



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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	§	
BERNARDO MCKINNEY,	§	
	§	No. 29, 2014
Defendant below,	§	
Appellant,	§	
	§	Appeal From The Honorable
v.	§	Richard R. Cooch's Oral Order
	§	On August 30, 2013 Denying A
STATE OF DELAWARE,	§	Motion To Suppress. Final Judgment
	§	Was Entered On Jan. 10, 2014 In
Appellee.	§	The Superior Court of
	§	The State Of Delaware
	§	In And For New Castle County
	§	In Case # 1212007654

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**APPELLANT'S OPENING BRIEF**

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Dated: February 19, 2014

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## NATURE OF THE PROCEEDINGS

This appeal, filed on January 21, 2014, asks this Court to reverse the Superior Court's Oral Order denying Mr. McKinney's Motion To Suppress Evidence.

The issue was first presented to Superior Court Judge, Richard R. Cooch, in a Suppression Hearing held on August 30, 2013. Judge Cooch denied the defendant's Motion to Suppress after arguments about whether the four corners of a search warrant established probable cause to search Mr. McKinney's home. The court determined that the search warrant was sufficiently corroborated based on assertions in the supporting affidavit that officers were familiar with the occupants of the home and that a DELJIS inquiry and a photo lineup confirmed the identity of the subject of the informant's tip.

Thereafter, the defendant submitted a motion to proceed *pro se*. That motion was granted on October 4, 2013. Mr. McKinney filed a repetitive Motion to Suppress/Dismiss and a Motion To Alter Judgment, which were both denied. Mr. McKinney acquiesced to a stipulated bench trial and was found guilty of Possession of Firearm By A Person Prohibited. Counsel was thereafter appointed to represent Mr. McKinney at sentencing and for appeal purposes.

Mr. McKinney was sentenced on January 10, 2014, wherein the State's Motion To Declare Mr. McKinney a habitual offender was granted. Pursuant to 11

Del. C. §4214(a), Mr. McKinney was sentenced to a mandatory term of eight years imprisonment. The defendant, through counsel, filed a timely Notice of Appeal on January 21, 2014.

This is Mr. McKinney's Opening Brief in support of his appeal.

## **SUMMARY OF ARGUMENT**

1. The trial court erred when it improperly weighed the totality of the relevant circumstances and held that a search warrant was sufficiently corroborated by an independent investigation that failed to corroborate any illegal activity.

## **STATEMENT OF FACTS**

### **A. The Parties**

Mr. Bernardo McKinney is a Delaware resident and the leaseholder of 1509 Maple Ave., Apt 1, the subject of the search warrant in question.

The State of Delaware is acting in its capacity to enforce the criminal laws of the State as codified by the Delaware General Assembly.

### **B. The Four-Corners Of The Search Warrant**

The search warrant identifies the place to be searched as 1509 Maple Ave., Apt. 1, Fenwick Park Apartments, New Castle County, Delaware. In the evening hours of December 9, 2012, Officer John Mitchell of the Elsmere Police Department applied for the search warrant in question. In support of his request, he asserted the following:

- A confidential informant (“CI”) contacted Officer Mitchell and stated that he had twice purchased marijuana at 1509 Maple Ave, Apt. 1.
- Although the CI had previously purchased marijuana from a black male, he conducted the most recent transaction with a white female who had dark hair, blue eyes and who was wearing a tank top and sweatpants.
- The CI paid \$20.00 for the marijuana.
- The CI observed cameras outside the apartment door.



- Officer Mitchell was familiar with the individuals who lived at 1509 Maple Ave.
- A DELJIS inquiry report listed Bernardo McKinney and Ashley King as residents of the apartment.
- The DELJIS report indicated that Ashley King had blue eyes.
- Officer Mitchell checked the Fenwick Park Directory and confirmed that Bernardo McKinney was the resident of 1509 Maple Ave, Apt. 1.
- The CI identified Ms. King as the person he saw at 1509 Maple Ave in a photograph lineup.

Thereafter, a magistrate approved the warrant and officers executed a search of the home.

## ARGUMENT

### **I. THE SUPERIOR COURT ERRED IN HOLDING THAT AN ANONYMOUS CONFIDENTIAL INFORMANT'S TIP WAS SUFFICIENT TO SUPPORT A SEARCH WARRANT WHEN LAW ENFORCEMENT OFFICERS FAILED TO CORROBORATE ANY ILLEGAL ACTIVITY**

#### **A. Question Presented**

Whether under 11 Del. C. §§ 2306 and 2307, Art. I §6 of the Delaware Constitution, and the Fourth Amendment of the U.S. Constitution, a search warrant establishes probable cause to search a home based entirely on a confidential informant's tip and without law enforcement's subsequent corroboration of illegal activity.<sup>1</sup>

#### **B. The Standard And Scope Of Review**

Issues alleging constitutional errors or misapplication of the law are reviewed *de novo*.<sup>2</sup>

#### **C. The Superior Court Should Have Followed This Court's Decision In *LeGrande v. State*, Which Required A Confidential Informant's Tip Of Illegal Activity To Be Corroborated By More Than Just Identity.**

Pursuant to the Fourth Amendment of the United States Constitution,

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<sup>1</sup> This issue was the subject of a Motion To Suppress, included herein as "Exhibit A," and was thus properly preserved for appeal.

<sup>2</sup> *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

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. When interpreting the Fourth Amendment, the Supreme Court has held that personal residences are entitled to the highest expectation of privacy.<sup>3</sup> In order for police to search a residence, a neutral magistrate must issue a warrant in response to a specific and delineated request from police.<sup>4</sup>

The Fourth Amendment and Art. I §6 were primarily established to safeguard against the evils of arbitrary police intrusion onto private property.<sup>5</sup> The warrant requirement provides a neutral procedure by which law enforcement officers' zealous investigation may be monitored for potential constitutional infringements of personal rights.<sup>6</sup> Upon the issuance of a warrant, a magistrate must have a reasonable belief that "an offense has been committed and the property to be seized will be found in a particular place."<sup>7</sup> The Court uses a "four

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<sup>3</sup> See *Kirk v. Louisiana*, 536 U.S. 635, 637 (2002); *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

<sup>4</sup> 11 Del. C. §§ 2306, 2307.

<sup>5</sup> See *Payton v. New York*, 445 U.S. 573, 583-84 (1980) (stating that "indiscriminate searches" provided the impetus for the adoption of the Fourth Amendment) and *Mason v. State*, 534 A.2d 242, 246-47 (Del. 1987).

<sup>6</sup> *Mason*, 534 A.2d at 247.

<sup>7</sup> *State v. Holden*, 2011 WL 4908360, at \*3 (Del. Super. Ct. Oct. 11, 2011).

corners test” to determine if, within the four corners of the affidavit of probable cause, there are enough facts to elicit a reasonable belief that evidence exists within a particular place.<sup>8</sup> Courts look to the “totality of the circumstances” of each case, which may include the reliability of the informant, the details of the informant’s tip, and the degree to which the tip is corroborated by independent means.<sup>9</sup>

In the 2012 case, *Arcuri v. State*, this Court held that an affidavit was supported by sufficient probable cause when a known informant provided detailed and specific information and had prior dealings with the law enforcement officers.<sup>10</sup> Additionally, the law enforcement officers in *Arcuri* were able to corroborate the predictive information provided by the informant with the use of a K-9 drug detection investigation.<sup>11</sup>

In the reasonable suspicion context, this court has held that “simple confirmation of readily observable facts does not enhance the reliability of an anonymous tip to the level required for a finding of reasonable suspicion.”<sup>12</sup>

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<sup>8</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>9</sup> *Id.*

<sup>10</sup> 49 A.3d 1177, 1179-80 (Del. 2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Flonnory v. State*, 805 A.2d 854, 858 (Del. 2001).

In *Florida v. J.L.*, police received an anonymous tip that a black male in a plaid shirt on a particular street corner possessed a handgun.<sup>13</sup> The United States Supreme Court held that the tip confirmed the identity of the person in the tip, but was insufficient to enhance the reliability of the alleged criminal activity without corroboration of predictive information or by other means.<sup>14</sup>

In *LeGrande v. State*, the Court held that a search warrant lacked adequate support when law enforcement officials failed to corroborate the details provided by an informant as to the alleged illegal activity.<sup>15</sup> In *LeGrande*, the informant, who was the defendant's acquaintance, personally observed illegal drug contraband in the defendant's possession, described the layout of the apartment building to be searched, included details of the occupants, including that one of the occupants had an outstanding *capias* for failure to pay fines, and relayed that the defendant was on probation while living at the provided address.<sup>16</sup> Finally, the confidential informant told the police that LeGrande kept his apartment padlocked.<sup>17</sup> Thereafter, the police confirmed that 1) one of the occupants of the building had an outstanding warrant for failure to pay court fines, 2) LeGrande in

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<sup>13</sup> 529 U.S. 266, 268 (2000).

<sup>14</sup> *Id.* at 273.

<sup>15</sup> 947 A2d 1103, 1104 (Del. 2008).

<sup>16</sup> *Id.* at 1105.

<sup>17</sup> *Id.*

fact lived in the building, and 3) LeGrande's apartment was padlocked shut. Despite confirming the details of the address, the officers were unable to corroborate illicit activity.<sup>18</sup>

This Court determined that a confidential informant's tip must be corroborated by more than mere identity.<sup>19</sup> A tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person."<sup>20</sup> The fact that law enforcement officers confirmed that LeGrande lived in the location merely established that he was the subject of the allegation, but did not enhance the reliability of the allegation as to his involvement with illegal activity.

In *State v. Holden*, this Court determined that an informant's tip could be sufficient to establish probable cause if the totality of the circumstances presented evidence that "demonstrated the tip's reliability."<sup>21</sup> For example, a tip could be corroborated by accurate predictive information.<sup>22</sup> In *Holden*, a CI's tip was sufficient because it accurately described drug sales from Holden's home, which

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<sup>18</sup> *Id.* at 1108.

<sup>19</sup> *Id.* at 1111.

<sup>20</sup> *Id.* at 1110 (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)).

<sup>21</sup> 60 A.3d 1110, 1115-16 (Del. 2013).

<sup>22</sup> *Id.*

were later observed by law enforcement.<sup>23</sup> Officers witnessed a suspected drug transaction and then promptly arrested one of the individuals who possessed drugs of the type predicted by the CI in the tip.<sup>24</sup> The officers were able to verify the reliability of the illegal activity because they observed a suspected drug transaction and obtained drugs of the type predicted. Consequently, the tip was sufficient to establish probable cause to search Holden's home.<sup>25</sup>

*LeGrande* is directly on-point to the case *sub judice*. Here, an anonymous confidential informant provided identifying information about a dark haired woman with blue eyes who sold marijuana at a specific location. Similar to the law enforcement officers in *LeGrande* who went to the apartment building and saw the named occupant and a padlocked door, here, Officer Mitchell corroborated the woman's identity by conducting a DELJIS search and checking the apartment building's occupant registry.

The officer's observations that a dark haired woman with blue eyes lived at 1509 Maple Avenue is similar to the observations of the anonymous informant in *J.L.* who stated that a black man wearing a plaid shirt was located at a street corner. Although the identity of the dark-haired woman had been determined, Officer Mitchell never corroborated the substance of the allegation, namely that drugs had

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1112-13.

<sup>25</sup> *Id.* at 1116.

been sold out of the apartment. In *J.L.*, the corroboration was insufficient for a *Terry* stop under a reasonable suspicion standard. Certainly, if the failure to corroborate an allegation of illegal activity fails the reasonable suspicion standard, the same would be insufficient when applied to the more rigorous probable cause standard in the context of a personal residence in which Mr. McKinney had the highest expectations of privacy.

Despite the fact that the CI told officers that cameras were located outside the apartment door, the officers took no investigative measures to confirm the existence of video footage of the incident. The officers had no information about whether the informant was a person “working off” charges or whether the informant had any self-interest in identifying the individuals at the location. Unlike in *Holden*, the officers did not observe illegal drug activity and they made no attempt to conduct surveillance of the apartment. The tip did not allege any predictive information other than to provide readily ascertainable information of the resident’s hair and eye color. In short, the officers merely confirmed the identity of the occupants in a DELJIS inquiry and an occupant registry check.

These procedures did nothing to ensure the reliability of the anonymous informant’s allegation and were insufficient to support the search of Mr. McKinney’s home. Because the officers failed to corroborate any evidence of drug sales, the search warrant was prematurely issued and was not sufficiently based on



the requisite finding of probable cause. The failure to do so was an error that requires the Superior Court's holding be reversed.

**CONCLUSION**

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Dated: February 12, 2014

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# EXHIBIT

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE ) ID# 1212007654  
 )  
v. )  
 )  
BERNARDO McKINNEY, )  
 )  
Defendant. )

- - - -  
BEFORE: THE HONORABLE RICHARD R. COOCH

- - - -  
APPEARANCES:

DANIEL B. McBRIDE, ESQ.  
Deputy Attorney General  
For the State

EUGENE J. MAURER, JR., ESQ.  
For the Defendant

- - - -  
MOTION TO SUPPRESS TRANSCRIPT  
FRIDAY, AUGUST 30, 2013

DENNEL J. NIEZGODA, RPR, CRR  
SUPERIOR COURT OFFICIAL REPORTERS  
500 N. King Street - Wilmington, Delaware 19801  
(302) 255-0560

1 Friday, August 30, 2013  
2 Courtroom No. 4C  
3 10:00 a.m.

4 PRESENT:

5 As noted.

6 -----

7 THE COURT: Good morning, counsel.

8 MR. MAURER: Your Honor, this young lady  
9 just took the Bar exam. We are keeping our fingers  
10 crossed she will pass the Bar and work with me.  
11 Her name is Allison Mielke.

12 THE COURT: Welcome.

13 MR. MAURER: If it's okay with the Court --  
14 she is probably smarter than I am -- it might be  
15 better to have her here.

16 THE COURT: Well, there's some kind of  
17 privilege that pertains to make me not have to  
18 answer that question.

19 Mr. Maurer, is your case to be a hearing?

20 MR. MAURER: Your Honor, could I just make a  
21 short --

22 THE COURT: If the defendant, your client,  
23 has decided not to accept the State's plea offer, I  
want to make a record of that so he understands

1 against him, his minimum mandatory would be 40  
2 years, and of course life imprisonment would be the  
3 maximum. And I have told him that the Judge has no  
4 choice with regard to the eight-year minimum  
5 mandatory that these charges would carry with them  
6 on conviction.

7 THE COURT: Did you say 40?

8 MR. MAURER: 40 years minimum mandatory.  
9 There are five separate cases involving ammunition  
10 or knives or guns, Person Prohibited. So, if he  
11 were to be convicted on all those Person Prohibited  
12 charges, his minimum, if the State moved for  
13 sentencing under the --

14 THE COURT: Now I understand. If the State  
15 were to move to have him sentenced as a habitual  
16 offender -- and I'll imagine, but I'll hear from  
17 Mr. McBride if he plans to do that -- if the plea  
18 is not accepted, he would be subject, if convicted  
19 of all charges in the trial scheduled for  
20 Wednesday --

21 MR. MAURER: The first trial is scheduled  
22 for Wednesday; the following trial is scheduled for  
23 September 10th.

1 that there will not be a later time to say that he  
2 wanted to accept the plea but was somehow prevented  
3 from doing so, et cetera. It's his choice, of  
4 course.

5 MR. MAURER: That's what I wanted to do just  
6 in light of the Supreme Court decisions.

7 THE COURT: Yes.

8 MR. MAURER: Your Honor, Mr. McKinney is  
9 charged in two separate indictments. And in this  
10 particular indictment, Possession of a Firearm By a  
11 Person Prohibited and Possession -- another Person  
12 Prohibited charge. He has a trial scheduled for  
13 Wednesday, in connection with which there is no  
14 suppression issue, in my opinion.

15 THE COURT: Is that a different case?

16 MR. MAURER: Different case. There's a  
17 search warrant in the case, and I carefully  
18 reviewed it and I reached the conclusion I don't  
19 think there's a suppression issue, so I didn't file  
20 one. There's some Person Prohibited charges in  
21 those cases.

22 Mr. McKinney is habitual offender eligible  
23 and we -- if convicted of all the counts pending

1 I spent -- we spent almost an hour and a  
2 half with him yesterday going over everything,  
3 without disclosing what our advice was. He has  
4 then chosen to go forward with this.

5 THE COURT: Has the plea offer that's been  
6 rejected been tendered to the prothonotary?

7 MR. MAURER: I have not.

8 THE COURT: I'd like to see that plea  
9 agreement.

10 Mr. McBride, anything to add to what  
11 Mr. Maurer just said?

12 MR. McBRIDE: I just would like to confirm  
13 that, if convicted, the State's intentions would be  
14 to file a motion to declare the defendant a  
15 habitual offender. Many times these decisions are  
16 made with the thinking that maybe a State's  
17 potential witness may not appear, and sometimes  
18 potential witnesses provide information to  
19 defendants that they will not appear when otherwise  
20 that's not true and the State has resources to  
21 force witnesses to appear and testify. And all  
22 that was taken into consideration.

23 THE COURT: Do I understand that as set

1 forth in this proposed plea agreement, which covers  
2 both charges, the State agrees to cap its  
3 recommendation as to both cases to eight years at  
4 Level V?

5 MR. McBRIDE: Correct, Your Honor.

6 THE COURT: Mr. McKinney, please stand.

7 Did you hear everything that Mr. Maurer and  
8 Mr. McBride and I just said?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Do you understand that the State  
11 right now has on the table a plea offer which has  
12 been discussed and has as part of it, the part that  
13 most interests you I'm sure, that the State will  
14 cap its recommendation at eight years at Level V,  
15 which would be the minimum mandatory sentence to be  
16 served if you were found to be a habitual offender  
17 if you're convicted of the charges on Wednesday?  
18 Do you understand that?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you understand that you will  
21 not be able to come back at any later time if you  
22 should be convicted and if the sentencing judge  
23 then sentences you to anything more than eight

1 years, which the Judge would have to do by law,  
2 sentence you to at least 40 years as to the charges  
3 on for trial on Wednesday? You would not be able  
4 to come back at any later time and say: I really  
5 wanted to accept the State's plea bargain that was  
6 offered today, August 30th?

7 Your choice today will be final; do you  
8 understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Do you need any further time to  
11 confer with Mr. Maurer about this?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: All right.

14 MR. MAURER: I should say, we met again this  
15 morning with him. I'm leery of saying any more  
16 because of the recent Supreme Court decision in  
17 which defense counsel was criticized for making  
18 comments. So, I think we've established a  
19 sufficient record and set forth our  
20 responsibilities.

21 THE COURT: I think a sufficient record has  
22 been made. So, you may be seated.

23 Are we prepared to go forward now with, I

1 guess, a hearing on the Motion to Suppress, which  
2 seems to be, as counsel points out, a four-corners  
3 test? So, I'm not sure any testimony is needed in  
4 a four-corners; I think only one is.

5 Since it's a defendant's Motion to Suppress  
6 but the State has the burden on this warrantless  
7 search, so carries the burden of proof, I think the  
8 State should go first with its argument.

9 MR. McBRIDE: Your Honor, in this matter  
10 there was a search warrant that was obtained and  
11 executed by the Elsmere Police Department. The  
12 warrant was obtained on December 10, 2012. And as  
13 outlined in the affidavit of probable cause, which  
14 I believe was provided to the Court, the entire  
15 search warrant, by Mr. Maurer -- Officer Mitchell  
16 with the Elsmere Police Department has outlined his  
17 justification for the search.

18 The State's position is that the facts  
19 outlined in the warrant give rise to probable cause  
20 that evidence of a crime would be located at 1509  
21 Maple Avenue, Apartment 1, Fenwick Park Apartments.  
22 The large majority -- the primary evidence that  
23 leads to probable cause is information provided by

1 a confidential source. Now, the confidential  
2 source in this case is, admittedly, not past proven  
3 and reliable or at least not stated so in the  
4 warrant, which is all that matters.

5 However, what is important in this case is  
6 that the confidential source is not anonymous. The  
7 Court in the cases regarding confidential  
8 informants and search warrants, which is  
9 numerous -- this issue has been litigated greatly;  
10 the primary case being *Illinois versus Gates*, a  
11 United States Supreme Court case. The Court has  
12 distinguished between past proven reliable  
13 informants and information provided by them,  
14 information provided by anonymous tipsters and  
15 information provided by informants whose identities  
16 are known. And then an important factor is whether  
17 that information can be independently corroborated  
18 through the investigation.

19 So, this case falls into the category where  
20 we have a confidential source whose identity is  
21 known, not an anonymous tip, and whose information  
22 is then corroborated through independent sources in  
23 the police investigation.

10

1 The State cites in its response that the  
2 Delaware Supreme Court has held that the  
3 information provided by an unfamiliar informant may  
4 form the basis for probable cause if corroborated  
5 by independent facts and an anonymous tip alone can  
6 form the basis for a lawful detention or search in  
7 this case if the information provided by the  
8 tipster is corroborated by independent facts.

9 So, the State is citing *Alabama versus*  
10 *White*, a United States Supreme Court case from  
11 1999. So the principle in that case is that an  
12 anonymous tip alone can form the basis for a search  
13 or a stop.

14 And in this case we don't have an anonymous  
15 tip. We have the identity of the source known.  
16 The source actually initiates the contact with the  
17 police, provides information that he has just that  
18 same day bought marijuana from the apartment  
19 searched and gives a description of the individual  
20 he purchased the marijuana from.

21 THE COURT: Now, where in the warrant does  
22 it say that that purchase occurred that day? I  
23 think it would be in Paragraph 1 or 2.

11

1 MR. McBRIDE: Paragraph 2, Your Honor.  
2 Paragraph 2 reads: "On the listed date and time I  
3 was conducting a separate investigation and was  
4 contacted by a confidential source."  
5 So, I read that as to mean on the day the  
6 search was conducted, the day the search warrant  
7 was obtained and authored, the officer was  
8 conducting a separate investigation in the area and  
9 was contacted by the confidential source.

10 Then it goes on to say: "The confidential  
11 source, who will be known as CS, advised that he  
12 responded to the apartment around 2:00 p.m. to  
13 purchase the marijuana."  
14 THE COURT: Now, the first sentence of  
15 Paragraph 2 says: "On the listed date and  
16 time ..."  
17 Now, the previous paragraph doesn't talk  
18 about the date and time. So, the phrase "listed  
19 date and time," you say, can only mean the date of  
20 the warrant as a fair inference?  
21 MR. McBRIDE: Correct, Your Honor.  
22 THE COURT: Because that was one of  
23 Mr. Maurer's points in his motion, was that the

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1 date of the alleged purchase wasn't specifically  
2 identified.  
3 I think it's a fair point, you might be able  
4 to argue -- and I'll hear from Mr. Maurer -- that  
5 it was inferred because of the choice of the words  
6 "listed date and time." What else could that mean?  
7 MR. McBRIDE: The only listed date and time  
8 in the entire warrant is the date of the warrant.  
9 It's a reasonable inference. And as the Court  
10 knows, the reading of the search warrant is a  
11 common sense reading, not a hypertechnical one.  
12 So, our reading of it really at first glance  
13 and our reasonable inferences that are made can be  
14 taken into consideration.  
15 So, "on the listed date and time" would be  
16 December 10th. It's the only listed date and time.  
17 And 2:00 p.m. would refer to the time on that date.  
18 The State can draw really no other inferences as to  
19 what that would mean.  
20 And the confidential source goes on to give  
21 a description of the individual that he purchased  
22 the marijuana from, which was a white female with  
23 dark hair, provided a clothing description and

13

1 states that she has blue eyes. He gives specific  
2 facts, such as he provided \$20 and was handed one  
3 gram of marijuana wrapped in tinfoil.  
4 This isn't an anonymous tip coming over the  
5 phone that there is -- a general tip where there is  
6 drug dealing occurring on a certain street corner  
7 and that's it, or someone calling and saying, I  
8 know "X" is selling drugs out of this address.  
9 In this we have a known informant providing  
10 this information in person. It's realtime, so to  
11 speak. It's all unfolding on the same day within  
12 hours. The recency of the sale gives the nexus to  
13 believe that evidence would be found in the home.  
14 The information is not stale. If this were weeks  
15 and months prior, then there could not be probable  
16 cause to believe evidence of drug dealing would  
17 still be found in the home. But considering that  
18 it was just hours before, it is reasonable to  
19 believe that evidence may be found in the home.  
20 The police independently corroborate the  
21 information through DELJIS searches where they  
22 verify that Ashley King, white female, dark hair,  
23 blue eyes, was involved in a domestic incident

1 reported with a Bernardo McKinney, who was the  
2 suspect in that case. And Ms. King in that report  
3 was listed not only as his girlfriend, but residing  
4 in that apartment. The officer also confirmed that  
5 Ms. King has blue eyes.

6 Then he goes on to check the Fenwick Park  
7 Apartments directory and verified that Bernardo  
8 McKinney is the renter at 1509 Maple Avenue,  
9 Apartment 1.

10 And this also makes sense to the officer  
11 because, as stated in Paragraph 4, the officer is  
12 familiar with that apartment and knows that  
13 Bernardo McKinney resides in the apartment. And  
14 the confidential source also indicates that on the  
15 prior occasions that he has bought marijuana from  
16 that apartment, it was from a black male.

17 So, now we have everything falling into  
18 line, things are clicking, things are making sense.  
19 The information by the confidential source that was  
20 initially uncorroborated has become corroborated,  
21 and the police have reason to believe now that the  
22 information is accurate and can conduct the search.

23 The officer outlines, based on his training

1 and experience, that if one is selling drugs out of  
2 an apartment, there is going to be some sort of  
3 evidence of that, whether it be drugs themselves,  
4 cell phones, beepers, packaging material, scales,  
5 et cetera.

6 So, the common sense reading of this, in  
7 connection with the case law and the United States  
8 Supreme Court decision that anonymous tips alone  
9 can corroborate, can form the basis for probable  
10 cause -- the State's position is that this search  
11 warrant does establish such and that it is a valid  
12 search and the evidence should not be suppressed.

13 THE COURT: Thank you.

14 Mr. Maurer.

15 MR. MAURER: Your Honor, I have a number of  
16 points that I'd like to make. But I would first  
17 argue that before we started this morning, I went  
18 down and re-read *LeGrande versus State*, which is  
19 the case on which we primarily rely in this case.  
20 In the *LeGrande* case the confidential informant,  
21 not a anonymous tipster, reported that he had  
22 personally been in the apartment of Mr. LeGrande  
23 and he made personal observations that there were

1 drugs and guns in that apartment.

2 THE COURT: Which we don't have here.

3 MR. MAURER: Which we don't really have  
4 here. And that was not an anonymous tip. That was  
5 a confidential informant. Even though a lot of the  
6 language in the opinion talks about anonymous tips,  
7 that was not a situation where you had an anonymous  
8 tip.

9 So, in *LeGrande* Justice Ridgely concluded  
10 that those facts, which I suggest are stronger than  
11 the facts that exist in this case, were not  
12 sufficient to establish probable cause to support  
13 the search warrant in that matter.

14 THE COURT: If I may interrupt. Did I  
15 misspeak when I called on Mr. McBride to go first  
16 because the State has the burden of proof? This is  
17 a search warrant case.

18 MR. MAURER: Yes.

19 THE COURT: So I think I misstated the  
20 burden of proof. It's the defendant --

21 MR. MAURER: It's my burden, yes.

22 THE COURT: -- who has the burden of  
23 establishing and challenging the search was

1 unlawful.

2 MR. MAURER: I agree with that.

3 THE COURT: I was thinking this is a  
4 warrantless search. I'm getting mixed up with my  
5 1:00 hearing with Mr. Foley.

6 MR. MAURER: Anyway, it being our burden, I  
7 believe that we've established that burden and that  
8 the case of *LeGrande versus State* is directly on  
9 point.

10 And in that regard, Mr. McBride's memo,  
11 which I did just have an opportunity to review this  
12 morning, kind of confirms what the Supreme Court  
13 said; that in that case the only corroboration that  
14 was done -- well, actually there was no  
15 corroboration done in that case and the only  
16 corroboration that was done had to do only with  
17 identity. It didn't have to do with anything  
18 having to do with whether there was probable cause  
19 to believe that there was contraband or drugs  
20 inside of the residence.

21 So, this case seems, to me, to be somewhat  
22 weaker than *LeGrande* from the State's point of  
23 view, but otherwise right on point with Justice

1 Ridgely's opinion and his reasoning. So, the  
2 State's argument is a good one. They do point out  
3 that there was corroboration, but, unfortunately,  
4 it was corroboration having to do with identity,  
5 which *LeGrande* specifically deals with and says  
6 that's not what you corroborate. You corroborate  
7 whether there's illegal activity.

8 It should also be pointed out that in  
9 connection with this affidavit there was a way to  
10 corroborate the illegal activity, assuming for the  
11 moment that this warrant establishes that it even  
12 happened on that day, in that it shows that there  
13 were cameras outside the door to the apartments.  
14 So it would have been a simple thing for the police  
15 to have gone -- if the informant said he made the  
16 purchase that particular day, to have gone, looked  
17 at the cameras and confirmed whether or not that  
18 took place. That was not done; there was no  
19 corroboration done in that regard. So, I would  
20 indicate -- or I would argue that *LeGrande* controls  
21 on that issue.

22 Now, on the other issue suggested by  
23 Mr. McBride, that this affidavit sets forth when

1 this prior purchase was made inferentially, we  
2 shouldn't have to infer when it was made. And the  
3 problem with that is pointed out by Mr. McBride's  
4 argument. He said that the listed date was  
5 December 10th. And as I look at the affidavit and  
6 also the search warrant, it looks like the search  
7 warrant was applied for on December 10th on the  
8 cover page, and the date of the application, which  
9 I see on the probable cause sheet at the top, is  
10 Sunday, December 9th. So, on the documents  
11 themselves that were submitted to the magistrate --  
12 I'm not sure which one the State is relying on as  
13 being the, quote, unquote, listed date.

14 I would also point out to the Court -- or  
15 argue to the Court that the date of the application  
16 is not part of the affidavit of probable cause.  
17 It's a heading. And the four-corners test requires  
18 the information on which the Court makes a  
19 determination of probable cause to be in the  
20 affidavit itself.

21 So, all we have in this affidavit is -- on  
22 the listed date, there is no listed date. It could  
23 have been five years before this. So there's a

1 separate argument that this is stale, as well.

2 So, I would argue that for those two  
3 reasons, this warrant fails and the suppression  
4 motion should be granted.

5 THE COURT: Mr. McBride, the copy of the  
6 search warrant that was sent to me doesn't have an  
7 officer's signature on the last page of the  
8 warrant. On the other hand, maybe that wasn't  
9 necessary because the affiant seems to have sworn  
10 as to the truthfulness of the affidavit on the  
11 first page of the warrant. The seal of the Justice  
12 of the Peace Court on my copy -- I can read it now.  
13 I guess it says, "Sworn and subscribed before me  
14 this 10th day of December."

15 Now, is the cover page part of the affidavit  
16 of probable cause and subject to the four-corners  
17 test?

18 MR. McBRIDE: Your Honor, it is, in short.  
19 The search warrant is read as a whole. And the  
20 affidavit of probable cause must establish probable  
21 cause. However, referencing a date in the  
22 affidavit that otherwise appears in the warrant  
23 does not -- would certainly be a hypertechnical

1 approach to a reading of the warrant. And, again,  
2 the State's position is that it is the warrant as a  
3 whole.

4 THE COURT: If I may interrupt. I'm just  
5 looking at this, and Paragraph 2 says: "On the  
6 listed date and time." At the top of the probable  
7 cause sheet it says: "Date of application, Sunday,  
8 December 9, 2012."

9 MR. McBRIDE: And that's my error by  
10 referring to the same date as the warrant was  
11 applied. And if we look at the time stamp from the  
12 Justice of the Peace Court on Page 1, as well as  
13 what's listed as Page 3 of 5 where there is a  
14 signature of issuing authority, it says this  
15 warrant should be served no later than 10:00 a.m.  
16 on 12/10, 2012 and shall be -- 12/20. I'm sorry.  
17 And that was signed at 12:50 a.m. That's the date  
18 on Page 3. And the time stamp shows 12:51 a.m.

19 So, what clearly occurred is that the  
20 investigation, which occurred on Sunday, 12/9 --  
21 that afternoon the warrant was applied for and by  
22 the time it was signed by the magistrate, it was  
23 one hour after midnight. So we spill over, 12:10.



1 So, as opposed to saying it was all the same day, a  
2 more accurate description would be that it all  
3 occurred within the same 24 hours.

4 As far as the cameras go in the search  
5 warrant --

6 THE COURT: I'm sorry?

7 MR. McBRIDE: Mr. Maurer mentioned there  
8 were cameras outside of the apartment and that the  
9 officers could have checked the cameras. My  
10 initial reading of that was that the apartment  
11 occupants had placed a camera outside. I don't  
12 know if that's correct. It could be probably more  
13 likely that it is cameras from the apartment  
14 complex.

15 But the fact that the officers could have,  
16 but did not review those videotapes is not a fatal  
17 flaw in the warrant and does not preclude or  
18 prevent what would otherwise be probable cause.

19 And as far as *LeGrande* goes, it was not an  
20 anonymous tip. It was a confidential informant, as  
21 this is. And the corroboration in this case is to  
22 the identity of the occupants, but also  
23 validates -- the fact that the confidential source

1 was correct about that information and it's  
2 corroborated makes the strength of his information  
3 greater as a whole as to the ...

4 THE COURT: ... as to the alleged  
5 transaction.

6 MR. McBRIDE: ... as to the alleged  
7 transaction.

8 So, because he is not past proven and  
9 reliable the courts want additional information  
10 that goes towards his reliability. If the  
11 confidential source was past proven and reliable  
12 and then given greater weight, that would have  
13 nothing to do with corroborating an illegal  
14 transaction.

15 So, if this confidential informant was past  
16 proven and reliable, it's not -- that wouldn't be  
17 additional evidence that there was an illegal  
18 transaction taking place; it would be additional  
19 evidence that the information provided by the  
20 confidential source is accurate and should be  
21 believed.

22 So, the corroboration -- the State's  
23 position is that corroboration that the Court is

1 looking for goes towards whether the confidential  
2 informant should be believed because it sort of  
3 takes the place of that past proven reliability.

4 So, the corroboration is more about  
5 reliability than corroboration that an illegal  
6 activity occurred. And there's case law -- and I  
7 apologize for not citing it -- that if a witness,  
8 civilian witness or civilian victim reports a  
9 crime -- and in this case we do have a civilian  
10 witness, in theory, reporting a crime -- that that  
11 civilian witness's information, unless otherwise  
12 shown, should be believed.

13 So, without any reason to believe that  
14 this -- without any bias or reason to believe that  
15 this confidential source is lying -- this wasn't a  
16 case where the confidential informant was working  
17 off charges or also arrested himself and,  
18 understandably, would be trying to lay the blame on  
19 another person. This confidential informant is  
20 equivalent to a civilian witness who came forward.  
21 And the Court says that a civilian witness claiming  
22 that they were victimized or that they saw a crime  
23 should be believed and can establish probable

1 cause, unless shown why they aren't believable.

2 So, when the burden is on the defendant --  
3 when a warrant has been signed by a neutral  
4 magistrate and deference paid to that decision,  
5 that the confidential informant's information in  
6 this case should be considered reliable not only  
7 because there's no bias otherwise and that they are  
8 really just a civilian witness providing  
9 information to the police, but also in that it's  
10 been corroborated independently.

11 THE COURT: Thank you.

12 Any rebuttal?

13 MR. MAURER: Your Honor, that's really a  
14 stretch. This officer here, Patrolman Mitchell in  
15 Elsmere Police, was an officer for 11 years when  
16 this warrant was sought and he knows the difference  
17 between a civilian witness and a confidential  
18 informant. All we have in this affidavit is the  
19 fact that it's a confidential informant. And I  
20 think -- I can't imagine how you can make the  
21 argument that we have a civilian witness here  
22 because if it was a civilian witness, the affidavit  
23 would say it's a civilian witness.

1 The only corroboration we have here is that  
 2 this informant knows Ashley King and can identify  
 3 her. That's it. This is not -- the Court has seen  
 4 vast numbers of affidavits of probable cause where  
 5 all the information that the informant is giving is  
 6 corroborated, they are there with him, he goes in,  
 7 they give him the money, they come back out with  
 8 the drugs. We don't have any scintilla of that in  
 9 this. All we have is the bald statement of this  
 10 individual. We also don't know if he's working on  
 11 charges. We don't know that. He's a confidential  
 12 informant. He approached the officer. There could  
 13 have been some prior arrangement with another  
 14 officer and this, he thinks, might be his  
 15 opportunity to provide some help.

16 So, all of those arguments that Mr. McBride  
 17 is making, I would suggest, should be disregarded  
 18 by the Court for the reasons I articulated.

19 THE COURT: And for other reasons; that they  
 20 are not found in the four corners of the warrant?

21 MR. MAURER: Correct. And I think *LeGrande*  
 22 is right on point here, and I would ask the Court  
 23 to grant the motion.

1 THE COURT: Thank you. I'm prepared to rule  
 2 and will do so from the bench. As I indicated a  
 3 few moments ago, I misstated the burden of proof.  
 4 The defendant has the burden of proof.

5 And because I think the standards  
 6 articulated by various Delaware and United States  
 7 Supreme Court cases are pertinent, it's worth  
 8 reciting because the legal context is critical to  
 9 the application of the facts that we find in the  
 10 affidavit of probable cause.

11 As stated in cases such as *LeGrande*, if an  
 12 issuing magistrate -- if a magistrate finds that  
 13 the facts recited in the Complaint constitutes  
 14 probable cause, a warrant should issue. And one  
 15 key phrase is that the applicant needs to require  
 16 a, quote, fair probability, unquote, that an  
 17 offense has been committed and that the property to  
 18 be seized will be found in a particular place. As  
 19 set forth in the State's summary of the law, a  
 20 reviewing court needs to take a so-called  
 21 deferential approach to a Magistrate's decision and  
 22 must not apply a hypertechnical approach to the  
 23 evaluation of the search warrant affidavit but,

1 rather, apply a common sense interpretation. And  
 2 just because a four-corners test is applied doesn't  
 3 constrain the reviewing court from adopting a  
 4 flexible nontechnical approach in evaluating a  
 5 warrant's validity.

6 As cases have said, probable cause is  
 7 measured not by precise standards, but by a  
 8 totality of the circumstances of the, quote,  
 9 factual and practical considerations of everyday  
 10 life on which reasonable and prudent men, not legal  
 11 technicians, act, unquote. That quote comes from  
 12 *State versus Rooney*. And the bottom line is that  
 13 the totality of the circumstances need only  
 14 suggest, quote, a fair probability that the  
 15 defendant has committed a crime.

16 Now, turning to the nature of the person,  
 17 I'll say, who supplied the information to Officer  
 18 Mitchell. He is not a past proven reliable  
 19 informant, so more is otherwise required than in  
 20 that situation.

21 Here we're in a middle ground of the person  
 22 being a confidential source known to the police  
 23 officer, which distinguishes it from cases that are

1 just totally anonymous tips called into 911 or a  
 2 police station or whatever.

3 I think *LeGrande* is partially  
 4 distinguishable for the reasons that Mr. Maurer  
 5 alluded to, but I don't think that's fatal to the  
 6 State's position because I think that there is  
 7 sufficient corroborating information in the  
 8 probable cause sheet for the following reasons:

9 As is set forth in the warrant, Officer  
 10 Mitchell says at Paragraph 2: Quote, "On the  
 11 listed date and time I was conducting a separate  
 12 investigation," et cetera, "and was contacted by a  
 13 confidential source," et cetera.

14 He doesn't identify the date. He doesn't  
 15 say December 9, 2012. But he does say "on the  
 16 listed date and time." The date of the application  
 17 on the probable cause sheet is identified by him as  
 18 being Sunday, December 9, 2012. I just think it's  
 19 a fair inference to conclude that the use of the  
 20 phrase, quote, listed date and time, unquote, which  
 21 appears only six lines below the date of  
 22 application, is a -- that he is referring to  
 23 Sunday, December 9th. So although perhaps the

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1 search warrant could have been more specific with  
2 respect to that, I think it's sufficient.

3 And I'll add to that that the -- I think  
4 it's appropriate for me to consider that the search  
5 warrant was applied for and signed by the issuing  
6 magistrate at 12:50 a.m. on Monday, December 10th,  
7 50 minutes past midnight or past the, quote, listed  
8 date, unquote, of December 9th.

9 Turning to other information set forth by  
10 Detective Mitchell in the warrant. The  
11 confidential source gave some detail, more than  
12 perhaps was needed, to Officer Mitchell in saying  
13 that the confidential informant went to the  
14 apartment in question about 1400 hours -- that  
15 would be 2:00 p.m. -- on Sunday, December 9th to  
16 purchase marijuana. The white female, Ashley King,  
17 the confidential source said, but didn't know the  
18 name, answered the door. And the confidential  
19 source said in some detail the female had dark  
20 hair, was wearing sweatpants and a tank top and had  
21 blue eyes. He also testified that \$20 in U.S.  
22 currency was exchanged for the one gram of  
23 marijuana wrapped in foil.

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1 The officer states he's familiar with the  
2 occupants of 1509 Maple Avenue, Apartment 1, along  
3 with other members of the Elsmere Police  
4 Department. A DELJIS inquiry check revealed that  
5 Bernardo McKinney had a domestic incident reported  
6 relating to that address. And in that report an  
7 Ashley King is listed as being the girlfriend who  
8 resides in the apartment.

9 A six-pack photo lineup was developed and  
10 the confidential source immediately identified  
11 picture number three as Ashley King, whose physical  
12 features tie in with the confidential source's  
13 original statement to Officer Mitchell.

14 I don't think the search warrant is stale,  
15 as argued by defendant in Paragraph 10 of the  
16 Motion to Suppress. I think there was sufficient  
17 corroboration of this confidential source known to  
18 Officer Mitchell.

19 I think, just stating, again, the common  
20 sense application that the Court must apply and the  
21 fair inferences that can be drawn, that there has  
22 been shown to have been a fair probability of a  
23 crime having been committed within the previous

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1 24 hours. The defendant having the burden must  
2 prove by a preponderance of the evidence that he's  
3 entitled to relief, taking into account  
4 particularly the burden of proof. I think  
5 defendant has not shown by a preponderance of the  
6 evidence that he is entitled to relief.

7 Accordingly, the Court denies the Motion to  
8 Suppress. And I will write on the cover of the  
9 Motion to Suppress, for docketing purposes, quote,  
10 the Motion to Suppress is denied for the reasons  
11 stated on the record.

12 That concludes our proceeding today, I  
13 believe. Is there anything further to come before  
14 the Court, or is the next step the trial on  
15 Wednesday?

16 MR. MAURER: Yes, Your Honor.  
17 MR. McBRIDE: Trial, Your Honor.

18 THE COURT: If there's nothing further for  
19 the Court, then we do stand in recess. I will be  
20 the criminal assignment judge on Wednesday, so I  
21 will see you both then. I am going to put on the  
22 plea agreement "rejected," with today's date.  
23 (Whereupon, the proceedings concluded at

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1 10:55 a.m.)  
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STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, DENNEL J. NIEZGODA, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 30th day of September, 2013.

/s/ Deniel J. Niezgoda  
DENNEL J. NIEZGODA, RHR, CRR  
DE CSR NO. 176-RPR