THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS
John C. Hayes, III, Circuit Court Judge

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

Appellate Case No. 2013-001406

State of South Carolina, ... Respondent,

v.

Marcus Dwain Wright, ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant, Marcus Dwain Wright, was indicted for Murder, Trafficking Powder Cocaine, Possession with Intent to Distribute Cocaine Base, Possession of a Weapon During a Violent Crime. A jury trial was held on June 17-21, 2013, the Honorable John C. Hayes presiding. The Appellant was represented by L. Morgan Martin and Edward M. Brown. The State was represented by Donna E. Elder, Assistant Solicitor for the Fifteenth Judicial Circuit. Dixie Cox Eubank was the court reporter. The jury returned a verdict of guilty on all charges. The Appellant was sentenced to life on the murder, five years on the weapons charge, twenty-five years on the trafficking charge, and fifteen years for the possession with intent to distribute cocaine base. All sentences were run concurrent to each other and consecutive to the life sentence. Appellant timely filed notice of appeal. J. Falkner Wilkes represents the Appellant on the appeal of this case.

I. THE COURT ERRED IN ADMITTING EVIDENCE FROM SEARCH OF RESIDENCE.

A. THE COURT ERRED IN RULING THAT DEFENDANT DID NOT HAVE STANDING TO CHALLENGE SEARCH WARRANT.

Wright timely exercised his right to challenge evidence seized during the search of the residence located at 3635 Kate's Bay Road. (R. 53). Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The court conducted a suppression hearing and as a result, ruled that Wright did not have standing to claim Fourth Amendment protection at that residence. In doing so the court failed to apply a proper analysis or consider relevant facts in its determination of standing.

Although the court initially stated the correct standard for determining standing, it failed to actually apply the law to the facts of the case. The trial court never made any findings as to the Wright's actual connection with the residence searched, focusing instead only on Wright's connection with *other* residences. (R. p. 143). Contrary to the trial court's "standing" analysis, the issue of protection under the Fourth Amendment turns entirely on whether or not an individual has sufficient contact with the property searched to establish a legitimate expectation of privacy in *that* property. In this case the trial court held that Wright did not have "standing" based on SCDMV records and Wright's bond sheet, both of which showed a different address for his residence. But regardless of what address Wright might have claimed on SCDMV records eight years prior, or on his bond paperwork a month after the search, the record shows that he clearly had sufficient contact with the residence searched to establish a legitimate expectation of privacy in that property.

The Fourth Amendment guarantees individuals the right to be free from unreasonable

searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). Throughout its analysis the trial court in Wright's case continually referred to the issue as one of standing. Standing is not the correct standard for the Fourth Amendment issue. The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. Rakas v. Illinois, 439 U.S. 128, 140, 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978). The use of the term "standing" has created confusion in this context, and therefore "standing" is no longer appropriate to "connote the legitimate expectation of privacy in the evidence seized or the premises searched." United States v. Bouffard, 917 F.2d 673, 675 (1st Cir. 1990).

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 that society recognizes as reasonable. Oliver v. United States, 466 U.S. 170, 177, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (*citing* Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (*Harlan, J., concurring*)).

It is fundamental that Fourth Amendment rights are personal in nature and may not be vicariously asserted. Rakas v. Illinois (1978), 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d (R. p. 387). 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, a person challenging the legality of a search bears the burden of proving that he has standing. The burden is met by establishing that the person has a legitimate expectation of privacy in the place searched that society is prepared to recognize as reasonable. Rakas, 439 U.S. at 143. Overnight guests have a reasonable expectation of privacy in the home in which they are staying, while a person merely present in the home with the consent of the owner may not. Minnesota v. Olson, (1990), 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85; Minnesota v. Carter, (1998), 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373.

In Carter the Supreme Court opened the door to argue that not just overnight guests will be afforded Fourth Amendment protection." *See* Minnesota v. Carter, 525 U.S. 83, 90, 91, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998); see also id. at 99, 101-02, 119 S.Ct. 469 (Kennedy, J., *concurring*); *id.* at 103, 119 S.Ct. 469 (Breyer, J., *concurring*); *id.* at 106-12, 119 S.Ct. 469 (Ginsburg, J., *dissenting*). "[T]he defendant must demonstrate that his own reasonable expectation of privacy was violated by the action of the State." *Id.*; *see also* Rakas v. Illinois, 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Our Supreme Court has recognized that at least five members of the United States Supreme Court — the three who dissented and the two who concurred in Carter — would be willing to extend protection to guests present for social reasons and present for some time less than an overnight stay. State v. Missouri, 361 S.C. 107 (2004).

Whether a person has a reasonable expectation of privacy in a third person's place falls somewhere on the continuum between the overnight guest in Minnesota v. Olson, 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (overnight guests have a reasonable expectation of privacy in a third person's property), and the person who was present solely for the purpose of

conducting a business transaction in Carter, 525 U.S. at 90-91, 119 S.Ct. 469 (a person legitimately on a third party's property solely for the purpose of conducting a business transaction does not have a reasonable expectation of privacy in that property).

In analyzing whether Wright had a reasonable expectation of privacy the trial court should have analyzed the connection between Wright and the property searched. This would include whether he or his wife owned or lived at the property, or whether Wright or his wife were guests at the property which would include the relationship to the property owner as well as the property itself. Here the record shows that Wright and his wife lived at the search location. Detective Cox testified that immediately prior to the search they sent a detective to 3635 Kate's Bay Highway where Detective Daniel Spencer spoke with Wright's wife, Jacinda Wright. Spencer "determined at that time that that is the residence where *they reside*." (R. p. 55, l. 24 - R. p. 56, l. 5). SCPPPS agent Johnson testified that he supervised Wright at the same location as the residence described in the search warrant. (R. p. 125). The defense also offered exhibits to show he resided at 3635 Kate's Bay Highway.[1] Detective Cox testified that Captain Buchanan lived in the area, was familiar with Wright's car, and had seen Wright coming and going from the search location in the days leading up to the search. (R. p. 54-55). Wright's cars were seen at the search location just prior to the search. (R. p. 89). The State's witness, Menendez, testified that Wright and his wife Jacinda lived at the search location. Menendez also testified that she had seen Wright at that residence on a regular basis. (R. p. 261). Despite the record, the trial court held that Wright failed in his burden to produce *any* evidence as to on the standing issue. (R. p. 99).

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[1]The trial court excluded Defense Exhibits 3 and 4 which showed 3635 Kate's Bay Highway as Wright's address.

Despite sufficient facts to establish a reasonable expectation of privacy in the search location the trial court instead focused on where Wright had claimed as his residence for other purposes. (R. p. 143). Subsequent to Wright's arrest Officer Chatfield testified that Wright gave him a Columbia address during a post arrest interview. (R. p. 129). The trial court focused on SCDMV records reflecting information from 2003 which indicated 3643 Kate's Bay Road address for Wright.[2] (R. pp. 130; 144; 603-604). The trial court also focused on the address given on Wright's bond sheet which was filled out over a month *after* the search. (R. p. pp. 136; 606; 612). None of the facts concerning these other addresses, either years before or more than a month after the search are sufficient to overcome the overwhelming evidence that Wright lived at that location.

The defense correctly argued that Wright's expectation of privacy does not turn on an address for a license or bond sheet. (R. p. 139). Yet instead of analyzing Wright's expectation of privacy based on his connection with the residence the trial court focused instead on his connection with other properties. (R. p. 326). Clearly the trial court failed to apply the proper analysis in determining whether Wright had a reasonable expectation of privacy in the search location. Regardless of what other addresses he may have claimed for various purposes before and after the search Wright had sufficient connection with the property to support a legitimate expectation of privacy.[3]

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[2]These SCDMV Records were admitted over the defense's objection and were not proper evidence for the trial court to consider.

[3]Ironically, the State later argues that evidence found as a result of the search of the Kate's Bay residence established a connection to Wright by virtue of its discovery there. A receipt for Glock, ammo, magazines, and shell test fire casings from a Glock box found at the Kate's Bay residence were all argued as "linking" Wright to "a forty calibre" by virtue of their

B. THE COURT ERRED IN HOLDING THE SEARCH WARRANT AFFIDAVIT WAS SUFFICIENT.

In addition to the court's ruling that Wright didn't have standing, the court further held that the warrant was valid for Fourth Amendment purposes. (R. p. 144). The police had no evidence that specifically identified the residence that they wanted to search so they simply made up facts identifying 3635 Kate's Bay Road. During the trial the police admitted that numerous references to residence at 3635 Kate's Bay Road were untrue. Despite the "salted" affidavit, the court held the search warrant valid. The court's ruling was therefore error.

A search warrant may issue only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Search warrants may be issued "only upon affidavit sworn before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may be used to supplement search warrant affidavits. State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000). The magistrate's task in determining whether to issue the search warrant is to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found *in a particular place*. State v. Dunbar, 361 S.C. 240, 246, 603 S.E.2d 615, 618 (Ct.App. 2004) *emphasis added.*

In Wright's case the police did not have information specifically identifying the residence at 3635 Kate's Bay Road. Although they had information concerning the general area, there was no specific information as to that residence *in particular*. With reckless disregard for the truth, the police simply made up facts to identify 3635 Kate's Bay Road in particular. Absent the

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discovery at that location. (R. p. 516-517).

statements that were not true, the warrant was not supported by sufficient information to justify a search of the 3635 Kate's Bay Highway residence.

Detective Cox admitted that the information provided in the affidavit was not accurate. (R. p. 73; 76-77). The statement that the weapon sought in the warrant was "obtained from his wife *at the above location*" was admittedly false. (R. p. 76). Cox also admitted that the statement in the affidavit that Wright *drove to 3635 Kate's Bay Road* after the shooting was also false. (R. p. 77). And while Weaver initially testified that the cell phone pinged to the *3635 Kate's Bay Road address*, he later admitted that this was untrue also. (R. p. 66, l. 25). At best the ping information provided only a "general area" for where the phone was located. (R. p. 66). At best Powell's statement provided only a general description of the Kate's Bay area. (R. p. 77). The several references to the 3635 Kate's Bay Road residences were necessary to link the property to the shooting and thus justify the search of that particular residence. They were added by the police and not supported by any evidence. There was no testimony explaining how false information of such importance was added not once, but three times to obtain the search warrant. Without those false statements, there was no evidence to support the search of 3635 Kate's Bay Road.

The trial court in this case noted that the police had "salted" the affidavit with information that could not be supported by the record. (R. p. 144). The court discussed the lack of evidence for the affidavit once you take out the inaccurate information. (R. p. 92). The court however focused on evidence of the cell phone pinging as supplementing the otherwise "salted" affidavit. (R. p. 145). For the court, this fact appears to have overshadowed the lack of any other credible facts in the affidavit. (R. p. 145). Unfortunately, the record shows that this supplemental

fact was also untrue.

Detective Weaver claimed that he had supplemented his affidavit with oral testimony.[4] (R. p. 65). As part of this testimony Weaver testified that Wright's cell phone had been tracked to the 3635 Kate's Bay Road residence the night after the murder. (R. p. 65). On cross-examination however Weaver testified only that the cell phone pinged only to "the general area" of Kate's Bay Road. (R. p. 65-67). So the critical fact relied on by the court as to the particular location to be searched, the fact that overcame the lack of accurate information in the affidavit, was also false. The record shows that the police had only an idea of the general location, and added their own unsupported statements specifically identifying 3635 Kate's Bay Road in order to obtain a search warrant.

Here the police made false statements to obtain the search warrant for 3635 Kate's Bay Road. The false statements were clearly made with reckless disregard for the truth. When removed, there are insufficient facts to warrant the search of 3635 Kate's Bay Road in particular. Under a Franks analysis, probable cause simply did not exist. *See* State v. Jones, 342 S.C. 121 (2000).

In addition to the failure to meet Fourth Amendment standards for the issuance of a search warrant, the warrant also fails to meet the standard under South Carolina law as our General Assembly has imposed stricter requirements than federal law for issuing a search warrant. Both the Fourth Amendment of the United States Constitution and Article I, § 10 of the

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[4]There is a lack of evidence showing the extent of supplemental oral information provided to the magistrate. The trial court discussed the lack of evidence of specific sworn oral testimony. (R. p. 86). It also discussed the lack of evidence for the affidavit once you take out the inaccurate information. (R. p. 92).

South Carolina Constitution require an oath or affirmation before probable cause can be found by an officer of the court, and a search warrant issued. U.S. Const. amend. IV; S.C. Const. art. I, § 10. Additionally, the South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record..." S.C. Code Ann. § 17-13-140 (1985). Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause. *See* State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471(1987).

The issue here is that there is a distinction between an affidavit with insufficient information on its face and an affidavit with false information. In Wright's case, as in Jones, *supra*, the false affidavit is the equivalent of not having an affidavit at all. As such, §17-13-140 has been violated since McKnight requires the existence of a truthful written affidavit as a necessary foundation to any search warrant. If an affidavit is not truthful, then oral evidence is all the magistrate would have to depend on to determine if probable cause exists. But without a underlying valid affidavit, supplemental oral information can not be used to establish probable cause. Under Jones, absent a truthful written affidavit, oral information is insufficient to establish probable cause. Here, because all of the information in the affidavit identifying the particular residence to be searched was false, the trial court could not rely on oral information to establish the particularity requirement. Oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant. *See* State v. Sachs, 264 S.C. 541, 216 S.E.2d 501(1975). In

Wright's case the information in the affidavit as to the particularity of the premises was made up by the police. The additional oral information about cell phone pinging could not supplement the affidavit, and even if it could it still wouldn't change the outcome since it was false as well. There simply wasn't sufficient evidence to identify the residence at 3635 Kate's Bay Road in particular. The trial court erred in failing to suppress evidence obtained as a result of the search of the 3635 Kate's Bay Road residence.

II. THE COURT ERRED IN ADMISSION OF SCDMV RECORDS WITHOUT PROPER FOUNDATION.

The State offered SCDMV records to establish that Wright had used a different address for his driver's license and for the title of a trailer. The defense timely objected to the records based on the State's failure to properly authenticate the records. (R. p. 139). The State argued that SCDMV records were business records and that it was not necessary to authenticate them through a record keeper. (R. p. 132). The records were admitted based on the records being "obtained through the normal processes as a law enforcement officer". (R. p. 132). The court's ruling was clearly erroneous.

Information contained in the documents was hearsay under Rule 803, SCRE. Although hearsay, certain business records kept in the normal course of business may qualify as an exception to the hearsay rule if certain criteria is met. Rule 803 SCRE provides:

> **(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective

> opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE, *emphasis added.*

The record fails to establish the required elements necessary under Rule 803(6) by a custodian or other qualified witness. The court held that the records were admissible merely because a police officer had obtained the records through his "normal processes as a law enforcement officer". (R. p. 132, l. 13-17). How the officer got the records however, is completely irrelevant under the Rule 803(6) analysis. The rule requires the testimony the custodian or other qualified witness to establish the elements necessary for admission. The State did not call an SCDMV representative to authenticate the records. And even if the police officer could have testified to a proper foundation to authenticate the records under Rule 803(6), he was never asked. Plus, the officer that testified wasn't even the officer that actually "ran" the driving record. (R. p. 132, l. 25-R. p. 133, l. 1). Admission of the documents as business records was therefore error.

Absent a custodian of records, the admissibility of SCDMV records is controlled by statute:

> Photostatic, optical disk, or certified copies of motor vehicle registration applications, registrations, notices of cancellation, suspensions or revocations, reports of violations, and documents pertaining to the motor vehicle safety responsibility laws of this State, when certified by the director of the Department of Motor Vehicles, or his designee, as true copies of originals, on file with the Department of Motor Vehicles, shall be admissible in any proceedings in any court in like manner as the original thereof.

§ 19-5-30. Admissibility of photostatic or certified copies of certain motor vehicle records.

A review of the record shows that the exhibits in question were not certified by the director of the

Department of Motor Vehicles, or his designee, as true copies. As a result, the documents were inadmissible hearsay. It was therefore error for the court to allow their introduction or rely on them in its analysis of standing.

III. THE COURT ERRED IN THE ADMISSION OF EVIDENCE WHICH WAS THE RESULT OF ILLEGAL SEARCH OF THE DEFENDANT'S HOTEL ROOM.

Wright moved to suppress the evidence seized from his hotel room as the fruits of unlawful search and seizure. (R. p. 103). The record shows that the police received information that Wright was at a local hotel. In response, they proceeded to the hotel where they showed the hotel clerk a photo of Wright. The clerk informed them that Wright was in room (R. p. 105). The police then had the clerk call the room and ask the occupants to step outside. Detective Chatfield testified that when either Wright or Lanard Powell (he couldn't recall which) opened the door, "he was identified and when he tried to close the door and we held the door open and made an entry". (R. p. 104). Powell testified that he did not consent to the police entry. (R. p. 303). Chatfield admitted that he "forced" his way into the room. (R. p. 107).

Detective Chatfield did not have, nor was he aware of, any outstanding arrest warrants for either Wright or Powell. (R. p. 104-105). The only basis for Chatfield forcing his way into the room without a warrant was that they were "looking for Mr. Wright." (R. p. 107). Chatfield testified that when he walked into the room he saw drugs and money in plain view. (R. p. 105). Although Detective Johnson claimed that Chatfield had seen drugs in plain view when the door was first opened, Johnson was not present at that time, and that was not Chatfield's testimony at trial. (R. p. 105; 112). Chatfield's testimony establishes only that he saw the drugs *after* entering the room. (R. p. 105). Wright and his co-defendant were then detained while the police sought a

search warrant for the room. (R. p. 105).

The facts in the search warrant affidavit made it appear that the drugs were observed immediately upon the door being opened. (R. p. 596-601). The testimony at trial however showed this not to be the case as the Chatfield only saw the drugs when he walked into the room. (R. p. 105). The drugs were therefore discovered as the result of a warrantless entry into Wright's room.

For the plain view exception to the warrant rule to apply, the government must show that: (1) the officer was lawfully in a place from which the object could be viewed; (2) the officer had a "lawful right of access" to the seized items; and (3) the incriminating character of the items was immediately apparent. *See* United States v. Jackson, 131 F.3d 1105, 1109 (4th Cir.1997). Because Chatfield had forcibly entered the room without a warrant prior to seeing the drugs, he was not lawfully in the place from which the drugs were first viewed. The plain view doctrine therefore does not apply to the discovery of the drugs. To the extent that the trial court's ruling is based on the plain view doctrine, it is in error. To the extent that it is based on any other exception to the search warrant rule, it is also in error.

The most basic principle of Fourth Amendment jurisprudence is that warrantless searches and seizures inside a home are presumptively unconstitutional. Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). The police forcibly entered Wright's hotel room without a warrant where evidence was then discovered. The warrantless entry is therefore, presumptively unconstitutional.

"Nevertheless, because the ultimate touch-stone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Id.* (*citing* Flippo v.

West Virginia, 528 U.S. 11, 13, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999) (*per curiam*)). Such reasonableness exceptions, however, must be narrow and well-delineated in order to retain their constitutional character. Flippo, 528 U.S. at 13, 120 S.Ct. 7 (*citing* Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)); United States v. Bush, 404 F.3d 263, 275 (4th Cir.2005) (*quoting* Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)); Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (*footnote omitted*).

As an exception to the warrant requirement the Supreme Court has recognized a variety of specific circumstances that may constitute an exigency sufficient to justify the warrantless entry and search of private property. These circumstances have included when officers must enter to fight an ongoing fire, prevent the destruction of evidence, or continue in "hot pursuit" of a fleeing suspect. Brigham City, 547 U.S. at 403, 126 S.Ct. 1943 (*citing* Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); Ker v. California, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (*plurality opinion*); and United States v. Santana, 427 U.S. 38, 42, 43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)). None of which were present in Wright's case.

In addition to these well-established exigencies, the Supreme Court and the Fourth Circuit have held that more general "emergencies," if enveloped by a sufficient level of urgency, may also constitute an exigency and justify a warrantless entry and search. *See generally*, Brigham City, 547 U.S. at 403, 126 S.Ct. 1943; United States v. Hill, 649 F.3d 258, 265 (4th Cir.2011). Under this more general emergency-as-exigency approach, in order for a warrantless search to pass constitutional muster, "the person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or

prevent harm to persons or property within." United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992). An objectively reasonable belief must be based on specific articulable facts and reasonable inferences that could have been drawn therefrom. *See* Mora v. City of Gaithersburg, 519 F.3d 216, 224 (4th Cir.2008) (*citing* Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). U.S. v. Yengel, 711 F.3d 392 (4th Cir. 2-15-2013). In this case the Detective Chatfield testified clearly that the only basis in his mind for forcing his way into the hotel room was that he was "[l]ooking for Mr. Wright." (R. p. 107, l. 12-13). At the time of the forced entry, Wright was simply wanted for questioning in regards to the murder. This does not establish a valid exception to search warrant requirement. The warrantless search of Wright's room therefore constituted a violation of Wright's Fourth Amendment rights.

The drugs and any other evidence discovered in Wright's room is inadmissible regardless of the subsequent issuance of a search warrant. The fruit of the poisonous tree doctrine, most often associated with violations of the Fourth Amendment's prohibition of unreasonable searches and seizures, prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure. Wong Sun v. U.S., 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Such evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620 (1996). Here, the drugs and evidence from the hotel room were obtained in violation of Wright's Fourth Amendment rights. This was not cured by the subsequent issuance of a search warrant. As a result, the trial court erred in refusing to suppress such evidence.

IV. THE COURT ERRED IN EXCLUDING EVIDENCE OF WITNESS'S PRIOR INCONSISTENT STATEMENT.

During the cross examination of Lanard Powell, the defense attempted to cross examine Powel based on a prior written statement Powell had given to Wright which exonerated Wright, and identified a third person as the having shot and killed the deceased. (R. p. 308). The State objected to the questioning claiming a discovery violation. (R. p. 308-309). Defense counsel could not locate Powell's letter when asked to do so by the trial judge. (R. p. 313). Stating that the defense could "not rely on your client's telling you what is in a written statement" the court sustained the objection and refused to allow Powell to be questioned as to the substance of the prior statement. (R. p. 313). There was no specific legal basis stated for the ruling. Nor is there any.

The State's stated objection fails to support a denial of the defense's right to effectively cross-examine Powell as to his prior inconsistent statement. Contrary to the State's argument, regardless of whether the statement is in writing, the defense was not required to provide Powell's statement to the prosecution under Rule 5, SCRCrimP:

> *Information Not Subject to Disclosure.* Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of *statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.*

Rule 5(b)(2) *emphasis added.*

Neither is the failure of the defense to locate and produce the actual letter during trial a proper basis for denying the right to cross-examine Powell as to his prior statement:

> *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) *emphasis added.*

All that was required under Rule 613 was that at trial the defense make the State aware of the contents statement. From the record, the facts surrounding the statement were clear by the time the State objected. (R. p. 308-310). In addition, it is also clear that prior to the trial the State knew about the existence of the Powell's prior statement and discussed it with Powell. (R. p. 310). Consistent with Rule 613(b), the defense argued that it did not have to produced a statement prior to its cross-examine Powell. (R. p. 310).

Under Rule 613 the defense had the right to cross-examine Powell as to the prior inconsistent statement. If he wished to offer extrinsic evidence of the statement he was required to meet the requirements set forth in Rule 613(b).

> *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 613(b), *emphasis added.*

Defense counsel's questioning was appropriate under Rule 613(b), and was tracking almost exactly its requirements for the admission of a prior inconsistent statement. Counsel had already established the time, place, and person to whom the statement was made. (R. p. 304-308). And at the time the court stopped the cross-examination of Powell, counsel was questioning

Powell about the substance of the statement. (R. p. 308). When the defense could not readily locate the letter in the courtroom, the trial judge stopped the cross-examination and instructed the jury to disregard all of Powell's testimony regarding the letter. (R. p. 308-315). [5] This was improper, as all that the defense could be required to do under the rule is disclose the substance of the prior statement, not necessarily produce the letter itself. As a result, the court's ruling was inconsistent with Rule 613 and unduly harsh in light of a defendant's right to effective cross-examination. Especially in this case where the Powell's prior statement exonerated Wright.

The trial court's suppression of Powell's testimony denied counsel's ability to effectively cross-examine and present favorable evidence in the case. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (*quoting* State v. Schmidt, 228 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *See* Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). As a result, the court erred in denying Wright the opportunity to effectively cross-examine Powell as to Powell's prior statement which exonerated Wright.

V. THE COURT ERRED BY DENYING DEFENDANT'S REQUEST TO TESTIFY.

Immediately after the close of the State's case in the afternoon of the last day of trial the

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[5]Defense counsel located and introduced the envelope but could not for some reason could not locate the actual letter in the courtroom during the trial. Ex. 1, (R. 296-297; 703).

court advised Wright of his rights and asked him whether or not he had decided to testify. (R. p. 439). In response, Wright responded that he would exercise his right to remain silent. (R. p. 442). At that point the defense had not put up any evidence, although it apparently intended to call one or more witnesses. When he asked Wright if he would testify, the trial judge specifically told Wright that he was not bound by his response. (R. p. 442). That afternoon the defense then called Christorpher McCray as its first witness. (R. p. 443). McCray was called outside the presence of the jury.[6] After McCray's testimony *in limine*, the court ruled McCray's testimony was inadmissible. (R. p. 461). Without consulting his client, defense counsel immediately announced that he had no other witnesses. (R. p. 461). Without making any further inquiry as to Wright's desire to testify the judge then brought the jury back in and allowed the defense to rest on the record. (R. p. 462). After some brief discussions about the potential charges, the court recessed for the day. (R. p. 463).

The next morning there were further discussions about the charge, after which the court ruled that it would not charge manslaughter or self-defense. (R. p. 477). When the court asked if the defense was ready to proceed Wright interrupted and asked the trial judge if he could say something. (R. p. 477). A discussion ensued and it was revealed that Wright wanted to testify. (R. p. 477). The trial judge stated that he would not allow Wright to testify because it appeared that Wright had waited to see what the ruling on the charge would be before he decided to testify. (R. p. 478). Defense counsel however put on record that Wright had not been given an opportunity to talk to counsel before the defense rested, and that Wright had actually told counsel

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[6]Apparently some issue as to McCray's testimony had been raised off the record that was to be considered before the testimony could be presented to the jury.

that before court started that morning of his desire to testify. (R. p. 480). Counsel also put on the record that when Wright told him before trial that he wanted to testify, counsel told him that he could not testify because the defense had rested its case. (R. p. 481). From the discussion on the record, it appears that the court would have allowed Wright to testify if counsel would have requested it when Wright told him. (R. p. 480-481). Counsel simply failed to advise the court timely. Wright was therefore denied the right to testify.

The denial of the right to testify presents a basis to proceed in direct appeal as a deprivation of a constitutional right separate from the ineffective assistance of counsel claim. *See* State v. Rivera, 402 S.C. 225 (2013). Although this appears to be a novel issue in this under South Carolina jurisprudence, there is support for requiring an abuse of discretion analysis for the refusal to allow the defendant to testify when he changes his mind after the defense has rested. *See* State v. Dauzart, 99-3471 (La. 10/30/00), 769 So.2d 1206; *See also* State v. Thompson, 2002-0361 (La.App. 4 Cir. 7/17/02); 825 So.2d 552. Applying the Dauzart/Thompson analysis requires a determination of whether the State would be prejudiced to allow the defense to reopen the case to allow the defendant to testify. This review is applied in light of the totality of circumstances. Thomson, *supra*. In the present case there would have been no prejudice to the State in allowing the defense to reopen the case to allow Wright to testify. In light of the importance of a defendant's right to testify, it was therefore error for the court to deny Wright's request to testify.

VI. THE COURT ERRED IN SENTENCING DEFENDANT TO STATUTORY LWOP WITHOUT EXPRESS FINDINGS OF FACTS AND WHERE RECORD DOES NOT CLEARLY SUPPORT STATUTORY LWOP.

The State sought to have Wright sentenced to life without parole (LWOP) based on S.C. Code Section 17-25-45. (R. p. 549).

§ 17-25-45 provides in pertinent part:

> Life sentence for person convicted for certain crimes. (A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either: (1) one or more prior convictions for: (a) a most serious offense;

S.C. Code Section 17-25-45.

The State specifically relied on the existence of a prior most serious offense as a basis for the life sentence in this case. (R. p. 549). The State represented that it had certified copies of the convictions which were entered in record. (R. p. 550; 553; 581-595). As a result, Wright was sentenced to life. (R. p. 552). LWOP in Wright's case appears to be based on the State's claim that Wright's record showed a conviction for a most serious offense. A review of the record shows that statutory LWOP is not supported by the record.

The court in this case failed to make specific finding as to the existence of a prior most serious offense. While a review of Wright's record does show a conviction for a carjacking, the record fails to show that this sentence was imposed as a most serious offense. Wright's sentencing sheet for carjacking does not indicate that it was entered as a most serious offense. Nor does Wright's sentencing sheet for the prior conviction for ABHAN indicate that it was a serious offense. Both convictions are the result of a guilty plea and neither indicate what the State

claims as its basis for imposing LWOP. (R. p. 581-595).[7] In light of the failure of the prior convictions to indicate that they were pled to or entered as serious or most serious offenses, the record fails to establish a proper basis for application of a statutory LWOP sentence under §17-25-45. As a result, Wright's life sentence should be set aside and the case remanded for re-sentencing.

V. THE TRIAL COURT ERRED IN FAILING TO GIVE REQUESTED CHARGES ON MANSLAUGHTER AND SELF-DEFENSE.

The trial judge in this case denied the defense requests for manslaughter and self defense charges finding no evidence supporting a fear of imminent danger by the Wright when the shots were allegedly fired. The record, however, fails to support this conclusion. The State's witness, Lanard Powell, testified: "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." (R. p. 276, l. 12-14). When the Solicitor asked Powell, during direct examination what Wright had told him about the incident, Powell testified that: "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 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 young boys in your house now. He indicated that Mr. Green looked as if he was going for a gun." (R. p. 275, l. 25- p. 276, l. 5). Here, the State introduced sufficient evidence from which Wright's fear of imminent danger could be inferred.

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[7]Wright currently has a PCR application pending as to the validity of those pleas. The transcript from the plea shows that he was specifically informed during the plea on the record that the Carjacking was not a most serious offense.

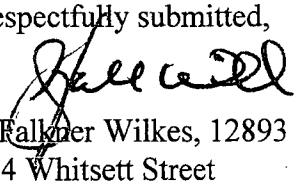
The record contains facts which, if taken in the light most favorable to Mr. Wright, would establish that Green came into the house making inflammatory and antagonistic comments towards Wright, either immediately before, or as he was drawing a gun on Wright. These facts are sufficient to give rise to an inference that Green was about to shoot Mr. Wright. Once the right to fire in self-defense arises, a person is not required to wait until his adversary is on equal terms in order to defend himself. State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Powell's testimony is sufficient to support a jury's finding that Wright was in fear of imminent danger. "If there is any evidence in the record from which it could reasonably be inferred that 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). Evidence that Green had made threatening comments just before or as he was drawing a gun on Wright is sufficient support for Wright's requests to charge.

Here the trial judge stated the it found "no evidence whatsoever of the crucial element required for both voluntary manslaughter and self-defense, of any fear of imminent danger on behalf of the Defendant at the time the shots were allegedly fired by -- allegedly by Mr. Wright, the Defendant, so I'm not going to charge either of those." (R. p. 477, l. 3-9). Given the "any evidence" standard, the trial judge's ruling is without support in the record. The failure to give the requested charges is therefore reversible error.

CONCLUSION

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

Respectfully submitted,



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