THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Case No.: 2012-206368
Opinion No.: 5214 (S.C. Ct. App. filed April 2, 2014)

The State, Respondent,

v.

Alton Wesley Gore Jr., Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

1. Whether the Court of Appeals erred in concluding that the admission of prejudicial photographs was harmless error when evidence was introduced corroborating Gore's contention that he did not reside at the residence and such an admission affected his constitutional right to a fair and impartial jury.
2. Whether the Court of Appeals erred in holding that Gore's motion pursuant to *Franks v. Delaware* was properly denied when the affidavit in support of the search warrant failed specify a date for the allegations as required by *State v. Winborne*, falsely indicated that the controlled buys occurred within seventy-two hours of one another, failed to establish a link between the alleged illegal activity and residence to be searched and was not supported by probable cause.
3. Whether the Court of Appeals erred in holding that the trial court's failure to charge the jury on the lesser-included offense of simple possession for a trace amount of cocaine found in a guest bedroom was proper when such a charge could have minimized the risk that the jury convicted Gore to avoid setting him free given that evidence was introduced corroborating Gore's contention that he did not reside at the residence but was merely an occasional guest at the residence.

STATEMENT OF THE CASE

Alton Wesley Gore, Jr. was the defendant in the Court of General Sessions for the Fifteenth Judicial Circuit in Horry County, South Carolina and will be referred to by name or as the petitioner. The Respondent, The State of South Carolina, will be referred to as the State.

Detective Jesse Ard of the Horry County Police Department drafted an affidavit on February 28, 2010 seeking a search warrant for a residence located in Longs, South Carolina.

(R. 24). A search warrant was issued on February 28, 2010. (R. 25). Officers searched the residence and retrieved evidence indicating drug activity. (R. 26). An indictment was returned on June 24, 2010, and charged that Gore did knowingly, sell, deliver, purchase or bring into this State, or aid, abet, attempt, or conspire to sell, deliver, purchase or bring into this State a quantity of cocaine in an amount of 200 grams or more, but less than 400 grams in violation of Section 44-53-370(e)(2)(d).

On February 23, 2011, Gore moved for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) alleging that the search warrant affidavit was insufficient. (R. 17). A hearing was held on March 15, 2011 and the trial court denied Gore's motion finding that the affidavit was not false or misleading and was supported by probable cause. (R. 2). A jury trial was held on January 5, 2012 and the jury found Gore guilty of the charge of trafficking cocaine 200 to 400 grams. (R. 234, lines 6-9). Gore was sentenced to a term of twenty-five years imprisonment and fined $100,000. (R. 239, lines 2-4). Gore filed a timely Notice of Appeal on January 12, 2012.

Petitioner filed his Initial Brief of Appellant on November 2, 2012. Respondent filed its Initial Brief of Respondent on March 11, 2013 and Petitioner filed his Initial Reply Brief on April 24, 2013. Petitioner filed the Final Brief of Appellant and Final Reply Brief of Appellant on May 21, 2013 and Respondent filed its Final Brief of Respondent on June 7, 2013. Oral arguments were held on December 10, 2013 before the South Carolina Court of Appeals. On April 2, 2014, the Court of Appeals entered its opinion affirming the decision of the trial court. *State v. Gore*, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014). Petitioner filed a petition for rehearing on April 18, 2014. On June 19, 2014, the South Carolina Court of Appeals entered its Order denying the petition for rehearing. This petition follows.

ARGUMENT ON WHY CERTIORARI SHOULD BE GRANTED

I. The Court of Appeals erred in holding that the admission of the prejudicial photographs was harmless error.

This issue should be heard by this Court. As established below, it involves novel questions of law and raises substantial constitutional concerns.

A. Standard of Review

The trial court's admission of evidence is viewed under an abuse of discretion standard. *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011).

B. Statement of Facts Relevant to Admission of Prejudicial Photographs

During Gore's trial which commenced on January 5, 2012, the State sought to introduce two photographs of Gore in which he appeared to be holding up a large amount of United States currency. (R. 77, lines 10-18). Defense counsel argued that the photographs were irrelevant, but even if they were relevant, the prejudicial effect outweighed the probative value of the photographs. (R. 77, lines 7-9). Throughout the trial, defense counsel argued that Angel Deangelo, who was Gore's girlfriend at the time, actually lived in the residence. (R. 55, lines 9-16). Defense counsel informed the trial court that "the issue is it's not relevant because Ms. Deangelo could've had a picture of him so how does that put him in the house." (R. 78, lines 11-13). Further, defense counsel argued that the photographs were prejudicial because "[h]e's not holding drugs but it makes him look as if he's holding a bunch of money. Nobody knows who took that photograph." (R. 77, lines 10-11). The State claimed that the photographs were "relevant because it goes to his identity. It puts him in the house." (R. 77, lines 21-22). While there were other non-prejudicial photographs of Gore located at the residence, the trial court allowed the photographs of Gore holding a large amount of United States currency to be admitted as evidence. (R. 78, lines 14-18; R. 107, lines 1-3).

C. The admission of the photographs greatly prejudiced Gore.

Over defense counsel's Rule 402 and 403 objections, the trial court allowed the State to introduce two photographs of Gore appearing to hold up a large amount of currency. (R. 77, lines 1-25, 78, lines 1-25, R. 79, lines 1-25, R. 240-41). Rule 401 of the South Carolina Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence which is not relevant is not admissible." Rule 402, SCRE. However, even if relevant, evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228-29 (2010) (quoting *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

In this case, officers retrieved the photographs from a dresser in the master bedroom of the residence. (R. 81, line 3). The State argued that the photographs established Gore's identity and connection to the residence. (R. 77, lines 21-22). However, this evidence was not relevant because there was no indication as to when the photographs were taken or by whom. (R. 82, lines 10-11). The photographs appear to be old, taken well before the date of the criminal conduct alleged in the Indictment and were not taken from inside residence. (R. 82, lines 6-15, R. 240-241). Furthermore, it did not have any relation to Gore and any alleged illegal drug activity. (R. 82, lines 20-25). Photographs used to arouse the sympathy or prejudice of the jury should not be admitted if they are irrelevant and unnecessary to substantiate material facts or

conditions. *See State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005); *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997); *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995). The photographs the State introduced suggested that because Gore possessed United States currency at some point he must be involved in drug transactions even though there was no evidence the photographs occurred or were taken in conjunction with any alleged drug trafficking offense. The photographs were admitted solely to lure the jury to decide the case on an improper basis as the State had other photographs of Gore that were found in the residence that could have been introduced in lieu of these prejudicial photographs. A defendant has a right to a fair and impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, § 14. In fact, the Court of Appeals agreed that these photographs were improperly admitted:

> Gore contends the circuit court erred in admitting two photographs, which depicted him holding large sums of United States currency. We agree with Gore. . . .
>
> . . .
>
> Gore claims these photographs were not taken inside the residence, there were other seized photographs of Gore in the residence that were not prejudicial, and the photographs invited the jury to infer criminal disposition. We agree and find these photos were unnecessary to link Gore to the residence, particularly when other photographs in evidence accomplished this purpose and several other witnesses testified Gore lived at the residence.

State v. Gore, 408 S.C. 237, 758 S.E.2d 717, 723 (Ct. App. 2014). However, it found that this error was harmless given the overwhelming evidence of Gore's guilt.

To the contrary, the evidence against Gore was not overwhelming. There was substantial testimony and evidence establishing that Angel Deangelo, rather than Gore, was living in the residence and was involved in drug activity. First, Detective Kent testified that Deangelo came to the residence while he was executing the warrant. Kent told her to leave. Deangelo

adamantly stated that she lived at the residence and refused to leave. (R. 54, lines 12-19). Notably, Deangelo admitted that she made such a statement. (R. 161, lines 23-25). Second, Deangelo acknowledged that she had continued staying at the residence even after her arrest. (R. 143, lines 1-11). Third, the pictures depicted Deangelo's personal effects at the residence. (R. 136, lines 9-11). Fourth, at the time of Deangelo's arrest, she had a large amount of United States currency in her possession. (R. 107, lines 15-17). Fifth, Deangelo had asked Gore's trial counsel to represent her child's father on drug charges, indicating her continued involvement in drug activity. (R. 153, lines 6-20). Sixth, Gore's driving record indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-p. 59, line 10).

Given the evidence and testimony indicating that Gore's girlfriend was residing at the residence rather than Gore, the trial court's admission of the photographs was not harmless error. Gore was entitled to a fair and impartial jury and the admission of the prejudicial photographs greatly affected his substantial rights. Therefore, the Court of Appeals erred in failing to set aside Gore's conviction.

II. The Court of Appeals erred in finding that the trial court properly denied Gore's motion for a *Franks* hearing because the affidavit contained information that was false and/or in reckless disregard for the truth and was not enough to establish probable cause to search the residence.

As shown below, this issue is a matter of great importance and should be heard by this Court. The decision of the Court of Appeals conflicts with prior decisions of this Court. Furthermore, this issue involves novel questions of law and substantial constitutional issues.

A. Statement of Facts Relevant to *Franks* Motion

During the pre-trial hearing held on March 15, 2011, defense counsel challenged the affidavit dated February 28, 2010 that provided for the execution of the search warrant at a residence located in Longs, South Carolina. (R. 24). He argued that the affidavit contained

information that was either deliberately false or a reckless disregard for the truth requiring an evidentiary hearing pursuant to *Franks v. Delaware*. (R. 28, lines 16-25, R. 29, lines 1-25). The affidavit stated the following:

> A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24). Defense counsel challenged both allegations.

Defense counsel argued that the affidavit failed to specify the date the first allegation occurred as required in *State v. Winborne*. (R. 29, lines 20-23). The drug transaction described in the first sentence actually occurred on July 23, 2009, seven months prior to the execution of the affidavit. (R. 21). Defense counsel also challenged the second allegation of the affidavit, arguing that, like the first allegation, the affidavit failed to specify a date and time for the second drug transaction. (R. 30, lines 22-23). He also stated that this sentence immediately followed the first allegation indicating that the buy occurred within seventy-two hours of the first buy. (R. 31, lines 2-11). However, the second buy actually occurred on February 25, 2010, over seven months after the first buy. (R. 21).

The State claimed that the officers informed the magistrate of the dates and times. (R. 35, lines 7-12). It stated that the second buy was a "refresh buy" that would allow law enforcement to meet the close time and proximity requirements for the warrant. (R. 35, lines 12-16). Defense counsel explained that the second allegation was not sufficient to establish probable cause to search the residence. (R. 36, lines 1-5). Rather, he argued that the first allegation was added to establish probable cause even though the officers were aware that the buy occurred seven months prior to the execution of the warrant. (R. 36, lines 3-5). Defense

counsel argued that the second allegation would not establish probable cause because there was no allegation in the affidavit that the drugs came from the residence. (R. 37, lines 11-13). The Circuit Court informed counsel that it could consider testimony given to the magistrate at the time the search warrant was issued. (R. 36, lines 6-11). Defense counsel suggested that the magistrate testify, but the trial court denied such a request:

> THE COURT: But in a motion to—the Motion to Suppress, I not only can take the matters that are set forth in the Affidavit that's presented to the Magistrate and signed by the Magistrate, Judge Mayers, I can take into consideration whatever testimony was given to the Magistrate at the time that the Search Warrant was issued.
>
> MR. TRUSLOW: Yes sir. Yes, the Magistrate could testify and provide oral supplementation as to what he was told.
>
> THE COURT: Or the Officers can testify as to what they testified and what they told the Magistrate, okay.

(R. 36, lines 6-16).

The Circuit Court heard testimony from the affiant of the affidavit, Detective Jessie Ard. (R. 38, lines 21-23). Detective Ard testified that the investigation was lengthy and since the first buy occurred seven months prior, he decided to do a "refresher buy" to obtain a search warrant for the residence. (R. 39, lines 5-16). He stated that he informed the judge about the lengthy investigation as well as the dates and times. (R. 39, lines 19-23). When asked why the dates and times were not included in the affidavit, Detective Ard said that it was customary in order to keep the informants' identities confidential. (*Id*). He stated that he told the magistrate that they were unable to make another buy from inside the residence. (R. 40, lines 21-24). However, during cross-examination, there were several occasions in which Detective Ard could not recollect what the magistrate was told prior to the execution of the warrant:

Q. I'm asking you, did you tell Judge Mayers that the Defendant came out of his residence and got in the vehicle? Did you tell that to the Judge?

A. I don't remember the specific conversation, but I—yes, it was to the fact that we observed him leave his residence.

. . .

Q. All right. Do you recall telling the Judge whether or not he was carrying any kind of bag or anything with him? Do you know if you told the Judge that?

A. I do not recall that I seen him carrying a bag. I do not.

Q. All right. And you don't remember whether or not you saw him enter the residence, only come out?

A. I do not remember that. I do remember that we did — we did identify him get in a vehicle. I don't remember the specific vehicle that it was. We did follow it.

Q. But just again—I'm summing it all up here. You testified you don't recall if you were specific with the Judge about that, in terms of him going in the house or coming out of the house and getting in the vehicle?

A. I do not recall. I do not recall.

(R. 43, line 22-R. 44, line 2; R. 45, lines 10-24).

The Circuit Court denied Gore's motion for a *Franks* hearing and his motion to suppress and found the statements contained in the affidavit to be true and that probable cause was established. (R.49, lines 24-25, 50, lines 1-14). The Court of Appeals found that the Circuit Court's decision was proper. *Gore*, 408 S.C. 237, 758 S.E.2d at 720.

B. The Court of Appeals erred in finding that Gore was not entitled to a *Franks* hearing and the search warrant was established by probable cause.

"Under both the United States and South Carolina constitutions, search warrants may not be issued except 'upon probable cause, supported by Oath or affirmation,' and particularly

describing the place to be searched and the persons or things to be seized." *State v. Thompson*, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005) (quoting U.S. Const. amend. IV; S.C. Const. art. I, § 10). The warrant must be supported by an "affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record . . . ." S.C. Code. Ann. § 17-13-140. "In reviewing the validity of a warrant, an appellate court may consider only information brought to the magistrate's attention." *Thompson*, 363 S.C. at 200, 609 S.E.2d at 560.

1. Gore was entitled to a *Franks* hearing as he established that the search warrant affidavit contained false and misleading information that was deliberately supplied or supplied in reckless disregard of the truth.

While great deference is ordinarily given to the probable cause determination of the magistrate, that deference does not preclude an inquiry into the knowing or reckless falsity of the underlying affidavit. *United States v. Leon*, 468 U.S. 897, 914 (1984). The United States Supreme Court held in *Franks v. Delaware* that the "Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). "[T]o mandate an evidentiary hearing, there must be 'allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof.'" *State v.* Davis, 354 S.C. 348, 359, 580 S.E.2d 778, 784 (Ct. App. 2003) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). This applies not only to false information included in the affidavit, but also when material is left out of the warrant. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397.

> To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless

> disregard of whether it made, the affidavit misleading to the issuing judge.

Id. The defendant has the burden of proving these allegations by a preponderance of the evidence. *Id.* Oral testimony may be used to supplement search warrant affidavits, however, such testimony, standing alone, does not satisfy the statute. *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997); *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987). Furthermore, oral testimony "may *only* be used by an affiant to supplement or to amend incorrect information in an affidavit which was *not* knowingly, intentionally, or recklessly supplied by the affiant." *State v. Jones*, 342 S.C. 121, 129, 536 S.E.2d 675, 679 (2000) (emphasis added).

In this case, the allegations contained in the affidavit were as follows:

> A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed the Defendant from the residence to another location, and were able to monitor and record another buy for cocaine.

(R. 24). The affidavit was executed on February 28, 2010. (R. 24). The first buy occurred on July 23, 2009, over seven months prior to the execution of the affidavit. (R. 17, 21). The second buy occurred on February 25, 2010. On that occasion, Gore drove his vehicle to a location other than the residence. It was not within seventy-two hours of the first buy as suggested in the affidavit. (R. p. 33, line 4-p. 34, line 4). During the motion hearing, Gore argued that the date was wrongfully excluded making the affidavit insufficient pursuant to *State v. Winborne*, 273 S.C. 62, 254 S.E.2d 297 (1979). Gore also argued that the structure of the sentences indicated that the first and second buy occurred within seventy-two hours of the execution of the affidavit which was false and in reckless disregard of the truth.

The Court of Appeals agreed with Gore that the date and time of the first buy was improperly omitted:

> We agree with Gore's argument that the first allegation in the affidavit improperly omitted the date and time of the drug transaction. The statement reads: "A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area." This phrase indicates only that a controlled buy was made at the residence on at least one occasion in the past. It gives no indication of how long ago the transaction occurred, which the supreme court in *Winborne* held is necessary to establish probable cause for a search warrant. *See Winborne*, 273 S.C. at 64, 254 S.E.2d at 298 ("An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient.").

Gore, 408 S.C. 237, 758 S.E.2d at 721. However, despite the improper omission which should have refuted the finding of probable cause, the Court of Appeals found that Detective Ard orally supplemented the affidavit and informed the magistrate of the dates of the controlled buys. *Id.* Detective Ard contended that he omitted the date of the first drug transaction to protect the identity of the confidential informant, stating that it was "common practice to not put the specific date, time of the buy and/or the amount in the written affidavit portion of the warrant, because given the fact that—through the process of deduction you can determine who the [confidential informant] is." (R. 40, lines 16-20). Even though both buys involved a confidential informant, Detective Ard omitted a date that occurred seven months prior to the execution of the affidavit, but included a date for the second buy which occurred three days prior to its execution. Surely, if Detective Ard's intention was to protect the confidential informant in omitting the date of the first buy, he would have similarly omitted the date of the second buy. This directly refutes Detective Ard's reasoning for the omission, and rather, shows an intent to omit and place language in the affidavit so that the first and second buy appear to have occurred within close proximity to each other in order establish probable cause to search the residence. *See Missouri*, 337 S.C. at 557, 524 S.E.2d at 398 ("[W]hen an omission is combined with an affirmative falsehood, it reveals that the affiant not only believed the omitted information was critical, but

that a statement in the affidavit to the contrary was necessary for establishing probable cause."). Furthermore, *Winborne* clearly states that an affidavit in support of a search warrant must state "facts so closely related to the time of the issuance of the warrant" to justify a finding of probable cause. 273 S.C. at 64, 254 S.E.2d at 298. "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is **insufficient**." *Id.* (emphasis added). The affidavit did not include a specific date for either of the controlled buys. Additionally, it should be noted that this Court has not expressly held that the timing of an occurrence set forth in an affidavit can be supplemented orally. Therefore, Detective Ard's contention that he informed the magistrate of the dates should have been held as insufficient to establish probable cause.

Moreover, the Court of Appeals' reliance on Detective Ard's alleged oral supplementation is completely contrary to this Court's holding in *Jones*. In that case, an officer submitted an affidavit that misled the magistrate concerning the identity of a source. *Jones*, 342 S.C. at 125, 536 S.E.2d at 677. The affidavit described the source not as a confidential informant but as an "agent" of the Florence Combined Drug Unit. *Id.* The affiant, a police officer, verbally corrected this misrepresentation by advising the magistrate that the "agent" was actually an informant and that he had used the term "agent" in the affidavit to protect the identity of the informant. *Id.* Notwithstanding this oral correction and additional information in the affidavit indicating corroboration by police surveillance, this Court found the evidence was insufficient for a finding of probable cause. *Id.* at 127, 536 S.E.2d at 678.

Here, similar to *Jones*, Detective Ard omitted key information regarding the dates and times of the allegations, but included language so as to imply that the first buy occurred in close proximity to the second buy, or within seventy-two hours of the execution of the affidavit. In

fact, the Court of Appeals indicated that the affidavit would have been misleading without the oral supplementation:

> While we agree that this sentence could have been more artfully drafted, we disagree with Gore's argument that it was deliberately misleading. It is uncontested that officers followed and observed Gore selling drugs within seventy-two hours of the affidavit's execution. Further, any confusion over the timing of these drug transactions was clarified by Detective Ard when he sought the search warrant. Because neither of these probable cause allegations were false, we find Gore failed to satisfy the first prong of the *Franks* test.

Gore, 408 S.C. 237, 758 S.E.2d at 722. The Court of Appeals' reasoning in this regard ignores this Court's holding in *Jones* that "oral information may *only* be used by an affiant to supplement or to amend incorrect information in an affidavit which was *not* knowingly, intentionally, or recklessly supplied by the affiant." 342 S.C. at 129, 536 S.E.2d at 679 (emphasis added). Detective Ard admitted that he intentionally omitted the date of the first buy. (R. 44, lines 17-21). Additionally, the structure of the second sentence together with the intentional omission of the date was at least a reckless disregard for the truth because it indicated that both buys occurred within seventy-two hours of the execution of the affidavit. Under the holding of *Jones*, Detective Ard should not have been able to orally supplement the affidavit because the omission of the date of the controlled buys was intentional and the inclusion of the "also within the last seventy-two hours" language in the second sentence was at the very least, recklessly supplied. Additionally, the Court of Appeals ignored the requirements of S.C. Code Ann. § 17-13-140. This section requires a sworn written affidavit. This Court noted that "if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists." *Jones*, 342 S.C. at 128, 536 S.E.2d at 679. When Detective Ard submitted an affidavit that improperly omitted key dates and falsely indicated that

both buys occurred within seventy-two hours of the execution of the affidavit, it was the equivalent of *not having an affidavit at all* and was insufficient to establish probable cause to search the residence. *See id.*

The language in its decision also shows the Court of Appeals' misapplication of the *Franks* requirements. *Gore*, 408 S.C. 237, 758 S.E.2d at 721. In its decision, the Court of Appeals suggests that Gore had to establish that Detective Ard *deliberately* intended for the affidavit to be misleading to the magistrate in order to meet the first prong under *Franks*. Specifically, it stated that Gore had to prove that "Detective Ard included a deliberate falsehood or recklessly disregarded the truth *in an effort* to make the affidavit misleading to the magistrate." *Gore*, 408 S.C. 237, 758 S.E.2d at 722 (emphasis added). To the contrary, this Court stated in *Missouri* that

> [t]o be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or *in reckless disregard of whether it made, the affidavit misleading to the issuing judge*.

337 S.C. at 554, 524 S.E.2d at 397 (emphasis added). The Court of Appeals improperly held Gore to a heightened standard of proof. Gore contends that the omission of the date and time of the controlled buys coupled with the "also" language in the second sentence was at least a reckless disregard as to whether it made the affidavit misleading to the issuing judge. *Id.* The first controlled buy clearly did not occur within seventy-two hours from the date the affidavit was executed as the affidavit indicates. Such an indication is undoubtedly false, misleading and at the very least, a reckless disregard for the truth.

Therefore, the Court of Appeals erred in finding that the trial court's denial of Gore's *Franks* motion was proper. Based on the foregoing, Gore was entitled to a suppression of the evidence obtained as a result of the unlawful search.

2. Alternatively, Gore was entitled to an evidentiary hearing pursuant to *Franks*.

Alternatively, Gore was entitled to an evidentiary hearing at a later date on this issue. While Detective Ard testified regarding his conversation with the magistrate, Gore specifically requested that he be allowed to question the magistrate at an evidentiary hearing. However, Gore was not given the opportunity to ask the magistrate as to his understanding of the affidavit:

> THE COURT: But in a motion to—the Motion to Suppress, I not only can take the matters that are set forth in the Affidavit that's presented to the Magistrate and signed by the Magistrate, Judge Mayers, I can take into consideration whatever testimony was given to the Magistrate at the time the Search Warrant was issued.
>
> MR. TRUSLOW: Yes sir. Yes, the Magistrate could testify and provide oral supplementation as to what he was told.
>
> THE COURT: Or the Officers can testify as to what they testified and what they told to the Magistrate, okay.

(R. 36, lines 12-16). The trial court limited the oral supplementation to that of Detective Ard. Considering that there were several occasions in which Detective Ard could not recollect what the magistrate was told prior to the execution of the warrant, it is at least questionable whether the information regarding the lapse in time was communicated to the magistrate. (R. 42, lines 9-12, 43, lines 3-25, 44, lines 1-16,45, lines 1-24). Therefore, the trial court erred in denying Gore the opportunity to question the magistrate as there were material facts at issue as to whether the magistrate was informed as to the specific dates and times of allegations in the affidavit. *See Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989).

3. Even if the allegations of the affidavit had been credible, the Court of Appeals erred in finding that the warrant was supported by probable cause.

A magistrate may issue a search warrant only upon a finding of probable cause. *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). In reviewing a magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

> This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). Probable cause cannot be established by affidavits which are conclusory and do not provide factual detail. *Weston*, 329 S.C. at 290, 494 S.E.2d at 802; *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

The Fourth Amendment to the United States Constitution provides the government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). "[P]robable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998). Additionally, "[i]n

order for an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *Winborne*, 273 S.C. at 64, 254 S.E.2d at 298 (internal quotation marks and citations omitted). "An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient." *Id.* However,

> [w]hile the lapse of time involved is an important consideration and may in some cases be controlling, it is not necessarily so. There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating.

State v. Corns, 310 S.C. 546, 550-51, 426 S.E.2d 324, 326 (Ct. App. 1992) (quoting *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975)).

Here, even if the information in the affidavit were credible, the affidavit and supplemental oral testimony were insufficient to provide the magistrate with a substantial basis for which to find probable cause to issue a search warrant for the residence. Despite a lengthy investigation, officers never established that the residence in question was in fact Gore's residence. The Fourth and Fourteenth Amendments offer significant protections when it comes to a person's residence. The person living at this residence was Gore's girlfriend, Angel Deangelo. When officers searched her residence without sufficient probable cause, this greatly infringed on her constitutional rights.

Furthermore, the affidavit in this case fails altogether to state the date and time of the occurrences and as a result, is insufficient to establish probable cause. *See Winborne*, 273 S.C. at 63, 254 S.E.2d at 298. The first allegation was the only part of the affidavit that pertained to alleged drug-related activity at the residence. Considering the first controlled buy occurred

seven months prior to law enforcement obtaining a search warrant, it was very unlikely that the alleged evidence would still be in the residence. (R. 21). Further, the type of incriminating items that law enforcement was attempting to recover would be considered highly incriminating and consumable, making it less likely to remain in the residence during that lengthy period of time. *See Corns*, 310 S.C. at 550-51, 426 S.E.2d at 326. Notably, Detective Ard was unable to detect another buy from inside the residence despite his extensive investigation into Gore's alleged drug activity. (R. 40, lines 21-24). As such, this allegation should not have even been included in the affidavit as it had become **stale** and was far removed from the date the affidavit was executed.

Additionally, no information was provided regarding personal knowledge of either drug use or drug possession at the residence. Affidavits may not be "purely conclusory" but must detail the "underlying circumstances" in order to support a determination that probable cause exists. *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965). Although the magistrate may draw reasonable inferences from the information given in the search warrant application, such inferences must be based on specific facts and cannot be the result of broad generalizations. *See Sowers v. Commonwealth*, 643 S.E.2d 506, 510 (Va. Ct. App. 2007) ("A *factual* nexus must connect the illegal activity to the place to be searched; otherwise police would have unfettered discretion to avow that criminals often keep contraband at home and then search the home of every suspect."); *State v. Graham*, 103 P.3d 1073, 1080 (Mont. 2004) ("[T]here were no facts included in the application for search warrant that implicated [the defendant's] home. Common sense, practical considerations and probabilities are not, therefore, enough."); *State v. Thein*, 977 P.2d 582, 590 (Wash. 1999) (holding that a "generalized conclusion that drug dealers are likely to keep evidence of illegal drug dealing in their homes" is insufficient to establish probable cause

to search a person's residence).

The first allegation was not enough for the magistrate to make a reasonable inference that drugs would be found in the residence because the alleged activity occurred seven months prior to the execution of the warrant. The second allegation occurred at a location other than the residence and established no connection to drug activity and the residence. Rather, the issuance of the warrant was based on mere generalizations and was not enough to establish probable cause. Probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. *See Rowland*, 145 F.3d at 1204. Simply connecting a person to a home does not necessarily connect the home to the drugs. There were two separate drug transactions referenced in the search warrant affidavit. The only transaction that occurred at the residence to be searched was the first transaction. That transaction had taken place seven months prior to the execution of the affidavit. The second drug transaction, which took place three days before execution of the affidavit, occurred in a lot away from the residence. Considering the buy at the residence occurred nearly seven months prior to the execution of the warrant, the remaining allegation did not establish *any* connection between the residence and any alleged drug activity.

Therefore, the Court of Appeals erred in holding that the warrant was supported by probable cause and Gore was entitled suppression of the evidence seized as a result of the invalid search warrant.

III. The Court of Appeals erred in holding that the trial court properly refused to charge the lesser-included offense of simple possession.

This issue should be heard by this Court. As argued below, it raises substantial constitutional concerns and the decision of the Court of Appeals conflicts not only with well-established case law of this Court but that of the United States Supreme Court.

A. Standard of Review

An appellate court reviews a trial court's decision regarding jury instructions on an abuse of discretion standard. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

B. Statement of Facts Relevant to Lesser-Included Jury Instruction

Gore was indicted on June 24, 2010 for trafficking based on possession of a quantity of cocaine in an amount of 200 grams or more, but less than 400 grams. Defense counsel requested a charge for simple possession as a lesser-included offense for trafficking. (R. 198, lines 1-3). He stated that there was a trace amount of powder cocaine located in a separate bedroom underneath one of the mattresses and there was a factual question as to whom the bedroom and consequently, the drugs belonged. (R. 198, lines 1-9). The trial court denied the request stating:

> I'm going to charge the jury that they must find he possessed 200 or more or less than 400. And if they found some amount less than that, they can find him not guilty but they're gonna be charged — they must under this indictment find that he possessed actual or constructive 200 or more grams of cocaine. So, I respectfully deny your motion with reference to simple possession.

(R. 198, lines 11-17). The Court of Appeals found that the trial court properly charged the jury because the "overwhelming and undisputed" evidence indicated Gore was a resident of the house as several witnesses testified he lived there, his girlfriend had her own residence in North Carolina, the guest bedroom appeared to be a child's bedroom and the master bedroom contained all men's clothing and pictures of Gore. *Gore*, 408 S.C. 237, 758 S.E.2d at 724.

C. Gore was entitled to an instruction on the lesser-included offense of simple possession.

In determining whether a lesser-offense charge is required, the court must view the

evidence in the light most favorable to the appellant, "mindful that the charge request is properly rejected only where 'there is no evidence whatsoever' of the lesser offense." *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). The law to be charged is determined by the evidence presented at trial. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). "[A] judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, *rather than the greater*, offense was committed.'" *Dempsey v. State*, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) (quoting *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996)). Where a requested instruction correctly states the law applicable to the issues in the case and is supported by the evidence, the court has a duty to give the instruction. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002); *State v. Harrison*, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000).

In this case, Gore was entitled to a charge on the lesser-included offense of simple possession. During trial, he presented evidence that he was not a resident of the residence. The testimony revealed that cocaine residue was found in the guest bedroom under the mattress. (R. 95, lines 6-15). The larger amount of cocaine was found in the master bedroom. (R. 67, lines 2-7). Since Gore's primary argument was that the residence belonged to his girlfriend, Angel Deangelo, a jury could have determined that Gore had constructive possession over items in the guest bedroom. In that circumstance, the jury would have found that Gore possessed less than the minimum amount required for the trafficking charge. However, the Court of Appeals found that the trial court properly charged the jury, stating the "overwhelming and undisputed evidence" indicated that Gore, not Deangelo, lived at the residence. *Gore*, 408 S.C. 237, 758 S.E.2d at 724.

To the contrary, the evidence against Gore was neither overwhelming nor undisputed. As

previously set forth above, there was evidence tending to indicate that Deangelo, Gore's girlfriend, not Gore, was residing at the residence. First, Detective Kent testified that during execution of the search warrant, Deangelo refused to leave the residence and adamantly stated that she lived there. (R. 54, lines 12-1). Second, Deangelo acknowledged that she had continued staying at the residence even after her arrest. (R. 143, lines 1-11). Third, Deangelo's personal effects and pictures of her were located at the residence at the time the search warrant was executed. (R. 110, lines 14-17; R. 136, lines 9-11). Fourth, Deangelo had a large amount of United States currency in her possession at the time of her arrest. (R. 107, lines 15-17). Fifth, Deangelo had asked Gore's trial counsel to represent her child's father on drug charges, indicating her continued involvement in drug activity. (R. 153, lines 6-20). Sixth, Gore's driving record indicated that he lived at a different address in Little River, South Carolina. (R. p. 58, line 22-p. 59, line 10).

This Court has held that when determining whether a lesser-offense charge is required, courts must view "the evidence in the *light most favorable to appellant*, mindful that the charge request is properly rejected only where 'there is no evidence whatsoever' of the lesser offense." *Cottrell*, 376 S.C. at 262, 657 S.E.2d at 452 (emphasis added); *see also State v. Heyward*, 350 S.C. 153, 158, 564 S.E.2d 379, 382 (Ct. App. 2002) ("[T]o warrant eliminating a lesser included offense charge, it must 'very clearly appear that there is *no evidence whatsoever*' tending to reduce the crime from the greater offense to the lesser."). Given the substantial amount of evidence that Deangelo rather than Gore resided at the residence, the trial court and the Court of Appeals undoubtedly failed to abide by this standard. The Court of Appeals seemed to give considerable weight to the fact that men's clothing was located in the master bedroom and that the guest bedroom was identified as a child's bedroom. However, that clothing was never taken

into evidence and the clothes were never measured to determine whether the clothing could even have belonged to Gore. (R. 74, lines 3-11.) Furthermore, Detective Cooper could not identify anything in the photographs taken of the guest bedroom that would support his characterization of it as a child's bedroom. (R. 94 line 17-95, line 4.)

Essentially, the Court of Appeals reinforced the trial court's dismissal of Gore's request for a lesser-included offense of simple possession as it too failed to consider the evidence tending to corroborate Gore's position that he did not reside at the residence:

> Mr. Truslow: Well, for the record, I — we talked about it the — up there but I would for the record request a charge of possession on this case. There was a trace amount of white powder located in a separate bedroom and there's questions about whose bedroom was whose and I would think —
>
> The Court: Well, he's not being tried for that nor has been indicted for that. He's been indicted as a document will disclose —
>
> Mr. Truslow: I understand but possession is a lesser included offense. They could find that just that little baggie is his that was tucked under the mattress.
>
> The Court: Then they would have to find him not guilty because I'm going to charge the jury that they must find he possessed 200 or more or less than 400. And if they found some amount less than that, they can find him not guilty but they're gonna be charged — they must under this indictment find that he possessed actual or constructive 200 or more grams of cocaine. So, I respectfully deny your motion with reference to simple possession.

(R. 197, lines 2-16, lines 24-25; R. 198, lines 1-17). In denying Gore his right to the lesser-included offense of simple possession, both the Court of Appeals and the trial court simply ignored the fact that "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . ." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). A lesser-included offense instruction minimizes this risk by giving jurors a "third option" when neither an acquittal nor a conviction on the charged offense fits the

facts of the case. *See Schad v. Arizona*, 501 U.S. 624, 646 (1991). Based on the evidence presented at trial, the jury could have reasonably concluded that Deangelo lived at the residence and that Gore only came to the residence as a *guest*. The testimony revealed that cocaine residue was found in the guest bedroom under the mattress. (R. 95, lines 6-15). The jury could have determined that Gore had constructive possession over the items in the guest bedroom and found him guilty of simple possession. As a result, inferring that the jury could simply find Gore not guilty of the charged offense if they believed he was guilty of some lesser amount was error. Rather, the jury could have felt that they had to convict Gore based on the trace amount of cocaine located in the guest bedroom because it indicates he was involved in drug activity. Under that circumstance, it is unlikely that the jury would have believed that the best option was a not guilty verdict.

Therefore, since there was evidence establishing the lesser-included offense of simple possession, Gore was entitled to a jury charge. *See Cottrell*, 376 S.C. at 262, 657 S.E.2d at 452.

CONCLUSION

For all the foregoing reasons, Petitioner, Alton Wesley Gore, respectfully requests that his petition for writ of certiorari be granted and this case be heard on the merits.

Respectfully Submitted,

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August 18, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Sr., Circuit Court Judge

Case No.: 2012-206368
Opinion No.: 5214 (S.C. Ct. App. filed April 2, 2014)

The State, Respondent,

v.

Alton Wesley Gore Jr., Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that the South Carolina Court of Appeals denied the Petitioner's, Alton Wesley Gore Jr.'s, petition for rehearing on June 19, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on August 18, 2014, a true copy of the Petition for a Writ of Certiorari in the above referenced case has been served upon:

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