ALAN WILSON
ATTORNEY GENERAL

November 2, 2015

The Hon. Dana Turner
Chief Administrative Judge
City of Columbia Municipal Court
Columbia, SC 29202

Dear Judge Turner:

This letter responds to your opinion request concerning the practice of "police officers signing other officer's warrants." In your letter, you explain that the City of Columbia has proposed procedural changes in the way its officers will seek an arrest warrant. Specifically, you state:

> After the arrest of a person for which an arrest warrant is necessary, the arresting officer or investigator will prepare a statement outlining the probable cause for the criminal charge. The statement will continue to appear on the form titled "Affidavit" and the signature on that form, if any, will not be a sworn signature. The statement will be presented by fax, by email, printed on a courthouse printer or delivered by hand to one of the Court's Ministerial Recorders who will review the statement and make a determination about whether the statement provides sufficient probable cause for the charge. Assuming the Ministerial Recorder is satisfied with the statement, he or she will enter the information in [Case Management System] and print the arrest warrant.

Continuing, you add that, unlike the current procedure, where the "arresting officer . . . prepares a statement outlining the probable cause for the criminal charge" the following proposed change will, at least on occasion, take place:

> Twice a day, a police officer assigned to [the Columbia Police Department's] Telephone Response Unit (TRU) will present himself or herself to the Ministerial Recorder for the purpose of swearing to the allegations of the statement or of the arrest warrant, yet he or she will be swearing upon oath that the allegations of the arrest warrant are true.

Accordingly, you have asked us to "provide an opinion with regard to the following questions:"

1. Is an oath provided for the purpose of establishing probable cause by an officer unfamiliar with the evidence establishing probable cause a valid oath?

2. Can a Ministerial Recorder or Municipal Court Judge legally administer and accept an oath to the probable cause of an arrest warrant or a search warrant when the Ministerial Recorder or Municipal Court Judge administering the oath is aware that the person swearing to the information is without any knowledge of the probable cause supporting the search warrant or arrest warrant?

3. Is a search or arrest warrant legally valid when the oath that is administered by a Ministerial Recorder for the purpose of establishing probable cause is provided by a person who has no knowledge about that to which he or she is swearing?

4. Since the City of Columbia Municipal Court has jurisdiction to prepare warrants for alleged crimes committed within the corporate limits of the City of Columbia and the corporate limits extend from Richland County into Lexington County, is a Circuit Court order from Lexington County finding a warrant issued under the proposed procedure by another jurisdiction binding on Columbia's Municipal Court? If so, would that ruling apply equally to those cases that stem from that part of the City of Columbia located in Richland County as well as to those cases that stem from that part of the City of Columbia located in Lexington County?

5. Would search and arrest warrants issued under the newly proposed procedure be subject to challenge as a result of a Circuit Court order striking down an arrest warrant issued under the proposed procedure?

6. If the proposed procedure is found to be acceptable, please advise the Court on the proper preparation of an arrest warrant. Whose name should appear as the affiant? If the name of the officer who creates the original statement of probable cause should appear at the top of an arrest warrant as the affiant, whose name should be typed below on the signature line—the affiant or the person signing for the affiant?

7. When the affiant of an arrest warrant and the person signing the arrest warrant are different people, who is considered to be the prosecuting officer at trial? If the affiant of an arrest warrant and the person signing the arrest warrant are different people, are the rules concerning the unauthorized practice of law violated?

8. If the affiant and the officer signing an arrest warrant are different people, who is considered the affiant for the purpose of meeting the requirements of S.C. Code Ann. 17-23-162?

Our responses follow.

I. Law/Analysis

Because a variety of your questions, particularly questions one through four, seem to implicitly suggest an officer must be involved in a case in order to have knowledge of the facts supporting probable cause, we believe it prudent to first examine this proposition. In particular, your request letter, describing the proposed procedure and explaining that the arresting officer or investigator would, at a minimum, advise the TRU officer in writing of the facts supporting probable cause, expresses a concern that the TRU officer:

> will not have been on scene for the arrest of the defendant, will not have been involved in the investigation of the case and most likely, will not have had any conversation with the officer or investigator involved in the case and will not have any independent knowledge of the information contained in the warrant.

In light of these concerns, we believe it prudent to address, as an initial matter, whether an officer is required to have independent knowledge of the information contained within a warrant in order to have knowledge of the information supporting probable cause. Because both our prior opinions as well as state and federal law explain that probable cause may be based upon hearsay, including hearsay information supplied to the affiant by other officers, we believe they do not.

On multiple occasions we have explained, "probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay." Op. S.C. Att'y Gen., 2012 WL 1774919 (May 2, 2012); Op. S.C. Att'y Gen., 2011 WL 2214068 (May 25, 2011); Op. S.C. Att'y Gen., 2001 WL 790252 (May 22, 2001); Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996); Op. S.C. Att'y Gen., 1993 WL 524194 (November 4, 1993); Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). Further, the law is clear that probable cause can also be based upon hearsay within hearsay[1] and may be supported by hearsay information supplied to the affiant by other officers. U.S. v. Ventresca, 380 U.S. 102, 108

[1] See State v. Sullivan, 267 S.C. 610, 615, 230 S.E.2d 621, 624 (1976) ("[W]hen a magistrate receives an affidavit which contains hearsay upon hearsay, he need not categorically reject this double hearsay information."); State v. Dunbar, 361 S.C. 240, 249, 603 S.E.2d 615, 620 (Ct. App. 2004) (acknowledging that a warrant affidavit may be based on hearsay within hearsay); U.S. v. McCoy, 478 F.2d 176, 179 (10th Cir. 1973) (concluding an affidavit based on information the affiant received from fellow FBI agents who had acquired their information from others was sufficient to sustain magistrate's determination of probable cause, adding "when a magistrate receives an affidavit which concerns hearsay or hearsay on hearsay, he need not summarily reject double hearsay information[.]").

(1965); U.S. v. Welebir, 498 F.2d 346, 349 n.2 (4th Cir. 1974); U.S. v. Various Gambling Devices, 478 F.2d 1194, 1200 (5th Cir. 1973); McCoy, 478 F.2d at 179; U.S. v. Steed, 465 F.2d 1310, 1315 (9th Cir. 1972). Thus, because the law does not require an officer to have independent knowledge of the facts supporting probable cause in order to have knowledge of the facts for purposes of seeking a warrant, where an officer assigned to the TRU follows the procedures contained within your request letter—i.e. the TRU officer is advised of the facts supporting probable cause by the investigating officer and the TRU officer then explains he was advised of the information in the affidavit by the investigating officer—such a procedure would appear to sufficiently apprise the affiant officer of the facts supporting probable cause such that the officer would be able to seek a warrant. As was explained by the Tenth Circuit in McCoy, "when a magistrate receives an affidavit which concerns hearsay on hearsay, he need not summarily reject the double hearsay information, but is rather called on to evaluate such information as well as all other information in the affidavit in order to determine whether the informant gathered his information in a reliable way and from reliable sources." 498 F.2d at 179. Stated differently, because an affiant officer, as a matter of law, has knowledge of the facts supporting probable cause when the information is conveyed to the officer by other officers, a magistrate cannot categorically disregard such information, but must instead review the information conveyed by the officer to determine if the facts contained in the affidavit support a finding of probable cause. With this in mind, we now turn to your first question.

A. Validity of an Oath where the Officer is Unfamiliar with the Evidence Supporting Probable Cause

You first ask, within the context of the procedural changes explained above, whether "an oath provided for the purpose of establishing probable cause by an officer unfamiliar with the evidence establishing probable cause is a valid oath?" While such an oath would in fact be invalid where an affiant lacks *any knowledge* of the evidence supporting probable cause, because the procedure discussed above shows that the officer assigned to the TRU is not truly unfamiliar with such evidence so long as they follow the appropriate procedures, we believe such an oath would be valid.

As you are well aware, the South Carolina Constitution provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." S.C. Const. art.I, § 10. Further, Section 22-3-710, applicable to municipal courts via Section 14-25-45 of the Code,[2] explains that "all proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." S.C. Code Ann. § 22-3-710 (2007). "[A]n oath is a solemn pledge, swearing to a higher power, that one's statement is

[2] See S.C. Code Ann. § 14-25-45 (2014 Supp.) ("Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates . . . .").

true and subjects one to penalties for perjury if the statement is false." State v. Dunbar, 361 S.C. 240, 247, 603 S.E.2d 615, 619 (Ct. App. 2004).

In State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004) a majority of the Court of Appeals found that an affiant officer who lacks "any knowledge" about the facts supporting probable cause is unable to make an oath supporting a probable cause affidavit. In particular, the Dunbar majority concluded a police officer who signed an affidavit in support of a warrant but, "did not have any firsthand knowledge of the events," and instead "merely" signed for the warrant, "could not make such an oath" and therefore the probable cause affidavit signed by the affiant officer was invalid.[3] 361 S.C. at 248, 603 S.E.2d at 619. Specifically, the majority found that the officer, despite being under oath when he signed the affidavit, "did not relay any information that would support probable cause" explaining, "there is no other evidence in the record that [the officer] had *any knowledge, either from personal observation or from hearsay statements* of [the investigating officer], regarding the other facts in the affidavit." Id. (emphasis added). Thus, while the majority held the affiant officer "could not make such an oath," this conclusion was based on the officer's complete lack of knowledge of the underlying facts combined with the investigating officer's failure to convey the facts supporting probable cause to the affiant officer in conjunction with the affiant officer's failure to credit the source of his information. In other words, Dunbar suggests that an oath from an affiant officer supporting a warrant *is valid* where the affiant officer has knowledge, "either from personal observation *or from hearsay statements*" regarding the facts supporting probable cause. Id.

Indeed, this understanding of Dunbar is consistent with the prior opinions noted in Section I, which as we have explained on multiple occasions, reflect that "probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay." Op. S.C. Att'y Gen., 2012 WL 1774919 (May 2, 2012); Op. S.C. Att'y Gen., 2011 WL 2214068 (May 25, 2011); Op. S.C. Att'y Gen., 2001 WL 790252 (May 22, 2001); Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996); Op. S.C. Att'y Gen., 1993 WL 524194 (November 4, 1993); Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). Likewise, this reading of Dunbar is consistent with the federal cases mentioned in Section I, which make clear that a determination of probable cause may be based upon hearsay within hearsay[4] and may also be supported by hearsay information supplied to the affiant by other officers. Ventresca, 380

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[3] In Dunbar, the affiant officer's statement of probable cause was as follows:

> That a confidential informant state that the subject stays at motel while in the area, that Co Def stated that the subject left Ramada Inn at I-26 @ 378 after Co-Def called subject in that room, that Co Def saw subject leave location to pick him up at location across from Ramada, that subject had on [sic] his possession a key to said room, that subject delivered approx. 5 oz. of cocaine to undercover agents.

361 S.C. at 245, 603 S.E.2d at 618.

[4] See FN 1 *supra*.

U.S. at 108 (1965); Welebir, 498 F.2d at 349 n.2; Various Gambling Devices, 478 F.2d at 1200; McCoy, 478 F.2d at 179; Steed, 465 F.2d at 1315. Thus, and as mentioned above, so long as an officer assigned to the TRU follows the procedures contained within your request letter—i.e. the TRU officer is advised of the facts supporting probable cause by the investigating officer and the TRU officer then explains he was advised of the information in the affidavit by the investigating officer—such a procedure would appear to comply with Dunbar and, as a result, the oath administered to the affiant officer would, as a matter of law, be valid since the officer would, legally speaking, have knowledge of the facts supporting probable cause. Nevertheless we caution that while "other officers [may] appear before the Magistrate on behalf of the arresting officer and relate what facts they are in possession of to the Judge in order to show probable cause for the issuance of a warrant" the affiant must still "satisfy the inquiring Magistrate that sufficient facts and information exist to support the issuance of the warrant, which . . . is entirely in the Magistrate's good judgment." Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978); see also, Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998) ("The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment."); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996) (same); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996) (same).

B. Administering and Accepting an Oath when the Affiant Lacks Personal Knowledge

You next ask, whether "a Ministerial Recorder or Municipal Court Judge [can] legally administer and accept an oath to the probable cause of an arrest warrant or a search warrant when the Ministerial Recorder or Municipal Court Judge administering the oath is aware that the person swearing to the information is without any knowledge of the probable cause supporting the search warrant or arrest warrant?" Again, while such an oath would appear to be invalid where an affiant lacks "any knowledge" of the evidence supporting probable cause under Dunbar, we are unaware of any South Carolina authority which would prohibit a Ministerial Recorder or Municipal Court Judge from administering an oath to such an individual, especially where such officers are, as a matter of law, ministerial officers. In any event, because a TRU officer who is properly advised and following the proposed procedure discussed above would in fact have knowledge of the probable cause supporting a search or arrest warrant, we believe a Ministerial Recorder or Municipal Court Judge would not be prohibited from administering an oath under the circumstances mentioned in your letter.

Although Dunbar explains that an oath is invalid where an affiant lacks "any knowledge" of the information contained within an affidavit, we are unaware of any South Carolina authority prohibiting a Ministerial Recorder or Municipal Court Judge from administering an oath to an affiant where such an official believes the affiant lacks "any knowledge" of the facts contained in

the affidavit. To the contrary, because each of the aforementioned are ministerial officers,[5] obligated[6] to make a "common-sense decision" on whether to issue a warrant[7] and in doing so, must review "all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information," we believe the law requires that the statutorily-mandated oath[8] be administered.

Moreover, and as discussed above in Sections I and I(A), it appears that since "probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay," an officer properly advised and following the proposed procedure contained in your request letter would not, as a matter of law, lack knowledge of the facts supporting probable cause. See Op. S.C. Att'y Gen., 2012 WL 1774919 (May 2, 2012); Op. S.C. Att'y Gen., 2011 WL 2214068 (May 25, 2011); Op. S.C. Att'y Gen., 2001 WL 790252 (May 22, 2001); Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996); Op. S.C. Att'y Gen., 1993 WL 524194 (November 4, 1993); Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). Indeed, the law is clear that probable cause can also be based upon hearsay within hearsay[9] and may be supported by hearsay information supplied to the affiant by other officers. Ventresca, 380 U.S. at 108; Welebir, 498 F.2d at 349 n.2; Various Gambling Devices, 478 F.2d at 1200; McCoy, 478 F.2d at 179; Steed, 465 F.2d at 1315.

However, despite the fact that a judge *may*, as a matter of law, consider hearsay information supplied to an affiant officer by other officers, we note this conclusion does not prohibit a Ministerial Recorder or Municipal Court Judge from declining to issue a warrant in the circumstances mentioned in your letter. To the contrary, the determination of probable cause must be based on the totality of the circumstances and therefore necessarily requires an evaluation of the basis of the affiant's knowledge as well as the veracity of the information contained within the affidavit, regardless of its source. See e.g., Bowie, 360 S.C. at 220, 600 S.E.2d at 117 ("A determination of probable cause depends on the totality of the

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[5] See Whaley v. Lawton, 57 S.C. 256, ---, 35 S.E. 558, 560 (1900) (taking judicial notice that statute creating two classes of magistrates, one of which is authorized to issue warrants, is a ministerial officer).

[6] See S.C. Code Ann. § 14-25-115 (providing for the appointment of ministerial recorders and authorizing them to issue warrants upon a showing of probable cause); S.C. Code Ann. § 14-25-45 (detailing that municipal courts have the same "powers, duties and jurisdiction in criminal cases" as magistrate courts).

[7] See State v. Bowie, 360 S.C. 210, 219, 600 S.E.2d 112, 117 (Ct. App. 2004) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983) ("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.")); State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) (emphasizing that under the totality of the circumstances test, courts must consider the basis of knowledge and veracity of individual providing information when determining the existence of probable cause).

[8] See S.C. Code Ann. § 22-3-710 (requiring all proceedings before magistrates in criminal court be "commenced on information under oath"); S.C. Code Ann. § 14-25-45 (explaining municipal courts "have all such powers, duties and jurisdiction and criminal cases under state law and conferred upon magistrates.").

[9] See FN 1 *supra*.

circumstances."); Bowie, 360 S.C. at 219, 600 S.E.2d at116-17 (explaining that the totality of the circumstances includes the affiant's basis of knowledge and the veracity of the information contained within the affidavit); State v. Williams, 297 S.C. 404, 405, 377 S.E.2d 308, 309 (1989) (same). Thus, while a Ministerial Recorder or Municipal Judge may not, as a matter of law, categorically disregard hearsay information serving as the basis for a determination of probable cause in an arrest warrant, he or she may decline to consider such information (or may ask the affiant for supplemental testimony) where the basis of the affiant's knowledge or the veracity of his or her information does not convince, "a man of reasonable caution . . . that an offense has been committed and that the accused committed it." Bowie, 360 S.C. at 220, 600 S.E.2d at 117. In other words, and as stated in a prior opinion of this Office, when an officer appears before a summary court judge or recorder on behalf of the arresting officer and relate the facts they are in possession of "in order to show probable cause for the issuance of a warrant" the affiant must still "satisfy the inquiring [summary court judge or recorder] that sufficient facts and information exist to support the issuance of the warrant, which . . . is entirely in the [the court's] good judgment." Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978); see also, Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998) ("The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment."); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996) (same); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996) (same).

C. Validity of a Warrant when the Oath is Provided by a Person who has No Knowledge about the Underlying Information Contained in the Affidavit

In your third question you ask whether "a search or arrest warrant [is] legally valid when the oath that is administered by a Ministerial Recorder for the purpose of establishing probable cause is provided by a person who has no knowledge about that to which he or she is swearing? As explained above in Section I(A), because Dunbar concludes that an oath sworn to by an officer lacking "any knowledge" of the facts is invalid, it follows that a search or arrest warrant supported by such an affidavit is invalid as well since South Carolina law requires that a warrant be supported by "oath or affirmation." See Dunbar, 361 S.C. at 248, 603 S.E.2d at 620 ("Because there is no evidence that the information [supporting probable cause] was given under oath, the search warrant in this case offends the constitutional requirement that it be supported by 'oath or affirmation.'"); S.C. Const. art.I, § 10 ("[N]o warrant shall issue but upon probable cause, supported by oath or affirmation[.]"). That said, for the reasons discussed in Sections I, I(A) and I(B), we believe an affiant officer who is properly advised and following the proposed procedure discussed above would in fact have knowledge of the probable cause supporting a search or arrest warrant, a search or arrest warrant procured via the proposed procedure at issue would be valid since the warrant would be supported by oath or affirmation as is required by South Carolina law.

As indicated above in Section I(A), Dunbar explains that an affiant officer with "no knowledge" about the facts supporting probable cause is unable to make an oath supporting a probable cause affidavit. 361 S.C. at 248, 603 S.E.2d at 619. Specifically, and as noted above, the Dunbar majority found that an officer lacking "firsthand knowledge of the events," who instead "merely" signed for the warrant, "could not make such an oath" and therefore the probable cause affidavit signed by the affiant officer was invalid meaning "the search warrant issued in the case offend[ed] the constitutional requirement that [the warrant] be supported by 'oath or affirmation.'" 361 S.C. at 248, 603 S.E.2d at 619-20. Thus, Dunbar instructs that where an affiant officer truly has "no knowledge" of the facts supporting probable cause in an affidavit, the oath is invalid and, as a result, absent sworn supplemental testimony providing probable cause, a warrant issued under such circumstances fails to meet the constitutional requirement that a warrant be supported by "oath or affirmation" rendering it invalid. Id.

Despite our conclusion that a warrant is invalid when the underlying oath supporting probable cause is provided by an individual with "no knowledge" of the underlying facts and there is no sworn supplemental testimony independently establishing probable cause, we believe an affiant officer who is properly advised pursuant to the proposed procedures discussed above would be sufficiently informed such that his or her oath would be legally valid. As mentioned previously in Sections I, I(A) and I(B), "probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay." Op. S.C. Att'y Gen., 2012 WL 1774919 (May 2, 2012); Op. S.C. Att'y Gen., 2011 WL 2214068 (May 25, 2011); Op. S.C. Att'y Gen., 2001 WL 790252 (May 22, 2001); Op. S.C. Att'y Gen., 1998 WL 61840 (January 30, 1998); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996); Op. S.C. Att'y Gen., 1993 WL 524194 (November 4, 1993); Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). Additionally, probable cause can be based upon hearsay within hearsay[10] and may be supported by hearsay information supplied to the affiant by other officers. Ventresca, 380 U.S. at 108; Welebir, 498 F.2d at 349 n.2; Various Gambling Devices, 478 F.2d at 1200; McCoy, 478 F.2d at 179; Steed, 465 F.2d at 1315. Thus, where an affiant officer is properly advised and following the proposed procedure discussed above, we believe the oath supporting probable cause would not, as a matter of law, be invalid since the affiant officer would have knowledge of the facts supporting probable cause. As a result, a warrant issued by a Ministerial Recorder or Municipal Court Judge under these circumstances, would also be valid as the warrant at issue would be supported by a valid oath thereby complying with the constitutional requirement that a warrant be supported by "oath or affirmation." Nevertheless, and as stated in Section I(B), an affiant officer appearing before a summary court judge or recorder on behalf of an arresting officer is still tasked with "relat[ing] what facts they are in possession of to the Judge in order to show probable cause for the issuance of a warrant" and must still "satisfy the inquiring [judge or recorder] that sufficient facts and information exist to support the issuance of the warrant, which . . . is entirely in the [court's] good judgment." Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978); see also, Op. S.C. Att'y Gen., 1998 WL

[10] See FN 1, *supra*.

61840 (January 30, 1998) ("The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment."); Op. S.C. Att'y Gen., 1996 WL 549522 (August 5, 1996) (same); Op. S.C. Att'y Gen., 1996 WL 265819 (April 30, 1996) (same).

D. Whether a Lexington County Order is binding on the City of Columbia

In your fourth question you have attached an order in a Lexington County criminal case[11] and inquire whether "a Circuit Court order from Lexington County finding a warrant issued under the proposed procedure by another jurisdiction [is] binding on Columbia's Municipal Court?" You further ask, if the ruling is binding whether it would "apply equally to those cases that stem from the part of the City of Columbia located in Richland County as well as to those cases that stem from that part of the City of Columbia located in Lexington County?" Because a Circuit Court order lacks precedential value and therefore can only bind the parties involved in the litigation, we believe the court order at issue does not bind the City's Municipal Court regardless of the fact that, as indicated in your letter, a portion of the city limits extend into Lexington County.

We have previously advised, "only opinions appearing in the official advance sheets, the South Carolina Reports, or the Southeastern Reporter, should be cited as binding authority . . . ." Op. S.C. Att'y Gen., 1995 WL 803674 (June 9, 1995) (quoting Benson and Davis, A Guide to South Carolina Legal Research and Citation, 17 (1991)). Continuing, we explained that while "trial court orders may be useful for their reasoning . . . [they] do not have significant precedential value." Op. S.C. Att'y Gen., 1995 WL 803674 (June 9, 1995) (quoting Benson and Davis, A Guide to South Carolina Legal Research and Citation, 17 (1991)). This conclusion is supported by our appellate court rules which state that "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR (2014). Accordingly, since the

[11] As background, we note that the order attached to your request letter comes from the Eleventh Circuit Court of Common Pleas wherein Judge Eugene Griffith, sitting in his appellate capacity over Magistrate's Court appeals, found an arrest warrant signed by a Sheriff's Deputy, on behalf of another deputy, invalid. See State v. Barton, 2013-CP-32-0582 (March 17, 2014). In the order, Judge Griffith explained that because the second deputy "made clear" he had "absolutely no knowledge of the supporting facts set forth in the affidavit supporting the arrest warrant" the warrant failed to meet South Carolina's "oath or affirmation" requirement. Id. While you have not asked us to express an opinion on the order, we note this conclusion is consistent with our reading of Dunbar, in that both police officers "merely" signed for the warrant, without "any knowledge" of the facts which in turn rendered the oath invalid meaning the warrant at issue in both cases failed to comply with the Constitution's "oath or affirmation" requirement. 361 S.C. at 248, 603 S.E.2d at 619. That said, the order in Barton does not appear to address the validity of an oath in the situation where an officer seeks an arrest warrant after being advised by another officer of the facts supporting a determination of probable cause. Thus, from our review, the order, even if it were binding, would not appear to invalidate the proposed procedure discussed in your letter as it does not purport to address such a situation.

attached order is a Circuit Court order, and is also unpublished, it only binds the parties involved in the litigation and does not bind Columbia's Municipal Courts.

E. Whether Warrants Issued Under the New Procedure are Subject to Challenge

In your fifth question you ask whether "warrants issued under the newly proposed procedure [would] be subject to challenge as a result of a Circuit Court order striking down an arrest warrant issued under the proposed procedure?" Because a determination of probable cause is always subject to judicial review, as is the question of whether a warrant is supported by oath or affirmation, we believe a warrant issued under any procedure is certainly subject to challenge. However, since the Circuit Court order you are referencing only: (1) binds the parties involved in the litigation; (2) lacks precedential authority; and (3) fails to address the issue of whether an affiant officer has knowledge of the facts supporting probable cause when he or she is advised by another officer of the facts contained within the affidavit, we do not believe the newly-proposed procedure would be struck down under the reasoning contained within the Circuit Court order.

As you are well aware, determinations of probable cause are subject to challenge via judicial review. On appeal, a court reviewing a determination of probable cause must decide whether the authority issuing the warrant had a "substantial basis for concluding probable cause existed." Bowie, 360 S.C. at 220, 600 S.E.2d at 117 (citing State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994)). Probable cause is a flexible, common-sense standard, Texas v. Brown, 460 U.S. 730, 742 (1983), "does not import absolute certainty," Bowie, 360 S.C. at 220, 600 S.E.2d at 117, and, as it relates to an arrest warrant, "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that an offense has been committed and that the accused committed it." Id. (quoting Brown, 460 U.S. at 742). "Probable cause 'does not demand any showing that such a belief will be correct or more likely true than false'" Id. (quoting Brown, 460 U.S. at 742), is based on the information available to the issuing authority at the of the issuance of the warrant, State v. Crane, 296 S.C. 336, 339, 372 S.E.2d 587, 589 (1988), and is determined by the totality of the circumstances, including, among other things, the veracity and basis of knowledge of those supplying hearsay information. Illinois v. Gates, 462 U.S. 213, 238 (1983). South Carolina's appellate courts, when reviewing such conclusions, "give substantial deference" to the issuing authority's probable cause determinations. Dunbar, 361 S.C. at 246, 603 S.E.2d 618-19; Crane, 296 S.C. at 339, 372 S.E.2d at 588.

Likewise, the question of whether a warrant is supported by oath or affirmation is also subject to judicial review. Like determinations of probable cause, the question of whether an officer has knowledge of the facts for purposes of establishing a valid oath—and thereby fulfilling the Constitutional "oath or affirmation" requirement—appears to be based on the facts and circumstances of each case. See e.g., Dunbar, 361 S.C. at 248-49, 603 S.E.2d at 619-20 (reviewing the appellate record to determine whether affiant officer had knowledge of the facts in order to swear out a proper oath); Id., (reviewing record to determine whether investigating

officer, who called the magistrate and provided him with information concerning the investigation, was under oath when providing such information).

With this in mind, we believe that while determinations of probable cause, as well as determinations concerning the validity of an oath supporting a warrant are subject to challenge, it does not appear the Circuit Court order at issue makes a challenge either more or less likely to succeed. Indeed, and as discussed above in Section I(E), the Circuit Court Order referenced in your letter binds only the parties involved in that particular case and has no precedential value. See Op. S.C. Att'y Gen., 1995 WL 803674 (June 9, 1995) (quoting Benson and Davis, A Guide to South Carolina Legal Research and Citation, 17 (1991)) ("While trial court orders may be useful for their reasoning . . . [they] do not have significant precedential value."); see also, Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

Moreover, and as mentioned in footnote 11 above, it appears the Circuit Court order discussed in your letter does not address the validity of an oath where an affiant officer is advised of the facts supporting probable cause via another officer. Stated differently, the Circuit Court order in Barton does not address, as a matter of law, whether an officer who has been advised of the basis for probable cause by an investigating officer, has sufficient knowledge of the facts supporting probable cause such that he or she may provide a legally valid affidavit in support of a warrant. Rather, it appears the Circuit Court's conclusion in Barton, like the majority's opinion in Dunbar, is based on the individual facts and circumstances of the case. Specifically, the order in Barton, like the majority opinion in Dunbar, relies on testimony from an affiant officer stating he had "no knowledge" of the facts contained within the affidavit supporting probable cause, to then conclude the warrant was not supported by oath or affirmation. Compare Barton, 2013-CP-32-0582 at p. 2 ("[T]he signing deputy had absolutely no knowledge of the supporting facts set forth in the affidavit supporting the arrest warrant.") and id. ("A law enforcement officer who knows nothing about the facts of a case, cannot properly provide information under oath to support probable cause upon which to issue an arrest warrant.") with Dunbar, 361 S.C. at 248, 603 S.E.2d at 619 ("Because [the affiant officer] admitted he had no knowledge of the facts of this case, we hold he could not make such an oath.").

Additionally, and as noted above, the Dunbar majority, by expressly acknowledging that the affiant officer "did not have any knowledge, either from personal observation, or from hearsay," actually recognized an affiant officer advised of the facts supporting probable cause by another, could, as a matter of law, have knowledge of such facts. Therefore Dunbar, while factually similar, actually cuts against the suggestion that the Circuit Court's order in Barton addressed anything other than the facts and circumstances present in the order (i.e. that the affiant officer had "absolutely no knowledge of the facts"). As a result, our review of the Circuit Court's order in Barton shows the order did not strike down a particular procedure for seeking warrants, but instead simply found the affiant officer in the case possessed "no knowledge" of

the facts contained within the affidavit thereby rendering the oath invalid. Accordingly, we do not believe the reasoning contained within the Circuit Court order discussed in your request would result in the newly-proposed procedure at issue being struck down.

F. Preparation of an Arrest Warrant Based Upon Information Conveyed to an Affiant Officer by way of Another Officer

Your sixth question asks us to "advise the Court on the proper preparation of an arrest warrant." Particularly you ask, in situations where a TRU officer is advised by another officer of the facts supporting probable cause in arrest warrant, who "should appear as the affiant?" and "[i]f the name of the officer who creates the original statement of probable cause should appear at the top of an arrest warrant as the affiant, whose name should be typed below on the signature line-the affiant or the person signing for the affiant?" As a general matter, our prior opinions suggest "any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender." Op. S.C. Att'y Gen, 1993 WL 524194 (November 4, 1993). That said, because the majority in Dunbar, as well as the Circuit Court order in Barton, indicate an individual with "no knowledge" of the facts supporting an arrest warrant cannot swear out a valid oath, we believe that where a TRU officer is advised by another officer of the facts supporting probable cause to be used in a warrant, the better practice in preparing the warrant would be for the TRU officer to serve as the affiant.

1. Proper Preparation of an Arrest Warrant—Who should be the Affiant Generally?

In a prior opinion addressed to the then-Chief Magistrate of Darlington County, we answered the question of who may serve as the affiant in an arrest warrant stating:

> [A]ny citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who he honestly and in good faith believes to be the offender. . . Furthermore, the probable cause expressed in the affidavit may be based on personal knowledge or hearsay. . . The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment. . . .

Op. S.C. Att'y Gen, 1993 WL 524194 (November 4, 1993).

We reiterated this exact conclusion in a 1999 opinion to the Court Administrator of the Richland County Central Court. Op. S.C. Att'y Gen., 1999 WL 986759 (September 29, 1999). There, we were also asked to address whether "warrants [for failure to appear should] be drawn at the appropriate time by the court for the signature as affiant by the original citing officer?" Op. S.C. Att'y Gen., 1999 WL 986759 (September 29, 1999). In response, we explained there was

no "basis to indicate that the original citing officer would necessarily be the one who must make any decision as to whether to proceed with a failure to appear case." Op. S.C. Att'y Gen., 1999 WL 986759 (September 29, 1999). Continuing, we again cited to our 1993 opinion and said, "any individual who in good faith believes a criminal violation has occurred can act as affiant on a warrant." Since then, we have stated the same on multiple occasions. E.g., Op. S.C. Att'y Gen., 2012 WL 1774919 (May 2, 2012); Op. S.C. Att'y Gen., 2012 WL 1561867 (April 19, 2012); Op. S.C. Att'y Gen., 2011 WL 2214068 (May 25, 2011); Op. S.C. Att'y Gen., 2001 WL 790252 (May 22, 2001); Op. S.C. Att'y Gen., 2001 WL 129340 (January 11, 2001). In light of these prior conclusions, we continue to believe that, generally speaking, "any individual who in good faith believes a criminal violation has occurred can act as affiant on a warrant." Op. S.C. Att'y Gen, 1993 WL 524194 (November 4, 1993).

2. Proper Preparation of an Arrest Warrant—Who should be the Affiant in the Proposed Procedure?

You have also asked us to discuss who should serve as the affiant in a warrant where the arresting or investigating officer has advised the TRU officer of the facts supporting probable cause. In such a situation, we believe the best course of action would be for the TRU officer to serve as the affiant. Specifically, since an officer can rely on hearsay information relayed by another officer when articulating probable cause, the TRU officer who is advised of the facts of the case by the arresting or investigating officer and then drafts an affidavit supporting probable cause and signs for it before the issuing authority, has satisfied Dunbar's requirement that the affiant officer have knowledge of the case.[12] See Dunbar, 361 S.C. at 248, 603 S.E.2d at 619 (suggesting an oath from an affiant officer supporting a warrant *is valid* where the affiant officer has knowledge, "either from personal observation *or from hearsay statements*" regarding the facts supporting probable cause). Indeed, we relied on similar logic in a prior opinion of this Office approving of a Lexington County warrant process in which "other officers appear before the Magistrate on behalf of the arresting officer and relate what facts they are in possession of to the Judge in order to show probable cause for the issuance of a warrant against persons already in custody." Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). We added, there is "no impropriety in such a practice as long as the affiant is able to satisfy the inquiring Magistrate that sufficient facts and information exist to support the issuance of the warrant . . . ." Op. S.C. Att'y Gen., 1978 WL 34666 (January 20, 1978). Thus, we continue to advise that where an arresting or investigating officer has notified the TRU officer of the facts supporting probable cause, the TRU officer should serve as the affiant on the warrant.

[12] In light of this conclusion (i.e. that the TRU officer should serve as the affiant) we believe your question regarding who should sign the warrant under the proposed procedure is also answered.

G. Determination of the Prosecuting Officer and the Unauthorized Practice of Law

Your seventh question asks, in the situation where the affiant of an arrest warrant and the person signing the arrest warrant are different people, "who is considered to be the prosecuting officer at trial?" You further question, "[i]f the affiant of an arrest warrant and the person signing the warrant are different people, are the rules concerning the unauthorized practice of law violated?" We believe either officer could serve as the prosecuting officer in the circumstances mentioned in your letter and therefore neither the affiant officer nor arresting officer would be engaging in the unauthorized practice of law by prosecuting the offense alleged in the warrant in summary court.[13]

Pursuant to Article V, Section 4 of the South Carolina Constitution, the Supreme Court is vested with the sole power to regulate the practice of law. S.C. Const. art. V, § 4; see also, S.C. Code Ann. § 40-5-10 (2001). However, instead of providing a comprehensive definition of the practice of law, the Court has instead endeavored to "decide what is and what is not the unauthorized practice of law on a case by case basis." In re Richland County Magistrate's Court, 389 S.C. 408, 415, 699 S.E.2d 161, 165 (Hearn J., dissenting) (citing In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 305-07, 422 S.E.2d 123, 124-25 (1992)). Therefore, the question of "what constitutes the unauthorized practice of law has evolved over time." In re Richland County Magistrate's Court, 389 S.C. at 415, 699 S.E.2d at 165 (Hearn J., dissenting).

As of this date, the Court has not directly addressed the question of whether an affiant officer advised of the facts of the case through the TRU process can serve as a prosecuting officer in summary court. Similarly, the Court has not addressed the more general question of whether an affiant officer advised of the facts of the case who has drafted the affidavit supporting probable cause, but has not otherwise participated in the investigation of the case, may serve as a prosecuting officer in summary court. Thus, this issue looks to be primarily controlled by three decisions of the South Carolina Supreme Court: State v. Messervy, 258 S.C. 110, 187 S.E.2d 534 (1972); State ex rel McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978); and State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989).

In Messervy, our Supreme Court endorsed the practice of a highway patrolman serving as the prosecuting witness in a DUI case, stating "[i]t has long been the practice in the magistrates' courts of this State for the arresting patrolman to prosecute the cases which he has made." 258 S.C. at 113, 187 S.E.2d at 525. Continuing, the Court added, "[i]deally, the State's case would be presented by a prosecuting attorney, but unfortunately such is not practicable because of the large number of traffic court violations." Id.

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[13] However, because your question is predicated on the assumption that the affiant and the person signing the warrant will be different people, an assumption which runs counter to our advice in Section I(F)(2)—that the better practice would be for the affiant officer to sign the warrant procured through the TRU process—the answer to this questions appears to be largely academic.

Subsequently, in Seaborn, the Court was asked to determine whether the South Carolina Highway Patrol engaged in the unauthorized practice of law by assigning non-lawyer supervisors to assist arresting officers in the prosecution of misdemeanor traffic violations in magistrate's court.[14] 270 S.C. at 318, 244 S.E.2d at 697. Deciding the question in the negative, the Court explained that because the prohibition against the unauthorized practice of law is designed to protect laymen from "the intrusion of incompetent and unlearned persons in the practice of law," the Highway Patrol did not violate the prohibition since the arresting officers and their supervisors prosecuted the cases "in their official capacities as law enforcement officers and employees of the State." 270 S.C. at 319, 244 S.E.2d at 698.

In contrast, in Sossaman the Court determined a state trooper who appeared on the scene after Sheriff's deputies arrested the defendant for an open container violation and prosecuted the case in Magistrate's Court was unauthorized to do so since he was not the arresting officer in the matter, nor was he the arresting officer's supervisor. 298 S.C. at 73, 378 S.E.2d at 260. As was later explained by the Court in State v. Rainwater, 376 S.C. 256, 259, 657 S.E.2d 449, 450 (2008), the Sossamon Court's rationale in so finding was that the state trooper in Sossamon was that unlike the officer in Messervy, or the non-lawyer supervisors in Seaborn, the open container violation was never the state trooper's case to make.

Applying these cases to the present case, we believe that both the officer who investigated the case as well as the TRU officer who drafts and signs the affidavit supporting the warrant could conceivably serve as the prosecuting officer. As we pointed out in a prior opinion, the salient question from the Messervy, Seaborn, Sossamon trilogy of cases is whether the officer is seeking to "prosecute a case by another officer." Op. S.C. Att'y Gen., 2012 WL 1964398 (May 18, 2012). In other words, where an officer is responsible for prosecuting a case as part of his official duties, it follows that he or she is likely authorized to prosecute the case under the rationale of Messervy and Seaborn since the individual is acting on behalf of the public rather than as a private prosecutor. However, where an officer is not responsible for prosecuting a case but elects to do so anyways, as was the case in Sossamon, he is not regarded as acting within the scope of his official duties and is therefore unable to bring the case in summary court on behalf of the State. Here, since both officers would have knowledge of the facts of the case and would also be acting on behalf of the general public when prosecuting based upon their position with the arresting agency, it follows that either officer would likely be able to serve as the prosecuting officer without violating the prohibition regarding the unauthorized practice of law. Indeed, there is no doubt the policy expressed in Seaborn supporting the prohibition on the unauthorized practice of law is not violated in such a situation as the prosecuting officer is not holding him or herself as an attorney to the general public, but is instead prosecuting a case in which he or she

[14] Later, our Supreme Court elaborated on its rulings in Messervy and Seaborn explaining, "the prosecutorial authority granted to law enforcement officers and licensed security guards applies with equal force to non-traffic misdemeanors within the jurisdiction of a magistrate's or municipal court." Easley v. Cartee, 309 S.C. 420, 422 n.2, 424 S.E.2d 491, 492 n.2 (1992).

was involved. Accordingly, while the determination of what constitutes the unauthorized practice of law remains a question reserved for our Supreme Court, we believe, based on our review of the cases regarding law enforcement's ability to prosecute misdemeanors in summary court, that either an affiant officer or an arresting officer could serve as a prosecuting officer without violating the prohibition.

H. Who is the Affiant for Purposes of Section 17-23-162 of the Code

In your final question you ask, in the situation where "the affiant and the officer signing an arrest warrant" are different people, "who is considered the affiant for the purpose of meeting the requirements of S.C. Code Ann. [§] 17-23-162?" Because our courts have generally defined an "affiant" as "an individual who makes 'a voluntary declaration of facts written down and sworn to" before the magistrate" Dunbar, 361 S.C. at 248, 603 S.E.2d at 619 (quoting Black's Law Dictionary 58 (7th ed. 1999)) we believe, under the circumstances mentioned in your question, the affiant, for purposes of Section 17-23-162, would be the individual most closely fitting this description.[15]

Section 17-23-162 of the South Carolina Code, entitled "[p]resence of affiant or arresting officer to testify at the preliminary hearing" states, "[t]he affiant listed on an arrest warrant or the chief investigating officer for the case must be present to testify at the preliminary hearing of the person arrested pursuant to the warrant." It appears the purpose of the statute, like that of the preliminary hearing in general, is to apprise the defendant of the "nature of the State's evidence." State v. Jones, 273 S.C. 723, 726-27, 259 S.E.2d 120, 122 (1979). Section 17-23-162 meets this requirement by directing either the affiant, or the chief investigating officer, to appear at the preliminary hearing in order to present the evidence supporting probable cause. Id.

Keeping the purpose of Section 17-23-162 in mind, to apprise defendants of the nature of the State's evidence by requiring the presence of the affiant or chief investigating officer at the preliminary hearing, we believe the affiant, for purposes of Section 17-23-162, would be the individual with knowledge of the information supporting probable cause in the affidavit. See e.g., Jones, 273 S.C. at 726-27, 259 S.E.2d at 122 (explaining the purpose of a preliminary hearing is to apprise the defendant of the State's evidence, but adding such evidence may properly come via hearsay). This conclusion is consistent with the Dunbar majority's understanding of the word "affiant" as well. As alluded to above, the majority in Dunbar, explained an affiant is "an individual who makes 'a voluntary declaration of facts written down and sworn to' before the magistrate." 361 S.C. at 248, 603 S.E.2d at 619. Further, the Dunbar majority, quoting State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) said, "[a]n affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation . . . ." Accordingly, we

[15] Again, because we have advised that an affiant officer who procures the warrant through the TRU process should also sign for the warrant, we believe the answer to this questions appears to be largely academic.

believe the affiant, for purposes of Section 17-23-162, would be the individual drafting the affidavit supporting probable cause who has sworn to or affirmed that probable cause exists.

II. Conclusion

In conclusion, and in response to your first question, the TRU process discussed in your letter would appear to result in a valid oath so long as an officer assigned to the TRU follows the procedures contained within your request letter—i.e. the TRU officer is advised of the facts supporting probable cause by the investigating officer and the TRU officer then explains he was advised of the information in the affidavit by the investigating officer. In particular, the oath administered to the affiant officer would, as a matter of law, be valid since, as discussed in Sections I, I(A) and I(B), the officer would, legally speaking, have knowledge of the facts supporting probable cause. As a result it follows that because a TRU officer who is properly advised and following the proposed procedure discussed above would in fact have knowledge of the probable cause supporting a search or arrest warrant, the answer to your second question is that a Ministerial Recorder or Municipal Court Judge would not be prohibited from administering an oath under the circumstances mentioned in your letter. It also follows, for the reasons discussed in Sections I, I(A) and I(B), that since an affiant officer who is properly advised and following the proposed procedure discussed above would in fact have knowledge of the probable cause supporting a search or arrest warrant, the answer to your third question is that a search or arrest warrant procured via the proposed procedure at issue would be valid as the warrant would be supported by oath or affirmation as required by South Carolina law.

Moving to your fourth question whether "a Circuit Court order from Lexington County finding a warrant issued under the proposed procedure by another jurisdiction [is] binding on Columbia's Municipal Court?" the answer is "no." In particular, since a Circuit Court order lacks precedential value and therefore can only bind the parties involved in the litigation, the court order at issue does not bind the City's Municipal Court regardless of the fact that, as indicated in your letter, a portion of the city limits extend into Lexington County.

As to your fifth question, whether "warrants issued under the newly proposed procedure [would] be subject to challenge as a result of a Circuit Court order striking down an arrest warrant issued under the proposed procedure" we believe that while a determination of probable cause is always subject to judicial review, as is the question of whether a warrant is supported by oath or affirmation, since the Circuit Court order you are referencing only: (1) binds the parties involved in the litigation; (2) lacks precedential authority; and (3) fails to address the issue of whether an affiant officer has knowledge of the facts supporting probable cause when he or she is advised by another officer of the facts contained within the affidavit, we do not believe the newly-proposed procedure would be struck down under the reasoning contained within the Circuit Court order.

With respect to your sixth question, regarding "the proper preparation of an arrest warrant" in the circumstances discussed in your letter, particularly, who "should appear as the affiant?" and "[i]f the name of the officer who creates the original statement of probable cause should appear at the top of an arrest warrant as the affiant, whose name should be typed below on the signature line-the affiant or the person signing for the affiant?" we believe that, because the majority in Dunbar, as well as the Circuit Court order in Barton, indicate an individual with "no knowledge" of the facts supporting an arrest warrant cannot swear out a valid oath, we believe that where a TRU officer is advised by another officer of the facts supporting probable cause to be used in a warrant, the better practice in preparing the warrant would be for the TRU officer to serve as the affiant.

Regarding your seventh question, in circumstances where one officer swears out an affidavit and another signs for it, "who is considered to be the prosecuting officer at trial?" and "[i]f the affiant of an arrest warrant and the person signing the warrant are different people, are the rules concerning the unauthorized practice of law violated?" We believe either officer could serve as the prosecuting officer in the circumstances mentioned in your letter and therefore neither the affiant officer nor arresting officer would be engaging in the unauthorized practice of law by prosecuting the offense alleged in the warrant in summary court.

Finally, to address your eighth question, where "the affiant and the officer signing an arrest warrant" are different people, "who is considered the affiant for the purpose of meeting the requirements of S.C. Code Ann. [§] 17-23-162?" It is the opinion of this Office that since Dunbar defines the meaning of the word "affiant" as "an individual who makes 'a voluntary declaration of facts written down and sworn to' before the magistrate" Dunbar, 361 S.C. at 248, 603 S.E.2d at 619 (quoting Black's Law Dictionary 58 (7th ed. 1999)), the affiant, for purposes of Section 17-23-162, would be the individual drafting the affidavit supporting probable cause who has sworn to or affirmed that probable cause exists.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

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