

**State of Michigan
In the Supreme Court**

People of the State of Michigan,
Plaintiff-Appellant,

vs

Melinda Sue Keller,
Defendant-Appellee.

Supreme Court No. 131224

Court of Appeals No. 265118

Circuit Court No. 05-15144-FH

People of the State of Michigan,
Plaintiff-Appellant,

vs

Michael David Keller,
Defendant-Appellee.

Supreme Court No. 131223

Court of Appeals No. 264865

Circuit Court No. 05-16145-FH

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Application for leave to appeal from the Michigan Court of Appeals, Div. 2
Davis, P.J., and Cavanagh and Talbot, JJ.

People's Supplemental Brief in Support of Application for Leave to Appeal

Submitted by:
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131223-4

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(3)

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(4)

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Statement of jurisdiction

Pursuant to MCR 7.302, *et seq.*, the People, Plaintiff-Appellant, filed for Michigan Supreme Court review of the Court of Appeals published opinion entered March 30, 2006 in *People v Michael David Keller*, 270 Mich App 446; 716 NW2d 311 (2006) [CA 264865] & *People v Melinda Sue Keller*, 270 Mich App 446; 716 NW2d 311 (2006) [CA 264865], reversing the trial court's denial of defendants' motion to suppress. [Appendix 1a-3a]

On December 15, 2006 pursuant to MCR 7.302(G)(1) this Court ordered the Clerk to schedule oral argument on whether to grant the prosecutor's application or take other peremptory action. Additionally the parties were ordered to submit supplemental briefs addressing the following issues: (1) whether the presence in the defendants' trash of a small amount of marijuana constituted probable cause justifying the search; (2) assuming there was a Fourth Amendment violation, whether police acted in objectively reasonable good-faith reliance on the warrant; (3) whether the search violated MCL 780.653; and (4) assuming that the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that police misled the magistrate and violated Michigan law in their efforts to obtain a search warrant.

This Court has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims. *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84 (1992). Withal, this Court has deviated from that rule in the face of exceptional circumstances. *Perini v Peeler*, 373 Mich 531, 534 (1964) [overruled on other grounds in *McDougall v Schanz*, 461 Mich 15 (1999)] (issue

resolution was necessary to quell confusion generated by Court's earlier opinions); *People v Snow*, 386 Mich 586, 591 (1972) (addressed issue to prevent a miscarriage of justice). cf., also *Curtis v Duval*, 124 F3d 1 (CA 1, 1997) citing *Caspari v Bohlen*, 510 US 383 (1994).

The case *sub judice* [*People v Keller*, 270 Mich App 446 (2006)] is a published opinion most recently appearing in the cumulative supplement of 178 ALR Fed 487, **Sufficiency of Information by Anonymous Information to Provide Probable Cause for Federal Search Warrant—Cases Decided After *Illinois v Gates***, 462 US 213 (1983). Cases involving anonymous tips present special problems and in this context the courts look to other indicia of reliability. *United States v Capozzi*, 91 F Supp 2d 423 (D Mass, 2000).

The Court of Appeals decision in this case of *People v Keller* is contrary to better reasoned decisions such as *United States v Fisher*, 33 Fed App 933 (CA 10, 2002). In *Fisher* police officers acted in good faith reliance on a warrant to search defendant's residence, and thus suppression of evidence recovered from the home was not warranted even if probable cause to support the warrant was lacking, although the affidavit contained no statements as to reliability of the confidential informant's tip that defendant was selling drugs from the residence, where police obtained independent corroboration by testing trash found on the curb outside defendant's residence which tested positive for drugs.

Michigan Supreme Court review and a published opinion reversing the Court of Appeals is necessary to bring Michigan search and seizure jurisprudence in line with better reasoned decisions such as *United States v Fisher*, *supra*.

Statement of questions presented

(1)

Whether the presence in defendants' trash of a small amount of marijuana constituted probable cause justifying the search.

Defendant-appellees say: No

Plaintiff-appellant says: Yes

(2)

Assuming there was a Fourth Amendment violation, whether the police acted in objectively reasonable good-faith reliance on the warrant.

Defendant-appellees say: No

Plaintiff-appellant says: Yes

(3)

Whether the search violated MCL 780.653.

Defendant-appellees say: Yes

Plaintiff-appellant says: No

(4)

Assuming that the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that police misled the magistrate and violated Michigan law in their efforts to obtain a search warrant.

Defendant-appellees say: Yes

Plaintiff-appellant says: No

Statement of facts

The Genesee County prosecutor's Information charged defendant-appellee Michael Keller as follows: Ct I: Possession With Intent to Deliver Marijuana (PWID), MCL 333.7401(2)(d)(ii), and Ct II: Maintaining a Drug House, MCL 333.7405d. Defendant-appellee Melinda Keller was charged with Ct I: Maintaining a Drug house, MCL 333.7405d, and Ct II: Possession of Marijuana, MCL 333.7403(2)(d).

A jury trial was scheduled for both defendants on November 8, 2005 at 8:30 am. The prosecutor requested an adjournment to permit the filing of an interlocutory appeal with the Court of Appeals but the trial court denied the same. [Trans. August 12, 2005, p 17]

The evidence in this case, marijuana and smoking paraphernalia were obtained pursuant to the duly issued search warrant by 68th District Court Judge Romana Roberts on December 1, 2004. [See search warrant—circuit court file] The search warrant was executed the same day at defendants' residence located at 3828 Maryland Street in Flint, Michigan. Executing officers seized 172 grams of marijuana and smoking paraphernalia, etc. [Prelim. Exam Trans. Vol I, April 13, 2005, p 30]

Following the bind-over to Circuit Court defendants filed a motion to suppress the fruits of the search warrant arguing the police had not complied with the standards set forth in MCL 780.653. The trial court denied the motion to suppress, but said that an anonymous tip was not a valid basis on which to issue a search warrant. However, relying on *People v Hawkins*, 468 Mich 488 (2003), the court found he could not suppress the evidence seized under the search warrant, but told defense counsel James Zimmer he would be permitted to argue to the jury the police "intentionally" violated the

law of Michigan in that the officers “deliberately” misled the magistrate when seeking the search warrant. [Trans. July 14, 2005, p 13]

While acknowledging that a jury should not hear search warrant issues, the trial court said he would permit defense counsel James Zimmer to argue police misconduct to the jury because the statute [MCL 780.653] talks about it which is relevant to the case. [Trans. July 14, 2005, p 13] On July 14, 2005 the trial court directed defense counsel and the prosecutor to brief the issue of whether the doctrine of *corpus delicti* would permit or deny admission of defendants’ statements at trial. Additionally the court said he was holding defendants’ motion to dismiss in abeyance until August 12, 2005 [Trans. July 14, 2005, p 14]

On August 12, 2005 defense counsel Zimmer petitioned the trial court to reconsider his motion to suppress. The court denied the motion, but reiterated that defense counsel could argue to the jury the police violated the law in obtaining the search warrant. [Trans. August 12, 2005, p 17] The court also ruled defendants’ statements could be admitted by the prosecution with proper foundation.

The people maintain the Court of Appeals decision reversing the trial court and ordering suppression of 173.2 grams of marijuana and smoking paraphernalia is contrary to the jurisprudence and should be reversed. The people further maintain that for the reasons set forth in the argument portions of this supplemental brief, *infra*, this Court should grant leave to appeal and order reinstatement of the suppressed evidence and further order that defense counsel shall not be permitted to argue to the jury that the police were guilty of misconduct in obtaining the search warrant in this matter.

(1)

Whether the presence in defendants' trash of a small amount of marijuana constituted probable cause justifying the search.

Defendants-appellees say: No

Plaintiff-appellant says: Yes

Argument

The Court ordered the parties to file supplemental briefs addressing the question whether the presence in defendants' trash of a small amount of marijuana constituted probable cause justifying the search of their home. [Please note recent legislation -- Crime Stoppers, MCL 600.2157b provides that a person shall not be required to disclose by way of testimony or other wise, a confidential communication to a crime stoppers organization.]

The Fourth Amendment provides that “no [w]arrants shall issue, but upon probable cause” Pursuant to the exclusionary rule, “[t]he usual remedy for seizures made without probable cause is to exclude the evidence wrongfully seized.” *United States v Brunette*, 256 F3d 14, 19 (CA 1, 2001) citing *Weeks v United States*, 232 US 383, 391-93 (1914). Nevertheless, because the “[t]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates,” *Leon*, 468 US at 916, in most cases where “an officer acting with objective good faith has obtained a warrant from a judge or a magistrate and acted within its scope There is no police illegality and thus nothing to deter” by suppressing the evidence, even if the warrant issued without probable cause. *Id.* at 920. In such a case, then, the exclusionary rule does not apply *Id.* at 922.

In *People v Russell*, 2003 WL 21108471, CA 234058 (Unpublished) citing *People v Pinnix*, 174 Mich App 445 (1989), marijuana residue was recovered from the trash in front of the residence. There it was said; “[P]robable cause for the issuance of a search warrant may be based on the fruits of the search without a warrant of household garbage set out for curbside collection.” The court rejected the claim that a small amount of marijuana found in the garbage was insufficient to establish that there might be marijuana at the residence.

... The odor of marijuana alone is enough to give rise to probable cause. *People v Kazmierczak*, 461 Mich 411, 424 (2000). Likewise, the presence of marijuana stems in the trash outside defendant’s residence was sufficient to “warrant a reasonably prudent person” to conclude that marijuana would probably be present inside the residence. See; [*People v Russo*, 439 Mich. 584; 487 NW2d 698 (1992); *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000)]. Moreover, the garbage was picked up on the day of a “normal trash pickup...”

In *People v Mendoza*, 2004 WL 1335819, CA 246270 (Unpublished) the court rejected defendant’s argument that the affidavit for search warrant contained false material. The Court found that the information was not necessary to the finding of probable cause because the affidavit also included information about marijuana discovered in defendant’s trash. The Court explained:

“[P]robable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched.” *People v Russo*, 439 Mich 584, 606-607 (1992). The mere odor of marijuana, if detected by a qualified individual and testified to before a magistrate, may support a finding of probable cause. *Johnson v United States*, 333 US 10, 132 (1948), citing *Taylor v United States*, 286 US 1 (1932). Thus, the discovery of marijuana in defendant’s trash was sufficient to support the magistrates finding of probable cause.

Decisions from other jurisdictions are to the same effect, that is, a single trash pull based on an anonymous tip is sufficient to indicate a fair probability that marijuana would

be found in a search. See e.g., *State v Colitto*, 929 So2d 654 (Fla 4th DCA, 2006); *State v Gross*, 833 So 2d 777 (Fla 3d DCA, 2002).

This Court should conclude that the presence in defendants' trash of a small amount of marijuana constituted probable cause justifying the search.

(2)

Assuming there was a Fourth Amendment violation, whether police acted in objectively reasonable good-faith reliance on the warrant.

Defendant-appellees say: No

Plaintiff-appellant says: Yes

Argument

In *United States v Leon*, 468 US 897 (1984), the Supreme Court modified the exclusionary rule “so as not to bar the admission of evidence seized in reasonable good-faith reliance on a search warrant that is subsequently held to be defective.” *Id.* at 905. In order for magistrates to be able to perform their official function, an affidavit must contain adequate supporting facts of the underlying circumstances to show that probable cause exists for the issuance of a search warrant. *Whitely v Warden*, 401 US 560, 564 (1971). The decisions define probable cause as “reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion.” *United States v Bennett*, 905 F2d 931, 934 (CA 6, 1990). It requires “only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Illinois v Gates*, 462 US 13, 244 (1983) n 13. A warrant must be upheld as long as the magistrate had a “substantial basis for ... conclud[ing] that a search would uncover evidence of wrongdoing...” *Id.* at 236. See also *United States v Finch*, 998 F2d 349, 352 (CA 6, 1993).

In *Illinois v Gates*, 462 US 213, 230 (1983) the Court stressed that the existence of probable cause must be determined from the totality of the circumstances.

When determining whether the affidavit in the case *sub juice* established probable cause to believe that contraband or evidence of a crime would be found at defendants’ home on Maryland Street, this Court must examine the totality of those circumstances in

a “realistic and commonsense fashion.” *United States v Van Shuttlers*, 163 F2d 331, 336 (CA 6, 1998), *cert. den.*, 526 US 1077 (1998). Of course, on appeal this Court must afford great deference to the determination of probable cause made by the magistrate judge who issued the search warrant. *United States v Allen*, 211 F3d 970 (CA 6, 1999) (*en banc*), *cert. den.*, 531 US 907 (2000); *United States v Akram*, 165 F3d 452, 456 (CA 6, 1999); *People v Burrows*, 429 Mich 865 (1987); *In re Search Warrant on 5000 Northwind Dr.*, 128 Mich App 564 (1983); *People v Russo*, 439 Mich 584 (1992). The existence of probable cause to support the warrant in this case must be ascertained exclusively from the four coroners of the affidavit. *Whiteley v Warden*, 401 US 560, 565 (1971), n. 8, *United States v Vigeant*, 176 F3d 565, 569 (CA 1, 1999); *United States v Etheridge*, 165 F2d 655, 656 (CA 8, 1999); *United States v Weaver*, 99 F3d 1372, 1377 (CA 6, 1996).

The *Leon* Court also held that the good faith exception to the exclusionary rule would not apply in the following circumstances: 1) when the search warrant was obtained in violation of *Franks v Delaware*, 438 US 154 (1978); 2) when the issuing magistrate has failed to act in a neutral and detached fashion; 3) when the affidavit in support of the warrant is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;” and 4) when the warrant is so facially deficient (i.e., it fails to describe the particular place to be searched or the items to be seized) that the executing officers could not have reasonably presumed that it was valid. 468 US at 923. See also *Van Shuttlers, supra*; *United States v Leake*, 998 F2d 1359, 1366 (CA 6, 1993).

Because “[t]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates,” *Leon*, 468 US at 916, in most cases

where “an officer acting with objective good faith has obtained a warrant from a judge or a magistrate and acted within its scope there is no police illegality and thus nothing to deter” by suppressing the evidence, even if the warrant issued without probable cause.

Id. at 920. In such a case then, the exclusionary rule does not apply. *Id.* at 922.

The people maintain that probable cause existed to support the issuance of the search warrant in the case *sub judice*. The affidavit for search warrant in pertinent part states:

* * *

7. That during the past several weeks, your affiant received an anonymous tip stating that large quantities of marijuana being sold and manufactured out of 3828 Maryland, City of Flint, Genesee County, Michigan. The tipster also indicated that there is a hidden room used for manufacturing Marijuana inside said residence.
8. That on November 30, 2004, your affiant removed two (2) trash bags, white in color with red ties that were located on the south side of Maryland, east of the driveway, near the curb of 3828 Maryland. After removing the trash bags your affiant transported the bags directly to the office of the City of Flint Police Department. Found inside the trash bags were one (1) suspected marijuana roach, and a green leafy substance on the side of a pizza box, and several pieces of correspondence addressed to Michael/Melinda Keller of 3828 Maryland
9. Your affiant field test(ed) the suspected marijuana, which tested positive for the presence of marijuana...

The Court of Appeals majority opinion in the case *sub judicie* failed to address *Leon*, and contends that the reliability of the informant was not established. [Appendix 2a] The people submit however, that even if the affidavit of Ofc. Vennete Lott failed to establish probable cause, the 173.2 grams of marijuana and smoking paraphernalia seized from 3828 Maryland, need not be suppressed when this case is considered in light of the

good faith exception to the exclusionary rule established in *Leon* and recognized in *People v Goldston*, 470 Mich 523; 682 NS2d 479 (2004).

It is important to observe that *Leon* allows the trial court, in its “informed discretion,” to bypass the customary “merits” inquiry into whether there existed a “substantial basis” for the probable cause determination made by the issuing magistrate, and simply decide whether the challenged search in all events came within the “good faith” exception to the exclusionary rule. See *United States v Zayas-Diaz*, 95 F3d 105, 112 (CA 1, 1996) (quoting *Leon*, 468 US at 925).

The people submit that this approach is warranted here, given the absence of any countervailing “prudential considerations” identified by *Leon*. *Id.* at 112, n 8.

The government bears the burden of showing that the good faith exception applies. *United States v Diehl*, 276 F3d 32, 42 (CA 1, 2002) citing *United States v Brunette*, 256 F3d 14, 19 (CA 1, 2001).

“[W]hile *Leon* restricts the application of the exclusionary rule, it does not eliminate it.” *United States v Capozzi*, 347 F3d 327, m 332 (CA 1, 2003). Under the decisions exclusion remains appropriate in certain circumstances, including where facts material to the decision to issue the warrant were intentionally or recklessly omitted from the affidavit submitted in support of it, or where “the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.*; see also *Leon*, 468 US at 923; *United States v Brunette*, 256 F3d 14, 19 (CA 1, 2003).

In *Franks v Delaware*, 438 US 154, 155 (1978), the Supreme Court recognized a defendant’s right to challenge “the veracity of a sworn statement used by police to procure a search warrant.” To receive a hearing for this purpose, a defendant must make

“a substantial preliminary showing that a false statement knowing and intentionally, or with reckless disregard for the truth, was included by the affidavit in the warrant affidavit, and [that] the allegedly false statement is necessary to the finding of probable cause....” *Id.* at 155-56.

The omission of a material fact from the affidavit in support of a warrant is treated as a false statement for purposes of the *Franks* analysis. See e.g., *United States v Castillo*, 287 F3d 21, 25 (CA 1, 2002); *United States v Charles*, 231 F3d 10, 23 (CA 1, 2000). In the case of an omission, “suppression should be ordered only if the warrant application, ... clarified by disclosure of previously withheld material, no longer demonstrates probable cause.” *United States v Stewart*, 337 F3d 103, 105 (CA 1, 2003); *Castillo*, 287 F3d at 25, n. 4 (“With an omission, the inquiry is whether its inclusion in an affidavit would have led to a *negative* finding by the magistrate on probable cause.”)

In *People v Goldston*, 470 Mich 523, 541; 682 NS2d 479 (2004), n 10 this Court held that the Michigan Constitution contains an objective good faith exception to the exclusionary rule, which allowed officials to prove guilt using illegally seized evidence. *Id.* at 541. In making this state constitutional law determination the Court created a good faith exception like the one established by the United States Supreme Court under the Fourth Amendment. The Court recognized its separate sovereignty: “In interpreting our Constitution, we are not bound by the United State Supreme Court’s interpretation of the United States Constitution, even where the language is identical. *Id.* at 484-485.

Nonetheless the majority opinion rhetorically justified its interpretation of our Constitution by citing interpretations of other state constitutions and state statutes, even

though it declared them to be “entirely irrelevant to [its] constitutional analysis. *Id.* at 541, n 10.

In the case *sub judice* Talbot, J., dissenting, correctly observed that defendant Michael Keller’s suppression motion was “nothing more than a disconnected list of statements attacking the reliability of the search warrant. The motion stated that the anonymous tip at issue failed to meet the standards set forth in MCL 780.653. The only constitutional arguments found in this motion are conclusory statements of constitutional infirmity citing *Franks v Delaware*, 438 US 154 (1978), and *People v Sloan*, 450 Mich 160 (1995), *People v Stumph*, 196 Mich App 218 (1992) without any additional analysis. Specifically, there is no citation of *United States v Leon*, 468 US 897 (1984), *People v Goldston*, 470 Mich 523 (2004), or the good-faith exception to the exclusionary rule, which defendants now argue the circuit court erred in applying.” *Keller*, 270 Mich App at 453.

178 ALR Fed 487, **Sufficiency of Information Provided by Anonymous Informant to Provide Probable Cause for Federal Search Warrant—Cases Decided After *Illinois v Gates***, 462 US 213(1983) is enlightening. Annotation author Eric C. Surette, J.D., collects and analyzes all federal cases since the decision in *Gates* that discuss whether, under the circumstances and applying or apparently applying the “totality of the circumstances” test, probable cause for a search warrant issued by a federal judge or magistrate was established in whole, or in part, by information supplied by an anonymous informant, i.e., one whose identity was unknown to the police. Cases involving informants whose identities are known to the police are not within the scope of the annotation.

In *United States v Washington*, 380 F3d 236 (CA 6, 2004) it was held that the good faith exception precluding suppression of evidence obtained in objectively reasonable reliance on subsequently invalidated search warrant will not apply in four specific situations: (1) when search warrant affidavit contains information that affiant knows or should have known to be false, (2) when issuing magistrate wholly abandoned his or her judicial role, (3) when search warrant affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or when warrant application was supported by nothing more than a bare-bones affidavit, and (4) when warrant is so facially deficient that executing officers cannot reasonably presume it to be valid.

In *United States v Fisher*, 33 Fed Appx 933 (CA 10, 2002), a case substantially similar to the case *sub judice*, police acted in good faith reliance on a warrant to search defendant's residence, and thus suppression of evidence recovered from the residence was not warranted even if probable cause to support the warrant was lacking, although the affidavit contained no statements as to reliability of the confidential informant's tip that defendant was selling drugs from his residence, where police obtained independent corroboration by testing trash found outside the residence, which tested positive for drugs. Accord, see *United States v Wade*, 2006 WL 2583271 (WD Mich, 2006).

The people respectfully submit that under the facts of this case and the above referenced jurisprudence, this Court, should grant leave to appeal and under authority of MCR 7.316(7), find that the police acted in objectively good faith in reliance on the search warrant for defendants' home. This Court should reverse the Court of Appeals

and remand the case to the Genesee County Circuit Court for trial and order reinstatement of the evidence obtained pursuant to the search warrant in question.

Issues (3) & (4)

(3) Whether the search violated MCL 780.653; and (4) assuming that the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that police misled the magistrate and violated Michigan law in their efforts to obtain a search warrant.

Defendant-appellees say: Yes

Plaintiff-appellant says: No

Argument

In this case the police received a tip that defendants were selling marijuana from their home at 3828 Maryland in Flint, Michigan. A trash pull from the curb of their residence revealed a marijuana cigarette butt and a small amount of marijuana residue in a pizza box. The 68th District Court Magistrate authorized a warrant for the search of defendants' home and the search revealed 172 grams of marijuana, and some smoking paraphernalia, etc. [Vol. I Prelim. Exam. Trans. April 13, 2005, p 30]

This Court requests that counsel for the respective parties address the question of whether the search violated MCL 780.653. Answering Issue (3) the people submit that the referenced statute provides that an affidavit for search warrant may be based on information supplied by an unnamed person if the affidavit contains affirmative allegations from which the magistrate may conclude the person spoke with personal knowledge of the information and either the unnamed person was credible or that the information was reliable.

This Court in *People v Hawkins*, 468 Mich 488; 688 NW2d 602 (2003) addressed the question of the application of the exclusionary rule to evidence obtained by a search warrant whose application contained an affidavit that did not comply with MCL 780.653.

This Court held that the statute does not contemplate application of the exclusionary rule, and evidence seized pursuant to a search warrant issued in violation of the affidavit requirement should not be suppressed.

In *People v Nolan*, CA 244509, 2004 WL 790416 (Apr. 3, 2004) (unpublished) the Court of Appeals, citing *People v Hawkins, supra*, under similar facts to the case *sub judice*, held that the statute did not contemplate application of the exclusionary rule. The Court said that absent the statutory violation, the evidence supplied by the confidential informant was properly before the magistrate. Where this evidence was corroborated by the trash pull, there was probable cause to issue the search warrant. See also *People v Strickland*, CA 260480, 2006 WL 1751751 (June 27, 2006).

Answering Issue (4) the people submit that the trial court may not permit the defense to argue that the police misled the magistrate and violated Michigan law in their effort to obtain a search warrant.

The issue can be resolved by reference to *People v Kramer*, 260 Mich 94 (1932). Defendant was charged with having in his possession 510 quarts of home-brew beer, 25 gallons of home-brew mash in the making, and several dozen empty beer bottles, used for bottling beer, contrary to section 9139, CL 1929. The sole claim of error on appeal was that the trial court denied defendant the right to have the jury determine whether the affidavit for search warrant was false in fact. The defendant contended that the beer, mash, and bottles were “planted” in his home by the police and that it was for the jury to determine whether this claim was true or not. Defendant’s suppression motion was denied. This disposed of the question. At trial defendant sought to prove the affidavit upon which search warrant was issued was false. The Supreme Court found that this was

equivalent to presenting his motion again and having the jury pass upon it, citing *People v Cech*, 236 Mich 75 (1926); *People v Burt*, 236 Mich 62 (1926). The Court held that defendant was not entitled to a second hearing on the same matter, or to have the jury determine the admissibility of evidence, citing *People v Lenic*, 255 Mich 29 (1931) and *People v Nutter*, 255 Mich 207 (1931). See also *People v Williams*, 368 Mich 494 (1962).

The people further maintain that it is improper to submit to the jury an issue not raised by the testimony and it is ordinarily error to submit issues on which there is no evidence. **75A Am Jur 2d Trial**, Section 734, fn 5 and 6 and citations. Questions of law are for the court to decide where motions for suppress of evidence are brought. *People v Hawkins*, 468 Mich 488, 496-497 (2003). Just as the court need not give requested instructions which would require a jury to decide questions of law, **75A Am Jur 2d, Trial** Section 734, fn 19 (citation omitted) defense counsel should not be permitted to argue police misconduct in obtaining a search warrant where there is no evidence to support the claim and the trial court has denied defendants' motion to suppress.

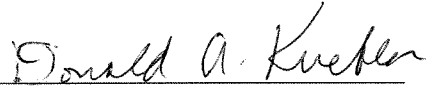
Under the above-referenced jurisprudence this Court should find that the trial court improperly held that defense counsel may argue police misconduct in the obtaining of the search warrant at issue in this case. The people so pray.

Relief

Wherefore, the People pray that this Honorable Court will grant leave to appeal and reverse the Court of Appeals below and reinstate the charged violations of the Public Health Court and remand the case to the Genesee County Circuit Court for trial.

Date: February 21, 2007

Respectfully submitted,



Donald A. Kuebler
Donald A. Kuebler P16282
Chief, Research Training and Appeals