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### **JURISDICTIONAL STATEMENT**

Appellant was convicted of possession of a chemical with the intent to create a controlled substance in violation of Section 195.420 RSMo. and was sentenced as a prior and persistent offender to a term of twenty (20) years. This case is not within the class of cases in which exclusive appellate jurisdiction is vested in the Supreme Court by Article V, Section 3 of the Constitution of the State of Missouri and accordingly jurisdiction lies in the Court of Appeals. Venue of this appeal lies in the Southern District of Missouri as per 477.070 RSMo.

## STATEMENT OF FACTS

On March 10, 2000, Officer James Wingo, a member of the Missouri State Highway Patrol, applied for a search warrant from Associate Circuit Judge Wayne Strothmann. (Legal File p. 16-22) (Vol 1, p. 22, L 9-10; p. 22, L 22-24; p. 29, L 2-5; p. 29, L 11-20). In his affidavit, Officer Wingo asserted that he had reason to believe that since January 1999, Appellant was involved with the manufacture of methamphetamine and the purchase of those items consistent with that manufacture. (Legal File p. 22). The Officer sought a warrant to search a residence located at 855 N. Highway 13, Clinton, Missouri for "Any and all methamphetamine, a Schedule II controlled substance. Any and all drug paraphernalia, any and all chemicals, glassware, instruction manuals, chemical formulas,

cutting agents, chemical by-products and precursors used in the manufacture of methamphetamine, any and all papers and/or records associated with the sale/distribution/manufacture of controlled substances, any and all weapons and/or firearms used to protect the sale/distribution/manufacture of controlled substances, any and all equipment used to deter the effectiveness of law enforcement and their attempts to halt the sale/distribution/manufacture of controlled substances, any United States currency determined to have been used in the sale of controlled substances or in close proximity thereof."

(Legal File p.16).

One affidavit was attached to the application. In the pertinent part of his affidavit, Officer Wingo, swore as follows:           H. That the Family Center Store in

Harrisonville, Missouri sells iodine crystals and assists law enforcement with the identification of individuals purchasing them. The Family Center Store formerly sold iodine crystals for \$2.49 per two ounce jar. Since June, 1995, however, they have raised the price dramatically to a cost of \$39.99 per four ounce jar, and \$79.99 per eight ounce jar. Further, that on January 16, 1999, a subject identified as Gary L. Baker, a white male, date of birth, November 1, 1955, giving an address of 1502 Leawood, Clinton, Missouri, purchased eight ounces of iodine crystals from the Family Center store for the purchase price of \$79.99. I spoke with employees of the store who told me that Baker indicated to them that he was going to put them "all over his horses" in order to treat them. I spoke with Missouri State Highway Patrol Sergeant Pat Shay who told me

that he had been receiving information that Baker was involved with the manufacture of methamphetamine and that he was not aware that Baker owned any horses.

I. That based on my experience and training, I am aware that ephedrine and pseudoephedrine are main precursors in the manufacture of methamphetamine. That these are frequently obtained by individuals manufacturing methamphetamine by purchasing large quantities of pills containing ephedrine and pseudoephedrine from stores. That on March 4, 1999, I spoke with West Central Drug Task Force Officer Amy Huber. TFO Huber told me that she had received information from an employee of the Wal-Mart store in Clinton, Missouri, about the purchase of pseudoephedrine pills from that store. This

information specifically indicated that Gary L. Baker had just purchased six boxes of pseudoephedrine from the Wal-Mart store on that date. Baker was later contacted at his residence, 40B Swisher Drive, Clinton, Missouri, by TFO Huber and Missouri State Highway Patrol Sgt. Pat Shay. That Baker admitted to Sgt. Shay and TFO Huber that he had purchased the pseudoephedrine pills due to a serious sinus problem. Baker also admitted that he had left the pills at a friends house, although he was unable to remember the friends name or the location of the residence. Sgt. Shay and TFO Huber later developed information that Baker had left the pills at the residence of Sarah Brewer, located at 814 E. Green, Clinton, Missouri. Subsequent to a search warrant issued for the residence on March 4, 1999, I assisted in the seizure of a

non-operational methamphetamine laboratory at that residence.

TFO Huber told me that she later interviewed Brewer at the Henry County Jail. TFO Huber told me that Brewer indicated that Baker had left the pills at her residence, and that Baker was in the process of learning how to manufacture methamphetamine.

J. That in December 1999, your affiant learned from Sgt. Shay that Gary L. Baker had moved his residence to 855 N. Highway 13, Clinton, Missouri.

K. TFO Huber further told me that she had received information from a female by the name of Samantha J. Chappell in July of 1999. TFO Huber told me that Chappell had indicated to her that she was the ex-girlfriend of Gary L. Baker and that prior to her breakup with Baker, she had

observed Baker manufacturing methamphetamine at his residence at 40B Swisher Dr., Clinton, Missouri. On January 13, 2000, your affiant assisted in serving a search warrant at Chappell's residence at Rt. 2, Box 246AE, Clinton, Missouri. A nonoperating methamphetamine laboratory was seized from the residence at that time. Chappell indicated to me at that time that Baker was still manufacturing methamphetamine at his residence on 13 Highway. Chappell developed this information because she had been purchasing chemicals for Baker for the manufacture of methamphetamine.

L. That on Friday, March 10, TFO Huber told me that she spoke with Keith Johnson who is the loss prevention coordinator with Wal-Mart in Clinton, Missouri. TFO Huber told me that according to Mr. Johnson, the Wal-Mart store in

Clinton, Missouri had taken notice of several unusual purchases made at the store during the period of late January 2000 through the middle of February 2000. That according to Mr. Johnson Gary L. Baker would come to the store between the hours of 2:00 a.m. and 5:00 a.m., and purchase three bottles of hydrogen peroxide, two cans of acetone and, on occasion several boxes of pseudoephedrine, every other evening for a two week period. I know based on my experience and training that acetone and hydrogen peroxide are both used in the manufacture of methamphetamine.

M. That based on my experience and training, I am aware that red phosphorous is a reagent chemical used in the manufacture of methamphetamine. That individuals illegally manufacturing methamphetamine frequently obtain the red phosphorous from the strike plates of match books. That

because these strike plates contain a small amount of red phosphorous, large quantities of match books are purchased in order to obtain a sufficient quantity. TFO Huber also told me that she had received information from Clinton Police Chief Rob Hyder on March 7, 2000, concerning Gary L. Baker. TFO Huber told me that Chief Hyder had received information from an individual with the Golden Valley Country Market Store in Clinton, Missouri, that Gary L. Baker was purchasing four boxes of matches, each containing 250 books of matches, from their store. That Baker had made the purchases of four boxes each of the previous two weekends. That on March 10, 2000, TFO Huber told me that she had received a phone call again from Chief Hyder at 10:30 a.m. TFO Huber told me that Chief Hyder had just received information, from an individual with Golden Valley Country Market Store, that Gary L. Baker had just purchased four more boxes of matches and was leaving the parking lot in a vehicle at that time. TFO Huber told me that she was near the location of the store and left immediately to the residence of Baker located at 855 N. Highway 13, Clinton, Missouri. She observed Baker exiting a vehicle in the

driveway and walk to the residence.

(Legal File p.19-22).

After the review of the application, Judge Strothmann issued a search warrant for controlled substances, drug paraphernalia, weapons or firearms, any equipment used to deter the effectiveness of law enforcement, cash and materials used to manufacture controlled substances, and any related records. (Legal File p. 14). Pursuant to the warrant, a minimum of twelve law enforcement officers went to Appellant's residence and searched it. (Vol 1, p. 28, L 12-13, p.37, L 7-10). During the course of this search, the officers found multiple items that could be used in the manufacture of methamphetamine. (Vol 1, p. 31, L 22-25; p. 32, L 1-13; p. 34, L 6-19).

Prior to trial, Appellant filed a Motion to Suppress contending, in part, (1) that the warrant was improper upon its face or was illegally issued, including the issuance of a warrant without proper showing of probable cause, and (2) that the warrant was illegally executed by law enforcement officers. (Legal File, p.5).

The pretrial suppression hearing was held on October 5, 2000, (Vol. 1, p. 18, L 22). Officer James Wingo was the sole witness called by the State. (Vol 1, p. 22, L 9-10). He testified that, upon receiving the search warrant from Judge Strothmann, a briefing was held at the Henry County Zone office and a team of officers was dispatched to the residence at 855 N. Highway 13, Clinton, Missouri. (Vol 1, p.36, L 19-25). The initial entry into the residence was made by the

Troop A S.E.R. Team. (Vol 1, p. 35, L 6-13). Officer Wingo was not present at the initial entry. (Vol 1, p. 37, L 20-25; p. 38, L 1-4); He was physically located at a church some distance away and did not observe the entry to the residence and was unaware if anyone knocked before entry. (Vol 1, p.38, L 6-12; p. 39, L 21-25). Officer Wingo testified that he believed Appellant had a violent, erratic, paranoid behavior and that Appellant's behavior was odd. (Vol 1, p. 77, L 21-24; p. 79, L 9-11). He testified that he believed Appellant was a convicted felon (Vol. 1, p.49, L 11-14) but he was unaware of Appellant's criminal history or if Appellant had any weapons convictions. He was unaware of any assaults on police officers by Appellant but thought that Appellant may have brandished weapons to citizens. (Vol 1, p. 77, L 25; p.

78, L 1-23). Officer Wingo testified that he had no personal knowledge of what was in the residence (Vol 1, p.50, L 1-6), but he believed three residents occupied the building. (Vol 1, p. 75, L 23-24). He testified that, while weapons were found during the search, (Vol 1, p.48, L 12-16) he had no information that weapons were at the residence. (Vol 1, p. 77, L 4-8). He was unaware of any threatening circumstances at the scene. (Vol. 1, p. 79, L 12-22).

Officer Wingo further testified concerning his affidavit as to information that Appellant had purchased iodine crystals at the Family Center Store, in Harrisonville, on January 16, 1999. (Vol. 1, p. 51, L 17-25; p. 52, L 12-13). He saw a videotape of the purchase. (Vol. 1, p. 83, L 10-13). He testified that Appellant provided an address at 1502 Leawood,

Clinton, Missouri (Vol 1, p. 52, L 19-21). In addition, he testified that it is not illegal to possess iodine crystals.

(Vol 1, p. 52, 1-3). His affidavit states that Missouri State Highway Patrol Officer Pat Shay indicated that he had been receiving information that Appellant was involved with the manufacture of methamphetamine. (Legal File, p.19).

Officer Wingo testified that on March 4, 1999, Appellant purchased six boxes of pseudoephedrine from the Wal-Mart store in Clinton, Missouri. (Vol. 1, p. 53, L 21-25). This information was passed on to him through West Central Drug Task Force Officer Amy Huber who had received the information from a Wal-Mart employee. (Legal File, p. 19-20). On March 4, 1999, Appellant was residing at 40B Swisher Drive, Clinton, Missouri (Legal File, p. 20; Vol. 1, p.54, L 8-10). The

affidavit states that Appellant admitted the purchase of pseudoephedrine pills due to sinus problems. Appellant stated he left the pills at a friends house, but was unable to remember the name or address (Legal File, p. 20). The affidavit further states that officers developed information that Appellant left the pills at the residence of Sarah Brewer. Subsequent to the execution of a search warrant at the Brewer residence, Brewer indicated that appellant left the pills at her residence and Appellant was in the process of learning how to manufacture methamphetamine. (Legal File, p. 20).

Officer Wingo testified that he learned, in December, 1999, from Officer Shay that Appellant moved his residence to 855 N. Highway 13, Clinton, Missouri. (Legal File, p. 20,

Vol. 1, p. 54, L 17-24). However, Officer Wingo did not know personally where Appellant resided. (Vol 1, p. 55, L 6-8).

Officer Wingo testified that Officer Huber received information in July 1999, from Samantha Chappell, an ex-girlfriend of Appellant's, that Chappell had observed Appellant manufacturing methamphetamine at his residence at 40B Swisher Dr., Clinton, Missouri. (Vol 1, p. 57, L 1-21; p. 58, L 1-4). On January 13, 2000, subsequent to the execution of a search warrant at the Chappell residence, Chappell indicated to officer Wingo that Appellant was still manufacturing methamphetamine at his residence on 13 Highway because she had been purchasing chemicals for Appellant for the manufacture of methamphetamine. (Legal File, p. 20; Vol. 1, p.58, L 11-25; p. 59, L 1; p.59, L 7-11).

Officer Wingo further testified that on March 10, 2000, Officer Huber told him that Keith Johnson, a loss prevention coordinator with Wal-Mart, in Clinton, Missouri, advised Officer Huber that the store had noticed several unusual purchases made during late January 2000 through the middle of February, 2000. (Vol. 1, p. 62, L 8-25). Officer Wingo believed that the purchases were made every other evening for a two week period (Vol. 1, p.63, L 6-9). The purchases included hydrogen peroxide, acetone and pseudoephedrine. (Legal File, p. 21). Officer Wingo testified that it was not illegal to make these purchases. (Vol 1, p. 63, L 16-17).

Officer Wingo testified that officer Huber informed him that Clinton Police Chief Rob Hyder, on March 7, 2000, received information from an individual with Golden Valley

Country Market Store in Clinton, Missouri that Appellant had purchased four boxes of matches, each containing 250 books of matches, from the store. Further, that appellant had made purchases of four boxes each of the previous two weekends.

(Vol 1, p. 64, L 8-25; p. 65, L 1-12). Officer Wingo did not know who the individual was that observed the purchase. (Vol. 1, p. 64, L 8-25; p. 65, L 1-12). The affidavit states that Police Chief Hyder received information, on March 10, 2000, from an individual with Golden Valley Country Market Store, that Appellant had just purchased Four boxes of matches. Officer Huber left for the residence of Appellant and observed him exiting a vehicle and enter the residence. (Legal File, p. 22).

Officer Wingo testified that he did not make application

for a search warrant based on the purchase of the iodine crystals on January 16, 1999; based on the purchase of pseudoephedrine pills on March 4, 1999; based on information provided by Samantha Chappell in July, 1999 and January, 2000; or based on the purchases at Wal-Mart because he believed probable cause was lacking. (Vol. 1, p. 68, L 12-25; p. 69, L 1-23; p. 69, L 24-25; p. 70, L 1-16). But, based upon the information that Appellant purchased four boxes of matches on March 10, 2000 and that Officer Huber saw Appellant at 855 N. Highway 13, he made application for a search warrant. (Vol. 1, p. 71, L 1-23).

The trial court denied Appellant's Motion to Suppress (Vol. 1, p. 95, L 6-14) and made a finding that Appellant was a prior and persistent offender. (Vol. 1, p. 97, L 1-25;

p.98, L 1-13). The trial court allowed a reopening of the evidence pertaining to the Motion to Suppress. Appellant and the State stipulated that Appellant had standing to file his Motion to Suppress. (Vol. 1, pl 159, L 16-25; p. 160, L 1-12). In addition, the Court admitted the search warrant into evidence. (Vol p. 160, L 21-25; p. 161 L 1-9 Legal File p. 14-22). Appellant, again, orally argued that the issuing judge lacked probable cause to issue a search warrant based upon stale information and hearsay/verification issues. Also, Appellant addressed the improper execution of the search warrant due to a no knock, no announce entry. (Vol. 1, p. 162, L 15-25; p. 162, L 1-25; p. 163, L 1-25; p.164, L 1-2). The trial court denied the motion to suppress (Vol 1, p. 164, L 3-6) and filed its supplemental findings at the close of the

case. (Legal File, p. 34).

The trial court discussed with counsel for Appellant and the State the mechanics of a continuing objection relating to the Motion to Suppress. (Vol. 1, p. 164, L 9-25; p. 165, L 1-25; p. 166, L 1-5). At the trial, Appellant made his continuing objection regarding evidence which was obtained through the search warrant. The objection was based upon the lack of probable cause to issue the search warrant and that the search warrant was improperly executed. The trial court overruled the objection and asked defense counsel if he wished it to be a continuing objection. Defense counsel requested a continuing objection and the State agreed to the use of a continuing objection to evidence seized pursuant to the search warrant. (Vol. 1, p. 175, L 15-25; p. 176, L 1-12). The

trial court took the continuing objection throughout the case and entered supplemental findings at the end of the case.

(Legal File p. 34)

During the course of trial, Bruce W. Houston, a Corporal with the Missouri State Highway Patrol, (Vol. 2, p. 276, L 21-25) testified that 25 S.E.R. team officials rushed the residence and utilized a battering ram or post hole driver to break in two separate doors. (Vol. 2, p. 308, L 3-25; p. 309; L 1-2; p. 292, L 10-16; p. 292, L 17-23; p. 293, L 1-13; p. 279, L 13-19). Their mission was to gain immediate entry to the residence (Vol. 2, p. 292, L 17-23) because they were worried about possible gunfire coming from the residence and that Appellant was possibly dangerous. (Vol 2, p. 281, L 1-3; p. 296, L 21-23)

Officer Houston testified further that the S.E.R. team could not see anybody in the residence and that he yelled "highway patrol" as he was hitting the door with a battering ram. (Vol. 2, p. 279, L 23-25; p. 280; L 7-9).

POINT I

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE  
CHEMICALS, EQUIPMENT AND OTHER ITEMS SEIZED FROM APPELLANT'S  
RESIDENCE BECAUSE THIS EVIDENCE WAS ILLEGALLY SEIZED IN THAT  
THE OFFICERS EXECUTING THE SEARCH WARRANT DID NOT KNOCK AT THE  
RESIDENCE AND ANNOUNCE THEIR IDENTITY AS LAW ENFORCEMENT  
OFFICERS PRIOR TO ENTERING THE PREMISES AND NO SHOWING HAD  
BEEN MADE PRIOR TO ISSUANCE OF THE WARRANT AS TO THE EXISTENCE  
OF ANY EXIGENT CIRCUMSTANCES WHICH WOULD JUSTIFY A NO KNOCK,  
NO ANNOUNCE SEARCH.      **STANDARD OF REVIEW**

Section 542.296(4) RSMo. 1994 provides that a Motion to  
Suppress may be based on the fact that the warrant was  
illegally executed. Appellant filed his Motion to Suppress

placing this issue into consideration (Legal File p. 5-6).

In a hearing to suppress evidence on the grounds that the evidence was obtained through an illegal execution of a search warrant, the state bears the burden of going forward with the evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the Motion should be overruled. State v. Milliorn, 794 S.W.2d 181 (Mo.banc 1990); State v. Ricketts, 981 S.W.2d 657 (Mo.App.W.D. 1998).

Review of the trial court's ruling on a Motion to Suppress evidence is limited to a determination of whether there is sufficient evidence to support the Court's ruling based on the complete record before the trial court. State v. Floyd, 18 S.W.3d 126 (Mo.App. S.D.2000). The trial court's ruling on a motion to suppress is reversed only if it is

clearly erroneous. State v. Slavin, 944 S.W.2d 314 (Mo.App. W.D. 1997). The facts are viewed in the light most favorable to the trial court's ruling. State v. Witte, 37 S.W.3d 378 (Mo.App. S.D. 2001).

Although the facts are reviewed under a clearly erroneous standard, the issue of whether the Fourth Amendment has been violated is a legal question reviewed de novo. State v. Rousan, 961 S.W.2d 831 (Mo.banc 1998).

#### **KNOCK AND ANNOUNCE**

Appellant contends that the law enforcement officials failed to properly follow the "knock and announce" procedure required by Article I, Section 15 of the Missouri Constitution of 1945 and the Fourth Amendment to the United States Constitution when executing a search warrant at a dwelling.

The Fourth Amendment of the United States Constitution protects the rights of the people to be secure against unreasonable searches and seizures. Missouri's constitutional search and seizure guarantee, Article I, Section 15, is co-extensive with the Fourth Amendment. State v. Deck, 944 S.W.2d 527 (Mo.banc 1999).

Woven within the fabric of the Fourth Amendment mandate for reasonableness is the requirement that law enforcement officers "knock and announce" before gaining entry pursuant to the execution of a search warrant. Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).

Specifically, law enforcement officers are obliged to knock on the door and announce their identity and purpose before attempting forcible entry. Richards v. Wisconsin, 520 U.S.

385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997).

A no-knock entry can be justified but only if law enforcement officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. State v. Hamilton, 8 S.W.3d 132 (Mo.App.S.D. 1999).

A fact-specific inquiry is required in determining whether there are "exigent circumstances" present, at the time of the execution of the search warrant, to justify a no-knock forcible entry. There are no "bright-line" rules to establish what law enforcement action will be in compliance with the knock and announce requirement. However, a examination of court findings does reveal several factors considered relevant to the issue but certainly not exhaustive:

1. Knowledge or belief occupant possessed weapons.
2. Knowledge of criminal history of occupant.
3. Possibility of destruction of evidence.
4. Officers contact with occupant before entry.
5. Sounds from within the premises.
6. Knowledge of violence or assaultive behavior of occupant.

See generally, 17 ALR4th 301 (1982); 85 ALR5th 1 (2001);

Ricketts, supra; Hamilton, supra.

An analysis of these factors which may or may not amount to "exigent circumstances" must be made in a fact specific context. Clearly, knowledge of the criminal history of an occupant for passing bad checks versus armed criminal action could tilt the scales towards a no knock, no announce execution of the warrant. Also, the absence of any knowledge of criminal history would be relevant.

A forced entry based upon speculation and hunches will not comply with the knock and announce requirement. The Supreme Court rejected the notion of a blanket exception to the knock and announce requirement in felony drug cases. Richards, supra. Therefore, arguments that suspected drug manufacturers commonly have weapons or that drugs are easily disposable, absent specific facts in the record, are insufficient to forego the knock and announce requirement. Ricketts, supra. Moreover, facts which become known to officers after a forcible entry cannot excuse the decision to force entry. U.S. v. Lucht, 18 F.3d 541 (8th Cir. 1994).

#### **A NO-KNOCK ENTRY**

A review of the entire record offers no evidence that the law enforcement officers knocked on Appellant's door during

the execution of this search warrant. In fact, the opposite was shown through Officer Houston's testimony that 25 S.E.R.T. officials rushed the residence and battered in two separate doors. (Vol 2 p. 308, L 3-25; p. 309, L 1-2; p. 292, L 10-16; p. 292, L 17-23; p. 293, L 1-13; p. 279, L 13-19).

Officer Houston further testified that he was yelling "highway patrol" as he was hitting the door with a battering ram. (Vol. 2, p. 279, L 23-25; p. 280, L 7-9).

#### **NO EXIGENT CIRCUMSTANCES**

Appellant contends that the state produced no persuasive evidence to conclude that there existed "exigent circumstances" in order to allow the law enforcement officers to dispense with the knock requirement during the execution of this search warrant.

The trial court entered it's "Supplemental Finding on Defendant's Motion to Suppress Evidence" on March 13, 2001 (Legal File p. 34). In it's supplemental findings, the court cites the following factors which justified the no-knock entry:

1. The Highway Patrol's past dealing with Defendant, particularly Sgt. Shay and Trooper Huber,
2. The paranoid state Defendant was known to be in at the time of obtaining the search warrant, and
3. Cpt. Bruce Houston's information that Defendant was armed and dangerous.

Appellant respectfully suggests that there is a total lack of evidence to support any of the trial court's supplemental findings. First, Sgt. Stay did not testify in this case. Second, Trooper Huber offered no testimony as to the character of any past dealings with the Appellant. Third, there was no testimony offered concerning the state of mind of

the Appellant at the time the search warrant was obtained.

Fourth, Cpt. Houston did not testify that he had information that Appellant was armed and dangerous.

The issue of whether "exigent circumstances" existed at the time the warrant was executed must be viewed from the perspective of the officers whose safety would be a concern. Those officers were the S.E.R. team. To "bootstrap" information of others not involved in the entry onto the S.E.R. team would trample the Fourth Amendment concept of "reasonableness" concerning search and seizures.

The testimony shows that a briefing was held at the Henry County Zone Office and, afterwards, the team of officers was dispatched to the Appellant's residence. (Vol. 1, p. 36, L 19-25). There is no testimony concerning what actually

occurred at that briefing or what was said.

Officer Houston, a member of the S.E.R. team, testified that the team members were worried about possible gunfire coming from the residence and that Appellant was possibly dangerous (Vol. 2 p. 281, L 1-3; p. 296, L 21-23). However, the record is devoid of any specific facts which would have suggest those possibilities. Moreover, the only testimony regarding knowledge of weapons at the residence was offered by Officer Wingo who testified he had no information that weapons were at the residence (Vol 1 p. 77, L 4-8). Officer Wingo was not present at the initial entry (Vol. 1 p. 37, L 20-25; p. 38, L 1-4). But, he did attend the pre-search briefing (Vol. 1, p. 36, L 19-250).

The possibilities that the S.E.R. team might encounter

gunfire or that the Appellant was dangerous, without any specific facts, are merely attempts to create a "blanket exception" in this type of case for the failure to knock and announce.

Again, Appellant argues that the focus on "exigent circumstances" should be limited to the S.E.R. team. However, in order to adequately examine any evidence that might be argued in the development of "exigent circumstances", Officer Wingo's testimony will be addressed.

Officer Wingo testified that he believed Appellant had a violent, erratic, paranoid behavior and that Appellant's behavior was odd. (Vol 1, p.77, L 21-24; p. 79, L 9-11). He offered absolutely no specific examples of Appellant's behavior or how Appellant's behavior justified a no-knock

entry by the S.E.R. team. Moreover, he did not testify whether his beliefs were shared with the S.E.R. team.

Officer Wingo further testified that he believed Appellant was a convicted felon but was unaware of Appellant's criminal history or if Appellant had any weapons convictions.

He testified that he was unaware of any assaults on police officers by Appellant, but that he thought that Appellant may have brandished weapons to citizens. (Vol. 1 p. 49, L 11-14; p. 77, L 25; p. 78, L 1-23).

Simply stated, Officer Wingo's testimony offers scant information concerning Appellant. It is long on speculation and short on facts.

POINT II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE AT TRIAL CHEMICALS, EQUIPMENT AND OTHER ITEMS SEIZED AT 855 NORTH 13 HIGHWAY, CLINTON, MISSOURI BECAUSE THIS EVIDENCE WAS THE FRUIT OF AN ILLEGAL SEARCH AND SEIZURE IN THAT NO PROBABLE CAUSE EXISTED FOR ISSUANCE OF THE SEARCH WARRANT UTILIZED TO OBTAIN THIS EVIDENCE BECAUSE THE AFFIDAVIT/APPLICATION CONTAINED INFORMATION BASED UPON HEARSAY WHICH WAS UNRELIABLE, UNCORROBORATED AND STALE.

**STANDARD OF REVIEW**

"Appellate review of the trial court's ruling on a motion to suppress is limited to determining whether evidence is sufficient to support the trial court's ruling." State v. McNaughton, 924 S.W.2d 517 (Mo.App.W.D. 1996). "While the

meaning of probable cause is a legal issue, its existence in a particular case is a question of fact." State v. Berry, 801 S.W.2d 64 (Mo.banc 1990). Therefore, "appellate review of whether the issuance of a search warrant lacked the requisite probable cause to render the search and seizure illegal so as to exclude the evidence at trial is not de novo." State v. Dowell, 25 S.W.3d 594 (Mo.App.W.D. 2000). The appellate courts are to afford "great deference on review to the initial judicial determination of probable cause made at the time of the issuance of the warrant, and will reverse only if that determination is clearly erroneous." State v. Middleton, 995 S.W.2d 443, (Mo.banc 1999).

#### **PROBABLE CAUSE**

Appellant contends that the issuance of the search

warrant for his residence was not supported by probable cause, as required by the Fourth to the United States Constitution and Article 1, Section 15, Missouri Constitution of 1945.

These constitutional requirements are codified in Section 542.276.4 RSMo. This contention was raised by Appellant in his Motion to Suppress filed in the trial court. (Legal File, Pages 5-6). Appellant objected to introduction at trial of the evidence which was seized pursuant to the search warrant. (Vol. 1, p. 164, L 9-25; p. 165, L 1-25; p. 166, L 1-5).

"Probable cause for the issuance of a search warrant is determined by the totality of the facts and circumstances alleged in the application for the warrant and its accompanying affidavit." State v. Hodges, 705 S.W.2d 585 (Mo.App.S.D. 1986). The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is

simply to ensure that the magistrate had a 'substantial basis for . . . conclud(ing)' that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Specifically, Appellant argues that the supporting affidavit of Officer Wingo was deficient because it was (1) based on hearsay which was uncorroborated, or (2) provided by an informant who was not known to the affiant as being reliable or (3) based on information that was stale which gave it little value in showing that contraband or evidence would likely be found in the place for which the warrant was sought.

The "veracity" and "basis of knowledge" of persons supplying hearsay information must be determined by the

issuing magistrate to be credible. State v. Dawson, 985 S.W.2d 941 (Mo.App.W.D. 1999). If an affiant relies on hearsay, there must be a substantial basis for crediting the hearsay. State v. Hammett, 784 S.W.2d 293 (Mo.App.E.D. 1989).

"The hearsay statement of an informant can be sufficient if the affidavit shows that the information was obtained through personal observation and if the informant's statements are corroborated through other sources. State v. Hill, 854 S.W.2d 814 (Mo.App.S.D. 1993). Hearsay information coming from an ordinary citizen is more deserving of a presumption of reliability than information from the "criminal milieu".

Dawson, supra. While certainty or even likelihood are not required, it is clear that, when information presented creates no more than mere suspicion, probable cause has not been

established. State v. Perrone, 872 S.W.2d 519 (Mo.App.S.D. 1994).

Staleness of information is a significant factor in the determination of whether probable cause exists for the issuance of a warrant. The issue was framed in Gates, supra, as to whether there exists a "fair probability" that evidence of a crime will be found in a particular place. Obviously, the likelihood that the evidence sought is still at a place to be searched depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized and the place to be searched.

Courts have grappled with this issue of "staleness" and decided no "bright-line" rules regarding time can be established. Each case must be reviewed on its own merit.

U.S. v. Golay, 502 F.2d 182 (8th Cir. 1974); Hodges, supra.

**NO PROBABLE CAUSE**

Appellant contends that the State produced insufficient evidence to allow the trial court to conclude that probable cause existed to issue the search warrant. The affidavit/application for search warrant was prepared and sworn to by Officer Wingo on March 10, 2000 (Legal File P.16-22). The pertinent part of the affidavit/application for search warrant upon which issuance of the warrant was based is set out as follows:

H. That the Family Center Store in Harrisonville, Missouri sells iodine crystals and assists law enforcement with the identification of individuals purchasing them. The Family Center Store formerly sold iodine crystals for \$2.49

per two ounce jar. Since June, 1995, however, they have raised the price dramatically to a cost of \$39.99 per four ounce jar, and \$79.99 per eight ounce jar. Further, that on January 16, 1999, a subject identified as Gary L. Baker, a white male, date of birth, November 1, 1955, giving an address of 1502 Leawood, Clinton, Missouri, purchased eight ounces of iodine crystals from the Family Center store for the purchase price of \$79.99. I spoke with employees of the store who told me that Baker indicated to them that he was going to put them "all over his horses" in order to treat them. I spoke with Missouri State Highway Patrol Sergeant Pat Shay who told me that he had been receiving information that Baker was involved with the manufacture of methamphetamine and that he was not aware that Baker owned any horses.

I. That based on my experience and training, I am aware that ephedrine and pseudoephedrine are main precursors in the manufacture of methamphetamine. That these are frequently obtained by individuals manufacturing methamphetamine by purchasing large quantities of pills containing ephedrine and pseudoephedrine from stores. That on March 4, 1999, I spoke with West Central Drug Task Force Officer Amy Huber. TFO Huber told me that she had received information from an employee of the Wal-Mart store in Clinton, Missouri, about the purchase of pseudoephedrine pills from that store. This information specifically indicated that Gary L. Baker had just purchased six boxes of pseudoephedrine from the Wal-Mart store on that date. Baker was later contacted at his residence, 40B Swisher Drive, Clinton, Missouri, by TFO Huber and Missouri

State Highway Patrol Sgt. Pat Shay. That Baker admitted to Sgt. Shay and TFO Huber that he had purchased the pseudoephedrine pills due to a serious sinus problem. Baker also admitted that he had left the pills at a friends house, although he was unable to remember the friend's name or the location of the residence. Sgt. Shay and TFO Huber later developed information that Baker had left the pills at the residence of Sarah Brewer, located at 814 E. Green, Clinton, Missouri. Subsequent to a search warrant issued for the residence on March 4, 1999, I assisted in the seizure of a non-operational methamphetamine laboratory at that residence.

TFO Huber told me that she later interviewed Brewer at the Henry County Jail. TFO Huber told me that Brewer indicated that Baker had left the pills at her residence, and that Baker

was in the process of learning how to manufacture methamphetamine.

J. That in December 1999, your affiant learned from Sgt. Shay that Gary L. Baker had moved his residence to 855 N. Highway 13, Clinton, Missouri.

K. TFO Huber further told me that she had received information from a female by the name of Samantha J. Chappell in July of 1999. TFO Huber told me that Chappell had indicated to her that she was the ex-girlfriend of Gary L. Baker and that prior to her breakup with Baker, she had observed Baker manufacturing methamphetamine at his residence at 40B Swisher Dr., Clinton, Missouri. On January 13, 2000, your affiant assisted in serving a search warrant at Chappell's residence at Rt. 2, Box 246AE, Clinton, Missouri.

A nonoperating methamphetamine laboratory was seized from the residence at that time. Chappell indicated to me at that time that Baker was still manufacturing methamphetamine at his residence on 13 Highway. Chappell developed this information because she had been purchasing chemicals for Baker for the manufacture of methamphetamine.

L. That on Friday, March 10, TFO Huber told me that she spoke with Keith Johnson who is the loss prevention coordinator with Wal-Mart in Clinton, Missouri. TFO Huber told me that according to Mr. Johnson, the Wal-Mart store in Clinton, Missouri had taken notice of several unusual purchases made at the store during the period of late January, 2000 through the middle of February, 2000. That according to Mr. Johnson, Gary L. Baker would come to the store between the

hours of 2:00 a.m. and 5:00 a.m., and purchase three bottles of hydrogen peroxide, two cans of acetone and, on occasion several boxes of pseudoephedrine, every other evening for a two week period. I know based on my experience and training that acetone and hydrogen peroxide are both used in the manufacture of methamphetamine.

M. That based on my experience and training, I am aware that red phosphorous is a reagent chemical used in the manufacture of methamphetamine. That individuals illegally manufacturing methamphetamine frequently obtain the red phosphorous from the strike plates of match books. That because these strike plates contain a small amount of red phosphorous, large quantities of match books are purchased in order to obtain a sufficient quantity. TFO Huber also told me that she had received information from Clinton Police Chief Rob Hyder on March 7, 2000, concerning Gary L. Baker. TFO Huber told me that Chief Hyder had received information from

an individual with the Golden Valley Country Market Store in Clinton, Missouri, that Gary L. Baker was purchasing four boxes of matches, each containing 250 books of matches, from their store. That Baker had made the purchases of four boxes each of the previous two weekends. That on March 10, 2000, TFO Huber told me that she had received a phone call again from Chief Hyder at 10:30 a.m. TFO Huber told me that Chief Hyder had just received information, from an individual with Golden Valley Country Market Store, that Gary L. Baker had just purchased four more boxes of matches and was leaving the parking lot in a vehicle at that time. TFO Huber told me that she was near the location of the store and left immediately to go to the residence of Baker located at 855 N. Highway 13, Clinton, Missouri. She observed Baker exiting a vehicle in the driveway and walking to the residence.

(Legal File p.19-22).

N. In subpart N, there was no effort made to corroborate information received from "an individual with Golden Valley County Store" other than Officer Huber arriving at Appellant's

residence and observing Appellant leave his vehicle and walk to the residence. Interestingly, there is no mention as to whether Officer Huber observed any match boxes.

Appellant contends that the affidavit/application for search warrant did not establish a fair probability that evidence of a crime would be found at 855 North Highway 13, Clinton, Missouri.

Appellant contends that a review of each of the foregoing subparts fails to establish probable cause.

In subpart H, the information predates the affidavit/application by approximately 14 months. The information is stale and attenuated and creates no nexus between drug activity and 855 N. Highway 13. The single purchase of an 8 ounce jar of iodine crystals is not an illegal act. Furthermore, the mere fact that Officer Shay told the affiant that he had information that Appellant was

involved with the manufacture of methamphetamine offers nothing as to the source of that information, its reliability or its basis for knowledge.

In subpart I, the information predates the affidavit/application by approximately one year. The information is stale and attenuated and creates no nexus between drug activity and 855 N. Highway 13. The single act of purchasing six boxes of pseudoephedrine pills is not an illegal act. Subsequent information regarding the fact that Appellant left the pills at the residence of Sarah Brewer provides no evidence that Appellant was involved in the non-operational methamphetamine laboratory located at the Brewer residence. Sarah Brewer did not implicate Appellant regarding the methamphetamine laboratory. She only stated that

Appellant was in the process of learning how to manufacture methamphetamine. Because of her involvement in criminal activity at her own residence, Sarah Brewer's allegation could not be classified on the same level as information provided by an "ordinary citizen." Therefore, Sarah Brewer's reliability and basis for knowledge should have been further explained and corroborated.

In subpart J, there is lacking any source of knowledge attributed to the information provided affiant from Officer Shay. Moreover, no attempts were made to corroborate the actual residence of the Appellant.

In subpart K, the information provided by Samantha J. Chappell that she had observed Appellant manufacturing methamphetamine at 40B Swisher Dr. was made in July, 1999.

This information was provided approximately 8 months prior to the affidavit/application for search warrant and is, therefore, stale. It is also attenuated and creates no nexus between drug activity and 855 N. Highway 13. As an ex-girlfriend of Appellant, Chappell's reliability is at issue. Subsequently, on January 13, 2000, the affiant assisted in serving a search warrant at the Chappell residence which resulted in the discovery of a non-operating methamphetamine laboratory. At that time, Chappell indicated she had purchased chemicals for Baker for the manufacture of methamphetamine and that Appellant was manufacturing methamphetamine at his residence on 13 Highway. Again, this information was provided approximately 2 months prior to the affidavit/application for search warrant and offers no time

frame for any purchase of chemicals by Chappell for Appellant.

Chappell's information can not be viewed in the same light as that provided by an "ordinary citizen" and no further corroboration was offered.

In subpart L, the information provided by Keith Johnson, the loss prevention coordinator with Wal-Mart, is not clarified as personal knowledge of the informant. Rather, it appears to have come from the Wal-Mart store as a whole. The affiant did not corroborate this information nor seek to discover the actual source of the information and its reliability. The information suggests that Appellant made purchases of hydrogen peroxide, acetone and, on occasion, several boxes of pseudoephedrine, every other evening for a two week period. The time frame for the purchases was between late January, 2000 and the middle of February, 2000. If made, the purchases occurred approximately one month prior to the affidavit/application for search warrant. Notwithstanding the issue of staleness, these purchases effectively ended in

February, 2000.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO FILE ITS SECOND AMENDED INFORMATION BECAUSE THE SECOND AMENDED INFORMATION FAILED TO CHARGE AN OFFENSE IN THAT THE SECOND AMENDED INFORMATION ALLEGES THAT APPELLANT VIOLATED 195.420 RSMO., CREATION OF A CONTROLLED SUBSTANCE, IN SEVERAL WAYS BY POSSESSION OF SEVERAL PRECURSOR CHEMICALS, ALL OF WHICH ARE CHARGED DISJUNCTIVELY RATHER THAN CONJUNCTIVELY.

On February 14, 2001, immediately prior to commencement of trial, the court granted the prosecuting attorney's request to file a Second Amended Information. (Legal File, Page ). The portion of the Second Amended Information which is pertinent to this appeal reads as follows:

The Prosecuting Attorney of the County of Henry, State of Missouri, charges that the

Defendant, in violation of Section 195.420,  
RSMo., committed the class C felony of  
possession of a chemical with the intent to  
create a controlled substances, punishable  
upon conviction under Sections 558.011.1(3)  
and 560.011, RSMo., in that on or about  
March 10, 2000, in the County of Henry,  
State of Missouri, the defendant knowingly  
possessed methanol **or** hydrogen peroxide **or**  
lighter fluid **or** naphtha **or** muriatic acid  
**or** pseudoephedrine **or** ephedrine **or** acetone  
**or** other solvents proven to be precursor  
ingredients of methamphetamine, with the  
intent to convert, process or alter one of

those chemicals to create methamphetamine,

a controlled substance. (Emphasis added)

Creation of a controlled substance as charged under 195.420 RSMo. is an offense which can be committed in many ways. The statute under which Appellant is charged reads:

It is unlawful for any person to possess chemicals listed in subsection 2 of section 195.400, or reagents, or solvents, or any other chemicals proven to be precursor ingredients of methamphetamine or amphetamine, as established by expert testimony pursuant to subsection 3 of this section, with the intent to manufacture, compound, convert, produce, process, prepare, test, or otherwise alter that chemical to create a controlled substance or a controlled substance analog in violation of sections 195.005 to 195.425.

As stated, possession of any one or more of a long list of different chemicals is prohibited by this section if the defendant charged possesses any of those chemicals with an intent to create a controlled substance.

The second amended information charges Appellant with

possession of one or more prohibited chemicals. These several possible violations of 195.420 RSMo. are stated disjunctively in the second amended information, i.e. Appellant is charged with possession of chemical A or chemical B or chemical C. Possession of each chemical listed in the information is a separate and distinct offense under the terms of the statute.

Missouri appellate courts have determined that an information which charges commission of an offense in several ways must state each of these prohibited acts conjunctively i.e. Defendant is charged with possession of chemical A and chemical B and chemical C. Case law establishes that an information which attempts to charge commission of a crime in several ways disjunctively (with the use of "or" to separate the various possible illegal acts charged) are insufficient as

a matter of law because an information in this form does not charge any offense.

The Missouri Supreme Court considered a criminal case very similar to the one before this court in State v. Barr, 34 S.W.2d 477 (Mo. 1930). In that case, Barr, the Defendant, was charged in a three-count indictment with several offenses relating to illegal sale and manufacture of alcoholic beverages. Count I of the indictment, charged Defendant with feloniously transporting one gallon, more or less, of hootch, moonshine **or** corn whiskey. Count II of the indictment charged Defendant with selling hootch, moonshine **or** corn whisky. The third count of the indictment charged possession of one gallon of intoxicating liquor. After trial by jury, Defendant was found guilty "as charged in the indictment" and he appealed.

The Supreme Court of Missouri reversed Defendant's conviction and remanded the case for a new trial. Judge White, writing the court's opinion, stated:

Where the statute forbids several distinct acts in the alternative, the indictment or information charging the commission of more than one of those things must charge them in the conjunctive. [Citations omitted] If each of the things mentioned is a separate and distinct offense, connecting them by the disjunctive would not charge the commission of either. The charge must be definite and concise as to the particular object.

\* \* \* \* \*

In State v. Bilyeu, supra, [295 S.W. 104], we held that the use of the word "or" in an information charging that the defendant unlawfully manufactured hootch, moonshine, **or** corn whisky was insufficient because in the disjunctive and charged the defendant definitely with nothing. Thus counts 1 and

2 of the indictment here were defective on

their face. (Citation added)

The Missouri Court of Appeals, Western District, considered a case which presented the same issue in State v. Hook, 433 S.W.2d 41 (W.D. 1968) at Pages 43 - 45. Defendant Patricia Hook was charged by information with inducing or attempting to induce a witness to absent herself or to avoid subpoena or to withhold evidence or with deterring her or attempting to deter her from appearing and giving evidence in a criminal case. In its opinion, the appellate court noted that the information charged the defendant, in the alternative, with each and every act prohibited by the statute under which the charge was filed. The court ruled that the information was fatally defective and that it did not charge

any offense. The court also determined that the information as filed was not sufficient to advise the defendant of the nature of the charge against her so as to permit her to prepare her defense. Appellant's conviction was reversed and the case remanded for a new trial.

Gary Baker, the Appellant in the case, is in the same position as Appellants Barr and Hook. The second amended information charges Appellant in the disjunctive with a number of prohibited acts and it is thereby fatally defective. The language of the second amended information prejudiced Appellant in preparing his defense to the charges. This is so because the information states that "defendant knowingly possessed methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or

acetone **and other solvents** proven to be precursor ingredients of methamphetamine". The information left Appellant and his attorney faced with the possibility that they would be required to defend against allegations that Appellant possessed solvents not specifically named in the information.

Appellant was required to speculate as to what evidence of possession of additional chemicals might be offered by the State as the trial progressed. This approach to the presentation of the defendant's case in a felony matter is not calculated to provide Appellant with a full and fair opportunity to defend the charge brought against him.

In order to be legally sufficient, an indictment or information must enable the defendant to prepare his or her defense, to be able to plead former jeopardy in the event of

an acquittal or conviction, and to permit the trial court to decide whether sufficient facts are alleged to support the conviction. State v. Moore, 501 S.W.2d 197 (Mo.App.W.D. 1973) and State v. Taylor, 498 S.W.2d 614 (Mo.App.E.D. 1973). In this case, Appellant is additionally prejudiced by the disjunctive language of the second amended information because the information does not allow him to know the exact offense with which he has been charged so as to be able to plead former jeopardy in the event of an acquittal or conviction. For example, suppose that a new information were to be filed by the prosecuting attorney alleging that Appellant, on or about March 10, 2000, in Henry County, Missouri possessed hydrogen peroxide with the intent to convert, process or alter that chemical to methamphetamine in violation of 195.420 RSMo.

An examination of the second amended information filed in this case will not allow Appellant to know whether or not he was charged and convicted of possessing hydrogen peroxide under the second amended information now before this court.

The problem is compounded by the fact that the state's verdict director, Instruction Number 6, also alleges possession of several chemicals in the disjunctive.

Moreover, the form of verdict used by the court for a finding of guilty, Verdict Form 9, states only that Appellant was found guilty of "possession of a chemical with the intent to create a controlled substance" without naming any specific chemical as having been possessed by Appellant.

#### STANDARD OF REVIEW

Gary Lynn Baker has suffered manifest injustice affecting

his double jeopardy rights under the Fifth Amendment to the United States Constitution and Article 1, Section 19 of the Missouri Constitution of 1945 as well as his rights to be informed of the nature and cause of the charge against him under the Sixth Amendment to the United States Constitution and Article 1, Section 18(a) of the Missouri Constitution of 1945. Because the errors complained in this Point of Appellant's Brief concern the sufficiency of the information upon which the case was tried and also constitute plain error affecting substantial rights, this court should grant plain error review under Rule 30.20 even though no objection was made to the information at trial or in Appellant's Motion for New Trial. State v. Fowler, 938 S.W.2d 894 (Mo.banc 1997) at Page 896 and State v. Parkhurst, 845 S.W.2d 31 (Mo.banc 1992) at Pages 33-35.

POINT IV

THE TRIAL COURT ERRED IN SUBMITTING THE STATE'S VERDICT DIRECTOR (INSTRUCTION NUMBER 6) AND THE FORM OF VERDICT FOR A FINDING OF GUILTY (INSTRUCTION NUMBER 9) BECAUSE THOSE INSTRUCTIONS VIOLATED APPELLANT'S RIGHT TO A UNANIMOUS VERDICT OF TWELVE JURORS UPON ONE DEFINITE CHARGE OF CRIME IN THAT IT IS IMPOSSIBLE TO DISCERN FROM THE INSTRUCTIONS AS GIVEN WHAT CHEMICAL OR CHEMICALS APPELLANT WAS FOUND TO HAVE POSSESSED IN VIOLATION OF 195.420 RSMO. AND IT IS THEREFORE POSSIBLE THAT LESS THAN ALL OF THE JURORS FOUND APPELLANT GUILTY OF POSSESSION OF THE SAME CHEMICAL BEYOND A REASONABLE DOUBT.

The trial court submitted the following verdict director to the jury for its use in determination of Appellant's guilt or innocence. This instruction, Instruction Number 6 is set forth herein.

INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about March 10, 2000, in Henry County, Missouri, the defendant possessed methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone, and

Second, that the defendant was aware of its presence and nature, and

Third, that the defendant did so with the intent to

convert, process or alter methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone to create methamphetamine, a controlled substance,

then you will find the defendant guilty of possession of a chemical with the intent to create a controlled substance.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "possessed" means

either actual or constructive possession of a substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

As used in this instruction the term "controlled substance" includes methamphetamine.

The trial court further submitted the form of verdict for a finding of guilty, Instruction Number 9, which reads as follows:

VERDICT FORM 9

We, the jury, find the defendant Gary Lynn Baker guilty of possession of a chemical with the intent to create a controlled substance as submitted in Instruction No. 6.

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Foreperson

Appellant believes that these instructions were erroneous and should not have been given by the trial court as written because the verdict director allows the jury to find that defendant possessed one or more listed chemicals with the intent to create a controlled substance without stating which chemical defendant is found to have possessed. The form of verdict submitted allows the jury to return a guilty verdict without stating which chemical forms the basis for the verdict. Because no chemical is required to be specified, it is impossible to determine whether or not all twelve of the jurors who heard the case and voted for the verdict of guilty in fact found the Appellant to be guilty of possession of the

same chemical. If it cannot be shown from the face of the verdict that all twelve jurors unanimously agreed to the same finding of guilt, then Appellant has been deprived of his right to be found guilty with respect to one definite crime by all twelve jurors.

This concept is illustrated by the facts and opinion in State v. Oswald, 306 S.W.2d 559 (Mo. 1957). In the Oswald opinion, Appellant had been convicted of the crime of sodomy and he appealed from this conviction. The indictment on which the case was tried charged, in one count, that defendant had committed the detestable and abominable crime against nature by inserting his genital organ into the mouth and rectum of an eleven-year old boy. The State's verdict director allowed the jury to find defendant guilty if he had inserted his penis

into the mouth and rectum of the victim or "committed either of such aforesaid acts". The form of verdict returned by the jury was a general finding that defendant was "guilty of the crime of sodomy as charged in the indictment".

On appeal, the Supreme Court of Missouri reversed Appellant's conviction and remanded the case for a new trial.

The court's opinion included the following statement, at Page 563, Notes 10-12:

The State refers us to no case holding a general verdict proper upon the trial of an indictment or information charging an appellant with the commission of two offenses in one count. \* \* \* Under the charge and the verdict some of the jurors may have agreed appellant was guilty of an

offense committed with the mouth of the  
pathic, while others may have reached the  
same result with respect to an offense  
committed with the rectum. **It cannot be  
determined that there was a concurrence of  
twelve jurors upon one definite charge of  
crime.** (Emphasis added)

The Missouri Court of Appeals, Southern District, issued a recent opinion which dealt with a similar fact situation as that found in the Oswald decision, State v. Puig, 37 S.W.3d 373 (Mo.App.S.D. 2001). Andrew Puig was found guilty of sale of a controlled substance in violation of 195.211 RSMo. after a trial by jury. Although the defendant had been charged as a principal in the crime, the State submitted the case to the jury under a theory of accomplice liability. The verdict director provided, in relevant part,

If you find and believe from the evidence beyond a

reasonable doubt:

First, that on or about April 17, 1998, in the County of Camden, State of Missouri, Hans Anderson sold more than 5 grams of marijuana, a controlled substance, to S.J. North, and

Second, that the defendant and Hans Anderson knew that the substance Hans Anderson sold was marijuana,

then you are instructed that the offense of selling more than 5 grams of marijuana has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that selling more than 5 grams of marijuana, the defendant **acted together with or aided** Hans Anderson in committing that offense,

then you will find the defendant guilty of selling

more than 5 grams of marijuana.

In its opinion, the Court of Appeals found that the disjunctive submission of alternative means by which a single crime can be committed is proper only if each alternative submission is supported by the evidence. After reviewing the record, the court accepted Appellant's contention that there was no evidence to support the portion of the instruction relating to acting together with Hans Anderson. Therefore,

the court concluded that the trial court had committed reversible error in submitting the verdict directing setting forth alternate means of committing the same offense. Judge Montgomery, in reversing and remanding the case for a new trial, wrote

We find prejudice to Defendant in this case because of the disjunctive submission in Instruction No. 5. Some of the jurors may have believed that Defendant "aided" Anderson by delivering the scale to him. Other jurors may have believed that Defendant "acted together with" Anderson based on the same act. As previously demonstrated, the State presented no evidence that Defendant "acted together with" Anderson. 37 S.W.3d at Page 378, Note 11.

In the case now before the court, even if Appellant were

to concede that evidence had been produced by the State which was sufficient to prove possession of all of the chemicals listed in the second amended information and in the State's verdict director, Appellant would be still be prejudiced as was Appellant Puig because there would be no way to determine from the record what chemical each juror actually believed Appellant had possessed. Because a unanimous verdict as to one finding of criminal responsibility is not shown, Appellant has suffered substantial prejudice.

#### STANDARD OF REVIEW

Gary Lynn Baker has suffered manifest injustice affecting his right to a unanimous jury verdict. Because the errors complained of in this Point of Appellant's Brief concern the verdict returned and the judgement of court and also

constitute plain error affecting substantial rights, this court should grant plain error review under Rule 30.20 and Rule 29.12(b) even though no objection was made to the jury instructions at trial or in Appellant's Motion for New Trial.

State v. Fowler, 938 S.W.2d 894 (Mo.banc 1997) at Page 896 and State v. Parkhurst, 845 S.W.2d 31 (Mo.banc 1992) at Pages 33-35.

POINT V

THE TRIAL COURT ERRED IN SUBMITTING THE STATE'S VERDICT DIRECTOR (INSTRUCTION NUMBER 6) AND THE FORM OF VERDICT FOR A FINDING OF GUILTY (INSTRUCTION NUMBER 9) BECAUSE THOSE INSTRUCTIONS VIOLATED APPELLANT'S DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 19 OF THE MISSOURI CONSTITUTION OF 1945 IN THAT IT IS IMPOSSIBLE TO DISCERN FROM THE VERDICT DIRECTOR AND THE FORM OF VERDICT EXACTLY WHAT CHEMICAL APPELLANT WAS CONVICTED OF POSSESSING WITH THE RESULT THAT APPELLANT CANNOT PLEAD FORMER JEOPARDY BY ACQUITTAL OR BY CONVICTION AS TO POSSESSION OF ANY OF THE CHEMICALS LISTED IN THE STATE'S VERDICT DIRECTOR.

Appellant argues at Point IV above that Appellant's

double jeopardy rights guaranteed by the Fifth Amendment to the United States Constitution and Article 1, Section 19 of the Missouri Constitution of 1945 have been violated by the improper use in the State's second amended information of a disjunctive listing of various chemicals which Appellant allegedly possessed for the creation of methamphetamine in violation of 195.420 RSMo. As stated above, the language of the verdict director compounds this error because the verdict director erroneously uses the same disjunctive listing of chemicals found in the second amended information under which the case was tried. The form of verdict for finding of guilty does nothing to clarify the issue because the verdict form states that Defendant is found guilty of possession of "a chemical".

Appellant has to right to protection from successive prosecution for the same offense after either acquittal or conviction and protection from multiple punishments for the same offense. State v. Flenoy, 968 S.W.2d 141 (Mo. 1998). In order the be assured of these protections, Appellant must have the right to a finding of guilt or innocence which is adequate to serve as a bar to further prosecution. The disjunctive submissions of the second amended information and the State's verdict director taken with the language of the form of verdict make it impossible for Appellant to have the protections from further prosecution which the principles of double jeopardy should afford him. Therefore, Appellant asserts that the verdict director and form of verdict submitted by the trial court constitute error as a matter of

law.

#### STANDARD OF REVIEW

As explained above, Appellant has suffered manifest injustice affecting his double jeopardy rights. Because the errors complained of in this Point of Appellant's Brief concern the verdict returned and the judgement of court and also constitute plain error affecting substantial rights, this court should grant plain error review under Rule 30.20 and Rule 29.12(b) even though no objection was made to the jury instructions at trial or in Appellant's Motion for New Trial.

State v. Fowler, 938 S.W.2d 894 (Mo.banc 1997) at Page 896 and State v. Parkhurst, 845 S.W.2d 31 (Mo.banc 1992) at Pages 33-35.

## CONCLUSION

Appellant asks this Court to find that the evidence seized pursuant to the search warrant obtained by the Missouri State Highway Patrol must be suppressed because it was obtained as a result of an improperly executed warrant for the reasons set forth in Point I of Appellant's Brief. If the Court so finds, Appellant should be discharged because there is no admissible evidence to support the charge brought by the State. If this court does not so discharge Appellant, the case should be remanded to the trial court for a new trial at which a correctly drafted information and a proper verdict director and form of verdict can be used.



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