Nos. 1243313, 1243314

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**185TH JUDICIAL DISTRICT**
	§	
MICHAEL VESTAL, ET AL.	§	**HARRIS COUNTY, TEXAS**

MOTION TO SUPPRESS WITH INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Michael Vestal respectfully move this Honorable Court, pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Section 9 of the Texas Constitution; and Article 38.23 of the Texas Code of Criminal Procedure; to suppress as evidence against them at trial the gamma hydroxybutyrate, methamphetamine as well as any associated drug paraphernalia, which were the subject of a illegal search and seizure by the Harris County Sheriff Office. In addition, any statements made by Mr. Vestal that were obtained as a result of an illegal arrest and detention or in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Mr. Vestal is being charged with Possession with Intent to Deliver a Controlled Substance – Penalty Group 1, 4 to 200 grams of Gamma Hydroxybutyrate and Possession of a Controlled Substance – Penalty Group 2, 1 to 4 grams of Methamphetamine.

STATEMENT OF FACTS

On December 2, 2009, Deputy James Savell, a crime control deputy, with the Harris County Sherriff's Office ("Affiant") presented a *Search and Arrest Warrant* ("Warrant") along with accompanying *Affidavit for Search and Arrest Warrant* ("Affidavit") to the Harris County Magistrate, who signed the warrant the same day at

8:47 am. The Warrant Executed December 3, 2009 at 9:00am and the Return of Inventory was filed with the Harris County District Clerks's Office on December 9, 2009 at 11:23am.

The Warrant specified that 10456 Hammerly Blvd., Houston, Harris County, Texas and a blue Chevrolet pickup truck bearing Texas registration SWB 626 were to be searched for Methamphetamine, a Texas controlled substance, in violation of Chapter 481 of the Texas Health and Safety Code.

Besides detailing his police experience and prior training, Affiant relies solely on hearsay information provided by Sergeant Robert Clark ("Clark"), "a certified Texas Peace Officer." The Affidavit is silent to which agency employees Clark.

The Affiant states that a confidential informant contacted Clark in "early November 2009," and that the Confidential Informant ("CI") "has previously supplied Clark with information which has resulted in the issuance of search warrants, the arrest of multiple felony suspects, and the seizure of narcotics." The Affidavit is silent on the number of times the CI has been used, but asserts "each and every occasion that the CI supplied information it was found to be true and correct." In addition, the CI "is a past abuser of methamphetamine and knows it by sight."

The CI provided the following information: (1) Charles Relan was "involved in the sale of large quantities of methamphetamine;" (2) "maintains a safe concealed under his bed in which he conceals narcotics and currency;" (3) he "resided at 10456 Hammerly Houston, TX ("Residence");" (4) he is a "white male with reddish hair;" (5) he "operated a single cab blue Chevrolet pickup bearing Texas registration 42HSH6 and a Mazada Miata convertible sports car;" and (6) that his "roommate named Mike with

LNU [Last Name Unknown], who provides financial backing for the distribution of methamphetamine." But, at no time does the Affidavit state the basis of the CI's information or if the CI has any personal knowledge of these facts.

In an attempt to collaborate the general information provided by the CI, Clark reviews publics records such as Harris County Appraisal District ("HCAD"), which lists Michael Vestal as the owner of 10456 Hammerly, Houston, TX; while Texas Crime Information Computer System ("TCIC") returned date of birth for Mr. Vestal and a Texas Driver's License with the same address.

Despite Clark only just discovering possible occupants of the Residence based on the CI's recent information, Affiant explains that Clark is "familiar with the residence" because "[i]n mid 2008" Harris County Sherriff's Office ("HCSO") received an "anonymous email complaint" stating Mr. Relan was "involved in the Distribution of methamphetamine and that [he] regularly traveled to Arizona to obtain methamphetamine and that the narcotics were concealed in a safe in his bedroom." Nevertheless, the Affiant failed to attach the "anonymous email complaint" as an exhibit to the Warrant nor did he provide a copy the magistrate.

Surprisingly, Affiant reveals "Clark had conducted surveillance on the location during the 2008 investigation, corroborating much of the information." Again, nothing is provided to the Magistrate detailing the information corroborated in 2008 or if it has any bearing to this Warrant.

Nevertheless, Clark begins a second investigation on November 11, 2009 conducting surveillance at the Residence. He observes "a blue Chevrolet pickup truck bearing Texas registration 42HSH6 parked in the car port;" "a white male with reddish

blond hair walk to the vehicle" from the Residence who depicted Mr. Relan's driver's license photograph; and "a blue Mazda Miata bearing Texas registration SWB626 parked beside the… Cheverolet pickup truck." It is Registered to Steven Gerardi, a 53 year old white male who lives in Houston.

Affiant claims Clark is also "familiar with Steven Gerardi as being the brother Charles Robert Gerardi." The Affiant recites following regarding Charles Gerardi, the vehicle owner's brother: (1) Clark and the Affiant arrested him for "Distribution of Methamphetamine;" (2) that "[d]uring previous methamphetamine related investigations, [he] was identified as operating vehicles owned by his brother;" and (3) "[he] is currently on parole form the Texas Department of Criminal Justice ("TDCJ") for Distribution of Methamphetamine." However, Charles Gerardi's court and TDCJ records indicate a convicted of possession of controlled Substance – Penalty Group 1, < 1 gram and that he was arrested by Officer Robert Dimambro of the Houston Police Department. (See "Exhibit 1")

Finally, on December 1, 2009, Affiant accessing the Residence on a common sidewalk serving a multiple complex buildings, placed a narcotics detection canine and its handler, Deputy R. Hoyt, were placed at the front door for an open-air sniff. Deputy Hoyt alleges "a positive alert from his canine partner indicating the presence of a controlled substance."

ARGUMENT AND AUTHORITIES

I. DEPUTY SAVELL'S AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE

A. Review of Search Warrant Affidavit

If the facts relied on to constitute probable cause for a search are not controverted,

the sufficiency of probable cause is a question of law to be determined by the court. *Killingsworth v. State*, 165 Tex. Crim. 286, 306 S.W.2d 715 (1957). In determining whether an affidavit for a search warrant establishes probable cause is to be tested by the "totality of the circumstances" set out in the "four corners" of the affidavit. *Barraza v. State*, 900 S.W.2d 840 (Tex. App. — Corpus Christi 1995). The review of the affidavit for a search warrant is not to be a de novo review of probable cause, but a review to ensure that the issuing magistrate had a substantial basis for concluding that probable cause was shown. *State v. Bradley*, 966 S.W.2d 871 (Tex. App. — Austin 1998).

In instances where an affiant make statements in a search warrant affidavit which are intentionally false or made with reckless disregard for the truth, such statements must be excised before determining whether the affidavit states probable cause. Hass v. State, 790 S.W.2d 609 (Tex.Cr.App.1990); citing Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), on remand 398 A.2d 783 (Del.1979).

B. Anonymous Informants Must Be Reliable and Have Basis for Their Knowledge

The Fourth Amendment to the United States Constitution and Article I, Section 9, of the Texas Constitution, guarantee the right of the people to be secure against unreasonable searches of their persons, houses, papers, and effects. Because of the potential unreliability of statements given by anonymous informants, the United States Supreme Court developed a test for analyzing search warrant affidavits. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Supreme Court established a "two-pronged test" for determining the validity of search warrant affidavits, which are based on hearsay information. The *Aguilar* Court held that an affidavit may be based on hearsay information rather than the direct personal observations of the affiant; however, the

magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and of some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. *Id*. at 114-115.

Under the *Aguilar* test, the affidavit must set forth facts sufficient from which a neutral and detached magistrate can reasonably conclude that the informant had a basis for his allegation that evidence of a crime would be found at a certain location (the "basis of knowledge" prong); and, that the informant's information is reliable (the "veracity" prong). Under *Aguilar*, and *Spinelli v. United States*, 393 U.S. 410 (1969) the entire warrant was invalidated if either prong was found to be insufficient. In *Illinois v. Gates*, 426 U.S. 213 (1983), the Supreme Court invalidated "hypertechnical" interpretations of the *Aguilar* analysis, and modified the analysis to allow for consideration of the totality of the circumstances. *Gates, supra* at 230. The Court of Criminal Appeals has held that *Gates* "did not dispense with the two requirements used in the *Aguilar-Spinelli* test." Rather, the Supreme Court simply held that the prongs should not be applied too rigorously, and the entire affidavit should be examined to determine whether, as a whole, probable cause is established. *Ware v. State*, 724 S.W.2d 38, 40 (Tex. Crim. App. 1986).

The focus of the inquiry is whether the statements of the informant are sufficiently reliable for a finding of probable cause. A deficiency in one of the two factors of reliability of the informant may not be fatal if the totality of the circumstances indicates reliability. *Gates, supra* at 230. However, the totality of the circumstances includes the veracity, reliability and the basis of knowledge of the informant and the informant's information. *Id; see also Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App.

1989).

C. Confidential Informant Had No Basis for Knowledge

The CI provided general conclusory information relating to narcotic trafficing. Specifically, Charles Relan was "involved in the sale of large quantities of methamphetamine;" and that his "roommate named Mike [Last Name Unknown], who provides financial backing for the distribution of methamphetamine." The CI is alleged to have a good track record in furnishing narcotic information, but what was the basis of his knowledge concerning the conclusory statements? The affidavit is silent as to any first-hand information by the informant. It did not include any assertions of personal knowledge or personal observations. No dates or specific addresses, other than the Defendant's, were given. There was no admission against penal interest by the informant which might indicate the informant had knowledge of cocaine sales, or the amounts and fees charged. There is no reasonable inference that the informant had personal knowledge of the assertion made. See, *Serrano v. State*, 123 S.W.3d 53 (Tex. App. Austin 2003), petition for discretionary review filed, (Nov. 7, 2003)(Confidential informant's conclusory tip that defendant was dealing in city along with police search of garbage can revealed plastic baggies containing white powdery substance, did not establish probable cause to believe contraband would be found at residence, as required to issue search warrant).

An informant, even one who has given correct information in the past, may acquire the information for a tip from some other person or source. Hearsay-upon-hearsay may be utilized to show probable cause if the underlying circumstances indicate a substantial basis for crediting the hearsay at each level. See, *Hennessy v. State, 660*

S.W.2d 87, 89 (Tex.Crim.App.1983); *Lowery v. State,* 843 S.W.2d 136, 140 (Tex.App.-Dallas 1992, pet. ref'd). That certainly was not shown in the instant affidavit, if indeed the informant had received his information from another source.

In regards to the CI's statement Mr. Relan "maintains a safe concealed under his bed in which he conceals narcotics and currency" is similar to an affidavit struck down by the Fifth Circuit Court of Appeals where three arrestees stated that the defendant had been their main supplier of narcotics for the last year and that the currency paid for the drugs could be found in the trunk of defendant's automobile. *See, U.S. v. Kolodziej*, 712 F.2d 975 (5th Cir. 1983)(Holding no basis of knowledge was set forth indicating (1) how it was known where the money was kept; (2) that the money was earned in drug trafficking; or (3) that narcotics would actually be found in the house, which was also covered by the warrant). Likewise, the CI gives no indication how he knew about the safe and if he witnessed its use or if he ever observed the sale of narcotics.

While police, for purposes of establishing probable cause to issue search warrant, can provide other indicia of reliability of an informant's tip by independent corroboration of the informant's information, corroboration of only innocent details is usually insufficient. *Elardo v. State*, 163 S.W.3d 760 (Tex. App. Texarkana 2005), reh'g overruled, (Apr. 27, 2005) and petition for discretionary review filed, (June 8, 2005).

Here, Clark's collaboration of HCAD, which lists Michael Vestal as the owner of 10456 Hammerly, Houston, TX; TCIC, which returned Mr. Vestal's Texas Driver's License with the same address; the blue Chevrolet pickup truck bearing Texas registration 42HSH6 parked under the car port; and observing a white male with reddish blond hair who depicted Mr. Relan's driver's license photograph amounted to innocent

details and are insufficient to gain probable cause.

D. Anonymous E-mail Complaint was not Reliable

In general, a mere anonymous tip, standing alone, will not establish probable cause to support issuance of search warrant. *Elardo v. State*, 163 S.W.3d 760 (Tex. App. Texarkana 2005), reh'g overruled, (Apr. 27, 2005) and petition for discretionary review filed, (June 8, 2005). In addition, wholly conclusory statements in the affidavit will not suffice. *Carroll v. State*, 911 S.W.2d 210 (Tex. App. Austin 1995). Therefore, the anonymous email complaint in mid 2008 by Harris County Sherriff's Office ("HCSO") stating Mr. Relan was "involved in the Distribution of methamphetamine and that [he] regularly traveled to Arizona to obtain methamphetamine and that the narcotics were concealed in a safe in his bedroom" cannot be used as probable cause.

Information from an unnamed informant alone will not establish probable cause to support the issuance of search warrant and must contain some indicia of reliability or be reasonably corroborated by police before it can be used to justify a search. *Parish v. State*, 939 S.W.2d 201 (Tex. App. Austin 1997); State v. Steelman, 93 S.W.3d 102 (Tex. Cr. App. 2002). However, Mere corroboration of details that are easily obtainable at the time the information is provided by anonymous informant will not support a finding of probable cause for issuance of search warrant. *Harris v. State*, 184 S.W.3d 801 (Tex. App. Fort Worth 2006). It can be logically concluded that Clark's 2008 surveillance and investigation of the Residence and Mr. Relan, despite "corroborating much of the information" was not sufficient probable cause, otherwise a warrant would have been obtained at that time.

E. Mazda Miata Owned By Steven Gerardi Must Be Excised From Affidavit

The blue Mazda Miata bearing Texas registration SWB626 allegedly parked beside the Cheverolet pickup truck and is registered to Steven Gerardi, a 53 year old white male who lives in Houston is irrelevant an to determining probable cause for the Warrant. Additionally, Steven Gerardi brother Charles Robert Gerardi equally has no bearing on the Warrant.

The Affiant falsely claims he and Clark arrested Charles Gerardi for "Distribution of Methamphetamine and "[he] is currently on parole form the Texas Department of Criminal Justice ("TDCJ") for Distribution of Methamphetamine." However, Harris County Justice Information Management System ("JIMS") records indicate he was arrested and convicted of Possession of Controlled Substance – Penalty Group 1, < 1 gram and that he was arrested by Officer Robert Dimambro of the Houston Police Department. (See "Exhibit 2")

In instances where an affiant make statements in a search warrant affidavit which are intentionally false or made with reckless disregard for the truth, such statements must be excised before determining whether the affidavit states probable cause. Hass v. State, 790 S.W.2d 609 (Tex.Cr.App.1990); citing Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), on remand 398 A.2d 783 (Del.1979).

II. THE WARRANT ITSELF IS CONSTITUTIONALLY DEFICIENT

A. Insufficient to Support Probable Cause

An affidavit that fails to state when affiant received the information from the confidential informant, when the informer obtained the information or when the described conduct took place is insufficient to support the issuance of a search warrant. State v. Davila, 169 S.W.3d 735 (Tex. App. Austin 2005); *Serrano,* 123 S.W.3d at 61

(citing *Schmidt v. State,* 659 S.W.2d 420, 421 (Tex.Crim.App.1983); *Peltier v. State,* 626 S.W.2d 30, 32 (Tex.Crim.App.1981); *Heredia v. State,* 468 S.W.2d 833, 835 (Tex.Crim.App.1971)). Here, the affidavit did not state whether the CI had actually seen the alleged contraband or was merely repeating hearsay information. Moreover, the affidavit did not say when the CI got the information and hence no point of reference for the informer's claim that narcotics were being "conceal" at the suspect address and thus to support an inference that the information was fresh. *Alvarez v. State, 750 S.W.2d 889* (Tex.App.—Corpus Christi 1988, pet. ref'd)(Affidavit which failed to state time when informant made his observation is insufficient to support warrant.).

B. The Warrant Was Stale Because of The Lapse of Time Between The Triggering Events and The Issuance of The Search Warrant.

"Although probable cause may exist at one point to believe that evidence will be found in a given place, the passage of time may (without additional newer facts confirming the location of the evidence sought) render the original information insufficient to establish probable cause at a later time." U.S. v. Freeman, 685 F.2d 942, 951 (5th Cir. 1982); *Guerra v. State,* 860 S.W.2d 609, 611 (Tex.App.-Corpus Christi 1993, pet. ref'd) (stating that the events delineated in the affidavit must have occurred sufficiently close enough in time to the request for the warrant to demonstrate probable cause that the evidence would be found in the suspected place at the time the warrant was issued).

While there is no specific number of days between the triggering events and the issuance of the warrant to render it stale, the amount of the delay is dependent on the particular facts of each specific case, including the nature of the criminal activity as well as the type of evidence sought. *See U.S. v. Freeman*, 685 F.2d 942, 951 (5th Cir. 1982);

Bower v. State, 769 S.W.2d 887 (Tex.Cr.App.1989), cert. denied 492 U.S. 927, 109 S.Ct. 3266, 106 L.Ed.2d 611 (1989).

Assuming we took the time frame stated in the Warrant of "early November 2009" when the CI contacted Clark, but before he began his second investigation on November 11, 2009 and when the Warrant was sought on December 2, 2009, it would be a minimum of 23 days. Courts in most narcotics information will consider the information provided by a confidential informant stale after 72 hours. See, *Brown v. State,* 243 S.W.3d 141 (Tex. App. Eastland 2007), petition for discretionary review refused, (Jan. 16, 2008).

III. CANINE ALERTS AS PROBABLE CAUSE

A. Canine Alerts Can Constitute Probable Cause for Public Places and Vehicles

Canine sniffs are recognized as being less intrusive than a typical search used to determine the presence of contraband, and the practice of using trained dogs to sniff baggage at airports has been held not to constitute a search. *See United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 2644-45, 77 L. Ed. 2d 110 (1983); Likewise**,** the Fifth Circuit has held that "[a] drug-sniffing canine alert is sufficient, standing alone, to support probable cause for a search". *Resendiz v. Miller,* 203 F.3d 902, 903 (5th Cir.2000) (citing *United States v. Williams,* 69 F.3d 27, 28 (5th Cir.1995) (citing *United States v. Seals,* 987 F.2d 1102, 1107 (5th Cir.), *cert. denied,* 510 U.S. 853, 114 S.Ct. 155, 126 L.Ed.2d 116 (1993))). However, in these cases, the sniff was conducted on a vehicle, not a home or business. *See, e.g., Resendez,* 203 F.3d at 903-04; *Williams,* 69 F.3d at 28; *Seals,* 987 F.2d at 1107; *see also United States v. Outlaw,* 319 F.3d 701, 704 (5th Cir.2003) (dog sniff alert on a suitcase created reasonable and individualized suspicion to

inspect bus passengers' tickets and question defendant, whose claim ticket matched suitcase); *United States v. Garcia-Garcia,* 319 F.3d 726, 730 (5th Cir.2003) (drug sniff alert in the aisle of a bus at border checkpoint created reasonable suspicion).

There is "a long-recognized distinction between stationary structures and vehicles" regarding the privacy interests recognized under the Fourth Amendment. *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Because of this distinction, "less rigorous warrant requirements govern [vehicles] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.* (quoting *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)).

The U.S. District Court for the Western District of Texas "concluded because of the 'less rigorous warrant requirements' governing the search of a vehicle, the Court does not read the above-cited Fifth Circuit authority to hold that a dog sniff, taken alone, is sufficient for a finding of probable cause to search an entire home or commercial property, particularly where, as here, the property encompasses nearly half a city block." *See U.S. v. Olivas*, Slip Copy, 2009 WL 2169893 (W. D. Tex., 2009). Nor is there any binding authority holding that an alert necessarily provides probable cause to search a home or commercial property when a known drug trafficker is present. *Id*.

B. A Canine Sniff At The Exterior Of A House Constitutes A Search

United States Court of Appeals for the Second Circuit, in United States v. Thomas, reasoned that "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985) The court explained why United States v. Place should not be applied to

homes:

> Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. *Id*. at 1366-67.

The Washington Supreme Court approached this subject in a similar manner, adopting the rationale that "a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection." State v. Young, 867 P.2d 593, 600 (Wash. 1994). This led a Washington Court of Appeals to hold that the use of a trained narcotics dog on the garage of a home constituted an unreasonable search under Washington's state constitution.

> Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "'see through the walls' of the home." The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as Corky. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog "does expose information that could not have been obtained without the 'device"' and which officers were unable to detect by using "one or more of [their] senses while lawfully present at the vantage point where those senses are used." The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required. State v. Dearman, 962 P.2d 850, 853 (Wash. Ct. App. 1998) (quoting Young, 867 P.2d at 597-98).

C. Canine Alert is Analogous to Thermal Imaging of the Home

In Kyllo v. United States, a 5-4 majority of the Supreme Court reaffirmed the

privileged position of the home in the Fourth Amendment hierarchy: "'At 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 government intrusion.'" Kyllo v. United States, 533 U.S. 27, 38 (2001). With broad statements that all details about the inside of the home are intimate and therefore private, Justice Scalia, writing for the majority, held that the warrantless use of a thermal-imaging device aimed at a private home from the street to detect the relative heat loss from the house was an illegal search.

Kyllo arose when a U.S. Department of the Interior agent became suspicious that marijuana was being grown inside Danny Kyllo's home. Indoor growth of marijuana relies upon high-intensity lamps, the presence of which may be inferred by measuring the amount of heat emanating from the home. Thermal imagers detect infrared radiation which is not visible to the naked eye, converting the radiation into images based on relative warmth. The images demonstrated that part of the roof and a wall in Kyllo's home were warm compared to the rest of the house, and furthermore, that Kyllo's home was "substantially warmer than neighboring homes in the triplex" which had been scanned for comparison purposes. Kyllo, 533 U.S. at 30. The images led the agent to correctly infer that Kyllo was growing marijuana in his home. Along with utility bills and tips from informants, the images were presented to a magistrate who issued a search warrant for Kyllo's home. The search uncovered a growing operation of more than 100 marijuana plants. *Id*.

Justice Scalia said that "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id*. At 37. Attempting to limit the protection to "intimate details," Justice Scalia said in response to

the dissent, "would not only be wrong in principle; it would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment."'. *Id*. at 38 (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)). Therefore, he concluded that everything within the home is an intimate detail. This broad statement led the majority to reject the distinction offered in Justice Stevens' dissent between off-the-wall technology, such as the thermal imager which only measures waste escaping from the home, and through-the-wall technology, which allows police to see into the home. Rather, Justice Scalia explained, the distinction is meaningless because each method exposes the intimate details of the home.

D. Canine Alert is Sense Enhancing Technology

In *Florida v. Rabb (Rabb I),* the U.S. Supreme Court reviewed a decision by the Florida District Court of Appeal, which affirmed a trial court's suppression of marijuana and other narcotics recovered from James Rabb's home pursuant to the execution of a search warrant. *State v. Rabb (Rabb II)*, 881 So. 2d 587, 588 (Fla. Dist. Ct. App. 2004). In light of Caballes, the Supreme Court, without discussion, vacated and remanded the case to the Florida court for reconsideration. *Rabb I*, 544 U.S. 1028 (2005).

James Rabb was arrested and charged with possession of 3, 4-methylenedioxymethamphetamine (MDMA or ecstasy), alprazolam (Xanax), and marijuana. *Rabb II*, 881 So. 2d at 588, 590. The Broward County Sheriff's Office received an anonymous tip that Rabb was growing marijuana inside his residence. Sheriff's detectives began surveillance and eventually conducted a traffic stop of Rabb's vehicle as it left the residence, resulting in Rabb's arrest for possession of marijuana.

Detectives also found books and videos on the subject of marijuana cultivation inside the vehicle. Rabb stated that he only had an interest in cultivation. Following his arrest, he requested an attorney. *Id*. at 588-89.

Detectives used a narcotic detector dog to conduct a sniff of Rabb's residence, resulting in an alert at the front door. Detectives then drafted a search warrant detailing their investigation, including the dog alert and the fact that they could smell marijuana emanating from the residence. After the search warrant was issued, detectives recovered marijuana, ecstasy, and Xanax from inside the residence. *Id*. at 589-90.

Rabb filed a motion to suppress the recovered narcotics alleging that the dog sniff of the exterior of his residence was an illegal search and that in the absence of the dog alert there was no probable cause for a search warrant. *Id*. at 590 The trial court granted the motion to suppress, finding that the dog sniff was an unlawful search in violation of the Fourth Amendment. *Id*. The State appealed, and the Florida District Court of Appeals for the Fourth District affirmed the suppression. *Id*. at 558. The appellate court reasoned that Kyllo applied to this case because of the heightened protection afforded to the home under the Fourth Amendment. The court distinguished the case from Place by noting that luggage was afforded less protection than the home. *Id*. at 591-92. The court also stated that the case was similar to Kyllo in that law enforcement agents detected emanations from the residence through the use of "sense-enhancing technology." Id. (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

The court expressly equated the use of the drug dog to the use of the thermal imager in Kyllo. The appellate court also noted that the amount of information revealed by the dog sniff was superfluous because the injury lay in the nature of the intrusion, not

"the quality or quantity of information obtained." Id. at 592-93.

On remand from the Supreme Court, the Florida District Court of Appeals again affirmed the motion to suppress and reiterated that Kyllo, not Caballes, controlled. *State v. Rabb (Rabb III)*, 920 So. 2d 1175, 1188-90 (Fla. Dist. Ct. App. 2006). The court distinguished the search of Rabb's home from the facts in Caballes, noting that the protection afforded to a vehicle on a public highway and that afforded to the home are greatly divergent. *See Id*. at 1189 (noting that focus was not on a stop of Rabb's car, but rather a sniff of his home). The court noted that the home "stands strong and alone, shrouded in a cloak of Fourth Amendment protection." *Id*. A subsequent petition for writ of certiorari was denied by the Supreme Court. *Florida v. Rabb (Rabb IV),* 549 U.S. 1052 (2006).

IV. THIS COURT SHOULD SUPPRESS THE FRUITS OF THE WARRANTLESS SEARCH

Under the "fruit of the poisonous tree doctrine," evidence tainted by Fourth Amendment violations may not be used directly or indirectly against the accused. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exclusionary rule "applies to any 'fruits' of a constitutional violation – whether such evidence be tangible . .. or confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S. 463, 470 (1980).

V. CONCLUSION

For all the foregoing reasons, Defendants respectfully requests that this motion be granted after a hearing, in which the evidence recovered was the product of a warrantless search and seizure, in violation of the Fourth Amendment. The entire fruits of this unlawful search and seizure must be suppressed.

Respectfully submitted,

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By:_____
Jon P. Thomas
State Bar No. 24037593

CERTIFICATE OF SERVICE

This is to certify that on April 18, 2010, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Harris County, 1201 Franklin, Houston, TX 77002, by hand delivery.

_____
Jon P. Thomas

Nos. 1243313, 1243314

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**185TH JUDICIAL DISTRICT**
	§	
MICHAEL VESTAL, ET AL.	§	**HARRIS COUNTY, TEXAS**

ORDER

On this _____ day of _____, 2010, came on to be considered Defendant's Motion to Suppress with Incorporated Memorandum of Points and Authorities, and said motion is hereby:

(Granted) (Denied)

_____

JUDGE PRESIDING