STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2014-001545

THE STATE,

Petitioner,

vs.

ALEX LORENZO ROBINSON,

Respondent.

BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

In September of 2008, Respondent Alex Lorenzo Robinson was arrested after attempting to flee from law enforcement officers conducting a narcotics investigation. In August of 2009, the Horry County Grand Jury indicted Robinson for one count of trafficking in cocaine in an amount between 100 and 200 grams and one count of failure to stop for a blue light. On November 9, 2011, a jury trial was commenced in the Horry County Court of General Sessions with the Honorable Edward B. Cottingham, circuit court judge, presiding, and the trial proceeded forward only on the trafficking in cocaine charge following a pre-trial ruling. At the conclusion of trial, the jury convicted Robinson of trafficking in cocaine in an amount between 100 and 200 grams. Following the verdict, the trial judge sentenced Robinson to a twenty-five year term of imprisonment and a $50,000 fine. Robinson then timely filed and perfected an appeal.

Subsequently, on appeal, the Court of Appeals issued a published opinion reversing Robinson's conviction. State v. Robinson, 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014). Both Robinson and the State petitioned the Court of Appeals for rehearing, and the petitions were denied. The State then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on December 3, 2014.

STATEMENT OF FACTS

In August of 2008, officers with the Horry County Police Department began a narcotics investigation targeting a residence in Conway, South Carolina, after a confidential informant indicated she knew someone who could arrange narcotics purchases from that residence. (App'x pp. 27-28). As part of the investigation, Sergeant Kent Donald met with the confidential informant prior to the arranged drug transactions, searched her, attached a recording device, and provided her with police funds, and the confidential informant then bought cocaine from the targeted residence on three separate occasions. (App'x pp. 28-31). During the transactions, the confidential informant met with an individual named Christopher Oliver, the informant drove Oliver to the targeted residence and parked nearby, Oliver went into the residence while the informant watched Oliver go inside from the car, and Oliver returned from the residence shortly thereafter with cocaine. (App'x pp. 29-30). As the investigation into the residence continued, Sergeant Donald began to suspect Respondent Alex Lorenzo Robinson was connected to the narcotics activity after discovering Robinson paid the electricity bills for the targeted residence. (App'x p. 131; p. 333; p. 337).

Based on the confidential informant's successful narcotics purchases, Sergeant Donald sought a search warrant for the targeted residence and prepared an accompanying sworn affidavit. (App'x pp. 31-32; pp. 547-551). In the search warrant affidavit, Sergeant Donald stated:

> I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 10 years with 7 years as a Detective. I have received training in the following: Drug Investigator Level I and Level II 80 hours, and Narcotics Commanders Course 40 hours. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. A confidential and reliable informant working for the Horry

> County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [the address of the targeted residence] in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

(App'x pp. 32-33; pp. 547-551). The search warrant was issued by the Honorable Edward B. Cottingham, circuit court judge, on September 17, 2008. (App'x pp. 547-551).

Thereafter, on the morning of September 25, 2008, law enforcement officers went to the targeted residence to execute the search warrant. (App'x pp. 130-132). The officers knocked on the door, announced their presence, and then forced entry after receiving no response from inside. (App'x pp. 133-134). After the officers entered the residence, Sergeant Donald headed to the bedroom on the left side of the home. (App'x pp. 134-135). Inside, he located Kenneth Durant, Robinson's half-brother, and Tiffany Smith, Durant's girlfriend. (App'x p. 137; p. 368; p. 377). The officer then secured the room, conducted a search, and discovered a book bag containing seven small bags of cocaine, a loaded nine-millimeter handgun, and a scale. (App'x pp. 137-138). Meanwhile, Detective Ashley Hardee entered the bedroom on the right side of the house. (App'x p. 307). Inside, he encountered Gil Yakoel, Robinson's pregnant girlfriend. (App'x p. 130; pp. 237-238; pp. 308-309). After securing the room, Detective Ashley conducted a search and located men's clothing in the bedroom closet. (App'x p. 310). Upon removing some of the clothing, a bag containing 109.35 grams of cocaine fell out of a pair of men's jeans. (App'x p. 153; pp. 310-312; p. 354). Additionally, three Ecstasy pills, several bags of green plant material, a photograph of Robinson, and paperwork addressed to Robinson were discovered in the bedroom. (App'x p. 151; p.

156; p. 355). As officers continued searching the residence, they additionally discovered a surveillance system with a monitor providing a view of the street outside, numerous letters addressed to Robinson, shotgun shells, a digital scale, baking soda, and plastic bags. (App'x pp. 141-142; pp. 145-146). A vehicle registered to Robinson was also discovered parked outside of the residence. (App'x p. 156).

Following the discovery of the narcotics in the targeted residence, Sergeant Donald sought and obtained a warrant for Robinson's arrest based on the evidence connecting him to the home. (App'x p. 166). Thereafter, Sergeant Donald learned Robinson was at a detention center on September 30, 2008, attempting to obtain the release of Yakoel, who had been arrested along with Durant and Smith after the search resulted in the discovery of the drugs. (App'x p. 165; p. 167). In response, Sergeant Donald travelled to the detention center to arrest Robinson. (App'x p. 167). When he arrived, he saw Robinson sitting in the detention center parking lot inside of the vehicle the officer had earlier seen parked outside of the targeted residence when he executed the search warrant. (App'x pp. 169-171). Robinson looked in Sergeant Donald's direction and then immediately began driving away. (App'x pp. 169-170). Sergeant Donald followed Robinson and activated his blue lights to initiate a traffic stop. (App'x p. 173). However, Robinson did not stop and, instead, quickly accelerated and began fleeing from the officer. (App'x p. 173). Robinson continued to flee at a high rate of speed until he hit a law enforcement device that punctured his tires. (App'x pp. 174-175). Robinson then crashed his vehicle, and Robinson and a passenger in his vehicle immediately fled into a nearby soybean field on foot. (App'x pp. 123-124; p. 175). In response, Corporal Scott Calderwood chased them into the field and quickly caught and arrested them. (App'x p. 124; p. 175). After Robinson was arrested, Sergeant Donald searched

Robinson and discovered a bank deposit slip with Robinson's name and the address of the targeted residence on it inside of Robinson's wallet. (App'x p. 175; pp. 177-179).

Subsequently, Robinson was indicted for trafficking in cocaine in an amount between 100 and 200 grams and failure to stop for a blue light, and he proceeded to trial before Judge Cottingham. (App'x p. 6; pp. 540-543). At the outset of trial, defense counsel moved for the solicitor to be required to select which of the indicted offenses to proceed forward on, and the trial judge granted that request. (App'x pp. 7-8; p. 13). Defense counsel then asserted the search warrant was defective because the information contained in the search warrant affidavit was allegedly false. (App'x pp. 14-17). In response, the solicitor noted the affidavit was truthful because the confidential informant went to the targeted residence and had the cocaine brought to the car from the residence. (App'x pp. 16-17). Following the exchange, the trial judge initially ruled the search warrant and affidavit were proper. (App'x p. 17). Defense counsel then sought the trial judge's recusal on the basis it was allegedly improper for the trial judge to rule on the propriety of a search warrant he personally issued it, and the trial judge declined to recuse himself after considering the issue. (App'x p. 17; p. 21). However, the trial judge agreed to conduct a pre-trial hearing on the warrant issue. (App'x p. 22).

During the ensuing hearing on the search warrant issue, Sergeant Donald testified about his investigation and the preparation of the search warrant affidavit.[1] (App'x p. 28; p. 32). Specifically, the officer stated the confidential informant informed him she

[1] Prior to the hearing, defense counsel reasserted his claim the information contained in the search warrant affidavit was false while acknowledging the alleged falsity was dependent on the context in which the statements were viewed. (App'x p. 23). Defense counsel further contended he needed the confidential informant present to testify in regard to the validity of the search warrant without identifying a specific reason as to why the informant's presence was necessary. (App'x p. 23). In response, the trial judge declined defense counsel's request regarding the informant, affirmatively indicated he could be fair and impartial in regard to the search warrant despite the fact he was the issuing judge, and reaffirmed his decision not to recuse himself. (App'x pp. 23-25).

purchased drugs from the targeted residence on three occasions, watched Oliver enter the residence on each occasion, and was in the vehicle when Oliver returned from the residence with the cocaine. (App'x pp. 28-30). He further indicated he did not believe he left anything out of the search warrant affidavit and did not attempt to mislead the trial judge through the information included in the affidavit. (App'x p. 36). On cross-examination, Sergeant Donald acknowledged the confidential informant never went to the door of the targeted residence, never entered the residence, and never met with Robinson. (App'x p. 39; pp. 41-43). However, those allegations were not contained in the search warrant affidavit. (App'x pp. 32-33; pp. 547-551).

Following Sergeant Donald's testimony, the trial judge asked defense counsel to specifically identify which allegations contained in the affidavit were false. (App'x p. 50). In response, defense counsel first moved for the warrant to be suppressed based on an alleged lack of information regarding the informant's reliability. (App'x p. 51). Defense counsel then asserted the affidavit was false because it stated the confidential informant purchased the cocaine. (App'x pp. 54-55). In reply, the solicitor asserted the reliability of the confidential informant was established by the successful narcotics purchases and the confidential informant's statements about purchasing the cocaine were accurate and truthful. (App'x pp. 55-56). After considering the arguments of counsel, the trial judge ruled the search warrant affidavit was valid and truthful when considered in the proper context. (App'x p. 56). Following the ruling, defense counsel moved for the search warrant to be quashed as stale, and the trial judge denied the motion. (App'x p. 57). Thereafter, the trial judge reaffirmed his ruling the search warrant affidavit was

free of false statements and contained sufficient information to justify the issuance of the warrant.[2] (App'x p. 59).

Subsequently, during trial, Sergeant Donald and Detective Hardee testified about the search of the targeted residence and their discovery of the narcotics inside, and the cocaine and other drugs located in the search were admitted into evidence without objection.[3] (App'x pp. 131-132; pp. 137-138; p. 151; p. 153; pp. 302-303; pp. 310-313; pp. 350-351; pp. 354-355). Thereafter, at the conclusion of trial, the jury convicted Robinson of trafficking in cocaine in an amount between 100 and 200 grams. (App'x p. 532). Following the verdict, defense counsel renewed several of the motions raised prior to and during trial, including the motion to quash the search warrant, and the trial judge denied the motions. (App'x pp. 539-540). The trial judge then sentenced Robinson to a twenty-five-year term of imprisonment and a $50,000 fine. (App'x p. 543).

Thereafter, Robinson appealed his conviction and sentence on several grounds, including on the ground the evidence found in the search of his residence should have been suppressed because the search warrant affidavit allegedly contained false and unreliable information and was not sufficient to support a finding of probable cause. (App'x pp. 599-610). On appeal, the Court of Appeals reversed. (App'x p. 679). In arriving at its decision to reverse, the Court of Appeals first considered whether the affidavit was knowingly misleading to the issuing judge and determined the trial judge clearly erred in concluding the search warrant affidavit contained no false information

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[2] Defense counsel also renewed the request for the confidential informant to be produced to testify on the search warrant issue, and the trial judge again denied the request, noting the confidential informant was not a participant in regard to the narcotics for which Robinson was on trial. (App'x p. 58).

[3] Although defense counsel did not object to the admission of the drugs, the trial judge subsequently indicated he understood the lack of an objection only related to the chain of custody for the evidence and was not a waiver of the search warrant issue that had previously been raised. (App'x p. 363).

based on its determination "Sergeant Donald's affidavit implie[d], if not expressly state[d], the informant personally entered the house and purchased cocaine." (App'x pp. 681-683). However, the Court of Appeals determined the alleged inclusion of the false information in the warrant affidavit did not require suppression because "including in the affidavit the correct information about Oliver's involvement would not have changed the fact that probable cause existed, *if* the informant was telling the truth." (App'x p. 683) (italics in original). The Court of Appeals then considered whether the search warrant affidavit established a probable cause basis for the search and concluded it did not due to Sergeant Donald's alleged failure to include "any evidence of the informant's reliability." (App'x p. 683). Finally, the Court of Appeals determined the good faith exception to the exclusionary rule was not applicable to Robinson's case after finding the search warrant affidavit did not provide the issuing judge with a substantial basis for determining the existence of probable cause and was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. (App'x pp. 684-686). In conclusion, the Court of Appeals instructed:

> We find the search warrant was invalid because Sergeant Donald gave the issuing judge no information regarding the informant's reliability. Without such information, the affidavit did not provide the issuing judge a substantial basis for a finding of probable cause, the good faith exception does not apply, and the evidence must be suppressed.

(App'x p. 687).

ARGUMENT

I.

Did the Court of Appeals err in finding the search warrant to be invalid based on its determination the search warrant affidavit contained no information as to the confidential informant's reliability where the trial judge correctly concluded the search warrant affidavit established a reliable probable cause basis to believe narcotics would be discovered at Robinson's residence in light of the information included in the search warrant affidavit in regard to the confidential informant's purchases of narcotics from the residence on multiple occasions while working with law enforcement officers and the law enforcement officers' corroboration of the information provided by the informant by working with her and field-testing the narcotics she purchased from the residence?

The Court of Appeals reversed Robinson's conviction after concluding the search warrant issued in his case was invalid. In support of that conclusion, the Court of Appeals determined the search warrant affidavit contained no information as to the confidential informant's reliability. Contrary to the Court of Appeals' conclusion, the search warrant affidavit contained sufficient reliable information to establish a probable cause basis to believe narcotics would be found at Robinson's residence at the time of the search based on the information regarding the confidential informant's work with the Horry County Police Department, the confidential informant's successful purchases of narcotics from the residence while working with the law enforcement officers, and the officers' corroboration of the informant's reliability by working with her and field-testing the narcotics she purchased from the residence. For that reason, the trial judge correctly denied Robinson's motion to suppress the evidence discovered during the search of his residence, and the Court of Appeals erred in reaching a contrary conclusion. Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

The Fourth Amendment protects "[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 touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). As a result, **only** unreasonable searches and seizures are constitutionally prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

In South Carolina, an affiant seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), this Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the issuing judge must "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." Gates, 462 U.S. at 238. In making the probable cause determination, "[issuing judges] are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Importantly though, the issuing judge must view the warrant affidavit in a common-sense and realistic fashion and give consideration to the fact such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

Furthermore, in making such a probable cause determination in a case where an affiant relied upon information supplied by a confidential informant, the informant's veracity, reliability, and basis of knowledge are highly relevant towards a determination of the value of the informant's information. Gates, 462 U.S. at 238. However, those elements related to the informant are **not** "entirely separate and independent requirements to be rigidly exacted in every case" and, instead, "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Id. at 230.

When reviewing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the issuing judge, the court should base its determination

on the totality of circumstances. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). The issuing judge's probable cause determination should be afforded great deference on appeal. State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007). Significantly, "[s]earches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause." Id. "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (citation omitted).

In the case sub judice, the Court of Appeals erroneously concluded the search warrant affidavit prepared in Robinson's case failed to provide the issuing judge a substantial basis for a finding of probable cause due to Sergeant Donald's alleged failure to include sufficient information in the warrant affidavit in regard to the reliability of the confidential informant working with the Horry County Police Department. Contrary to the Court of Appeals' conclusion, the trial judge properly determined the warrant affidavit established a probable cause basis to believe drugs would be located in Robinson's residence because there was sufficient information included in the search warrant affidavit to establish the confidential informant who participated in the controlled narcotics buys from the residence was reliable.

Looking to the warrant affidavit, the confidential informant's reliability was established through the inclusion of the information regarding the informant's successful narcotics purchases from the targeted residence on multiple occasions while working with the law enforcement officers. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 ("The controlled buy was evidence of the credibility and trustworthiness of the informant.").

Critically, the statements in the affidavit specifically indicated the informant was working for the Horry County Police Department, the informant successfully purchased what was purported to be cocaine from the residence in a recent and continuous manner, and the purchased cocaine was confirmed to be cocaine through field-testing.[4] Cf. State v. Viard, 276 S.C. 147, 150-151, 276 S.E.2d 531, 532 (1981) ("Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause."). Thus, the information in the warrant affidavit – when viewed in a common-sense fashion and in a manner consistent with the wording used coupled with the reasonable inferences to be drawn from that wording – made it clear to the issuing judge the confidential informant had participated in successful control drug buys from the targeted residence and law enforcement officers working with the informant had corroborated the information provided by her by working directly with her and field-testing the cocaine she purchased from the targeted residence. See Gates, 462 U.S. at 241 ("Our decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work."); see also United States v. Bynum, 293 F.3d 192, 197 (4th Cir. 2002) ("The Supreme Court has expressly recognized that affidavits in support of search warrants should not be subject to '[t]echnical requirements of elaborate

[4] The inclusion of that information in the warrant affidavit rendered the affidavit in Robinson's case far different from the affidavit in State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990), which contained **no** information of any kind from which the issuing judge could determine if the confidential informant was reliable. Critically, in Johnson, the warrant affidavit merely stated a confidential informant had seen a quantity of cocaine in Johnson's home within the past seventy-two hours and there was nothing indicating the information had been corroborated in any way. Id. at 247-248, 395 S.E.2d at 169. Therefore, the Court of Appeals' conclusion Johnson was "indistinguishable" from Robinson's case was incorrect.

specificity,' and that a magistrate has the "authority . . . to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant.' " (citation omitted and brackets in original)). As a result, Sergeant Donald's warrant affidavit provided the issuing judge with a sufficient basis upon which he could find the information supplied by the confidential informant to be reliable and make a probable cause determination.

Because Sergeant Donald sufficiently established the confidential informant's reliability in the warrant affidavit and provided the issuing judge with a probable cause basis to believe more cocaine would be found in a search of Robinson's residence, the trial judge properly declined to suppress the evidence discovered during the search of the residence due to the alleged defectiveness of the search warrant. See Gates, 462 U.S. at 233 ("[A] deficiency in [veracity or basis of knowledge] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."); see also Bellamy, 336 S.C. at 145, 519 S.E.2d at 349 (finding a search warrant sufficiently established the confidential informant's reliability where, "[a]lthough the affidavit [was] weak on the element of the reliability of the informant, this deficiency [was] compensated for by the strong showing of specificity, first-hand observation, and partial corroboration"); see generally Viard, 276 S.C. at 149-150, 276 S.E.2d at 532 ("Affidavits must be judged on the facts presented and not on the precise wording used."). Therefore, the Court of Appeals' conclusion the search warrant affidavit was insufficient to establish probable cause in Robinson's case was clearly erroneous. See generally Gates, 462 U.S. at 246 ("[P]robable cause does not demand the certainty we associate with formal trials."). Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

II.

Even assuming the search warrant affidavit was insufficient to establish a probable cause basis for the search of Robinson's home, did the Court of Appeals err in finding the good faith exception to the exclusionary rule was not applicable in Robinson's case when the law enforcement officer relied on the judicially-issued search warrant in good faith and in an objectively-reasonable manner and when the search warrant affidavit was not so lacking in indicia of probable cause that belief in and reliance on its validity was objectively unreasonable?

The Court of Appeals reversed Robinson's conviction after concluding the trial judge erred in declining to suppress the evidence discovered in the search of Robinson's home. In support of that conclusion, the Court of Appeals held the exclusionary rule should have been applied in Robinson's case based on its determination the good faith exception articulated by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), did not apply due to the fact the warrant affidavit allegedly lacked any basis for determining if the information included in it was reliable. Contrary to the Court of Appeals' conclusion, the good faith exception was applicable under the facts and circumstances of Robinson's case because Sergeant Donald's reliance on the judicially-issued warrant was objectively reasonable and because the warrant affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, which was the proper standard identified by the Supreme Court in Leon for determining if the good faith exception applied in a particular case. As a result, the Court of Appeals' decision to reverse Robinson's conviction was plainly erroneous. Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. When an unreasonable search or seizure occurs, any evidence seized as the result of that unconstitutional action generally must be excluded from trial pursuant

to the exclusionary rule, a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); see State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, __ U.S. __, 131 S. Ct. 2419, 2426 (2011) (citations omitted). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. Brown, 401 S.C. at 88, 736 S.E.2d at 266. As a result, judicially-created exceptions to the exclusionary rule have been established, including the good faith exception first recognized by the United States Supreme Court in Leon. Brown, 401 S.C. at 88-89, 736 S.E.2d at 266; see also State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued.").

In Leon, officers received information from an informant of **unknown** reliability about drug activity occurring at a particular residence and initiated a narcotics investigation as a result. Id., 468 U.S. at 901. During their investigation, they observed cars registered to individuals with criminal records come to and leave from the residence

and saw individuals enter the residence and leave a short time later with small paper sacks. Id. They also located a small quantity of marijuana at an airport in the belongings of two individuals connected to the targeted residence when those individuals returned from a trip to Miami. Id. at 902. Thereafter, a narcotics investigator prepared a search warrant affidavit recounting those details, obtained a search warrant, searched a variety of locations connected to Leon and his accomplices, and discovered large quantities of cocaine and other evidence. Id. Subsequently, during trial, Leon and his accomplices sought the suppression of the evidence discovered during the searches, and the district court judge granted the suppression motion after finding that the warrant affidavit contained insufficient information to establish probable cause. Id. at 903. Following that ruling, the State appealed, and the Ninth Circuit Court of Appeals affirmed the district court judge's decision. Id. at 904-905. The State then filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court granted that petition to address the issue of whether the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." Id. at 900.

After considering the issue, the Supreme Court determined the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Id. at 926. Specifically, the Supreme Court concluded suppression of the evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the warrant affidavit was " 'so lacking in indicia of probable cause as to render

official belief in its existence entirely unreasonable[;]' " and (4) when a warrant was so facially deficient in some technical respect the officer executing the search warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted). Thereafter, the Supreme Court reversed the district court judge's decision despite the fact the warrant affidavit had been found not to contain sufficient information to establish probable cause after concluding "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable" under the circumstances. Id. at 926.

Just as in Leon, the good faith exception was applicable in Robinson's case even assuming the trial judge erred in finding the search warrant affidavit was sufficient to establish a probable cause basis for the search. That is true because the warrant affidavit prepared in Robinson's case was not " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[,]' " which is what was necessary for Sergeant Donald's reliance on the judicially-issued search warrant to be objectively unreasonable. Id. at 924; cf. Bynum, 293 F.3d at 195 ("[I]f Agent Peterson's affidavit does not provide a substantial basis for determining the existence of probable cause, . . . it is not 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (citations omitted)). Specifically, the information in Sergeant Donald's warrant affidavit was not "bare bones." Instead, the warrant affidavit contained statements establishing the grounds for why the officer believed drugs would be located at the targeted residence, statements regarding the ongoing and continuous nature of the drug activity occurring at the targeted residence, and at least some information regarding the reliability of the confidential informant through the statements about the informant's work with the Horry County Police Department in conducting the successful narcotics buys that yielded what was verified by the officers through testing to

be cocaine. Cf. Leon, 468 U.S. at 926 (finding an officer's reliance on a search warrant was not objectively unreasonable despite the fact the warrant affidavit did not contain sufficient information to establish probable cause where the warrant was supported by more than a "bare bones" affidavit). As a result, the officer's reliance on the search warrant was not objectively unreasonable, the officer acted in good faith in executing the search warrant, and the trial judge properly declined to suppress the evidence discovered during the search of the targeted residence. See id. at 922 ("[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion.").

In reaching a contrary conclusion, the Court of Appeals found the good faith exception was not applicable after concluding the warrant affidavit did not contain a substantial basis for determining the existence of probable cause and was so lacking in indicia of probable cause as to render official belief in its existence unreasonable. To the extent the Court of Appeals' decision was based on a finding of an absence of a substantial basis for finding probable cause, that was **not** the appropriate standard for determining if the good faith exception was applicable and, instead, was the standard for determining whether a warrant affidavit itself establishes a probable cause for the issuance of the warrant. Bynum, 293 F.3d at 195; see also Gates, 462 U.S. at 239 ("An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause[.]"). Critically, in United States v. Bynum, the Fourth Circuit Court of Appeals explained:

> "Substantial basis" provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, **the**

> **exception would be devoid of substance**. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." This is a less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (citations omitted and emphasis added). Accordingly, the Court of Appeals applied an incorrect standard in determining if the good faith exception was applicable to Robinson's case. See Weston, 329 S.C. at 293, 494 S.E.2d at 804 ("Johnson should not be read as prohibiting the applicable of the good-faith exception every time an affidavit fails to satisfy the technical requirements of Gates. Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (citation omitted)). Moreover, to the extent the Court of Appeals found the warrant affidavit to be so lacking in indicia of probable cause, the Court of Appeals' finding was clearly erroneous in light of the information included in the affidavit regarding the confidential informant's work with the Horry County Police Department, the confidential informant's successful purchases of cocaine from the targeted residence on multiple occasions, and the results of the field-testing that confirmed what the informant purchased was cocaine. Compare Viard, 276 S.C. at 150-151, 276 S.E.2d at 532 ("Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause."); with Johnson, 302 S.C. at 245, 395 S.E.2d at 168 (finding a search warrant affidavit did not contain a substantial basis for determining the existence of probable

cause where it merely stated "that a confidential informant had seen a quantity of cocaine in Johnson's home within the past seventy-two (72) hours"). As a result, the Court of Appeals' conclusion the good faith exception was not applicable was erroneous.

Critically, in Robinson's case, Sergeant Donald developed a probable cause basis for a search of Robinson's home through his work with a confidential informant in conducting controlled buys of narcotics from the home, and he acted in an objectively-reasonable manner by obtaining a search warrant from the issuing judge before searching the home. See Messerschmidt v. Millender, __ U.S. __, 132 S. Ct. 1235, 1245 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.' " (citation omitted)). Because Sergeant Donald's actions were objectively reasonable in light of the fact he obtained a search warrant and because the search warrant affidavit was not so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable, the application of the exclusionary rule in Robinson's case was not warranted even assuming the search warrant was ultimately defective due to the officer's failure to include more details in the affidavit. See id. at 1250 ("The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. **Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the**

officers can be considered 'plainly incompetent' for concluding otherwise." (emphasis added and citation omitted)); see also Herring v. United States, 555 U.S. 135, 147-148 (2009) ("In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, . . . we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' In such a case, the criminal should not 'go free because the constable has blundered.' " (citations omitted)); cf. United States v. Danhauer, 229 F.3d 1002, 1007 (10th Cir. 2000) ("Although the affidavit in support of the warrant did not establish probable cause, it was not so lacking in indicia of probable cause that the executing officer should have known the search was illegal despite the state magistrate's authorization. Further, the absence of information establishing the informant's reliability or basis of knowledge does not necessarily preclude an officer from manifesting a reasonable belief that the warrant was properly issued, . . . particularly when the officer takes steps to investigate the informant's allegation." (citations omitted)); United States v. Schultz, 14 F.3d 1093, 1098 (6th Cir. 1994) (finding the good faith exception to be applicable where the officer "certainly" had probable cause to believe the defendant committed a crime and the information he provided to the magistrate "was not so remote as to trip on the 'so lacking' hurdle" even though it was not sufficient to properly support the issuance of a search warrant). As a result, the Court of Appeals plainly erred in concluding the good faith exception was not applicable under the facts and circumstances of Robinson's case. See Leon, 468 U.S. at 918-921 ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the

purposes of the exclusionary rule. . . . Penalizing the officer for the [issuing judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); see also United States v. Anderson, 851 F.2d 727, 729-730 (4th Cir. 1988) (finding the good-faith exception applied even though the search warrant affidavit did not contain any information regarding the date of the crime or the date of Anderson's offer to sell a weapon to the informants). Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

III.

Although the Court of Appeals correctly determined the law enforcement officer's alleged inclusion of false information in the search warrant affidavit did not warrant suppression in Robinson's case, did the Court of Appeals err in finding the law enforcement officer included false information in the warrant affidavit by omitting information that would have had no bearing on whether there was a probable cause basis justifying the issuance of the search warrant?

The Court of Appeals determined the trial judge clearly erred in finding the search warrant affidavit did not contain any false information. In reaching that conclusion, the Court of Appeals held Sergeant Donald's warrant affidavit – at a minimum – implied the informant personally entered Robinson's residence and purchased cocaine, which the Court of Appeals found was conclusively demonstrated to be false in light of Sergeant Donald's trial testimony regarding the details of the narcotics transactions. Ultimately though, the Court of Appeals determined the alleged inclusion of the false information did not require suppression because it would not have had an impact on the probable cause basis for the issuance of the warrant if the informant's information was truthful. Although the Court of Appeals correctly concluded the inclusion of the alleged false statements would not have had an impact on whether a probable cause basis existed for the issuance of the warrant, the testimony and evidence presented during trial – when viewed in the proper context – established Sergeant Donald did not include any false information in the warrant affidavit. As a result, the trial judge's determination the warrant affidavit did not contain any false information was correct and supported by the evidence presented during trial, and the Court of Appeals' conclusion to the contrary was clearly erroneous. Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

Under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right "to challenge misstatements in a search warrant affidavit" even after a search warrant is issued. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and "if the allegedly false statement is necessary to the finding of probable cause[.]" Id. at 155-156. Then, if such a preliminary showing is made, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming the allegations are proven during the hearing **and** the search warrant affidavit's remaining content is insufficient to establish probable cause, the trial judge should then void the search warrant and exclude the evidence discovered during the search "to the same extent as if probable cause was lacking on the face of the affidavit." Id.

In the case sub judice, the trial judge properly determined the warrant affidavit did not contain any false information because none of the statements included in the affidavit were intentionally false or misleading. Critically, contrary to the Court of Appeals' interpretation of the warrant affidavit, the affidavit did not contain any language indicating – or even implying – the confidential informant actually entered the targeted residence. Cf. Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 ("Rutledge . . . contends the affidavit improperly implied that the officers recovered the marijuana, seeds, and stalks

from the residence itself. . . . Nowhere does the affidavit say it was found in the house."). Instead, when viewed in the proper context, the information contained in the affidavit only indicated the confidential informant purchased and obtained drugs from the targeted residence, which is **exactly** what actually occurred. Specifically, the testimony and evidence presented during trial established the confidential information went to the targeted residence accompanied by her contact with the agreed-upon purpose of buying cocaine, gave money to the contact for the cocaine, specifically watched as the contact took the money into the residence, and continued to watch as the contact returned from the residence with the cocaine. See State v. Thomas, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding courts should consider a "common-sense reading of the entire affidavit" in determining whether probable cause exists). Thus, by going to the residence, sending money inside for cocaine, and receiving cocaine that was brought out of the residence in exchange for the money, the confidential informant purchased cocaine from the occupants of the residence just as described in the search warrant affidavit, and, significantly, that information fully established a probable cause basis to believe narcotics would be discovered in the targeted residence irrespective of whether the confidential informant ever personally went inside. See Anderson, 851 F.2d at 729 ("[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence."); Dupree, 354 S.C. at 691, 583 S.E.2d at 445 (instructing evidence of a drug transaction supports an inference more drugs will be found at the same location); see also United States v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) ("[E]ven if the additional facts cited by Cioni were included in the affidavits, the probable cause calculus would nonetheless have remained unchanged. Under these circumstances, Franks is

inapplicable."); United States v. Colkley, 899 F.2d 297, 298 (4th Cir. 1990) ("Johnson's incriminating statements were properly admitted because Johnson made no showing that the affiant intended to mislead the magistrate by omitting information, and because the warrant with the omitted information would in any event have been supported by probable cause[.]").

Notably, although the Court of Appeals failed to reference or discuss it in its opinion, defense counsel for Robinson readily conceded during trial the issue of whether the information included in the warrant affidavit was false hinged upon the "matter of the way you look at it." (R. p. 19). Despite that concession from defense counsel, the Court of Appeals concluded the statements in the warrant affidavit could only be interpreted as an implication or direct expression the informant personally entered the residence and purchased cocaine. Critically though, when the question of whether information in a warrant affidavit is intentionally false or misleading rests on the "matter of the way you look at it," the inclusion of information that **could** potentially be interpreted in a way to suggest it is false or misleading is not sufficient to establish false or misleading information actually was included in the warrant affidavit, particularly when considering an officer preparing a search warrant affidavit is not required to prepare the affidavit with unerring technical precision or include every detail of an investigation in the affidavit. See Arnold, 319 S.C. at 260, 460 S.E.2d at 405 ("Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion."); see also Colkley, 899 F.2d at 300 ("An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.").

Significantly, the most compelling evidence establishing Sergeant Donald did not knowingly and intentionally include false or misleading information in the warrant affidavit was he would have had no reason to do so since doing so would not have impacted the probable cause basis for the issuance of the warrant. See State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 398 (1999) ("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."). Just as the Court of Appeals specifically determined, the inclusion of all of the details about the narcotics transactions – including those about the involvement of the confidential informant's contact – would **not** have changed the fact probable cause existed for a search of the residence assuming the confidential informant was telling the truth. Under such circumstances, Sergeant Donald's failure to include every detail of the transactions did not establish the information he did include in the warrant affidavit was designed to be intentionally false or misleading. As a result, the trial judge correctly found the warrant affidavit did not contain any false information, and, although the Court of Appeals correctly concluded no Franks violation occurred, the Court of Appeals' determination Sergeant Donald included false information in the warrant affidavit was clearly erroneous. See Rutledge, 373 S.C. at 319, 644 S.E.2d at 792 (finding no Franks violation occurred where nothing in the search warrant affidavit demonstrated a reckless disregard for the truth); see also Colkley, 899 F.2d at 301 ("Franks protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the [issuing judge]." (italics in original)). Accordingly, the decision of the Court of Appeals should be reversed and vacated, and Robinson's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals be reversed and vacated and the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

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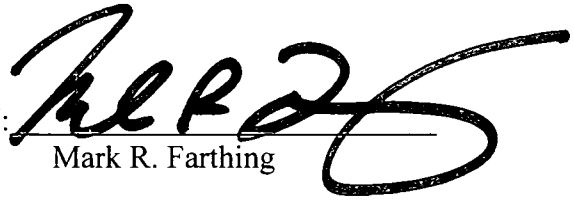
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
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ATTORNEYS FOR PETITIONER

December 8, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2014-001545

THE STATE,

Petitioner,

vs.

ALEX LORENZO ROBINSON,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Petitioner complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 8th day of December, 2014.

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December 8, 2014

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RE: State v. Alex Lorenzo Robinson – Appellate Case No. 2014-001545

Dear Ms. Ganjehsani:

I am enclosing two copies of the Brief of Petitioner, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: ~~Honorable Daniel E. Shearouse (original and fourteen enclosed)~~
Victim Services

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