THE STATE OF SOUTH CAROLINA
In the Court of Appeals

23400

APPEAL FROM CHESTER COUNTY
Court of General Sessions

Honorable Roger E. Henderson, Sixth Circuit Court Judge

Appellate Case No.: 2016-000193

The State, Respondent

v.

Charles David Hayes, Appellant

FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN CONCLUDING THAT PAULINE HAYES' CONSENT TO SEARCH HER HOME WAS VOLUNTARILY GIVEN WHEN SHE ONLY CONSENTED TO THE SEARCH OUT OF FEAR OF WRONGFUL ARREST?

II. EVEN HAD THE CONSENT TO SEARCH BEEN VOLUNTARILY GIVEN, DID THE TRIAL COURT ERR IN CONCLUDING THAT THE OFFICERS DID NOT EXCEED THE SCOPE OF THE SEARCH WHEN THE REQUEST FOR CONSENT TO SEARCH WAS COUCHED IN LOCATING THE FIREARM USED IN THE ARMED ROBBERY AND THE OFFICERS' LACK OF KNOWLEDGE AS TO WHAT KIND OF FIREARM USED ALLOWED THEM TO SEARCH THE HOME INDISCRIMINATELY?

III. WHETHER THE SEARCH WARRANT WAS CONSTITUTIONALLY DEFECTIVE WHEN IT WAS ISSUED BY THE SPOUSE OF SHERIFF UNDERWOOD, WHOM WAS INVOLVED WITH THE SEARCH AND ARREST OF APPELLANT?

IV. DID THE TRIAL COURT ERR IN DENYING SUPPRESSION OF APPELLANT'S STATEMENTS WHEN THREATS WERE MADE TO ARREST HIS MOTHER SHOULD HE NOT CLAIM OWNERSHIP OF EVIDENCE SEIZED FROM HIS HOME?

STATEMENT OF CASE

On August 27, 2014, a group of seven officers from the narcotics unit of the Chester County Sheriff's Office sought to apprehend Patrick Simpson, a fugitive wanted for armed robbery in North Carolina. They started their search at the home of Pauline Hayes, Mr. Simpson's grandmother and Appellant's mother. The officers conducted "a knock and talk" and informed Mrs. Hayes of the reason for their visit and inquired as to whether Simpson was at her home. (ROA, p. 89, lines 1-25, p.90, lines1-8, and 1-12, p. 91, lines 1-3, and 5-16).

Mrs. Hayes informed the officers that Mr. Simpson did not live at her home, but was briefly staying to attend his grandfather's funeral. (ROA, p. 89, lines 8-25, and p. 91, lines 1-25). Mrs. Hayes told the officers that she thought Mr. Simpson had left because he was not at her house when she returned from church after 9:30 p.m. the night before and had not seen him sleeping on her couch where he had been staying. After Mr. Simpson was sure the police had gone, he ran out of Appellant's bedroom, dropped his bag of belongings near the living room couch, and ran out the backdoor (ROA, p. 394, lines 1-10, and lines 14-15). Mr. Simpson had slept in Appellant's bedroom the night before. The officers left the residence to return upon Sheriff Alex Underwood's order only five minutes later to find Mr. Simpson in the backyard. Agent Albert Crawford testified that they did not see Mr. Simpson exit the home and enter the backyard upon returning. (ROA, p. 223, lines 6-11). Simpson was immediately arrested and a search of his person revealed a bag of marijuana. (ROA, p. 164, lines 7—16). Officers did not question Mr. Simpson about the firearm or any other narcotics he possessed. (ROA, p. 125, lines 19-25, and p. 126, lines 1-4).

The officers had already secured Mr. Simpson in handcuffs and in the back of a patrol car when they sought to conduct a search incident to arrest of Mrs. Hayes' home for the gun Mr.

Simpson used in the armed robbery. (ROA, p. 93, lines 18-25, and p. 94, lines 1-5). At this time, the officers neither obtained a search warrant to search the home nor knew of the kind of firearm they were looking for. (ROA, p. 122, lines 12-25, and p. 123, lines 1-3). Mrs. Hayes initially refused Sheriff Underwood's requests for consent to search but relented when Sheriff Underwood told her that if they obtain a search warrant and then find *a* gun in the home, she and her boyfriend, Quinton Feaster, whom also lived in the home, were going to jail. Without advising Mrs. Hayes of her right to refuse consent, Mrs. Hayes signed the consent to search form based on the threat of arrest. Mrs. Hayes later testified that she was terrified and called her son, Appellant, to come home from York Technical College, where he was earning a degree in Business Management. Mrs. Hayes' high blood pressure medication requires her to frequently visit the restroom; however, officers refused Mrs. Hayes' requests to use the restroom while they searched. (ROA, p. 398, lines 23-25, and p. 399, lines 1-17).

During their search, officers moved past Mr. Simpson's belongings in the living room and searched the back bedroom. Agent Crawford testified that he had smelled marijuana upon entering the home and spied a jar of marijuana lodged behind a couch in the bedroom The agents then found a Taurus .38 revolver stuffed in the couch and crack cocaine in the computer desk. (ROA, p. 167, lines 5-25, and p. 168, lines 1-19). The officers then decided it was time to obtain a search warrant. The search warrant was issued by Judge Angel Underwood, the spouse of Sheriff Underwood, whom was involved in the search of Mrs. Hayes' home and the arrest of Appellant. (ROA, p. 356, lines 16-25, and p. 357, lines 1-9).

Searching pursuant to the swiftly obtained warrant, agents found marijuana in a Ziplock bag and a scale. (ROA, p. 186, lines 6-24). Appellant arrived home after the search had concluded, and the officers handcuffed him, his mother, and Mr. Feaster and held them on the

front porch. Appellant, his mother, and Mr. Feaster denied ownership of the fruits of the search. (ROA, p. 401, lines 4-7). The officers read *Miranda* warnings and explained the constructive possession doctrine to them, in which each resident of the home would be arrested if no one claimed ownership of the drugs and gun. (ROA, p. 105, lines 16-24). Officers walked Appellant's mother and Mr. Feaster to the patrol car to drive them to the detention center. (ROA, p. 106, lines 7-10). Based on fear that his mother would be arrested and put in jail, Appellant then claimed ownership, and the officers promptly and officially arrested him. (ROA, p. 421, lines 15-19).

At the detention center, after Appellant was read his *Miranda* rights, Appellant repeated in his written statement that he was claiming the fruits of the search to spare his mother from arrest. (ROA, p. 516). At trial, Appellant testified that he claimed ownership of the fruits of the search even though they were not his because his mother is more important. Appellant also testified that he felt pressured to continue questioning because he was afraid the police were going to do something to his mother. (ROA, p. 423, lines 19-25, and p. 424, lines 1-9) Moreover, Appellant testified that he was told what to write in his statement and in his written responses to questions, such as who owned the gun, and how long he owned it. Appellant repeatedly asserted his reason for doing so, "I was just saying anything just to help my mama. I was, basically, just agreeing just to get this out of the way so they wouldn't arrest my mama." (ROA, p. 425, lines 4-18). Appellant acknowledged that everything he told officers at the detention center was false, but he did so in order to protect his mother. Further, Appellant testified that he did not write in his statement that the seized evidence belonged to Mr. Simpson because after verbally informing officers that they must be Mr. Simpson's, he was told that he must claim ownership if he wanted to keep his mother free. (ROA, p. 435, lines 7-20).

Because Appellant did not genuinely claim ownership of the seized evidence at the detention center, his mother and Mr. Feaster were arrested for possession with intent to distribute crack cocaine and marijuana and booked into jail. Moreover, fingerprint testing later revealed that the jars of marijuana, the container of crack cocaine, and the revolver did not contain Appellant's fingerprints. Only the outside of the Ziplock bag contained his fingerprint. (ROA, p. 292, lines 11-25, and p. 293, lines 1-22).

Prior to trial, defense counsel moved to suppress Appellant's statements and the evidence seized arguing: (1) that Appellant's statements to police were involuntary; (2) Mrs. Hayes' consent to search the home was not voluntarily made; (3) even if the consent to search was voluntarily made, officers did not have reasonable suspicion that further criminal activity existed to search the home after Mr. Simpson had already been apprehended, rendering the search in violation of the Fourth Amendment; (4) even if the consent to search was not involuntary, the search exceeded the scope of the consent because the consent was given to search for the firearm Mr. Simpson used in the robbery. The State responded arguing that the consent to search was voluntary and that the warrant was lawfully issued. Following a pre-trial hearing, the trial court denied Appellant's suppression motion, generally concluding that: 1) the consent to search was voluntarily given; 2) the officers did not exceed the scope of the search 3) the search warrant was unnecessary because consent was voluntarily given; and 4) Appellant's confession and waiver of his *Miranda* rights were voluntary. (ROA, p. 78, lines 4-25, and p. 79, lines 1-11).

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT PAULINE HAYES' CONSENT TO SEARCH HER HOME WAS VOLUNTARILY GIVEN BECAUSE SHE ONLY CONSENTED TO THE SEARCH OUT OF FEAR OF WRONGFUL ARREST.

The Fourth Amendment of the United States Constitution and its counterpart in the South Carolina Constitution provide protection against unreasonable searches and seizures.[1] Searches absent a warrant based upon probable cause are *per se* unreasonable and are limited to specifics exceptions.[2] Consent to search is one exception to the warrant and probable cause requirement; however, the consent is invalid if it is not voluntarily made.[3] Whether consent to search was voluntary or the product of duress or coercion – express or implied [4] – is determined by examining the totality of the circumstances.[5] The totality of the circumstances analysis applies in both custodial and non-custodial situations,[6] and the court must take individual characteristics into account, including the vulnerability of the consenter and whether he or she knew of the right to refuse.[7] The court must also consider the coercion of police, no matter how subtle, which includes threats, promises in exchange for consent, and even a show of force, such as the use of a

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[1] U.S. Const. amend. IV.; S.C. Const. art. 1, § 10.
[2] *E.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043 (1973).
[3] *Id.* at 222, 93 S.Ct. at 2045.
[4] The Supreme Court has held that "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id.*, at 228, 93 S.Ct. at 2048.
[5] *State v. Wallace,* 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) (citing *Bustamonte,* 412 U.S. at 227, 93 S.Ct. at 2048).
[6] *Wallace*, 269 S.C. at 550, 238 S.E. 2d at 676 (citing *Bustamonte,* 412 U.S. at 246-47, 93 S.Ct. at 2058; *State v. Ellefson*, 266 S.C. 494, 502, 224 S.E.2d 666, 670 (1976); *U.S. v. Watson*, 423 U.S. 411, 414-22, 96 S.Ct. 820, 823-27 (1976)).
[7] *Bustamonte*, 412 U.S., at 228-229, 93 S.Ct. at 2048-49, 2059.

threatening tone and the number of police officers present.[8] The prosecution carries the burden of proving that the consent to search was voluntarily given.[9]

In the present case, considering the totality of the circumstances, the trial court erred in concluding that Mrs. Hayes' consent to search her home was not voluntarily given. Just before Sheriff Underwood asked for consent to search her home, six to seven officers had just intruded into her backyard and arrested her nephew for a violent crime. Mrs. Hayes was not told she could refuse consent with impunity, and she was startled and frightened by the sudden commotion at her home that interrupted her usual routine and calm morning. Moreover, Sheriff Underwood threatened Mrs. Hayes after she denied consent to search. Mrs. Hayes testified that after she refused to consent, Sheriff Underwood told her: "'Well if you don't let us search the house we're going to go and get a warrant and if I find a gun in there all of y'all are going to jail." (ROA, p. 398, lines 6-8). The purported purpose of gaining consent to search was to locate the firearm Mr. Simpson used in the armed robbery, and there is no evidence that Mrs. Hayes was aware that Mr. Simpson was a fugitive or had any knowledge of the firearm at issue. Moreover, at the time the threat was made, the officers had not yet entered the home, and there is no evidence that the officers thought that Mrs. Hayes was involved in criminal enterprise with Mr. Simpson and had planned to charge her accordingly. Hence, Sheriff Underwood used this baseless threat to coerce Mrs. Hayes into giving consent.

Bumper v. North Carolina[10] is instructive here. In *Bumper*, police searched a woman's house without a warrant after gaining her consent by informing her that they already had a search

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[8] *State v. Provet*, 391 S.C. 494, 507, 706 S.E.2d 513, 520 (Ct. App. 2011) (citing *State v. Mattison*, 352 S.C. 577, 585, 575 S.E.2d 852, 856 (Ct. App. 2003)).
[9] *Wallace*, 269 S.C. at 550, 238 S.E. 2d at 676. (internal citations omitted).
[10] 391 U.S. 543, 88 S.Ct. 1788 (1968).

warrant.[11] The Supreme Court found the consent to search involuntary because it was induced by deceptive practices by law enforcement that were presented as requests for submission to a lawful authority.[12] The Court reasoned that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[13]

The factual circumstances of *Bumper* are distinguishable from the case at hand; however, the spirit of the Court's reasoning is applicable. Similar to the deceptive practices in *Bumper*, Mrs. Hayes' consent to search was induced by a threat of arrest, an arrest that Sheriff Underwood had no probable cause to make.[14] Mrs. Hayes testified that the threat of arrest terrified her so much that she consented to the search, "I hurried up and signed those papers because I'm fifty-three years old, I've never been to jail, and I wasn't about to start that day." (ROA, p. 398, lines 11-15). Because Mrs. Hayes thought she would be arrested if she did not consent, she believed that she had no right to resist the search because the officers would just arrest her anyway. Moreover, Mrs. Hayes' refusal prior to the threat further demonstrates that she was coerced into giving consent.

Further, as demonstrated by her trial testimony, Mrs. Hayes thought the threat was real and would be carried out if she did not relinquish consent. In *State v. Greene*, a homeowner testified that her consent to search was coerced because a police officer had threatened her that they would take her to jail and her children to Department of Social Services (DSS).[15] This Court held that her consent to search was voluntarily made because she had signed the consent form

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[11] *Id.* at 550, 88 S.Ct. at 1792.
[12] *Id.* at 548-50.
[13] *Id.* at 550.
[14] *See supra* p. 12.
[15] 330 S.C. 551, 555-56, 499 S.E.2d 817, 819 (Ct. App. 1997).

after she had calmed down from the commotion and knew the threats were not real because the officer in charge had told her that no one was going to jail.[16] Here, not only was the threat made by the highest ranking officer in the county – the Chester County Sheriff himself – but also, none of the officers present contradicted Sheriff Underwood's threat. Moreover, unlike the homeowner in *Greene*, Mrs. Hayes had not had time to calm down before signing the consent to search form. On the contrary, she testified that she was terrified and hurried to sign the consent form without time to regain composure or scrutinize the veracity of the threat.

Because Mrs. Hayes' consent to search was not voluntarily given, the evidence seized pursuant to her consent to search must be suppressed. Courts have long held that evidence must be suppressed if seized as a result of police misconduct and the abrogation of constitutional rights.[17] The exclusionary rule's justification lies in the notion that law enforcement and subsequently, prosecutors, should not benefit from constitutional rights violations.[18] The exclusionary rule applies not only to the direct product of police illegality, but to secondary evidence, what has been deemed "fruit of the poisonous tree."[19]

Here, the threat that induced Mrs. Hayes to consent was the initial illegality that allowed officers to search her home in violation of the Fourth Amendment. Because the evidence seized during that search constitute as fruits of the poisonous tree, the trial court erred in denying Appellant's suppression motion.

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[16] *Id.* at 558, 499 S.E.2d at 820.
[17] *Weeks v. United States*, 232 U.S. 383, S.Ct. 341 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014); *See generally State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013).
[18] *See United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620 (2004).
[19] *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963); *see also Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268 (1939); *see also Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006).

II. EVEN HAD THE CONSENT TO SEARCH BEEN VOLUNTARILY GIVEN, THE TRIAL COURT ERRED IN CONCLUDING THAT THE OFFICERS DID NOT EXCEED THE SCOPE OF THE SEARCH BECAUSE THE REQUEST FOR CONSENT TO SEARCH WAS COUCHED IN LOCATING THE FIREARM USED IN THE ARMED ROBBERY AND THE OFFICERS' LACK OF KNOWLEDGE AS TO WHAT KIND OF FIREARM USED ALLOWED THEM TO SEARCH THE HOME INDISCRIMINATELY, THEREBY VIOLATING THE FOURTH AMENDMENT.

The Fourth Amendment's warrant and probable cause requirements are subject to a few specific exceptions, including obtaining consent to search.[20] However, the Fourth Amendment is violated when the search exceeds the scope of the consent.[21] Further, the scope of a search is generally defined by its expressed object[22] and consent may be limited by the type of activity for which it has been granted.[23] The scope of the consent is determined considering "objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[24]

In the present case, even if Mrs. Hayes' consent to search had been voluntarily made, the resulting search exceeded the scope of consent. The expressed object or type of activity here was defined – the firearm Mr. Simpson used in the armed robbery. Moreover, Agent Albert Crawford testified that their main focus was locating the firearm. (ROA, p. 224, lines 2-9).

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[20] *Bustamonte*, 412 U.S. at 219, 93 S.Ct. at 2043.
[21] *State v. Forrester,* 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001) ("When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable.").
[22] *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1804 (1991).
[23] *State v. Tillman*, 304 S.C. 512, 516, 405 S.E.2d 607, 610 (Ct. App. 1991). *See also Walter v. United States*, 447 U.S. 649, 657, 100 S.Ct. 2395, 2401-02 (1980) ("If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy.")
[24] *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04.

Agent Johnny Neal also testified that they asked Mrs. Hayes consent to search her home *for the firearm*. (ROA, p. 93, lines 1-4). Accordingly, because Agent Crawford testified that he wrote in his report that Mr. Simpson had been staying in the living room of the home and not in the back bedroom (ROA, p. 233, lines 1-17), the officers should have only searched for the firearm in his belongings set in front of the living room couch. By combing through the back bedroom, the officers exceeded the scope of the consent to search as they did not know that Mr. Simpson slept there the night before, yet knew that Mr. Simpson was staying on the living room couch where his belongings were placed.

Furthermore, the scope of the search was impermissibly exceeded because the officers did not know what type of firearm they were searching for. The officers did not know whether to look for a two-foot long shotgun or a much smaller handgun, which gave them justification to search indiscriminately throughout the entire home. Using this gap of information, the officers could search every drawer, compartment, and any container that could conceivably hold a handgun. The Supreme Court has held that searches of this nature are unconstitutional:

> [c]onsent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment".[25]

Thus, because the "Amendment requires that the scope of every authorized search be particularly described", the lack of knowledge as to what firearm to search for rendered the search a free-for-all and a fishing expedition.

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[25] *Walter*, 447 U.S. at 656-57, 100 S.Ct. at 2401-02 (quoting *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378 (1980).

Moreover, Mrs. Hayes signed a pre-printed boilerplate consent form the officers had on hand. Although the form did not explicitly state that the search consented to was only for the firearm used in the armed robbery, the South Carolina Supreme Court has held that general consent, such as boiler plate language, does not validate an unconstitutional search, "[e]ven in a situation where police have received a general and unqualified consent, 'the police do not have carte blanche to do whatever they please.'"[26] As the officers testified, the request for consent to search Mrs. Hayes' home was made for the purpose of finding the firearm used in the armed robbery – no other purpose was relayed to her. The request was made for this purpose, and whether voluntary or not, Mrs. Hayes consented for this purpose. (ROA, p. 397, lines 6-10). Therefore, the officers exceeded the scope of the search by searching in locations other than where Mr. Simpson had slept and placed his belongings. Accordingly, the evidence seized as a result of the constitutionally impermissible search should have been suppressed.

[26] *Forrester*, 343 S.C. at 648-49, 541 S.E.2d at 843 (quoting Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996)).

III. THE SEARCH WARRANT WAS CONSTITUTIONALLY DEFECTIVE BECAUSE IT WAS ISSUED BY THE SPOUSE OF SHERRIFF UNDERWOOD, WHOM WAS INVOLVED WITH THE SEARCH AND ARREST OF APPELLANT, THEREBY ISSUED IN VIOLATION OF THE FOURTH AMENDMENT'S REQUIREMENT THAT WARRANTS SHALL ONLY BE ISSUED BY NEUTRAL AND DETACHED MAGISTRATES.

The Fourth Amendment and its counterpart in the South Carolina Constitution provide protection against unreasonable searches and seizures.[27] "Unreasonable" searches and seizures have been interpreted as those executed without a warrant based upon probable cause.[28] As another protection against unreasonable searches and seizures,[29] the Fourth Amendment forbids a magistrate who is neither neutral nor detached from issuing a search warrant.[30] Magistrates must be impartial, severed, and disengaged from activities of law enforcement such that independent judgment is not distorted.[31] Further, in evaluating an application for a search warrant, a magistrate must make an independent determination of probable cause and not serve as a "rubber stamp for the police."[32] A warrant issued by a magistrate who is neither neutral nor detached is defective, and the individual against whom the seized evidence is offered has standing to object to the warrant and search.[33]

In the present case, the search warrant was constitutionally defective because it was issued by Judge Underwood, the wife of Sherriff Underwood. The South Carolina Advisory

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[27] U.S. Const. amend. IV.; S.C. Const. art. 1, § 10.
[28] *Bustamonte*, 412 U.S. at 219, 93 S.Ct. at 2043.
[29] "The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 3304 (1984) (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1948)). *See also Gerstein v. Pugh*, 420 U.S. 103, 113, 95 S.Ct. 854, 862 (1975).
[30] *See U.S. v. Leon*, 468 U.S. 897, 913-14, 104 S.Ct. 3405, 3415-416 (1984) (quoting *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482 (1977)).
[31] *Shadwick v. City of Tampa,* 407 U.S. 345, 350-51, 92 S.Ct. 2119 (1972).
[32] *Leon*, 468 U.S. at 914, 104 S.Ct. at 3416 (quoting *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512 (1964)).
[33] *State v. Freeman*, 319 S.C. 110, 118, 459 S.E.2d 867, 872 n. 7 (Ct. App. 1995).

Committee on Standards of Judicial Conduct has encountered similar conflict of interests. For example, the Committee concluded that a magistrate could not serve in the same county where the magistrate's spouse was a Sheriff's department employee and might appear before the magistrate.[34] Similarly, the Committee found that a part-time bond magistrate should not serve in the same county where the magistrate's spouse was a captain of the detective unit, and the spouse *or spouse's employees* would appear before the judge to apply for warrants.[35] The Committee has also concluded that it was improper for a judge to serve in a jurisdiction in which the judge's spouse was the primary investigator for the Solicitor's office in that county.[36] Further, the Committee concluded that it was improper for a part-time judge to serve at a jail issuing warrants and releasing defendants on bond when her husband is a bonding company runner in the same county.[37] The Committee concluded that it was irrelevant whether the spouse was involved in the proceeding, "The fact that the spouse would not be the bonding agent for any defendants that the judge issues an arrest warrant for or sets a bond for would not remove the appearance of impropriety. 'It is the husband-wife relationship alone which creates the conflict. They will reside in the same house, share in each other's income, and most importantly, their conversations will be private and privileged.'"[38] The Committee concluded that the relationships in all four situations would violate certain Canons of the Code of Judicial Conduct because they created the appearance of impropriety, which would dampen the public's confidence in the judiciary.[39]

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[34] Advisory Comm. on Standards of Judicial Conduct Op. No. 8-2007.
[35] Advisory Comm. on Standards of Judicial Conduct Op. No. 12-2005. (emphasis added).
[36] Advisory Comm. on Standards of Judicial Conduct Op. No. 4-2011.
[37] Advisory Comm. on Standards of Judicial Conduct Op. No. 19-1998.
[38] *Id.*
[39] Op. No. 4-2011; Op. No. 19-1998.

Thus, the martial relationship between Judge Underwood and Sheriff Underwood invalidates Judge Underwood as impartial. Moreover, it is of no consequence that Sheriff Underwood was not the affiant applying for the warrant, as the Committee makes clear, it is improper regardless of whether he applied for the warrant, it is improper for any of his employees to. Thus, the marital relationship, and ultimately, the inherent conflict of interest, renders Judge Underwood's authorization of the search warrant defective and improper.

Additionally, not only is the search warrant defective because their marriage alone removes Judge Underwood from a role independent of the competitive law enforcement enterprise,[40] but also because Judge Underwood may have been told information before the warrant was issued – information that may or may not have been contained in the affidavit. *State v. Dunbar* is instructive here.[41] In *Dunbar*, this Court held that a search warrant was defective because the issuing magistrate judge drafted the affidavit using information relayed from a telephone conversation with one of the officers involved.[42] In holding that the magistrate abandoned his impartial role, this Court reasoned, "We do not know if the magistrate inadvertently interposed his own interpretation of the facts into the affidavit in support of the search warrant."[43] Thus, *Dunbar* stands for the proposition that a warrant may be defective based on the *possibility* that extraneous interpretations or information invaded the probable cause determination.[44]

Although the conduct of magistrate in *Dunbar* is distinguishable from the present case, its reasoning is applicable. Sheriff Underwood was involved in the investigation from the very start

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[40] *See supra* p. 20.
[41] 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004).
[42] *Id.* at 250, 603 S.E.2d at 621.
[43] *Id.*
[44] *Id.* (emphasis added).

and agents from the narcotics unit primarily made up the officers sent to apprehend Mr. Simpson. Thus, it appears that the apprehension of a fugitive objective was a pretext for a fishing expedition to find narcotics. This conclusion is made all the more plausible by the State's cross-examination of Appellant in which he was accused of selling narcotics to specifically named individuals from his bedroom window. (ROA, p. 438, lines 13-25, and p. 439, 1-25). Thus, Sheriff Underwood was aware that there may be an opportunity to undertake a narcotics investigation before an officer smelled burnt marijuana upon entering Mrs. Hayes' home on August 27, 2014. Like the magistrate in *Dunbar*, it is impossible to know whether Sheriff Underwood discussed this with Judge Underwood in the privacy of their home, even casually, before she issued the warrant. Hence, it is uncertain whether Judge Underwood's determination of probable cause was colored by relayed information that is absent from the affidavit and by her own interpretation of what may have been in Mrs. Hayes' home. Therefore, because Judge Underwood was in a unique position to obtain information outside of the affidavit, the evidence seized pursuant to the search warrant should have been suppressed.

IV. THE TRIAL COURT ERRED IN DENYING SUPPRESSION OF APPELLANT'S STATEMENTS BECAUSE THREATS TO ARREST HIS MOTHER RENDERED APPELLANT'S WAIVER OF *MIRANDA* RIGHTS AND CONFESSION INVOLUNTARY.

The right against self-incrimination pursuant to the Fifth Amendment and the right to due process of the law contained in the Fourteenth Amendment forbid the use of an involuntarily made confession against a criminal defendant.[45] The voluntary requirement stems not only from the general unreliability of involuntary confessions, but also because the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."[46] Accordingly, a criminal conviction even partially founded upon an involuntary confession is a deprivation of due process and thus, must be suppressed.[47] *Miranda* warnings secure the privilege against self-incrimination and its waiver is only valid if made knowingly, intelligently, and voluntarily.[48] A voluntary *Miranda* waiver is the product of free deliberate choice – a decision made without police overreaching,[49] intimidation, coercion, or deception.[50] Assessing whether *Miranda* rights were voluntarily waived requires careful scrutiny of all surrounding circumstances, which includes characteristics of the accused and the manner in which the police

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[45] *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 433, 120 S.Ct. 2326, 2330 (2000) ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.") (internal citations omitted); *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, (1964); *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735 (1961).
[46] *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 80 S.Ct. 274, 280 (1960).
[47] *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780 (1964).
[48] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966).
[49] *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S.Ct. 515, 524 (1986).
[50] *Bustamonte*, 412 U.S. at 226, 93 S.Ct. at 1047.

interrogated him.[51] Further, when applying this test, courts are not limited by an exhaustive list of factors[52] and no factor alone is determinative.[53]

It is established that involuntary confessions do not just take the form of interactions that come to physical blows in the interrogation room, "coercion can be mental as well as physical, and...the blood of the accused is not the only hallmark of an unconstitutional inquisition." [54] Courts applying the totality of the circumstances test have found a confession to be involuntary when induced by threats, coercion, and offers of indirect or direct promises, however slight.[55] Further, due process protections encompass extraneous adverse consequences as the subject of threats and coercion.[56]

For example, in *Lynumn v. Illinois*, James Zeno, an alleged customer of Lynumn led police to her apartment where they confronted her about selling narcotics.[57] Lynumn initially denied she sold a package of narcotics to Zeno and officers responded by threatening her that her children would be taken away from her and given to strangers to care for them.[58] At trial, Lynumn testified that,

> After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted.

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[51] *E.g.*, *Dickerson*, 530 U.S. at 434, 120 S.Ct. at 2331; *Moran v. Burbine*, 475 U.S. 412, 422, 106 S.Ct. 1135, 1141 (1986); *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572 (1979).
[52] *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct 1745, 1754 (1993).
[53] *Bustamonte*, 412 U.S. at 226-27, 93 S.Ct. at 1047.
[54] *Blackburn*, 361 U.S. at 206, 80 S.Ct. at 279. *See also Garrity v. New Jersey*, 385 U.S. 493, 497, 87 S.Ct. 616, 618 (1967) ("Subtle pressures may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.'") (internal citations omitted).
[55] *State v. Moses*, 390 S.C. 502, 514, 702 S.E.2d 395, 401 (2010) (internal citations omitted).
[56] *E.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959) (holding that the suspect's will was overborne when the police made him believe that his police officer friend might be fired if he did not cooperate with police).
[57] *Lynumn*, 372 U.S. at 529-30, 83 S.C. at 918.
[58] *Id.* at 531-532, 83 S.C. at 919.

They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to say 'You must admit you gave Zeno the package' so I said, 'Yes, I gave it to him.' The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were false... I lied because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say.[59]

The officers did not deny that these were the circumstances in which Lynumn made incriminating statements.[60] The Supreme Court held that Lynumn's verbal confession was involuntary because it was "abundantly clear" that her confession was coerced, while noting that Lynumn had no reason not to believe that the police had the power to carry out their threats.[61]

The present case shares substantial similarities with *Lynumn*. Like Lynumn, Appellant denied all involvement with the narcotics found in the home only to relinquish to the accusations to protect his mother after police threatened to arrest her. Also similar to *Lynumn*, the officers did not deny that the assertion had been made his mother and Mr. Feaster would be arrested. Moreover, almost identical to Lynumn's testimony, Appellant testified that he would say anything to protect his mother and falsely claimed the evidence seized because he was led to believe he could protect her by doing so. Lastly, Appellant also had no reason not to believe that the police would not put his mother in jail. This belief is particularly reasonable because he watched officers handcuff his mother and lead her to the police vehicle. Watching police take his mother away in handcuffs, Appellant had only seconds before they placed her in the patrol car to decide whether to allow his mother to be wrongfully arrested, or succumb to accusations of crimes he did not commit.

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[59] *Id.*
[60] *Id.*
[61] *Id.* at 534, 83 S.C. at 920.

Additionally, in substantially similar factual circumstances to the present case, this Court has also held confessions to be involuntary when made in response to threats levied against an accused's family.[62] In *State v. Corns*, Horry County police obtained a search warrant of Corns' home stemming from information gained from an informant in Georgia about a string of armed robberies in Horry County.[63] After finding marijuana and items consistent with the armed robberies, Corns was arrested and subsequently read his *Miranda* rights, to which he stated he understood.[64] At trial, the officers testified that although they did not threaten or intimidate Corns, the officers informed him they had a warrant to arrest his wife, and if they did arrest her, DSS could take his children away.[65] One of the officers testified that Corns then stated something to effect of "I'll plead guilty to the marijuana, just don't mess with my wife and kids."[66] Another officer corroborated this version of events by testifying that Corns denied that his wife had any involvement and stated he would claim the marijuana.[67] This Court held that the officers' improper influence rendered Corn's confession involuntary "because at the very least, the officers coerced Corn's confession on the marijuana by means of veiled threats against his family."[68] Moreover, this Court expressed no weight given to whether the police had the legal authority to arrest his wife based on the evidence found in the home they shared.

Pursuant to *Corns*, it is unequivocal that the trial court erred in holding that Appellant's confession at the detention center was voluntarily made. Like Corns, Appellant stated he understood his *Miranda* rights, but the threats to arrest his mother rendered his waiver

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[62] *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992).
[63] *Id.* at 548-59, 426 S.E.2d at 325.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 549-50.
[68] *Id.* at 552, 426 S.E.2d at 327.

involuntary. Further, not only did Appellant claim the seized items in exchange to protect his mother, but Appellant also claimed the items for this purpose more explicitly in his written statement than in *Corns*,

> I am claiming up to what was found in the house in order to keep my parents from going to jail so the weed, gun and I think, crack is mine. Therefore, there is no need to go back and arrest anyone else. My reason for saying that I didn't see none of this come out of the house, I, myself, did have in my possession a black gun and some weed in jars.

Moreover, after Appellant asserted that he was only claiming the evidence to protect his mother, the police returned to Mrs. Hayes' home and arrested her and Mr. Feaster. Thus, the materialization of the threat after Appellant did not genuinely claim the evidence further demonstrates that Appellant's *Miranda* waiver and confession were coerced.

Spano v. New York is also instructive here because in that case, the police extracted a confession from Spano by presenting him with a situation with arguably lower stakes than in the present case.[69] In *Spano*, the officers repeatedly arranged for Spano's childhood friend, Gaspar Bruno, to inform petitioner that their previous telephone conversation could cost him a future career in law enforcement, which melted Spano's resolve, and he thereafter made incriminatory statements.[70] The Court held that Spano's will was overborne by official pressure, fatigue, and sympathy for his friend's livelihood.[71]

Similar to the incidents in *Spano*, the police here used Appellant's sympathy as a tool to extract a confession. Further, the fact that the petitioner in *Spano* was at the station house longer than Appellant and subjected to more interrogation attempts is of little consequence. Armed with counsel, Spano surrendered himself to arrest at the stationhouse and remained steadfast in his

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[69] 360 U.S. 315, 79 S.Ct. 1202 (1959).
[70] *Id.* at 316-320, 79 S.Ct. at 1203-1205.
[71] *Id.* at 323, 79 S.Ct. at 1207.

refusal to speak to police while in custody.[72] It was only shortly after Bruno's final assertion that Spano may have cost him his career did he give a statement.[73] Similarly, Appellant also gave a statement in response to repeated assertions that his mother would be arrested. Appellant was also under pressure to protect his mother from the time he arrived home that day until he made his written statement at the detention center. Further, unlike the petitioner in *Spano*, Appellant witnessed the consequences almost materialize should he not confess before he set foot in the detention center.[74] Lastly, even if *Spano* involved circumstances and pressures more substantial than in the present case, in holding that Spano's confession was involuntary, the Court noted it has "reversed a conviction on facts less compelling than these."[75]

The State carries the burden of proving by a preponderance of the evidence that the defendant's *Miranda* rights were voluntarily waived.[76] In the present case, the trial court erred in holding that the State met their burden. Considering the totality of the circumstances, particularly watching police lead his mother in handcuffs to the patrol car, Appellant's waiver of his *Miranda* rights and resulting confession were not voluntarily made. Further, Appellant's explicit assertion that he was only claiming the fruits of the search to protect his mother from wrongful arrest unequivocally demonstrates that he was coerced to claim ownership. Therefore, the trial court erred in holding that the State met their burden to demonstrate that Appellant's waiver of his *Miranda* rights and confession were the product of free deliberate choice.

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[72] *Id.* at 317-320, 79 S.Ct. at 1204-1205.
[73] *Id* at. 318-19.
[74] *Supra* p. 26.
[75] *Spano*, 360 U.S. at 324, 79 S.Ct. at 1207.
[76] *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (citing *State v. Washington*, 296 S.C. 54, 370 S.E.2d 611 (1988)).

CONCLUSION

Appellant's conviction must be reversed because the trial court erred in denying suppression of the fruits of illegal searches and seizures. Moreover, reversal is warranted because Appellant's coerced confession and its subsequent use against him at trial violated his right to due process.

Respectfully Submitted,

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This 30th day of June, 2017