. (RT 181, 183-184, 189, 216-217, 248-249, 257.)

Had these items been suppressed from evidence, appellant could not have been convicted of having been a felon in possession of a gun (count 1) and of having possessed ammunition as a felon (count 2).

But the methamphetamine sales and possession for sales counts must also be reversed. Appellant's theory was that Renschler was the seller, appellant the buyer. (RT 370-371.) Renschler testified opposite. (RT 90103.) Renschler's credibility was enhanced by the fact that the piece of white plastic found at appellant's home matched that in which the methamphetamine was packaged that was held by Renschler; the two scales, suspected meth residue, packaging materials and the gun with ammo that are all indicative of appellant having engaged in the sale of drugs. Without that evidence, the jury might not have believed Renschler's self-serving testimony. There is a reasonable probability that, but for the unobjected admission of the nighttime search evidence, the verdicts on counts 3 and 4 would have been different.

All four convictions must be reversed.

II. COURT'S FAILURE TO INSTRUCT JURY THAT RENSCHLER WAS AN ACCOMPLICE TO BOTH DRUG CRIMES AND LACK OF CORROBORATION OF RENSCHLER'S TESTIMONY, REQUIRE REVERSAL OF BOTH DRUG COUNTS

A. Renschler Was an Accomplice to Both Drug Crimes

1. The Accomplice

An "accomplice" is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony

of the accomplice is given." (Pen.Code, § 1111.) The definition of accomplice "encompasses all principals to the crime, including aiders and abettors and co-conspirators." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114; Pen.Code, § 31 ["All persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.])

To prove a conspiracy, it must be shown that: (1) two or more persons agree; (2) with the specific intent to agree to commit a criminal offense; (3) with the further specific intent to commit that offense; and (4) which is accompanied by an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.)

"The overt acts need not be in themselves criminal in nature so long as they are done in pursuance of the conspiracy." (*People v. Robinson* (1954) 43 Cal.2d 132, 139.) "The overt act need not be committed by the defendant; it is sufficient to establish the conspiracy if any conspirator commits it." (Pen.Code, § 184.) "Evidence of the conspiracy itself may come from uncorroborated testimony of an accomplice." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312.)

The trial court instructed the jury that it was for them to decide whether Renschler was an accomplice

but only as to the possession of methamphetamine for sale offense in count 4. (CT 312-313; RT 333-336.)

"Whether a person is an accomplice within the meaning of [Penal Code] section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

The defendant has the burden of proof on the issue of whether a particular witness is an accomplice to the crime the defendant is charged with committing. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) However, the defendant's burden is satisfied if the prosecution introduces evidence that establishes the accomplice status by a preponderance of the evidence. (*People v. Belton* (1979) 23 Cal.3d 516, 523-524; *People v. Jacobs* (1991) 230 Cal.App.3d 1337, 1342.)

If there is sufficient evidence that a witness is an accomplice, "'the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices,' including the need for corroboration. [Citations.]" (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Frye* (1998) 18 Cal.4th 894, 965-966.)

Jurors are also to be instructed to "view [ ] with caution" the testimony of accomplices called by the

prosecution because "such witness has the motive, opportunity, and means to help himself at the defendant's expense. . . ." (*People v. Guiuan* (1998) 18 Cal.4th 558, 567, 569.)

2. How Appellant's Jury Was Instructed

The court delivered Judicial Council of California Criminal Jury Instructions CALCRIM No. 334 [Accomplice Testimony Must Be Corroborated: Dispute Whether Witness is Accomplice] as to count 4 only (possession for sale of meth) but not CALCRIM No. 335 [Accomplice Testimony: No Dispute Whether Witness is Accomplice].

The court should have given the latter instruction instead, as Renschler was an accomplice to the possession for sale offense as a matter of law. Renschler told the jury that he had accepted drugs – which he must have known were meant for sale as he had just purchased drugs from the same person – in order to hold on to those drugs on behalf of the person who gave the narcotics to him. (RT 99-103, 246-247, 258.)

Furthermore, the instruction should also have been delivered as to the sales counts, as Renschler was an accomplice to the sale of methamphetamine (see below). "[I]f the evidence adduced at trial establishes as a matter of law that a witness was an accomplice to the charged offense, the jury must be so

instructed." (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1218-1219; citing *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

3. A Buyer of Drugs is an Accomplice to their Sale

Is a buyer of narcotics an accomplice of the seller? Two opposite answers have been given by appellate courts in our state, permitting this Court to choose which decisional line to follow. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d, at 455.)

The 'yes' answer is supplied by *People v. Ramirez* (1952) 113 Cal.App.2d 842, 856. Other courts replied with a 'no.' (*People v. Hernandez* (1968) 263 Cal.App.2d 242, 247-248; *People v. Freytas* (1958) 157 Cal.App.2d 706, 714 [no analysis but follows *Mimms* and *Galli*]; *People v. Lamb* (1955) 134 Cal.App.2d 582, 585-586; *People v. Mimms* (1952) 110 Cal.App.2d 310, 311; *People v. Abair* (1951) 102 Cal.App.2d 765, 773 [no analysis]; and *People v. Galli* (1924) 68 Cal.App. 682, 684-685.)

Mimms does not belong on this list – meaning the *Freytas* Court should not have relied on the decision – because it presents the distinct situation that the two buyers in that case were acting as agents of the police in an undercover capacity. (*People v. Mimms, supra,* 110 Cal.App.2d, at 311.) Such "feigned accomplices" fall outside of the corroboration ambit of

Penal Code section 1111. (*People v. Gossett* (1971) 20 Cal.App.3d 230, 234.)

The *Galli* Court reasoned that the possession of the drug by the seller is "separate and distinct" from the possession by the buyer, who does not "abet" the sale because the buyer approaches the crime from a different direction. (*People v. Galli, supra,* 68 Cal.App., at 684-685.)

The *Ramirez* answer presents the better view, even though that court offered no analysis. (*People v. Ramirez, supra,* 113 Cal.App.2d, at 856.) The courts replying in the negative overlooked the fact that a coconspirator is an accomplice. Although in an analogous situation, a thief cannot be the receiver of stolen property, an exception to that rule exists if the two conspired to a prearranged plan for one to steal, the other to receive: "each is an accomplice of the other." (*People v. Lima* (1944) 25 Cal.2d 573, 577-578.)

Another analogous example is that a female can be guilty of rape if she aids and abets a male in the commission of the offense, even though she could not commit the act herself. (*People v. Bartol* (1914) 24 Cal.App. 659, 661.)

Based on Renschler's own testimony, he was an accomplice to the sale of methamphetamine because he conspired with appellant to transact the sale. It was Renschler who phoned appellant, asking him to bring him meth so that Renschler could purchase them. The phone call was an overt act. Appellant promised to stop by the gas station where Renschler

worked and provided its attendant with his requested drugs. (RT 94-96.) "One who is a party to a conspiracy and active in carrying out its object is an accomplice." (*People v. Jones* (1964) 228 Cal.App.2d 74, 94.)

B. Standard of Review

Penal Code section 1111 provides also that

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereto.

(Pen.Code, § 1111.)

A conviction will not be reversed for failure to instruct on the principles governing the law of accomplices if a review of the entire record reveals sufficient evidence of corroboration. (*People v. Frye, supra,* 18 Cal.4th, at 966.) The drug convictions should be reversed if due to the absence of the proper instruction as to both drug counts, it is reasonably probable that appellant would not have been convicted of the drug offenses had CALCRIM No. 335 been given as to both drug counts. (See *People v. Lawley* (2002) 27 Cal.4th 102, 161.)

If there were insufficient corroboration, reversal is required if it is reasonably probable that a result more favorable to appellant would have been reached.

(*People v. Miranda* (1987) 44 Cal.3d 57, 101, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.)

Such corroboration may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*People v. Frye, supra,* 18 Cal.4th, at 966.) Possession of the subject drugs, evidence of flight and silence in the face of accusatory statements support an inference of consciousness of guilt sufficient to corroborate the testimony of an accomplice. (*People v. Perry* (1972) 7 Cal.3d 756, 769-776.)

The accomplice corroboration rule is not required by the federal Constitution. (*People v. Arias* (1996) 13 Cal.4th 92, 143.) The failure to instruct the jury that Renschler was an accomplice to both drug crimes as a matter of law and the lack of corroboration of his testimony constitute prejudicial errors if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Lack of Corroboration Requires Reversal of Drug Counts

The accomplice corroboration rule also applies to statements used as substantive evidence of guilt. (*People v. Andrews* (1989) 49 Cal.3d 200, 214, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.) The testimony of an accomplice includes out-of-court statements made by the accomplice and testified to by another. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132-1133.)

"An accomplice's testimony must be corroborated by independent evidence which, without aid or assistance from the accomplice's testimony, tends to connect the defendant with the crime charged." (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; citing *People v. Perry, supra,* 7 Cal.3d, at 769.)

"To determine if sufficient corroboration exists, we must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence of other witnesses tending to connect the defendant with the offense." (*People v. Falconer, supra,* 201 Cal.App.3d, at 1543; citing *People v. Shaw* (1941) 17 Cal.2d 778, 803-804.)

"[C]orroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value." (*People v. Reingold* (1948) 87 Cal.App.2d 382, 393.) "It must do more than raise a conjecture or suspicion of guilt,

however grave." (*Ibid.*; see also *People v. Perry, supra,* 7 Cal.3d, at 769.)

Excluding Renschler's testimony and any of his out-of-court statements elicited from the deputies, we are left with deputy McDevitt having observed appellant talk with Renschler at the gas station, Renschler having leaned into appellant's car and when Renschler had pulled back from the vehicle, McDevitt had seen what appeared to the deputy as Renschler having held something in his right hand that Renschler had put directly into his jacket pocket, after which Renschler walked back to the service desk at a fast pace. (RT 148, 156-161.)

Based on that, only rank speculation can link appellant with the drugs found in Renschler's belongings and at the latter's place of work. Any of the evidence obtained at appellant's home (trash bag with the missing piece; scales; residue; gun) may be indicative of appellant's drug involvement but does not connect him to any drug offense at the gas station that night. McDevitt had a hunch that he had witnessed a drug transaction at the gas station but he provided no evidence thereof from his observations. (RT 162.) Renschler's testimony was needed to link appellant to the drugs. Renschler's accomplice testimony was uncorroborated as a matter of law. (*People v. Falconer, supra,* 201 Cal.App.3d, at 1544.)

The lack of corroboration of Renschler that appellant committed the charged drug crimes, the fact that the jury was not instructed to require corroboration

of Renschler's testimony on the sales count, the uncertainty whether the jury found Renschler to be an accomplice on the possession for sale count (they were given the optional instruction that they could find him to have been an accomplice even though they should have been instructed that he was an accomplice as a matter of law)[20], and the jury's reliance on evidence that could not properly be used to corroborate Renschler's testimony, are all problematic as to the methamphetamine counts.

By failing to produce any corroborating evidence which would tend in any way to connect appellant to the drug crimes, the prosecution did not present a prima facie case, entitling appellant to reversals on counts 3 and 4. (See *People v. Martinez* (1982) 132 Cal.App.3d 119, 133.)

III. FAILURE OF TRIAL COUNSEL TO MOVE FOR ACQUITTAL DEPRIVED APPELLANT OF ACQUITTALS ON ALL COUNTS AT THE CLOSE OF THE PROSECUTION EVIDENCE

Appellant's trial counsel did not move for a judgment of acquittal on any counts after the prosecution rested or before the case was submitted to the jury. (CT 185-187.) A defendant may move for the entry of a judgment of acquittal on one or more of the offenses charged "if the evidence then before the court

[20] CALCRIM No. 334 was delivered. (RT 333-336.)

is insufficient to sustain a conviction of such offense or offenses on appeal." (Pen.Code, § 1118.1.)

The standard applied at trial in ruling upon such a motion "is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.)

"The sufficiency of the evidence is tested as it stood at the time of the defendant's motion." (*People v. Cole* (2004) 33 Cal.4th 1158, 1213; see *In re Anthony J.* (2004) 117 Cal.App.4th 718, 730 [deficiency in prosecution's case not cured by subsequent testimony].)

A. Gun and Ammunition Counts

The prosecution rested without having proven appellant's felony status, an element of the gun possession and ammunition offenses charged in counts 1 and 2. (Pen.Code, §§ 12021, subd. (a)(1) and 12316, subd. (b)(1).) Had trial counsel, at that point in time, moved for a judgment of acquittal on counts 1 and 2, his client would have been entitled to a judgment of acquittal on both counts. But trial counsel did not make the motion.

As the sole item of evidence in the defense case, trial counsel then read the jury a stipulation ("Mr. Solomon and the prosecution have stipulated or

agreed that Mr. Solomon was previously convicted of a felony"). (RT 320.) In closing, trial counsel conceded that guilt had been proven beyond a reasonable doubt on counts 1 and 2 and invited the jury to convict appellant on those counts. (RT 371-372.)

Using the familiar *Strickland* test, counsel's representation fell below an objective standard of reasonableness because he did not move for judgments of acquittal on counts 1 and 2 at a time that they had to be granted, and that there exists a reasonable probability that, but for counsel's unprofessional errors, counts 1 and 2 would have vanished. (See *Strickland v. Washington, supra,* 466 U.S. at 688, 694.)

"A reversal is required but is not an adequate remedy, as a retrial would result. In this situation, a retrial would violate the prohibition against double jeopardy." (*People v. Falconer, supra,* 201 Cal.App.3d, at 1544; citing *People v. Belton, supra,* 23 Cal.3d, at 527, fn. 13 [in *Falconer,* a motion was timely made but improperly denied].) The judgments on counts 1 and 2 must reversed and the trial court directed to enter judgments of acquittal on both counts. (*People v. Falconer, supra,* 201 Cal.App.3d, at 1544.)

B. Drug Counts

As discussed above, Renschler's testimony lacked corroboration and without it, appellant would have been entitled to the entry of judgments of acquittal on the drug charges in counts 3 and 4, had his counsel made a timely motion under Penal Code section

1118.1. Double jeopardy principles would preclude retrial.

CONCLUSION

Appellant's convictions should be reversed, and the trial court directed to enter judgments of acquittal on all counts.

DATED: July 15, 2011.

Respectfully submitted,

PAUL F. DeMEESTER
Attorney for Appellant

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent, vs. PETER PIERO SOLOMON, Petitioner-Appellant. /	No. _____ Court of Appeal No. A129352 (First Dist. Division Two) Contra Costa County Sup. Ct. No. 5-100197-3

PETITION FOR REVIEW

(Filed Aug. 27, 2012)

Following the July 16, 2012, Court of Appeal Decision Affirming the Judgment

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[Table Of Contents Omitted In Printing]

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE

HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner PETER SOLOMON petitions this Court for review following the filing of the Court of Appeal's unpublished opinion on July 16, 2012 (see Appendix).

Issues Presented for Review

1) Did *Jones v. United States* (1958) 357 U.S. 493 establish that an unauthorized nighttime residential search constitutes a Fourth Amendment violation?

2) Were nighttime residential searches regarded as unreasonable by the Framers?

3) Is the exclusionary rule consistent with early remedies for constitutional violations?

Necessity for Review

Review is necessary to settle an important question of law. (Cal. Rules of Ct., rule 8.500, subd. (b)(1).) Review is appropriate to address "questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases." (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4.)

Prior to the passage of Proposition 8 in 1982, appellate decisions in *People v. Watson* (1977) 75

Cal.App.3d 592 and *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320 had held that the Fourth Amendment required suppression of evidence seized in nighttime searches when good cause for night service had not been shown as required by Penal Code section 1533. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1468.) The *Rodriguez* court construed federal law not to require the exclusion of evidence seized in a nighttime search that violated the requirements of section 1533. (*Id.,* at 1469-1470.)

But this Court, however, has not spoken on whether evidence should be excluded when a nighttime search is conducted without a magistrate's approval and without good cause therefore having been shown in the search warrant affidavit. But the United States Supreme Court has. (*Jones v. United States, supra,* 357 U.S. 493.)

The answer must further be guided by the meaning ascribed by the Framers of the Fourth Amendment to the term "reasonable search." (*Wilson v. Arkansas* (1995) 514 U.S. 927, 931; citing *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 337.)

At that time, nighttime residential searches were unreasonable. Abundant historical research demonstrates this notion. But case law has not taken that history into account.

Although exclusion of evidence is a remedy of more modern vintage, early remedies at the time of

the Framing were consistent with the exclusionary rule. Again, our cases have not addressed this aspect.

Statement of the Case

The District Attorney for Contra Costa County filed an information charging petitioner with having committed four felonies on January 2 and 3, 2010: possession of a firearm by a felon (count 1 – Pen.Code, § 12021, subd. (a)(1)); possession of ammunition by a felon (count 2 – Pen.Code, § 12316, subd. (b)(1)); sale of methamphetamine (count 3 – Health & Safety Code, § 11379, subd. (a)); and possession for sale of methamphetamine (count 4 – Health & Safety Code, § 11378). Two misdemeanor charges were dismissed prior to trial. One prior felony drug conviction (Health & Safety Code, § 11370.2, subd. (c); two prison priors (Pen.Code, § 667.5, subd.(b)); and two separate probation ineligibility priors (Pen.Code, §§ 1203, subd. (e)(4) and 1203.07, subd. (a)(11)) were alleged as sentencing enhancements. (CT 101-105.)

Petitioner's motion to quash and traverse the search warrant that had issued for the search of petitioner's home, was denied. The motion was not based on the search having been an unauthorized nighttime search. (CT 113-142, 144-156.) Trial was by jury. Petitioner was found guilty of the remaining charges. (CT 265-270.) The court found the priors to be true. (RT 465, 467.)

The court sentenced petitioner to an aggregate prison term of three years, eight months. (SCT 3-4.)

On appeal, petitioner argued that the evidence obtained in the nighttime search should have been suppressed, requiring the reversal of his convictions. The Court of Appeal disagreed and affirmed the judgment of conviction.

Statement of Facts[1]

Michael Renschler was an employee of a gas station, a long-time user of methamphetamine, and a friend of petitioner, who sold him methamphetamine. On the evening of January 2, 2010, petitioner was on his way to the station to deliver some methamphetamine to Renschler when he was spotted by Deputy Sheriff Pliler driving a vehicle without current registration. At Pliler's request, Deputy McDevitt began observing petitioner.

When petitioner got to the gas station, he exchanged a small bindle for cash from Renschler. Petitioner also asked Renschler to retrieve "something" from the car ashtray, "hang on to it and he will pick it up later." Renschler reached inside the car and pulled out of the dashboard ash tray a sandwich baggie containing what Renschler assumed was methamphetamine. When petitioner left the station, Deputy McDevitt radioed what he had seen, namely, "a drug transaction," to Deputy Pliler.

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[1] The Statement of Facts is taken from the Court of Appeal decision, modified as to petitioner's appellation. (Slip opn., at 2-3.)

Deputy Pliler stopped petitioner's car. Deputy McDevitt then arrived with a dog trained to detect the smell of methamphetamine. The dog "alerted," signaling the smell of a controlled substance. However, although petitioner had a considerable amount of cash, no "contraband" was found on him or in his car.

The deputies believed petitioner was under the influence of a controlled substance. After he was arrested for that offense, the deputies took petitioner back to the gas station. After a fair amount of questioning of Renschler, the deputies concluded that he, too, was under the influence. Renschler refused permission to search the gas station office, where he'd secreted the baggie taken from petitioner's car. After the dog "alerted" in the station office, Renschler admitted to have methamphetamine on him. The bindle petitioner sold him was found in Renschler's wallet, and Renscler too was arrested. After he and petitioner were taken to a police station, Renschler told the deputies that he "bought the meth" from petitioner. He also revealed the location of the baggie he took from petitioner's car. The baggie contained a lump of white crystal substance that Deputy McDevitt described as being of "golf-ball size."

Deputy McDevitt applied for a warrant authorizing a search of petitioner's apartment. The search, conducted the next day, January 3, 2010, with the dog, produced the following: in the living room, a scale with methamphetamine residue, a glass pipe for smoking methamphetamine, and "a single .25 caliber unexpended bullet"; in the bedroom, "a .25 caliber

handgun with a magazine"; and in the kitchen, another scale and packaging that matched that used in the bindle found on Renschler. Expert testimony established that the substances seized were in fact methamphetamine. The testimony of another expert constituted a basis for the jury concluding that petitioner possessed methamphetamine for the purpose of selling it.

Petitioner did not testify or present evidence on his behalf.

ARGUMENT

Introduction

This case raises three related questions on the topic of nighttime residential searches. The first question is whether the decision by the United States Supreme Court in *Jones v. United States* (1958) 357 U.S. 493 established that an unauthorized nighttime residential search is a Fourth Amendment violation?

The Court of Appeal's disagreement with petitioner's position on *Jones* must be disregarded because the court below was analyzing the wrong *Jones* case: *Jones v. United States* (1960) 362 U.S. 257, overruled in *United States v. Salvucci* (1980) 448 U.S. 83, 84-85, instead of the case on point, *Jones v. United States* (1958) 357 U.S. 493.

In addition, as a matter of first impression, this case raises the question whether nighttime residential searches were deemed unreasonable at the time

of Framing, and the follow-up remedial question whether modern day exclusion of evidence comports with the remedies in existence at the time of Framing.

If petitioner is correct, then his trial counsel was ineffective in not litigating the nighttime search issue.

I. *JONES V. UNITED STATES* (1958) 357 U.S. 493 HELD THAT UNAUTHORIZED NIGHTTIME SEARCHES VIOLATE THE FOURTH AMENDMENT

A. Night Service Was Neither Sought Nor Granted

Deputy McDevitt prepared a search warrant application for the search of petitioner's apartment. It did not claim to set forth any good cause for nighttime service of the warrant. (CT 135-142.) The magistrate who approved the search warrant at 4:10 a.m. on the morning of January 3, 2010, did not allow service of the warrant at night. (CT 133.) The search was conducted at approximately 5 o'clock on the morning of January 3, 2010. (RT 256-257.)

B. Standard of Review

> "'An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the

applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.'" [Citation.]

(*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

C. Nighttime Warrant Service Requires Good Cause and Magistrate's Approval

Penal Code section 1533 provides that:

> Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m.

(Pen.Code, § 1533.)

D. Exclusion of Evidence Required Only When Compelled by Federal Law

In 1982, Proposition 8 added article I, section 28, subd. (d) to the California Constitution, mandating that relevant evidence shall not be excluded in any criminal proceeding. This Court explained its legal effect in the context of suppression issues in *In re Lance W.* (1985) 37 Cal.3d 873, 886-887: "What Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."

E. Nighttime Searches without Judicial Approval Violate the Federal Constitution, Requiring Exclusion of Evidence so Obtained, as Held by *United States v. Jones*

In *Jones v. United States,* a federal agent obtained a daytime search warrant to search Joy Jones's house, based on the officer's belief that the home sheltered an illicit distillery. Late in the afternoon when the warrant had been obtained, but still in daylight, officers returned to the house. But rather than execute the search warrant, they decided to make further observations. (*Jones v. United States* (1958) 357 U.S. 493, 494-495.)

At about 9 p.m., after darkness had set in, the officers noticed a truck enter the house's yard out of

sight of the lawmen. When a short time later, the truck tried to leave, it got stuck in the driveway. The truck's two occupants were arrested and 413 gallons of liquor on which no taxes had been paid, were seized. (*Id.,* at 495.)

About that time, Jones's wife returned home with the kids. She rushed to the house and blocked entry to the door. When an agent identified himself, she demanded to see a warrant. The agent told her that no warrant was needed and brushed past her. From the hands of her young son, the agent took a shotgun which the young boy was brandishing in an attempt to prevent entry. Jones was arrested about an hour after the search was completed upon his return home. (*Ibid.*)

The search by the officers yielded distilling equipment, which Jones moved to suppress for use as evidence at trial. The prosecution conceded that the daytime warrant had expired but urged that the search was reasonable because the crime was being committed in the presence of the officers who assumed they had probable cause, obviating the need for a nighttime search warrant. (*Id.,* at 496.)

The Supreme Court held that the Fourth Amendment had been violated. (*Id.,* at 497.) The Court stated that "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance." (*Id.,* at 498.) The Court reversed the judgments of the courts below

it because "the evidence obtained through this unlawful search was admitted at the trial." (*Id.,* at 500.)

The case at bench is akin to *Jones*: a daytime search warrant had been approved by a judicial officer; the officers decided not to search during the day; the suspect was not home during the search; and the search occurred at night. The only distinction was that in *Jones,* the officers observed nighttime activity at the home consistent with criminality immediately prior to the search. In this case, there was no such home activity. Yet, the *Jones* Court found the nighttime search action to have violated the Fourth Amendment. In other words, the facts in *Jones* were more in favor of admitting the evidence yet that argument did not prevail.

The *Jones* Court left no doubt that it issued a constitutional ruling when it held that the lower court judgments "cannot be squared with the Fourth Amendment to the Constitution of the United States." (*Id.,* at 497.)

F. Court of Appeal's Treatment of *Jones* is Suspect Because It Relied on the Wrong *Jones v. United States* Case that Arose Two Years After the 1958 *Jones v. United States* Case

The Court of Appeal below agreed that "a violation of Penal Code section 1533 appears to have occurred." (Slip opn., at 4.) But the court erred on the constitutional status of *Jones*:

> And while it is true that *Jones* did involve a nighttime search not authorized by the magistrate's warrant, and the Supreme Court did conclude that the conviction "cannot be squared with the Fourth Amendment" (*Jones v. United States, supra,* at p. 497), the court has subsequently made it clear that the sole constitutional dimension of *Jones* concerned the issue of standing to challenge the legality of a search. Otherwise *Jones* was only applying Rule 41. (*Rakas v. Illinois* (1978) 439 U.S. 128, 132-133, fn. 2; *Alderman v. United States* (1969) 394 U.S. 165, 173, fn. 6.)

(Slip opn., at 4-5.)

But the Court of Appeal erred in a major way: *Rakas* and *Alderman* both refer to *Jones v. United States* (1960) 362 U.S. 257, a standing case (or better a legitimate expectation of privacy case), not the 1958 decision by the same name.

The Court of Appeal never cited the 1960 *Jones* case. The opinion jumps from discussing the 1958 *Jones* case to the 1960 *Jones* case while still believing that it was discussing the 1958 *Jones* case. Instead, it described the 1960 case, which was indeed a standing case under Rule 41. The 1960 case and its "automatic standing" rule, was later overruled in *United States v. Salvucci* (1980) 448 U.S. 83, 84-85, a fact that went unnoticed by the Court of Appeal.

The mention of the nighttime search portion of Rule 41 (not the portions on standing at issue in the 1960 case) in the correct *Jones* decision (1958) makes

clear that it was not based on Rule 41 but that Rule 41 was cited in support of the Court's constitutional holding:

> The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant.
>
> (*United States v. Jones, supra,* 357 U.S., at 498; citations omitted.)

The constitutional aspect was not lost on Justice Marshall, who was unambiguous about *Jones* having been a constitutional holding:

> Mr. Justice Harlan observed in holding a nighttime search unconstitutional in *Jones v. United States,* 357 U.S. 493, 498 (1958): "(I)t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."
>
> (*Gooding v. United States* (1974) 416 U.S. 430, Marshall, J. dissenting.)

The Court of Appeals' confusion between two distinct cases bearing the same name renders that no credit can be given to the decision's discussion of the

correct *Jones* holding. The 1958 *Jones* holding controls this case.

II. NIGHTTIME SEARCHES BANNED AT TIME OF FRAMING

Our nation's high court, in its 1995 *Wilson* decision, set forth the analytical parameters that guide us in the case at bench. "'Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,' our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." (*Wilson v. Arkansas* (1995) 514 U.S. 927, 931; citing *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 337.)

In investigating the status of nighttime searches at the time of the framing and what remedies existed then, petitioner relies on three sources that have explored either or both of these issues: William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (Oxford University Press 1990) [hereinafter Cuddihy][2]; Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule,* 45 Gonzaga L.Rev. 1 (2010) [hereinafter Roots]; and *State v. Jackson* (Mn.2007) 742 N.W.2d 163.

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[2] Justice O'Connor described Cuddihy's work as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 669 (O'Connor, J., dissenting).)

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 Fourth Amendment was ratified on December 15, 1791. The language of the Fourth Amendment was first proposed by the first U.S. Congress on September 25, 1789. (Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press 2006), at 278-279.) The amendment had first been proposed by James Madison on June 8, 1789, worded slightly differently:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

(Id., at 265-266.)

By the time Madison first proposed his version, every state except Delaware had enacted statutes banning nighttime searches. (Cuddihy, *supra,* at 747-748 & n. 294 [listing statutory examples in Massachusetts,[3] New Hampshire,[4] Connecticut,[5] Rhode Island,[6] New York,[7] Pennsylvania,[8] New Jersey,[9] Maryland,[10]

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[3] Mass. Resolution 1776-77, c. 1176 (7 May 1777), *Mass. Acts and Resolves,* vol. 19 (Resolves: 1775-76), p. 935. Mass. St., c. 51 (10 Mar. 1783), *Mass. Acts and Laws, 1782-83,* pp. 131-32. For an act allowing nocturnal search: Mass. St., 1776-77, sess. 4, c. 45, secs. 1, 2 (9 May 1777), *Mass. Acts and Resolves,* vol. 5 (1769-80), p. 641.

[4] N. H. St. 2nd Gen. Assemb., sess. 3, c. 1 (19 June 1777), *N. H. Laws,* vol. 4 (1776-84), p. 98.

[5] "An Act for Laying an Excise," Ct. St., 1783, Jan. sess., Ct. Laws, Stats., *Acts and Laws,* 1783, Jan. sess., p. 622.

[6] "An Act in Amendment of and Addition to the Laws Already in Force for Collecting Duties Upon Imported Goods," R. I. St., 1785, Oct. sess., *R. I. Acts* (1747-1800), [vol. 13], *1784-85,* 1785, Oct. sess., p. 43.

[7] N. Y.St., sess. 5, c. 39, sec. 3 (13 Apr. 1782), *N. Y. State Laws,* vol. 1 (1777-84), p. 480. N. Y.St., sess. 8, c. 7 (18 Nov. 1784), *ibid.,* vol., 2 (1785-88), p. 17.

[8] Pa. St., c. 1161, sec. 3 (5 Apr. 1785), *Pa. Stats.,* vol. 11 (1782-85) p. 577. Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *ibid.,* vol. 12 (1785-87), p. 421.

[9] N. J. St., 5th Gen. Assemb., 2nd Sitting, c. 44, sec. 3 (28 June 1781), N. J. Laws, Stats., *Acts, 1780-81,* May sess., pp. 115 at 116-17, N. J. St., 6th Gen. Assemb., 2nd Sitting, c. 32, sec. 18 (24 June 1782), *ibid., 1781-82,* May sess., pp. 95, 105 at 101.

[10] Md. St., 1784, c. 84, sec. 7, *Laws of Maryland, . . . 1784,* unpaginated.

Virginia,[11] North Carolina,[12] South Carolina,[13] and Georgia[14]].)

One of the two Pennsylvania examples cited by Cuddihy provided that:

> And be it further enacted by the authority aforesaid, That any justice of the peace within the limits of the said city and the adjacent county within two miles of the said city on demand made by such superintendent or keeper of the said magazine showing a reasonable cause on oath or affirmation may issue his warrant under his hand and seal empowering such superintendent or keeper of the said magazine to search in the day time any house, store, shop, cellar or other place or any boat, ship or other vessels for any quantity of gunpowder forbidden by this act to be kept in any place or places and for that purpose to break open in the day time any such house, store, shop or other places aforesaid or any boat, ship or other vessel if there be occasion and the said

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[11] Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.,* vol. 12 (1785-88), p. 308.

[12] N. C. St., 1784, sess. 1 (Apr.), c. 4, sec. 7, *Laws, 1774-88; N. C. State Recs.,* vol. 24, p. 50.

[13] S. C. St., no. 1196, sec. 23 (13 Aug. 1783), *S. C. Stats.,* vol. 4 (1752-86), pp. 581-82.

[14] "An Act to Revise and Amend an Act for Regulating the Trade Laying Duties Upon All Wares," Ga. St., 13 Aug. 1786, *Statutes, 1774-1805; Ga. Col. Recs.,* vol. 19, p. 2, pp. 507-08, Graydon, *Justices and Constables Assistant* (1805), p. 269.

> superintendent or keeper of the said magazine on finding such gunpowder may sieze and remove the same in twelve hours from any such place or places, boats, ships or vessels to the said magazine and therein detain the same until it be determined in the proper court whether it be forfeited or not, by virtue of this act and the said superintendent or keeper of the said magazine shall not in the mean time be sued for seizing, keeping or detaining the same nor shall any writ of replevin issue therefore until such determination as aforesaid be made but all such suits are hereby declared illegal, erroneous and abated.
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> (Pa. St., c. 1279, sec. 12 (28 Mar. 1787), *Pa. Stats.,* vol. 12 (1785-87), pp. 421-422; cited in Cuddihy, *supra,* at 747, n. 294.)

The Virginia example cited by Cuddihy reads in part:

> IX. *And be it enacted,* That it shall be lawful for the searchers, as well as for the naval officers, and for any other person, having good cause to suspect that any goods, wares, or merchandises, on which duties have not been paid, are stored or secreted in any house, warehouse, or storehouse, to apply to a justice of the peace, or alderman of the corporation, for a warrant (which warrant shall not be granted but on information upon oath) and being accompanied with a constable, to break open in the day time, such suspected house, warehouse, or storehouse, when it may be necessary; and any

> goods so found, on which the duties have not been paid, or secured to be paid, may be seized and carried away, and together with the vessel from which the same were delivered, shall be forfeited. . . .
>
> (Va. St., 1786 (11 Commonwealth), Oct. sess., c. 40, sec. 9, *Va. Stats.,* vol. 12 (1785-88), p. 308; cited in Cuddihy, *supra,* at 747, n. 294.)

Cuddihy conducted a thorough review of the early statutes and described the fruits of his research:

> An occasional wartime measure had allowed nighttime searches, while Delaware's legislation after 1776 ignored them, neither allowing nor prohibiting. Otherwise, the overwhelming preponderance of American statutes after 1776, and even more so after 1782, when hostilities concluded, forbade house searches, and even mere entrances to arrest, at night.
>
> This extinction of nocturnal house searches was incremental and incidental rather than topical and global, for no state abolished them categorically. Rather, the extinction was incidental to the multitude of applications that characterize routine legislation, such as excises, imposts, game poaching, smuggling, ammunition storage, and the like. In other words, the states annihilated the nocturnal house search by assuming rather than announcing its unreasonableness. The effect was the same, however, for assumptions are no less authoritative reflectors of belief than declarations.

> Second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding. In the 1780s, American law rejected nighttime searches even more than general ones. Even the jurisdictions that retained general warrants denounced searches at night in most circumstances [citing New York, South Carolina and Georgia], and the authors of the Fourth Amendment left no doubt on the issue.
>
> Affirming state tradition, the [federal] Collection and Excise Acts of 1788-91 restricted all searches of buildings and search warrants that they permitted to the day time, even warrantless searches of distilleries.[15] The creators of the amendment did not renounce all searches without warrant, but they impliedly renounced all searches on land at night, whether by warrant or without. (Cuddihy, *supra,* at 747-748; footnotes omitted.)

Comparing British search and seizure practices with that of America, Cuddihy states that "[p]erhaps the most dramatic divergence of the American law of search from the British pattern, therefore, was the

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[15] In footnote 296, Cuddihy cites: "U. S. St., 1st Congr., 1st sess., c. 5, sec. 24 (31 July 1789), *U.S. Stats.,* vol. 1 (1789-99), pp. 29 at 43." (Cuddihy, *supra,* at 748, n. 296.)

American rejection of the nocturnal search." (Id., at 661.)

The American practice was not the subject of congressional protests, pamphlets or newspaper articles as were the warrantless house searches and general warrants that marked British rule. (Id., at 781.)

> A different foundation, that of unspoken assumption, had also established the unconstitutionality of nocturnal searches. Although Americans often denounced general warrants and warrantless, door-to-door searches in the 1770s and 1780s, they said nothing regarding nocturnal entrance of their dwellings, either for or against. Nonetheless, the statutes that they enacted on the subject, both federal and state, palpably assumed the unconstitutionality of nocturnal entrance into the domicile in the decade before the amendment's framing. No state permitted such entrance; Delaware ignored it; the rest voted against it by assumption, yielding, in effect, a *de facto* 12-0-1 mandate against the entry of dwellings after the sun set.
>
> (Ibid.)

The aversion to nighttime searches that motivated the early statutes was reflected in some of the writings by the Founders. For instance, as early as 1774, John Adams described the unique status occupied by the home at night:

> Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquility which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave.
>
> (1 Legal Papers of John Adams 137 (L. Kinvin Wroth & Hiller B. Zobel eds., The Belknap Press 1965 (republished from the 1774 original); cited in *State v. Jackson, supra,* 742 N.W.2d, at 169-170.)

The historical evidence demonstrates that at the time of the Framing, nighttime searches were constitutionally unreasonable. This evidence may not be ignored. The Supreme Court has held that the "Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted. . . ." (*Carroll v. United States* (1925) 267 U.S. 132, 149.)

Justice Scalia warned against applying modern concepts of what police officers should be allowed to do. "It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness 'is to preserve that degree of respect for the privacy of persons and the inviolability of their

property that existed when the provision was adopted-even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" (*Richards v. Wisconsin* (1997) 520 U.S. 385, 392, fn. 4; quoting *Minnesota v. Dickerson* (1993) 508 U.S. 366, 380 (Scalia, J., concurring).)

III. EXCLUSIONARY RULE IS CONSISTENT WITH EARLY REMEDIES

A. Exclusion is an Ancient Remedy

The exclusionary rule was created by the United States Supreme Court as a "prudential doctrine" to "compel respect for the constitutional guaranty." (*Davis v. United States* (2011) 564 U.S. ___, 131 S.Ct. 2419, 2426.) Its origin dates to 1914 in the case of *Weeks v. United States* (1914) 232 U.S. 383. Evidence seized in violation of the Fourth Amendment cannot be used against a defendant at trial. (*Id.,* at 398.) It was applied to state court practice under the Fourteenth Amendment in *Mapp v. Ohio* (1961) 367 U.S. 643, 655.

Although the *Davis* Court pointed out that the "Fourth Amendment . . . is silent about how this right is to be enforced," (*Davis v. United States, supra,* 131 S.Ct., at 2423) recent research has revealed that "exclusion is an ancient remedy" (Roots, *supra,* at 1). Roots's research establishes that "the Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period." (Roots, *supra, at* 1.)

"During the late eighteenth century, when the Constitution was debated and ratified, there were no professional police officers to enforce criminal laws." (Id., at 11; footnote omitted.) "Initiation and investigation of criminal cases was the nearly exclusive province of private persons. . . . The courts of that period were venues for private litigation – whether civil or criminal – and the state was rarely a party." (Ibid.; citation omitted.)

Of course, the Bill of Rights limited the Federal Government only, not private parties. (Id., at 12; see *Barron v. City of Baltimore* (1833) 32 U.S. 243.) Moreover, the United States Supreme Court did not have appellate jurisdiction in criminal cases. (*United States v. More* (1805) 7 U.S. 159, 172-174.) Congress did not enact its first Supreme Court criminal appellate review statute until 1874 (specified Utah Territory cases only) and did not provide for such review in capital cases until 1889; and finally to all federal criminal defendants convicted of "infamous crimes" until 1891. (Alan G. Gless, Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion, 45 Am. J. Legal History 391, 394 (2001) [hereinafter Gless]; 3 C. Warren, The Supreme Court in United States History 54, n. 1 (1922) [hereinafter Warren].)

This explains why it took until 1886 before the Supreme Court first delved into the exclusion of evidence issue in a search and seizure case. (Roots, *supra,* at 12-13; referring to *Boyd v. United States*

(1886) 116 U.S. 616, 622-623.) In that earliest decision to construe the Fourth Amendment's applicability to physical evidence, the *Boyd* Court applied an exclusionary rule.

"Nonetheless, the broad principles upon which exclusion of physical evidence is grounded were certainly ever-present in the Founders' constructions of search and seizure protections." (Roots, *supra,* at 13.)

Three sources of potential remedies are explicitly stated in the Constitution and a fourth is suggested by Alexander Hamilton in *Federalist* No. 83. The three explicit constitutional remedies are: (1) the habeas corpus[16] clause, article I, section 9, clause 2; (2) the Seventh Amendment right to civil jury trials; and (3) the Fifth Amendment's description of an exclusionary rule in the context of self-incrimination [a coupling of Fourth and Fifth Amendments as done in *Boyd, supra,* 116 U.S. 616].

The fourth possibility – suggested by Hamilton – is the bringing of criminal charges against officials who violate the Fourth Amendment protections, as was done in *State v. Brown* (1854) 5 Del. (5 Harr.) 505, 506 [officer indicted and convicted for entering an occupied dwelling at night without a warrant

[16] The Supreme Court did not have criminal appellate jurisdiction but did possess various degrees of appellate habeas jurisdiction over federal circuit cases. (Warren, *supra,* at 187.)

while chasing a fleeing felon]. (Roots, *supra,* at 13 & n. 69.)

A case published in the first volume of the first case reporter ever printed in the United States, suggests that courts would impair criminal proceedings when a Fourth Amendment illegality had been found. (Id., at 17-18.)

The case was *Frisbie v. Butler* (Conn.Super. 1787), 1 Kirby[17] 213, wherein appellant Frisbie had been found guilty of stealing pork from Butler, who had obtained a search warrant from a justice of the peace. (*Ibid.*) Three of the six appellate issues dealt with the lack of the warrant's legality. The Connecticut reviewing court reversed the conviction for reasons unrelated to the warrant but had this to say about the warrant:

> And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal; yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to

[17] Legal historian John Langbein referred to Kirby's Reports as America's first case reports. (Roots, *supra,* at 15, n. 81.) "[A]ppellate courts of the late eighteenth and early nineteenth centuries often had little or no jurisdiction over criminal cases. . . . Thus, appellate criminal opinions on evidentiary matters were rare even when decisions in criminal trial courts were otherwise recorded." (Ibid.)

> determine; as also the sufficiency of several of the other matters assigned in error.

(*Id.,* at 215.)

In his in-depth study, Roots interprets the *Frisbie v. Butler* "vitiates the proceedings" language as a major statement supporting Fourth Amendment exclusion. (Roots, *supra,* at 18.) Roots points out that courts in our Republic's early years employed "ultimate exclusionary sanction" for Fourth Amendment violations: "discharge," using pretrial habeas corpus as the procedural vehicle to effect it (ibid.):

> Lost in the modern discussion of Fourth Amendment remedies is the fact that one ancient remedy – the pretrial writ of habeas corpus – once operated as something of an exclusionary rule in search and seizure cases but has since been stripped of its Founding-era substance. Today we know habeas corpus as a narrow, post-conviction remedy applied mostly as a sentence-review mechanism. But the Framers viewed habeas corpus as primarily a pretrial remedy that was often applied in search and seizure cases. (Id., at 20-21; footnotes omitted.)

An early example of that in the United States Supreme Court was *Ex parte Burford* (1806) 7 U.S. 448, a habeas corpus case wherein Chief Justice John Marshall wrote the Court's opinion holding that a warrant of commitment by justices of the peace must state "some good cause certain, supported by oath." (*Id.,* at 453.) The *Burford* Court decided the case

based on the constitutional clauses against excessive bail (Eighth Amendment), guaranteeing confrontation (Sixth Amendment) and what we now call the Fourth Amendment, referred to by Marshall as "the 6th article of the amendments to the constitution of the United States."[18] (*Ex parte Burford, supra,* 7 U.S., at 451-452.) Because the warrant on the basis of which Burford was detained, was found lacking in that regard, the proceedings were found to be irregular and the prisoner discharged. (*Id.,* at 453.) The Court noted that a proper case could proceed *de novo,* provided the courts took "care that their proceedings are regular." (*Ibid.*) *Burford* is an example where proceedings were "vitiated."

A second United States Supreme Court case illustrates even more clearly how the highest court used the habeas writ to dismiss proceedings in pre-trial fashion. Chief Justice Marshall examined the legality of a commitment for treason to determine "whether the accused shall be discharged or held to trial." (*Ex parte Bollman* (1807) 8 U.S. 75, 125.) Finding that "the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged." But the Court left open the possibility that "fresh proceedings against them" might be properly instituted, implying

[18] On September 25, 1789, Congress submitted twelve articles to the States for ratification. The first two were not ratified, hence the different numbering system in *Burford.* (See Labunski, *supra,* at 278-280.)

necessarily that the current proceedings were vitiated by way of habeas discharge. (*Id.,* at 136-137.)

In other cases, a demurrer was the procedural vehicle to defeat the criminal case. One such example was a civil action wherein the justice of the peace who issued an illegal warrant and the constable who served the warrant that was illegal on its face, were both held civilly liable in trespass, after the criminal case was defeated by way of demurrer. (*Grunion v. Raymond* (Conn.1814) 1 Conn. 40.)

The existence of the second potential remedy, a civil suit, was not in lieu of a criminal case dismissal, but in addition. For instance, in *Murray v. Lackey* (N.C.1818) 6 N.C. 368, the perjury defendant's criminal case had been commenced by warrant taken out by the civil defendant in the later civil action; after discharge in the criminal action, the criminal defendant then sued the warrant taker for malicious prosecution. Although the plaintiff lost the civil suit, the case shows the availability of the civil suit option in addition to termination of criminal proceedings, not instead thereof. (*Ibid.*)

The modern doctrines of immunity for police, prosecution and the judiciary were unheard of in early America. (Roots, *supra,* at 36, n. 229; citing *Burlingham v. Wylee* (Conn.Super.1794) 2 Root 152, 152-153 [justice of the peace and officer held liable], and *Percival v. Jones* (N.Y.Supr.1800) 2 Johns.Cas. 49, 50-51 [justice of the peace found liable for false imprisonment].)

The North Carolina Supreme Court defined "discharge" as meaning "where proceedings are at end and cannot be revived." (*Murray v. Lackey, supra,* 6 N.C., at 368.) Along the same lines, a habeas discharge of the prisoner spelled the end of criminal proceedings against that prisoner. Roots calls a habeas corpus discharge "a form of exclusion by another name – . . . thought to be required under the Fourth Amendment." (Roots, *supra,* at 30.) "Prior to the Civil War, habeas corpus was invoked mostly to attack pretrial proceedings, and search and seizure issues were among the most common matters that were remedied by the Great Writ." (Ibid.)

B. Hudson Decision Not Applicable to Nighttime Searches

"Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" (*United States v. Leon* (1984) 468 U.S. 897, 906; quoting *Illinois v. Gates* (1983) 462 U.S. 213, 223.) "The rule's sole purpose . . . is to deter future Fourth Amendment violations." (*Davis v. United States, supra,* 131 S.Ct., at 2426.)

In *Hudson v. Michigan* (2006) 547 U.S. 586, the Supreme Court held that the exclusionary rule does not apply to violations of the knock-and-announce rule. But the interests involved in the bar against

nighttime searches are significantly different from the interests protected by police announcing their presence.

> At the core of Hudson is the Supreme Court's determination that a knock-and-announce violation does not require suppression was that the police in Hudson would have discovered the evidence whether they had knocked and announced or not. In contrast, in the context of a nighttime search, if the police do not search and seize evidence at night, there is no guarantee that it will be there the following day. The Court's reliance on the inevitability of discovery in Hudson is inapplicable here.
>
> (*State v. Jackson, supra,* 742 N.W.2d, at 178; citations and footnote omitted.)

The Court has noted that the exclusionary rule applies "only where its deterrence benefits outweigh its 'substantial social costs.'" (*Pennsylvania Bd. of Probation and Parole v. Scott* (1988) 524 U.S. 357, 363.) The Minnesota Supreme Court concluded that prohibited nighttime entry by police "is capable of repetition and that application of the exclusionary rule will have an appreciable deterrent effect." (*State v. Jackson, supra,* 742 N.W.2d, at 179.)

"The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." (*United States v. Ceccolini* (1978) 435 U.S. 268, 279.) Because the

nighttime security of one's home is such a vital interest, the best way to prevent police officials from violating the nighttime entry ban is to preclude the use of any evidence derived from such entry.

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." (*Hudson v. Michigan, supra,* 547 U.S., at 596.) "'[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule. Similarly, in *Krull* we elaborated that 'evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" (*Herring v. United States* (2009) 555 U.S. 135, 143; quoting *United States v. Leon, supra,* 468 U.S., at 911, and *United States v. Peltier* (1975) 422 U.S. 531, 542.) In petitioner's case, there can be no question that the officers conducting the search of his home had knowledge that the search was without nighttime approval, and therefore contravened the Fourth Amendment.

"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." (*Herring v. United States, supra,* 555 U.S., at 144.) This concept is apt in appellant's case. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws,

or worse, its disregard of the charter of its own existence." (*Mapp v. Ohio, supra,* 367 U.S., at 659.)

"Since the warrant was 'legally invalid' the officers' entry into the defendant's apartment was on the same plane as an entry without any warrant at all and as such was an unlawful 'invasion' within the proscription of the Fourth Amendment." (*United States v. Merritt* (3d Cir.1961) 293 F.2d 742, 743.)

Penal Code section 1533 protects persons from unauthorized police invasion 9 out of 24 hours of the day, "whereas the rule against unannounced searches protects individuals for 10 to 15 seconds during which the police must wait before they can enter a home." (See *State v. Jackson, supra,* 742 N.W.2d, at 176; citing *United States v. Banks* (2003) 540 U.S. 31, 38-40 [knock-and-announce case involving the length of time officers should wait after announcing themselves before seeking entry of a home pursuant to a warrant].)

The *Hudson* Court noted that the knock-and-announce rule "is not easily applied." Exceptions exist (threat of physical violence and likely destruction of evidence with advance notice). (*Hudson v. Michigan, supra,* 547 U.S., at 589.) The ban on nighttime entries does not have any such exceptions. The ban is an easily applied bright-line rule.

Once the knock-and-announce rule is held to apply, a court's task becomes difficult:

> . . . it is not easy to determine precisely what officers must do. How many seconds' wait are too few? Our "reasonable wait time standard," see *United States v. Banks,* 540 U.S. 31, 41 (2003), is necessarily vague. *Banks* (a drug case, like this one) held that the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs-but that such a time (15 to 20 seconds in that case) would necessarily be extended when, for instance, the suspected contraband was not easily concealed. *Id.,* at 40-41. If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante,* police officers about to encounter someone who may try to harm them will be uncertain how long to wait.
>
> (*Hudson v. Michigan, supra,* 547 U.S., at 590.)

A court's task in determining whether a nighttime entry ban was violated is simple: at what time was entry gained?

Adherence by police officers of the knock-and-announce rule may have negative consequences if exclusion is the remedy for a violation of the rule. "If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires-producing preventable violence against officers in some cases, and the destruction of evidence in many others." (*Id.,* at 595.) The nighttime entry ban never suffers such nefast consequences.

Hence, there is no social cost associated as there is when officers in the field have to gauge how much knock-and-announce time is sufficient or whether an exception applies.

That petitioner may not have been home at the time of the search is of no import. The interest protected is not just that of the intrusion of the person but rather the person's interest in maintaining a secure home, whether he is home or not. (*State v. Jordan* (Mn.2007) 742 N.W.2d 149, 154.)

The good-faith exception to the exclusionary rule does not apply because the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." (*Herring v. United States, supra,* 555 U.S., at 145; citing *United States v. Leon, supra,* 468 U.S., at 922, fn. 23.) The answer to that question is a resounding 'yes,' rendering that the good-faith exception does not apply.

IV. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PURSUE NIGHTTIME SEARCH ISSUE

A. Trial Counsel Erred in not Litigating the Nighttime Search

Trial counsel never sought to suppress any evidence based on an unlawful nighttime search. (CT 113-142, 144-156; RT 1-10.) The 5 a.m. time of the

search was not established until trial in answer to a juror question. (RT 256-257.)

Petitioner claims that his right, under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, to the effective assistance of counsel, was violated. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)

"Counsel's competence, however, is presumed, and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." (*Id.,* at 384.) The standard of proof is a preponderance of the evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 449.)

In this case, the presumption is easily overcome. There can be no explanation why trial counsel did not bring a motion to suppress the evidence obtained from the nighttime search of petitioner's home. Trial counsel's failure to litigate the issue was unreasonable.

The Court of Appeal differed, calling trial counsel's decision not to litigate the nighttime search issue " . . . a reasonable tactical decision . . . based on the absence of any authority interpreting *Jones* as defendant now reads it, and counsel's anticipation that if this new basis for suppression was advanced the trial court would reject it on the basis of *Rodriguez.*" (Slip opn., at 5, citing *Rodriguez, supra,* 199 Cal.App.3d 1453.)

The Court of Appeal's conclusion cannot be credited in light of the Court's reliance on the wrong *Jones* case. The correct *Jones* decision trumps *Rodriguez,* a state appellate opinion. Trial counsel should have relied on *Jones,* not *Rodriguez.*

B. Petitioner was Prejudiced by Counsel's Failing

Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

The search of petitioner's home yielded a glass pipe, a precision scale with some crystal substance residue on it, another digital scale, a white plastic trash bag missing a small portion of plastic at the top; a measuring cup containing residue, a cotton-tip swab, several syringes, a .25 caliber handgun and bullet. (RT 181, 183-184, 189, 216-217, 248-249, 257.)

Had these items been suppressed from evidence, petitioner could not have been convicted of having been a felon in possession of a gun (count 1) and of having possessed ammunition as a felon (count 2).

But the methamphetamine sales and possession for sales counts must also be reversed. Petitioner's theory at trial was that Renschler was the seller, petitioner the buyer. (RT 370-371.) Renschler testified opposite. (RT 90-103.) Renschler's credibility was enhanced by the fact that the piece of white plastic found at petitioner's home matched that in which the methamphetamine was packaged that was held by Renschler; the two scales, suspected meth residue, packaging materials and the gun with ammo. All are indicative of petitioner having engaged in the sale of drugs. Without that evidence, the jury might not have believed Renschler's self-serving testimony. There is a reasonable probability that, but for the admission of the nighttime search evidence, the verdicts on counts 3 and 4 would also have been different. All convictions must be reversed.

CONCLUSION

Review should be granted.

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Respectfully submitted,

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