STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT
	)	
	)	
STATE OF SOUTH DAKOTA	)	FILE NO. CR 12-568
	)	FILE NO. CR 12-57[illegible]
Plaintiff,	)	
	)	
vs.	)	**DEFENDANTS' JOINT BRIEF**
	)	**IN SUPPORT OF THEIR**
	)	**MOTION TO SUPPRESS**
	)	**EVIDENCE**
Defendant.	)	
	)	
	)	
Defendant.	)	

Defendants, , by and through their Attorneys of Record, Jeffrey J. Fransen for , and Patrick K. Duffy for , hereby submit their Joint Brief in Support of their Motion to Suppress Evidence. Defendants request that the evidence seized be suppressed, as the search initiated by Trooper Swets violated Defendants' constitutional rights.

PRELIMINARY STATEMENT

This Brief follows the Suppression Hearing held before this Court on October 24, 2012. An Affidavit of Jodi Glanzer, Paralegal, includes the Suppression Hearing Transcript along with other exhibits attached hereto and incorporated herein by reference.

References to those exhibits in Ms. Glanzer's Affidavit will be referenced below as follows:

- Glanzer Affidavit, Exhibit 1: Trooper Brian Swets' South Dakota Highway Patrol Case Report ("Swets Report"), followed by paragraph number.
- Glanzer Affidavit, Exhibit 2: Trooper Dennis Mez's South Dakota Highway Patrol Case Report ("Mez Report"), followed paragraph number.
- Glanzer Affidavit, Exhibit 3: Suppression Hearing Transcript ("SHT"), followed by page number.
- Glanzer Affidavit, Exhibit 5: DCI Agent Spencer's Case Report ("Spencer Report"), followed by page and paragraph number.

South Dakota Highway Patrolman Brian Swets' Dashboard Video and Audio and exact replica of the temporary license tag referenced below have already made its way to the Court's file and shall be referenced below as:

- State's Exhibit State's Exhibit 1 at Suppression Hearing: "Swets Dashboard Video and Audio", followed by the approximate time on the video ("Hour:Minute:Second")
- State's Exhibit State's Exhibit 2 at Suppression Hearing: "Copy of Temporary License Tag."

INTRODUCTION

As set forth below and in related filings, Defendants' constitutional rights were violated.

In summary, this Court should suppress the evidence seized for the following reasons:

- The evidence establishes that Troopers Swets and Mez could not have smelled a strong or overwhelming odor of unburned marijuana emanating from the vehicle for the following reasons:
    - The *de minimis* amount of marijuana – contained in plastic baggies in a sealed cosmetic bag underneath a mattress at least four feet away from Swets' nose – could not have emitted a strong or overwhelming odor of unburned marijuana.
    - If the odor of marijuana was strong and overwhelming, it would not have taken 20 minutes of searching to find it.
    - Troopers Swets and Mez did not deploy their drug dogs to see if either dog would alert to the presence of illegal drugs.
- The Courtroom demonstration proved no strong or overwhelming odor emanated from the marijuana seized.
- Scientific evidence supports the proposition that it was impossible for Troopers Swets or Mez to smell the small amount of marijuana found in the motor home.
- It was not possible for Swets to detect a strong and overwhelming odor of marijuana emanating from the vehicle which formulated probable cause to search the vehicle.
- Trooper Swets' statements to Trooper Mez about an "overwhelming" odor of marijuana were impermissibly suggestive and unreliable.

- If Swets or Mez actually smelled a strong and overwhelming odor of marijuana emanating from the motor home, they would have deployed their drug dogs, Rocco and Brix, to easily find the copious amounts of marijuana they believed to be in the motor home.
- This is not the first time Swets' credibility has been called into question.

STATEMENT OF THE FACTS

On August 7, 2012 at approximately 10:30 pm, Defendants were travelling in a 2013 Coachman Motor Home ("motor home") westward on Highway 14A in Sturgis, Meade County, South Dakota. SHT" 4-5. The Defendants and the driver of the motor home. , were working as merchants at the Sturgis Motor Cycle Rally. Swets Report ¶ 1; Spencer Report, p. 2. South Dakota Highway Patrolman Brian Swets ("Swets") was driving east on Highway on 14A, while the motor home was travelling west on Highway 14A[2]. Swets stopped the motor home for either displaying no license plate or for having expired temporary tags near Exit 32 in Sturgis, South Dakota. Swets Dash Board Video 22:34:25; SHT 5; SHT 20-21; 41. Swets admitted that it is not possible to see that the tag was expired on Swets' dashboard video. SHT 36-37. Swets is a K9 handler for the South Dakota Highway Patrol, and his K9 dog, Rocco, was in the back of the vehicle. SHT 26.

Swets approached the vehicle and made contact with the driver on the driver's side. SHT 5. The driver of the vehicle had her window down and upon "approaching the vehicle" Swets claims he smelled "unburned or raw" marijuana coming from the vehicle.

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1 . pled guilty to Possession of Marijuana – less than two ounces.

2 This testimony is contradicted by Swets' case report, where he wrote that he was "travelling westbound on Lazelle Street in Sturgis near I-90 Exit 32. I saw a westbound motorhome travelling in front of me had an expired temporary license plate displayed in the rear window." Swets Report ¶ 1.

SHT 7. Swets claimed the marijuana odor was neither slight nor moderate, but rather it was a "strong smell". SHT 7. Swets informed the driver of the motor vehicle violation, and that he would be searching the vehicle based upon his suspicion of a strong odor of unburned marijuana emanating from the vehicle. SHT 8-9. The driver did not confirm or deny the presence of marijuana in the vehicle. SHT 9. Swets did not request consent to search the motor home. Swets Dashboard Video 22:39:07.

Swets attempted to call another trooper to the scene, but that trooper was busy, so he called dispatch and requested another backup. SHT 9; 40. Swets told and unidentified person who arrived on the scene that "there's going to be a bunch of weed in here." Swets Dashboard Video 22:50:00. Swets then had the Defendants and the driver exit the motor home and had them sit on the curb while he began searching the motor home. SHT 10.

Trooper Mez ("Mez") arrived on scene. SHT 40-41. Mez is also a drug dog handler with the South Dakota Highway Patrol, who had his dog, Brix, with him in the back of his vehicle. SHT 54. Swets told Mez that he smelled an "overwhelming" odor of marijuana emanating from the vehicle. SHT 47. After receiving that information, Mez entered the motor home and "was immediately overwhelmed by the odor of [unburned] marijuana." Mez Report ¶ 1; SHT 43, 47.

Mez joined Swets in searching the motor home. SHT 12-13. After approximately 15-20 minutes, Mez found a sealed black nylon makeup bag containing a marijuana pipe and two plastic baggies containing a couple of grams of marijuana. SHT 13; 26; 42; 47; 51. The cosmetic bag containing the marijuana was found underneath a mattress above

the passenger seat approximately three to four feet from where Swets claimed he smelled the strong odor of unburned marijuana. SHT 31.

Just prior to the suppression hearing the sealed evidence bag containing the zippered nylon cosmetic bag with the two grams of marijuana was unsealed. Swets admitted the aroma coming from the bag was not "overwhelming". SHT 25. The two plastic baggies containing the marijuana were removed from the cosmetic bag and handed to Swets. SHT 25-26. With the marijuana in his hand he could not say the aroma was "overwhelming". SHT 25-28. Only after the marijuana was less than 12 inches from Swets' nose could he detect any marijuana smell. SHT 28.

Mez also smelled the marijuana at the suppression hearing. SHT 47. Mez could not state that the unburned marijuana aroma coming from the cosmetic bag was overwhelming. SHT 48. Only when he put his nose right in the bag could he detect the smell was close to overwhelming. SHT 48.

Swets and Mez never deployed their drug dogs. SHT 34; 48; 54. No evidence was presented at the suppression hearing as to whether Swets and Mez have ever had their olfactory senses tested.

Defendan is charged with Unauthorized Possession of a Controlled Substance (Class 4 Felony) and Possession of Marijuana – less than two ounces. Ms. is a Girl Scout Leader, receiving their highest honor, Gold Award, and former Sunday School teacher who earned a Sociology Degree from the . She now resides in where she owns her own fashion business – – and her designs have made their way into numerous stores on the . has no criminal record.

Defendant _ ... . is charged with two counts of an Unauthorized Possession of a Controlled Substance (Class 4 Felonies) and Possession of Marijuana – less than two ounces. works and lives nea has no criminal record as an adult.

DISCUSSION

The observation that a vehicle has committed a minor traffic violation triggers reasonable suspicion and justifies an officer's stop of the vehicle. *State v. Overbey*, 2010 S.D. 78, ¶ 16. "Reasonable suspicion is a common-sense and non-technical concept dealing with the practical considerations of everyday life." *State v. Wright*, 2010 S.D. 91, ¶ 11 (quoting *State v. Quartier*, 2008 S.D. 62, ¶ 10). The stop must not be made by "mere whim, caprice, or idle curiosity," and the stop must be made up upon 'specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Wright, 2010 S.D.* at ¶ 11 (quoting *State v. Abuka*, 2004 S.D. 94, ¶ 15).

However, the Fourth Amendment's[3] "prohibition against unreasonable search and seizures requires generally the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." *Overbey*, 2010 S.D. at ¶ 16 (quoting *State v. Mattson*, 2005 S.D 71, ¶ 29). One exception to the warrant requirement includes investigatory detentions where an officer has reasonable suspicion

[3] The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

to believe criminal activity is taking place. *Id.* Still, "'the Fourth Amendment's prohibition against unreasonable search and seizures applies when a vehicle is stopped by law enforcement.'" *Wright*, at ¶ 10 (quoting *State v. Hayen*, 2008 S.D. 41, ¶ 5). Unreasonable searches and seizures "and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266 (2002). The State has a heavy burden of proving a warrantless search meets an exception to the warrant requirement[4]. *Wright*, at ¶ 14. In those circumstances, "law enforcement is afforded no deference when relying on an exception to" the warrant requirement. *State v. Labine*, 2007 S.D. 48, ¶ 14.

1. Swets did not have the requisite reasonable suspicion or probable cause under the Fourth Amendment to stop the motor home.

a. Mistake of Law.

Swets claimed reasonable suspicion to stop the motor home based upon his belief that the motor home did not have license plate (supposedly while he was driving East and the motor home was driving West), or for having an expired temporary license plate when he turned around and began following the motor home westward and initiating his lights for the motor home to pull over. Swets Dashboard Video 22:34:25; Swets' Report, ¶; SHT 6. In either case, Swets did not have reasonable suspicion to stop the motor home.

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[4] This Court's findings will be reviewed under the clearly erroneous standard. *State v. Zahn*, 2012 S.D. 19, ¶ 10. The application of the legal standard applied to those facts would be reviewed de novo. *Id.* "The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the [circuit] court". *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 26. "Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." SDCL 15-6-52(a).

First, if reasonable suspicion was formed based upon the motor home not having any license plate, as Swets stated on his Dash Board Video, it was formed when Swets came upon the motor home. Under Florida law, it is not illegal for a Florida registered motor home to not have a front license plate and under South Dakota law, exempting the motor home from South Dakota's front and back license plate requirement. Fla. Stat. § 316.605(1); *Overbey*, at ¶ 17; SDCL 32-5-46; SDCL 32-5-98. Further, there is nothing in the record that the temporary registration was affixed in an illegal manner under Florida law. This was a mistake of law and therefore was not a lawful stop. *Wright*, at ¶ 21. A law enforcement officer cannot for reasonable suspicion for a violation when the officer is mistaken about what the law requires and stops a vehicle under such a mistake of law. *Id.*

"[T]he legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an 'objectively reasonable one.'" *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006). "Failure to understand the law by the very person charged with enforcing it is not objectively reasonable." *United States v. Delfin-Colina,* 464 F.3d 392, 399 (3rd Cir. 2006). "'An officer's reasonable mistake of fact, as distinguished from a mistake of law, may support the probable cause or reasonable suspicion necessary to justify a traffic stop.' An officer's 'failure to understand the plain and unambiguous law he is charged with enforcing, however, is not objectively reasonable.'" *United States v. Pena-Montes*, 589 F.3d 1048, 1054 (10th Cir. 2009). "[O]fficers have an obligation to understand the law that they are entrusting to enforcing, at least to a level that is objectively reasonable." *Wright*, at ¶ 21 (quoting *Washington*, 455 F.3d at 827). Ignorance of the law is no excuse

for judges, trial lawyers, defendants and lay people. Certainly, policemen should be held to at least the standard of the citizens against whom the police enforce the law. *United States v. Orduna-Martinez*, 561 F.3d 1134, 1137 n.2 (10th Cir. 2009) (citing *United States v. Hodson*, 77 U.S. 395, 409 (1870) ("Everyone is presumed to know the law," and stating that "if a defendant is presumed to know the law, we must expect as much from law enforcement."). "[S]ubjective good faith is not sufficient to justify the stop[.]" *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005). "Any mistake of law that results in a search or seizure, therefore, must be objectively reasonable to avoid running afoul of the Fourth Amendment." *Wright*, at ¶ 21 (quoting *Martin*, 411 F.3d at 1001).

In this case, it was not illegal for the Florida motor home to be operating in South Dakota without a front license plate. Swets mistake of law was not objectively reasonable. This was an illegal stop.

b. It was impossible for Swets to see the expired tag.

An alternative reason for the stop was because the motor home had an "expired temporary license displayed in the rear window." Swets' Case Report, ¶ 1; Swets' Dashboard Video 22:38:51. There is nothing in the record to suggest the placement of the temporary tag was illegal under Florida law. Defendants do not dispute that the temporary license was expired. However, it was 10:30 at night, very dark and the size of the temporary tag, not to mention the small font size of the number on the temporary tag, the distance Swets claims he was situated when he saw the expired tag (approximately 10 feet), and the lack of light on the tag from Swets' patrol vehicle refute Swets' testimony that he saw an expired license on the motor home. A review of the Swets' dashboard video confirms this fact.

2. Swets and Mez did not have the requsite probable cause to search the motor home as it was impossible for Swets and Mez to have smelled a strong and overwhelming odor of marijuana emanating from the motor home.

Automobile searches can also be a warrantless search exception upon a finding of probable cause[5]. *Carroll v. United States,* 267 U.S. 132, 149 (1925); *Overbey,* at ¶ 16 (upholding warrantless search of drug dealers' fifth wheel upon smelling odor of raw marijuana in drug dealers' pickup pulling fifth wheel leading to discovery of 11 grams of marijuana and 45.77 grams of methamphetamine). Probable cause is triggered when known facts and circumstances of a *reasonably trustworthy nature* are sufficient to justify a reasonable and prudent law enforcement officer to believe that a crime has been or is being committed. *Draper v. United States,* 358 U.S. 307 313 (1959) (emphasis added).

The subjective assessment of a law enforcement officer claiming that the odor of marijuana emanating from a vehicle or structure forming the basis for probable cause to search test can be troubling. Richard L. Doty, Thomas Wudarski, David A. Marshall, & Lloyd Hastings, *Marijuana Odor Perception: Studies Modeled From Probable Cause Cases,* Law and Human Behavior, Vol. 28, No. 2, p. 223-224 (2004). Pursuant to SDCL 19-10-2, Defendants request that the Court take notice of this published article in a learned treatise. "It is generally believed that the characteristic marijuana odor can be discerned from a wide variety of [marijuana] plants, regardless of their geographic origin, strain, extent of processing, and tetrahydrocannabinol (THC) content. However, such beliefs are based largely on anecdote[.]" *Id.* at 224. In other words, marijuana can come

[5] While Defendants argue that, given the evidence here, Swets and Mez did not smell a "strong" and overwhelming odor of marijuana, precedent exists from other jurisdictions holding that the odor of marijuana emanating from a vehicle or structure does not constitute probable cause for a warrantless search of the vehicle. *State v. Grande,* 187 P.3d 248 (9th Cir. 2008); *Comm. V. Cruz,* 945 N.E. 2d 899 (Mass. 2011).

in many different aromas, and, in fact, marijuana found in a vehicle might be odorless. Therefore, law enforcement officers who claim that they have been trained in marijuana aroma really haven't been fully trained and any claims that they are experts on marijuana aroma should be rejected.

In a recent New York case, relevant here, a law enforcement officer stopped a vehicle after observing the driver make numerous traffic violations. *People v. Howington*, 946 N.Y.S. 2d 368, 369 (N.Y. App. Div. 1012). The officer testified that he smelled the odor of unburned marijuana emanating from the vehicle. *Id.* Similar to this case, the only marijuana found, however, in the vehicle was in a closed plastic bag inside a pocket in the defendant's clothing. *Id.* The court re-stated that the trial court's opinion that it did "not credit the testimony that the odor of raw marijuana was present," concluding that the officers did not have the necessary probable cause to arrest defendant. *Id.* On appeal, the government argued that the trial court erred in refusing to credit the officer's testimony that he smelled unburned marijuana. *Id.* The appellate court upheld the trial court's determination that it was impossible for the officer to smell unburned marijuana, given the evidence in the record was based solely upon the court's credibility of the witnesses. *Id.*

A recent scientific experiment provides a persuasive argument that it was impossible for Swets and Mez to detect a strong or overwhelming odor of marijuana. Richard L. Doty, Thomas Wudarski, David A. Marshall, & Lloyd Hastings, *Marijuana Odor Perception: Studies Modeled From Probable Cause Cases,* Law and Human Behavior, Vol. 28, No. 2, p. 224 (2004). A copy of this article is attached.

In the experiment the scientists sought to recreate a situation where the law enforcement officer claimed he smelled marijuana odor in a plastic bag in the trunk of a 1983 two-door car automobile. *Id.*, at 226 (2004). Nine non-smoking individuals, scoring within the normal limits of the University of Pennsylvania Smell Identification Test I (UPSIT), who were familiar with marijuana aroma, were selected for the test. *Id.* at 225. Prior to the formal test, the participants familiarized with the smell of *five pounds* of processed Mexican marijuana in one garbage bag and another garbage bag full of newspapers. *Id.* (emphasis added). All nine participants "unequivocally" smelled marijuana in the garbage bag containing five pounds of marijuana. *Id.* None reported the smell to be "strong" or "overwhelming". *Id.*

After that control experiment, either the five pounds of processed Mexican marijuana or the five pounds of newspapers were placed in the trunk of the 1983 two car Chevy automobile. *Id.* at 226. The nine participants were led to the vehicle individually to the vehicle to the driver's side door and instructed that when the driver exited the vehicle they should "sniff in the front seat area, and in the back seat area, and tell [the tester] if you smell the odor of marijuana." *Id.* A total of 27 sessions were conducted with the five pounds of marijuana in a garbage bag in the trunk or five pounds of newspaper in a garbage bag in the trunk of the 1983 Chevy. *Id.* at 226-227. Only 13% of the participants correctly identified the fact that five pounds of marijuana were in fact in the trunk of the two-door Chevy, and 9.3% incorrectly identified a marijuana odor when nothing more than five pounds of newspaper was present in the trunk. *Id.* at 227. Interestingly, six of the nine participants smelled no marijuana odor in either vehicle containing five pounds of marijuana in a garbage bag or five pounds of newspaper. *Id.*

Three of the participants "smelled" marijuana in both the marijuana and non marijuana bags. *Id.* However, the same study participants supposedly smelled marijuana constituted 33% of the participants who smelled 100% of the marijuana. *Id.* In other words, six out of nine participants did not detect any marijuana smell, while 3 of 9 of the particpants smelled marijuana correctly 39% of the time, while mistakenly smelling it 28% of the time.

If Swets' had participated in this Study, he would have been one of the participants who smelled marijuana in the vehicle, regardless of whether it was present or not. Further, if these study participants had come up the same motor home, none of them would have claimed to smell what Mez and Swets claim they smelled.

3. Swets' Credibility.

This is not the first time Swets' credibility has been called into question. *See, State v. Haar*, 2009 S.D. 19[6]; *Labine*, 2007 S.D. 48. In *Labine*, Swets injected himself into a traffic stop made by Spearfish City Police Officer Symonds ("Symonds") after Symonds pulled a vehicle over for speeding. As Symonds was issuing a citation, Swets came upon the scene[7]. *Labine*, 2007 S.D. at ¶ 3. Swets claimed that he talked with the officer about whether another potential traffic violation had been addressed, while Symonds testified Swets went directly to the passenger side and began speaking with the occupants. *Id. at* ¶ 4. Swets claimed he smelled alcohol and burned marijuana emanating from the vehicle, and asked the passenger to step out the vehicle. *Id. at* ¶ 5.

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[6] In *Haar*, the South Dakota Supreme Court suppressed evidence Swets' gathered following an illegal stop. The Court noted that in that case, Swets' actions were not "justified at [their] inception." 2009 S.D. at ¶ 18.
[7] Swets did not stop because he witnessed any criminal activity, nor was he dispatched to the scene for backup. He stopped because he wanted to visit. *State v. Labine*, 2007 S.D. 48, ¶ 3.

Another conflict arose between the officers' testimony. Swets claimed that he asked the individual for consent to search his person, telling him that he could refuse and deny the search and received such consent. *Id. at* ¶ 7. Swets' search discovered misdemeanor quantities of marijuana. Symonds testimony, who was in earshot of the conversation between Swets and Labine, testified that Swets asked Labine number times if he could pat him down. Symonds also testified that the pat down was "more in depth" than the pat-down search he was trained to conduct. *Id.*

In suppressing the evidence, Magistrate Judge Michelle Percy wrote "based upon Trooper Swets testimony he acted completely within the scope of the law. However consideration of the testimony of the other witnesses gives the Court reasonable doubt. As such the Court finds the State has not met its burden of proof. " *Id. at* ¶¶10 & 15.

In *Labine*, the South Dakota Supreme Court noted that "[a]fter weighing the credibility of the witnesses and their testimony, the trial court and their testimony, the trial court resolved the conflicting testimony" against Swets. *Id. at* ¶ 19.

In this case, the same result is warranted. Swets is not credible. His "evidence" of probable cause is not supported by logic, science, or reason. "'[L]aw enforcement is afforded no deference when relying on an exception to the warrant requirement." *State v. Labine*, 2007 S.D. 48, ¶ 14 (quoting *State v. Sweedland*, 2006 S.D. 77, ¶ 12).

Swets definitive statements to Mez that he smelled an "overwhelming" odor of marijuana emanating from the vehicle before Mez entered the motor home, and his statement that "there's going to be a bunch of weed in" in the motor home deserve scrutiny as well. SHT 47; Swets Dashboard Video 22:50:00. These suggestive statements were made to condition Mez or whoever else arrived on to the scene in order

for Swets to get corroboration from other law enforcement as to his claim of smelling a strong smell of marijuana emanating from the vehicle. It is not a coincidence that Swets informed Mez when Mez came on the scene (before approaching the motor home) that there was an "overwhelming" odor of marijuana coming from the vehicle and that Mez wrote in his report of allegedly being "overwhelmed" by marijuana odor. SHT 47; Mez Report, ¶ 1. This kind of conditioning is analogous to lineup cases in which law enforcement tip their hand to a witness as to who in the lineup they would like to have identified. An identification procedure violates that core right if it is "both impermissibly suggestive *and* unreliable." *Brisco v. County of St. Louis, Missouri*, 690 F.3d 1004, 1012 (8th Cir. 2012) (quoting *United States v. Martinez,* 462 F.3d 903, 911 (8th Cir.2006)). That is the case here. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976). Swets made an impermissibly suggestive statement that, given the evidence elicited at the suppression hearing was unreliable as well.

The fact that Swets and Mez, both experienced dog handlers with their dogs on the scene, did not deploy their drug dogs raises questions as to the reliability of Swets' and Mez's statements. Why did Swets and Mez choose not to deploy their drug dogs, present on the scene, and ready, willing and (supposedly) able to detect the scent of illegal drugs, especially when Swets expected to find a lot more (meaning more than misdemeanor quantities at issue here)? Why did Swets and Mez choose to search the motor home on their own for 20 minutes in attempt to locate the illegal substances after they both allegedly detected a strong and overwhelming odor of unburned marijuana (which Swets indicating that a lot of marijuana would be found), and with precedent

indicating that a sweep of a drug dog around a motor vehicle can detect illegal drugs in a manner of few seconds? *See, Haar*, 2009 S.D. at ¶ 9.

The answers to these questions are simple: Swets and Mez were not confident that his drug dog would confirm his false olfactory sense of smelling a strong and overwhelming odor of unburned marijuana. Indeed, the fact that it took them 15-20 minutes to find the *de minimis* amount of marijuana when, as documented above, a drug dog can detect drugs in a matter of seconds, suggests that if Mez and Swets were drug dogs, they would have failed in their duties. They most certainly failed in their duties as law enforcement officers to abide by the constitutional constraints they are sworn to abide by.

CONCLUSION

This Court's skepticism expressed at the suppression hearing about Swets' probable cause determination to search the motor home is well founded. SHT 52. The reasonable suspicion and probable cause Swets' formed which led to the stop and discovery of the illegal drugs in the motorhome was built upon a foundation of lies. It cannot stand, as the minute Swets' decided to initiate his lights and pull the motor home over, he was determined to search the motor home.

"*Falsus in Uno, Falsus in Omnibus*" is Latin for "False in One, False in All". This Roman legal principle sets forth the ideal that a witness – in this case Trooper Swets – who willfully testifies falsely is not credible. Swets is without credibility, not only given the record in this case, which refutes Swets' notion of smelling a strong and overwhelming odor of marijuana emanating from the motor home, but also his lack of credibility present in other cases articulated above. In a word, Swets lied.

As for Trooper Mez, the most charitable explanation is that Swets conditioned Mez to state he smelled marijuana as well, nothing to do with his training and experience. Mez's senses were conditioned by, and guided by, Swets' suggestive statements made to him prior to approaching the motor home door.

A less charitable explanation for Mez's testimony would better known as the South Dakota law enforcement version of the Blue Code of Silence, which is an well-documented, unwritten rule among law enforcement not to report another colleague's errors, misconduct, crimes, errors, and/or omissions. In other words: Mez covered for Swets' lies.

Based on the foregoing, Defendants request that this Court grant their motion to suppress and dismiss the charges against them. This was an unconstitutional seizure under the United States Constitution and the South Dakota Constitution. This was a search done without sufficient probable cause. In a case like this, "[e]xclusion of the evidence deters police officers from … the type of search" that violates individuals' rights. *Labine*, at ¶ 24. As articulated above, Swets has been reproached and reprimanded for past unlawful conduct. Another reprimand is needed to deter Swets' unlawful conduct.

If this evidence is not suppressed, Swets' unlawful conduct will continue and the lives of two young women with promising futures may well be destroyed.

Dated this 19th day of November, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of a *Defendants' Joint Brief in Support of Their Motions to Suppress Evidence* upon the person herein next designated, on the date shown below, via hand-delivery:

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Dated this 19th day of November, 2012.

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