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SC SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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THE STATE,

Petitioner,

vs.

ALEX ROBINSON,

Respondent.

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**PETITIONER'S PETITION FOR REHEARING**

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Through its decision in Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the procedure for raising a challenge to the truthfulness or accuracy of statements contained in a search warrant affidavit. Pursuant to that procedure, a defendant in a case in which statements in a search warrant affidavit are challenged as false due to the omission of certain key information is entitled to the exclusion of the evidence discovered during the search if the defendant can establish the affiant failed to include the omitted information either knowingly and intentionally or with a reckless disregard for the truth **and** the search warrant affidavit would not have been sufficient to establish a probable cause basis for the search if the omitted information had been included. See State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 398 (1999) (“To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted

with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.” (citation and footnote omitted)). Critically, the purpose of the Franks procedure is to prevent the admission of evidence obtained pursuant to a search warrant that was issued only because the issuing judge was misled into believing probable cause existed when, in fact, probable cause did not actually exist. United States v. Friedemann, 210 F.3d 227, 229 (4th Cir. 2000).

In affirming as modified the appellate decision reversing Respondent Alex Robinson’s conviction for trafficking in cocaine, this Court determined the officer who sought and obtained the search warrant in Robinson’s case included intentionally false information in the search warrant affidavit by omitting key information regarding the full details of the drug transactions that served as the basis for the issuance of the search warrant. State v. Robinson, Op. No. 27617 (S.C. Sup. Ct. filed March 30, 2016). After making that determination, this Court concluded suppression of the evidence was warranted in Robinson’s case pursuant to Franks after finding the search warrant affidavit no longer provided a substantial basis for a finding of probable cause if the false statements were “excised” or “removed.” Specifically, in reaching that conclusion, this Court stated the search warrant affidavit would have only established probable cause if it demonstrated the credibility and reliability of Christopher Oliver, the third-party middleman who facilitated the drug transactions, but failed to do so. Respectfully, in deciding Robinson’s case, this Court misapprehended or overlooked several critical points – particularly in respect to the proper Franks analysis to be conducted in cases where key information is omitted and in respect to the sufficiency of the search warrant

affidavit in the case sub judice if the omitted information had been included – and should reconsider and rehear this matter as a result.

As this Court has previously explained, no Franks violation occurs in a case in which key information is omitted from a search warrant affidavit “if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.” Missouri, 337 S.C. at 554, 524 S.E.2d at 398. In deciding Robinson’s case, this Court appears to have analyzed the sufficiency of the search warrant affidavit after “excis[ing]” or “remov[ing]” the statements from the affidavit that were rendered false by the law enforcement officer’s omission of the full details of the drug transactions that were connected to Robinson’s residence without considering the sufficiency of the search warrant affidavit with the omitted information included. Accordingly, this Court should reevaluate the sufficiency of the search warrant affidavit by following the analysis it has previously articulated and consider whether the search warrant affidavit taken together with the information omitted from it established a probable cause basis for the search of Robinson’s residence. Importantly, when such an analysis is conducted and the omitted information is properly considered as part of the probable cause determination, the information contained in the search warrant affidavit coupled with the information omitted from it established a probable cause basis for the search of Robinson’s residence.

Looking to the facts omitted from the search warrant affidavit, the drug transactions that supplied the probable cause basis for the search in Robinson’s case were conducted in the following manner on three separate occasions: (1) a confidential informant working for the Horry County Police Department arranged to purchase cocaine with the assistance of Oliver, the third-party middleman; (2) the confidential informant met with the officers prior to the arranged drug transactions; (3) the confidential

informant was searched and provided with a covert recording device along with police funds; (4) the confidential informant left the officers and met with Oliver; (5) the confidential informant drove Oliver to Robinson's residence and parked just down from it at Oliver's behest so as not to draw "undue suspicion" to the residence; (6) the confidential informant gave the police funds to Oliver and then watched as Oliver went into the residence; and (7) the confidential informant watched as Oliver returned from the residence shortly thereafter with cocaine. (App'x pp. 25-30). Furthermore, as explained in the search warrant affidavit, the confidential informant delivered the cocaine to the officers after the transactions, and subsequent field testing confirmed the substance purchased by the confidential informant on each occasion was cocaine. (App'x pp. 551-555).

Significantly, if all of the omitted details of the drug transactions had been included in the search warrant affidavit, there would have been a probable cause basis to believe there was a fair probability drugs would have been located at Robinson's residence in light of the fact the drug transactions occurred at and were connected to that location. See State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987) ("[T]he evidence of a contemporaneous drug deal cited in the warrant's supporting affidavit was a sufficient basis for the determination of probable cause under the totality of the circumstances."); State v. Dupree, 354 S.C. 676, 691, 583 S.E.2d 437, 445 (Ct. App. 2003) (instructing evidence of a drug transaction supports an inference more drugs will be found at the same location); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause simply as "a fair probability that contraband or evidence of a crime will be found"). Moreover, the fact a third-party middleman was involved in the transactions did **not** weaken the probable cause basis that existed in regard to Robinson's

residence as a result of the transactions despite the fact officers were not able to search or interview Oliver prior to his delivery of the drugs to the confidential informant. See Gates, 462 U.S. at 246 (“[P]robable cause does not demand the certainty we associate with formal trials.”). That is true because the logical and reasonable inference to be drawn from Oliver’s acts of entering and exiting the residence directly before delivering the cocaine to the confidential informant was Oliver retrieved the cocaine from that particular location. See United State v. Dukes, 758 F.3d 932, 937-938 (8th Cir. 2014) (finding probable cause existed for a search of Dukes’s residence based on drug transactions that occurred at that location where the confidential informant did not directly enter the residence and, instead, simply waited outside while a third-party middleman who was never searched entered the residence and then returned from it with drugs); State v. Mejia, 111 Wash. 2d 892, 900, 766 P.2d 454, 459 (Wash. 1989) (holding a search warrant for the defendant’s residence was sufficient and instructing the issuing judge “could reasonably infer that the middleman acquired cocaine from the defendant’s house from the middleman’s conduct alone” where the middleman, who was **not** searched by officers prior to the transactions, met with the informant, travelled to the defendant’s residence, went inside, exited, returned to the confidential informant, and delivered cocaine on two separate occasions). As Oliver’s actions reasonably and logically supported a fair and reasonable probability drugs would be at the location he appeared to retrieve them from, the existence of an alternative possibility, such as the possibility Oliver possessed the drugs before entering Robinson’s residence and was simply attempting to “set up” Robinson to be arrested for drug activity, did **not** eliminate the probable cause basis for believing drugs would be found at that location.<sup>1</sup> See Gates,

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<sup>1</sup> Notably, in light of the fact Oliver exposed himself to a lengthy prison sentence by openly and personally

462 U.S. at 243 (holding probable cause existed where Gates's actions were "as suggestive of a pre-arranged drug run, as [they were] of an ordinary vacation trip"); see also Mejia, 111 Wash. 2d at 901, 766 P.2d at 459 ("The defendants assert that the middleman's conduct is inherently ambiguous, and so not sufficient to establish probable cause, because 'the drugs could have been in [the middleman's] car all along and he could have simply been 'setting up' the defendant . . . out of some sort of personal grudge.' However, an affidavit need not establish proof of criminal activity, but merely probable cause to believe it has occurred. In the absence of any evidence tending to show that the middleman intended to communicate a 'setup' to the police, it is most likely that the middleman obtained cocaine from the house. It follows that the magistrate could reasonably infer that there would be more cocaine at the house." (citations omitted and brackets in original)); cf. Carrillo v. State, 98 S.W.3d 789, 792-793 (Tex. App. 2003) (finding probable cause existed for a search of Carrillo's residence after an undercover officer gave money to an individual for cocaine, the individual left the officer and went to

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engaging in criminal activity through his act of distributing cocaine to the confidential informant on three separate occasions, the possibility Oliver was doing so in an effort to "set up" Robinson or to connect drugs to Robinson's residence was greatly minimized while the reliability and credibility of Oliver's representations he was retrieving the cocaine from Robinson's residence were greatly enhanced. See S.C. Code Ann. § 44-53-370(b)(1) (authorizing the imposition of a sentence of up to fifteen years for first-offense distribution of cocaine, five to thirty years for second-offense distribution of cocaine, and ten to thirty years for third-offense distribution of cocaine); see also United States v. Harris, 403 U.S. 573, 583-584 (1971) (finding an admission by an individual of involvement in a crime is "sufficient at least to support a finding of probable cause to search"); see generally Garcia v. County of Merced, 639 F.3d 1206, 1209 (9th Cir. 2011) ("For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence, a distinction which the district court overlooked. . . . [P]olice are not required 'to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence' that a suspect has committed a crime. All that is required is a 'fair probability,' given the totality of the evidence, that such is the case." (citations omitted)); United States v. Sanchez, 689 F.2d 508, 515-516 (5th Cir. 1982) ("[O]ur ultimate inquiry is not whether there is some hypothesis of the yellow truck's 'innocence' which is reasonably consistent with the circumstances shown, for such an analysis is more appropriate to the 'beyond a reasonable doubt' standard used on the merits. Here, we are dealing with 'probable cause,' which requires 'far less evidence[.]' All that is required is a showing of 'facts and circumstances (that) would lead a reasonably prudent man to believe that the vehicle contain(ed) contraband.'" (citations omitted)).

Carrillo's residence for a short time, and then the individual returned to the undercover officer with cocaine while rejecting the suggestion the possibility the individual's actions were motivated by subterfuge eliminated the probable cause basis for the search where there was no evidence of any kind indicating the individual involved in the transaction was aware the undercover officer was actually a law enforcement officer). Accordingly, no Franks violation occurred in Robinson's case. See Missouri, 337 S.C. at 554, 524 S.E.2d at 398 ("There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause."); see also United States v. Cioni, 649 F.3d 276, 286 (4th Cir. 2011) ("[E]ven if the additional facts cited by Cioni were included in the affidavits, the probable cause calculus would nonetheless have remained unchanged. Under these circumstances, Franks is inapplicable."); United States v. Colkley, 899 F.2d 297, 298 (4th Cir. 1990) ("Johnson's incriminating statements were properly admitted because Johnson made no showing that the affiant intended to mislead the magistrate by omitting information, and because the warrant with the omitted information would in any event have been supported by probable cause[.]").

Perhaps most troublingly, this Court's conclusion to the contrary – if permitted to stand – would provide a framework for drug traffickers to follow to avoid prosecution while distributing dangerous and illicit substances to the citizens of South Carolina. Specifically, if officers could not develop a sufficient probable cause basis to fairly and reasonably believe drugs were located in a particular residence from which a middleman was seen entering and exiting before delivering drugs, officers would be forced to ignore the logical and reasonable inferences to be drawn from the middleman's actions while drug traffickers would be able to insulate themselves from prosecution simply by employing a trustworthy middleman that is loyal through either threat or reward and by

refusing to allow anyone other than the middleman to enter the residence from which the trafficker's drugs are distributed. Furthermore, such a conclusion would radically depart from this Court's earlier decisions regarding what is required to establish a probable cause basis for a search of a residence, including this Court's recent decision in State v. Kinloch, 410 S.C. 612, 613-614, 767 S.E.2d 153, 153-154 (2014). In that case, the officer who sought the search warrant included the following details in the search warrant affidavit: (1) officers conducted surveillance of a particular residence after receiving numerous tips about drug transactions taking place at that location; (2) during their surveillance, officers saw a then-unknown man in a red shirt meet with two other men outside of the residence before all three parties briefly went inside; (3) on another occasion, officers saw the man in the red shirt leave the residence and engage in hand-to-hand transactions of some kind with other individuals while an unknown man in a black jacket stood nearby; (4) officers observed the man in the red shirt count money after the transactions; (5) later on, officers saw the man in the black jacket approach another individual and exchange a plastic bag for money; and (6) after that, officers approached the person who made the exchange with the man in the black jacket and recovered a plastic bag containing heroin when it was dropped to the ground. Id. at 614-615, 767 S.E.2d at 154. Based on those facts, this Court concluded the search warrant affidavit provided the magistrate with a substantial basis for reaching his probable cause determination based on the information contained within it regarding the numerous tips received by the officers and the officers' subsequent observation of "seemingly drug-related behavior." Id. at 618, 767 S.E.2d at 156. Importantly, this Court was able to reach that determination despite the fact the search warrant affidavit in Kinloch contained **no** information indicating either the man in the red shirt or the man in the black jacket

had any connection to the residence for which the search warrant was sought aside from the information establishing those men were present at, entered into, and exited from the residence on several occasions. Id. at 614-615, 767 S.E.2d at 154. Furthermore, this Court determined the search warrant affidavit contained sufficient information to establish a probable cause basis for a search despite the fact no information was included in that affidavit regarding the reliability and credibility of the man in the red shirt and the man in the black jacket or excluding the possibility both men whose actions served as the foundation for the issuance of the search warrant obtained their drugs from another location before bringing them to the residence with the intent to shift police suspicions to that residence as opposed to some other location. Id.

For the same reasons the officers' observations in Kinloch established a fair probability drugs would be found in the residence targeted in that case, the information known to the investigating officers in Robinson's case through their work with the reliable confidential informant provided them with a probable cause basis to reasonably and fairly believe drugs would be located in Robinson's residence despite the fact they were not able to search Oliver prior to his delivery of the cocaine to the confidential informant or to conclusively verify Oliver did not bring the drugs to that location in an effort to "set up" Robinson. See id. at 618, 767 S.E.2d at 156 (holding probable cause existed for a search of a residence based on drug-related activity that occurred outside the residence even though no information was presented excluding the possibility the unknown individuals engaged in the drug-related activity at that location did not simply bring their drugs there from some other place); cf. Commonwealth v. Villella, 39 Mass. App. Ct. 426, 427-428, 657 N.E.2d 237, 238 (Mass. App. Ct. 1995) (holding probable cause existed for a search based on a properly-conducted controlled buy where a

confidential informant purchased drugs from a residence through an intermediary that was not searched before the transaction took place); State v. Lovato, 117 N.M. 68, 69-70, 868 P.2d 1293, 1294-1295 (N.M. Ct. App. 1993) (finding probable cause existed for a search of a motel room where an “unwitting informant” met with an undercover narcotics detective, directed him to a motel, took money from him, approached a motel room while the officer waited nearby in his car, knocked on the motel room door, entered the room after the door was opened, and then returned with cocaine for the officer a few minutes later). Accordingly, although it would undeniably have been a better practice for the officer who prepared the search warrant affidavit in Robinson’s case to include the full details of the drug transactions in that affidavit, the officer’s failure to do so does **not** warrant the exclusion of the evidence discovered in the search of Robinson’s home because the inclusion of the omitted information would not have affected the probable cause basis for the search. See Missouri, 337 S.C. at 554, 524 S.E.2d at 398 (“There will be no Franks violation if the affidavit, **including the omitted data**, still contains sufficient information to establish probable cause.” (emphasis added)); see also State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) (recognizing judges are concerned with probabilities as opposed to certainties when making probable cause determinations). Under those circumstances, the heavy societal toll that would be incurred by the exclusion of the evidence that was found in a search conducted with a warrant and fully supported by probable cause cannot be justified, and, therefore, Robinson’s conviction should not be reversed. See Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-365 (1998) (“Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be

incarcerated to escape the consequences of their actions. Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." (citations and footnote omitted)). For the foregoing reasons coupled with the arguments raised in the Brief of Petitioner and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and affirm Robinson's conviction after finding no Franks violation occurred in his case.

Respectfully submitted,

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April 12, 2016

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**PROOF OF SERVICE**


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I, Anne A. Mueller, certify that I have served the within Petitioner's Petition for Rehearing on Respondent by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served.  
This 12th day of April, 2016.

  
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