STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

v.

MARCUS DWAIN WRIGHT,

Appellant.

Appellate Case No. 2013-001406

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant murdered Jerome Green on April 30, 2012 in Horry County. Appellant was arrested on May 2, 2012. The Horry County grand jury indicted him for murder, trafficking in cocaine 28 grams or more, PWID crack, and possession of a weapon during a violent crime.[1] On June 17, 2013, appellant was tried by a jury before the Honorable John C. Hayes, III. He was found guilty as charged. Appellant was sentenced to life for murder, 5 years on the gun charge, 25 years for trafficking, and 15 years for PWID. All sentences were run concurrent but consecutive to the life sentence.[2] This appeal followed raising 13 issues. Rather than addressing the issues separately, Respondent will address the issues collectively under the appropriate topic.

RESPONDENT'S STATEMENT OF FACTS

In April of 2012, appellant Marcus D. Wright ("Wright") was a drug trafficker in cocaine who was using his subordinate Lanard Powell ("Powell") to distribute drugs out of a home at 5456 Figure Eight Road, in Socastee. The home's owner, Roy Sinclair ("Sinclair"), who is paralyzed and wheel chair bound, allowed Wright and Powell to use his home in exchange for Sinclair receiving free drugs. This arrangement was on-going for 3 to 4 weeks at the time of this murder.[3] On April 30, 2012, Powell had been selling drugs out of the home and left that evening with his girlfriend, Qwanda Caldwell-Brown ("Qwanda") to make a drug sale or delivery for Wright and to go to the store. Powell took with him a 9 mm pistol Wright had provided Powell for protection during his drug distribution activities. (R. 176-200, 231-33, 247-50, 254, 265-70).

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[1] (*Ind. #s 2012-GS-26-2339-40, 255 -53*).

[2] (R. 1, 11-12, 28-30, 46, 176-92, 279-80, 317-23, 351-52, 540-53, Indictments).

[3] Powell testified that while operating their drug distribution business out of Sinclair's home he, Powell, sold approximately 2 to 3 ounces of crack per week. Powell received approximately $1,300 to $1,400 dollars for each ounce. The money was split as follows: Wright would receive about $1,000 for each ounce, and Powell, would receive $300 to $400 per ounce. (R. 266-67).

Wright remained at the home sitting at the kitchen table cutting up drugs, with his loaded *.40 caliber* pistol beside him. Also there were Sinclair and several women there to buy, use drugs, or with someone who was there for that purpose. Around 11:30 p.m., Jerome J. Green, Jr. ("the victim"), known as "J.J.," knocked on the front door. Sinclair told Wright it was okay to open the door because it was his cousin, "J.J.". Wright, with his gun in his hand, opened the door and let the victim in. The victim looked around, saw what was going on, and stated to Sinclair: "you going to let these young boys come in here and run your house like this?" Wright took offense at the comment and asked the victim to repeat what he just said. The victim refused, ignored Wright, and continued to talk to a woman sitting in the living room. Wright, who had returned to the kitchen area, raised his loaded *.40 caliber* pistol and shot the victim 10 times including in the back, the chest, and the arms. The victim collapsed dead. (R. 176-90, 200-08, 215-20, 223-24, 230, 241, 268-70, 275, 355-57, 367, 375-82, 384, 395-96, 410-19, 428-34).

Several individuals who witnessed the shooting fled outside. Sinclair fled down a handicap ramp to his home and down the street in his wheelchair. One woman fled through the front door and one out the back door. Wright left the home. Outside, Wright told 1 witness, she better not say anything about what had just occurred. Wright got into his black BMW and started driving away when he saw his subordinate, Powell, returning with Qwanda in Powell's car. Wright spoke from his vehicle to Powell in Powell's vehicle. Sinclair, who was moving up the road in his wheel chair, heard Wright say to Powell: "go in the house, get your shit, I just murdered this nigger." Qwanda heard Wright say: "Pick up the shell casings Brah."[4] Wright fled

[4] When crime scene experts processed the murder scene, they found only 3 fired *.40 caliber* shell casings, 2 under couch seat cushions and 1 on the floor. No other caliber fired shell casings were found. No weapons were found at the murder scene. (R. 353-55, 375-79, 383-84, 389, 410-21).

the scene, drove to another location, abandoned his BMW there, and changed vehicles getting into a Cadillac Escalade. Wright also picked up a gas can and took it with him. (R. 181-82, 187, 202-08, 217-21, 223-24, 231-37, 256-59, 265-72, 269-72).[5]

Meanwhile, Powell and Qwanda pulled into Sinclair's residence. Veronica Chandler, an eyewitness, approached Powell and stated: "..that boy shot him. That boy shot him." Powell did as Wright instructed him. Powell got out of his car with his 9mm, went in the home, determined the victim was dead, and removed drugs and money from the residence. While inside, a woman tried to give or gave Powell some fired shell casings. Powell got the victim's keys, threw the money and drugs in the vehicle Qwanda was in, and Powell got in the victim's vehicle and drove it away from the scene with Qwanda following in Powell's car. (R. 182, 233-35, 265-72).

Wright and Powell contacted each other by cell phone, and agreed to meet up at another location. Once there, Powell and Qwanda followed Wright to another location where the dark Cadillac Escalade was abandoned, and Wright got in the victim's vehicle with Powell. Wright, Powell, and Qwanda proceeded to a gas station. Qwanda was instructed to purchase gasoline, after which Wright and Powell filled up the gas can with fuel. The 3 proceed to Johnsonville, where the victim's vehicle was disposed of on a dirt road in some woods. Wright and Powell used the gasoline to attempt to burn the victim's vehicle. (R. 233-37, 268-73).

The 3 then went to a motel where they rented a room in Qwanda's name and stayed for 1 night. Wright realized they needed another vehicle; so, they proceeded to the airport where a red

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[5] Daisy Menendez, Wright's wife's aunt, testified that during the *early morning hours of May 1st* she received a call from Wright's wife. Wright's wife asked if she could park the black BMW at Daisy's residence. Daisy agreed. Then still during dark, Wright came and parked the BMW in Daisy's garage. The BMW stayed there for 1 day. The next day, Wright appeared and stated he needed to get something out of the car. He went to the car and got something out of it. Later, police came and seized the BMW. (R. 256-59). The murder weapon was never recovered.

Chevrolet Camaro was rented by Wright's wife, Jacinda. Qwanda picked up the car, but Wright and Powell got in the Camaro at another location and began using it. Qwanda returned to her home. The 2 men drove to another motel, the Sleep Inn in Conway, where Powell rented a room under an alias using a fake I.D. Wright provided. By the morning of May 2nd, both Wright and Powell were suspects in the murder. Police located the 2 at the Sleep Inn by tracing Wright's cell-phone signal and determined both suspects were in Room 105 through the motel clerk. There, Wright and Powell were taken into custody after 1 of the men tried to flee back into the motel room after stepping outside the room and being identified by police. In plain view on a refrigerator of the room were over 28 grams of cocaine, several grams of crack, and $3,000. A search warrant was obtained and the drugs and money were recovered along with car keys and hotel receipts from the first motel. Police found the rental car in the Sleep Inn parking lot. It was searched pursuant to a separate search warrant, and Powell's 9mm pistol and a set of digital scales was found within, along with *a .40 caliber Glock box*, which had paperwork in it showing the gun was registered to Wright's wife, and the receipt indicated it was for a *.40 caliber* pistol, and the gun had been purchased by Wright's wife on June 7, 2008. Police also found 2 ammunition clips in the *box*, containing 9 unfired rounds and 13 unfired rounds, all of which were *.40 caliber.* (R. 273-83, 317-23, 331-48, 402-21, 347, 237-41, 336-37).

Police executed a search warrant on Wright's wife's home finding *2 fired .40 caliber shell casings* fired from a .40 caliber pistol by the manufacturer of the gun before it was sold.[6] The serial number for the *.40 pistol* from the receipt found in the Camero matched the serial

[6] The envelope containing these 2 shell casings indicated the *.40 caliber gun* had been test fired by the manufacturer and these casings recovered and put in the envelope to show the gun had been test-fired and was in working condition. This test firing occurred on May 20, 2008.

number on the envelope containing the 2 fired *.40 caliber* casings. Police also found on a nightstand a receipt from 7 days before the murder for 2 boxes of ammo. (R. 360-70, 379-82, 396, 410-21).

Forensic examination revealed the 2 shell casings found in Wright's wife's residence were fired from the same gun that fired the 3 *.40 caliber* shell casings recovered from the murder scene. The projectiles removed from the victim at autopsy were consistent with having been fired from a *.40 caliber* weapon, but not a 9mm. Police also executed a search warrant on the black BMW, which Wright fled the crime scene in, finding 1 unfired *.40 caliber bullet.* Although police searched, the murder weapon was never found. The autopsy determined the victim died as a result of multiple gunshot wounds. Six projectiles were removed from the victim's torso. (R. 355, 375, 410-21, 339-40, 347, 428-37, 360-67, 415-16).[7]

ARGUMENT I.

Judge Hayes did not err in denying the motion to suppress the fruits of the search of Jacinda Wright's home.[8]

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[7] At trial, Sinclair testified to the arrangement with Wright and Powell to sell drugs from his residence, to witnessing Wright murder the victim, to overhearing Wright admit to Powell he murdered the victim, and to Wright instructing Powell to remove the drugs and money from the residence after the murder. Veronica Chandler and Mildred Small also testified to being in the home for Chandler to purchase drugs, and Chandler testified how Wright murdered the victim with a firearm while she was talking with the victim. Powell also testified to the drug dealing arrangement he had with Wright and how Sinclair was letting them use his home as a drug distribution point. Powell also testified to what he saw upon returning to the mobile home shortly after Wright murdered the victim; and, how he [Powell] assisted with the attempted cover-up of the crime including removing the cash and drugs from the home and disposing of the victim's vehicle. Qwanda also testified and related what she overheard Wright say to Powell upon leaving the crime scene, to Wright's admission to her he shot and killed the victim, and to her and Powell's role in helping Wright to cover up the crime, get rid of any drug evidence from the scene, and avoid apprehension. (R. 176-200, 200-12, 214-30, 265-308, 315-16, 231-55).

[8] In grounds 1 through 6 of his brief, Wright challenges Judge Hayes denial of his motion to suppress the fruits of the search of his wife Jacinda's residence. These grounds will be addressed collectively because they all have to do with this search, and there is no merit to these arguments

The Search at Issue

On May 2, 2012, police sought and obtained a search warrant from an Horry County Magistrate to search the residence of Wright's wife, Jacinda Wright, located at 3635 Kate's Bay Road in Horry County. Police executed the warrant and recovered the manufacturer fired casings and ammo receipt. Nothing else of real evidentiary value was admitted as a result of this search.[9]

What Occurred Below

Wright moved to suppress the fruits of this search. An *in camera* hearing was held at which both the officer who obtained the warrant [the affiant] and the chief investigating officer on the case testified. (R. 53-61, 61-82, 122, 137-45). The testimony established prior to obtaining the warrant, police had the following information pursuant to the murder investigation:

On April 30, 2012, at approximately 11:30 p.m., at 5456 Figure Eight Road in Horry County, Jerome J. Green, Jr. had been murdered. When police arrived at the scene shortly after midnight on May 1st, they found the victim's bullet riddled body on the floor of the home and recovered 3 fired *.40 caliber* shell casings there. As a result, police were aware the homicide was the result of a shooting, and they were looking for a .40 caliber pistol as the murder weapon. Police apprehend a co-defendant of Wright, Lanard Powell, who informed police Wright was the shooter in Green's death. Both Powell and Qwanda Caldwell-Brown, informed police Wright had fled the scene in a black BMW and then switched getaway vehicles into a dark in color

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because the search of Jacinda's residence was lawful, and Judge Hayes did not err in denying the motion to suppress. Further, the admission of this evidence was harmless given *the other* overwhelming evidence of guilt independent of the fruits of *this search.*

[9] The State established Wright's wife purchased a .40 caliber pistol before the murder through the evidence found in the red Camaro and established the victim was murdered with a .40 caliber pistol by what was recovered from the crime scene [3 fired .40 caliber casings] and what was recovered at autopsy [fired projectiles consistent with a .40 caliber weapon].

Cadillac Escalade. The police investigation revealed Wright eventually drove to his wife's residence and left the *Cadillac Escalade* there in the Conway. Powell also informed police Wright was carrying a firearm on the night of the shooting, and the gun was registered in the name of Wright's wife, Jacinda. Powell and Qwanda also informed police Wright's wife had rented another vehicle, a red Camaro, at the airport on May 1st, for them to operate in to avoid police. Police Captain Dale Buchanan, who lived in the same area as Wright's wife, and was familiar with the area, informed officers he had seen both the black BMW and the dark in color *Escalade* at the wife's home coming and going from the residence in the days leading up to and on the date of the murder. Police confirmed through driving and property records Wright's wife resided at 3635 Kate's Bay Road. Another officer, Daniel Spencer went to the home and confirmed the dark in color *Cadillac Escalade* was there and parked at the rear of the property. Spencer also confirmed Wright's wife lived there by knocking on the front door and briefly speaking with her when she answered. Finally, an individual at the crime scene had given police Wright's cell phone number, and on May 2nd, S.L.E.D., who was tracing Wright's cell phone, notified police that on the night of May 1st, 2012 Wright's phone "pinged" [sent a signal] at the location of 3635 Kate's Bay Road. (R. 53-61, 61-68, 68-82). At the time police sought the search warrant, the murder weapon, which belonged to Jacinda, had not been recovered.

As a result, on May 2, 2012, as is customary during a homicide investigation, the chief detective on the case, Todd F. Cox, directed another detective, David Weaver, to obtain a search warrant for Jacinda Wright's residence located at 3635 Kate's Bay Road to look for the murder weapon and any evidence related to the murder of Jerome Greene. As is common during a murder investigation, Cox related to Weaver the information that had been uncovered during the

investigation recited above. (R. 53-57). Detective Weaver went to Magistrate Mayers' office and submitted the following sworn search warrant affidavit to Magistrate Mayers. (R. 62-63):

STATE OF SOUTH CAROLINA **AFFIDAVIT**

COUNTY OF HORRY

Personally appear before me, one *Detective David Weaver*, who, being duly sworn, says there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any and all items of evidentiary value that may aid in the investigation into the Homicide of one Jerome Green Jr. which occurred at the residence of 5456 Figure Eight Rd. located within the Myrtle Beach section of Horry County reference HCPD case # 12041053. These items may include but are not limited to any and all weapons, to include firearms and ammunition of any form, and any articles of clothing which may have been used or worn in the commission of said crime. Any vehicles, latent fingerprints shoe prints, blood, or blood residue or any time believed to contain blood. Any and all DNA, fibers, hairs, any form of biological or trace evidence. Any and all personal effects, papers, notes, documents, analog and/or magnetic media which may contain information that may aid in determining the identification of the person(s) occupied said vehicle and subsequently aided in said criminal action.

DESCRIPTION OF PREMISES (PERSON OF THING) TO BE SEARCHED

A tanish color vynil sided manufactured home located at 3635 Kates Bay Road which is located in the Conway section of Horry County. The mobile has a rock veneer bottom skirt with a white in color front door and the numbers 3635, clearly marked, next to the front door. The residence has wooden stairs and deck leading to the front door. The property is surrounded by a wooden six foot fence. In the left corner of the rear of the property, the back yard, there is a ten foot by ten foot tanish, with white trim, shed. There are two visible vehicles parked in the rear of the property. One of the vehicles is a dark in color Cadillac Escalade with chrome wheels and an older light brown Chevrolet sedan.
A 2003 Cadillac Escalade Exit SUV (VIN) 3GYEK63N93G334144) bearing South Carolina plate of 656 2DL. The vehicle is currently located at the above described location of 3635 Kates Bay road in the Conway section of Horry County.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On 05-01-12, members of the Horry County Police Department responded to the residential address of 5456 Figure Eight Rd., located in the Myrtle Beach section of Horry County, in reference to a shooting incident wherein the victim Jerome Green Jr. was shot to death. A co-defendant, Lanard Powell, informed law enforcement the shooter, identified as Marcus Dewain Wright, fled the scene at the above said location in a black in color BMW vehicle and then later switch[ed] getaway vehicles to a dark in color Cadillac Escalat[d]e. The shooter then drove to the address of 3635 Kates Bay Road which is in the Conway section of Horry County, and left the above said vehicle at that address. The co-defendant also informed law enforcement the shooter obtained the mu[r]der weapon, from his wife, at the above location. It is believed the shooter transported the murder weapon in the Cadillac Escalat[d]e back to the said residence and that it may still be present in the home and/or described vehicles.

The affidavit and warrant was sworn before the magistrate. Prior to the warrant being issued, Detective Weaver also provided sworn supplemental oral testimony to the Magistrate. (R. 63-65). Weaver informed the magistrate S.L.E.D. had been tracking or tracing Wright's cell phone; and, on May 1, 2012 Wright's cell phone "pinged" at the 3635 Kate's Bay Road residence, the residence of his wife Jacinda Wright. (R. 63-65).[10] After Weaver submitted the sworn affidavit and oral testimony, the magistrate issued the warrant for Wright's wife's residence to look for the murder weapon and any evidence related to the murder.

Trial Court's Ruling

At the hearing's conclusion, Judge Hayes denied the motion to suppress finding, first, Wright had not met his burden to show he had a possessory interest in the property searched;[11]

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[10] Apparently, either Detective Weaver failed to include this information in the affidavit through inadvertence or it was not conveyed to him by Detective Cox until Weaver was on his way to the Magistrate's Office to obtain the warrant. (R. 66-67).

[11] During the *in camera* suppression hearing, Judge Hayes allowed the State to introduce Wright's official driving record from the S.C. Department of Motor Vehicles (DMV) which was introduced through the officer who "ran" the record by use of computer. Wright now challenges the admission of this evidence in the *in camera* hearing. The official driving record was admitted solely on the issue of appellant's standing to challenge the search of his wife's residence. The official driving record was admissible as a self-authenticating document. Furthermore, it makes no difference because the expectation of privacy issue was not dispositive of the search issue but the validity of the search warrant, and the search warrant was valid.

and second, even if Wright could make that showing, he would deny the motion, because even removing any factual inaccuracies from the affidavit, the affidavit along with the sworn supplemental testimony before the Magistrate established probable cause to search Wright's wife's residence. (R. 143-45). On appeal, Wright alleges both rulings were error, and he should be granted a new trial. Wright is wrong on both issues, and he is not entitled to a new trial.

Standard of Review
(Circuit Court's Affirmation of Probable Cause)

The standard of review of Fourth Amendment search and seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with this court only being able to reverse the ruling of a trial judge where there is clear error. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013).[12] As a result, if there is any evidence to support the trial judge's ruling as to the validity of a search with a warrant, it will be affirmed on appeal. Id.; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012).[13]

Further, the good faith exception applies in this situation, and the exclusionary rule should not apply. Furthermore, the admission of the DMV record was harmless on the issue for which it was admitted where it only showed where appellant Wright resided in 2003. There was other evidence closer in time that showed Wright did not live at Jacinda Wright's residence. Further, Wright does not dispute the accuracy of the driving record as far as where he lived in 2003.

[12] State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013); State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)(whether a search violated the 4th Amendment depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and an this court must affirm if there is "any evidence" to support the ruling); State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005)(deferential standard of review applies in a challenge to a trial court's fact-driven affirmation of probable cause.).

[13] State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012); State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002)(appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling). In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law. Tynes, *supra*, *citing* State v. Asbury, 328 S.C. 187, 193, 493

Standard of Review
(Magistrate's Issuance of a Search Warrant)

Search warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).[14] When determining the propriety of the issuance of a search warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In making such a decision, this Court must consider the totality of the circumstances. Jones, *supra* (under this test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, in determining whether probable cause existed to issue a search warrant); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).[15]

"A search warrant may issue only upon a finding of probable cause." State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). Under S.C. Code Ann. Section 17-13-140

S.E.2d 349, 352 (1997).

[14] The Fourth Amendment evidences a "strong preference for searches conducted pursuant to a warrant. Illinois v. Gates, 462 U.S. 213, 236 (1983). Searches based on warrants will be given judicial deference to the extent an otherwise marginal search may be justified if it meets a realistic standard of probable cause. Bowie, *supra*, *citing* State v. Bennett, 256 S.C. 234, 241, 182 S.E.2d 291, 294 (1971); State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

[15] "The Fourth Amendment by its terms prohibits [only] unreasonable searches and seizures." McHam v. State, 404 S.C. 465, 480, 746 S.E.2d 41, 49, (2013), *quoting* New York v. Class, 475 U.S. 106, 116 (1986). The touchstone of an analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *See* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977), *quoting* Terry v. Ohio, 392 U.S 1, 19 (1968). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" Id. at 109 (citation omitted).

(1985), a search warrant may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant."[16] The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Dupree.[17] "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009). Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984).[18] South Carolina has adopted the "totality of the circumstances" test of Illinois v. Gates, in determining whether sufficient probable cause exists to issue a search warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The task of the issuing magistrate is simply to make a practical,

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[16] On appeal, Wright argues the affidavit did not comply with the more strict requirements of Section 17-13-140; however, from Respondent's review of the record, Respondent cannot find where this issue was raised below. As a result, Respondent believes this issue is not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). However, as stated, Respondent will respond to all of Wright's appellate arguments collectively under this argument.

[17] 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 the time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The magistrate should determine probable cause based on all of the information available to him at the time the warrant is issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

[18] Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). It is a fluid concept-turning on the assessment of probabilities in a particular factual context–nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Gates. It is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Id. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

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 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting Gates test). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742.[19] In determining whether a search warrant should issue, magistrates are concerned with probabilities not certainties. Bowie, *supra, citing* Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

An affidavit in support of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant. Sullivan, 267 S.C. at 614-15, 230 S.E.2d at 623 (search warrant can be supported by information given to the affiant by other officers); *see* Jones v. United States, 362 U.S. 257 (1960);[20] United States v. Ventresca, 380 U.S. 102, 108 (1965)(same); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(same); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974).[21]

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[19] "Under this formula, veracity and basis of knowledge are treated '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." Gates, 462 U.S. at 230; Weston, 329 S.C. at 290-91; 494 S.E.2d 802-03.

[20] *Overruled on other grounds* United States v. Salvucci, 448 U.S. 83 (1980).

[21] Observations by fellow officers engaged in an investigation with the search warrant affiant are a reliable basis for a warrant. Ventresca, 380 U.S. at 111; State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002); State v. Hage, 568 N.W.2d 741 (N.D. 1997); United States v. Morales, 238 F.3d 952 (8th Cir. 2001)(probable cause may be based on collective knowledge of all officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some communication).

As recognized in Gates, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no place. *See* Ventresca, 380 U.S. 102.[22] Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The decision to issue a search warrant must include consideration of the veracity of the person supplying the information and the basis of the affiant's knowledge. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). "The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" Dupre, 319 S.C.at 459, 462 S.E.2d at 282, *citation omitted.*[23] Eyewitnesses and non-confidential informants are often given a higher level of credibility when supplying information to support probable cause to search. *See* State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996).

Further, a warrant affidavit may be supplemented by sworn oral testimony before the magistrate. S.C. Code Ann. Section 22-3-710; Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006).[24] Oral supplementation may only be used by an affiant "to supplement or to amend incorrect information in an affidavit which was not knowingly and intentionally, or recklessly supplied by the affiant." State v. Jones, 331 S.C. 228, 500 S.E.2d 499 (Ct. App.

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[22] "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." Bowie, *citing* Sullivan, *supra*; Dupree, 354 S.C. at 683, 583 S.E.2d at 441.

[23] *See* Taylor (recognizing well-settled principle courts must give due weight to common sense judgments reached by officers in light of their experience and training), *citing* United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004).

[24] *See* State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975); Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999).

1999),[25] *affirmed* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Gore, 408 S.C. 237, 246, 758 S.E.2d 717, 721 (Ct. App. 2014)(noting the holding in Jones but pointing out "[o]ral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause.").

The Lack of Merit of Wright's Arguments

A. Lack of legitimate expectation of privacy in the premises searched

To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show they have legitimate expectation of privacy in the place to be searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one society recognizes as reasonable. Oliver v. United States, 466 US. 170, 177 (1984), *citing* Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, concurring). It is fundamental Fourth Amendment rights are personal in nature and may not be vicariously asserted. Rakas, 439 U.S. at 133-34. A person aggrieved by the introduction of evidence secured by an illegal search of a third person's premises or property has not suffered any infringement upon his Fourth Amendment rights. Id. at 134. Consequently, as Judge Hayes correctly found, a person challenging the legality of a search bears the burden of proving that he has a legitimate expectation of privacy in the premises searched. Rakas, 439 U.S. at 143.

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[25] This Court noted in Jones what its decision did not do: "First, our holding does not prevent oral *supplementation* of a warrant affidavit which contains false information. In other words, oral supplementation pursuant to Sachs, *supra*, is not affected by this decision so long as it does not supplant false information knowingly and intentionally, or recklessly, provided by the affiant. Second, our holding does not prevent oral substitution of truthful information for false information contained within an affidavit so long as the affiant does not knowingly and intentionally, or recklessly provide it." Id.

During the suppression hearing, Wright personally offered no testimony on this issue. Wright did not call his wife either. Wright did call his former probation officer; however, he could not verify where on Kate's Bay Road, he supervised Wright in *March* of 2012. And, he testified his supervision ended in March of 2012. SCDMV records from 2003 indicated Wright lived at *3643* Kate's Bay Road, not 3635 Kate's Bay Road, his wife's residence. (R. 130, 144). Officer Chatfield testified that on May 2, 2012 [the day this search warrant was issued], when he interviewed Wright, Wright informed Chatfield his residence was in Columbia, S.C. **not on Kate's Bay Road**. (R. 129).[26] In June of 2012, when Wright was released on bond, he indicated his address was **not 3635 Kate's Bay Road** but another location. (R. 136, State's Ex. 5). The issue on appeal is whether Judge Hayes' ruling, that Wright had failed to meet his burden of proof to show a legitimate expectation of privacy in the premises searched, is supported by *any evidence*. Taylor; State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); Tynes; Brockman. The record clearly shows that it is. Id. As a result, there is no merit to this appeal.[27]

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[26] Earlier on the issue of probable cause to issue the search warrant, Detective Cox testified that Detective Daniel Spencer went to Jacinda Wright's residence and made contact with her and determined at that time that that is the residence where "they" reside. (R. 56-57). There was no explanation who "they" are.

[27] In his brief, Wright also argues the testimony of his wife's aunt in support of his argument of an expectation of privacy in his wife's home. However, Wright did not call his wife's aunt during the suppression hearing and offer any evidence from her on this issue. Wright's wife's aunt did not testify until during the trial before the jury. Wright also argues Captain Buchanan saw Wright coming and going from the residence in the days before the murder. (See IBOR, p, 5). That was not the testimony. Captain Buchanan saw the vehicles coming and going from the residence in the days leading up to the murder. (R. 55, ll. 4-6).

B. Wright's challenge to the search warrant and search has no merit

Wright alleges the affidavit contains recklessly false statements and the affidavit is not supported by probable cause.[28] Wright is wrong on both points.

The sworn affidavit states the victim was shot and killed at 5456 Figure Eight Rd., located in the Myrtle Beach section of Horry County, and police arrived at the crime scene on May 1, 2012. These statements are true and were learned by detectives through the investigation. Wright does not contest the veracity of these statements. The affidavit states a named co-defendant, Lanard Powell, informed law enforcement the shooter was Marcus Dewain Wright, and he fled the scene at the above said location in a black in color BMW vehicle. This statement is true and was learned through the investigation. (R. 76, 78-79). Wright does not contest the veracity of these facts. The affidavit states Powell informed police Wright then later switch[ed] getaway vehicles to a dark in color Cadillac Escalade. According to Detective Cox' sworn testimony at the suppression hearing, this information was related to police by Powell.[29]

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[28] Wright conceded below that there was no intentionally false statements by the affiant in filling out the search warrant affidavit. (R. 82, ll.12-16).

[29] Respondent has reviewed *the transcript* of Lanard Powell's orally recorded statement to police apparently prepared by the defense. Respondent cannot find a reference in that transcript where Powell told police Wright changed vehicles into a dark in color Escalade. In one portion of the statement, Powell is asked if Wright met him at a pawn shop in the Escalade, and Powell states he did not see him in that vehicle. However, Detective Cox testified at the suppression hearing that the actual recording of Powell's statement would be more accurate than the transcript that defense counsel submitted. Additionally, defense counsel's transcript indicates there are portions of the tape that are inaudible. Further, while Cox testified the oral recorded statement of Powell was the only interview of Powell, upon Respondent's review of the transcript of Powell's statement, it is clear that Powell talked to police in the police car on the way to the police station, and he mentions having talked to other police officers who were not in the interview room. Detective Cox testified at the suppression hearing that Powell definitely told them that Wright switched vehicles after the murder from the BMW into the Escalade. Further, Detective Cox testified at the hearing that Qwanda Caldwell-Brown also informed police Wright switched vehicles from the BMW to the Escalade after the murder. Both Powell and Qwanda testified

(R. 55, ll. 12-19). Further, Qwanda Caldwell-Brown, who police interviewed before Powell, informed police of the same information, including the fact Wright switched vehicles from the BMW into the dark in color Cadillac Escalade. (R. 55, ll. 7-11). Wright does not argue on appeal this statement in the affidavit was false or inaccurate. (IBOA). The affidavit then states that the shooter then drove to the address of 3635 Kates Bay Road which is in the Conway section of Horry County and left the above said vehicle [the Escalade] at that address. This is a true statement and came from several sources of information gathered during the investigation including the previously mentioned information or facts developed above. Additionally, Captain Dale Buchanan, who lived in the area of Wright's wife's residence had seen the black BMW and the dark Cadillac Escalade coming and going from the wife's residence in the days leading up to and on the day of the murder. (R. 54, l. 21 – 55, l. 7). Police also verified through going to the residence of 3635 Kate's Bay Road, after the murder, the dark in color Cadillac Escalade was *parked behind* the wife's residence. (R. 55, l. 24 – 56, l. 5, 78). The search warrant states the vehicle is at the location. The affidavit then states the co-defendant also informed law enforcement the shooter obtained the murder weapon, from his wife, at the above location. What the co-defendant Powell actually told the officers verbatim was the shooter, Wright, was carrying a firearm on the day of the murder, and the firearm was owned by his wife, Jacinda. (R. 73, 75-76). So, the weapon *did not* belong to Wright, and he would had to have obtained the firearm *from his wife*, who was the registered owner. The investigation, including a check of the property records and going to the residence, revealed Wright's wife, the owner of the gun, *did reside* at

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during the trial that Wright switched vehicles from the BMW to the Escalade after the murder.

3635 Kate's Bay Highway.[30] Further, the officer provided sworn oral testimony to the magistrate that SLED traced Wright's phone and had detected it sending a signal at the 3635 Kate's Bay Highway address on May 1, 2012, which would have been shortly after the murder. (R. 61-72).[31] This information was also gathered during the investigation and came from SLED to Horry County police. (R. 54, ll. 9-20, R. 68-72). Finally, the affiant stated that it is believed the shooter transported the murder weapon in the Cadillac Escalade back to the said residence and it may still be present in the home and/or described vehicles. This information was based on the fact investigators had been unable to locate the murder weapon, Wright had initially placed the gun in the black BMW, and then changed vehicles into the Escalade and parked it behind Jacinda's [the owner of the gun's] residence, which had been confirmed by an officer who had gone to the scene. Further, the sworn supplemental testimony before the magistrate was S.L.E.D. had traced Wright's cell-phone to the residence to be searched, on May 1st, the night immediately following the murder.

As a result, based on the totality of the circumstances outlined in the affidavit alone or the affidavit in conjunction with the sworn oral testimony, and considering the nature of the evidence sought (the murder weapon or any evidence related to the murder), the type of offense involved (murder), and the experience of the officer involved, the magistrate made a practical, common sense decision **a fair probability** existed additional evidence regarding the murder, including the murder weapon, could be found in or at the residence of the murderer's wife, the

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[30] Police admitted at the pre-trial hearing the prepositional phrase, "at the above location," was factually incorrect. Powell told police the shooter, Wright, got the gun from his wife, who was the owner. Police determined through their own investigation Wright's wife resided at 3635 Kate's Bay Highway.

[31] The murder was committed shortly before midnight on April 30th. Police did not arrive at the crime scene until just after midnight, May 1st.

registered owner of the gun. State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990)(magistrate is to make practical, common sense, decision whether under the totality of the circumstances there is a fair probability evidence of a crime will be found in a particular location); [32] United States v. Severance, 394 F.3d 222, 230 (4th Cir.), *vacated on other grounds*, 544 U.S. 2047 (2005)(recognizing the 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.); United States v. Suarez, 906 F.2d 977, 979 (4th Cir. 1990)(noting search warrant application was based on officer's surveillance of defendant during day before search, when he was seen walking to targeted residence of his girlfriend). A practical, common sense, and logical interpretation of the affidavit accompanying the warrant in this case, along with the deference which must be accorded a magistrate, overcomes any deficiency alleged by Wright. State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d, 129, 132 (1984).

Further, even though there are some factual inaccuracies in the affidavit, removing any factual inaccuracies, the affidavit alone, and the affidavit with the supplemental sworn testimony,[33] provided sufficient probable cause to justify issuance of the search warrant. Franks

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[32] Police were working together in a joint criminal investigation. The chief investigator reported to the affiant information and facts developed by criminal investigators at the scene and during the investigation. These facts were included in the warrant and accompanying affidavit the affiant provided to the magistrate. There was no confidential informant, concerned citizen, or anonymouns tipster involved in this investigation, so there was no requirement the affiant corroborate the information provided by other officers in the affidavit. *See* Gates. The salient facts in the affidavit were provided by criminal investigators engaged in a joint criminal investigation for murder who gathered the facts they directly observed. The magistrate could rely on this in determining the reliability and credibility of the information averred to in the affidavit. Taylor; Dupree; Fisher; Perkins. There is no merit to Wright's argument. Sullivan. *See* State v. Pressley, 288 S.C. 128, 341 S.E.2d 626 (1987)(during the execution of a lawful search, an officer may seize items in plain view that are related to the crime).

[33] Contrary to Wright's argument in his brief, the affiant was not attempting to supplant,

v. Delaware, 438 U.S. 154 (1978).[34] "There will be no Franks violation if the affidavit ... still contains sufficient information to establish probable cause." Missouri, at 554, 524 S.E.2d at 397, citing Franks, 438 U.S. at 171-72.[35]

In State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2006), this Court held the trial judge erred in suppressing evidence obtained by a search warrant containing falsified or incorrect information in the affidavit, where such information was not directly relevant to the search. In State v. Rutledge, 373 S.C. 312, 644 S.E.2d 789 (Ct. App. 2007), this Court found where the search warrant affidavit stated officers recovered marijuana, marijuana seeds, and marijuana stalks from 162 Bailey Avenue, the fact officers actually found marijuana residue in a trash can outside of the residence, which affiant stated to the magistrate in supplemental testimony at the time the warrant was issued, did not constitute reckless disregard for the truth.

While Wright may have shown negligence or inadvertence on the part of the affiant, he did not show the officer filled out the affidavit in reckless disregard for the truth or with the

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substitute, or amend incorrect information in the affidavit which was knowingly, intentionally, or recklessly supplied by the affiant. *See* Jones. The affiant and the State are using the "oral testimony" to supplement the search warrant affidavit, which is entirely proper. Gore, *supra.*

[34] In determining whether alleged misstatements render a search warrant invalid, the court must conduct the analysis set forth in Franks which outlined a 2 part test for challenging the warrant affidavit's veracity. First, to mandate an evidentiary hearing, there must be allegations of deliberate falsehood or of reckless disregard for the truth and those allegations must be accompanied by an offer of proof. Second, the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause. State v. Davis, 354 S.C. 348, 359-60, 580 S.E.2d 778, 784 (Ct.App. 2003), *citing* State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

[35] *See* Sachs, 264 S.C. at 555, 216 S.E.2d 501("However, even if the officer was delict, so long as probable cause was established by affidavit or affirmation without the aid of the erroneous fact, the warrant satisfies the constitutional demands."); Rugendorf v. United States, 376 U.S. 528 (1964)(even if a veracity challenge were permitted, the alleged factual inaccuracies in that case's affidavit were only of peripheral relevancy to the showing of probable cause, and not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit).

intent to deceive or mislead the magistrate. Detective Weaver received the information he put in the affidavit from Detective Cox. He drafted the affidavit in the heat and hurry of an ongoing murder investigation. Any misstatements in the affidavit were supported by other information gained during the murder investigation.[36] Even striking from the affidavit those statements alleged to be inaccurate or erroneous, there is still sufficient probable cause to issue the warrant for Wright's wife's residence to look for the murder weapon or evidence of the crime. Franks. *See* State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999)(magistrate's task is simply to make a practical, common-sense decision whether, given all the circumstances there is **a fair probability** evidence of a crime will be found in a particular place).

The Exclusionary Rule Should Not Apply

Even if Judge Hayes erred in finding the magistrate's determination of probable cause was supported by substantial evidence, the exclusionary rule should not apply. The U.S. Supreme Court and our appellate courts have recognized the exclusionary rule should only apply as a last resort, only after balancing the deterrence value verses the societal costs, and only when there is flagrant police misconduct. Davis v. United States, 131 S.Ct. 2419 (2011); State v.

[36] Here, police knew through their investigation the victim had been murdered [shot to death] shortly before midnight of May 1st. A named co-defendant, Lanard Powell, informed police Wright was the person who shot and killed the victim and Wright was carrying a gun on the night of the murder that Wright had received from his wife, Jacinda, the gun's owner. Police confirmed Jacinda lived at 3635, Kate's Bay Road. Wright had left the murder scene in a black BMW, but he had switched vehicles into a dark in color Cadillac Escalade. The black BMW and the dark in color Escalade had been seen by a policeman, who lived in the area, coming and going from Jacinda's home in the days leading up to and on the date of the murder. Police confirmed the Escalade was now parked, just 1 day later on May 2nd, at the residence of Wright's wife, the same person from whom Wright had obtained the weapon, the gun's owner. And, police had traced Wright's cell-phone to the wife's residence on the night of May 1st.

Brown.[37] Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. Davis; Herring, 555 U.S., at 144. The conduct of the officers here was neither of these. Under the circumstances of this case, exclusion would not further the purposes of the exclusionary rule, and suppression is not proper. Id.; State v. Harvin, 343 S.C. 190, 194, 547 S.E.2d 497, 500 (2001)(main purpose of the exclusionary rule is deterrence of police misconduct). *See* Gates (recognizing affidavits are drafted by non-lawyers in the midst and haste of a criminal investigation). At most, there was some miscommunication of specific details of information police had from the chief investigator to the detective directed to obtain the search warrant. The conduct of the investigators here did not violate Wright's 4th Amendment rights deliberately, recklessly, or with gross negligence. Herring, *supra*.[38] The evidence from Wright's wife's residence should not be excluded. Id.[39]

The Evidence is Admissible under the Good Faith Exception

In addition, judicially created exceptions have been established to ameliorate the harsh effects of the judicially-created exclusionary rule. Id.; Brown. The evidence recovered from Wright's wife's residence is admissible under the "good faith" exception to the warrant

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[37] *See* Herring v. United States, 555 U.S. 135 (2009); Hudson v. Michigan, 547 U.S. 586 (2006); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012); Weston, 329 S.C. at 293, 494 S.E.2d at 804; State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471 473 (1987); Sachs 264 S.C. at 566, 216 S.E.2ad at 514; State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324 (Ct. App. 2011).

[38] Further, under the facts of this case, suppression would make no sense where there is no evidence of police misconduct, there is no question the residence searched was Wright's wife's; officers had probable cause to search the residence; they did not conduct a warrantless search, but obtained a search warrant from a neutral and detached magistrate before entering Wright's wife's residence. *See* Illinois v. McArthur, 531 U.S. 326 (2001); Davis, *supra*; Brown, *supra*.

[39] Furthermore, if Wright's argument is correct, that he had a possessory interest in the residence of his wife, this only adds to the probable cause police had to search the residence since he had been identified as the shooter and he had obtained the weapon from his wife, its owner.

requirement. Herring, 555 U.S. 135; Leon, 468 U.S. 897; United States v. Williams, 548 F.3d 311 (4th Cir. 2008); State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). In Leon, the Court held the exclusionary rule does not ban evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but later found to be invalid for lack of probable cause. Id. As the Court made clear in Herring v. United States:

> These principles are reflected in the holding of Leon: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated warrant. 468 U.S., at 922, 104 S.Ct. 3405.

Id., 555 U.S. at 142. The Fourth Circuit has addressed the "good faith" exception at length:

> As the Supreme Court instructed in Leon, "a court should not suppress the fruits of a search conducted under the authority of a warrant, even a 'subsequently 'invalidated' warrant, unless 'a reasonable well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" United States v. Byrum, 293 F.3d 192, 195 (4th Cir. 2002) (*quoting* Leon, 468 U.S. at 922, n. 23, 104 S.Ct. 3405). The Leon Court explained "that the deterrence purpose of the exclusionary rule is not achieved through the suppression of evidence obtained 'by an officer acting with objective good faith' within the scope of a search warrant issued by a magistrate." United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004)(*quoting* Leon, 468 U.S. at 920, 104 S.Ct. 3405, 82 L.Ed. 2d 677). "Hence, under Leon's good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if the officer's reliance on the warrant was 'objectively reasonable.'" Id. (*quoting* Leon 468 U.S. at 922, 104 S.Ct. 3405, 82 L.E.2d 677).

Williams, *supra* at 317.[40] South Carolina also recognizes a good faith exception to evidence seized pursuant to a warrant defective under S.C. Code Ann. Section 17-13-140, if the officers

[40] Leon admonished searches conducted "pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." 468 U.S. at 922 (internal quotation marks omitted). An officer's reliance on a warrant would not qualify as

made a good faith attempt to comply with the affidavit requirement under S.C. Code Ann. Section 17-13-140. Sachs. *See* McKnight, 291 S.C. at 112-13, 352 S.E.2d at 472 (refusing to apply exception where officers failed to attempt to comply in good faith to the affidavit requirements), *and* State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *Toal, C.J. concurring in result.* Recently, the Court again recognized a good faith exception to the search warrant requirement and the requirements of Section 17-13-140 in State v. Herring.

> Recently, however, we recognized that there is a "'good faith'" exception to the statute's [S.C. Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures." State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* McKnight.[fn 6] [In Covert, we left open the question of whether a good faith exception applies when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." Id. at 209, 675 S.E.2d at 743. Given our recognition of an exception for an officer's good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, Such that the search should be upheld.]

Herring, 387 S.C. at 215. Here, police did not search Wright's wife's residence without a warrant, but obtained what they believed to be a valid search warrant from a neutral and detached magistrate, who independently determined probable cause existed; and, in reliance on

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"objectively reasonable," however, in 4 circumstances: (1) the magistrate in issuing the warrant was misled by information in an affidavit the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the magistrate acted as a rubber stamp for the officers and so wholly abandoned his detached and neutral judicial role; (3) a supporting affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) a warrant is so facially deficient, i.e., in failing to particularize the place to be searched or the things to be seized, the executing officers cannot reasonably presume it to be valid. Williams, 548 F.3d at 317; Weston; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990); Adolphe; State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).

that warrant, police searched the residence for the murder weapon and evidence related to the murder. The affidavit was not based on an informant's information, but on facts developed in the murder investigation. On this record, none of the 4 circumstances listed above barring the application of the "good faith" exception apply: (1) There is no evidence the magistrate was misled by knowingly false or recklessly false information;[41] (2) There is no contention the magistrate was not neutral and detached; (3) The affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" (4) The warrant particularly describes the place to be searched and the items to be searched for. This was the residence of Wright's wife. The good faith exception should apply and the exclusionary rule should not be enforced.

Harmless Error

Regardless, even if Judge Hayes erred in admitting this evidence, its admission was harmless because the evidence of Wright's guilt was overwhelming despite this evidence. State v. Herring (even if search of defendant's home was illegal, any error was harmless given the overwhelming evidence of the defendant's guilt independent of the evidence seized in his home), *citing* State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991)(improperly admitted evidence harmless given evidence of guilt). The State established Wright's guilt of each of the crimes through the testimony of several different

[41] While there may have been some factual inaccuracies or misstatements in the affidavit, those are attributable to the communication of information from one investigator to another who is directed to go obtain a search warrant during the heat and hurry of a murder investigation. Wright does not argue any intentional misstatements in the affidavit; he merely argues the misstatements were made in reckless disregard for the truth. Wright has not proven the statements were made with reckless disregard for the truth. The fact remains, officers had probable cause to search the residence based on information developed during the investigation.

witnesses including Roy Sinclair,[42] Veronica Chandler,[43] Mildred Small,[44] Lanard Powell,[45] Qwanda Caldwell-Brown,[46] the forensic evidence,[47] and the evidence gathered during the

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[42] At trial, Sinclair testified to the arrangement with Powell and Wright to allow them to sell drugs out of his home, the crime scene. Powell left the residence earlier in the evening of April 30th, with Powell's girlfriend. Wright remained at the home sitting at the kitchen table cutting up drugs with his pistol next to him. Wright was acting strangely before the victim was murdered, accusing Sinclair of saying something derogatory about a woman in the residence. Thereafter, the victim arrived and made the previously referenced comment to Sinclair to which Wright took offense. Wright then shot the victim with his gun. The victim was not armed. Sinclair fled the home, but as he was fleeing down the road, he overheard Wright tell the returning Powell that he [Wright] had just murdered the victim and Powell needed to get his stuff out of the residence.

[43] Veronica Chandler testified consistent with Sinclair. She was at Sinclair's home and witnessed the murder of the victim. Sinclair was also in the home and witnessed the murder. The victim came into the residence and made a remark to Sinclair that Wright took offense to. The victim was talking to Veronica when Wright shot the victim numerous times, and she, Veronica, fled outside. Wright left the scene after the murder, and Powell arrived and went into the home. Veronica immediately left the scene, stopped at a store and called her husband and the police.

[44] Mildred Small testified she was present in the mobile home with Veronica who was in the living room as Veronica described. Sinclair was also there. There was a man in the kitchen at the kitchen table [Wright]. The victim came in the residence and then someone started shooting and the victim was killed. Mildred fled outside and Veronica fled outside as well. Wright left the scene; then another man [Powell] arrived and went into the home with a gun but did not fire his weapon. Mildred and Veronica left the scene.

[45] Powell testified as follows: There was an agreement with Sinclair in which Wright and Powell were allowed to sell drugs from Sinclair's home. Powell was selling drugs for Wright. Powell and his girlfriend left the home before the murder occurred to make a drug sale. When they left, Wright was still in the home sitting at the kitchen table. Wright carried a *.40 caliber* pistol, which belonged to Wright's wife. When Powell and Qwanda returned, Wright was leaving the residence in his black BMW. Wright spoke to Powell from his vehicle. Powell did exactly what Sinclair overheard Wright instruct Powell to do. Powell went in the residence, saw the victim had been killed, and removed drugs and cash from the residence and put them in his car. Powell took the victim's car keys, but he did not see any weapon on the victim or remove any other weapon from the scene. Powell left the scene in the victim's vehicle with his girlfriend following in Powell's vehicle. Powell and Wright made contact by phone; Powell met up with Wright, and he and Wright attempted to destroy the victim's car with gas. Powell and Wright then got a rental car and hid out at different motel rooms until they were arrested. Powell rented the last room under an alias using a fake I.D. Wright had given him. While Powell was with Wright before they were arrested, Wright told him he killed the victim.

investigation.[48] As a result, even if the admission of the fruits of the search of Jacinda's home was error, *its admission was harmless given the overwhelming evidence of Wright's guilt independant of that found in Jacinda's residence.* Herring; Gillian; Garner; Baccus.

ARGUMENT II.

Judge Hayes did not err in denying the motion to suppress the evidence found in the hotel room rented by Lanard Powell because the initial intrusion into the motel room was reasonable and the evidence was in plain view.

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[46] Qwanda Brown testified consistent with Powell. Powell was selling drugs out of Sinclair's home. She and Powell left the home before the murder, but Wright was still at the home. When they returned, Wright was leaving the residence in his black BMW. Wright spoke out the window of his vehicle to Powell and told him to pick up the shell casings. There was a dead man lying on the floor inside the front door of the home. Powell entered the home with his 9mm but did not fire his weapon. Powell returned with a book bag containing something and put it in the car Qwanda was driving. She and Powell left the scene with Powell driving the victim's car. They later met up with Wright, who had switched vehicles, and they disposed of the victim's vehicle on a dirt road. She eventually rented a motel room for the 3 of them. They picked up a rental car, which Wright and Powell got into, and she returned home. Wright told her he killed the victim, and she heard Wright make an admission to killing the victim in the first hotel room.

[47] Crime scene technician's established consistent with the above witnesses' testimony the victim was murdered inside Sinclair's home; 3 fired *.40 caliber* shell casings were found inside the home; 2 of these casings were found under the cushions of a couch in the living room and 1 on the floor between the kitchen and the living room. No other shell casings were found. No weapon was found on or around the victim. The autopsy findings were consistent with the above witnesses' testimony and with what was found at the crime scene. The victim died from multiple gunshot wounds. The projectiles taken from the victim's body were consistent with a *.40 caliber* weapon and not a 9 mm pistol. Forensic examination revealed the 3 fired *.40 caliber* shell casings found at the crime scene were fired by *the same gun.* Even if the court were to exclude the 2 fired shell casings found in Jucinda's home, the firearm's examiner still testified the 3 fired shell casings found at the murder scene were fired by 1 and the same gun.

[48] Police arrested Wright and Powell together in the same motel room. In the rental car in the motel parking lot was a gun case containing 2 *.40 caliber* clips containing *.40 caliber* ammunition and registration papers for a *.40 caliber* pistol purchased by Wright's wife. Wright did not challenge the search of the red Camaro at trial or on appeal. Police searched the BMW which Wright fled the crime scene in and found 1 unfired *.40 caliber* bullet. Wright did not challenge the search of the BMW below or on appeal.

Standard of Review

When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004). "The appellate court will reverse only when there is clear error." Id..

The Seizure of the Evidence in Room 105 of the Sleep Inn Motel

On May 2, 2012, police tracked Wright and Powell to the "Sleep Inn" motel in Conway. Police already had an arrest warrant for Powell for murder, and were looking for Wright and Powell as suspects in connection with the shooting murder of Jerome Green. Police determined through the desk clerk Powell had rented a room with a fake I.D. in the name of Desmond Jetter, and by showing the clerk a photograph, that Wright was in the same motel room, Room 105. Police surrounded the motel room. Police had the clerk call the room and ask the occupants to step outside. When Powell or Wright opened the door to the room and stepped outside and saw it was police, that individual fled or retreated back into the room and attempted to slam the door shut, but police were able to prevent them from doing so and entered the room and detained Powell and Wright. Without searching, police saw in plain view on top of a refrigerator a quantity of crack and powder cocaine and over $3,000. Police did not search the room, but secured it and obtained a search warrant, and pursuant to its execution, seized the drugs and cash.

What Occurred Below

Wright moved *in limine* to suppress the fruits of the search of the motel room rented by Powell. The State called 2 witnesses at the suppression hearing, Detectives Mark Chatfield[49] and

[49] Detective Chatfield testified that on May 2, 2012, he went to the Sleep Inn motel as part of the investigation of the victim's murder, because police received information 1 person they were looking for, Wright, was at the motel. This information came from Lt. Squires of the Horry

Paul Johnson[50] of the Horry County Police Department and introduced the search warrant obtained by police for the room. The State also introduced the arrest warrant for Powell obtained the day before police entered Room 105. Wright did not testify or call witnesses at the hearing.

County P.D. who was receiving information from S.L.E.D. who was tracing Wright's cell phone and was receiving "pings" from the phone at the motel. Squires directed Chatfield to go to the motel and attempt to locate Wright. Chatfield also went to the motel in an attempt to locate Lanard Powell, Wright's co-defendant. When Chatfield arrived, he met Sgt. Trexell, his supervisor, who had a driver's license photo of Wright and showed it to the motel desk clerk who stated Wright was in Room 105. The clerk called Room 105 while police officers were standing outside the room. Someone stepped out of the room. Chatfield could not remember if it was Wright or Powell. That person was identified as 1 of the individuals police were looking for. Police identified themselves, and that person, either Powell or Wright, fled or retreated back in the room and attempted to close the door. Police held the door open and made entry, and Wright and Powell were detained and taken into custody. Chatfield was not aware an arrest warrant for Powell for murder was outstanding at the time police entered the room. When police entered the room, there were illegal drugs and cash in plain view. Wright and Powell were taken out of the room. Detective Johnson entered the room at that time. Chatfield provided Johnson with the information provided by the clerk regarding the identity of who was in the room. The room was not searched. Everyone backed out of the room, it was secured, and Johnson went to obtain a search warrant for the room from a magistrate. (R. 103-07).

[50] Detective Johnson testified he was instructed to go to the Sleep Inn motel *in relation to the homicide investigation* of Jerome Green's death. He was asked by Lt. Stewart to assist other officers in apprehending Wright. Johnson followed Stewart to the motel. Once there, he and other detectives set up an outside perimeter covering all exits. Det. Chatfield and Sgt. Trexell went to the front desk and the clerk confirmed Wright was in Room 105. At that time, Johnson positioned himself outside the window of the room in case the subjects inside ran or fled. It was then communicated to Johnson the front desk called the room and asked Wright to step outside. According to Johnson, once Wright opened the door and observed the police presence, he tried to close the door and at that time he was taken into custody. Johnson did not enter the room until after Wright and Powell were taken into custody. When the officers who entered the room notified others Wright was under arrest, Johnson went around to the front of the room. Before he entered the room, the door was open, and Johnson could see an amount of narcotic drugs sitting on the refrigerator of the room in plain view. Wright and Powell were removed from the room. Everyone left the room, it was secured, and Johnson went and obtained a search warrant from a magistrate. The search warrant was dated May 2, 2012. Johnson returned to the motel and executed the search warrant. Johnson seized the cocaine and crack and the $3,000 found in the motel room in plain view. There were 2 individuals who were arrested, detained, or taken into custody in Room 105, Wright and Powell. Johnson identified State's Ex. 2, the arrest warrant for Powell for the crime of murder. Johnson confirmed the arrest warrant was issued and signed by

The Search Warrant

The search warrant Detective Johnson obtained provided as follows:

STATE OF SOUTH CAROLINA **AFFIDAVIT**
COUNTY OF HORRY

Personally appear before me one Detective Paul Johnson, who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises of this County.

DESCRIPTION OF PROPERTY SOUGHT

Specifically, cocaine, marijuana, heroin, crack cocaine, and any other illegal controlled and controlled substances. Items used to facilitate the distribution of controlled substances such as scales, baggies, vials, containers, etc, firearms, ledgers, books and papers. Any computers, hard drives or any type of electronic storage devices including any GPS devices. Any cellular devices used for incoming, outgoing calls, text messages and voice messages to include telephone numbers from the address book and contacts list. Any and all saved or deleted text messages and voice messages. Any and all photograph and videos saved to the cellular SIM car. Any paraphernalia used to facilitate the use any controlled substances such as pipes, bongs, spoons, straws, hypodermics, and etc. that could show that the occupants of the residence are involved with the possession, personal use/or sale of controlled substances. Any currency, monies, or merchandise related to the sale of marijuana or any other illegal controlled substances. Items of personal property that may establish ownership and control of areas searched.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

The place to be searched is the Sleep Inn Hotel located at 3145 Church Street Conway, South Carolina 29526. The room to be searched is specifically room 105. The room is plainly marked with a plastic marker with the number 105 beside the room door. Coming from ML Brown Public safety Building you will travel south west on Main street for 1.1 Mile and then turn left onto 16th Avenue and travel .5 Mile. Then you will turn right onto Highway 501 and travel 3.1 Miles and you will arrive at the Sleep Inn Hotel which will be located on the left side of the Highway.

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the Magistrate on May 1, 2012, the day before police entered Room 105 and arrested Powell. The arrest warrant was marked as State's Ex. 2 for the purpose of the suppression hearing. (R. 108-09, 112-13, State's Ex. 1 [search warrant], State's Ex. 2).

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

I am a police officer, certified in South Carolina. I have been employed by the Horry County Police Department for 5 years and am currently assigned as a Detective. I have received training in the following: Criminal Investigations Class at the SC Criminal Justice Academy. I have been involved in other search warrants relating to the seizure of illegal narcotics. I am authorized to make searches and seizures. On May 2, 2012 Detectives with the Horry County Police Department responded to 3345 Church Street Conway South Carolina at the Sleep Inn Hotel in reference to a wanted murder suspect. Upon arrival Detectives confirmed with the front desk that the suspect was in room 105. The front desk called the suspect and when the suspect stepped outside the room, the detectives confirmed the identity of the suspect. While the front door was open the detectives observed in plain view a baggy of off white substance and a baggy of green leafy substance on top of the refrigerator. It is my belief that there may be more illegal substances in the residence.

(R. 596; State's Ex. 1). The search warrant affidavit was sworn to and the search warrant was signed by the Magistrate on May 2, 2012 at 9:50 a.m. (R. 596; State's Ex. 1).

At the conclusion of the *in camera* hearing, Judge Hayes denied the motion to suppress. Specifically, he found the officers had the right to act as they did in entering the room and eventually recovering the evidence that was in plain view. He found that based on articulable reasonable information the officers had at the time, their actions were reasonable. (R. 121-22).

Analysis

Judge Hayes did not err. There were several recognized exceptions to the search warrant requirement making entry by police into the motel room reasonable; and, as a result, regardless of the subsequent search warrant, the evidence seized in plain view was admissible.[51]

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[51] "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced in evidence." State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). To satisfy the "plain view" exception, two elements must be met: "(1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391

The initial intrusion was reasonable and the evidence was in plain view

Exigent Circumstances

Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. Herring, 387 S.C. at 210, 692 S.E.2d 490, *citing* Katz v. United States, 389 U.S. 347, 357 (1967). The Supreme Court has recognized one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. Id., *citing* Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." Id., at 210, *quoting* Scott v. United States, 436 U.S. 128, 138 (1978). "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Id., *citing* Schmerber v. California, 384 U.S. 10, 15 (1948). "The likelihood a suspect will flee is also an exigency warranting such an intrusion." Id., *citing* Johnson v. United States, 333 U.S. 10, 15 (1948). "Protecting the safety of police officers has also been held an exigent circumstance." Id., *citing* Chimel v. California, 395 U.S. 752 (1969).[52] "In such circumstances, a protective sweep of the premises may be permitted." Wright, *quoting* Herring, *citing* Maryland v. Buie, 494 U.S. at 337, *and* State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344 (Ct. App.

S.C. 436, 443, 702 S.E.2d 324, 327 (2011); Brown, 289 S.C. at 587-88, 347 S.E2d 882. *See also* State v. Abdullah, 357 S.C. 344, 351-52, 592 S.E.2d 344, 348-49 (Ct. App. 2004). The drug and cash evidence was admissible because it was seen in plain view; its illegal nature was readily apparent, and officers were lawfully within the interior of the room to detain the first subject. State v. Johnson, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014).

[52] "A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling." State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324 (2011), *quoting* Herring, 387 S.C. at 210, 692 S.E.2d at 495, *citing* Minnesota v. Olson, 495 U.S. 91, 100 (1990).

2004). "The Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." Id., *quoting* Whren v. U.S., 517 U.S. 806, 814 (1996)(citations omitted)(emphasis in original). In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action. Id., *referencing* Whren, 517 U.S. at 815.

Police initially entered the motel room because an identified murder suspect, either Wright or Powell, fled or retreated into the motel room after recognizing police and attempted to close the motel room door. Exigent circumstances justified the officers' entry into the room.[53]

The initial entry was lawful pursuant to a Terry *stop*

Further, the police officers could lawfully seize or detain both Wright and Powell pursuant to Terry v. Ohio, 392 U.S. 1 (1968) and its progeny. Under Terry and its progeny, a law enforcement officer may briefly detain and frisk a suspect, if the officer has a *reasonable*

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[53] In this case, police responded to the motel because they received information S.L.E.D. had traced Wright's cell phone to the motel. The clerk confirmed Wright was in Room 105. Powell rented the room under an alias. The above information allowed police to move forward in their investigation. Police could approach the door of the motel room and even knock to speak with Wright or Powell. Wright, *supra*, *quoting* United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990)(citations omitted)("A policeman may lawfully go to a person's home to interview him ... In so doing, he obviously can go up to the door ....). Further, immediately outside of a motel room is a common area of the motel, not private property. When Wright or Powell opened the door to the motel room and stepped outside, that person was identified by police as 1 of the individuals they were looking for as suspects in the shooting murder of the victim. When that individual recognized police, he fled back into the motel room and attempted to close the door. "Exigent circumstances developed when the suspects [sic] started fleeing." Wright, 391 S.C. at 445, 706 S.E.2d 324. Moreover, the presence of another individual or potential other individuals in the motel room who might be armed created a potential danger to the officers. Id. "Hence, the deputies had the authority to perform a protective sweep of the premises." Wright, 391 S.C. at 445. The officers could stop the individual from closing the motel room door and enter to perform a protective sweep. Id.[53] "Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon." Herring, 387 S.C. at 211, 692 S.E.2d 490. The drugs observed in plain view in the motel room were admissible at trial. Wright.

suspicion that the person has been *involved in* or is *wanted in connection with a completed felony*. United States v. Hensley, 469 U.S. 221 (1985);[54] United States v. Place, 462 U.S. 696 (1983); State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992).[55]

Protective Sweep

Further, entry into the motel room was justified by the recognized exception of "protective sweep." In State v. Brown, 289 S.C. 58, 347 S.E.2d 882 (1986), our Supreme Court recognized under almost the same exact factual scenario, police had the right to make a protective sweep of the interior of a motel room after apprehending a suspect who stepped outside the motel room for whom police had no arrest warrant or search warrant for the motel room. Id. The Court found police had the right to conduct a protective sweep of the motel room to make sure no further subjects were within the room that could endanger the officers, and

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[54] *See* State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984); State v.Khingratsaipon, 352 S.C. 32, 572 S.E.2d 456 (2002); State v. Morris, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993).

[55] When the officers responded to the motel, they were in the middle of a murder investigation regarding a shooting death. They were looking for 2 subjects, Wright and Powell, who were suspects in the shooting murder. Police had received information Wright was at the motel. S.L.E.D. had traced Wright's cell phone to the motel. The desk clerk confirmed Wright was in Room 105. Powell, the other person they were pursuing, actually rented the room in a false name. (R. 279-81). Officers surrounded the room, and had the clerk call the room and ask Wright and Powell to step outside. One of the men [Wright according to Det. Johnson] opened the motel room door and stepped outside. His identity was confirmed. When he recognized police, he fled back into the motel room and attempted to close the door. *See* Illinois v. Wardlaw, 528 U.S. 119, 125-26 (2000). The officers stopped him from closing the door and escaping detention or apprehension. Officers entered the motel room and Wright and Powell were detained. Officers saw the drugs and cash in plain view while making a reasonable Terry stop or detention of the 2 subjects who officers had reasonable suspicion had committed and were wanted for a completed felony [murder]. Terry. Further, underscoring their reasonableness, they did not attempt to search the room, but secured it, and had an officer obtain a search warrant. They did not go in the room looking for narcotics but to detain or apprehend 2 wanted murder suspects for questioning. It was only after securing the warrant the room was searched.

anything found in plain view during that protective sweep would be admissible in evidence. Id.[56] However, in Brown, the case was reversed because the State failed to prove by any competent testimony the evidence recovered from inside the motel room was actually seen in plain view. *See* Brown, *supra*.[57] Here, the State established through the 1st officer who entered the room and the 2nd officer who was outside the room there were narcotic drugs visible in plain view.[58]

Police could enter to room to arrest Powell because police had a warrant for his arrest

Police could also enter Room 105 because they had an arrest warrant for the person who rented the room, Powell. *See* Payton v. New York, 445 U.S. 573 (1980)(An arrest warrant carries with it by implication the authority to enter the suspect's dwelling when there is reason to believe he is within); Goins v. State, 367 S.C. 568, 574, 726 S.E.2d 1, 4 (2012)("police are allowed to enter a hotel room to arrest an occupant when acting pursuant to a valid arrest

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[56] In Brown, the Court found the "exigent circumstances" exception to the warrant requirement did not apply because police had the motel surrounded for approximately 2 and 1/2 hours and could have gone and gotten a warrant. Id. However, the Court found that "the protective sweep" exception *did apply* for officer safety. *See* Brown.

[57] In Brown, the only witness who testified at the suppression hearing was Lt. Ennis who admitted he could not say under oath whether the seized evidence was in plain view or not. He did not go in the motel room. He would be relying on what other officers told him. Id.

[58] Here, officers were investigating a homicide in which the victim was shot 10 times. No weapon was found at the crime scene. Police had identified both Wright and Powell as suspects in the homicide and had actually obtained a warrant for Powell's arrest for murder. Police had information Wright was at the motel and confirmed he was in Room 105. Powell actually rented the room. When Wright or Powell opened the door to Room 105 and stepped out of the room, that person was identified by police. When that person recognized police, he fled or retreated back into the motel room and attempted to close the door. It was reasonable for police to believe that person *or* concealed persons remaining in the room might pose a danger to the officers or others given the crime they were investigating and the murder weapon was still missing. *See* Herring, 387 S.C. at 211, 692 S.E.2d 490 ("Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon."). It was reasonable for police to stop that individual from closing the motel room door and to enter the room to detain him, and police had the right to conduct a protective sweep of the room and detain any individuals within the motel room pursuant to Brown. The drugs and cash were in plain view.

warrant."); *See* State v. Asbury; 328 S.C. 187, 493 SE.2d (1997)(same); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981)(same).[59] It makes no difference the officers who testified at the suppression hearing were unaware of the arrest warrant; the knowledge of the other officers in the investigation, is imputed to the officers who were seeking to apprehend Powell, through the "fellow officer rule" or the "collective knowledge doctrine." Johnson v. State, 660 So.2d 648 (Fla. 1995)("knowledge of the existence of a valid warrant is imputed to all officers in the departments working on the case from the moment the warrant is signed, without regard to actual knowledge, at least where the arrest is prompted by the crime identified by the warrant or its accompanying papers").[60] As a result,

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[59] Powell rented Room 105 of the Sleep Inn with a fake I.D. Wright provided. (R. pp. 279-81). Police confirmed both subjects, including Powell, were in the motel room before approaching the room. (R. 317-20). Police had an arrest warrant for murder for Powell, which had been issued the day before the officers went to the motel, May 1, 2012. (R. 113, 602; State's Ex. 2 for Suppression Hearing). Officers entered the motel room on May 2, 2012. (R. 104, 113).

[60] Moreover, the collective knowledge doctrine provides an officer may act on instruction of another officer if the instructing officer or officers had sufficient information to justify taking such action [himself]. United States v. Hensley, 469 U.S. 221 (1985); United States v. Massenburg, 654 F.3d 480, 492 (4th Cir. 2011). *See* United States v. Joy, 336 F.App'x 337, 342 (4th Cir. 2009); United States v. McRae, 336 F.App'x 301, 305 (4th Cir. 2009)(collective knowledge doctrine can also supply reasonable suspicion), *citing* United States v. Hensley, 469 U.S. 221, 232 (1985); United States v. Wells, 98 F.3d 808, 810 (4th Cir. 1996)(Under the collective knowledge doctrine, police officers cooperating in an investigation are entitled to rely upon each other's knowledge of facts when forming a conclusion a suspect has committed or is committing a crime); United States v. Laughman, 618 F.2d 1067, 1072 (4th Cir. 1980); United States v. Pitt, 382 F.2d 322, 324 (4th Cir. 1967); Jones v. Camden Police Department, 2010 WL 3489021 (D.S.C. 2010), *Report and Recommendation*, (UNPUBLISHED). *See also* Morelli v. Webster, 552 F.3d 12, 17 (1st Cir. 2009)(doctrine applies to police "engaged in a joint mission" and "derives from a felt sense that officers acting in concert actually do, and are entitled to, assume that fellow officers are acting in a manner consistent with their legal responsibilities"), *cited in* Unites States v. Putt, 990 F.Supp. 2d 571 (E.D. Va. 2013); United States v. Williams, 627 F.3d 247, 252 (7th Cir. 2010)("[t]he collective knowledge doctrine permits an officer to stop, search, or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the given action").

police could lawfully enter the motel room to arrest Powell, and seize any items in plain view while lawfully in the room. *See* Johnson, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014).[61]

Entry Pursuant to a Lawful Warrantless Arrest

Further, police had the right to make a lawful warrantless arrest for a felony, and neither Wright nor Powell could defeat the arrest by retreating into the motel room to avoid arrest. United States v. Santana, 427 U.S. 38 (1976). Police officers can make a warrantless arrest for a felony when an officer of the law has reasonable grounds to believe a felony has been committed and the person arrested is the party who committed the felony. State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)(other citations omitted); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966). The limitation being the arrest must be in a public place. Kirk v. Louisiana, 536 U.S. 635, 123 S.Ct. 2458 (2002); United States v. Watson, 423 U.S. 411 (1976). However, once Wright or Powell stepped out of the motel room into a public place, they could not avoid a lawful felony arrest without a warrant by retreating back into the motel room. Santana.[62]

Inevitable Discovery

Further, the evidence would have inevitably been discovered. Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998).[63] Officers had the motel room

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[61] In Johnson, this Court found the initial entry into a motel room to arrest a subject for whom officers had an arrest warrant, who cracked the door and then backed away from the door into the room, was justified and resulting protective sweep was justified and evidence seized in plain view was admissible); State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997)(entry into residence was lawful where officers had reasonable belief suspect was home-evidence in plain view was properly seized).

[62] Santana, 427 U.S. 38 ("a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient escaping to a private place"). In Santana, the defendant was standing in the doorway of her house, and retreated into her home.

[63] *See* United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown (inevitable

surrounded. They were not going to allow Wright or Powell to escape.[64] As a result, the drugs and currency found on the refrigerator would have been inevitably discovered. Id.

The Search Warrant was Valid

Additionally, the search warrant was valid even though it *may* have contained a factual misstatement. Franks.[65] While this Court must determine the legality of the initial entry into the motel room, the Magistrate's sole determination was whether *there was probable cause to issue the search warrant to search the motel room for drugs or narcotics*, not the legality of the entry of the room. Even excluding any *possible* misstatement about when officers first saw the drugs in plain view, whether when the door was opened or after entry into the room, the fact remains officers inadvertently discovered drugs and currency in plain view. Further, the affiant saw the drugs in plain view from outside the motel room. Therefore, there was probable cause to issue the search warrant to search the motel room for drugs or narcotics. Franks.

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discovery is an exception to the exclusionary rule); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(remanding to determine if inevitable discovery applied); State v. Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013)(recognizing exception but finding exception not met); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted "if the government can prove the evidence would have been obtained inevitably."

[64] Wright and Powell would have eventually come out of the room and surrendered, justifying a protective sweep of the motel room under Brown and the discovery of the drugs in plain view, or officers would have eventually brought the arrest warrant for Powell to the scene and entered the motel room to arrest Powell, or would have gone and gotten a search warrant to enter the motel room and seize Powell and Wright and search for evidence of the crime of murder.

[65] The search warrant affidavit states that the officers who initially entered the motel room saw the drugs in plain view when the door was first opened and they were standing outside. The officer who obtained the search warrant testified before the jury that this was the information that was related to him before he went and obtained the search warrant. (R. 319-20). The affiant also testified at the suppression hearing that both officers who initially entered the room saw the drugs in plain view when the motel room door was first opened. (R. 112, ll. 7-23). However, at the suppression hearing, the officer who first entered the motel room was only asked what he saw after entering the motel room. (R. 105). In response, he stated he saw the drugs in plain view after entering the room. (R. 104-05).

The Exclusionary Rule should not apply

Further, the exclusionary rule should not apply in this situation. Johnson, 660 So. 2d 648 (finding exclusionary rule should not be applied where police had obtained valid arrest warrant for defendant but officer who actually made the arrest was not aware of the existence of the warrant; police had complied with the warrant requirement; there could be no remedial value in such a draconian penalty).[66] Further, police obtained a search warrant after inadvertently finding the drugs, and only then seized the drugs found in plain view.

Harmless Error

Finally, with regard to the murder and gun charge, the evidence seized from the motel room was harmless and could not have affected the verdict on either. The evidence seized from the motel room was important to the trafficking and PWID charge, not the murder or gun charge.[67] Even if the court erred in admitting the evidence from Room 105, its admission was harmless on the murder and gun charge. State v. Herring.

ARGUMENT III.

The issue alleging Judge Hayes erred in not allowing counsel to question a witness about a prior statement is not preserved for appeal; and, even if preserved Judge Hayes did not err in preventing counsel from questioning the witness about a prior

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[66] Police had obtained a valid arrest warrant for Powell for murder; police had verified Powell was in the room as well; Powell rented the motel room; and, therefore police had the right to enter the room to arrest Powell where knowledge of fellow officers in the investigation was imputed to all officers working on the case, and these officers had been directed to go to the motel and apprehend the subjects. In any event, the exclusionary rule should not apply. Id.

[67] The testimony of the eyewitnesses to the murder, the cover-up of the murder as testified to by Qwanda and Powell, the admissions of Wright as testified to by Sinclair, Qwanda, and Powell, and the physical evidence recovered at the crime scene in addition to that in the red Camaro [Police established Jacinda rented the red Camaro for Wright by introducing the lease agreement and through the testimony of Qwanda and Powell], the BMW, and Wright's wife's residence was what resulted in his conviction for murder and the gun charge, not what was in Room 105.

statement where the defendant did not meet the requirements of the Rule; however, even assuming *arguendo* error, it was harmless given the other impeachment and admissions of the witness and the over-whelming evidence of Wright's guilt.

What Occurred Below

After lengthy cross-examination and impeachment of Powell, Wright sought to impeach Powell with the contents of a letter Powell purportedly wrote to Wright while the two were incarcerated together in the county jail. Wright *alleged* the witness stated in the letter a third person committed the murder, a man nicknamed "Two Guns." (R. 208). The Solicitor objected on the basis she could not tell what statement Wright was referring to, and she had requested the letter be provided or disclosed to her previously and it had not been disclosed, and she was again asking to see the letter before counsel cross-examined the witness on the contents of the letter. (R. 308-11). Wright argued that under the S.C. Rules of Evidence he did not have to produce the statement because there might be something in the statement that was nefarious to his client. (R. 309-10). The Solicitor indicated she had spoken to the witness prior to trial and the witness indicated he was coerced into writing a statement by the defendant, but the only thing he said in the statement was he did not see anything or know anything about the case, not what Wright was claiming. (R. 310). Wright did not produce the letter prior to trial when requested by the Solicitor, and he did not produce it to the Solicitor when requested during the examination of the witness. (R. 310-15). During the initial questioning of the witness on this issue, counsel claimed he could not find the letter, then outside the presence of the jury he admitted they could not find the letter. (R. 308-09, 313). After some *in camera* argument, counsel informed the court the witness admitted he wrote the statement, and counsel was satisfied with the fact he was able to ask the question in front of the jury. (R. 310, ln. 207, 313, ll. 11, 23-25). As the *in camera*

hearing continued, counsel acquiesced to the trial court's ruling he would not allow the impeachment. (R. 313, ll. 11, 23-25). Judge Hayes informed both parties he was going to give a curative instruction regarding this particular statement, and Wright made no objection to the curative instruction the court proposed. (R. 313, 314, ll. 1-15). And, Wright made no objection to the curative instruction when it was given to the jury or after it was given. (R. 314, l. 16 – 315, l. 1). Wright now alleges Judge Hayes erred in refusing to allow him to impeach Powell on the letter which he never produced to opposing counsel.

The Lack of Preservation of this Issue

This issue is not preserved for appeal. First, Wright stated he was satisfied with his cross-examination given the fact the witness admitted he wrote the statement, and given the fact Wright was able to ask the question in front of the jury regarding "Two Guns." State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). Further, Wright made no offer of proof what Powell's testimony would have been if he answered the question. State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004); State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991). And, there was no proffer of the extrinsic evidence. Id. Further, Wright acquiesced to the court's ruling, not once, but twice, and agreed he would ask no further questions of the witness on this subject. Benton; State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998). Finally, Wright acquiesced to the curative instruction regarding the proposed impeachment and raised no objection to it. As a result, this issue is simply not preserved for appellate review and must be denied and dismissed.

The Lack of Merit of this Issue

Further, there is no merit to this issue. Rule 613(a), SCRE, provides in pertinent part:

(a) **Examining witness concerning prior statement.**

> In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, ***but on request the same shall be shown or disclosed to opposing counsel.***

Rule 613(a), SCRE (emphasis added). The record shows "opposing counsel" [the Solicitor] requested the written statement [letter] in question be shown to her or disclosed to her, as the Rule requires. Wright failed to do so. In fact, the Solicitor requested she be shown the statement or the statement be disclosed to her before trial and again at the time Wright sought to question the witness. Wright *did not* show her the statement or disclose the same to her prior to trial *or* at the time Wright sought to question the witness. In fact, Wright stated under the SCRE he did not have to produce the statement because it might contain something nefarious about him. Wright is wrong. The Rule provides the statement must be produced to opposing counsel when requested. As a result, Wright failed to comply with the requirements of the Rule before examining the witness about the prior statement and its alleged contents. Rule 613(a), SCRE; *South Carolina Evidence, 2nd Ed.*, Danny R. Collins, p. 140, ll. 2-8 (pointing out the holding in State v. Rowell, 75 S.C. 494, 56 S.E.2d 23 (1906) suggesting a prior inconsistent statement does not have to be shown to opposing counsel before it is used for impeachment is no longer good law on this point), *citing* Rule 613(a), SCRE *and referencing also* State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). The efficacy of this Rule is evident. Where only a portion of the statement is introduced for impeachment, the entire statement is generally admissible to explain the inconsistency. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); *South Carolina Evidence, 2nd Ed.,* Danny R. Collins, p. 141.[68]

[68] "[A]fter a witness has been impeached, the party offering the witness can use the rule of completeness to require the cross-examiner to bring out any other matters that ought in fairness

Wright wanted to impeach the witness but not allow the State to effectively offer any reply or rebuttal testimony with the contents of the statement itself.[69] As a result of the failure of Wright to comply with the requirements of Rule 613(a), SCRE, Judge Hayes could not have erred in denying the request to cross-examine the witness about the prior statement. Wright should not be heard to complain about his own actions in failing to comply with the Rule. Id.

Harmless Error

Even if the court erred in denying the requested impeachment, the error was harmless. In State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 33-24 (1998) and State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999), our Supreme Court held the failure to allow impeaching evidence was subject to harmless error analysis and found in both cases the error was harmless.

> In determining harmless error regarding any issues of witness credibility, we will consider the importance of the witness testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995), (*quoting* Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Id. at 70, 508 S.E.2d at 34. *See* State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). Here, Powell's testimony was not critical to the State's case for murder, trafficking, PWID, or the weapon charge.[70] An error, if any, in the limitation of cross-examination was harmless on this record. Beckam; Fossick; McLeod.

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be considered with the prior statement." *South Carolina Evidence, 2nd Ed.,* Danny R. Collins, p. 143.

[69] And, this was not the first time during the trial Wright had sought to impeach a witness about something alleged to be in a prior statement, and the witness disputed what was actually in the statement. On that occasion, Wright did not offer the extrinsic proof to substantiate the prior inconsistency. (R. 209-12).

[70] Powell was not an eyewitness to the murder by his own admission. Powell was involved only

ARGUMENT IV.

Judge Hayes did not err in denying the defendant's late request to testify.

What Occurred Below

During the trial, Judge Hayes reviewed with Wright his right to testify and not testify and fully explained to Wright his constitutional rights in this regard. Wright stated under oath *he did*

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in the cover-up of the crime, after the fact. Qwanda's testimony corroborated Powell's testimony regarding what occurred when she and Powell returned to the mobile home after the murder and regarding the cover-up of the crime by Wright, Powell and Qwanda. She testified Wright told Powell to "pick up the shell casings." She testified to Powell going in the mobile home after the murder and returning with items and placing them in her car. She testified to the fact she, Wright, and Powell disposed of the victim's vehicle and to Wright's admission to her he killed the victim. Roy Sinclair and Veronica Chandler *were eyewitnesses* to the murder. Sinclair testified to the fact Wright shot the victim because of the statement the victim made to Sinclair upon entering the mobile home. Chandler also testified the man in the kitchen [Wright] shot and killed the victim because of the comment the victim made to Sinclair. Chandler's companion also corroborated Powell's testimony he entered the mobile home after the murder and then took the victim's Durango from the scene. Sinclair also testified to the statement he overheard Wright make to Powell as Wright was leaving the crime scene, i.e. that Wright had just murdered someone and Powell needed to get his stuff [drugs] out of the home. Sinclair, Qwanda, and Chandler all testified to Wright being in possession of a firearm. None of the witnesses who were present at the crime scene when the murder occurred stated a person named "Two Guns" committed the offense, instead of Wright. Sinclair had known Wright for approximately 3 to 4 weeks at the time of the murder and positively identified Wright as the person who murdered the victim. Impeaching Powell with the letter in which Powell allegedly stated "Two Guns" committed the crime, would not have made any difference because Powell was not even inside the home when the crime occurred. The physical evidence also corroborated the fact Wright committed the murder. Fired .40 caliber shell casings were found at the crime scene adjacent to the victim's body. The projectiles removed from the victim's body were consistent with a .40 caliber weapon. A gun case was found in the car Wright's wife rented, and the gun case was for a .40 caliber pistol. The paperwork in the gun case showed the pistol was owned by Wright's wife. Further, an un-fired .40 caliber bullet was found in the BMW which Wright fled from the crime-scene in. Finally, 2 fired .40 caliber shell casings were found in Wright's wife's residence, and they matched the fired shell casings from the crime scene, i.e. they were fired from the same gun. Further, the drugs that were the basis of the trafficking and PWID charge were found in the motel room in which Wright and Powell were arrested. Sinclair also testified to the agreement he had with Wright and Powell to allow them to distribute drugs from his residence, and Sinclair testified Wright was sitting in the kitchen cutting up drugs before the murder occurred. Additionally, Judge Hayes allowed Wright to cross-examine Powell extensively before the jury regarding his credibility. (R. 285-308).

not wish to testify. The defense rested the following morning after Judge Hayes declined to allow a defense' witness to testify.[71] The jury was instructed all of the evidence in the case had been introduced and the only thing remaining was closing arguments and the charge on the law. The parties then engaged in a charge conference with Judge Hayes. At its close, Judge Hayes informed the parties he would not charge self-defense or voluntary manslaughter and explained exactly what he would charge to the jury. Both the Solicitor and Wright's attorney stated they were ready for closing arguments and the charge on the law. The jury was being brought into the courtroom, and the parties were about to give closing arguments, when Wright informed Judge Hayes he wanted to speak with the court. Wright's attorney then informed the court Wright would now like to testify. Judge Hayes declined Wright's late request to testify. (R. 477-82). There is no merit to this appellate ground.

Analysis

Obviously, a criminal defendant has the right to testify in a criminal case. Rock v. Arkansas, 483 U.S. 44 (1987); State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). However, a criminal defendant's right to testify is not unfettered, and there are limitations on its exercise, such as the accommodation of legitimate interests in the trial process. Rock 483 U.S. at 55; United States v. Scheffer, 523 U.S. 303, 308 (1998); Commonwealth v. Baldwin, 619 Pa. 178, 59 A.3d 754 (Pa. 2012)(same). Where the defendant tells the court he does not wish to testify, and the defense rests its case, the defendant's right to testify is no longer absolute and his request to re-open his case so he can testify may be declined. Baldwin, (Defendant was not entitled to reopen and testify after the parties had rested), *affirming Pennsylvania Superior Court's decision*

[71] Wright does not challenge Judge Hayes' ruling regarding this witness on appeal.

in Commonwealth v. Baldwin, 8 A.3d 901 (Pa. Super. 2012); United States v. Peterson, 233 F.3d 101 (1st Cir. 2000)(court did not err in refusing to allow defendant to re-open his case and testify where his change of mind occurred after the jury had been told the parties had rested and to expect closing arguments and had recessed, and a charging conference had been held); United States v. Jones, 880 F.2d 55, 60, n. 5 (8th Cir. 1989)(court did not err in refusing to allow defendant to re-open for purpose of him testifying where the decision was not communicated until after the parties had prepared jury instructions and summations, and potential rebuttal witnesses had been released and were unavailable, and defendant had previously stated on the record he understood his right to testify and not testify and he chose not to.).[72] The court did not err in declining the late request to testify after Wright rested, a charge conference, and the parties were preparing to argue and charge. This appellate ground must be denied and dismissed.

ARGUMENT V.

Wright's challenge to his sentence is not preserved for appellate review; and, there is no merit to the argument.

Wright alleges his sentence of life for murder is illegal or improper. He raises grounds 10-12 challenging the sentence. These grounds are not preserved for appellate review. At sentencing, Wright did not object to his sentence of life when it was imposed, on any basis. As a result, these issues are not preserved. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009).[73]

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[72] *See* United States v. Byrd, 403 F.3d 1278, 1283 (11th Cir. 2005)(following 1st and 8th Circuit's decisions in Peterson and Jones); Harrison v. Commonwealth, 2011 W.L 66016 (Va. App. 2011)(Unpublished)(similar); United States v. Larson; 596 F.2d 759, 779 (8th Cir. 1979). *See* Minor v. Commonwealth, 16 Va. App. 803, 433 S.E.2d 39 (1993); State v. Caillier, 450 So.2d 53 (La. App. 3rd Cir. 1984); C.J.S., Criminal Law, Section 900.

[73] *See* State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)(challenge to sentencing must be raised at trial or issue will not be preserved for appeal); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981); State v. Winestock,

Further, the record does not reveal Judge Hayes sentenced Wright to life on the basis of the LWOP notice or recidivist statute S.C. Code Ann. Section 17-25-45. Wright was convicted of murder and eligible for a life without parole sentence based solely on the crime itself. S.C. Code Ann. Section 16-3-20(A).[74] Additionally, this was a particularly heinous murder. The victim was shot 10 times while Wright was engaged in drug trafficking in a 3rd party's home, and Wright attempted to burn the victim's vehicle after the murder. Finally, Wright had been to prison for several prior convictions including carjacking, ABHAN where he shot a 7 year old child with a high-powered BB gun, MIPP, and carrying a pistol; and, Wright had not been rehabilitated. (See R. 556; Court's Ex. 1). Judge Hayes could have sentenced Wright to life simply because of the circumstances of this crime and his prior record. In fact, the record reveals, Judge Hayes sentenced Wright on the murder indictment as he did for this very reason:

> THE COURT: The sentence on murder is life imprisonment. All sentences are to run concurrent to each other and consecutive to the life sentence, and it is five years for the weapons charge, twenty-five years for the trafficking charge, and fifteen years for the possession of cocaine base, crack cocaine with intent to distribute, so it's life, followed by those three – two drug charges and the pistol charge sentences. Thank you.

(R. 552, ll. 14-21). There is no indication the court imposed the life sentence based on Section 17-25-45 instead of the facts and circumstances of this case and Wrights prior record. In fact, the court did not even use the words life without parole or the acrostic LWOP. Finally, and importantly, the sentencing sheet for murder reflects the court sentenced Wright to life for

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271 S.C. 473, 248 S.E.2d 307 (1978); State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012); State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997), *citing* State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995).

[74] S.C. Code Ann. Section 16-3-20(A)("For the purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole." "No person sentenced to 'life imprisonment' pursuant to this section is eligible for parole, ...").

murder, not pursuant to Section 17-25-45. (Sentencing Sheet, 2012-GS-26-02551).[75] Further, the sentencing sheet states Wright was sentenced to life imprisonment not LWOP. [76]

ARGUMENT VI.

Judge Hayes did not err in declining to charge voluntary manslaughter or self-defense.

What Occurred Below

Wright requested Judge Hayes instruct the jury on the lesser included offense of voluntary manslaughter and on the complete defense of self-defense. Judge Hayes heard arguments from both sides and reviewed the testimony in the record. He declined to charge the jury on voluntary manslaughter or self-defense based on the testimony in the record. (R. 463-77). Judge Hayes did not err in declining to instruct the jury on voluntary manslaughter and self-defense given the evidence presented at trial.

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[75] The sentencing sheet indicates Wright was sentenced to life imprisonment for violation of 16-3-20, and the box for sentencing Wright pursuant to 17-25-45 was not checked by the court.

[76] Finally, Wright was convicted of murder in this trial, a "most serious offense" under S.C. Code Ann. Section 17-25-45(A) & (C)(1). And, the record shows Wright had previously been convicted of carjacking, which is a "most serious offense" under Section 17-25-45 (C)(1). (See Court's Ex. 1). Wright had been properly noticed by the State prior to this trial if he was convicted of murder or voluntary manslaughter the State was seeking a sentence of life without parole (LWOP). S.C. Code Ann. Section 17-25-45(A) & (B). As a result, Wright **was subject to an LWOP sentence** pursuant to Section 17-25-45(A) & (C)(1) of recidivist statute. Even if the court sentenced Wright to "life" pursuant to 17-25-45, the sentence was legal. Further, Wright had previously been convicted of assault and battery of a high and aggravated nature (ABHAN) a "serious" offense under Section 17-25-45(C)(2)(b). (Court's Ex. 1). The carjacking and the ABHAN were separate offenses occurring in 2002 and 2001 respectively. (Court's Ex. 1). This also made Wright subject to an LWOP sentence separately when the ABHAN conviction [a serious offense] is considered in conjunction with his prior conviction for carjacking [a most serious offense] under Section 17-24-45(B)(1),(2),(3),(4) & (C)(1) & (C)(2)(b). Wright had been properly noticed by the State prior to trial if he was convicted of murder or voluntary manslaughter the State was seeking a sentence of LWOP. S.C. Code Ann. Section 17-25-45(A) & (B). As a result, the Judge Hayes properly sentenced Wright.

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. State v. Hughey, 339 S. C. 439, 529 S.E.2d 721 (2000).

Jury Charges

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Mattison, 388 S.C. at 479, 697 S.E.2d at 583.[77]

[77] If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2011). A trial court commits error when it fails to give a requested charge on an issue raised by the evidence presented. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The court has a duty to charge the jury as to the law applicable to the facts brought out in the testimony. State v. West, 138 S.C. 421, 136 S.E. 736 (1927).

In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on voluntary manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008). However, "[a]n instruction should not be given unless it is justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "Only the law applicable to the case should be charged to the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "If a jury instruction is provided that does not fit the facts of the case, it may confuse the jury." Id.[78] When the record contains no evidence to support a lesser included offense, a charge on the lesser offense should not be given. *See* State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005).

In order to be entitled an instruction on the law of self-defense, the defendant must produce some evidence or some evidence must be presented at trial establishing the elements of self-defense. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999)(A self-defense charge is not required unless supported by the evidence); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)(same).[79] "If there is any evidence in the record from which it could

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[78] Further, a trial judge must be cautious in charging a lesser included offense. If a judge improperly charges the jury on a lesser included offense not supported by the facts, and the jury returns a verdict of guilty on the lesser included offense, then upon reversal of the conviction, the Double Jeopardy clause prevents retrial of the defendant on the greater offense. *See* Price v. Georgia, 398 U.S. 323 (1970); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001)(discussing prosecution on retrial of greater offense than that which defendant was convicted of would constitute a violation of Double Jeopardy); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992)(counsel ineffective for falsely informing defendant he could be convicted of murder on retrial if he appealed and succeeded in vacating manslaughter conviction).

[79] *See* State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996)(defendant was not entitled to a self-defense charge where he presented no evidence he believed he was in imminent danger

reasonably be inferred the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). "Because all of the elements are required to establish self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established if any one element is disproven." In re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct.App. 2011), *quoting* State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010). A self-defense charge is not required unless supported by the evidence. State v. Bryant, 336 S.C. at 344, 520 S.E.2d a 321; Goodson.[80]

Voluntary Manslaughter

Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden head of passion upon sufficient legal provocation. State v. Smith, 391 S.C. 408, 412,-13, 706 S.E.2d 12, 14 (2011); State v. Frazier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013).[81] The sudden heat of passion "must cause a person to lose control." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604 (2010).

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when he shot the victim).

[80] Moreover, "[n]o instruction should be given which tenders an issue which has not been presented or supported by the evidence ...[as] even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury." *See* State v. Huckabee, 388 S.C. 232, 694 S.E.2d 781 (Ct. App. 2010), *quoting* State v. Mollison, 319 S.C. 41, 48, 459 S.E.2d 88, 93 (Ct. App. 1995)(internal citation and quotation omitted). *See also* Bruno, 322 S.C. at 536, 473 S.E.2d at 452.

[81] The sudden heat of passion upon sufficient legal provocation, ...while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State Childers, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007).

Self-defense

The elements of self-defense are as follows: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in actual danger of losing his life or sustaining serious bodily injury; (3) if his defense is based on his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such that would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or loss of his life; and (4) the defendant had no other probable means of avoiding the danger. If however the defendant was on his own premises he has no duty to retreat before acting in self-defense. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).[82] Wright was not entitled to a charge on voluntary manslaughter or to a jury charge on self-defense given the evidence introduced at trial.

Analysis

Wright alleges his request for a jury instruction on the lesser included offense of voluntary manslaughter and the affirmative defense of self-defense should have been given based on statements he made to witnesses after the crime, and to some portions of eyewitness' testimony. Therefore, it is necessary to review the testimony of these witnesses at trial.

The Eyewitnesses

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[82] *Citing* State v. Davis, 282 S.C. 45, 46, 317 S.E2d 452, 453 (1984). *See also* State v. Frasier, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013).

Roy Sinclair

Sinclair testified the victim, his cousin, was let into Sinclair's residence and the victim spoke to him, Sinclair. The victim stated "..you got these dudes running your house like that?" Sinclair responded: "..no, ain't nobody running my house but me." At this point, Wright stated: "..what the fuck you just say, nigger?" The victim responded "nah, man, I didn't say nothing. Everything cool." At that point, Wright jumped up from the table with the gun and said: ".. aw, fuck this shit, nigger," and started shooting at the victim multiple times while walking toward the victim as he was shooting. (R. 181, ll. 10-24). Sinclair testified he never saw a weapon on the victim, the victim did not carry a weapon, and the victim did not threaten Wright before the shooting occurred. (R. 186, ll. 4-13). Obviously, this testimony would not entitled Wright to a charge on voluntary manslaughter or self-defense and needs no discussion.

Veronica D. Chandler

Chandler testified she had just arrived at Sinclair's home to purchase crack cocaine. The victim, J.J. arrived shortly after she did. When the victim came in Sinclair's home he "..made a statement because somebody opened the door and he [the victim] was like that's how you got your house run. You got people opening your doors and what not." When the victim came in he spoke to everybody in the home, and then he spoke to her. She and the victim were talking. She testified the man in the kitchen [Wright] said something, and the victim said: "..yeah, yeah, yeah." There was no argument or fussing or anything. She did not hear the victim threaten anyone, and he [the victim] resumed talking to her in the living room. Then the person in the kitchen [Wright] started shooting: "boom, boom, boom, boom." (R. 202, l. 12 – p. 203, l. 22, p. 204-05). She was close enough to the victim when he was shot, that she thought she had been

shot, and the victim's blood splattered on her clothing. (R. 205-07).[83] Obviously, this testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense.

Mildred B. Small

Small testified she was there because her friend Chandler was there to purchase something. She testified she was in the kitchen, and there was a man sitting at the kitchen table [Wright]. She testified she saw a clip for a semi-automatic weapon on the kitchen table where Wright was sitting. There was a knock at the door and Roy [Sinclair] said that's J.J. because he's supposed to be coming over here to bring me a drink. Chandler was in the living room. Mildred was talking to a white girl in the kitchen. She did not hear any arguing or fussing. She did not hear anyone threaten anyone. Wright disappeared from the kitchen table. The next thing she heard was "..pow, pow" and she got on the floor. When she looked up, the victim was laying on the floor and blood was coming out of his mouth. She saw no weapon in the victim's hand. She testified his hand was wrapped or looked like it was injured or something. She ran out of the house. Her friend Chandler came running from behind the house. Mildred testified Chandler thought she had gotten shot. She saw a man run to a black car. She heard someone say to her, if you say anything about what just happened, "we will kill you." (R. 215-20). Obviously, this testimony would not entitle Wright to a charge on voluntary manslaughter or self-defense. Small

[83] On cross-examination, defense counsel *tried* to get Chandler to admit she told police she thought she saw a gun on the victim. However, Chandler testified she did not recall ever telling the police she saw or thought she saw a weapon on the victim; she did not give a written statement as defense counsel suggested on cross-examination, and she only gave a recorded statement which she had reviewed prior to trial and in that statement she did not tell police she thought she saw a weapon on the victim. (R. 209-12). Wright did not introduce any prior inconsistent statement, written or recorded, to impeach Chandler on these facts. She did remember telling the police that she saw the victim raise his shirt up on one (1) occasion, but she did not see a gun on him. (R. 209-12).

did not hear the victim threaten Wright, she did not see a weapon on the victim, and she did not see the victim make any threatening gesture. She did not even hear any argument. (R. 215-30).

The non-eyewitnesses

Relevant Law Enforcement Testimony

Police found no weapon on the victim or around his body. (R. 353-55; 370-379, l. 4; 383, l. 23 – 384, l. 9). The autopsy determined the victim died from multiple gunshots. The victim was shot a total of ten (10) times, three (3) in the back. (R. 428-37, 360-67, 415-16).

Qwanda Caldwell-Brown

Qwanda testified when she and Powell returned to Sinclair's residence shortly after the murder occurred, she was driving the car she and Powell were in. Wright was leaving Sinclair's residence in his BMW, and Wright stopped beside her vehicle coming in the opposite direction from Qwanda and spoke out his driver's side window next to her driver's side window. (R. 233, ll. 1-9; 251, l. 4 – 252, l. 18). Wright stated to Powell: "Pick up the shells Brah." (R. 233, ll. 1-9; 251, l. 4 – 252, l. 17). That was all he said according to Qwanda. (R. 252, ll. 15-18).

Qwanda also testified to what Wright told her about the murder while she was assisting in the cover-up of the crime:

Q: During the time that you were in the vehicle with Marcus, did you ask him what happened at the trailer?

A: Yes, I did. I asked him what happened, and he told me that - - he was explaining to me that when - - when the victim came and knocked on the door and he asked who it was, he didn't recognize who it was, and he asked - - at that - - they called Roy Unc, the guy in the wheelchair, he asked Unc did he know who it was at the door, and he told him yes, that's my cousin, open the door.

So he said he opened the door for him and when he opened the door, he was explaining to me that when someone is walking in, you've got to watch how they stand because you never know what could happen, and he opened the door, the victim came in, and Marcus said that the victim, Jerome, asked Unc why you got these young boys in here, something to that extent, and I believe that's when words were exchanged, a argument happened, and then he said - - I can't

recall if he said that he - - that if that - - Jerome had a gun or not, but I do remember him saying that he [the victim] had to get got.

Q. And this was Marcus [Wright] talking?

A. Yes.

Q. What was - - as Marcus is describing this, and this is - - when y'all were talking about this, how long after the shooting is this?

A. Maybe five, six hours later.

Q. And what was his demeanor? Do you understand - - do you understand what I'm saying, demeanor?

A. Yes.

Q. What was Marcus's demeanor when he was telling you about this?

A. Just speak - - talking regular, just a regular conversation, you know, no jitterness, or regret, or remorse or anything, just like, you know, just explaining like this is what happened, this is how it is, in that sense?

Q. Have you seen Marcus [Wright] with a gun?

A. Yes, I have.

Q. Was it that day?

A. Yes, it was.

Q. Where was it?

A. It was on the kitchen table.

(Testimony continues on an unrelated subject)

(R. 241, l. 9 – 242, l. 23). Qwanda then testified as follows:

Q. Did Marcus ever tell you that he took a gun from the victim?

A. No.

(Testimony continues on an unrelated subject).

(R. 243, ll. 17-19). Qwanda also testified she only saw 2 guns that day, the 9 mm pistol Powell took with them in the vehicle when they left the home before the murder, and the gun Wright had on the kitchen table. (R. 242-43). Qwanda also testified that at the La Quinta motel she heard Wright say out loud: "he knew he was going to have to shoot him or kill him a nigger tonight." (R. 245, ll. 9-15). Obviously, the testimony of Qwanda would not entitle Wright to an instruction on voluntary manslaughter or self-defense. The fact the victim made a statement to Sinclair, and Wright was offended, did not give Wright the right to shoot and kill the victim or lessen Wright's culpability. This evidence proves malice and murder, not voluntary manslaughter or self-defense.

Lanard Powell

Powell testified that when he and Qwanda returned to Sinclair's residence from making the drug delivery, Wright stated out the window of his car: "nigger trying to pull a jack move" or "nigger tried to pull a jack move." (R. 297, ll. 1-2; 298, l. 9). Powell did not hear Wright say anything else. No testimony was introduced at trial what a "jack move" was.[84] Powell testified when he entered Sinclair's residence, there was no weapon on or around the victim. Powell did not take a weapon off the victim, and no one gave Powell a weapon from the victim.

On direct examination, Powell testified to what Wright told him occurred during the shooting:

Q. Did you and Marcus talk about what had happened in the trailer?
A. Yes.
Q. What did Marcus tell you about that?
A. He told me that Mr. Green – he say he heard him knock on the door. He say he swung the door open. He say he [Wright] had a gun in his hand, say everybody else was just like basically roaming in there, and Mr. Green came in saying such things as you got these boys in your house now. He indicated that Mr. Green looked as if he was going for a gun.
Q. So if he indicated that Mr. Green looked like he was going for a gun, he [the victim] didn't have – he [the victim] wouldn't have had it in his hand, right?
A. No.
Q. So - - and it's important. Did Marcus – what did Marcus tell you about that?
A. He said that he looked like he was – he took like – he said Mr. Green took like three steps into the home and was reaching by his abdomen, indicating he had a gun, so he shot him.
Q. Did Marcus ever tell you he saw a gun?
A. No.
Q. Did he tell you what he [Wright] did with the forty [caliber, Wright's gun]?
A. No.
Q. Did you ask him?
A. No.
Q. Did you see it once y'all got in the car together, the Durango?
A. No ma'am.
Q. Did he say that Mr. Green threatened him in any way?
A. No.

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[84] According to *Urban Dictionary*, a "jack move" is to steal something without their consent. An action which someone does to another person for their personal belongings.

(Testimony continues on another subject).

(R. 275, l. 21 – 277, l. 1).[85] This testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense.

There is nothing from this testimony that would entitle Wright to a charge on voluntary manslaughter. The fact that the victim took three (3) steps into the home and reached by his abdomen, even if indicating he had a gun, would not naturally disturb the sway or reason and render the mind of an ordinary person incapable of cool reflection, and produce what according to human experience may be called an uncontrollable impulse to do violence. Childers. There were no prior threats by the victim against Wright. The victim did not point a gun at Wright, or even pull a gun. And, Wright did not tell Powell he even saw a gun. Further, Powell never saw a gun alleged to have come off the victim at any time while covering up the crime with Wright or hiding out with him. Judge Hayes did not err in declining to charge voluntary manslaughter.

There is no evidence in the record the defendant was entitled to a charge on self-defense.

There is no evidence Wright was without fault in bringing on the difficulty. Wright went and opened the door with a gun in his hand, the .40 caliber. According to Wright, the victim made the comment to his cousin, Roy Sinclair. Wright took offense to the comment and started

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[85] The only other thing that Powell testified to that could have any relation to a charge on voluntary manslaughter or self-defense was an admission that he, Powell, wrote a letter, *at Wright's insistence*, absolving Wright of any wrongdoing. Powell admitted that in the letter, he wrote at Wright's insistence, he stated that Wright did not do anything wrong. Powell testified that based on what Wright told him to write in the letter, Wright did not do anything wrong. However, Powell did not testify to what was in the letter, or what Wright had told him, that led him to believe Wright did nothing wrong. (R. 304, l. 25 – 308, l. 2). And, Wright did not introduce the letter. This testimony would not entitle Wright to an instruction on voluntary manslaughter or self-defense. If this is the same letter wherein Wright alleged Powell stated that "Two Guns" committed the crime **not Wright**, this would certainly not entitle Wright to an instruction on voluntary manslaughter or self-defense. (R. 304, l. 25 – 315, l. 6).

arguing at the victim with a loaded .40 caliber pistol in his hand. Wright simply cannot show he had no fault in bringing on the difficulty.

There is no evidence Wright was in actual imminent danger of losing his life or sustaining serious bodily injury when the fatal blow was struck or that he believed he was in imminent danger. Davis, *supra.*[86] *See* Bruno (the defendant was not entitled to a self-defense charge where he presented no evidence that he believed he was in imminent danger when he shot the victim); Goodson (same);[87] If Wright's alleged statement to Powell about a "jack move" relates to the victim allegedly trying to take his drugs and drug money, Wright was not in fear of his life or serious bodily injury but only of losing his illegal drugs and illegal drug profits. Additionally, Wright did not tell Powell that he ever saw a gun on the victim. In fact, Wright stated he [Wright] had a gun in his hand when he opened the door and let the victim into the residence. Further, there is no evidence Wright was in danger or losing his life or suffering serious bodily injury when he shot the victim a total of 10 times, 3 of which were in the back. No weapon was found on the victim or around the victim. Powell did not take a weapon off of

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[86] *see* Tate v. State, 308 S.C. 163, 417 S.E.2d 553 (1992)(where there is no evidence to suggest defendant believed she was in imminent danger of loss of life at the time she killed, counsel's failure to secure expert on self-defense was not ineffective assistance because the defense was not applicable).

[87] Wright argues he was entitled to a self-defense instruction under State v. Light. Light is clearly distinguishable from this case. In Light the defendant was in his own home and had no duty to retreat. Further, in Light the victim had armed herself with a loaded rifle the defendant stated he took away from the victim and in taking the gun away from the victim it accidentally discharged. Id. That did not occur in this case. Further, in Light, the victim had previously threatened the defendant before that if she caught him running around with another woman it was going to be bad and had found what she believed was a woman's hair and confronted the defendant with it shortly before the shooting. In the present case, there was no evidence of any previous threats by the victim against the defendant, but the opposite. Light is not controlling on these facts.

the victim. Powell never saw a weapon in the 2 following days he spent with Wright that Wright represented or alleged belonged to the victim.

Even if Wright believed he was in danger of losing his life or suffering serious bodily injury that belief was not reasonable under the circumstances and a reasonable person would not have so believed. State v. Fuller, 297 S.C. 440, 442-43, 377 S.E.2d 328, 330 (1989).[88] No one saw a weapon on the victim, including Wright. The victim came to Sinclair's residence at Sinclair's invitation. No threats were ever made by the victim to Wright. Wright's paranoia as a drug trafficker or dealer would not entitle him to kill the victim because he saw the victim move his hand toward his abdomen.[89] And, there was no testimony in the record what a "jack move" was. Even if Wright's version is believed, the belief he needed to use deadly force was unreasonable. *See* State v. Wood, 1 S.C.L. (1 Bay)(1794)(key to self-defense is the defendant can only respond with proportionality).

Further, Wright was not in his own home but the home of Roy Sinclair. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996).[90] The victim was an invitee to Sinclair's home.[91] Wright had a duty to retreat and there was no evidence he retreated before the fatal blow or blows he

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[88] *See* State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987)(finding on the facts of that case any belief in the necessity of using deadly force was unreasonable as a matter of law; consequently holding the court did not err in failing to instruct on defense of habitation, and noting defendant *was not* entitled to self-defense instructions he did receive).

[89] The victim had a cell phone case containing a cell phone on his belt next to his abdomen. The victim's right hand was bandaged and had a splint on one finger. (R. 354-55, 371-74, 378-79).

[90] *See* State v. Chambers, 310 S.C. 43, 425 S.E.2d 45 (Ct. App. 1992).

[91] Sinclair testified he invited the victim to come to his home that evening to drink, and he directed Wright to open the front door to let the victim, in. *Compare* State v. Osborne, 202 S.C. 475, 25 S.E.2d 561 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942)(a lawful guest attacked in the owner's home has no duty to retreat where the attacker is *an intruder*).

intentionally inflicted. Brown; Chambers.[92] Even assuming a "jack move" is an attempted hijacking of drugs, Wright was not acting in self-defense but to protect his illegal contraband, crack and powder cocaine and illegal drug profits. "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (Ct. App. 2012), *quoting* Bixby, 388 S.C. at 554, 698 at 586. Wright *failed to present* any evidence retreating would have increased the danger to himself. And, *there was no evidence in the record* retreating would have increased the danger to Wright. Frasier; Jackson.

Finally, Wright had other means of avoiding the difficulty rather than to act as he did. Instead of shooting the victim 10 times with a .40 caliber pistol, Wright could have simply pointed his .40 caliber weapon at the victim, which Wright had in his hand when he opened the front door, and told the victim not to move when he reached by his abdomen. Or, waited until the victim actually started pulling out an actual gun before shooting the victim 10 times. As a result, Wright is not entitled to an instruction on self-defense. Rivera, *supra.*

The Defense case

Wright introduced no evidence during the defense case.[93] There was nothing introduced by Wright that would justify an instruction on voluntary manslaughter or self-defense. As a result, there was no error in declining to charge voluntary manslaughter or self-defense.

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[92] "It is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased." Frasier, *citing* State v. Jackson, 227 S.C. 221, 279, 87 S.E.2d 681, 685 (1955).

[93] The only evidence Wright introduced during the trial was *an envelope* on cross-examination of a State's witness. (R. 463-65).

Harmless Error

Even assuming *arguendo* Wright was somehow entitled to a voluntary manslaughter or a self-defense instruction, the failure to do so was harmless under the particular facts of this case. State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014)(finding harmless error analysis is appropriate for the failure to charge a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(same).[94] The failure to charge voluntary manslaughter and self-defense in this case was harmless where Wright's version of events was so preposterous and non-credible and the evidence of guilt was so overwhelming that the jury would not have accepted the same and convicted him of voluntary manslaughter or acquitted him of murder even had self-defense been charged. State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" Middleton, *supra*, *quoting* State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id., *citation omitted.* "Thus, whether or not the error was harmless is a fact intensive inquiry." Id. A fact intensive inquiry shows the trial court's not charging voluntary manslaughter and/or self-defense did not contribute to the verdict.[95] Given the evidence *in this*

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[94] This Court has previously held the refusal to charge the jury with a requested instruction is subject to harmless error analysis. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007), *affirmed* 387 S.C. 310 (2010); State v. Jeffries, 316 S.C. 13,21, 446 S.E.2d 427, 431 (1994)(harmless error analysis is appropriate where the error complained of is a "trial error" rather than a "structural defect" in the trial mechanism itself). *See also* Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41, *Toal, C.J. concurring. Contra* Light; Lee.

[95] The evidence presented at trial showed on April 30, 2012, Wright and Powell were distributing

crack cocaine from Sinclair's home and had been doing this illegal activity for 3 to 4 weeks. Wright had given Powell a 9mm pistol to carry while dealing drugs from Sinclair's home and making drug deliveries. On the night of April 30th, Powell left the home with his girlfriend Qwanda to make a drug delivery and to go to the store. Powell took the 9mm with him. Wright remained at the home cutting up drugs at the kitchen table with his .40 caliber pistol beside him. Several witnesses arrived at Sinclair's residence, including Veronica Chandler and Mildred Small. Both women came into the residence with Small going into the kitchen and Chandler remaining in the living room. Both were in the residence before the victim arrived. The victim Jerome J. Green, Jr. was a cousin of Sinclair, the owner of the home. Green came to the residence to bring Sinclair some alcohol to drink. When the victim knocked on the door, Sinclair told Wright it was his cousin "J.J." and it was okay to let him in the residence. Wright opened the door with his .40 caliber handgun in his hand. After the victim entered, he spoke to Sinclair stating something to the effect: "So this is how it is, you going to let these young boys run your house." Wright took offense to the statement. Wright asked the victim to repeat what he just said. The victim declined and turned to speak with Chandler who was in the living room with the victim. Wright, who was in the kitchen, raised his .40 caliber pistol and shot the victim and continued shooting at the victim as he walked toward him. Wright shot the victim 10 times including 3 times in the back. Sinclair and Chandler both witnessed the murder. Neither Sinclair nor Veronica saw any weapon on the victim. Sinclair testified his cousin the victim did not carry a weapon. Neither eyewitness heard or saw the victim threaten Wright in any way. Small did not see the shooting but immediately dropped to the floor. Sinclair, Chandler, and Small fled from the residence. Wright fled from the residence, not out of fear, but because of what he had done. He took his .40 caliber pistol with him. He got into his black BMW and started driving away. Powell and Qwanda were returning, and Wright spoke to Powell. Sinclair overheard Wright say he had just murdered someone and Powell needed to get his stuff out of the mobile home. Qwanda heard Wright tell Powell to "pick up the shell casings." Wright then fled in his BMW. Powell did exactly as Wright told him to do. Powell, Qwanda, and Small all testified Powell pulled into the residence, got out of his car, and went into the residence with a 9mm pistol; but, Powell did not fire his weapon. Powell determined the victim was dead, got the drugs and money out of the residence, and threw them in the car driven by Qwanda. Powell did not see any weapons on the victim and did not pick up any weapons inside the home. Powell took the victim's car keys and drove away in the victim's vehicle. Qwanda followed him in Powell's car. While Powell was cleaning up the crime-scene at Wright's instructions, Wright drove his BMW to another location and switched vehicles. He then contacted Powell by phone and met Powell and Qwanda at another location. Wright was now driving a dark Cadillac Escalade. The 3 then drove to another location, where the Escalade was abandoned, and Wright got in the victim's truck with Powell. The 3 then drove to a gas station where Qwanda was told to purchase gas, and Wright and Powell put gas in a can Wright brought with him. The 2 men drove the victim's truck to a secluded location, and Wright attempted to burn the victim's vehicle. Qwanda picked them up in Powell's car. The 3 then proceeded to a motel where Qwanda rented a motel room for them. The following day, Wright's wife rented a red Camaro for Wright, which Qwanda picked up. Wright and Powell eventually got in the Camero and went to another motel, where Powell rented a room using an alias and fake I.D. Wright provided. When police apprehended

particular case, the failure to charge voluntary manslaughter or self-defense was harmless beyond a reasonable doubt. Middleton (failure to charge lesser included offense was harmless after a fact specific inquiry); *see* Battle (failure to charge lesser included offense was not harmless after a fact specific inquiry). Further, the failure to charge voluntary manslaughter or self-defense could have had no effect on the guilty verdicts for PWID crack cocaine, trafficking greater than 28 grams, and the gun charge.

CONCLUSION

For the above stated reasons, Wright's convictions and sentences should be affirmed and this appeal dismissed.

Respectfully submitted,

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March 26, 2015

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the 2 men in the motel room, there was a large amount of crack cocaine, over 28 grams of cocaine, and over $3,000. Upon searching the Camaro, police found Powell's 9mm, scales, a gun case for a .40 caliber pistol, which contained paperwork showing Wright's wife purchased a .40 caliber pistol before the murder, and 2 ammunition clips containing .40 caliber ammo. Upon searching Wright's wife's residence, police found 2 fired .40 caliber shell casings that matched the 3 fired shell casings found at the crime-scene next to the victim's body. All 5 fired shell casings were fired by the same gun, a .40 caliber pistol. Upon searching, the black BMW Wright used to flee the crime scene, police found 1 unfired .40 caliber bullet. Police never found the .40 caliber pistol because Wright got rid of the murder weapon. Wright offered no evidence in the defense case.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

v.

MARCUS DWAIN WRIGHT,

Appellant.

Appellate Case No. 2013-001406

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled A Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

ANTHONY MABRY
Assistant Attorney General

March 26, 2015

CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States Mail, postage prepaid, to J. Falkner Wilkes, Esquire, 114 Whitsett Street, Greenville, SC 29601 this 26th day of March, 2015.

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