

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2021-001043

The State Respondent,

v.

General T. Little Petitioner.

BRIEF OF PETITIONER

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ISSUES PRESENTED

- I. Did the court of appeals err in affirming the circuit court's finding that the exigent circumstances exception to the Fourth Amendment's warrant requirement justified officers' trespass into the curtilage of Dr. Little's home to illegally search a vehicle twice?
- II. Did the court of appeals err in affirming the circuit court's finding that the State's illegal searches did not run afoul of article I, section 10 of the South Carolina Constitution?
- III. Did the court of appeals err in affirming the circuit court's denial of Dr. Little's motion for a mistrial when the State prejudicially referenced during closing argument a ring that was suppressed before trial due to the unconstitutional means by which officers obtained it?
- IV. Did the court of appeals err in affirming the circuit court's admission of prejudicial and unreliable testimony from the State's unqualified outsole footwear impressions expert?

STATEMENT OF THE CASE

This appeal arises out of officers' unlawful trespass into the curtilage of Petitioner General Little's (Dr. Little)¹ home to conduct illegal, unreasonable, and warrantless searches of his vehicle.

Facts

On September 22, 2015, Barbara Little was found dead in her home in Charleston, South Carolina. (R. pp. 341, 344). Barbara's brother discovered her body in the bathroom after her daughter, Kimberly Little-Armstrong, asked him to check on her. (R. pp. 342, 344). Investigators spoke with both of them immediately upon arriving at Barbara's home. (R. pp. 345, 514). An hour later, law enforcement went to the home of Barbara's ex-husband,² Dr. Little, to locate him. (R. p. 514).

Dr. Little lived in an upper-middle-class neighborhood in West Ashley in a two-story colonial style home with a front porch. See (R. pp. 547, 161, 1264). Upon arrival to Dr. Little's home, Deputy Matthew Colburn of the Charleston County Sheriff's Department saw a vehicle he knew belonged to Dr. Little parked slightly off the driveway and less than a car's width from the side of the dwelling. (R. pp. 514, 1265, 1286–87). Deputy Colburn approached the vehicle, traversing beyond the portion of the driveway feeding into the sidewalk where a visitor might pass to reach the front porch. See (R. pp. 1265, 1286–87 & 553). He then purportedly performed a safety sweep of all vehicles in the driveway using a flashlight. (R. pp. 516, 555).

Although he was able to quickly ascertain from the driver's side window that no one was hiding in Dr. Little's vehicle, which was parked and not running, Deputy Colburn nevertheless reapproached it after checking the other vehicles. (R. pp. 70, 551, 554). He walked to the other

¹ Dr. Little was employed as a medical doctor with the U.S. Department of Veterans Affairs in Beaufort, South Carolina, at the time. (R. p. 336).

² They had been divorced for almost twenty years and "didn't fight." (R. pp. 336, 485).

side of Dr. Little's vehicle and discovered the front passenger window rolled down. (R. pp. 516–17). During this subsequent search of Dr. Little's vehicle, Deputy Colburn noticed a brownish stain that appeared to be blood on the exterior of the open center console lid. (R. p. 517). Using his flashlight, Deputy Colburn further searched the vehicle and discovered towels that were similar to those found at Barbara's home. (Id.). While Deputy Colburn was snooping through his vehicle, Dr. Little exited his residence. (Id.). Deputy Colburn asked if Dr. Little would accompany him to the law enforcement center to speak with detectives, and Dr. Little obliged. (R. p. 557). Deputy Colburn conceded he had neither a warrant nor probable cause to search Dr. Little's property. (R. p. 548). According to Deputy Colburn, Dr. Little was not even a suspect at the time. (R. p. 543).

Deputy Colburn transported Dr. Little to the law enforcement center and, upon arrival, turned Dr. Little over to Detective Dustin Turner. (R. p. 518). Detective Turner proceeded to interrogate Dr. Little about Barbara's death. (R. p. 644). Meanwhile, Deputy Colburn asked Detective Will Muirhead to meet him back at Dr. Little's residence. (R. p. 663). Following a second illegal search of Dr. Little's vehicle, Detective Muirhead relayed his findings to Detective Jason Bowen. (R. pp. 663–64). Only then did Detective Bowen “construct” a probable cause affidavit to present to a magistrate for purposes of obtaining a search warrant. (R. p. at 664). In the interim, Detective Muirhead asked Dr. Little's wife, Carla Little, for permission to enter the home for a “walk-through.” (R. p. 665).

Shortly thereafter, Detective Muirhead returned to the law enforcement center and began interrogating Dr. Little. (R. p. 666). In all, three different detectives interrogated Dr. Little at the station for almost four hours before someone finally read him Miranda warnings.³ (R. p. 206). In that time, detectives searched Dr. Little's person for scratches and any evidence of a struggle. (R.

³ See Miranda v. Arizona, 384 U.S. 436 (1966).

pp. 649–50, 1075). Over his objection, detectives also required Dr. Little to remove his clothes and place them in an evidence bag. (R. pp. 217, 225). Detectives had no search warrant for his clothing and never bothered to obtain one. (R. pp. 226–27). In the back pocket of his pants, detectives discovered Dr. Little’s wedding ring. (R. p. 203). The ring tested positive for blood, but detectives never matched it to any known DNA. (*Id.*). Detectives later executed the warrants obtained pursuant to the unlawful searches and seized various items, including the vehicle, from Dr. Little’s home. (R. pp. 669, 739).

Trial and Procedural History

In May 2016, a Charleston County grand jury indicted Dr. Little for murder. (R. pp. 1255–56). The case was initially called for a jury trial in February 2018. Before trial began, the circuit court held a lengthy hearing on Dr. Little’s motions to suppress. (R. pp. 5–246). The circuit court granted Dr. Little’s motion to suppress his wedding ring, finding it was obtained in an illegal search following a Miranda violation. (R. pp. 233–34). The circuit court denied Dr. Little’s motion to suppress the blood evidence found in his vehicle and all related evidence. (R. pp. 159–62). Because the State belatedly turned over evidence, the circuit court continued the trial after jury selection to allow counsel time to review the evidence. (R. pp. 269–70).

The circuit court recalled the case for a jury trial on March 19–23, 2018. During its case, the State presented a smattering of law enforcement and fact witnesses to discuss the crime scene, the searches of Dr. Little’s vehicle and home, the investigation, cell tower records, a rule to show cause in family court, Dr. Little’s interrogation, blood forensics, and Dr. Little’s computer records. (R. pp. 321–943). The State also called Dawn Claycomb, a crime scene agent with the South Carolina State Law Enforcement Division (SLED), to testify as an expert in footwear examination. (R. p. 960). Dr. Little challenged Claycomb’s qualifications, as well as the substance of her novel

testimony, but the circuit court permitted her to testify over his objection. (R. pp. 944–55, 963). Claycomb testified the “outsole design” from Dr. Little’s shoe was “similar” to an impression taken from the scene. (R. p. 976). She could not, however, say it was the same shoe. (Id.).

After the State rested, Dr. Little moved for directed verdict, (R. pp. 1061–64), and the circuit court denied the motion, (R. pp. 1066). Dr. Little called three witnesses in his defense. Detective Matthew Downing, who questioned Dr. Little along with two other detectives at the station, testified he did not observe any physical injuries on Dr. Little’s body on the night in question. (R. pp. 1074–75). Next, Kimberly Mears, a fingerprint examiner with SLED, testified she attempted to compare five latent fingerprint lifts from the crime scene with Barbara’s and Dr. Little’s fingerprints. (R. pp. 1087, 1096–97). She determined four latent lifts were of “no value for comparison,” and the fifth one—which was taken from the interior of the glass storm door at Barbara’s home—did not match Dr. Little’s fingerprints. (R. p. 1097). Following Deputy Robert Haslip’s testimony about the events at the crime scene, (R. pp. 1108–20), the defense rested and renewed all prior motions, (R. p. 1135). The circuit court denied the motions, and the parties proceeded with closing arguments. (R. pp. 1135, 1137–1224).

During its closing argument, the State heavily relied upon the blood discovered in Dr. Little’s vehicle and the testimony of its footwear impressions expert. (R. pp. 1138–39, 1144–45, 1147–48 & 1171–72). The State then referenced Dr. Little’s wedding ring both verbally and via a PowerPoint slide published to the jury that incredulously said, “No jewelry (no ring???)” (R. pp. 1161, 1306). Dr. Little immediately objected and moved for a mistrial. (R. p. 1162). The circuit court denied his motion, instructing the State—outside the presence of the jury—to take down the slide and not mention the ring anymore. (R. p. 1163). After receiving instructions, the jury retired for deliberations. (R. pp. 1225–37). The jury struggled with this case. Ultimately,

after five hours of deliberation, the jury returned a guilty verdict. (R. p. 1243). The circuit court denied all renewed motions and subsequently sentenced Dr. Little to thirty years in prison. (R. pp. 1243, 1247–52).

Dr. Little appealed, and the court of appeals heard oral arguments in the case on January 12, 2021. On June 9, 2021, the court of appeals affirmed in an unpublished opinion. See State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021); (App. pp. 108–11). Dr. Little filed a timely petition for rehearing and suggestion for rehearing en banc. (App. p. 112). On July 21, 2021, the court of appeals granted the petition for rehearing, withdrew its prior opinion, and issued a substituted opinion that still summarily affirmed. State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. withdrawn, substituted, and refiled July 21, 2021); (App. p. 162). The only addition was a one-sentence ruling on Dr. Little’s state constitutional argument that was not previously addressed. (App. p. 163). Given the new ruling, Dr. Little filed another petition for rehearing to address the court of appeals’ erroneous state constitutional finding. (App. p. 166). On August 23, 2021, the court of appeals denied that petition. (App. p. 172).

Dr. Little filed a petition for a writ of certiorari, which the Court granted on September 13, 2022. This brief follows.

STANDARD OF REVIEW

The Court recently clarified that the standard of review in appeals based on Fourth Amendment grounds “involves a two-step analysis.” State v. Frasier, Op. No. 28117 (S.C. Sup. Ct. filed Sept. 28, 2022) (Howard Adv. Sh. No. 35 at 15–16). In reviewing a motion to suppress based on the Fourth Amendment, the Court must first “review the [circuit] court’s factual findings for any evidentiary support.” Id. at 16. The Court will then consider “the ultimate legal conclusion,” which “is a question of law subject to de novo review.” Id.

ARGUMENT

Officers trespassed into the curtilage of Dr. Little's home twice to conduct illegal, unreasonable, and warrantless searches of his vehicle. The State then used unlawfully obtained evidence from the unlawful searches to secure Dr. Little's conviction. Indeed, the fruits of the illegal searches were the crux of the State's case.

The court of appeals erred in affirming the circuit court's rulings because (1) no exigent circumstances justified officers' two illegal searches of Dr. Little's vehicle parked in the curtilage of his home, and suppression was required under the state and federal constitutions; (2) the State's improper reference during its closing argument to a ring the circuit court suppressed prior to trial prejudiced Dr. Little; and (3) the testimony of the State's unqualified footwear impressions expert was unreliable and prejudicial. Accordingly, the Court should reverse and remand for a new trial.

I. The court of appeals misapplied the exigent circumstances exception to the warrant requirement and erred in invoking it to justify officers' trespass into the curtilage of Dr. Little's home to conduct an illegal search of his vehicle.

The State violated Dr. Little's rights under the Fourth Amendment to the U.S. Constitution and article I, section 10 of the South Carolina Constitution by conducting a warrantless search of his vehicle parked in the driveway, which was within the curtilage of his home. See U.S. CONST. amend. IV (guaranteeing every person the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); S.C. CONST. art. I, § 10 (asserting that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated"). All evidence obtained in this illegal search thus should have been suppressed under the exclusionary rule as fruit of the poisonous tree. See State v. Adams, 409 S.C. 641, 648, 763 S.E.2d 341, 345 (2014)

(“Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible.” (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002))).

The court of appeals erred in four respects in passing upon Dr. Little’s arguments regarding substantial state and federal constitutional issues. First, the court of appeals failed to consider or address that the warrantless search occurred in the curtilage of Dr. Little’s home—as the State conceded—which is entitled to heightened protection under the Fourth Amendment. Second, the court of appeals misapplied the exigent circumstances exception. Third, the court of appeals’ reliance on State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), was misplaced because it is readily distinguishable. Fourth, the court of appeals erred in giving short shrift to Dr. Little’s argument that the State’s actions violated his right to privacy enshrined in the state constitution.

A. *The court of appeals failed to consider the vehicle in Dr. Little’s driveway, within the curtilage of his home, was entitled to heightened protection.*

The curtilage of a home is “the land immediately surrounding and associated with the home” and is “part of the home itself for Fourth Amendment purposes.” Oliver v. United States, 466 U.S. 170, 180 (1984). Importantly, “[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.” California v. Ciraolo, 476 U.S. 207, 212–13 (1986) (emphasis added). “With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” Kyllo v. United States, 533 U.S. 27, 31 (2001). Because the Fourth Amendment extends this heightened protection to “the curtilage of the home,” State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723 (2017) (citation omitted), few exceptions can render a warrantless search of curtilage reasonable and constitutional.

Here, the State conceded at the court of appeals that the vehicle the officers searched in Dr. Little’s driveway was within the curtilage of Dr. Little’s home. Because the search took place in the curtilage, this area of the home—and everything located within it—was entitled to heightened constitutional protection. See Ciruolo, 476 U.S. at 212–13. Notably, the word “curtilage” did not appear once in the court of appeals’ opinion. By overlooking this uncontested fact, the court of appeals failed to account for the significance of the location where the illegal search occurred in analyzing the Fourth Amendment issue. This error colored the court of appeals’ analysis and ultimate conclusion “that Deputy Colburn’s minimally intrusive search was reasonable.” Little, Op. No. 2021-UP-196, at 2; (App. p. 163).

To reach Dr. Little’s vehicle, Deputy Colburn had to substantially veer off the customary invited path to the front door of the home. Trespassing upon the curtilage of one’s home to conduct an illegal search is not and cannot be minimally intrusive. After all, “searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.” Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018). Because the area of the driveway in which Deputy Colburn searched Dr. Little’s vehicle was within the curtilage of his home, it was entitled to heightened protection under both the Fourth Amendment and the South Carolina Constitution.

The court of appeals erred in omitting this important piece of the Fourth Amendment puzzle in analyzing the reasonableness of the unlawful search.

B. The State finds no refuge in the exigent circumstances exception to the warrant requirement.

The State conceded to the court of appeals that a search within the meaning of the Fourth Amendment occurred. After struggling to commit to a justification of the officers’ unlawful conduct, the State finally landed on the argument that exigent circumstances justified the

warrantless search. But no evidence supports the conclusion that exigent circumstances existed at Dr. Little’s home, and the court of appeals erred in accepting the State’s argument on this ground.

“Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). The exigent circumstances doctrine applies only when, “from an objective standard, a compelling need for official action and no time to secure a warrant exists.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). “Exigent circumstances—such as . . . a risk of danger to police or others—may justify a warrantless entry, but absent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present.” State v. Dobbins, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017).

To determine whether probable cause exists, the Court will consider “the events which occurred leading up to the . . . search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.” Ornelas v. United States, 517 U.S. 690, 696 (1996). “[D]etermining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances.” State v. Morris, 411 S.C. 571, 581, 769 S.E.2d 854, 859 (2015). The State bears the burden of establishing exigent circumstances exist and constitute an exception to the warrant requirement. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

Because this is not a hot pursuit case, Deputy Colburn must have had probable cause to believe exigent circumstances existed.⁴ Dobbins, 420 S.C. at 592, 803 S.E.2d at 880. Importantly,

⁴ Notably, the protective sweep doctrine does not apply because the search of the premises was not conducted “incident to an arrest,” as Dr. Little was not even a suspect at the time, and Dr. Little’s property was not an “arrest scene.” Maryland v. Buie, 494 U.S. 325, 327 (1990) (noting “[a] ‘protective sweep’ is a quick and limited search of the premises incident to an arrest and conducted to protect the safety of police officers or others” (emphasis added)); id. at 334 (asserting “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in

Deputy Colburn conceded during his testimony that he had no probable cause to search Dr. Little's property upon arrival at his home. (R. p. 548). Putting aside this critical concession, the question becomes whether Deputy Colburn's conduct amounted to an objectively reasonable search. Florida v. Jardines, 569 U.S. 1, 10 (2013) (noting "the question before the court [was] precisely whether the officer's conduct was an objectively reasonable search").

The State offered two justifications on this front. First, according to the State, it was necessary and reasonable to conduct a welfare check on Dr. Little. But as one court of appeals judge recognized during oral arguments, the welfare check argument is "nonsense." Officers were not checking vehicles in Dr. Little's driveway to make sure Dr. Little was okay. Dr. Little's daughter and officers had been in contact with Dr. Little several times that evening.⁵ That argument deserves no further commentary. Second, the State contends the warrantless search was necessary because there was a risk of danger to the police or others at Dr. Little's property.

1. The circumstances objectively show Deputy Colburn acted unreasonably.

As the Supreme Court recognized in Jardines, whether the search was objectively reasonable "depends upon whether the officers had an implied license to enter the [curtilage], which in turn depends upon the purpose for which they entered." 569 U.S. at 10. If the officer's "behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do," then the search was not objectively reasonable. Id.

believing that the area to be swept harbors an individual posing a danger to those on the arrest scene" (emphasis added)). The State conceded as much at the pre-trial hearing. (R. p. 156).

⁵ Although Dr. Little did not rush to the murder scene of his ex-wife within an hour of voluntarily agreeing to come there, that did not give officers license to perform multiple illegal searches within the curtilage of his home. And the State has not articulated a single reason for believing Dr. Little's welfare was in danger prior to Deputy Colburn's illegal search. Regardless, from an objective standpoint, that was not a reasonable belief under the totality of the circumstances.

Here, the uncontested historical facts were that (1) the crime scene contained a lot of blood, (R. pp. 30); (2) Kimberly had spoken with Dr. Little on the phone multiple times that evening, (R. pp. 447, 452–54); (2) Dr. Little did not show up to the crime scene, (R. p. 57); (3) Deputy Colburn was told to locate Dr. Little an hour later, (R. pp. 1262, 1257 & 515); (4) Dr. Little was not a suspect, (R. p. 56–57); (5) Deputy Colburn did not believe Dr. Little was hiding, (R. p. 550); (6) Deputy Colburn did not think Dr. Little was armed and dangerous, (R. p. 59); and (7) Deputy Colburn had backup on the scene, (R. p. 62).

Respectfully, seeing a vehicle’s passenger side window down and its right rear tire parked slightly off the driveway⁶ could not have given Deputy Colburn a good faith belief Dr. Little or any other person posed a danger to those on his premises. And a conclusory assertion of officer safety, standing alone, is insufficient to show probable cause for exigent circumstances. The State also failed to address what “compelling need” existed “for official action” or why it had “no time to secure a warrant.” Abdullah, 357 S.C. at 351, 592 S.E.2d at 348.

The historical facts preceding the search do not support that argument. Indeed, Deputy Colburn’s actions—making multiple laps around Dr. Little’s vehicle with a flashlight for over 90 seconds and paying such close attention to the interior that he was able to notice an infinitesimal smudge on the inside of a door and towels in the floorboard—demonstrate he was not clearing the vehicles to eliminate potential danger. Instead, he was plainly conducting a search for evidence. The State had no grounds for a warrant until it created the need for one by performing illegal searches in the curtilage of Dr. Little’s home. See Bash, 419 S.C. at 277–78, 797 S.E.2d at 729

⁶ The photographs in the record, see (R. pp. 1265, 1286–87 & 553), plainly refute the State’s claim that the vehicle was “parked half in the driveway and half into a grassy area.” (R. p. 514). Only the right rear tire was off the driveway, and Dr. Little did not have “plenty of room to park in the driveway,” (R. p. 516), given the position of the car on the left.

(noting the officers “did not have probable cause for a search—until after they drove onto the grassy area and saw one of the men throw down what appeared to be cocaine”).

While the court of appeals held the search was reasonable “[d]ue to the exigencies presented by the violence at the crime scene[,] as well as Deputy Colburn’s legitimate officer safety concerns,” Little, Op. No. 2021-UP-196, at 2; (App. p. 163), these facts simply do not support a finding of reasonableness.

Importantly, the court of appeals erred in focusing on the crime scene, not what occurred at Dr. Little’s residence.⁷ As for the purported concerns, Deputy Colburn never explained why he found certain things odd about Dr. Little’s property. (R. pp. 160–61). Still, instead of looking at the evidence presented during the suppression hearing, the circuit court let its own knowledge about alleged break-ins in the area in which Dr. Little lived influence its decision. In doing so, the circuit court—without testimony from Deputy Colburn on this point—noted that a car that is “unlocked” with a “window [] open” is a “factor [that] would certainly enter [Deputy Colburn’s] mind” because of the break-ins. (R. p. 161).

“The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures.” Gamble, 405 S.C. at 416, 747 S.E.2d at 787. Yet in support of its shifting argument, the State almost exclusively relies upon the circuit court’s comments during the suppression hearing. For one, that’s not evidence. Cf. Evidence, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining evidence as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence or nonexistence of a fact”); James B. Thayer, Presumptions

⁷ In its analysis, the court of appeals also mentioned several facts about Deputy Colburn that are inaccurate. Deputy Colburn was not the first on the scene of the crime. (R. p. 1118). Further, there is no evidence in the record indicating Deputy Colburn “made contact” with Dr. Little prior to his arrival at Dr. Little’s house. Instead, Dr. Little’s daughter contacted him. (R. p. 454, 469).

and the Law of Evidence, 3 HARV. L. REV. 141, 142 (1889) (stating, in relevant part, that “[e]vidence is any matter of fact which is furnished to a legal tribunal” (emphasis added)). The State did not proffer any of the matters in the judge’s remarks. For another, that’s important because the circuit court also noted—just prior to that sua sponte finding—that Deputy Colburn never explained why he found certain things odd about Dr. Little’s property. (R. pp. 160–61).

This is fatal to the State’s case. As noted above, the State had the burden of proof. Yet the State can point only to the circuit court’s statements, details of the crime scene, and Deputy Colburn’s testimony regarding whether someone was hiding that “you do not know.” (R. p. 550). Deputy Colburn, however, conceded he had no probable cause to conduct a search. (R. p. 548). After all, Deputy Colburn testified that Dr. Little was not a suspect, he did not believe Dr. Little was hiding, and he did not believe Dr. Little was armed and dangerous. At most, Deputy Colburn had a hunch that something was off that evening. But an “inchoate and unparticularized suspicion or hunch” will not do. Buie, 494 U.S. at 332 (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

The State then tried to pivot from these inconvenient and innocuous facts by providing a detailed description of the murder scene. But a review of the record reveals that “nothing occurred at the residence” well over an hour later “to create an exigency to justify a warrantless search.” Herring, 387 S.C. at 218, 692 S.E.2d at 499 (Kittredge, J., concurring) (emphasis added). The court of appeals overlooked these important facts in its analysis of the exigent circumstances exception. When viewed with the totality of the circumstances, Deputy Colburn’s officer safety concerns were not objectively reasonable. Instead, Deputy Colburn’s behavior objectively revealed a purpose to conduct a search, “which is not what anyone would think he had license to do.” Jardines, 569 U.S. at 10. This unlawful, unreasonable, and warrantless search violated Dr. Little’s Fourth Amendment rights.

2. *Deputy Colburn's warrantless search was not limited in scope or duration.*

“The State also bears the burden to show that the warrantless entry was limited in scope and duration in accordance with the exigent circumstances [that] required its presence.” State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). Despite the court of appeals’ conclusion that the search was “minimally intrusive,” the evidence reflects the warrantless search was not reasonably “limited in scope and duration” when measured against the purported exigent circumstances Deputy Colburn said justified his presence in the first instance. Id.

Deputy Colburn scrupulously searched Dr. Little’s vehicle twice over at least a 90-second period. The vehicles, which were parked in the curtilage, were not near the front door, and Deputy Colburn had to stray beyond the path a visitor would normally traverse to go knock on the front door. If Deputy Colburn were truly clearing vehicles, however, he could have ruled out Dr. Little’s in a matter of seconds. Yet he took multiple laps around the car for a minute and a half, looking meticulously at every inch of the car with his flashlight. Deputy Colburn’s testimony that he could not see the passenger floorboard during the initial search simply does not pass the smell test. See (R. p. 554). He had a flashlight. (R. p. 71–72, 80). In any event, the State continues to ignore that no one could have even fit into such a small area to hide. See (R. p. 1272). Thus, the warrantless search was not reasonably “limited in scope and duration” when measured against the purported exigent circumstances Deputy Colburn said justified his presence in the first instance. Robinson, 410 S.C. at 530, 765 S.E.2d at 570.

And while the State tries to rescue the illegal search by arguing one can infer reasonableness from law enforcement’s subsequent decision to obtain a search warrant for the car,” Return at 16 (citing State v. Johnson, 410 S.C. 10, 20, 763 S.E.2d 36, 42 (Ct. App. 2014); Abdullah, 357 S.C. at 351 n.3, 592 S.E.2d at 348 n.3), the State overlooks that the “subsequent

decision” here was for Detective Muirhead to conduct another illegal search of the vehicle. Only after he confirmed Deputy Colburn’s findings did officers bother to trying to obtain a warrant. And that warrant application was tainted by the findings of the two illegal searches. The State does not and cannot argue to the contrary. Indeed, to this day, the State has yet to explain or defend this second search. It was plainly illegal. Under these circumstances, the State finds no refuge in Johnson or Abdullah.

In sum, the State’s post-hoc alleged exigent circumstances justification does not validate the unreasonable, unlawful, and warrantless searches. Deputy Colburn was not concerned with Dr. Little’s welfare. Kimberly had already spoken with Dr. Little a mere hour before Deputy Colburn went to his residence. And the circumstances surrounding Deputy Colburn’s entry onto the property, as well as the scope and duration of his search, demonstrate Deputy Colburn was not concerned with officer safety. He was looking for evidence, which does not satisfy the Fourth Amendment’s touchstone of reasonableness. Consequently, all evidence obtained from the unlawful searches should have been suppressed.

C. The court of appeals misapplied Herring.

Next, the court of appeals’ reliance on Herring was misplaced. Herring is inapplicable for two reasons.

First, in Herring, “officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon.” 387 S.C. at 211, 692 S.E.2d at 495. Indeed, prior to arriving at the suspect’s residence at 2:00 A.M., officers had “responded to a shooting at Chastity’s nightclub at which the manager of the club was shot and killed,” “watched the video which showed the suspect as he entered and departed from the nightclub,” and were “given a description of Herring’s black SUV.” Id. at 209, 692 S.E.2d at 494. By contrast, Dr. Little was not a suspect at

the time of the unlawful search, and officers testified they had no reason to believe he was armed and dangerous. (R. pp. 56–57, 59, 543, 547).

Second, in Herring, the Court noted the officer’s “peek into the garage yielded no evidence against Herring” because “[p]olice already had knowledge of the make, model, and license plate number of the vehicle the suspect drove.” 387 S.C. at 211, 692 S.E.2d at 495. Because the officer’s “observation of the vehicle in the garage yielded no evidence which further inculpated Herring,” the Court found “the de minimis intrusion to secure the officers’ safety did not necessitate suppression.” Id. Here, however, Deputy Colburn performed an intrusive search of Dr. Little’s vehicle with a flashlight, and Detective Muirhead later followed up with another unlawful search to confirm his findings, all without a warrant. (R. pp. 554, 663–64). As a result of these unlawful searches, the State obtained physical evidence that directly inculpated Dr. Little. This was not a de minimis intrusion.

Accordingly, the court of appeals erred in relying upon Herring to find the State’s unlawful searches in violation of Dr. Little’s rights under the Fourth Amendment and the South Carolina Constitution were reasonable.

D. The court of appeals failed to fully analyze and appreciate Dr. Little’s state constitutional argument.

“In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures.” State v. Counts, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015) (quoting State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)); see also S.C. CONST. art. I, § 10 (asserting that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated”). “By articulating a specific prohibition against ‘unreasonable invasions of privacy,’ the people of South Carolina have indicated that

searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution.” State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). In other words, “this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.” Counts, 413 S.C. at 164, 776 S.E.2d at 65 (quoting Forrester, 343 S.C. at 644, 541 S.E.2d at 840).

1. This issue is preserved for appellate review.

At the outset, anticipating the State’s preservation argument, an examination of the record reveals Dr. Little’s state constitutional argument is properly before the Court.

“Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the [circuit] court.” State v. Cain, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017).

Here, the record shows (1) Dr. Little argued to the circuit court that the State’s illegal search violated article I, section 10 of the South Carolina Constitution; (2) the circuit court ruled on the issue and even said, “I’m glad to see that y’all have raised the South Carolina Constitution issue,” (R. p. 159); (3) Dr. Little raised the argument in his brief to the court of appeals, (App. pp. 14–15, 20, 32); (4) the State responded to the argument in its brief to the court of appeals, (App. pp. 68, 74); (5) Dr. Little’s counsel addressed the issue during oral arguments at the court of appeals; (6) Dr. Little argued in his petition for rehearing that the court of appeals failed to address the state constitutional issue in its initial opinion, (App. p. 127); (7) the court of appeals granted Dr. Little’s petition for rehearing and addressed the issue in a substituted opinion, (App. pp. 160, 162–63); (8) Dr. Little argued the insufficiency and incorrectness of the court of appeals’ holding in a petition for rehearing of the substituted opinion, which was denied, (App. pp. 166–69, 172); and (9) Dr. Little raised the issue in his petition for a writ of certiorari to this Court.

Nothing else was required to preserve the issue for this Court's review. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 284 (2012) (stating error preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants").

2. *The Court should reverse and remand on the merits.*

Because the State's actions here do not fit neatly into any exception to the warrant requirement, even if the State satisfied the Fourth Amendment's touchstone of reasonableness, the unlawful searches do not pass muster under article I, section 10 of the South Carolina Constitution.

The Court has had few occasions to interpret the right against unreasonable invasions of privacy in article I, section 10 of the South Carolina Constitution. Given the "scant" authority on the issue, this Court essentially has a blank canvas. Counts, 413 S.C. at 167, 776 S.E.2d at 67; see also Jaclyn L. McAndrew, Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants, 62 S.C. L. REV. 671, 694 (2011) (interpreting the history of article I, section 10 and concluding "the drafters were depending upon the state judiciary to construct a precise meaning of this phrase"). That said, our Constitution "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Counts, 413 S.C. at 168, 776 S.E.2d at 68 (quoting Forrester, 343 S.C. at 645, 541 S.E.2d at 841); see also id. at 164, 776 S.E.2d at 65 ("This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." (citation omitted)).

The people of South Carolina, together with the General Assembly, have determined that privacy is so important that it should be enshrined in the first article of our state constitution. In the context of a knock and talk, the Court has held that, "[b]ecause the privacy interests in one's home are the most sacrosanct, . . . there must be some threshold evidentiary basis for law enforcement to approach a private residence." Counts, 413 S.C. at 172, 776 S.E.2d at 69. There,

the Court held the standard was reasonable suspicion due to its nature as “a criminal investigative technique used for the sole purpose of discovering criminal activity.” Id. at 174 n.7, 776 S.E.2d at 71 n.7. Where, as here, an officer enters the curtilage of one’s home with the obvious intent to search the curtilage—not to conduct a permissible knock and talk—a higher standard of probable cause is demanded. See Bash, 419 S.C. at 268, 797 S.E.2d at 723 (recognizing the heightened protection afforded to the home under the Fourth Amendment extends to the curtilage of the home).

Here, Deputy Colburn testified he searched the vehicle twice over a 90-second period. While his purported justification was to ensure officer safety, he could have easily ascertained no one was hiding in the vehicles in only a few seconds. By the time he walked around Dr. Little’s vehicle the second time, Deputy Colburn undoubtedly had already established nobody was hiding in the vehicle. The State never argued to the contrary. Accordingly, the post-hoc justification manufactured by the State is a façade that the Court should see right through. Deputy Colburn was there in the curtilage of Dr. Little’s home to conduct a warrantless search to discover evidence to use against Dr. Little, and this trespass constituted an unreasonable invasion of privacy. See S.C. CONST. art. I, § 10. Further, to this day, the State has still not articulated any exigent circumstances that purportedly justified Detective Muirhead’s second illegal search.

The State trampled on Dr. Little’s right to privacy by performing multiple warrantless, illegal, and unreasonable searches of his vehicle, which was parked within the curtilage of his home. The State then used unlawfully obtained evidence to secure a murder conviction against Dr. Little. This was a textbook example of an unreasonable invasion of privacy into an area entitled to heightened constitutional protection. And that was only one of the many constitutional violations plaguing this case. See infra Section II. South Carolinians demand more of their

criminal justice system. If somehow the Fourth Amendment does not protect Dr. Little, then—for all of the same reasons—the higher level of privacy embedded in the state constitution should.

Nevertheless, the court of appeals relied on Weaver to find the illegal searches in this case were reasonable under our Constitution. Amid a lengthy string-citation, the court of appeals cited Weaver for the proposition that “The focus in the state constitution is on whether the invasion of privacy is reasonable.” Little, Op. No. 2021-UP-196, at 2; (App. p. 163). While that may be true, the invasion here was not reasonable. To begin, the court of appeals missed that this Court’s analysis in Weaver hinged on the fact that, as of 2007, “there ha[d] never been a clear statement by the United State Supreme Court that a warrant is required before a vehicle is searched in a private place.” 374 S.C. at 322 n.2, 649 S.E.2d at 483 n.2. As the Court is likely aware, this is no longer the case, which calls into question the continued validity of Weaver. E.g., Collins, 138 S. Ct. at 1672 (holding that “searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of curtilage”). Weaver was decided under the automobile exception, which does not apply to a vehicle on private property. Id. In any event, to the extent Weaver is still good law, the case is distinguishable.

Under these circumstances, the court of appeals erred in not finding the State’s trespass into the curtilage of Dr. Little’s home to conduct an unlawful search constituted an unreasonable invasion of privacy in violation of article I, section 10 of the South Carolina Constitution.

* * * *

In sum, because Deputy Colburn did not have probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle in the curtilage of Dr. Little’s home, the unlawful search was unreasonable and violated Dr. Little’s rights under the Fourth Amendment and the South Carolina Constitution. Accordingly, the Court should reverse

Dr. Little's conviction and remand for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle and the house, as well as all evidence obtained pursuant to these two search warrants, as fruit of the poisonous tree.⁸

II. The court of appeals erred in affirming the circuit court's denial of Dr. Little's motion for a mistrial when the State prejudicially referenced the suppressed ring during its closing argument.

Before trial, the circuit court suppressed Dr. Little's wedding ring and forbade the State from mentioning it due to the unconstitutional means by which it was unlawfully seized from Dr. Little following a Miranda violation. Despite this admonition and the fact no evidence of the wedding ring was ever presented during trial, the State referenced Dr. Little's wedding ring during its closing argument, highlighting it both verbally and via a PowerPoint slide published to the jury that incredulously said, "no jewelry (no ring???)". (R. pp. 1161, 1306). Dr. Little immediately objected and moved for a mistrial. (R. p. 1162). The circuit court denied his motion, instructing the State—outside the presence of the jury—to take down the slide and not mention the ring anymore. (R. p. 1163).

It is well-settled that closing "argument[s] must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Van Dohlen v. State, 360 S.C. 598, 609–10, 602 S.E.2d 738, 744 (2004); see also Tappeiner v. State, 416 S.C. 239, 251–52, 785 S.E.2d 471, 477 (2016) (finding the State's comments that "misrepresented the evidence adduced at trial" during closing argument "were clearly improper and objectionable"). "[T]o receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

⁸ The State never contested Dr. Little's fruit of the poisonous tree analysis and, thus, agrees that suppression of all evidence obtained or derived from the unlawful searches is required if the Court finds the unlawful searches were unreasonable under either the Fourth Amendment or the South Carolina Constitution.

Here, although the State was well aware of the circuit court’s pretrial ruling, it nevertheless sought to test the limits and reference the wedding ring anyway. In doing so, the State “convey[ed] the impression to the jury” that it had “evidence not presented to the jury but known by the prosecution which supports conviction.” Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). And the State’s closing argument and the PowerPoint slide focusing on the wedding ring were some of the last things presented to the jury before deliberations. (R. pp. 1161–62, 1306). As one court of appeals judge noted during oral arguments, that was “clearly misconduct.”

Despite the court of appeals’ apparent agreement that the State crossed the line by mentioning suppressed evidence during closing, the court of appeals dismissed the prejudicial effect of this improper tactic. Review of whether a closing argument prejudiced a defendant “is based upon the standard of whether [its] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Van Dohlen, 360 S.C. at 609, 602 S.E.2d at 744; see also U.S. CONST. amends. V & XIV; S.C. CONST. art. I, § 3. “[T]he appellate court will view the alleged impropriety of the [State]’s argument in the context of the entire record, including whether the trial court’s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant’s guilt.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The fundamental unfairness of the State’s inappropriate reference to the ring during closing argument was underscored by the fact that the circuit court had already suppressed the ring due to the unconstitutional means by which it was obtained in the first instance.⁹ Referencing the

⁹ Even the justifications offered for the State’s ability to sneak in this evidence during closing argument are manifestly without merit. Although Detective Turner did testify in passing that Dr. Little was not wearing any jewelry, that is of no consequence here. His testimony was buried in the middle of a week-long trial and did not specifically center on the ring. (R. p. 645). The State’s closing argument and PowerPoint slide, on the other hand, did focus on the ring. (R. pp. 1161–62).

suppressed ring only added insult to injury, creating two layers of a constitutional violation. That this evidence was a wedding ring only compounded the prejudice.¹⁰ The State took advantage of that fact, asserting that “we know [Dr. Little] was together with Carla,” his second wife, “and yet Detective Turner” did not “really remember him wearing” any jewelry. (R. p. 1161). A jury likely would have attached great significance to learning—for the first time during closing argument—that Dr. Little was not wearing his wedding ring when police questioned him about the death of his ex-wife. Further, the State implied some improper motive behind Dr. Little not wearing the wedding ring. This was highly prejudicial because the jury could have thought he was hiding the wedding ring for some nefarious reason.

Although the court of appeals concluded the mention of the suppressed evidence was not prejudicial because the PowerPoint slide did not say the ring had blood on it, respectfully, that is setting the bar too low. Certainly, mentioning a suppressed bloody ring would have been beyond the pale. But that is not the question before the Court. The question is whether the State can give “the impression to the jury” it had “evidence not presented to the jury but known by the prosecution which supports conviction” for the first time during closing. Matthews, 350 S.C. at 276, 565 S.E.2d at 768. The answer is no, and doing so in this case was highly prejudicial to Dr. Little.

Further, while the circuit court recognized the impropriety of the reference to the ring, its attempt to cure the error fell short. Certainly, “[t]he trial court should exhaust other methods to cure possible prejudice before aborting a trial.” State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203–04 (Ct. App. 2010). To that end, “[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission.” Id. In this case, however, the circuit court

¹⁰ See generally Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 VA. L. REV. 1901, 1917 (2000) (“By exchanging wedding rings and ceremonial promises, the couple bind themselves to one another in a way that signals both the seriousness of their intentions to undertake the many obligations of marriage and their nonavailability for other intimate relations.”).

did not give a curative instruction. Instead, the circuit court merely told the State—outside the jury’s presence—to take down the PowerPoint slide that referenced the ring, stating, “don’t mention that anymore.” (R. pp. 1162–63). This was insufficient to cure the taint of the State bringing up a symbolic piece of evidence that was excluded from the record due to the State’s illegal investigative tactics.

The Court should reverse and remand for a new trial based on the State’s deliberate reference to evidence outside the record. This violation of Dr. Little’s due process rights was prejudicial and not harmless error. In fact, the State made Dr. Little’s harmless error argument for him by noting that “[o]ne could reasonably draw the inference that [Dr. Little] was cleaning up after the murder and had removed his ring.” Return at 21. But that’s the whole problem: the jury likely did make that inference—on an issue going to the heart of the case—from the State’s improper reference to Dr. Little’s wedding ring. Respectfully, that is not harmless error. Reversal is therefore “dictated by . . . the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

III. The court of appeals erred in affirming the circuit court’s admission of prejudicial and unreliable testimony from the State’s unqualified footwear examination expert.

At trial, Dawn Claycomb testified for the State as an expert in footwear examinations. Claycomb stated the “outsole design” from Dr. Little’s shoe was “similar” to an impression taken from the crime scene, but she could not say it was the same shoe. (R. p. 976). The court of appeals erred in affirming the circuit court’s finding Claycomb was qualified to offer expert testimony regarding outsole footwear impressions and that her methods were reliable.¹¹

¹¹ As noted above, Dr. Little’s shoes were unlawfully obtained and should have been suppressed. See supra Section I. Without the shoes, Claycomb’s entire testimony should have been excluded as well.

A circuit court’s decision on whether to exclude evidence “will not be reversed on appeal absent an abuse of discretion.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (quoting State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). “An abuse of discretion occurs when the [circuit] court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

A party may present expert testimony to the factfinder if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Rule 702, SCRE. An expert witness, however, must be “qualified as an expert by knowledge, skill, experience, training, or education.” Id. In Watson v. Ford Motor Co., the Court laid out a three-prong test a circuit court must consider before admitting expert testimony:

First, the [circuit] court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the [circuit] court must evaluate the substance of the testimony and determine whether it is reliable.

389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). “[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions.” Id. And the circuit court must serve “as the gatekeeper” in deciding “whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence.” Id. at 445, 699 S.E.2d at 174.

A. *Dawn Claycomb was not qualified to offer expert testimony regarding footwear impressions.*

Although Dr. Little certainly recognizes “the expert need not be a specialist in the field,” Watson, 389 S.C. at 446, 699 S.E.2d at 175, the circuit court here did not perform the requisite

gatekeeping function in finding Claycomb qualified as an expert with reliable testimony. “In determining a witness’s qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope. The test for qualification of an expert is a relative one that is dependent on the particular witness’s reference to the subject.” Id. at 447, 699 S.E.2d at 176 (internal citation omitted).

Here, Claycomb does not possess the requisite qualifications to testify as an expert in footwear impressions. Claycomb graduated from Williamsburg University with a BS in forensic science and began her career as a uniform patrol for the Richland County Sheriff’s Department. (R. p. 958). Claycomb testified she had been working as an agent in the SLED crime scene department for only five years. (R. p. 957). Crime scene investigations were her primary responsibility and, in fact, were all she did for her first two years at SLED. (Id.). In August 2014, Claycomb began basic footwear training, and footwear has since become what she characterized as an “extra duty.” (Id.). In other words, it is not her main focus.

As part of her training, Claycomb worked under a qualified footwear examiner for three years performing supervised casework. (R. p. 959). She attended a training session with Dwane Hilderbrand, whom she indicated was an internationally renowned footwear examiner. (Id.). Additionally, Claycomb attended a week-long International Association of Identification (IAI) conference. (Id.). She is not a member of this organization—or any other organization for that matter—and has never received IAI certification. (R. p. 962). Since completing her apprenticeship, Claycomb has had only fifteen to twenty instances of “actual casework.” (R. p. 958). While Claycomb has appeared in court eleven times over the course of her career, (R. p. 960), she has testified only regarding the broader topic of crime scene investigations not footwear

examination, (Id.). And even then, she was qualified as a crime scene expert only once. (R. p. 961). Claycomb has never published any articles on footwear impressions. (R. p. 963).

Prior to this trial, Claycomb had never testified as an expert in footwear impressions—and for good reason. While she may be a very competent crime scene agent, she is not qualified to testify as a footwear examination expert, and the circuit court erred in qualifying her as such. See Watson, 389 S.C. at 446, 699 S.E.2d at 175 (asserting that, “while the expert need not be a specialist in the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter”).

B. The footwear impressions testimony was unreliable.

Even if Claycomb was qualified, the court of appeals misapprehended the reliability test in upholding the circuit court’s admission of her footwear examination testimony.

“The test for reliability for expert testimony does not lend itself to a one-size-fits-all approach.” Watson, 389 S.C. at 450 n.3, 699 S.E.2d at 177 n.3. The Court has explained that, when “considering the admissibility of scientific evidence under the Jones standard,” an appellate court generally looks at the following factors: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” Council, 335 S.C. at 19, 515 S.E.2d at 517 (citing State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). Scientific evidence, of course, “is also subject to attack for relevancy and prejudice.” Id. at 19–20, 515 S.E.2d at 517.

Applying the Council factors here, the circuit court should have excluded Claycomb’s footwear impressions testimony. As to the first factor, while Claycomb indicated her report was confirmed via peer review, (R. p. 960), she named no publications citing with approval the

technique she employed. The State, which bore the burden of proving the admissibility of Claycomb's expert testimony, did not articulate any publications or other research Claycomb actually reviewed. Indeed, the court of appeals generally noted only that "Claycomb testified she read publications on the subject and explained she was familiar with other experts' research on fundamental footwear patterns." Little, Op. No. 2021-UP-196, at 4; (App. p. 165); see also (R. p. 963). Who or what remains a mystery, for the State has never provided that information.

Turning to the second factor, Claycomb testified she had fifteen to twenty cases involving footwear impressions, (R. p. 958), but she never indicated whether the same method was employed in each case. Regarding the third factor, although Claycomb testified in detail about the chain of custody for the DVD containing the digital photographs, (R. p. 970), she failed to indicate what quality control measures were employed to ensure the photography department accurately enlarged photographs used to compare impressions. Nor did she indicate the consistency of this method with recognized scientific laws and procedures required under the fourth factor. The court of appeals concluded Claycomb "explained the procedures and steps she used when comparing footprint impressions." Little, Op. No. 2021-UP-196, at 4; (App. p. 165). But that is not the same as showing the method was consistent "with recognized scientific laws and procedures." Council, 335 S.C. at 19, 515 S.E.2d at 517.

The admissibility of outwear sole impressions testimony is a novel issue in South Carolina. In 2001, however, the Court did reject the State's effort to present testimony from a "barefoot insole impressions" expert, holding this evidence was inadmissible because it was not scientifically reliable. State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (Jones I). The case was retried and reversed again based upon the circuit court's admission of unreliable "barefoot insole impression" evidence. State v. Jones, 383 S.C. 535, 557-58, 681 S.E.2d 580, 592 (2009) (Jones

II). Interestingly, the Court there rejected the publications and testimony of William Bodziak—the very individual under whom Claycomb trained—as unreliable. See id.; (R. p. 952).

Although this case involves “outsole impressions” and tread design, the same analysis applies and renders outsole footwear impressions testimony speculative and unreliable.¹² For instance, while Claycomb found the “outsole design [was] similar,” she could not say it was the same shoe because she was unable to “conduct a further examination” due to the quality of the photographs. (R. pp. 971; 950). Claycomb could not even say whether this was a left or right shoe, (R. p. 979), or determine the shoe size, (R. p. 983). Frankly, Claycomb was unable to answer some of the most basic questions about the alleged science behind footwear impressions to give even an indicia of reliability.

Thus, as in Jones I, the trial court here “erred in permitting expert testimony purporting to demonstrate that ‘[footwear outsole] impression’ testing revealed” Dr. Little’s shoe “to be consistent with the impression” found at the crime scene. 343 S.C. at 574, 541 S.E.2d at 819. At bottom, Claycomb created an ink impression from a shoe, placed it onto a clear transparency, and then had another department enlarge and print a photograph of the unknown footprint to compare footwear impressions. Because “[e]ven a small millimeter could change things,” it can be very hard to compare footwear impressions. (R. p. 968).

This method is simply not scientifically reliable, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury. See Council, 335 S.C. at 19–20, 515 S.E.2d at 517; Rule 403, SCRE.

¹² While some jurisdictions have recognized the admissibility of outsole footwear impressions testimony, this Court has not. Accordingly, the State’s citation of cases from other jurisdictions—none of which were presented to the circuit court—does not and cannot give it a pass on proving admissibility.

C. *The court of appeals overlooked that the circuit court’s errors regarding Claycomb cannot be harmless as her testimony directly linked Dr. Little to the crime.*

Finally, because the State introduced Claycomb’s testimony solely for the purpose of linking Dr. Little to the scene of the crime, it is prejudicial and cannot be harmless.

In her final testimony on redirect, Claycomb confirmed the outsole impression from the pictures she received from the crime scene was “similar to the shoes that [she] received from the defendant’s house.” (R. p. 985). The State connected the dots during its closing argument, posing the following question to the jury: “What are the odds that it is somebody else’s shoe?” (R. pp. 1171–72). Irrespective of the use of “similar” versus “the same,” the State introduced Claycomb’s testimony for the singular purpose of putting Dr. Little at the scene of the crime. The circuit court’s error cannot be found harmless because Dr. Little was necessarily prejudiced by Claycomb—a SLED agent—being imbued with the imprimatur of an expert and confusingly testifying that Dr. Little’s shoes were “similar” to the prints found at the murder scene.

The Court has stated that an “opinion [that] goes to the heart of the case is not harmless.” State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). Claycomb’s testimony purported to directly link Dr. Little to the murder scene. Accordingly, the Court should reverse the court of appeals because the circuit court’s admission of this evidence was not harmless. To the contrary, the admission of this prejudicial testimony mandates reversal of Dr. Little’s murder conviction and a new trial. See id. (holding that a reversal is mandated when a solicitor exploits “the trial court’s imprimatur of [an officer] as an ‘expert’ . . . to the prejudice of” the defendant).

CONCLUSION

As the U.S. Supreme Court has recognized, “[i]f the government becomes a lawbreaker, it breeds contempt for the law.” Elkins v. United States, 364 U.S. 206, 223 (1960). The State—in its quest to secure a conviction at any cost—violated Dr. Little’s constitutional rights from the

outset of the investigation all the way through trial. “In law, the ends do not justify the means.” Adams, 409 S.C. at 654, 763 S.E.2d at 348. Without the State’s unconstitutional and prejudicial tactics, the case presented to the jury would have been fundamentally different. In other words, these are not mere technicalities. Dr. Little deserves a fair trial. Accordingly, the Court should reverse Dr. Little’s conviction and remand for a new trial with instructions to exclude the fruits of the illegal search and the outsole footwear impressions testimony.

Respectfully submitted,

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