THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No.: 2013-001406

John C. Hayes, III, Circuit Court Judge

Case No. 2012-GS-26-2339; 2340; 2551; 02552; 02553

State of South Carolina, ... Respondent,

v.

Marcus Dwain Wright, ... Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues in Reply iii

ARGUMENT

I. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENT AS TO THE EXISTENCE OF ANY EXCEPTION TO THE SEARCH WARRANT REQUIREMENT. 1

II. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENTS AS TO THE SEARCH WARRANT REQUIREMENT AND EXCLUSION OF EVIDENCE IN THIS CASE. 3

III. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENT AS TO ISSUE PRESERVATION AND HARMLESS ERROR ANALYSIS AS TO CROSS-EXAMINATION. 5

IV. IN LIGHT OF THE STATE'S POSITION THAT THE APPELLANT WAS NOT SENTENCED UNDER LWOP, THE COURT SHOULD ENTER AN ORDER CLARIFYING THE BASIS OF THE SENTENCE ACCORDINGLY. 6

V. THERE IS SUFFICIENT EVIDENCE IN RECORD TO REQUIRE THE REQUESTED CHARGES AND REFUSAL TO DO SO CAN NOT BE SHOWN TO BE HARMLESS. 8

TABLE OF AUTHORITIES

Cases

In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003) 1,8

Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) 5

State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991) 2

State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) 8

State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009) 2

State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct.App. 2004) 2

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 6

State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) 2

State v. Sachs, 264 S.C. 541, 216 S.E.2d 501(1975) 2

State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003) 8

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 2

United States v. Williams, 548 F.3d 247 (7th Cir. 2010). 2

Wong Sun v. U.S., 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). 5

STATEMENT OF ISSUES ON IN REPLY

1. Does the record support any exception to the search warrant requirement?

2. Does the record require the exclusion of evidence in this case?

3. Did the Appellant abandon the issue of cross-examination and if not, was the issue adequately preserved for appellate review?

4. In light of the state's position that the appellant was not sentenced under LWOP statutory provisions, can the court enter an order so clarifying the basis of the sentence accordingly.

5. Was the failure of the court to give the requested charges harmless?

6. All other issues are believed to have been sufficiently raised and argued expressly or implicitly in the Appellant's Brief and failure to readdress any herein is not intended as a waiver thereof.

ARGUMENT IN REPLY

The Appellant only includes issues in reply that are not otherwise adequately addressed by the facts and arguments in the Appellant's Brief. No waiver of issues is intended.

I. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENT AS TO THE EXISTENCE OF ANY EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

The record fails to support any exception to the search warrant requirement, or the application of the exclusionary rule in this case. The officers in this case obtained a search warrant using false information which identified in particular the residence at 3635 Kate's Bay Road, the property they wanted to search. In light of the nature and importance of the misrepresentations, they could not have been made without the intent to do so, or in the least, a reckless disregard for the truth.

The officer obtaining the warrant informed the magistrate that SLED had "pinged" the Appellant's cell phone *to the residence* at 3635 Kate's Bay Road. This was untrue, as cell phone information at best placed the phone only "in the general area" of the residence. T. p. 66. It also appears that SLED did not begin the "pinging" until the night of May 1st, which was the day after the incident on the night of April 28th. T. p. 54. Nor does it appear that the co-defendant actually told the police that the Appellant drove to 3635 Kate's Bay Road as the search warrant affidavit makes it appear. The record shows misrepresentations in both the affidavit as well as in the supplemental oral information provided by Detective Weaver to obtain the search warrant. The record shows that not only were the references to the particular residence at 3635 Kate's Bay Road untrue, but also not of the type that could be made absent a reckless disregard for the truth.

The record shows that the search warrant was obtained by the police "salting" the

information given to the magistrate with references to the specific residence they wanted to search. Even in its brief the State continues to cling to the assertion that the Appellant's cell phone "pinged" to the residence at 3635 Kate's Bay Road. (Resp. Brf. pg. 9). The record repeatedly shows this to be incorrect, as the cell phone was shown to have pinged only "in that general area". T. p. 66, l. 10. Similarly, the representation in the search warrant affidavit that the police had been told that Appellant obtained a gun *from the residence* at 3635 Kate's Bay Highway was equally untrue. Contrary to the State's argument, these are not simple misinterpretations or inaccuracies made in haste. These are gross misrepresentations intended to point to 3635 Kate's Bay Road in particular. Unlike the statements of witnesses or minor misstatements of insignificant details, these are direct representations which the police, absent a reckless disregard for the truth, should have known to be untrue. Representations without which, probable cause would otherwise be lacking. *See* State v. Sachs, 264 S.C. 541, 216 S.E.2d 501(1975); State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct.App. 2004).

The exclusionary rule is applicable under the facts of this case. Here the police could not have acted "in objectively reasonable reliance" on a warrant obtained in reckless disregard for the truth. *See* Leon, U.S. 468 U.S. at 922, n. 23, 104 S.Ct. 3405; McKnight, 291 S.C. at 112-113, 352 S.E.2d at 472; State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009). The record shows that the magistrate was mislead by knowingly false or recklessly false information. As a result, application of the good faith exception to the exclusionary rule is barred in this case. Here the police made misrepresentations to obtain the search warrant for 3635 Kate's Bay Road. These misrepresentations, if not knowingly false, were made with reckless disregard for the truth. Where a magistrate is mislead by knowingly false or recklessly false information, the good faith

exception to the exclusionary rule does not apply. Williams, 548 F.3d at 317; State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991). The trial court therefore erred in failing to suppress evidence obtained through the search of the Kate's Bay residence.

II. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENTS AS TO THE SEARCH WARRANT REQUIREMENT AND EXCLUSION OF EVIDENCE IN THIS CASE.

Drug evidence in this case was discovered as the result of a warrantless entry into Wright's room. Here the police were at the motel in sufficient numbers to secure the area and apply for a search warrant. They chose instead to try and trick the occupants of the room into coming outside. When they would not come outside and tried to close the door, the police forced their way inside the room. It was only *after* entering the room that any illegal substance was observed. 105. Absent a valid exception to the search warrant requirement, the officers were not lawfully inside of the room when the evidence was observed.

Because the police were at the motel in sufficient numbers, and as admitted by the State in its Brief, had surrounded the location and weren't going to allow the suspects to leave, there was no exigent circumstances to justify a warrantless entry.

Although Powell had an outstanding arrest warrant for an unrelated offense, neither the arrest warrant nor lawful warrantless arrest exception apply in the Appellant's case. Detective Chatfield admitted that he "forced" his way into the room unaware of any outstanding arrest warrants for either Wright or Powell. 104-105. The forced entry was therefore not made with the intent to serve an outstanding arrest warrant. Here, because the record fails to show that the arrest at the hotel was for the crime identified by the outstanding warrant, the collective knowledge doctrine does not apply. Additionally, the collective knowledge doctrine does not appear to have

been applied to the search warrant issues under the South Carolina Constitution. An unrelated outstanding warrant for Powell, of which the officers at the scene were unaware, does not support an exception to the search warrant requirement in this case.

The State's argument as to the forced entry and resulting discovery of evidence being justified as a Terry stop is unsupported by the facts in this case. *Terry* authorizes certain brief detentions to allow for questioning. It does not authorize warrantless entry into a home. Neither Powell nor Appellant were in a public place or subject to detention pursuant to the *Terry* doctrine. Neither Powell nor Appellant were detained until after the warrantless entry into the room. The *Terry* doctrine does not justify the warrantless entry of the Appellant's hotel room.

The State's argument as to a protective sweep under State v. Brown is also unsupported by the facts of this case. Here, neither Powell nor Applicant were arrested prior to the police entry into the room. In fact, officers forcing entry into the room did so without any knowledge of the unrelated warrant on Powell. They did so only because they wanted to "talk" to Wright. The protective sweep doctrine is therefore inapplicable. Additionally, even if applicable, the facts of this case show clearly that the evidence was not observed until after Chatfield had entered the room. Under Brown the warrantless entry is not justified under as part of a valid protective sweep and the evidence must still be suppressed.

The State further argues that the evidence should not be excluded as it would have been discovered anyway. The burden of proving a factual basis for its eventual discovery rests with the State. The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded. State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975). The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can

establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained. Nix v. Williams, 467 U.S. 431, 443-44, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Here the State failed to produce evidence at trial to show that the evidence would have eventually been discovered even without the unlawful search. As a result, the doctrine of inevitable discovery does not apply under the facts of this case.

The State further argues that the evidence was lawfully obtained by the subsequent search warrant. This argument is unsupported as the subsequent search warrant was obtained using evidence gained through the prior unlawful search and seizure. The fruit of the poisonous tree doctrine, most often associated with violations of the Fourth Amendment's prohibition of unreasonable searches and seizures, prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure. Wong Sun v. U.S., 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As a result of their being no valid exception to the search warrant requirement, the subsequent search warrant is invalid and the evidence must still be suppressed. The court therefore erred in refusing to suppress the evidence. As to the effect of the improper admission of the drug evidence, the State offered testimony that the motive for the shooting was entirely drug related. The Improper admission of drugs found in the Appellant's hotel room days later presented unduly prejudice, not only on the murder charge, but the drug charges as well. As a result, the improper admission of the drug evidence can not be harmless error in the Appellant's case.

III. THE RECORD FAILS TO SUPPORT THE STATE'S ARGUMENT AS TO ISSUE PRESERVATION AND HARMLESS ERROR ANALYSIS AS TO CROSS-EXAMINATION.

During the cross examination of Lanard Powell, the defense attempted to cross examine Powel based on a prior written statement Powell had given to Wright which exonerated Wright, and identified a third person as the having shot and killed the deceased. 308. As more fully set forth in the Appellant's Brief, the defense was not required to provide Powell's statement to the prosecution under Rule 5, SCRCrimP. It was only required to disclose the contents after the cross examination. The record is clear that the State was aware of the prior inconsistent statement before the trial. T. 310. There is therefore no basis for the trial court to have terminated the defense's cross-examination of Powell as to the prior inconsistent statement. At the time of the defense's cross-examination was terminated Powell was admitting to everything he was asked about the statement. The defense's cross-examination was therefore, entirely proper.

The State argues that the issue was not preserved. It is clear from the record involving the discussion of the testimony that the defense never acquiesced in the trial court's ruling, indicated any intent to waive an objection thereto. The record shows quite the opposite. The defense engaged in a lengthy discussion as to its right to cross Powell on the prior inconsistent statement. 300. The defense also argued that production of the written statement was not necessary for the cross-examination or necessarily required under the rules of evidence. 310. The defense only stopped arguing once the trial court had made a clear ruling. 310-313. Although the defense did not make an objection to the court's instruction to the jury immediately after it had ruled and brought the jury back in, it is not required to make an objection where the instruction immediately follows the ruling if it is clear that the court is not going to change its ruling. *See*

State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (where no evidence is taken between the trial court's *in limine* ruling and the admission at trial of the evidence, the issue is preserved). The issue is therefore adequately preserved for this Court's review.

In this case Powell's testimony against the Appellant was critical to the State's case. Attacking Powell's credibility through his prior inconsistent statement was a critical part of the Appellant's defense. It was important not only because it impeached Powell in general, but also because it expressly exonerated the Appellant. As a result of the importance of Powell's testimony to the State's case, as well as to the defense, denial of Powell's effective cross-examination can not be said to be harmless.

IV. IN LIGHT OF THE STATE'S POSITION THAT THE APPELLANT WAS NOT SENTENCED UNDER LWOP, THE COURT SHOULD ENTER AN ORDER CLARIFYING THE BASIS OF THE SENTENCE ACCORDINGLY.

The record shows that the State sought to have Wright sentenced to life without parole (LWOP) based on S.C. Code Section 17-25-45. 549. At sentencing the Solicitor alleged the existence of a prior most serious offense as a basis for the life sentence in this case and represented that sentencing under LWOP was mandatory in this case. 549. The Solicitor represented that it had certified copies of the qualifying convictions, which were entered into the record in this case. Ct. Ex. 1. 550; 553. Wright was subsequently sentenced to life by the trial court but without an explicit reference to the LWOP statute. 552. Since the State appears to take the position that the LWOP statute was not applied as a basis for the sentence in this case, the Appellant submits that this Court should enter a ruling finding that the Appellant was not sentenced under the LWOP statute.

V. THERE IS SUFFICIENT EVIDENCE IN RECORD TO REQUIRE THE

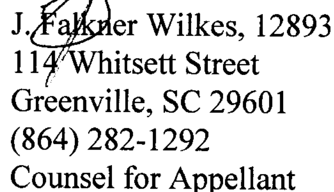
REQUESTED CHARGES AND REFUSAL TO DO SO CAN NOT BE SHOWN TO BE HARMLESS.

The State argues that the refusal to charge manslaughter or self-defense was harmless. Such error would be harmless only if it could not reasonably have affected the result of the trial. *See In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003). Here, based on the Appellant's view of the record, the jury could have reached a rational conclusion that the Appellant was not guilty of murder. Failure to charge is only harmless where it could not have reasonably affected the result of the trial. This occurs only where the defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. *See* State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989)." Because there was evidence which, if believed by the jury, the Appellant could have been found not guilty, the failure to give the requested charges is harmful error. Our Courts have placed great emphasis on the importance of a defendant's right to assert self-defense when there is *any evidence* to support it. *See,* State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003). In the Appellant's case, there is evidence which would support the requested charges. As a result, the trial court's refusal to give the requested charges can not be said to be harmless.

CONCLUSION

Based on the foregoing the convictions and sentences of the Appellant should be reversed.

Respectfully submitted,



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January 12, 2015.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Reply Brief of Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 12TH day of January, 2015, addressed as follows:

Anthony Mabry, Assist. Atty. Gen.
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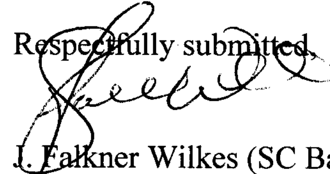
Respectfully submitted,



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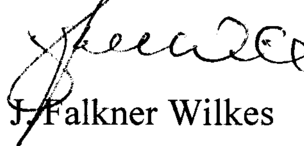
Re: State v. Marcus Dwain Wright,
2012-GS-26-2551; 2552; 2553; 2339

Dear Ms. Kitchings,

I am enclosing herewith a copy of the Appellant's Initial Reply Brief and Certificate of Service.

Respectfully,



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