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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

ON CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2021-001043

The StateRespondent,

v.

General T. Little.....Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the circuit court err in failing to suppress evidence as fruit of the poisonous tree stemming from the illegal search of Dr. Little's vehicle parked in the driveway within the curtilage of his home?
- II. Did the circuit court err in denying Dr. Little's motion for a mistrial when the solicitor mentioned a ring during her closing argument that the court suppressed prior to trial?
- III. Did the circuit court err in qualifying the State's witness as an expert in footwear impressions and admitting her prejudicial and unreliable testimony purporting to link the tread design of Dr. Little's shoe to one found at the crime scene?

STATEMENT OF THE CASE

This appeal arises out of an officer's unlawful intrusion into the curtilage of Appellant General T. Little's (Dr. Little)¹ home that set off a series of State action that infringed upon Dr. Little's constitutional rights and ultimately secured his murder conviction.

On September 22, 2015, Barbara Little was found dead in her home in Charleston, South Carolina. (R. pp. 341, 344). Barbara's brother, A.J. McConnell, discovered her body in the bathroom after her daughter, Kimberly Little-Armstrong, had asked him to check on her. (Id. at 342, 344). Barbara did not answer Kimberly's phone calls that evening. (Id. at 449). After discovering Barbara's body, McConnell called 911 and dispatchers notified law enforcement. (Id. at 344, 511). Investigators spoke with A.J. and Kimberly immediately upon arrival to Barbara's home. (Id. at 345, 514). An hour later, law enforcement was sent to the home of Barbara's ex-husband,² Dr. Little, to locate him. (Id. at 514). Dr. Little had not shown up for a dinner date at IHOP with his daughter, Kimberly, earlier that evening. (Id. at 449).

Dr. Little lived in an upper-middle-class neighborhood in West Ashley. (Id. at 547, 161). The house was a two-story colonial style with a front porch. See (R. p. 1264). Its driveway ran from the street up to the garage on the left side of the house. See (R. pp. 1265, 1286–87). Before the front threshold of the house was a sidewalk that fed into the driveway. See id. All vehicles were parked beyond the sidewalk in the back part of the driveway. See id. The driveway was wide enough to fit two vehicles, and Dr. Little's vehicle was on the righthand side. See id. Because the vehicle on the left was hugging the middle of the driveway, Dr. Little's vehicle was parked

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).

farther to the right. See id. His right rear tire rested in the mulch beside the driveway as a result. See id. The vehicle was less than a car's width from the side of the dwelling. See id.

Seeing a vehicle that he knew belonged to Dr. Little parked slightly off the driveway, Deputy Matthew Colburn of the Charleston County Sheriff's Department approached it. (R. p. 514). In doing so, Deputy Colburn traversed 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. (Id. at 516, 555). Although he quickly ascertained 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 approached it again after checking the other vehicles. (Id. at 551, 554 & 70). Specifically, Deputy Colburn walked around to the other side of Dr. Little's vehicle and discovered the front passenger window rolled down. (Id. at 516–17).

The timing of his discovery is inconsistent in the record. The search warrant affidavits indicate Deputy Colburn observed the window down during his sweep, (Id. at 1257, 1262), but he testified at trial he could see the window down from the street as he pulled up to the home on the evening in question. (Id. at 516). Deputy Colburn arrived after 11:00 P.M. that evening. Id. As noted above, the vehicles in the driveway were parked beyond the front threshold of the home. See (R. pp. 1265, 1286–87). No overhead lights were on inside the car. (Id. at 549).

During the 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. (Id. at 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 walked out of the residence. (Id.). Deputy Colburn asked Dr. Little if he would

accompany him to the law enforcement center to speak with detectives, and Dr. Little obliged. (Id. at 557). Deputy Colburn conceded he had neither a warrant nor probable cause to search Dr. Little's property. (Id. at 548). According to Deputy Colburn, Dr. Little was not even a suspect at the time. (Id. at 543).

Deputy Colburn subsequently transported Dr. Little to the law enforcement center in the back of his vehicle. (Id. at 557). Upon arrival, Deputy Colburn turned Dr. Little over to Detective Dustin Turner, to whom he privately divulged his findings from the search of the vehicle. (Id. at 518). Detective Turner then proceeded to interrogate Dr. Little about Barbara's death. (Id. at 644). Meanwhile, Detective Will Muirhead received a call to meet Deputy Colburn back at Dr. Little's residence. (Id. at 663). Following his search of Dr. Little's vehicle, Detective Muirhead relayed his findings to Detective Jason Bowen. (Id. at 663–64). Detective Bowen was tasked with “constructing” a probable cause affidavit to present to a magistrate for purposes of obtaining a search warrant. (Id. at 664). In the interim, Detective Muirhead asked Dr. Little's wife, Carla Little, for permission to enter the home for a “walk-through.” (Id. at 665).

Shortly thereafter, Detective Muirhead returned to the law enforcement center and took his turn interrogating Dr. Little. (Id. at 666). In all, Dr. Little was interrogated at the station for almost four hours by three different detectives before someone finally read him Miranda warnings.³ (Id. at 206). During this time, detectives searched Dr. Little's person for scratches and any evidence of a struggle. (Id. at 649–50, 1075). Over his objection, detectives also required Dr. Little to remove his clothes and place them in an evidence bag. (Id. at 217, 225). Detectives had no search warrant for his clothing and never bothered to obtain one. (Id. at 226–27). In the back pocket of his pants, detectives discovered Dr. Little's wedding ring. (Id. at 203). While the ring tested

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

positive for blood, it was never matched to any known DNA. (Id.). After Dr. Little stripped down, Detective Turner gave him a ride home. (Id. at 645).

Detectives later executed the search warrants obtained pursuant to Deputy Colburn's unlawful search of Dr. Little's vehicle and seized various items, including the vehicle, from Dr. Little's home. (Id. at 669, 739). They also searched his phone and computer records. (Id. at 669, 386 & 903). Investigators were fixated on the fact that Dr. Little was behind in alimony payments and was served with a rule to show cause on the day of Barbara's death. (Id. at 652, 673). But this was nothing new. Dr. Little had been hailed into family court on numerous prior occasions to account for his delinquent alimony payments. (Id. at 647, 336). Although the State exaggerated the amount of alimony owed at trial, the amount at issue in the rule to show cause was approximately \$17,000. (Id. at 509). As one witness noted, that is not kill people money. (Id. at 437). Nevertheless, detectives fingered Dr. Little as the primary suspect and pursued no other leads that supported a different theory of the case.

In May of 2016, a Charleston County grand jury indicted Dr. Little for murder. (Id. at 1255–56). The case was initially called for a jury trial in February of 2018. Prior to trial, the circuit court held a lengthy hearing on Dr. Little's motions to suppress based upon law enforcement's violations of his constitutional rights throughout the investigation as well as various other pre-trial issues. (Id. 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. (Id. at 233–34). But the court denied Dr. Little's motion to suppress the blood evidence found in his vehicle and all related evidence. (Id. at 159–62). Following jury selection, the State turned over video evidence the defense had been requesting for months.⁴ (Id. at 287). In lieu of declaring a

⁴ See Brady v. Maryland, 373 U.S. 83 (1963); Rule 5(d)(2), SCCrimP. Although not relevant to the issues on appeal, the State's repeated delay in turning over evidence to the defense in this case was disturbing.

mistrial or excluding the evidence withheld by the State, the circuit court elected to continue the case to the next term of general sessions. (Id. at 289–90).

The case was recalled for a jury trial on March 19–23, 2018. After jury selection and opening statements, 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 subsequent investigation, cell tower records, the family court’s rule to show cause, Dr. Little’s interrogation, blood forensics, and Dr. Little’s computer records. (Id. at 321–943). Additionally, the State proffered Dawn Claycomb, a crime scene agent with the South Carolina State Law Enforcement Division (SLED), to testify as an expert in footwear examination. (Id. at 960). Claycomb participated in the investigation into Barbara’s death. (Id. at 968). Dr. Little challenged Claycomb’s qualifications, as well as the substance of her testimony, but the circuit court permitted her to testify over his objection. (Id. at 944–55, 963). Claycomb testified that she found the “outsole design” from Dr. Little’s shoe was “similar” to an impression taken from the scene, but she could not say it was the same shoe. (Id. at 976). A forensic pathologist from the Medical University of South Carolina also testified regarding her findings from Barbara’s autopsy. (Id. at 1010–49).

After the State rested, Dr. Little moved for directed verdict. (Id. at 1061–64). The circuit court denied his motion and instructed the defense to call its first witness. (Id. at 1066, 1071). Dr. Little called three witnesses to the stand. Detective Matthew Downing, who questioned Dr. Little along with two other detectives at the station, testified that he did not observe any physical injuries on Dr. Little’s body on the night in question. (Id. at 1074–75). He confirmed that Dr. Little was questioned for at least two or three hours, starting after midnight. (Id. at 1085, 1073). When asked

about Dr. Little's demeanor during this questioning, Detective Downing stated he was aware that Dr. Little had been up since 4:30 A.M.—for almost twenty-four hours. (Id. at 1085).

Next, Kimberly Mears, a fingerprint examiner with SLED, testified that she was given five latent fingerprint lifts from the crime scene and attempted to compare them with Barbara's and Dr. Little's fingerprints. (Id. at 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. (Id. at 1097). Finally, Deputy Robert Haslip testified regarding his recollection of events at the crime scene. (Id. at 1108–20). He further testified about the policies and procedures governing dashboard cameras and body cameras. (Id. at 1106). Following his testimony, the defense rested and renewed all prior motions. (Id. at 1135). They were denied, and the parties proceeded with closing arguments. (Id. at 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. (Id. at 1138–39, 1144–45, 1147–48 & 1171–72). In essence, this was the only physical evidence purportedly linking Dr. Little to the scene of the crime. The State then referenced Dr. Little's wedding ring both verbally and via a PowerPoint slide published to the jury. (Id. at 1161). It sought to draw attention to the fact that Dr. Little, who was married to his second wife Carla, was not wearing a wedding ring during the relevant period in question. (Id.). As noted above, the circuit court suppressed the ring before trial because it was taken during an unlawful search that followed a violation of Dr. Little's Miranda rights. (Id. at 233–34).

Dr. Little immediately moved for a mistrial. (Id. at 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. (Id. at 1163). But the damage was already done. The defense delivered

its closing argument, and the State briefly replied. (Id. at 1181–1218, 1219–24). After receiving instructions, the jury retired for deliberations. (Id. at 1225–37).

The jury struggled with this case. Four hours into deliberations, the jury asked for a copy of the charge. (Id. at 1240). When the circuit court asked the foreman to be more specific, the jurors instead decided to return to their room and resume deliberations. (Id. at 1240–41). Ultimately, after deliberating for a total of five hours, the jury returned a guilty verdict. (Id. at 1243). The circuit court denied all renewed motions and then sentenced Dr. Little to thirty years in prison. (Id. at 1243, 1247–52). This appeal followed.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Jenkins, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). Although “an appellate court is bound by the circuit court’s factual findings unless they are clearly erroneous,” State v. Blakney, 410 S.C. 244, 249, 763 S.E.2d 622, 625 (Ct. App. 2014), the court “is free to decide questions of law with no particular deference to the circuit court,” State v. Bailey, 416 S.C. 344, 347, 785 S.E.2d 622, 623 (Ct. App. 2016).

ARGUMENT

The Court should reverse and remand for a new trial because (1) the State’s blood evidence was obtained following an illegal search and should have been suppressed as fruit of the poisonous tree, (2) the solicitor improperly referenced a ring during her closing argument that the circuit court had suppressed prior to trial and prejudiced Dr. Little, and (3) the State’s purported footwear impressions expert was not qualified and her testimony was unreliable and prejudicial.

1. *The circuit court erred in failing to suppress the evidence found in Dr. Little’s vehicle and home because officers obtained it following an illegal search.*

The State violated Dr. Little's rights under the Fourth Amendment to the U.S. Constitution by conducting a warrantless search of his vehicle parked in the driveway, which was within the curtilage of his home, and all evidence obtained in this illegal search should have been suppressed under the exclusionary rule as fruit of the poisonous tree.

When deciding "appeals from a motion to suppress based on Fourth Amendment grounds," the appellate court "reviews questions of law de novo." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017) (quoting State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)). "As to a circuit court's findings of fact," the appellate court "must affirm 'if there is any evidence to support it,' and 'may reverse only for clear error.'" Id. at 268, 797 S.E.2d at 724 (quoting State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012)). While the appellate court "applies a deferential standard of review" in Fourth Amendment cases, "this deference does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]'s decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

The Fourth Amendment, of course, guarantees the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "Private residences are places in which an individual normally expects privacy free of government intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable." State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009). "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).

The relationship between the two constitutions is significant because “[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.” Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. 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. Thus, 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 (alteration in original) (quoting Forrester, 343 S.C. at 643–44, 541 S.E.2d at 840).

Under both constitutions, “[w]arrantless 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); see also Herring, 387 S.C. at 209, 692 S.E.2d at 494 (holding “searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances”). “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). And the Fourth Amendment extends this protection to “the curtilage of the home.” Bash, 419 S.C. at 268, 797 S.E.2d at 723 (quoting Herring, 387 S.C. at 209, 692 S.E.2d at 494).

Our supreme court has held that “the Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy, or unless the government commits a common-law trespass for the purpose of obtaining information.” State v. Robinson, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); United States v. Jones, 565 U.S. 400, 404–05 (2012)). “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Robinson, 410 S.C. at 527, 765 S.E.2d at 568 (quoting Katz, 389 U.S. at 351). To that end, “mere visual observations from public thoroughfares do not constitute a search, and police officers need not ‘shield their eyes’ when passing by a home.” Id. (emphasis added) (internal citation omitted) (quoting California v. Ciraolo, 476 U.S. 297, 213 (1986)). “But what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” Katz, 389 U.S. at 351.

A. The vehicle in Dr. Little's driveway was within the curtilage of his home.

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). “The 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.” Ciraolo, 476 U.S. at 212–13. “While the boundaries of curtilage are generally ‘clearly marked,’ the ‘conception defining the curtilage’ is at any rate familiar enough that it is ‘easily understood from our daily experience.’” Florida v. Jardines, 569 U.S. 1, 8 (2013) (quoting Oliver, 466 U.S. at 182 n.12).

The U.S. Supreme Court has outlined several factors a court may consider in determining whether an area constitutes curtilage:

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987). But this is not a bright line test, and the Court has emphasized that “the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.” Id. at 301 n.4. In other words, the above-cited “factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.” Id. at 301; see also United States v. Jackson, 728 F.3d 367, 373–74 (4th Cir. 2013) (observing the U.S. Supreme Court “cautioned” for limited use of the Dunn factors).

Just this Term, the U.S. Supreme Court decided a case directly on point here and held that a “part of the driveway where [the defendant]’s motorcycle was parked and subsequently searched [was] curtilage” for purposes of the Fourth Amendment. Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018). In reaching its 8–1 decision,⁵ the Court found it was “of no significance that the motorcycle was parked just a ‘short way up the driveway.’” Id. at 1673 n.3. As the Court noted, “[t]he driveway was private, not public property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture, in an area ‘intimately linked to the home, . . . where privacy protections are most heightened.’” Id. (quoting Ciraolo, 476 U.S. at 213).

⁵ Although Justice Thomas filed a concurring opinion, he wrote separately only to express his skepticism of the Court’s authority to require the states to apply the exclusionary rule. Id. at 1675 (Thomas, J., concurring). Because he agreed the majority “correctly resolve[d] the Fourth Amendment question,” however, he “join[ed] the Court’s opinion.” Id. (Thomas, J., concurring). Justice Alito wrote the lone dissent. Id. at 1680–83 (Alito, J., dissenting).

Likewise, our supreme court confronted a similar curtilage question in Bash. In that case, the court held “the evidence support[ed] the circuit court’s factual finding that the grassy area in the backyard” in which officers encountered the defendant “was sufficiently tied to the home to be within the curtilage.” Bash, 419 S.C. at 271, 797 S.E.2d at 725. The grassy area of the property included a grill and a shed, and it “was located only a few feet from a fence surrounding the home.” Id. at 269, 797 S.E.2d at 724. A clothesline sat “[i]n the short distance between the fence and the grassy area.” Id. Further, “a short dirt road that reaches only a few residences” ran “very close to the home and [came] to a dead end on the property where the home [sat].” Id.

Here, as in Collins, a review of the photographs reveals “the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house.” 138 S. Ct. at 1670; see (R. pp. 1265, 1286–87). Dr. Little’s vehicle was parked in the portion of the driveway that sits beyond the front perimeter of his home. (R. pp. 1265, 1286–87). The vehicle was only a few feet from the side of the home. (Id.); cf. Bash, 419 S.C. at 269, 797 S.E.2d at 724 (noting the grassy area “was located only a few feet from a fence surrounding the house”). A garage sits immediately to the right of the area of the driveway in which he parked. (R. pp. 1265, 1286–87). The driveway was surrounded by grass and a large tree on the lefthand side, separating it from the neighbor’s property. (Id.); cf. Bash, 419 S.C. at 269, 797 S.E.2d at 724 (observing the dirt road ran “very close to the home” and “[l]arge trees line[d] the side of the road between [a public road] and the home”).

Directly in front of the vehicle parked next to Dr. Little’s in the driveway is a basketball goal. (R. pp. 1265, 1286–87); cf. Bollini v. Bolden, No. 08-14608, 2010 WL 1494562, at *7 (E.D. Mich. Apr. 14, 2010) (holding a pole barn was within the curtilage of the home because, among other things, it was “located on the same driveway that is used to access the main home” and

“contain[ed] a basketball hoop, with an area of concrete just in front to facilitate play,” and finding “[t]he physical layout of [the] property clearly indicate[d] that ‘home life’ extended to the pole barn”); see also Bash, 419 S.C. at 269, 797 S.E.2d at 724 (noting “[t]he use of a grill is an activity closely associated with the use of a home”). Further, this portion of the driveway is situated behind where the driveway abuts the sidewalk leading up to the front porch of Dr. Little’s home. (R. pp. 1265, 1286–87). Dr. Little has mulch and bushes planted between the sidewalk and the house, distinguishing this area from the grassy front yard. (Id.). Additionally, the back of Dr. Little’s car appears to be flush with the front porch of the home. (Id.).

In short, the area of the driveway in which Dr. Little parked his vehicle was curtilage. While curtilage determinations require a case-specific inquiry, a straightforward application of Collins and Bash compels this result. Dr. Little’s vehicle was parked only a few feet from the side of the house where classic curtilage, such as a porch or side garden, would be found. See Bash, 419 S.C. at 268, 797 S.E.2d at 724. To reach Dr. Little’s vehicle, the officer had to veer off the customary invited path to the front door of the home. And the fact that Dr. Little parked his vehicle in the driveway instead of the garage is of no consequence here. See Collins, 138 S. Ct. at 1673 n.3 (finding it was “of no significance that the motorcycle was parked just a ‘short way up the driveway’”). Countless individuals park their vehicles outside the garage—whether it be for convenience, preferred temperature, or otherwise—and their reasonable expectation of privacy does not vanish when they choose to do so.

The Fourth Amendment’s protections do not begin and end with the close of a retractable garage door. See id. at 1675 (“So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage.”). 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. With this question settled, the Court must next determine whether the search was unlawful. It was.

B. Officers illegally searched the vehicle and failed to prove an applicable exception to the warrant requirement.

“At its core, the Fourth Amendment ‘stands [for] the right of a man to retreat into his own home and there be free from unreasonable government intrusion.’” Robinson, 410 S.C. at 526, 765 S.E.2d at 568 (alteration in original) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). Therefore, “[a] law enforcement officer must have a warrant to enter a home for the purpose of conducting a search, unless an exception applies.” Bash, 419 S.C. at 271, 797 S.E.2d at 725 (internal citations omitted). “[T]he Fourth Amendment extends the same protection to a home’s curtilage.” Robinson, 410 S.C. at 526–27, 765 S.E.2d at 568; see also Covey v. Assessor of Ohio Cty., 777 F.3d 186, 192 (4th Cir. 2015) (asserting that “[t]he Fourth Amendment protects homes and the ‘land immediately surrounding and associated’ with homes, known as curtilage” (quoting Oliver, 466 U.S. at 180)). And a reviewing court’s “task, at a minimum, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment.” Jones, 565 U.S. at 406 n.3.

“The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible.” Collins, 138 S. Ct. at 1675. “When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant.” Id. at 1670 (internal citation omitted); see also Bash, 419 S.C. at 271–72, 797 S.E.2d at 725 (“When officers ‘physically occup[y] private property for the purpose of obtaining

information, a search has occurred.” (quoting Jones, 565 U.S. at 404)). 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, 138 S. Ct. at 1672.

Deputy Colburn physically intruded upon the curtilage of Dr. Little’s home without a warrant for the objective purpose of obtaining information. Thus, he committed a common law trespass and his actions constituted a search within the meaning of the Fourth Amendment. Indeed, during the suppression hearing, the State conceded that a search occurred. (R. p. 156). The only question remaining, then, is whether he “was entitled to conduct the search or seizure under an exception to the Fourth Amendment’s warrant requirement.” Robinson, 410 S.C. at 530, 765 S.E.2d at 570. Some of “[t]hese exceptions ‘include (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, and (6) consent.’” State v. Morris, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) (quoting State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981)).

The State failed to articulate any of these exceptions during the suppression hearing. Rather, the State contended Deputy Colburn conducted “a de minimis search” of the vehicle “solely out of concern for his safety.” (R. p. 156). In a suppression hearing, the State bears the burden of proving an exception applies. Robinson, 410 S.C. at 530, 765 S.E.2d at 570. “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.” Id. To the extent the State argues (1) the evidence was in plain view, or (2) exigent circumstances warranted the intrusion into Dr. Little’s curtilage and his vehicle, neither exception applies.

1. The plain view doctrine is inapplicable

Although the State never argued the plain view doctrine at the suppression hearing, this justification was offered in one of the search warrant affidavits. (R. p. 1262). To the extent the State relies upon it, the plain view doctrine is inapplicable.

“Under the ‘plain view’ exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence.” State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). “Hence, the two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities.” Wright, 391 S.C. at 443, 706 S.E.2d at 327.

Here, the initial intrusion was unlawful and Deputy Colburn was not rightfully in a position to view the objects the State introduced over Dr. Little’s objection at trial. See Beckham, 334 S.C. at 317, 513 S.E.2d at 613; Wright, 391 S.C. at 443, 706 S.E.2d at 327. In analyzing this first factor, a review of South Carolina’s “knock and talk” jurisprudence is necessary.

Our supreme court “has found that ‘police ha[ve] the investigative authority to approach the front door of [a] home . . . to investigate [an] anonymous tip.’” Counts, 413 S.C. at 166, 776 S.E.2d at 66 (first and second alterations in original) (quoting Wright, 391 S.C. at 445, 706 S.E.2d at 328). “[A] police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’” Jardines, 133 S. Ct. at 1416 (quoting Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)). To be sure, “the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers[,] and peddlers of all kinds.” Breard v. Alexandria, 341 U.S. 622, 626 (1951). And “[c]omplying with the terms of that invitation does not require fine-grained legal knowledge; it is

generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." Bash, 419 S.C. at 275, 797 S.E.2d at 727 (quoting Jardines, 133 S. Ct. at 1415).

Although "the 'knock and talk' technique is not per se violative of the Fourth Amendment or the parallel provision in the South Carolina Constitution," Counts, 413 S.C. at 161, 776 S.E.2d at 63, it is not without its limits. Indeed, the "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Jardines, 133 S. Ct. at 1415. In other words, this traditional invitation to visitors does not give officers license to go snooping around anywhere on the premises. See id. As the U.S. Supreme Court has observed, "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." Id. at 1416.

Here, as in Jardines, Deputy Colburn's "behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." 133 S. Ct. at 1417. As the Jardines Court noted, "[t]o find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking for permission, would inspire most of us to—well, call the police." Id. at 1416. Similarly, observing a perfect stranger prowling around one's vehicle with a flashlight, late at night, without permission, and mere feet from the home would inspire anyone to call the police.

"The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." Id. Deputy Colburn's implied invitation to approach the front door did not extend to the back area of Dr. Little's driveway, nor did it extend to the vehicles parked there. After all, "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to

obtain information not otherwise accessible.” Collins, 138 S. Ct. at 1675. Deputy Colburn’s path to the front door would never include walking to the far side of a vehicle located where Dr. Little was parked in the driveway. Because Deputy Colburn was not entitled to be in the area of the driveway in which he was lurking during the search of Dr. Little’s vehicle, he does not enjoy the protections of the plain view doctrine. See Wright, 391 S.C. at 443, 706 S.E.2d at 327.

Further, Deputy Colburn did not see blood from the street or any other public area. Cf. Robinson, 410 S.C. at 527, 765 S.E.2d at 568 (asserting that “mere visual observations from public thoroughfares do not constitute a search, and police officers need not ‘shield their eyes’ when passing by a home” (internal citation omitted) (quoting Ciraolo, 476 U.S. at 213)). Rather, he claimed to see a window down in plain view from that lawful vantage point. A window down is not suspicious. The State, however, struggled to get its story straight even on this point. The first search warrant affidavit never mentioned a window being down and noted only that the evidence “was observed in plain view through the window.” (R. p. 1262). In the next affidavit, officers swore that “[w]hile performing a security sweep of the vehicle he observed the front passenger window rolled down and the middle console lid was up.” (R. p. 1257 (emphasis added)). Yet at trial, Deputy Colburn testified he somehow observed the window down from the street as he was approaching the home in his vehicle. (Id. at 516). Frankly, this does not pass the smell test.

The pictures in the record show Dr. Little’s vehicle parked past the front threshold of the home, and most of the passenger side was blocked by the side of the home. See (R. pp. 1265, 1286–87). Deputy Colburn testified he wears reading glasses at night so he can “read license plates.” (Id. at 563). He arrived at the home after 11:00 P.M. on the night in question. (Id. at 516). It was dark. Deputy Colburn’s recollection of the timing and manner in which he discovered the window down simply finds no support in the record. It was not only inconsistent with the search

warrant affidavits, but also would have been physically impossible based upon the pictures showing the position of the vehicle.

Although credibility determinations are largely left to the discretion of the circuit court, this Court is not required to turn a blind eye to the evidence. See State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015) (asserting that “[c]redibility findings are treated as factual findings, and . . . appellate inquiry is limited to reviewing whether” these “findings are supported by any evidence in the record”). Respectfully, the testimony upon which the circuit court relied to make its ruling was not supported by any evidence.

Irrespective of the window, Deputy Colburn only saw the blood evidence “in plain view,” with the aid of his flashlight, during the subsequent unlawful search of the vehicle while he was intruding upon the curtilage of the home. He testified as follows on this point:

COLBURN: Yes, sir. I believe I walked up the driveway to the left side of the vehicle.

THE COURT: That’s the driver’s side?

COLBURN: Correct. Initial clearing of that vehicle with a flashlight looking inside the windows to make sure there were no persons or anything inside the vehicle. Moved on to the other vehicles that were there, and then came back around to the passenger side of the silver SUV.

THE COURT: And that’s when you noticed the dark stuff on the console and the towel?

COLBURN: Yes, sir.

(R. pp. 72–73). Deputy Colburn confirmed he was “[m]aybe a foot” from the vehicle during the initial clearing. (Id. at 81).

To the extent it was even necessary, Deputy Colburn had already cleared the vehicles to ensure officer safety before he engaged in the subsequent search. Although no exigent

circumstances existed in the first instance, see Part I.B.2, infra, any purported exigencies had certainly vanished at this point during the two-minute search of the vehicles in the driveway. When Deputy Colburn walked around to the passenger side of the vehicle with his flashlight, he was unquestionably “conducting a search to obtain information not otherwise accessible.” Collins, 138 S. Ct. at 1675. No exception to the warrant requirement justified this prolonged intrusion onto Dr. Little’s property, much less the curtilage of his home. See U.S. CONST. amend. IV; S.C. CONST. art. I, § 10.

Turning to the second requirement, “the incriminating nature of the evidence” was not even “immediately apparent to the seizing authorities.” Wright, 391 S.C. at 443, 706 S.E.2d at 327. As the search warrant affidavits and testimony at the suppression hearing indicate, Deputy Colburn only observed what appeared to be a brownish stain on the open center console lid. (R. p. 517). It was not “immediately apparent” that this evidence was blood. To that end, both affidavits swore that he saw what “appeared to be blood.” (Id. at 1262, 1257). At trial, Deputy Colburn confirmed he “did not immediately recognize it as blood.” (Id. at 556). Nevertheless, Deputy Colburn continued his unlawful search and found towels similar to those found at the scene of the crime in the floorboard of the passenger seat of Dr. Little’s vehicle. The towels were not in plain view. Deputy Colburn only saw them while he was in between the house and the vehicle performing an illegal search after 11:00 P.M. with a flashlight. Therefore, the State failed to prove the second element of the plain view doctrine necessary to invoke its protections from an otherwise unlawful warrantless search. See Wright, 391 S.C. at 443, 706 S.E.2d at 327.

Because Deputy Colburn deviated from the norms established for the knock and talk procedure and entered the curtilage of Dr. Little’s home, the initial intrusion was unlawful and he was not rightfully in a position to view the objects in Dr. Little’s vehicle. Nor was the

incriminating nature of these objects immediately apparent. Thus, the plain view doctrine is inapplicable and did not excuse Deputy Colburn's failure to obtain a warrant prior to the search.

2. *No exigent circumstances justified the unlawful intrusion.*

"[A] warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (citing Minnesota v. Olson, 495 U.S. 91, 100 (1990)). "In such circumstances, a protective sweep of the premises may be permitted." Counts, 413 S.C. at 163, 776 S.E.2d at 65 (quoting Abdullah, 357 S.C. at 351, 592 S.E.2d at 348). "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." Maryland v. Buie, 494 U.S. 325, 327 (1990) (emphasis added).

"The exigent circumstances doctrine is an exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate." State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986). "Exigent circumstances—such as imminent destruction of evidence, the potential for a suspect to flee, or 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). Further, the doctrine only applies when, "from an objective standard, a compelling need for official action and no time to secure a warrant exists." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348.

This is not a hot pursuit case. Deputy Colburn, then, must have had "probable cause to believe the exigent circumstances were present." Dobbins, 420 S.C. at 592, 803 S.E.2d at 880. "The principal components of a determination of . . . probable cause will be the events which

occurred leading up to the stop or 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). “Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances.” Morris, 411 S.C. at 581, 769 S.E.2d at 859.

In the context of a sweep, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Buie, 494 U.S. at 334 (emphasis added); see also id. at 332 (noting “a limited patdown for weapons” is authorized “where a reasonably prudent officer would be warranted in the belief, based on ‘specific and articulable facts,’ and not on a mere ‘inchoate and unparticularized suspicion or hunch’” (quoting Terry v. Ohio, 392 U.S. 1, 21, 27 (1968))).

As a preliminary matter, the State finds no solace in this exception to the warrant requirement because the alleged protective sweep of the premises was not conducted “incident to an arrest.” Id. The State rightly conceded the protective sweep doctrine was inapplicable during the suppression hearing. (R. p. 156). While Dr. Little accompanied Deputy Colburn to the law enforcement center, where he was later subjected to custodial interrogation for four hours, Dr. Little was never placed under arrest on September 22, 2015. See (R. p. 663). What is more, his property was never an “arrest scene” on the night in question. Because the search did not occur incident to arrest, Deputy Colburn was not justified in intruding upon Dr. Little’s privacy in this manner. See Buie, 494 U.S. at 327,

Even when putting aside the “incident to an arrest” requirement, no exigent circumstances justified a security sweep. Indeed, as noted above, Deputy Colburn testified Dr. Little was not a

suspect at the time. (R. p. 543). Thus, a sweep was not conducted “to prevent a suspect from fleeing.” Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. Nor did anything pose “a risk of danger to the police or others inside or outside the home.” Id. Deputy Colburn notably testified he had no reason to believe Dr. Little was hiding. (R. p. 550). Seeing a vehicle’s passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person posed a danger to those on his premises.⁶ See Buie, 494 U.S. at 332 (asserting that an officers search must be “based on ‘specific and articulable facts,’ and not on a mere ‘inchoate and unparticularized suspicion or hunch’” (quoting Terry, 392 U.S. at 21, 27)). Moreover, it strains credibility to think Deputy Colburn could not have seen the floorboard of the passenger side with the aid of his flashlight from the driver’s side window during the initial search of the vehicles, as he testified, or that someone could have even fit into such an area to hide. See (R. p. 554).

With all due respect, no “ordinarily prudent and cautious person, under the circumstances, [would] believe” a search was justified to protect the safety of officers or others. Deputy Colburn testified he had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543). He was only sent to Dr. Little’s home “to locate” or “make contact” with him.”⁷ (Id. at 1262, 1257 & 515). Whatever that means, it does not translate into an unabridged right to search areas of the property beyond those available to any other stranger. See Jardines, 133 S. Ct. at 1415. Neither the initial

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.” (Id. at 514). Only the right rear tire was off the driveway. And Dr. Little did not have “plenty of room to park in the driveway,” (id. at 516), given the position of the car on the left.

⁷ The testimony in the record reveals Kimberly had already been in contact with her father for some time before officers visited his home. In fact, a detective asked Kimberly to call Dr. Little—in the detective’s presence—to come to Barbara’s home. (R. pp. 454, 464). And she was instructed “to stay on the phone with him.” (Id. at 464). Thus, Deputy Colburn hardly could have been concerned for Dr. Little’s safety. Cf. (R. p. 155) (noting it could have been a “welfare check”).

search of the three vehicles nor the follow up on the passenger side of Dr. Little's vehicle was justified. Deputy Colburn conceded he had no probable cause, (R. p. 548), and the Court should take him at his word. A review of the record reveals that "nothing occurred at the residence to create an exigency to justify a warrantless search." Herring, 387 S.C. at 218, 692 S.E.2d at 499 (Kittredge, J., concurring).

While the State emphasized its belief that this was a "de minimis search," the State never articulated any exigent circumstances that required the officer's presence in the first instance. Pre- (R. p. 156). As the circuit court noted, although Deputy Colburn saw "the car parked in the manner that it was parked and with the passenger window down," he "[d]idn't go into any great detail why that attracted his attention." (Id. at 160–61). The circuit court nevertheless found it was "unusual to have a car parked like that with the window down at that time," noting the incidence of car break-ins in what was "certainly an upper middle-class neighborhood." (Id. at 161–62). But the State never argued about vehicle theft crimes, and the circuit court erred in asserting this as a basis for its ruling because it finds no factual support in the record. See Tindall, 388 S.C. at 521, 698 S.E.2d at 205 (asserting that an appellate court's deferential standard of review "does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]'s decision is supported by the evidence"). Regardless, a window down is not objectively suspicious.

At the suppression hearing, the State heavily relied upon the Herring case. (R. pp. 155–56). Herring, however, is inapposite for two critical 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. Thus, under these exigent circumstances, our supreme court found that the “minimal intrusion” of peeking into “the garage window to see if the suspect was there” was “objectively reasonable” and did not violate the Fourth Amendment.⁸ *Id.* at 209, 211, 692 S.E.2d at 494, 495 (emphasis added). 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. 543, 547).

Second, and more importantly, 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.” *Id.* 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.* In other words, no harm, no foul.

The opposite is true here. Deputy Colburn did not merely confirm that Dr. Little’s vehicle was parked in the driveway—he ascertained that from the street. Instead, 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 did inculpate Dr. Little and link him to the scene of the crime. This was not a *de minimis* intrusion. Accordingly, the State finds no refuge in Herring.

⁸ *But see id.* at 218–19, 692 S.E.2d at 499 (Kittredge, J., concurring) (“disagree[ing] that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring’s residence two hours after the shooting of John Johnson at Chastity’s strip club” and stating that the peek into the garage was “an unwarranted trespass and warrantless search” but finding this search yielded no evidence).

Because Deputy Colburn had no probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle, the unlawful search was unreasonable and violated Dr. Little’s rights under the Fourth Amendment and the South Carolina Constitution.

C. *All evidence obtained as a result of the unlawful search is fruit of the poisonous tree.*

The purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” Elkins v. United States, 364 U.S. 206, 217 (1960). In Elkins, the U.S. Supreme Court reiterated the sound justifications behind the rule:

In a government of laws, . . . existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes . . . to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

364 U.S. at 223 (quoting Olmstead v. United States, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting), overruled in part by Katz, 389 U.S. at 347).

“Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible.” Adams, 409 S.C. at 648, 763 S.E.2d at 345 (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002)). “The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” Wong Sun v. United States, 371 U.S. 471, 485 (1963). Indeed, “[t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions.” Id. at 484.

“However, not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint.” Adams, 409 S.C. at 648, 763 S.E.2d at 345 (quoting Najjar, 300 F.3d at 477). In determining “whether the derivative evidence has been purged of the taint of the unlawful search,” the court may “consider several factors, including: (1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” Id. (quoting United States v. Gaines, 668 F.3d 170, 173 (4th Cir. 2012)).

Applying these factors to the instant case, suppression is required. Very little time passed between Deputy Colburn’s illegal search, Detective Muirhead’s illegal search confirming the findings, and the first search warrant affidavit sworn out on the vehicle. (R. pp. 663–64). Detective Bowen expressly relied upon the observations from the illegal search to “construct” the search warrant affidavit. (Id. at 664, 1262, 1257). And no intervening circumstances cured the taint. In fact, the only significant event that happened in between the illegal searches and the seizure of this evidence was another violation of Dr. Little’s constitutional rights when he was subjected to custodial interrogation for four hours without receiving Miranda warnings and was then forced to remove his clothing. The purpose and flagrancy of officers’ misconduct in this case is troublesome. Deputy Colburn failed to articulate any plausible exigent circumstances that would justify a reasonably prudent officer to objectively believe he was entitled to trespass and perform the illegal search, and he searched the cars for the purpose of obtaining evidence to which he was not otherwise entitled.

Here, the search warrant was tainted by the initial unlawful search of the vehicle. The first warrant affidavit provided the following:

On September 22, 2015, Charleston County Deputies responded to [Barbara’s residence], in reference to a deceased person. Prior to

deputies response, the deceased's family was unable to contact her. Family members went to the residence and found the door to be unsecured. They entered the residence and observed bloody towels. The deceased was located in several rooms in the victim's residence. The deceased's ex-husband, General Little, did not show for a dinner meeting with their daughter on 9/22/2015. Deputies responded to Mr. Little's home, after locating the deceased, to locate him. While approaching Mr. Little's home Deputies observed a towel similar to towels from the deceased's residence in a vehicle at Mr. Little's. the towel was observed in plain view through the vehicle window. Deputies also observed, in plain view, what appeared to be blood in the same vehicle. It is believed items recovered in the execution of this search warrant will further the investigation of the death.

(R. p. 1262). A subsequent warrant affidavit swore as follows:

Facts to establish the aforesaid are that on September 22, 2015 the Charleston County Sheriff's Office responded to [] at or around 2200 hrs in reference to Barbara Little being found dead in her residence. Preliminary investigation indicated that Barbara Little is a victim of an apparent murder and suffered severe head trauma. The deceased was located by her brother after a phone call from the deceased's daughter, Kimberly Armstrong, prompting him to do a welfare check.

Armstrong advised detectives that at or around 2030 hrs her father, General Little, contacted her and asked to meet her for dinner. General Little never showed up to the agreed upon spot. Armstrong contacted her father and he asked her to meet at another restaurant, which he never came to either. Armstrong attempted to call her father several times but received no answer.

In an effort to locate G. Little FTI Colburn went to his listed residence . . . and observed G. Little's Toyota Sequoia bearing South Carolina license plate, EDA 806, parked halfway in the driveway and halfway off. While performing a security sweep of the vehicle he observed the front passenger window rolled down and the middle console lid was up. While looking at the lid FTI Colburn observed a brownish stain on the console that appeared to be blood.

It is the affiant's belief that the items sought may be used to compare against known standards already in existence and may provide further insight into G. Little's movements prior to, during and after the incident. All evidence will be compared against evidence already obtained.

(R. p. 1257).

Deputies later gathered evidence pursuant to these warrants within Dr. Little's vehicle and inside the home. As explained above, though, officers had no legal justification to "view" the towel or the spot that "appeared to be blood."⁹ See id. All blood evidence used against Dr. Little at trial was obtained as a direct result of the unlawful invasion into Dr. Little's curtilage and subsequent illegal search of his vehicle. See Wong Sun, 371 U.S. at 485. The evidence is not indirectly linked to the illegal search—it is the very product of it. The towel, coupled with the "brownish stain" that "appeared to be blood," was the central feature of the search warrant affidavit presented to the magistrate. Both items were discovered during the illegal search. But investigators never even tested the brown stain for DNA or to confirm if it was blood. (R. pp. 556, 175). Absent the towel discovered during the illegal search, the State would not have obtained a warrant for Dr. Little's vehicle and discovered the additional blood evidence found there. Therefore, the evidence ultimately discovered was not "attenuated enough from the violation to dissipate the taint." Adams, 409 S.C. at 648, 763 S.E.2d at 345 (quoting Najjar, 300 F.3d at 477).

Although an additional warrant was later sworn out, this was insufficient to cure the taint from the illegal search. See id. (quoting Najjar, 300 F.3d at 477). In fact, the second warrant affidavit still relied upon the findings of the same illegal search of the vehicle. (R. p. 1257). The only difference offered was the justification for the search. Using this vague warrant they secured based upon the initial unlawful search of the vehicle, officers searched the home and found shoes with blood on them. (Id. at 666–67). Detective Muirhead did not discover the shoes during his walk-through of the home to which Dr. Little's wife consented. (Id.). Rather, the shoes were found as a direct result of the warrant obtained pursuant to the unlawful search of Dr. Little's

⁹ Interestingly, the affiant made no mention of the towel in the second search warrant affidavit.

vehicle. (*Id.*). Consequently, the circuit court erred in failing to suppress all evidence found in the vehicle—as well as all derivative evidence in the home as outlined in the search warrant returns, *see* (R. pp. 1258–61)—because the evidence was not “purged of the taint of the unlawful search.” *See Adams*, 409 S.C. at 648, 763 S.E.2d at 345 (quoting *Gaines*, 668 F.3d at 173).

Accordingly, the Court should reverse and remand for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle, the towel, the bloody shoes found in the home, and any and all evidence obtained pursuant to these two search warrants.

II. The circuit court erred in denying Dr. Little’s motion for a mistrial when the State improperly referenced the suppressed ring during its closing argument.

The State’s closing “argument 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). Further, the State “may not vouch for the credibility of a State’s witness based on . . . other information outside the record.” *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). As our supreme court has recognized, “[v]ouching for a witness based on outside material conveys the impression to the jury that the [State] has evidence not presented to the jury but known by the prosecution which supports conviction.” *Id.*; *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”).

On appeal, review of the State’s “closing argument 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 [circuit 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).

Dr. Little moved for a mistrial after the State improperly referenced the suppressed ring during its closing argument. (R. p. 1162). Admittedly, our courts have recognized that "[t]he granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). "The decision to grant or deny a motion for a mistrial is a matter within a [circuit] court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "[T]o receive a mistrial, the defendant must show error and resulting prejudice." Id. at 13, 515 S.E.2d at 514.

An appellate court's ruling "must hinge on whether there was a manifest necessity for declaring a mistrial." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). The court must also consider whether a "mistrial was dictated by . . . the ends of public justice," which is "defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." Bantan, 387 S.C. at 417, 692 S.E.2d at 203. "The [circuit] court should exhaust other methods to cure possible prejudice before aborting a trial." Id. at 417, 692 S.E.2d at 203–04. To that end, "[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission." Id.

In State v. Huggins, our supreme court reversed the defendant's murder and criminal conspiracy convictions and remanded for a new trial based upon the State's discussion of matters outside the record during closing arguments. 325 S.C. 103, 107–08, 481 S.E.2d 114, 116 (1997).

Reiterating that closing “[a]rguments must be confined to evidence in the record,” the supreme court held the circuit court should have granted a mistrial because the State’s reference to matters not in evidence during closing argument was “fundamentally unfair.” *Id.* at 107, 108, 481 S.E.2d at 116, 117.

So too here. The State, well aware of the circuit court’s pre-trial ruling, nevertheless sought to test the limits and reference the wedding ring anyway. *See id.* (holding that closing “[a]rguments must be confined to evidence in the record”). And the justifications offered for its 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 moment 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 and were some of the last things the jury heard and saw prior to deliberations. (*Id.* at 1161–62). This was fundamentally unfair and prejudicial. *See id.* (holding the State’s reference to matters not in evidence during closing was “fundamentally unfair” and required a mistrial).

Nor was the reference to the ring minor or insignificant. A ring is very symbolic. *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.”). 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). And the ring was specifically listed on the PowerPoint slide. (*Id.* at 1162).

By mentioning the ring, the State “convey[ed] the impression to the jury” it had “evidence not presented to the jury but known by the prosecution which supports conviction.” Matthews, 350 S.C. at 276, 565 S.E.2d at 768. The State further implied some improper motive behind Dr. Little not wearing his wedding ring. This was highly prejudicial because the jury could have attached great significance to him not wearing a wedding ring and, for example, thought he was hiding it. The fundamental unfairness of the State’s inappropriate reference to the ring during closing argument is underscored by the fact that the circuit court had already suppressed the ring because the State violated Dr. Little’s constitutional rights to obtain it in the first instance. Referencing the suppressed ring only added insult to injury, creating two layers of a constitutional violation. In short, this fundamental unfairness amounted to a due process violation and, therefore, the circuit court should have ordered a mistrial.

Although the circuit court must “exhaust other methods to cure possible prejudice” to alleviate the need for a mistrial, that did not occur here. The court, for instance, did not give a curative instruction. Cf. Bantan, 387 S.C. at 417, 692 S.E.2d at 203–04 (asserting that “[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission”). Rather, the court only instructed the State—outside the jury’s presence—to take down the PowerPoint slide that referenced the ring and stated, “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 upon the State’s deliberate reference to evidence outside the record. The ring was suppressed prior to trial due to the unconstitutional means by which it was obtained, and the State only doubled down on the constitutional violation by bringing it up anyway. This violated Dr. Little’s due process rights.

III. *The circuit court erred in admitting testimony from the State's purported footwear examination expert.*

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., our supreme court laid out a three-prong test a circuit court must consider before allowing the jury to hear 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). As the court observed,

Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.

Id. at 445–46, 699 S.E.2d at 175. Accordingly, “expert 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. The State’s witness was not qualified to offer expert testimony.

At the outset, the State’s witness did not possess the requisite qualifications to testify as an expert in footwear impressions.

“In determining a witness’s qualifications as an expert, the [circuit] court should not have a solitary focus, but rather, should make in 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.” Watson, 389 S.C. at 447, 699 S.E.2d at 176 (internal citation omitted). A police “officer’s 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). Indeed, our supreme court has held that a reversal is mandated when a solicitor exploits “the [circuit] court’s imprimatur of [an officer] as an ‘expert’ . . . to the prejudice of” the defendant. Id.

Dawn Claycomb, the State’s purported footwear examination expert, 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 has only been working as an agent in the SLED crime scene department for five years. (Id. at 957). Crime scene investigations are her primary responsibility, and that was all she did for the first two years at SLED. (Id.). In August of 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. (Id. at 959). She also attended a training session with Dwane Hilderbrand, who 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. (Id. at 962). To conduct footwear examinations, however, Claycomb was required to complete a competency test. (Id. at 959).

Since completing her apprenticeship, Claycomb has had only fifteen to twenty instances of “actual casework.” (Id. at 958). When asked if her work is peer reviewed, Claycomb responded that she sends reports to another qualified examiner for review. (Id. at 960). Most of the time, Claycomb sends her reports to the person under whom she performed supervised casework. (Id. at 961). Claycomb has appeared in court eleven times over the course of her career. (Id. at 960). Each time, she testified regarding the broader topic of crime scene. (Id.). She was qualified as a crime scene expert only once in court. (Id. at 961). Claycomb has never published any articles on footwear impressions. (Id. at 963).

To accept Claycomb’s qualifications would be the equivalent of allowing a first-year associate to testify as an expert in a legal malpractice case. An associate would have trained for three years in law school, presumably working under the tutelage of various law firms during that time, and taken the bar exam to be able to practice in South Carolina. That associate would then join a specific practice group and attend various CLEs to further his or her education on the subject. Some of those CLEs undoubtedly would be taught by reputable members of the profession. And, over the course of that first year of practice, he or should would have encountered at least fifteen

to twenty cases. Even if each case centered on legal malpractice, one would be strained to find any court in the country that would allow a first-year associate to testify as an expert on the subject.

The present situation is virtually indistinguishable. 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, a review of Claycomb’s qualifications reveals 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 [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”); id. at 445, 699 S.E.2d at 174 (asserting that the circuit court must serve “as the gatekeeper” in deciding “whether the evidence submitted by a party is admissible”).

Further, the circuit court’s error cannot be harmless because Dr. Little was necessarily prejudiced by Claycomb, a SLED agent, being imbued with the imprimatur of an expert. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491. As an expert, she confusingly testified that Dr. Little’s shoes were very similar to the prints found at the murder scene and, thus, linked Dr. Little to the crime. See id. (holding a police “officer’s opinion [that] goes to the heart of the case is not harmless”). Accordingly, the Court should reverse and remand for a new trial.

B. The footwear impressions testimony was unreliable and prejudicial.

Even if Claycomb was qualified to testify as an expert in footwear examination, her purported scientific testimony was unreliable as a matter of law.¹⁰

“The test for reliability of 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. For many years, “the standard for

¹⁰ As noted above, Dr. Little’s shoes were unlawfully obtained and should have been suppressed as fruit of the poisonous tree. Without the shoes, Claycomb’s entire testimony should have been excluded as well.

admitting scientific evidence in South Carolina was ‘the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.’” Council, 335 S.C. at 19, 515 S.E.2d at 517 (quoting State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)).

In Council, our supreme court provided some additional guidance. The court held 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.” Id. Scientific evidence, of course, “is also subject to attack for relevancy and prejudice.” Id. at 19–20, 515 S.E.2d at 517.

Applying these factors to the instant case, the circuit court should have excluded Claycomb’s footwear impressions testimony. While Claycomb indicated her report was confirmed via peer review, (R. p. 960), she named no publications citing with approval the technique she employed. She merely confirmed she “read articles.” (Id. at 963). Claycomb testified she had fifteen to twenty cases involving footwear impressions, (id. at 958), but she never indicated whether the same method was employed each time. And although Claycomb testified in detail about the chain of custody for the DVD containing the digital photographs, (id. at 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.

The basic premise of footwear impressions evidence is that “[w]hen a shoe comes in contact with the ground, or clothing, a door, a counter, anything like that,” it “makes an impression

of the outsole of the bottom of the shoe.” (Id. at 965). If an officer cannot “collect the actual item,” she “can photograph it and that actual unknown impression can be compared to the shoe” belonging to a suspect. (Id.). Here, the impressions left at the crime scene were photographed. Claycomb then “create[d] an inked impression” from Dr. Little’s shoe and compared it to the unknown impression left at the scene to determine any similarities among them. (Id. at 966). She sent the photographs to the photography department so they could be “made to size.” (Id. at 969).

When collecting an unknown impression from a crime scene, the photographs “have to be taken ninety degrees” to the impression, meaning the camera must be parallel to the surface. Photographs must also contain a scale for a point of reference. (Id. at 967). When a photo is not taken at ninety degrees or does not contain a scale, this can change the examiner’s perspective and render him or her unable to fully make a comparison. (Id. at 967–68). Indeed, it can be very hard to compare footwear impressions. (Id. at 968). “Even a small millimeter could change things.” (Id.). Claycomb indicated it is “helpful sometimes having the actual shoes.” (Id. at 970).

In sum, 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. Following this process, Claycomb found in her report a “corresponding tread design,” but due to the quality of the photographs, she was unable to “conduct a further examination.” (Id. at 950). Although she found the “outsole design [was] similar,” she could not say it was the same shoe. (Id. at 976). Claycomb could not even say whether this was a left or right shoe. (Id. at 979). She also could not determine the shoe size. (Id. at 983).

This is not reliable scientific testimony, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury. See Rule 403, SCRE (providing

“evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”). In her final testimony on redirect, Claycomb confirmed that 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 closing, posing the following question to the jury: “What are the odds that it is somebody else’s shoe?” (*Id.* at 1171–72). Irrespective of the use of “similar” versus “the same,” Claycomb’s testimony was introduced solely for the purpose of linking Dr. Little to the scene of the crime. In light of the basic questions she was unable to answer regarding the impressions, her opinion was unreliable as a matter of law. The highly prejudicial nature of her testimony substantially outweighed whatever probative value this “scientific” evidence offered. See Rule 403, SCRE. The fact that the State cloaked a SLED agent with the title of an expert only compounded upon the prejudice Dr. Little experienced from the admission of this unreliable and misleading testimony. See *Ellis*, 345 S.C. at 178, 547 S.E.2d at 491.

In 2001, our supreme court rejected the State’s effort to present testimony from a “barefoot insole impressions” expert, holding this type of 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, in that case, the court rejected the publications and testimony of William Bodziak—the very individual under whom Claycomb trained—as unreliable. See *id.*; (R. p. 952).

Although the present case involves “outsole impressions” and tread design, the same analysis applies. Here, as in *Jones I*, the circuit court “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. The science behind outsole footwear impressions is sketchy and undeveloped, and the State failed to prove it was reliable. Dr. Little experienced significant prejudice by the introduction of Claycomb’s misleading testimony because—semantics aside—she directly linked him to the scene of the crime. The circuit court’s “admission of this evidence mandates reversal of” Dr. Little’s murder conviction. Id.

CONCLUSION

“While the [State] should prosecute vigorously, [its] duty is not to convict but to see justice done.” Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)). The State disregarded Dr. Little’s constitutional rights from the outset of the investigation all the way through trial. That is not justice. “In law, the ends do not justify the means.” Adams, 409 S.C. at 654, 763 S.E.2d at 348. Accordingly, the Court should reverse and remand for a new trial.

(Signature page to follow)

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June 4, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Robinson Gray Stepp & Laffitte, LLC, attorneys for Appellant, General T. Little, do hereby certify that I have served Respondent and all counsel in this action with a copy of the document/pleadings shown below by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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June 4th, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County

The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE,

Appellant.

Appellate Case No. 2018-000561

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in failing to suppress evidence as fruit of the poisonous tree stemming from the illegal search of Dr. Little's vehicle parked in the driveway within the curtilage of his home?

- II. Did the circuit court err in denying Dr. Little's motion for a mistrial when the solicitor mentioned a ring during her closing argument that the court suppressed prior to trial?

- III. Did the circuit court err in qualifying the State's witness as an expert in footwear impressions and admitting her prejudicial and unreliable testimony purporting to link the tread design of Dr. Little's shoes to one found at the crime scene?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether there was any evidence for the circuit court to find the initial search of appellant's vehicle was reasonable and justified by exigent circumstances.
- II. Whether the circuit court abused its discretion in denying appellant's motion for a mistrial.
- III. Whether the circuit court abused its discretion in admitting expert testimony on footwear examination.

STATEMENT OF THE CASE

In May 2016, a Charleston County Grand Jury indicted appellant, Dr. General T. Little, for the murder of Barbara Little. (R. 1255-1256). The solicitor called the case for trial on February 12, 2018, before the Honorable Thomas L. Hughston, Jr. After hearing several pre-trial motions, the court continued the case until March 19, 2018. (R. 268, l. 6-8). Assistant Solicitors Jessica Baldwin and Whit Sowards represented the State of South Carolina. (R. 308). Appellant was represented by attorneys Mason West, Ryan Schwartz, and Aimee Zmroczek. (R. 308). After a week-long trial, the jury convicted appellant for murder. (R. 1243, l. 17). Judge Hughston sentenced appellant to thirty years imprisonment. (R. 1252, l. 3). Appellant filed this timely appeal on March 27, 2018.

STATEMENT OF FACTS

The Investigation of Barbara Little's Murder

Barbara Little was appellant's ex-wife. She lived in Charleston with a grown daughter, Kim, whom she shared with appellant. (R. 442, l. 2-18). On September 22, 2015, appellant called Kim at 8:00 p.m. to see if she would meet him for dinner at The International House of Pancakes (IHOP) at 9:15 p.m. (R. 447, l. 14-15; 673, l. 10). Kim agreed and left the house at approximately 8:30 p.m. (R. 447, l. 25). As Kim walked out, Barbara locked the front glass door behind her. (R. 448, l. 10-11).

When Kim arrived at IHOP, she sat down and waited on appellant. (R. 449, l. 4-5). After waiting for some time, she called appellant, but he did not answer. (R. 449, l. 20-22). Kim called several more times, but appellant never answered his phone. (R. 449, l. 20-22). With no response from her father, Kim called her mother, but she did not answer either. (R. 449, l. 6-7, 23-25). As closing time approached the IHOP, Kim placed a to-go order. (R. 451, l. 9-12). Her receipt indicates she paid for the meal at 9:43 p.m. (R. 1309). After paying, Kim texted appellant that IHOP was closing at 10:00 p.m. (R. 452, l. 5-6). Appellant finally called Kim back and told her to meet him at a Waffle House instead. (R. 452, l. 8-12). Kim was confused why appellant wanted to go to Waffle House since she had already gotten him a to-go order, but she agreed to meet him there anyway. (R. 452, l. 20-25).

Kim then called her uncle, A.J. McConnell, and asked him to check on Barbara. A.J. lived a quarter of a mile from Barbara and Kim. (R. 340, l. 12-13). While speaking with Kim on his cell phone, A.J. went to the house and rang the front doorbell. (R. 342, l. 24-25). He did not try to open the front glass door because Barbara always kept it locked. (R. 343, l. 1-2). When he heard no response, A.J. checked a bedroom window, checked the garage, and checked the back

porch, but he could not find Barbara. (R. 343, l. 3-13). He returned to the front glass door and, surprisingly, was able to pull it open. (R. 343, l. 16-17). As he opened the glass door, A.J. felt something was wrong. (R. 343, l. 17-18). He looked down and saw a pink towel lying between the glass door and the main door. (R. 343, l. 20-21).

When he opened the main door, A.J. saw blood everywhere. (R. 343, l. 25). He followed a blood trail down the hall to the bathroom where he found Barbara's dead body. (R. 344, l. 1-5). A.J. immediately hung up the phone with Kim and called 911. (R. 344, l. 5-6). Kim called appellant to tell him she could not meet him at Waffle House because something was wrong with her mother. In response, appellant stated, "okay." (R. 453, l. 11).

Deputy Matthew Colbrun was dispatched to the scene around 10:00 p.m. (R. 542, l. 21). When he opened the front door, he immediately saw a pool of blood on the floor and blood on the walls. (R. 49, l. 23-25; 511, l. 14-15). There were also some towels and a blanket on the floor as if someone had tried to clean up the bloody mess. (R. 511, l. 23-25; 1307). As Deputy Colbrun walked through the house, he saw blood in the hallway, blood in the living room, and blood smears on the wall leading to the back. (R. 512, l. 2-7). He found Barbara's dead body on the bathroom floor. (R. 512, l. 13-14). Her head lay in a pool of blood, she was nude from the waist down, and one leg was propped on the edge of the bathroom tub. (R. 512, l. 17-19; 533, l. 17-23; 1310; 1311). Deputy Colbrun secured the scene for detectives. (R. 514, l. 2-4).

The lead detective arrived on scene around 10:30 p.m. (R. 661, l. 19). When he got there, he learned that appellant had already been contacted and had agreed to come to the scene. (R. 89, 16-18; 662, l. 1-4). The detectives found no evidence of a forced entry into the home, but the scene inside the house appeared "very chaotic." (R. 662, l. 8-16). By 11:20 p.m., appellant still had not come to the scene, even though he only lived five minutes away. (R. 89, l. 18-24;

542, l. 22). As such, detectives asked Deputy Colbrun to go to appellant's house to make contact with him. (R. 89, l. 21-24; 542 l. 21-22; 663, l. 1-3).

When Deputy Colbrun drove past appellant's house, he noticed that the front passenger window of appellant's Toyota Sequoia was rolled down. (R. 51, l. 11-12). The vehicle was also parked partially in the driveway, and partially in the mulch adjoining appellant's home. (R. 51, l. 15-16; 1311). Deputy Colbrun thought this was strange because there was plenty of room to park completely in the driveway. (R. 51, l. 23-24; 516, l. 16-17).

Deputy Colbrun pulled past appellant's house and parked his patrol vehicle. (R. 53, l. 9-10). He walked up appellant's driveway to the rear driver's side of the Toyota Sequoia. (R. 53, l. 20; 54, l. 1-17; 72, l. 19-23). Deputy Colbrun looked inside the rear and front driver's side windows of the Toyota Sequoia before approaching other vehicles in the driveway. (R. 54, l. 14-17; 72, l. 19-23). One of those vehicles was parked directly in front of the Toyota Sequoia. (R. 54, l. 14-17; 1265). After he cleared that vehicle, he walked back towards the front of the Toyota Sequoia. (R. 54, l. 14-17; 72, l. 19-23). As he walked by the passenger side, he looked through the front passenger window, which was rolled down. Inside he saw a dark stain on the center console that appeared to be blood. (R. 54, l. 1-6). He also saw a burgundy towel on the passenger seat similar to the ones he saw at the crime scene. (R. 54, l. 1-9).

Deputy Colbrun later testified that he looked in the windows of the Toyota Sequoia for officer safety to ensure no one was inside. (R. 51, l. 1-2). He did not open a door, or even touch the car. (R. 53, l. 21-24). When he looked inside the front passenger window, he was approximately one foot away. (R. 81, l. 8). Deputy Colbrun had been on the property between ninety seconds and two minutes when he observed the stain and towel. (R. 72, l. 5-6).

As Deputy Colbrun was looking inside the window of the Toyota Sequoia, appellant came out of the front door of his house. (R. 517, l. 6-7). The two men met on the front porch, and appellant told Deputy Colbrun that he knew he was there in regards to Barbara's murder. (R. 85, l. 3; 517, l. 15-16). Appellant agreed to speak with detectives at the Sheriff's Department, and Deputy Colbrun drove him there in his patrol vehicle. (R. 518, l. 3-14). Deputy Colbrun later informed detectives about the apparent blood stain and towel in appellant's Toyota Sequoia. (R. 83, l. 13-14; 518, l. 14-23).

During appellant's interview at the Sheriff's Department, he came across as smug and arrogant. (R. 1083, l. 15-22). Towards the end of the interview, a detective collected appellant's clothing in order to preserve any evidentiary value it might have. (R. 220, l. 4-7). The detective found a wedding ring inside the back pocket of appellant's pants. (R. 203, l. 11). Analysis at SLED later revealed the presence of human blood on the ring, although there was not enough DNA on it to develop a profile. (R. 203, l. 11-15). Also found in appellant's clothes was a Wal-Mart receipt from earlier that evening for the purchase of rubbing alcohol and a burgundy towel. (R. 203, l. 5-8). Law enforcement did not arrest appellant that night. Instead, a detective drove him back to his house after the interview. (R. 645, l. 21-22).

While appellant was being interviewed that night, law enforcement executed search warrants on appellant's home and Toyota Sequoia. Inside the foyer of the home, officers found a Wal-Mart bag containing a pair of men's shoes. (R. 580, l. 17-19). Testing at SLED later revealed that Barbara Little's blood was on one of the shoes. (R. 989, l. 18-19; 994, l. 13-14). The victim's blood was also found on the driver's door and passenger seat of appellant's Toyota Sequoia. (R. 989, l. 15-21; 994 l. 13-14). Detectives noticed that the compartment containing the tire iron and tire jack was empty. (R. 670, l. 12-14).

In appellant's bedroom, officers smelled bleach or cleaning solution, which they felt was unusual because the bathroom did not appear to be recently cleaned. (R. 665, l. 15-25; 790, l. 4-5). The shower also appeared moist. (R. 796, l. 15). On appellant's bedroom dresser, officers found a Rule to Show Cause in Family Court for failure to pay alimony to Barbara Little. (R. 580, l. 16-17). Appellant owed Barbara Little \$68,115, with \$17,750 past due from the most recent family court order. (R. 503, l. 18-21). Appellant had been served with the Rule to Show Cause earlier in the day. (R. 583, l. 19-21).

The FBI also analyzed appellant's cell phone records. According to geolocational data, on the day of Barbara's murder, appellant's cell phone was in Beaufort near his employment at the Naval Hospital from 8:00 a.m. to 5:24 p.m. (R. 380, l. 5-14). At 5:48 p.m., appellant left Beaufort and arrived at his residence in Charleston at 7:13 p.m. (R. 380, l. 17-21). From 7:37 to 10:28 p.m., appellant's phone was connecting to two towers that encompassed the area around both the crime scene and appellant's house. (R. 381, l. 1-7). Significantly, between 9:19 p.m. to 9:45 p.m., appellant received ten incoming calls, all of which went unanswered. (R. 382, l. 24; 383, l. 1).

Surveillance footage from a gas station captured appellant pulling up in his Toyota Sequoia at 10:35 p.m. (R. 679, l. 3). As noted above, by that time appellant had already told detectives that he was going to come down to the crime scene. (R. 661, l. 19-20; 662, l. 1-4). The surveillance reveals appellant entered the store, hailed an employee, and removed some type of white envelope from his pocket. (R. 680, l. 10-15). The employee shakes her head and appellant leaves. (R. 680, l. 18-25). He did not pump any gas. (R. 680, l. 25).

Law enforcement also searched appellant's cell phone, revealing several deleted text messages that he received earlier on the day of the murder. Although the texts had been deleted

from appellant's phone, law enforcement could recover them because they had not yet been overwritten. (R. 908, l. 18). Several minutes after being served with the Family Court Rule to Show Cause, appellant's new wife, Carla Washington, sent him following text: "I'm not giving her a nickel if she sues your estate." (R. 504, l. 20-21; 720, l. 3-4). Minutes later she texted "the only asset you have close to that amount is your mom's house." (R. 720, 4-5). She further stated, "I'm not giving her a nickel of the life insurance. She will never come before my kids. She's trying to give you a heart attack." (R. 720, l. 7-9).

In fact, law enforcement's investigation of appellant's finances confirmed he was heavily in debt. Although he earned around \$200,000 a year as a physician with the Veteran's Administration, money left his bank account as soon it was deposited. (R. 430, l. 11-13; 646, l. 5-6). Appellant's tax liens were approximately \$300,000, and he had seventy-one different debts that were over ninety days past due. (R. 647, l. 7-16). Even appellant's Toyota Sequoia was subject to a title loan through Title Max. (R. 647, l. 19-21).

The day after Barbara's murder, appellant called his son Chris in an effort to reach Kim. (R. 433, l. 13-15). The two had not spoken since Barbara's murder. Appellant explained to Chris that "the cops think I did this to your mother. I need to talk to Kim to see what timeline she gave them." (R. 433, l. 22-24). Chris was shocked because appellant gave no condolences and expressed no emotion whatsoever. (R. 433, l. 24; 464, l. 3). Shortly thereafter, appellant called A.J. and asked him when he found Barbara's body. (R. 347, l. 1).

Additionally, a search of appellant's computer revealed a web browsing history that included internet searches for "forensic science blood detection," "forensic tests for blood," "false positives for blood," and "tests for the presence of blood." (R. 906, l. 1-8). The browsing

history occurred on the day following Barbara's murder. (R. 906, l. 7-8). Law enforcement ultimately arrested appellant on October 14, 2015. (R. 213, l. 24).

Appellant's Trial

Prior to trial, appellant moved to suppress the evidence seized pursuant to the search warrants on his home and Toyota Sequoia. Specifically, he argued that the evidence was the fruit of an illegal search: Deputy Colbrun's looking inside the Toyota Sequoia prior to making contact with appellant. (R. 149-154). The State argued that Deputy Colbrun's actions were reasonable both as a welfare check on appellant and for officer safety, citing State v. Herring, as favorable precedent. (R. 155, l. 14-25). The circuit court held that given the circumstances, Deputy Colbrun's actions were reasonable under both the United States and South Carolina Constitutions. (R. 159, l. 24-25; 60, l. 1). Furthermore, the court stated "as a footnote," the manner in which the car was parked with the window down was unusual. (R. 162, l. 1-3).

Appellant also moved to suppress the statements he gave during his interview and the evidence found in his clothes. As discussed above, near the end of the interview, detectives collected his clothes and found a wedding ring and Wal-Mart receipt for rubbing alcohol and a burgundy towel. Analysis at SLED revealed the presence of human blood on the ring, although there was not enough to develop a DNA profile. (R. 203, 11-15). The circuit court held the interview was admissible as a non-custodial interrogation that did not require *Miranda* warnings. (R. 215, l. 23-25; 216, l. 1-6). However, the circuit court suppressed the ring and receipt because they were not collected incident to arrest or with appellant's consent. (R. 232, l. 15-22; 233, l. 18-25).

During its case-in-chief, the State called fifteen witnesses. Near the end of the trial, the State offered expert testimony in footwear examination from SLED Agent Dawn Claycomb. (R.

946, l. 24-25; 947, l. 1-6). Before the agent testified to the jury, the State proffered testimony regarding her qualifications and the reliability of the field of footwear examination. (R. 946-955). The court also permitted *voir dire* in the jury's presence prior to qualifying her as an expert. (R. 961-963). After hearing arguments, the court overruled appellant's objections to her qualifications and the reliability of the subject matter. (R. 955, l. 11-13). Agent Claycomb testified that she compared a photograph of a bloody shoe print taken at the crime scene with inked impressions taken from the shoes found in appellant's house. (R. 969, l. 1-22). She found the two had corresponding tread designs, but could not match them because the photograph of the bloody shoe print had not been taken at precisely ninety degrees. (R. 975, l. 12-25; 976, l. 1-15).

As its final witness, the State called Dr. Ellen Reimer, the forensic pathologist who performed Barbara Little's autopsy. (R. 1013, l. 6). According to Dr. Reimer, Barbara Little died from blunt force trauma to her head. (R. 1013, l. 8). Dr. Reimer had never seen blunt force trauma of such magnitude in her career, which includes over 4,000 autopsies. (R. 1012, l. 10; 1014, l. 11-12). Barbara sustained multiple blunt force strikes to her head causing complex lacerations. (R. 1017, l. 10-15; 1018, l. 3-4; 1020, l. 1-15). The impacts to Barbara's head were so powerful that they caused a build-up of gaseous pressure underneath her cranium that ultimately tore through her scalp. (R. 1014, l. 7-9). Barbara also sustained injuries to her hands, consistent with her taking a defensive posture during the attack. (R. 1016, l. 10-11; 1021, l. 12-13). The force was so brutal that it actually ripped off a piece of Barbara's index finger. (R. 1016, l. 25; 1017, l. 1). Dr. Reimer further explained that she performs a sexual assault examination in every female autopsy. (R. 1033, l. 22-25). In this case, she took oral, vaginal, and rectal swabs, and found no evidence of any sexual trauma. (R. 1034, l. 4-5).

In closing, appellant argued that the State had not proven its case beyond a reasonable doubt. (R. 1184, l. 21-22). Although he acknowledged that the victim's blood on his shoes and in his car was "the elephant in the room," appellant argued the State had not shown how the blood got there. (R. 1183, l. 4-9). Specifically, appellant highlighted Kim's testimony that an unknown car pulled in to the driveway of Barbara's house, turned around, and drove away. (R. 1206, l. 16-19). Appellant also noted that when Kim arrived at the scene, she asked detectives to let her in the house because she knew who killed her mom. (R. 1204, l. 15-16). Appellant suggested in closing argument that Kim's violent ex-husband, who lives in Texas, could have come to the house looking for Kim and murdered Barbara instead. (R. 1205, l. 10-15; 1206, l. 9-19). Appellant argued that he could have come to the house after the murder, found Barbara's dead body, and panicked. (R. 1212, l. 13-25; 1213, l. 1-12).

The jury found appellant guilty of murder, and the circuit court sentenced him to thirty years in prison. (R. 1243 l. 17; 1252, l. 3).

STANDARD OF REVIEW

Fourth Amendment Search and Seizure

On appeals from a motion to suppress on Fourth Amendment grounds, appellate courts review questions of law de novo. State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723-24 (2017). However, with respect to a circuit court's findings of facts, appellate courts, "must affirm 'if there is any evidence to support it,' and 'may reverse only for clear error.'" Id. The "clear error" standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

Denial of a Mistrial

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). Declaring a mistrial "is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." Earley v. State, 418 S.E. 255, 267, 792 S.E.2d 226, 233 (2016). The circuit court's "decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Stanley, 365 S.C. at 33, 615 S.E.2d at 460.

Admission of Expert Testimony

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

ARGUMENT

I. **The Circuit Court Properly Denied Appellant’s Motion to Suppress Evidence Seized in Appellant’s Car Because Exigent Circumstances Justified the Officer Approaching the Car to Look Through Its Windows.**

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The South Carolina constitution additionally prohibits “unreasonable invasions of privacy.” S.C. Const. art I, § 10.¹ Pursuant to these dual constitutional provisions, warrantless searches and seizures inside a home are presumptively unreasonable. E.g. Kentucky v. King, 563 U.S. 452, 459 (2011); State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). This protection also extends to the curtilage of the home. Florida v. Jardines, 569 U.S. 1, 6 (2013); State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723 (2017). As the United States Supreme Court recently explained, “[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.” Collins v. Virginia, 138 S.Ct. 1663, 1670 (2018).

But one recognized exception to the warrant requirement is the exigent circumstances doctrine. E.g. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986); See also Collins, 138 S.Ct. at 1675 (“We leave for resolution on remand whether [the officer’s] warrantless intrusion on the curtilage of Collins’ house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement.”). Exigent circumstances

¹ Although in some limited situations the South Carolina constitution prohibits searches and seizures that would not otherwise violate the Fourth Amendment, see e.g. State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), there appears to be no precedent recognizing enhanced state constitutional protection in a factual scenario similar to the case at bar. In fact, in State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), the South Carolina Supreme Court rejected a claim that the state constitution created an additional layer of protection in a case involving a warrantless search of a car parked in the back yard of a private residence.

occur when there is “a compelling need for official action and no time to secure a warrant.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). For example, exigent circumstances arise “where there is a risk of danger to police or others inside or outside a dwelling.” Id. (citing Minnesota v. Olson, 495 U.S. 91, 100 (1990)). A warrantless search based on exigent circumstances must be “limited in scope and duration in accordance with the exigent circumstances which required its presence.” Robinson, 410 S.C. at 530, 765 S.E.2d at 570.

The circuit court correctly found that Deputy Colburn acted reasonably given not only the exigencies he faced on the night of the murder, but also the limited scope of the search. When Deputy Colbrun first arrived at the murder scene, he immediately saw a large pool of blood on the floor and blood on the walls. (R. 49, l. 23-25; 511, l. 14-15). In the foyer, there were towels and a blanket soaked in blood, apparently from an apparent attempt to clean up. (R. 511, l. 23-25; 1307). There was blood in the hallway, blood in the living room, and blood on the walls leading to the back of the residence. (R. 512, l. 2-7). In the bathroom, Deputy Colbrun saw the victim’s dead body. Her head lay in a pool of blood, she was nude from the waist down, and one leg was propped on the edge of the bathroom tub. (R. 512, l. 17-19; 533, l. 17-23; 1310; 1311). Detectives quickly made contact with appellant, and he agreed to come to the scene. (R. 89, l. 16-18; 543, l. 10-11; 662, l. 1-4). After waiting almost an hour, detectives sent Deputy Colbrun to appellant’s house to look for him. (R. 89, l. 16-24; 542, l. 21-22; 543, l. 1-11; 663, l. 1-3).

Furthermore, the scene at Appellant’s house only enhanced Deputy Colbrun’s legitimate safety concerns. As he drove by the house, Deputy Colbrun observed appellant’s car parked partially in the driveway and partially in the mulch area adjoining the house. (R. 51, l. 15-16; 1265). The car’s position was strange because there was plenty of room to park completely within the driveway. (R. 51, l. 23-24; 53, l. 17-18; 516, l. 16-17). Additionally, it was past

11:00 p.m., and the front passenger window was rolled down.² (R. 51, l. 11-12). At this point, Deputy Colbrun was justified in approaching the front door for the dual purposes of conducting a welfare check and asking appellant if he would be willing to speak with detectives about his ex-wife's murder. See State v. Counts, 413 S.C. 153, 174 n.7, 776 S.E. 2d 59, 71 n.7 (2015)(noting the distinction between the “knock and talk” investigative technique and a “welfare check.”).

Given these circumstances, it was reasonable for Deputy Colbrun to look inside the car's windows before approaching the front door. The sheer amount of violence he observed at the murder scene, appellant's unexplained absence after agreeing to meet law enforcement at the scene, and the strange scene at appellant's house, made it reasonable for Deputy Colbrun to believe there was a risk of danger to police or others. Simply put, someone could have been inside the car either injured, dead, or waiting to ambush the police. It would be unreasonable to present law enforcement with the dilemma of either obtaining a search warrant to look inside the window or ignoring a potential threat.

The search was also narrowly tailored for Deputy Colbrun's safety. He did not open a door or even touch the car. (R. 53, l. 21-24). In fact, Deputy Colbrun stood approximately one foot away as he looked inside the front passenger window. (R. 81, l. 8). The entire episode—from initially walking on to the property to meeting appellant on the porch—lasted between ninety seconds and two minutes. (R. 72, l. 5-6). Furthermore, one can infer reasonableness from law enforcement's subsequent decision to obtain a search warrant for the car. E.g. State v. Johnson, 410 S.C. 10, 20, 763 S.E.2d 36, 42 (Ct. App. 2014)(noting “the reasonableness of the

² Appellant argues that Deputy Colbrun's testimony that he saw the window rolled down from the street “does not pass the smell test.” (App. Brief 19). The State disagrees. The pictures reveal enough distance between the house and the car for someone on the street to see the window rolled down. (R. 1264-1265).

deputies' conduct can be inferred from their decision to obtain a search warrant before fully searching the room."); State v. Abdullah, 357 S.C. 344, 351 n. 3, 592 S.E. 2d 344, 348 n.3 (Ct. App. 2004)("The reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and exigent circumstances unquestionably ceased to exist.").

Appellant argues that exigent circumstances did not exist because the rolled down window and position of the car in the driveway would not give Deputy Colbrun a good faith belief he or anyone else was in danger. (App. Brief 24). But this argument ignores the context in which Deputy Colbrun was responding: a brutal, fresh homicide investigation in which appellant had failed to show for an agreed meeting with detectives. Deputy Colbrun was walking in to the unknown when he approached Appellant's house. One individual had already been brutally murdered, so the potential danger to the police and others was not some abstract idea. Although appellant claims that there was no reason to believe anyone was hiding in the car (App. Brief 24), the officer on the ground assuming that risk disagreed, noting "honestly sir, you do not know." (R. 550, l. 13). Law enforcement officers never know the danger around the next corner, and on this particular night, those dangers were even more real. Deputy Colbrun had just seen them.

As such, Deputy Colbrun's actions mirror those taken by law enforcement in State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (S.C. 2009). In Herring, the defendant shot and killed the manager of a night club around midnight before fleeing in a black SUV. After police obtained the license plate number from witnesses, an officer went to the defendant's house shortly after 2:00 a.m. The officer observed a light on in the garage and peeked inside the garage window to see if the defendant was there. The officer did not see anyone, but confirmed that the black SUV

was inside the garage. The defendant subsequently claimed the officer's look inside the garage window constituted an illegal search.

Our Supreme Court disagreed, noting that "an action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" Id. at 210, 692 S.E.2d at 494 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). The court found that it "was objectively reasonable for [the officer] to take precautions to protect his own safety, and the safety of the officers around him, by looking into the garage to see if the suspect was there." Id. at 211, 692 S.E.2d at 495. The court also noted that the officer's "minimal intrusion" was reasonable in light of the exigent circumstances he faced.

There are several key similarities between Herring and this case. First, both involved fresh homicide investigations with rapidly developing situations. In Herring, the police arrived at the defendant's house within two hours of the initial shooting, whereas in this case the police arrived at Appellant's house approximately an hour and twenty minutes after first being dispatched to the murder scene. (R. 65, l. 21-22; 542, l. 21-24). Second, both cases involved malicious levels of violence. Herring involved a shooting death in a parking lot, and this case involved a gruesome crime scene with a half-naked victim and a home covered in blood. Third, both involved the narrowly tailored action of looking inside a window located on the curtilage of the home.

Fourth, law enforcement in both cases had an obligation to approach a home with little time to act. In Herring, the police were trying to locate a suspect of a murder committed in public. In this case, law enforcement had two reasons to locate appellant: to interview him and to conduct a welfare check. After waiting nearly an hour for appellant to arrive at the crime

scene as he had agreed, law enforcement needed to ensure he was safe. Appellant lived only five minutes away. (R. 89, l. 23-24). Law enforcement could reasonably suspect his absence meant he was intentionally avoiding law enforcement or something had happened to him.

Appellant believes Herring is inapplicable because the defendant in that case was considered a “suspect” that was “armed and dangerous.” In contrast, Deputy Colbrun testified that he did not consider appellant a “suspect” and had no reason to believe he was “armed and dangerous.” (App. Brief 25-26). This argument is misplaced. Deputy Colbrun’s subjective understanding of appellant’s status in the investigation—whatever that would even mean—is not the relevant inquiry. The relevant inquiry is the objective reasonableness of his actions in light of the dangers posed. Here, it would be reasonable for Deputy Colbrun to understand that: (1) someone was acting with malice that night, and (2) approaching appellant’s house carried a real risk of coming face to face with that person. Regardless of whether Deputy Colbrun believed appellant was a suspect, he was entering a dangerous situation.

Appellant also argues that even if exigent circumstances existed when Deputy Colbrun first approached the Toyota Sequoia, those exigent circumstances ended after he cleared the other two cars and began walking back toward the front of Toyota Sequoia. At that point, appellant claims, Deputy Colbrun could rule out the presence of anyone in that car. However, the circuit court received plenty of evidence to rule otherwise. See State v. Wright, 391 S.C. 436, 442, 763 S.E.2d 324, 326 (2011)(“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). Deputy Colbrun testified that he was unable to see the passenger side floorboard area when he initially passed by the car. (R. 554, l. 14). Given the hour and the brevity of the initial pass by of the vehicle, the circuit court could reasonably rely on this testimony. In order to ensure no one was

either slumped down with an injury, or hiding from the police, Deputy Colbrun needed to take the additional step of looking in the front passenger window. Moreover, he would have also passed by the front passenger window in order to check the back passenger area of the SUV.

Accordingly, the circuit court received sufficient evidence to rule that Deputy Colbrun acted reasonably and in accordance with the United States and South Carolina Constitutions.

II. The Circuit Court Properly Denied Appellant's Motion for a Mistrial Because the Solicitor's Allegedly Improper Argument Simply Referenced Facts Already Admitted Into Evidence and Resulted in No Prejudice.

The circuit court has wide discretion in handling the propriety of the solicitor's closing argument to the jury, and ordinarily those rulings will not be disturbed on appeal. E.g. State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 240 (Ct. App. 1999). The State's closing argument must be confined to evidence contained in the record, and any reasonable inferences drawn therefrom. Id. The solicitor has the right not only to argue the State's version of the facts, but also to comment on the weight the jury should give those facts. Id. at 319, 240. Furthermore, failure to confine arguments to evidence contained in the record does not automatically warrant a mistrial. State v. Huggins, 325 S.C. 103, 107, 481 S.E. 2d 114, 116 (1997). A new trial will be granted only when the solicitor's "comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. On appeal, the defendant bears the burden of showing an improper comment deprived him of a fair trial. E.g. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). The circuit court's "decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005).

The circuit court properly denied appellant's motion for a mistrial because the solicitor confined her argument to facts contained in the record and reasonable inferences therefrom. As

discussed above, during appellant's interview at the Sheriff's Department, a detective collected appellant's clothing in order to preserve any evidentiary value it might have. That detective subsequently found a ring in the back pocket of appellant's pants. Testing at SLED revealed the presence of blood on the ring, although there was not enough DNA on it to develop a profile. (R. 203, l. 4-15). During pre-trial hearings, the circuit court ruled that appellant's statements during the interview were admissible, but the search of his clothes was inadmissible because it was not incident to arrest or consensual. (R. 232, l. 15-22; 233, l. 18-25).

Later at trial, the solicitor asked the detective if appellant was wearing any jewelry during the interview, to which he responded, "not that I can recall." Appellant did not object to this question or the detective's response. (R. 645, l. 19). Testimony at trial also revealed that appellant was married to a woman named Carla Washington at the time of the murder. (R. 420, l. 7; 489, l. 1). Officers further testified that during execution of the search warrant, appellant's bathroom smelled like bleach even though the bathroom did not appear to be recently cleaned. (R. 665, l. 15-19). During closing arguments, the solicitor stated, "I asked [the detective] if the defendant was wearing any jewelry at all and he said no, he didn't really remember that. Well, we know he was together with Carla at the time and yet Detective Turner--" at which point appellant objected and moved for a mistrial. (R. 1161, l. 13-16). A slide on the solicitor's demonstrative power point presentation read "no jewelry, no ring." (R. 1162, l. 15-16).

Therefore, the facts contained in the record were: (1) appellant was not wearing jewelry, (2) appellant was married to Carla Washington, and (3) appellant's bathroom smelled like bleach but had not been recently cleaned. One could reasonably draw the inference that appellant was cleaning up after the murder and had removed his ring when law enforcement arrived at his house. The solicitor could rightfully make that argument because it was confined to reasonable

inferences from evidence contained in the record. As the solicitor noted to the circuit court, she did not reference collecting a ring, blood on a ring, or appellant's clothing. (R. 1162, l. 11-14).

As such, this case is unlike the situation in State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997), which appellant cites in his brief. (App. Brief 32-33). In Huggins, the State asked the defendant on cross-examination if she offered someone \$4,000 to murder the victim. Id. at 106, 481 S.E. 2d at 116. Apparently, the defendant's brother had previously reported that information to law enforcement, but the State failed to elicit that fact at trial. Naturally, the defendant denied making the offer. Our Supreme Court held that the State's question did not amount to putting the fact into evidence, so the State could not refer to it during closing argument. In contrast, the solicitor in this case referenced testimony already received into evidence without objection, which the circuit court noted. (R. 1162, l. 17-25).

Therefore, this case is more analogous to State v. New, 338 S.C. 313, 525 S.E.2d 237 (Ct. App. 1999). In New, the State offered testimony from a cooperating co-defendant who was already serving prison time for his role in the crime. Id. at 316, 525 S.E.2d at 238. The case boiled down to the credibility of that co-defendant. Id. at 319, 525 S.E.2d at 240. During closing arguments, the State argued that the cooperating co-defendant had nothing to gain from testifying because he would be considered a "rat" in prison. Id. at 318, 525 S.E.2d at 239. The defendant argued that the State's reference to being a "rat" fell outside the scope of evidence presented at trial. Id. This Court disagreed, holding that the comment was a reasonable inference from the evidence in the record. Id. This case is similar in that the solicitor's comments dealt with a reasonable inference from evidence received into the record.

Not only did the solicitor limit her argument to evidence contained in the record, but appellant has also suffered no prejudice. People commonly fidget with, or remove their wedding

ring for a variety of daily tasks, such as working out or washing their hands after doing yard work. If appellant literally had the victim's blood on his hands, he would likely need to remove his ring to wash the blood off. Therefore, the solicitor's argument was not an underhanded attempt to cast appellant as an unfaithful husband, as he suggests. (App. Brief 33). It went to the heart of the State's case: connecting the victim's blood to appellant.

The State's case against appellant was overwhelming. See e.g. Simmons v. State, 331 S.C. 333, 338, 503 S.E. 2d 164, 165 ("On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including ... whether there is overwhelming evidence of the defendant's guilt."). Law enforcement found the victim's blood on the driver's door of appellant's car, the passenger seat of his car, and on his shoes. (R. 989, l. 14-21; 994, l. 12-13). At the time of the murder, appellant was not answering phone calls from his daughter, even though he had just arranged to meet her for dinner. (R. 449, l. 20-22). He avoided law enforcement for over an hour, and his house still smelled like bleach when it was searched later that night. (R. 665, l. 15-19; 790, l. 4-5). Appellant also had a motive to kill his ex-wife, after being served that day with a Rule to Show Cause for failure to pay over \$68,000 in alimony. (R. 583, l. 9-21).

For these reasons, the circuit court did not abuse its discretion in denying appellant's motion for a mistrial.

III. The Circuit Court Properly Admitted Expert Testimony Regarding Footwear Examination Because the Witness Was Qualified and the Testimony Was Reliable.

The admission of expert testimony "is a matter within the trial court's sound discretion and the determination will not be reversed on appeal absent an abuse of discretion." State v.

Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018). The trial court must consider: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in the field; and (3) whether the substance of the testimony is reliable. Id. A witness “is competent as an expert when he or she has acquired knowledge, skill, or experience so that he or she is better able than the jury to form an opinion on the subject matter.” State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). Challenges to “the amount or quality of education or experience go to the weight of the expert’s testimony and not its admissibility. Id.

A. The SLED Agent Was Qualified to Give Expert Testimony in Footwear Examination.

The circuit court properly qualified the State’s expert witness because she had sufficient training and experience to testify as an expert in footwear examination. As explained to the circuit court, she initially received between eight months and a year of basic crime scene training, which involved recovery, collection, enhancement, and preservation of footwear evidence. (R. 947, l. 17-20). After that, she completed three years of footwear specific training, consisting of research, written examinations, and supervised casework. (R. 947, l. 21-24). At the end of those three years, she passed a competency test. (R. 948, l. 1-3). She has also received training with an internationally recognized expert in the field and completed a class with the International Association of Identification. (R. 959, l. 8-18). In addition to her training, she served as the lead agent on fifteen to twenty cases of footwear examination. (R. 958, l. 2-3). Every year she must pass a proficiency exam to continue working in footwear examination. (R. 962, l. 15).

This training puts the SLED agent in a better position than the jury to determine whether the shoe print found at the scene matched the shoes law enforcement seized from Appellant’s

house. See e.g. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)(“To be competent to testify as an expert, ‘a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.’”) As such, the circuit court did not abuse its discretion in qualifying her as an expert. Appellant’s challenges to the agent’s qualifications go to the weight of her testimony, not its admissibility. See e.g. White, 382 S.C. at 273-274, 676 S.E.2d at 688.

Appellant argues that qualifying the SLED agent as an expert is akin to having a first-year associate provide expert testimony on legal malpractice. (App. Brief 37). The analogy is ill-suited to this case. The type and amount of training necessary to provide expert testimony depends on the subject matter. For example, the training needed to become an expert in brain surgery varies from the training needed to run a blood hound, or compare shoe prints. Equating the two is comparing apples to oranges.

This is not a legal malpractice case. Comparing the SLED agent’s training to a first-year associate confuses the issue because the law involves both art and science that is inherently different from comparing shoe prints. The relevant issue is whether the agent’s training and experience made her more qualified than the jury to compare the shoe print with the shoes recovered from Appellant’s house. Although outside the realm of lay knowledge, it is not rocket science. Accordingly, the circuit court did not abuse its discretion in finding that she met that threshold.

B. Footwear Examination is an Uncontroversial and Reliable Discipline.

Appellant also argues that the circuit court abused its discretion in admitting the SLED agent’s expert testimony because it was unreliable. (App. Brief 38). In reaching this conclusion,

he applies the factors articulated in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). In Council, our Supreme Court identified four relevant factors in assessing reliability in a case involving mitochondrial DNA analysis. Id. at 18-20, 515 S.E.2d at 516-518. However, since then the court has recognized that “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific testimony.” White, 382 S.C. at 274, 676 S.E.2d at 688. More recently, the court noted that although both scientific and nonscientific expert testimony require a finding of reliability, “there is no formulaic approach for determining the reliability of nonscientific testimony.” Jones, 423 S.C. at 638-639, 817 S.E.2d at 272. Therefore, as a nonscientific, technical field, there is no “formula” for assessing the reliability of footwear examination. See Id.

Without a formulaic approach, a good starting point for assessing reliability is analyzing how other jurisdictions have handled the issue. As the circuit court likely understood, footwear examination is not controversial. Although appellant describes the field as “sketchy and undeveloped” (App. Brief 41), courts across the country have held this type of expert testimony is reliable.³ For example, in United States v. Ford, the Third Circuit Court of Appeals noted that “[c]ourts have admitted shoeprint identification evidence for a long time.” Ford, 481 F.3d 215, 218 n. 4. It upheld the district court’s finding that “there was general acceptance of shoeprint analysis in both the federal courts and the forensic community, the theory has been subject to

³ See United States v. Ford, 481 F.3d 215 (3d Cir. 2007); United States v. Allen, 390 F.3d 944 (7th Cir. 2004); State v. Gay, 145 A.3d 1066 (N.H. 2016); Berks v. State, 427 S.W.3d 98 (Ark. Ct. App. 2013); Jennings v. State, 123 So. 3d 1101 (Fla. 2013); Rodriguez v. State, 30 A.3d 764 (Del. 2011); Castellon v. State, 302 S.W.3d 568 (Tex. Ct. App. 2009); State v. Reid, 91 S.W.3d 247 (Tenn. 2002); West v. State, 755 N.E.2d 173 (Ind. 2001).

peer review and publication, the potential error rate is known, and there are standards and techniques commonly employed in the analysis.” Ford, 481 F.3d at 218.

Similarly, the Texas Court of Appeals in Castellon v. State noted, “the field of expertise in shoe print comparison is not complex. Nor is the degree of scientific expertise required high, particularly when the discipline is compared with, for example, DNA profiling. Indeed, Texas courts have long admitted lay and expert testimony on shoe print comparison.” Castellon, 302 S.W.3d 568, 572 (citations omitted). Because this type of expert testimony had been recognized as admissible for decades, a complete “gatekeeper” hearing was not even required in that case. Id. at 573. As the court explained, “it is unnecessary for trial courts to reinvent the scientific wheel in every trial.” Id.

Given the uncontroversial nature of this type of expert testimony, the circuit court did not abuse its discretion in finding it reliable. As explained at trial, the SLED agent applied techniques she learned during her three years of training at a statewide law enforcement agency. (R. 947, l. 17-25). SLED did not reinvent the wheel of footwear examination, or employ techniques made up from whole cloth. Instead, in addition to its own training program, SLED sent this agent to train with an internationally recognized expert in the field and with the International Association of Identification. (R. 959, l. 8-18). In other words, the agent applied techniques used not only throughout South Carolina, but also throughout the greater law enforcement community. As such, the sources of her methodology are inherently open to challenge and refinement from law enforcement, defense attorneys, or general skeptics. This was not a case of a keystone cop making something up as she went along and calling it an expert opinion.

Furthermore, the SLED agent explained that every case requires a peer review by another qualified examiner to assess her work. (R. 948, l. 5-7). The peer review serves as an additional quality control mechanism to ensure the agent has not missed anything. (R. 960, l. 7-13). Peer review of casework carries even greater importance in this particular field. As explained by the court in Ford, the reliability of fields like footwear examination “rests upon the experience and observational powers of their practitioners.” Ford 481 F.3d at 218, n. 5. Because a second practitioner performed a peer review on this case, the agent’s testimony was based not on one individual’s experience and observational powers, but two. As such, the peer review enhanced the reliability of her testimony.

The agent’s testimony also revealed other quality control methods employed on this case. For example, she explained that photographs of prints taken at a crime scene must be taken at precisely ninety degrees from the ground, preferably with a tripod. (R. 968, l. 9-12). Deviations as small as a millimeter can affect the examination. (R. 968, l. 16-17). In this case, because the photograph of the print was not taken at precisely ninety degrees, the agent’s testimony was limited. She could only determine that the shoe print at the crime scene had a corresponding tread design with the shoes taken from appellant’s house, but could not elaborate further. (R. 975, l. 12-14). Although the deviation from the ninety degree standard limited the scope of the agent’s opinion, it enhanced the reliability of her testimony by illustrating the quality control protocols she uses.

Nevertheless, appellant argues that this case is similar to the testimony found unreliable in the Jones⁴ case, but there are enormous differences between the two. In Jones I, the State

⁴ State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001)(Jones I) and State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009)(Jones II).

introduced expert testimony in the field of “barefoot insole impression.” Essentially, this field involves comparing inked impressions of a suspect’s feet, photos of a suspect’s known insole, and a standing cast of a suspect’s foot, with impressions of an unknown shoe insole. Jones I, 343 S.C. at 572, 541 S.E.2d at 818. The leading researcher in the field testified for the State, but acknowledged that he was still collecting data to determine what standards are relevant for points of comparison. Id. at 573, 541 S.E.2d at 819. He also testified that much of the earlier work in the field had been discredited. Id. Moreover, the officer that analyzed the insoles testified that neither he, nor anyone else in the agency, had ever done this type of test before. In fact, there was no written protocol in place at the time he conducted the test. Id. 574, 541 S.E.2d at 819. As such, the court held the testimony was unreliable and remanded the case for a new trial.

In Jones II, the State again offered barefoot insole impression evidence, but there had been no additional research developments to validate the field. Jones II, 383 S.C. at 550, 681 S.E.2d at 588. The officer also conducted no additional tests after the first trial. Id. at 553-54, 681 S.E.2d at 589. The court further noted that a publication from one of the State’s experts revealed “[t]he consensus among experienced examiners is that identifications are rare because the random individual characteristics necessary for an identification are rarely encountered.” Id. at 556-57, 681 S.E.2d at 591. Thus, the court assessed that peer reviewers found the technique unreliable. Id. Also noteworthy to the court, both SLED and the FBI stopped conducting barefoot insole analysis. Id.

This case differs from Jones in several important respects. First, the forensic and legal communities generally accept shoe print comparison as an uncontroversial technique. See Ford, 481 F.3d at 218. In contrast, SLED and the FBI have discontinued barefoot insole impression examinations. Jones II, 383 S.C. at 557, 681 S.E.2d at 591. Second, the officer in Jones had

never previously conducted a barefoot insole examination, or received any formal training in the field. In fact, the agency did not even have a training program or written protocol for testing in this area. In this case, the SLED agent had previously conducted between fifteen to twenty examinations and had over three years of training both in house and with outside agencies. Third, the State's expert in Jones published a work that cast doubt on the reliability of barefoot insole impressions. Id. at 556, 681 S.E.2d at 591. No such doubt exists with the shoe print comparisons involved in this case.

A better case for comparison involves a prosecution for criminal sexual conduct, with a defendant whose last name, coincidentally, is also Jones. In State v. Jones, 423 S.C. 631, 817 S.E.2d 268, (2018), the State offered expert testimony to explain the delayed disclosure of child sexual abuse victims and the behavior of non-offending caregivers. The victims in the case did not immediately disclose the abuse, and their mother failed to report it to law enforcement. The defendant argued that the trial court failed in its duty to ensure reliability because the expert witness could not identify academic studies supporting her opinions, or whether those studies had been peer reviewed. The Supreme Court disagreed, noting:

We find Jones's argument conflates reliability with perfection. There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence. Here, [the expert] met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field.

Jones, 423 S.C. 639-640, 817 S.E.2d at 272.

The case at bar also involves an expert using techniques generally relied upon by professionals in the field and subject to peer review. As discussed above, the circuit court

received extensive testimony to ensure its reliability. As such, the circuit court did not abuse its discretion in allowing the jury to consider the evidence.

C. Even Assuming the Circuit Court Abused Its Discretion in Admitting Expert Testimony on Footwear Examination, the Error is Harmless.

A trial court's error is harmless when "it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012)(quoting State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993). "Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

The importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002)(quoting Delaware v. Van Arsdall, 475 U.S. 673 (1986).

Even assuming that the circuit court abused its discretion in admitting expert testimony on footwear examination, this error would be harmless. The SLED agent testified that the shoe print at the crime scene had a corresponding tread design with the shoe seized from appellant's house. (R. 975, l. 12-14). The circuit court permitted a full cross-examination in which the agent conceded she could not match the appellant's shoes to the print at the crime scene. (R. 978, l. 23-25). Rather, she could only "say the overall tread design is similar." (R. 703, l. 18-19).

Therefore, the agent's testimony is cumulative to other evidence that actually connected appellant's shoes to the crime scene. As discussed above, law enforcement found the victim's blood on the same pair of shoes. (R. 994, l. 12-14). Law enforcement also discovered the

victim's blood on the driver's door and passenger's seat of appellant's car. (R. 994, l. 12-14). In light of this testimony, any error would be harmless.

As such, this case is similar to the situation in State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). In Tapp, the State presented testimony of an expert in crime scene analysis and victimology, who gave an opinion on how and why a murder occurred. At the time of the trial, the law instructed that reliability of nonscientific expert testimony was exclusively a jury determination. The Supreme Court held that although the circuit court should have vetted the testimony for reliability, the error was harmless. The court explained that in light of a DNA test connecting the defendant to the crime scene and the defendant's confession to cellmates, the expert testimony on crime scene analysis was harmless. Id. at 391, 728 S.E.2d at 476.

The same reasoning applies here. In light of the State's other evidence, particularly the victim's blood found on the same pair of shoes, testimony on footwear examination was cumulative. Any error in its admission would be harmless.

CONCLUSION

Law enforcement acted reasonably and with measured restraint in responding to this violent, chaotic murder scene. The law requires that appellant receive a fair trial, and he did. For the reasons discussed above, it is respectfully submitted that the appeal be dismissed.

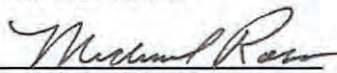
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May 31, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 31st day of May, 2019.

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In the Court of Appeals

Appeal from Charleston County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Robert M. Dudek, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina and Vordman C. Traywick, III, Esquire, P.O. box 11449, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 31st day of May, 2019.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

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ARGUMENT

Appellant General T. Little (Dr. Little) writes this Reply only to clarify a few points raised by the State in its brief. For the reasons set forth below, as well as those raised in Dr. Little's Brief of Appellant, the Court should reverse and remand for a new trial because (1) no exigent circumstances justified the State's illegal search of Dr. Little's vehicle parked within the curtilage of his home, and all blood evidence obtained following the illegal search should have been suppressed as fruit of the poisonous tree; (2) the State's improper reference during closing argument to a ring that 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.

I. No exigent circumstances justified the illegal search of Dr. Little's vehicle.

No exigent circumstances justified the State's warrantless searches of Dr. Little's vehicle, which was located within the curtilage of his home, and all evidence obtained in this illegal search should have been suppressed as fruit of the poisonous tree.

Here, by failing to address the issues, the State has conceded (1) the vehicle in the driveway was within the curtilage of Dr. Little's home and entitled to heightened constitutional protection, (2) a search within the meaning of the Fourth Amendment occurred, and (3) the plain view doctrine is inapplicable. The State does not even contest Dr. Little's fruit of the poisonous tree analysis—nor could it. Indeed, if the Court agrees the search violated Dr. Little's constitutional rights, it is beyond dispute that any evidence obtained pursuant to the search warrants was tainted as fruit of the poisonous tree because the search warrant affidavits presented to the magistrate solely relied upon information obtained during the illegal searches. Accordingly, the State's case rises and falls on the exigent circumstances exception to the warrant requirement. As explained below, however, the exception is inapplicable to the present case.

While the appellate court “applies a deferential standard of review” in Fourth Amendment cases, “this deference does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]’s decision is supported by the evidence.” State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

The exigent circumstances doctrine only applies 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). “[A]bsent 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). “The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or 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).

At the outset, Deputy Colburn conceded he had no probable cause during trial and the State conceded the protective sweep doctrine was inapplicable during the pre-trial hearing. (R. pp. 548, 156). Therefore, the State cannot rely upon these arguments on appeal. See I’On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421 n.11, 526 S.E.2d 716, 724 n.11 (2000) (asserting that “the failure to present an additional sustaining ground to the lower court reduces the likelihood that an appellate court will rely on it to affirm a judgment”); State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (asserting that an issue conceded in the circuit court cannot be argued on appeal (citing State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007))).

Indeed, the protective sweep doctrine is inapplicable because the search of the premises was not even conducted “incident to an arrest” and Dr. Little’s property was not an “arrest scene.” Maryland v. Buie, 494 U.S. 325, 327 (1990) (noting that “[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 believing that the area to be swept harbors an individual posing a danger to those on the arrest scene” (emphasis added)).

Even when putting aside the “incident to an arrest” requirement, no exigent circumstances justified a security sweep. The State offers two justifications for its warrantless search. According to the State, it was necessary to conduct a welfare check on Dr. Little and to protect officer safety. As to the “welfare check” argument, the testimony in the record reveals Kimberly had already been in contact with her father for some time before officers visited his home. The State dedicated very little ink to this argument for good reason—it is without merit. From an objective standpoint, Deputy Colburn hardly could have been concerned for Dr. Little’s safety based upon the totality of the circumstances.

Nor did anything pose a risk of danger to the police or others at Dr. Little’s property. Deputy Colburn notably testified he had no reason to believe Dr. Little was hiding. (R. p. 550). Seeing a vehicle’s passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person posed a danger to those on his premises.¹ And Deputy Colburn’s testimony that he could not see the floorboard of the passenger side during the initial search of the vehicles is simply not credible. See (R. p. 554). In any event, the State failed to address the argument that it is difficult to believe someone could have fit into such an area to hide.

¹ The photographs in the record, see (R. pp. 1265, 186–87 & 553), plainly refute the State’s claim that Dr. Little had “plenty of room to park completely within the driveway,” Resp. Br. at 15–16, given the position of the car on the left.

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. And the reason is obvious. The State had no grounds for a warrant until it created the need for one by performing an illegal search within the curtilage of Dr. Little’s home. At most, the State had a hunch that something was off that evening. But a hunch is not the same as probable cause. Deputy Colburn conceded he had no probable cause to conduct the search, and the Court should reverse and remand for a new trial on this ground alone.

Respectfully, no ordinarily prudent and cautious person, under the circumstances, would believe a search was justified to protect the safety of officers or others. Deputy Colburn had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543). Although the State seeks to distract the Court with a detailed description of the murder scene, a review of the record reveals that “nothing occurred at the residence to create an exigency to justify a warrantless search.” State v. Herring, 387 S.C. 201, 218, 692 S.E.2d 490, 499 (2009) (Kittredge, J., concurring) (emphasis added).

To that end, the State’s reliance upon the Herring case is misplaced. The State ignores the critical fact that 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.” Id. 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. Deputy Colburn, however, 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 did inculcate Dr. Little. This was not a de minimis intrusion. Accordingly, Herring did not justify the State's actions in this case.

In short, the circuit court's ruling is not supported by any evidence. A window being down in an upper-middle-class neighborhood during September in Charleston is not objectively suspicious. Because Deputy Colburn had no probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle, the unreasonable search violated Dr. Little's rights under the Fourth Amendment and the South Carolina Constitution. Accordingly, the Court should reverse and remand for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle, the towel, the bloody shoes found in the home, and any and all evidence obtained pursuant to these two search warrants. 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))).

II. The circuit court erred in denying Dr. Little's motion for a mistrial when the State improperly referenced the suppressed ring during its closing argument.

"[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).

It is well-settled that closing "[a]rguments must be confined to evidence in the record." By mentioning the ring, the State "convey[ed] the impression to the jury" 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). The fundamental unfairness of the State's inappropriate reference to the ring during closing argument is 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. Referencing the suppressed ring only added insult to injury, creating two layers of a constitutional violation.

The State's closing argument and PowerPoint slide focused on the ring and were some of the last things the jury heard and saw prior to deliberations. (R. pp. 1161–62, 1306). And the circuit court failed to exhaust other methods to cure possible prejudice to alleviate the need for a mistrial. *Cf. State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203–04 (Ct. App. 2010) (asserting that “[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission”). Instructing the State—outside the jury's presence—to take down the PowerPoint slide that referenced the ring 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 upon the State's reference to evidence outside the record. As to the prejudice prong, the Court need look no further than the State's concession in its brief that the solicitor's statement “went to the heart of the State's case: connecting the victim's blood to [Dr. Little].” Resp. Br. at 23. That is not harmless error.

III. The circuit court erred in admitting prejudicial testimony from the State's purported footwear examination expert.

Here, the circuit court's error cannot be harmless because Dr. Little was necessarily prejudiced by Dawn Claycomb—a SLED agent—being imbued with the imprimatur of an expert and confusingly testifying that Dr. Little's shoes were very similar to the prints found at the murder scene. *See State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that a reversal is mandated when a solicitor exploits “the [circuit] court's imprimatur of [an officer] as an ‘expert’ . . . to the prejudice of” the defendant” because a police “officer's opinion [that] goes to the heart of the case is not harmless”).

Turning to the substance of Claycomb’s footwear testimony, the State claims this is not scientific evidence while simultaneously citing cases from other jurisdictions recognizing that footwear examination evidence is, in fact, scientific. See Resp. Br. at 27. Regardless of whether the Council factors for determining reliability apply, this evidence was still inadmissible. After all, scientific evidence “is also subject to attack for relevancy and prejudice.” 335 S.C. at 19–20, 515 S.E.2d at 517. 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. This is not reliable scientific testimony, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury. See Rule 403, SCRE (providing “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”).

To the extent the State argues the circuit court could skip over its gatekeeping role because this evidence is “uncontroversial,” it notably failed to cite a single South Carolina case in support of that proposition. Until this Court or our supreme court has ruled upon the issue, the State is not entitled to any such pass. In light of the basic questions Claycomb was unable to answer regarding the impressions, her opinion was unreliable as a matter of law. And the highly prejudicial nature of her testimony substantially outweighed whatever probative value this “scientific” evidence offered. See Rule 403, SCRE. Because her testimony was introduced solely for the purpose of linking Dr. Little to the scene of the crime, it cannot be harmless. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491.

CONCLUSION

Based upon the foregoing, the Court should reverse and remand for a new trial. The State finds no solace in the exigent circumstances exception to the warrant requirement, and Dr. Little

was prejudiced by the State's reference to the suppressed ring and the circuit court's admission of Claycomb's footwear impressions testimony.

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July 16, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

PROOF OF SERVICE

I certify that I have caused the service of Appellant General T. Little's Consent Motion for Leave to File an Amended Final Reply Brief, as well as the Amended Final Reply Brief of Appellant, by email on July 16, 2020, pursuant to *In re Operation of the Appellate Courts During the Coronavirus Emergency*, App. Case No. 2020-000447, Order No. 2020-03-20-01, ¶ (g)(3) (S.C. Sup. Ct. filed Mar. 20, 2020), and via United States Mail on July 16, 2020, see Rule 262(b), SCACR, to the attorneys of record at the following addresses:

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July 16, 2020



VORDMAN CARLISLE TRAYWICK, III

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January 12, 2021

VIA E-FILING

Honorable Jenny Abbott Kitchings, Clerk
 South Carolina Court of Appeals
 1220 Senate Street
 Columbia, SC 29201
 ctappfilings@sccourts.org

RECEIVED**Jan 12 2021****SC Court of Appeals**

RE: The State v. General T. Little
 Appellate Case No. 2018-000561
 Our File No. 998-1759

Dear Ms. Kitchings:

In the spirit of Rule 208(b)(7), SCACR, I am writing on behalf of Appellant General T. Little to respectfully provide supplemental citations pertaining to a question from the panel during oral arguments this morning.

Specifically, during arguments, Chief Judge Lockemy expressed concerns that the illegal search issue may not be preserved for appellate review. Because the State did not contest preservation in its brief and this issue arose for the first time during oral arguments, Appellant respectfully wishes to provide the following supplemental citations to the record and case law on preservation for the benefit of the Court.

Regarding preservation, Dr. Little supplements pages 8 through 31 of the Final Brief of Appellant, as well as pages 1 through 5 of the Amended Final Reply Brief, with the following citations: *l'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (observing that issue preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282 (2012) (noting preservation "is not a 'gotcha' game" but is to ensure appellate courts "do not reach issues which were not ruled upon by the [circuit] court"); *State v. Hendricks*, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (holding the evidentiary "objection preserved the issue because it is clear from the record that both the State and the [circuit] court immediately understood" the basis for the objection); *State v. Bowers*, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019) ("The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection."), *cert. granted* (S.C. Sup. Ct. May 22, 2020); *Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) (stating our appellate courts do "not require parties to engage in futile actions . . . to preserve issues for appellate review"); *State v. Ross*, 272 S.C. 56, 60-61, 249 S.E.2d 159, 162



(1978) ("Once the court rules on an objection to a line of questioning, it is not necessary that counsel repeat his objection after each question."); State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) (finding an issue preserved when "it would have been futile to move to strike testimony which the [circuit] court already ruled was proper"); Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 45-46, 426 S.E.2d 756, 758 (1993) (ruling the circuit court "had a fair opportunity to rule upon the issue and did so," and "[i]t was not incumbent upon defense counsel to harass the judge by parading the issue before him again"); State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (per curiam) (excusing the failure to make a contemporaneous objection when the circuit court's comments are such that any objection would be futile).

As for support in the record, Dr. Little supplements the same portions of his briefs mentioned above with the following citations: (R. p. 800) (showing the State trying to admit State's Exhibits 37 through 47 into evidence, which consisted of photographs officers "took from processing the search warrant on the vehicle and of the items that [officers] searched inside the vehicle" and defense counsel saying "[s]ubject to previous objections"); (R. p. 807) (depicting the State trying to admit Dr. Little's shoes, which appeared in Exhibits 53 through 58, and defense counsel asking the Court to "[p]lease note our previous objection"); (R. p. 809) (demonstrating the circuit court stating "that same objection carries forward but I continue to rule as I have in the past," but "the previously maintained position [is] maintained"); (R. p. 810) (requesting clarification on the circuit court's ruling and stating, "Your Honor, just to clarify State's 136, the shoes, are into evidence pursuant to a standing objection," to which the circuit court replied, "Yes."); (R. p. 993) (noting "[s]ubject to our previous objection" in response to the State attempting to offer State's Exhibits 115 through 119 into the record, which related to Dr. Little's shoes); (R. p. 1238) (stating, at the close of trial, the defense wished to note "for the record a renewal of all objections including suppression in this trial," to which the circuit court responded, "As far as I'm concerned you are fully protected on all the matters you've raised.").

Of course, should the Panel have any questions or require additional information, please do not hesitate to contact me. We appreciate the opportunity to address this new matter and, again, thank the Court for its time and careful attention to this case.

With warmest regards, I remain

Respectfully yours,

Vordman Carlisle Traywick, III

VCT:rco
Enclosures



Litigation + Business

January 12, 2021

Page: 3

cc: Robert M. Dudek, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Michael Ross, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jan 12 2021

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

PROOF OF SERVICE

The undersigned certifies that, on January 12, 2021, the undersigned’s Rule 208(b)(7), SCACR, Letter on behalf of Appellant General T. Little was served on the below counsel via their email addresses in AIS pursuant to In re Operation of the Appellate Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2020-05-29-01, ¶ (g)(3) (S.C. Sup. Ct. filed May 29, 2020).

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Respectfully submitted,

/s/Vordman Carlisle Traywick, III

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Columbia, South Carolina
January 12, 2021

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

General T. Little, Appellant.

Appellate Case No. 2018-000561

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-196
Heard January 12, 2021 – Filed June 9, 2021

AFFIRMED

Vordman Carlisle Traywick, III, of Robinson Gray Stepp & Laffitte, LLC, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Michael Douglass Ross, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: General T. Little appeals his conviction for the murder of his wife, Barbara Little (Victim). Little argues the trial court abused its discretion by (1) refusing to suppress evidence found in Little's vehicle and home because officers conducted a warrantless search by looking through the window of his vehicle while it was in his driveway, (2) denying his motion for a mistrial, and (3) qualifying the State's witness as a footwear expert and admitting her testimony. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. We affirm the trial court's admission of evidence found in Little's vehicle and home. *See State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014) ("Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion."). The record showed Deputy Matthew Colburn was the first to respond to the crime scene, where he found a large pool of blood on the floor, blood on the walls, and towels and a blanket soaked in blood. He located the Victim, who was covered in blood, and was unable to determine whether the killer had used a firearm. Deputy Colburn made contact with Little, who agreed to meet him at the crime scene. When Little failed to appear, detectives sent Deputy Colburn to Little's home to locate him. Due to the exigencies presented by the violence at the crime scene—as well as Deputy Colburn's legitimate officer safety concerns—we find the evidence supports the trial court's ruling that Deputy Colburn's minimally intrusive search was reasonable. *See State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . ."); *id.* ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement."); *id.* ("Protecting the safety of police officers has also been held an exigent circumstance."); *State v. Dobbins*, 420 S.C. 583, 591, 803 S.E.2d 876, 880 (Ct. App. 2017) ("In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." (quoting *State v. Wright*, 416 S.C. 353, 369, 785 S.E.2d 479, 487 (Ct. App. 2016))); *id.* at 592, 803 S.E.2d at 880 ("Exigent circumstances—such as imminent destruction of evidence, the potential for a suspect to flee, or 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." (emphasis added)).

2. We find the trial court did not err in denying Little's motion for a mistrial because he was not prejudiced by the PowerPoint slide. *See State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an

abuse of discretion amounting to an error of law."); *State v. Rowlands*, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000) ("Whether a mistrial is manifestly necessary is a fact specific inquiry."); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). During the pretrial suppression hearing, the trial court suppressed the admission of Little's wedding ring, which had traces of blood on it, finding it was obtained from an unlawful search. During the State's closing, it presented a PowerPoint slide, which stated "no jewelry (no ring???)". The slide did not inform the jury of the blood evidence on the wedding band, and the slide was presented to the jury only briefly before the trial court ordered the State to take down the reference to the ring, which the trial court had excluded in its earlier evidentiary hearing. Without the broader context of the ring's blood evidence, the State's error did not prejudice Little, and we are unconvinced by Little's argument that because wedding bands are symbolic, the fact he was not wearing one inherently prejudiced him. *See Harris*, 340 S.C. at 64, 530 S.E.2d at 628 ("[F]or the defendant to be prejudiced, the misconduct must have affected the verdict."); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) ("A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

3. We find the trial court did not err by qualifying Dawn Claycomb as an expert in footwear examination and by admitting her testimony. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). Claycomb testified at length about her experience in footwear examination. She explained she worked in crime scene analysis for five years, trained for three years in footwear examination under the supervision of a qualified footwear impression expert, attended multiples classes, and passed a final competency test on footwear examination. *See State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) ("To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997))). Although she was not certified with the International Association of Identification and had never testified as an expert in footwear examination before, these factors go to the weight of Claycomb's testimony, not its admissibility. *See White*, 382 S.C. at 273-74, 676 S.E.2d at 688 ("[D]efects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." (quoting *State v.*

Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990))). Thus, the trial court did not err in finding Claycomb qualified to testify as an expert witness.

Further, we hold the trial court did not abuse its discretion in finding the substance of Claycomb's testimony was reliable. See *State v. Hewins*, 409 S.C. 93, 103, 760 S.E.2d 814, 819 (2014) ("An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support."); *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (holding the trial court must weigh the following factors to determine whether the underlying science is reliable: "(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"). First, Claycomb testified she read publications on the subject and explained she was familiar with other experts' research on fundamental footwear patterns. Second, she testified about the method she used in comparing footprint impressions and stated she had previously analyzed footwear evidence in fifteen to twenty cases. Third, Claycomb testified the South Carolina Law Enforcement Division conducts a peer review of her analysis to ensure quality control and to ensure another qualified footwear examiner agrees with her results. Fourth, she explained the procedures and steps she used when comparing footprint impressions. Thus, the trial court did not abuse its discretion in finding the substance of Claycomb's testimony was reliable. See *White*, 382 S.C. at 270, 676 S.E.2d at 686 ("Reliability is a central feature of Rule 702 admissibility . . .").

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

**APPELLANT’S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

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Attorneys for Appellant General T. Little

Pursuant to Rule 221(a), SCACR, Appellant General T. Little (Dr. Little) petitions the three-judge panel to rehear its decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021). For the reasons that follow, the panel should grant rehearing, issue a substituted opinion, reverse Dr. Little's murder conviction, and remand to the court of general sessions for a new trial. Alternatively, because the case presents "a question of exceptional importance," Rule 219(a), SCACR, the Court rehear the case en banc and do the same.

BACKGROUND

This appeal arises out of an officer's unlawful intrusion into the curtilage of Dr. Little's home that set off a series of State action that infringed upon Dr. Little's constitutional rights and ultimately secured his murder conviction.

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 had asked him to check on her. (R. pp. 342, 344). Investigators spoke with the two immediately upon arrival to Barbara's home. (R. pp. 345, 514). An hour later, law enforcement was sent to the home of Barbara's ex-husband,¹ Dr. Little, to locate him. (R. p. 514).

Dr. Little lived in an upper-middle-class neighborhood in West Ashley. (R. pp. 547, 161). The driveway ran from the street up to the garage on the left side of the house. See (R. pp. 1265, 1286–87). Before the front threshold of the house was a sidewalk that fed into the driveway. All vehicles were parked beyond the sidewalk in the back part of the driveway. Because the vehicle on the left was hugging the middle of the driveway, Dr. Little's vehicle was parked farther to the right. His right rear tire rested in the mulch beside the driveway as a result. The vehicle was less than a car's width from the side of the dwelling.

¹ They had been divorced for almost twenty years and "didn't fight." (R. pp. 336, 485). Respectfully, the panel erred in referring to Barbara as Dr. Little's wife.

Seeing a vehicle that he knew belonged to Dr. Little parked slightly off the driveway, Deputy Matthew Colburn of the Charleston County Sheriff's Department approached it. (R. p. 514). In doing so, Deputy Colburn traversed 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 quickly ascertained 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 approached it again after checking the other vehicles. (R. pp. 551, 554 & 70). He walked around to the other side of Dr. Little's vehicle and discovered the front passenger window rolled down. (R. pp. 516–17). The search warrant affidavits indicate Deputy Colburn observed the window down during his sweep, (R. pp. 1257, 1262), but he testified at trial he could see the window down from the street as he pulled up to the home. (R. p. 516). Deputy Colburn arrived after 11:00 P.M. that evening. Id. No overhead lights were on inside the car. (R. p. 549).

During the 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 the residence. (Id.). Deputy Colburn asked Dr. Little if he 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 subsequently transported Dr. Little to the law enforcement center in the back of his vehicle. (R. p. 557). Upon arrival, Deputy Colburn turned Dr. Little over to Detective

Dustin Turner, to whom he privately divulged his findings from the search of the vehicle. (R. p. 518). Detective Turner then proceeded to interrogate Dr. Little about Barbara's death. (R. p. 644). Meanwhile, Detective Will Muirhead received a call to meet Deputy Colburn back at Dr. Little's residence. (R. p. 663). Following this second illegal search of Dr. Little's vehicle, Detective Muirhead relayed his findings to Detective Jason Bowen. (R. pp. 663–64). Detective Bowen was tasked with “constructing” a probable cause affidavit to present to a magistrate for purposes of obtaining a search warrant. (R. p. 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 station and took his turn with Dr. Little. (R. p. 666). In all, Dr. Little was interrogated at the station for almost four hours by three different detectives before someone finally read him Miranda warnings. (R. p. 206). During this time, detectives searched Dr. Little's person for scratches and any evidence of a struggle. (R. 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). While the ring tested positive for blood, it was never matched to any known DNA. (Id.). Detective Turner gave him a ride home. (R. p. 645).

Detectives later executed the search warrants obtained pursuant to Deputy Colburn's unlawful search of Dr. Little's vehicle and seized various items, including the vehicle, from Dr. Little's home. (R. pp. 669, 739). They also searched his phone and computer records. (R. pp. 669, 386 & 903). Investigators were fixated on the fact that Dr. Little was behind in alimony payments and was served with a rule to show cause on the day of Barbara's death. (R. pp. 652,

673). But this was nothing new. Dr. Little had been hailed into family court on numerous prior occasions to account for his delinquent alimony payments. (R. pp. 647, 336).

In May of 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 of 2018. Before trial, the circuit court held a lengthy hearing on Dr. Little’s motions to suppress as well as various other pre-trial issues. (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). But the court denied Dr. Little’s motion to suppress the blood evidence found in his vehicle and all related evidence. (R. pp. 159–62). Following jury selection, the State turned over video evidence the defense had been requesting for months. (R. p. 287). The circuit court elected to continue the case to the next term of general sessions. (R. pp. 289–90).

The case was recalled for a jury trial on March 19–23, 2018. After jury selection and opening statements, 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, the family court’s rule to show cause, Dr. Little’s interrogation, blood forensics, and Dr. Little’s computer records. (R. pp. 321–943). The State also proffered Dawn Claycomb, a crime scene agent with SLED who investigated Barbara’s death, to testify as an expert in footwear examination. (R. pp. 960, 968). Dr. Little challenged Claycomb’s qualifications, as well as the substance of her testimony, but the circuit court permitted her to testify over his objection. (R. pp. 944–55, 963). Claycomb testified that she found the “outsole design” from Dr. Little’s shoe was “similar” to an impression taken from the scene, but she could not say it was the same shoe. (R. p. 976). A forensic pathologist from the Medical University of South Carolina also testified regarding her findings from Barbara’s autopsy. (R. pp. 1010–49).

After the State rested, Dr. Little moved for directed verdict. (R. pp. 1061–64). The circuit court denied his motion and instructed the defense to call its first witness. (R. pp. 1066, 1071). Dr. Little called three witnesses to the stand. Detective Matthew Downing, who questioned Dr. Little along with two other detectives at the station, testified that he did not observe any physical injuries on Dr. Little’s body on the night in question. (R. pp. 1074–75). He confirmed that Dr. Little was questioned for at least two or three hours, starting after midnight. (R. pp. 1085, 1073). When asked about Dr. Little’s demeanor during this questioning, Detective Downing stated he was aware that Dr. Little had been up since 4:30 A.M.—for almost twenty-four hours. (R. p. 1085).

Next, Kimberly Mears, a fingerprint examiner with SLED, testified she was given five latent fingerprint lifts from the crime scene and attempted to compare them 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). Finally, Deputy Robert Haslip testified regarding his recollection of events at the crime scene. (R. pp. 1108–20). Following his testimony, the defense rested and renewed all prior motions. (R. p. 1135). They were denied, 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 suppressed wedding ring both verbally and via a PowerPoint slide published to the jury that said, “No jewelry (no ring???)” (R. pp. 1161, 1306). Dr. Little immediately 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). But the damage was already done.

The defense delivered its closing argument, and the State briefly replied. (R. pp. 1181–1218, 1219–24). After receiving instructions, the jury retired for deliberations. (R. pp. 1225–37). The jury struggled with this case. Four hours into deliberations, the jury asked for a copy of the charge. (R. p. 1240). When the circuit court asked the foreman to be more specific, the jurors instead decided to return to their room and resume deliberations. (R. pp. 1240–41). Ultimately, following five hours of deliberations, the jury returned a guilty verdict. (R. p. 1243). The circuit court denied all renewed motions and then sentenced Dr. Little to thirty years in prison. (R. pp. 1243, 1247–52). Dr. Little appealed.

A three-judge panel heard oral arguments in the case on January 12, 2021. On June 9, 2021, the panel affirmed in an unpublished opinion. This petition for rehearing and suggestion for rehearing en banc follows.

STANDARD

Rule 221(a), SCACR, allows a party to petition the Court for rehearing. The petition for rehearing must state “the points supposed to have been overlooked or misapprehended by the court,” Rule 221(a), SCACR, so as “to aid the court in deciding correctly a case heard by it,” Arnold v. Carolina Power & Light Co., 168 S.C. 163, ___, 167 S.E.2d 234, 238 (1933). And the Court will only order a rehearing en banc “(1) when consideration by the full court is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

ARGUMENT

“In law, the ends do not justify the means.” State v. Adams, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). Yet 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. The

panel erred in finding no abuse of discretion in the circuit court's rulings because (1) no exigent circumstances justified the State's two illegal searches of Dr. Little's vehicle in the curtilage of his home; (2) the State's improper reference during closing argument to a ring that 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. The panel should grant rehearing and issue a substituted opinion, or the Court should rehear the case en banc and reverse and remand.

I. The panel misapprehended the applicability of the exigent circumstances exception to the warrant requirement and erred in invoking it to justify the intrusion into the curtilage of Dr. Little's home to conduct an illegal search of his vehicle.

While the appellate court “applies a deferential standard of review” in Fourth Amendment cases, “this deference does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]’s decision is supported by the evidence.” State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). Further, when deciding “appeals from a motion to suppress based on Fourth Amendment grounds,” the appellate court “reviews questions of law de novo.” State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017) (quoting Adams, 409 S.C. at 647, 763 S.E.2d at 344).

Viewed in this prism, the panel erred in four respects. First, the panel overlooked 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 to the U.S. Constitution. Second, the panel misapplied the exigent circumstances exception given that Deputy Colburn testified Dr. Little was not a suspect, he had no reason to believe Dr. Little was armed and dangerous, he had backup on the scene, and Dr. Little was not arrested on the evening in question. Third, the panel overlooked that State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), is distinguishable here.

Fourth, the panel did not address Dr. Little’s argument that the State’s actions also violated his right to privacy enshrined in article I, section 10 of the South Carolina Constitution.

A. *Curtilage is a critical missing piece in the panel’s analysis of the search issue.*

Taking them in order, Dr. Little would note as a threshold matter that the word “curtilage” did not appear in the panel’s opinion.

Curtilage 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). “The 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). “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). And the Fourth Amendment extends this protection to “the curtilage of the home.” Bash, 419 S.C. at 268, 797 S.E.2d at 723 (quoting Herring, 387 S.C. at 209, 692 S.E.2d at 494).

Here, the State conceded the vehicle in the driveway that officers searched was within the curtilage of Dr. Little’s home. Because the search took place in the curtilage, this area of the home was entitled to heightened constitutional protection. See Ciraolo, 476 U.S. at 212–13. In overlooking this uncontested issue, the panel failed to account for the significance of the location where the illegal search occurred in analyzing the Fourth Amendment issue. And this error colored the panel’s conclusion “that Deputy Colburn’s minimally intrusive search was reasonable.” Little, Op. No. 2021-UP-196, at 2. Trespassing upon the curtilage of one’s home to conduct an illegal search is not 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).

Given that officers’ illegal search of the vehicle took place in the curtilage, this was no different than them peering in the windows of Dr. Little’s home with a flashlight and no warrant. That is unreasonable, and so is what happened here. See U.S. CONST. amend. IV (guaranteeing the people’s right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”); State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) (“Private residences are places in which an individual normally expects privacy free of government intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable.”).

Respectfully, the panel erred in overlooking this important piece of the Fourth Amendment puzzle in analyzing the reasonableness of the unlawful search.

B. The exigent circumstances exception to the warrant requirement is inapplicable.

The State conceded a search within the meaning of the Fourth Amendment occurred and put all its eggs in the exigent circumstances basket. But the exception is inapplicable, and the panel 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); see also Herring, 387 S.C. at 209, 692 S.E.2d at 494 (holding “searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances”). Here, the panel and the State focused on the exigent circumstances doctrine, which only applies 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). “[A]bsent 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). “The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.”² Ornelas v. United States, 517 U.S. 690, 696 (1996).

This case does not fit neatly into any of the exceptions to the warrant requirement. Indeed, the protective sweep doctrine does not apply because the search of the premises was not conducted “incident to an arrest,” and Dr. Little’s property was not an “arrest scene.” Maryland v. Buie, 494 U.S. 325, 327 (1990) (noting that “[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 believing that the area to be swept harbors an individual posing a danger to those on the arrest scene” (emphasis added)).

Even when putting aside the “incident to an arrest” requirement, no exigent circumstances justified a security sweep. The State argued that Deputy Colburn’s thoughts as to whether Dr. Little was a suspect were irrelevant because that goes to the subjective intent of the officer. Not so. Indeed, the U.S. Supreme Court has expressly rejected this argument. In Florida v. Jardines, the Court clarified its precedent “merely hold[s] that a stop or search that is objectively reasonable

² At the outset, Deputy Colburn conceded he had no probable cause during trial, and the State conceded the protective sweep doctrine was inapplicable during the pre-trial hearing. (R. pp. 548, 156). Therefore, the State could not rely upon these arguments on appeal. See I’On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421 n.11, 526 S.E.2d 716, 724 n.11 (2000) (asserting that “the failure to present an additional sustaining ground to the lower court reduces the likelihood that an appellate court will rely on it to affirm a judgment”); State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (asserting that an issue conceded in the circuit court cannot be argued on appeal (citing State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007))).

is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." 569 U.S. 1, 10 (2013). So a "defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment." *Id.* In *Jardines*, however, "the question before the court [was] precisely whether the officer's conduct was an objectively reasonable search." *Id.* As the Court recognized, "that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." *Id.* And "their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." *Id.*

So too here. In this case, the question is whether Deputy Colburn's conduct was an objectively reasonable search. That depends on whether he had an implied license to enter the driveway, which in turn depends on the purpose for which he entered. The State offered two justifications for its warrantless search. According to the State, it was necessary to conduct a welfare check on Dr. Little and to protect officer safety. As the panel recognized during oral arguments, the welfare check argument was "nonsense." Nor did anything pose a risk of danger to the police or others at Dr. Little's property. The uncontested historical facts were that (1) the crime scene contained a lot of blood, (2) Kimberly had spoken with Dr. Little on the phone multiple times that evening, (2) Dr. Little did not show up to the crime scene, (3) officers were told to locate him an hour later, (4) Dr. Little was not a suspect, (5) officers did not believe he was hiding, (6) officers did not think he was armed and dangerous, and (7) officers had backup on the scene.

Seeing a vehicle's passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person

posed a danger to those on his premises.³ And Deputy Colburn’s testimony that he could not see the floorboard of the passenger side during the initial search of the vehicles is simply not credible. See (R. p. 554). In any event, the State failed to address the argument that no one could have fit into such a small area to hide. 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. And the reason is obvious. The State had no grounds for a warrant until it created the need for one by performing an illegal search within the curtilage of Dr. Little’s home.

When taking all of that into account, Deputy Colburn’s behavior objectively reveals a purpose to conduct a search—not a welfare check or a safety sweep—“which is not what anyone would think he had license to do.” Jardines, 569 U.S. at 10. Deputy Colburn conceded he had no probable cause to conduct the search, and the Court should reverse and remand for a new trial on this ground alone. Further, as the circuit court noted, Deputy Colburn never explained why he found certain things odd about Dr. Little’s property. At most, the State had a hunch that something was off that evening. But an unparticularized hunch will not do. That is not the same as probable cause. Respectfully, no ordinarily prudent and cautious person, under the circumstances, would believe a search was justified to protect the safety of officers or others. Deputy Colburn had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543).

During oral arguments, the panel was perplexed as to why the State had its officer testify Dr. Little was not a suspect. But the panel did not wrestle with this fact in the opinion. It was an important one too. Although the State sought to distract the Court with a detailed description of the murder scene, a review of the record reveals that “nothing occurred at the residence to create

³ The photographs in the record, see (R. pp. 1265, 186–87 & 553), plainly refute the State’s claim that Dr. Little had “plenty of room to park completely within the driveway,” Resp. Br. at 15–16, given the position of the car on the left.

an exigency to justify a warrantless search.” Herring, 387 S.C. at 218, 692 S.E.2d at 499 (Kittredge, J., concurring) (emphasis added). Thus, contrary to the panel’s findings, Deputy Colburn’s officer safety concerns—when viewed with the totality of the circumstances—was not legitimate. And the panel failed to address what exigent circumstances justified the subsequent unlawful searches of Dr. Little’s vehicle parked in the curtilage of his home. None existed.

The circuit court erred in not taking Deputy Colburn at his word, and the panel erred in finding no abuse of discretion. Dr. Little was not a suspect, and officers had no probable cause to search his home. For the same reasons, they had no probable cause to trespass and conduct an unlawful search of a vehicle parked within the curtilage of his home. No exigent circumstances justified this first illegal intrusion. Indeed, the doctrine only applies when, “from an objective standard, a compelling need for official action and no time to secure a warrant exists.” Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. To this day, no one has explained why officers had no time to secure a warrant. The reason is obvious. As Deputy Colburn conceded, he had no probable cause. Thus, he could not have gotten a warrant. But that did not give him license to conduct an illegal search. And certainly, no exigent circumstances excused the second illegal search conducted by Detective Muirhead, and the State does not even try to argue to the contrary.

In light of these repeated Fourth Amendment violations, all evidence obtained from the unlawful searches should have been suppressed as fruit of the poisonous tree. The circuit court abused its discretion by failing to exclude the evidence, and the panel erred in affirming.

C. The panel misapprehended the applicability of Herring.

Next, the panel’s reliance upon the Herring case was misplaced because it overlooked critical distinctions in this case.

In Herring, 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.” Id. 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. Deputy Colburn, however, 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 did inculpate Dr. Little. This was not a de minimis intrusion.

Further, 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. Thus, under these exigent circumstances, our supreme court found that the “minimal intrusion” of peeking into “the garage window to see if the suspect was there” was “objectively reasonable” and did not violate the Fourth Amendment.⁴ Id. at 209, 211, 692 S.E.2d at 494, 495 (emphasis added). 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. 543, 547).

⁴ But see id. at 218–19, 692 S.E.2d at 499 (Kittredge, J., concurring) (“disagree[ing] that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring’s residence two hours after the shooting of John Johnson at Chastity’s strip club” and stating that the peek into the garage was “an unwarranted trespass and warrantless search” but finding this search yielded no evidence).

Accordingly, Herring did not justify the State's actions in this case, and the panel erred in relying upon it to find the State's actions were reasonable.

D. The panel failed to address the state constitutional argument.

What is more, the panel overlooked Dr. Little's argument under article I, section 10 of the South Carolina Constitution and failed to address it in the opinion.

"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, the failure to address this argument is important because "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).

In failing to address the privacy argument under the state constitution, the panel overlooked that this was an independent ground for reversal. Given the "scant" authority interpreting the state constitutional right to privacy, 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 state 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).

Because the State’s actions here did not fit into an exception to the warrant requirement, even if the panel found they satisfied the Fourth Amendment’s touchstone of reasonableness, they do not pass muster under article I, section 10. The people of South Carolina, together with the General Assembly, have determined that privacy is so important that it should be enshrined in our state constitution. Here, however, the State trampled on Dr. Little’s right to privacy by performing multiple illegal 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 one of its citizens. And that was only one of the many constitutional violations plaguing this case. But South Carolinians demand more of their criminal justice system. This was a classic trespass into an area entitled to heightened constitutional protection. If the Fourth Amendment did not protect Dr. Little, then the state constitution does and should.

Under these circumstances, the panel erred in overlooking that the State violated article I, section 10 of the South Carolina Constitution by invading Dr. Little’s right to privacy.

* * * *

In short, because Deputy Colburn had no probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle, the unreasonable search violated Dr. Little’s rights under the Fourth Amendment and the South Carolina Constitution. Accordingly, the panel should issue a substituted opinion reversing and remanding for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle, the towel, the

bloody shoes found in the home, and any and all evidence obtained pursuant to these two search warrants as fruit of the poisonous tree.⁵ See Adams, 409 S.C. at 648, 763 S.E.2d at 345 (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002)). Alternatively, the en banc Court should reverse the panel and do the same.

II. The circuit court erred in denying Dr. Little’s motion for a mistrial when the State improperly referenced the suppressed ring during its closing argument.

Although the panel seemed to agree the State crossed the line by mentioning evidence suppressed prior to trial during its closing argument, see Little, Op. No. 2021-UP-196, at 3 (finding “the State’s error did not prejudice Dr. Little”), the Court overlooked the prejudicial effect of this concerning move.

It is well-settled that closing “[a]rguments must be confined to evidence in the record.” State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). “[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). An appellate court’s ruling “must hinge on whether there was a manifest necessity for declaring a mistrial.” State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). The court must also consider whether a “mistrial was dictated by . . . the ends of public justice,” which is “defined as the public’s interest in a fair trial designated to end in just judgment.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). “Whether a mistrial is manifestly necessary is a fact specific inquiry.” State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010).

Here, the State’s closing argument and the PowerPoint slide focused on the ring were some of the last things presented to the jury before deliberations. (R. pp. 1161–62, 1306). The State

⁵ The State never contested Dr. Little’s fruit of the poisonous tree analysis and, thus, agrees that suppression was required if the Court finds the exigent circumstances exception to the warrant requirement inapplicable.

“convey[ed] the impression to the jury” 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). As the panel noted at oral arguments, that was “clearly misconduct.” Indeed, the fundamental unfairness of the State’s inappropriate reference to the ring during closing argument is 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. Referencing the 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.⁶ 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. Although the panel 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, the mention of a 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. And the answer is no.

And the circuit court failed to exhaust other methods to cure possible prejudice to alleviate the need for a mistrial. Cf. Bantan, 387 S.C. at 417, 692 S.E.2d at 203–04 (asserting that “[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission”). Instructing the State—outside the jury’s presence—to take down the PowerPoint

⁶ 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.”).

slide that referenced the ring 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. Taking the slide down did nothing—the cat was already out of the bag. As to the prejudice prong, the Court need look no further than the State's concession in its brief that the solicitor's statement “went to the heart of the State's case: connecting the victim's blood to [Dr. Little].” Resp. Br. at 23. That is not harmless error.

Dr. Little was entitled to a mistrial, and the circuit court erred in denying his motion in light of the State's misconduct in the final hours of a weeklong murder trial. The Court should therefore issue a substituted opinion reversing and remanding for a new trial based upon the State's reference to evidence outside the record.

III. The circuit court erred in admitting prejudicial testimony from the State's purported footwear examination expert.

Next, the panel overlooked that Dawn Claycomb was not qualified to offer expert testimony regarding outsole footwear impressions. See App.'s Final Br. at 36–38.

Although Dr. Little recognizes “the expert need not be a specialist in 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.” Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Respectfully, the circuit court did not perform the requisite gatekeeping function here. And the panel overlooked that the circuit court's error cannot be harmless because Dr. Little was necessarily prejudiced by Dawn Claycomb—a SLED agent—being imbued with the imprimatur of an expert and confusingly testifying that Dr. Little's shoes were very similar to the prints found at the murder scene. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that a reversal is mandated when a solicitor exploits “the

[circuit] court's imprimatur of [an officer] as an 'expert' . . . to the prejudice of' the defendant" because a police "officer's opinion [that] goes to the heart of the case is not harmless").

Even if she was qualified, the panel misapprehended the reliability test in upholding the circuit court's decision to give the State a pass on this testimony. In State v. Council, our supreme court held 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." 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (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. While Claycomb indicated her report was confirmed via peer review, (R. p. 960), she named no publications citing with approval the technique she employed. She merely confirmed she "read articles." (Id. at 963). Claycomb testified she had fifteen to twenty cases involving footwear impressions, (id. at 958), but she never indicated whether the same method was employed each time. And although Claycomb testified in detail about the chain of custody for the DVD containing the digital photographs, (id. at 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.

In 2001, our supreme court rejected the State's effort to present testimony from a "barefoot insole impressions" expert, holding this type of 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. Here, as in Jones I, the circuit court “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.

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. That is 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. Like insole footwear impressions testimony, outsole footwear impressions testimony is speculative and unreliable. With all due respect, Ms. 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. Because her testimony was introduced solely for the purpose of linking Dr. Little to the scene of the crime, it cannot be harmless. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491. Dr. Little was prejudiced by the introduction of Claycomb’s misleading testimony because—semantics aside—she directly linked him to the scene of the crime. And the prejudice outweighed what probative value, if any, the testimony offered. See Rule 403, SCRE. So the circuit court’s “admission of this evidence mandates reversal of” Dr. Little’s murder conviction. Jones I, 343 S.C. at 574, 541 S.E.2d at 819.

CONCLUSION

In sum, the panel should grant rehearing, issue a substituted opinion, and reverse and remand to the court of general sessions for a new trial. Alternatively, the Court should rehear the case en banc, reverse the panel, and remand for a new trial.

Respectfully submitted,

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June 24, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

PROOF OF SERVICE

I certify that I have served Appellant General T. Little’s Petition for Rehearing or Suggestion for Rehearing En Banc on the following counsel by email on June 24, 2021.

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Columbia, South Carolina
June 24, 2021

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County

The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE,

Appellant.

Appellate Case No. 2018-000561

**STATE'S RETURN TO APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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Appellant has not provided sufficient grounds to warrant either a rehearing from the panel or a rehearing en banc. The Court's opinion did not overlook or misapprehend any of the issues. See Rule 221(a), SCACR. Additionally, the case neither presents "a question of exceptional importance," nor is the opinion inconsistent with the Court's precedent. See Rule 219(a), SCACR. For the reasons discussed below, appellant's Petition for Rehearing and Suggestion for Rehearing En Banc should be denied.

I. THE COURT CORRECTLY HELD THAT DEPUTY COLBRUN ACTED REASONABLY IN LIGHT OF THE EXIGENT CIRCUMSTANCES FOLLOWING BARBARA LITTLE'S MURDER.

The exigent circumstances following Barbara Little's murder have already been fully presented to the Court. (Resp. Br. 14-20). Nothing has been overlooked or misapprehended. See Rule 221(a), SCACR. Recall that a killer was on the loose. Barbara Little had just been beaten to death in a manner that shocked even the veteran pathologist who performed the autopsy. (R. 1014, l. 11-12). With no signs of any forced entry, her home had been turned into a violent, bloody crime scene. (R. 49, l. 23-25, 89, l. 14-15; 662, l. 12; 511-12). And now Barbara's ex-husband (appellant) was unaccounted for. (R. 89, l. 18-24). Although he initially informed detectives that he was on his way to the crime scene, almost an hour had passed without any word from him. (R. 89, l. 17-18; 542, l. 22; 662, l. 1-4). Appellant only lived five minutes away. (R. 89, l. 24).

At that point, law enforcement rightfully took action. A welfare check was in order. Appellant discounts the decision as "nonsense," but police have to respond as if the worst case scenario is happening. (Pet. 12). From their vantage point, there was the possibility of a murder/suicide in progress, the killer could be targeting family members, or appellant could be evading the police. Law enforcement did not have the luxury to wait and see what was happening. The clock was ticking. They could not allow a worst case scenario to occur while personnel are

only a few minutes away. Had something like that happened in this case, then we would be asking why the police did not think to conduct a welfare check. In sending an officer to make contact with appellant, law enforcement was acting responsibly.

When Deputy Colbrun arrived at appellant's house, he believed he was walking into a dangerous situation. (R. 76, l. 7). That belief was reasonable. Not only was he aware of the violence that had just taken place at Barbara's house, but also the scene at appellant's residence was unusual. Appellant's Toyota Sequoia was parked partially in the driveway and partially in the mulch surrounding the home. (R. 51, l. 15, 16; 1286-87). The front passenger window was also rolled down. (R. 51, l. 11-12). In other words, it appeared that the driver parked the car in a hurry. Before approaching the house, Deputy Colbrun looked in the car's windows to ensure no one was inside the vehicle. (R. 51, l. 1-2). He did not open the door, or even touch the car. (R. 53, l. 21-24). Given the totality of the circumstances, the Court correctly recognized that Deputy Colbrun was justified in taking this small, precautionary measure before knocking on the front door.

Nevertheless, appellant raises several objections to the Court's analysis. None have merit. For example, he believes the Court "failed to account for the significance of the location" of the search. (Pet. 9). According to appellant, the "error colored the panel's conclusion that Deputy Colbrun's minimally intrusive search was reasonable." (Pet. 9)(internal citations omitted). Appellant argues that looking through the window of a car parked in the driveway is the same as looking through a window of the house. (Pet. 10).

The argument fails to recognize that there are two steps to the analysis: (1) determining whether a search occurred, and (2) if so, assessing if it was reasonable under the circumstances. See e.g. State v. Edwards, 415 S.C. 401, 407-08, 782 S.E.2d 124, 128 (Ct. App. 2016)(holding that although an officer's actions constituted a search under the Fourth Amendment, the search was

reasonable). Appellant's argument ignores the second step. By his logic, any intrusion on the curtilage—no matter how slight or under what circumstances—would require a search warrant. Such an interpretation is inconsistent with settled, black letter law. See e.g. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006); State v. Dobbins, 420 S.C. 583, 803 S.E.2d 876 (Ct. App. 2017). This Court correctly proceeded to step two in the analysis and evaluated whether the intrusion was reasonable in scope. See State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014)(noting the State must show “the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence.”). Rather than misapprehending the law, this Court followed it.

Appellant's reliance on Florida v. Jardines, 569 U.S. 1 (2013) is unpersuasive for the same reason. (Pet. 11-12). In Jardines, the issue was whether a search occurred, not if the search was reasonable. To answer that question, the Court assessed whether the officer had an implied license to approach the front door. Id. at 8. Here, the issue is not whether a search occurred, but if it was reasonable. Contrary to appellant's suggestions, that inquiry is a purely objective one. See State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009)(“An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer's state of mind, ‘as long as the circumstances, viewed objectively, justify [the] action.’”)(quoting Scott v. United States, 436 U.S. 128, 138 (1978); State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004)(“The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist.”).

Furthermore, appellant's attempt to distinguish this case from Herring falls short. He notes that unlike the officer in Herring, Deputy Colbrun did not consider him a “suspect” when he

approached the house. (Pet. 15). But the situation was no less dangerous for Deputy Colbrun. Regardless of whether appellant was a potential suspect or a potential victim, approaching his house carried the risk of coming face to face with whoever murdered Barbara Little. The subtle distinction with Herring does not affect the analysis of exigent circumstances. In both cases, law enforcement needed to act. In both cases, such action carried a substantial risk of danger. And in both cases, the officer took the minimally intrusive step of looking through a window to ensure no one was either inside a car or a garage.

Finally, appellant believes the Court overlooked an argument that the search was impermissible under the state constitution. (Pet. 16). According to appellant, the absence of controlling authority gives the Court “a blank canvas” upon which to create new law. (Pet. 16). But the Supreme Court of South Carolina has already put its mark on this canvas. In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), the court rejected the argument that the state constitution creates enhanced privacy protections in a vehicle parked in the backyard of a private residence. Id. at 322, 649 S.E.2d at 483.

Moreover, it is unclear that appellant even raised this argument in his initial brief. Although he made a passing reference that state courts can interpret their own constitutional provisions more broadly than the Fourth Amendment, he never argued that the South Carolina Constitution imposes upon law enforcement additional restrictions on top of the Fourth Amendment while acting in the context of exigent circumstances. (App. Br. 9-10). To the contrary, he argued that “[u]nder both constitutions,” warrantless searches are impermissible absent a recognized exception. (App. Br. 10). The Court was under no obligation to address an issue that was not clearly presented in the initial brief. See Southern Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012)(holding that an argument was

abandoned because a litigant only made a passing reference without supporting case law). Accordingly, a rehearing on this issue is unwarranted.

II. THE COURT CORRECTLY FOUND THAT APPELLANT SUSTAINED NO PREJUDICE WARRANTING A MISTRIAL BECAUSE THE JURY NEVER HEARD ANY OF THE SUPPRESSED EVIDENCE.

Declaring a mistrial is “an extreme measure” that should be taken only when “absolutely necessary.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). The reasons for doing so must be “very plain and obvious.” Id. Appellant’s grounds simply do not meet this standard. As this Court recognized, the jury never heard any of the evidence that had been previously ruled inadmissible. It was unaware that law enforcement recovered appellant’s wedding ring from his back pocket. And it was also unaware that the ring had the victim’s blood on it. Without that context, appellant sustained no prejudice, much less prejudice justifying the extreme remedy of a mistrial. The trial court did not abuse its discretion in refusing to grant one. In directing the solicitor to remove the power point slide and move on, the trial court prevented any prejudice from developing in the first place.

Appellant cites Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) in arguing that the solicitor implied that there was additional incriminating evidence. That case provides a useful comparison to this one. The prosecutor in Matthews was addressing the credibility of a State’s witness at a drug trial. During closing arguments, he told the jury that:

I don’t trust any of these people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

Id. at 275, 565 S.E.2d at 767 (emphasis in original). The prosecutor did not identify any evidence that corroborated the witness, such as witness testimony or physical evidence. Id. at 277, 565

S.E.2d at 768. The state supreme court held the comment was improper because it implied that the prosecutor had done so.

The same reasoning does not apply here. The solicitor simply repeated the detective's testimony that appellant was not wearing any jewelry during his interview. (R. 1161, l. 13-16). Neither her words, nor the power point slide, imply that law enforcement found appellant's ring in his back pocket. They do not imply that the ring had the victim's blood on it. Unlike the situation in Matthews, the jury could not draw any of these inferences from the solicitor's closing argument. As such, the Court's ruling on this issue need not be revisited.

III. THE COURT CORRECTLY FOUND THAT THE SLED AGENT WAS QUALIFIED UNDER RULE 702 AND THAT HER TESTIMONY WAS RELIABLE.

Appellant argues that the SLED Agent was not qualified to provide expert testimony and that the testimony was unreliable. (Pet. 20-22). The argument is unpersuasive in both regards. The trial judge explored the agent's credentials prior to qualifying her as an expert. (R. 946-48; 957-63). As this Court correctly held, any perceived "defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility." State v. Robinson, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). As for the reliability of the evidence, this Court's opinion is in accordance with other jurisdictions that have addressed the issue. See e.g. United States v. Ford, 481 F.3d 215 (3d Cir. 2007); United States v. Allen, 390 F.3d 944 (7th Cir. 2004); State v. Gay, 145 A.3d 1066 (N.H. 2016); Berks v. State, 427 S.W.3d 98 (Ark. Ct. App. 2013); Jennings v. State, 123 So. 3d 1101 (Fla. 2013); Rodriguez v. State, 30 A.3d 764 (Del. 2011); Castellon v. State, 302 S.W.3d 568 (Tex. Ct. App. 2009); State v. Reid, 91 S.W.3d 247 (Tenn. 2002); West v. State, 755 N.E.2d 173 (Ind. 2001). As the Second Circuit Court of Appeals observed, "[c]ourts have admitted shoeprint identification evidence for a long time." Ford, 481 F.3d at 218 n.4.

Furthermore, even if appellant could establish the trial court abused its discretion, any error would be harmless. The agent's testimony that appellant's shoes had a similar tread design as the print at the crime scene was cumulative to other evidence. (R. 979, l. 18-19). Law enforcement discovered the victim's blood on the same pair of shoes. (R. 994, l. 12-14). Additionally, the victim's blood was on the driver's door and passenger seat of appellant's car. (R. 994, l. 12-14). During closing arguments, appellant's counsel even conceded that the presence of the victim's blood on these items was "the elephant in the room." (R. 1183, l. 4-5). Given the abundance of other evidence linking appellant to the crime scene, any error surrounding this witness was harmless. See State v. Tapp, 398 S.C. 376, 391 728 S.E.2d 468, 476 (2012).

CONCLUSION

For the foregoing reasons, the Petition for Rehearing and Suggestion for Rehearing En Banc should be denied.

Respectfully submitted,

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July 8, 2021

ATTORNEYS FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County

The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

GENERAL T. LITTLE,

Appellant.

Appellate Case No. 2018-000561

PROOF OF SERVICE

I, Michael D. Ross, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing by email and by depositing two (2) copies of the same in the United States mail, addressed to Appellant's attorneys of record: ltraywick@robinsongray.com and Vordman Carlisle Traywick, III, Robinson Gray Stepp & Laffitte, LLC, Post Office Box 11449, Columbia, South Carolina 29211 and to rdudek@sccid.sc.gov and Robert M. Dudek, S.C. Commission on Indigent Defense, Division of Appellate Defense, P. O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 8th day of July 2021.

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

**APPELLANT’S REPLY IN SUPPORT OF PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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Pursuant to Rule 240(f), SCACR, Appellant General T. Little (Dr. Little) submits this reply in support of his petition for rehearing and suggestion that the Court rehear en banc the panel's decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021). For the reasons that follow, as well as those set forth in his petition, the panel should grant rehearing, issue a substituted opinion, reverse Dr. Little's murder conviction, and remand to the circuit court for a new trial. Alternatively, the Court rehear the case en banc and do the same.

ARGUMENT

Dr. Little writes this reply only to address four points. First, the State's skewed analysis of the exigent-circumstances doctrine is unavailing, and the search was not reasonable. Second, although the State seeks to run from Dr. Little's argument under article I, section 10 of the South Carolina Constitution, it is both preserved and meritorious. Third, the State's misconduct—mentioning a suppressed piece of evidence during closing arguments—did prejudice Dr. Little and was grounds for a mistrial. Fourth, while the State continues to argue other jurisdictions accept shoeprint identification evidence, our supreme court has not blessed outsole footwear impressions expert testimony in South Carolina, and the State thus was not entitled to a pass on its admissibility.

I. The State failed to establish exigent circumstances, and even if such circumstances existed, Deputy Colburn's illegal search unreasonably exceeded the scope and duration of those circumstances that purportedly demanded his warrantless entry into the curtilage of Dr. Little's home to conduct a search.

The State argues Dr. Little has confused the analysis for Fourth Amendment cases. Not so. In determining whether a search is reasonable, one must analyze the purpose for which the officer was there in the first instance.

Here, the State seeks to invoke the exigent circumstances doctrine to argue it was reasonable for Deputy Colburn to perform a safety sweep of the vehicles parked in the curtilage of the home. But when objectively looking at the totality of the circumstances, Deputy Colburn was

not conducting a safety sweep. Instead, viewing Deputy Colburn's testimony from an objective standpoint, it is clear he was conducting an illegal search. The justification manufactured by the State after the fact—that Deputy Colburn was looking for individuals in Dr. Little's vehicle—does not hold water in light of what was presented during the suppression hearing and trial.

Take the illegal fruits of his search: a smudge on the inside of the driver's side door and towels found in the floorboard. One does not find such infinitesimal matters when looking to see if a person is hiding in a car. It is unrealistic to claim that an officer searching for a missing person or dangerous person would notice such an infinitesimal detail as the smudge found here. Similarly, a review of the pictures confirms no one could have possibly fit into the tight space where the towels were found. Consider next the duration of the search. Deputy Colburn testified that he searched the vehicle twice over a 90-second period. The alleged reason for this intrusion onto Dr. Little's property—to search for persons who could have been hiding in vehicles—could have been ascertained in a few seconds. By the time he walked around Dr. Little's vehicle the second time, Deputy Colburn undoubtedly had already ascertained nobody was hiding in the vehicle.

The exigent circumstances justification is therefore a façade. Deputy Colburn was there to conduct a warrantless search to discover evidence to use against Dr. Little. Plain and simple. Such a search was not reasonable under the Fourth Amendment. If that was not enough, Detective Muirhead later came along and did the same thing. It is beyond dispute that officers had zero justification at that point to conduct an illegal search. The State does not and cannot argue to the contrary. In short, the State failed to show “the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence.” State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). Again, Dr. Little does not concede that the State met its burden of demonstrating exigent circumstances to avail itself of the exception in the first

place. See State v. Dobbins, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017) (“[A]bsent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present.”). 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. Further, Deputy Colburn had backup on the scene. But even if the Court moves past that step, the State’s argument necessarily must fail because the search was not reasonable in scope or duration. This is where Florida v. Jardines, 569 U.S. 1 (2013), comes into play.

In Jardines, contrary to the State’s representations, “the question” was “precisely whether the officer’s conduct was an objectively reasonable search.” Id. at 10. As the Court recognized, “that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered.” Id. And “their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do.” Id. A review of Deputy Colburn’s actions—making multiple laps around Dr. Little’s vehicle with a flashlight for over 90 seconds, paying such close attention to the interior of the vehicle that he was able to notice a smudge on the inside of a door and towels in the floorboard—demonstrates he was not clearing the vehicles to eliminate potential danger. Instead, he was plainly conducting a search for evidence. And that violates the Fourth Amendment because “the circumstances, viewed objectively,” did not “justify [the] action.” State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

The State, in its return, argues Dr. Little believes any warrantless intrusion into the curtilage of the home is unlawful. This is a straw man. Dr. Little never made such an argument. To be sure, the exceptions to the warrant requirement are well-defined in the law. But the State bears the burden of proving an exception applies. And here, the State wholly failed to meet its burden

in light of Deputy Colburn's inconsistent and puzzling testimony on the initial unlawful search. Notably, the State does not even attempt to grapple with the subsequent illegal searches of the vehicle. As much as Deputy Colburn's testimony was insufficient to invoke an exception to the warrant requirement, the State had absolutely no justification for illegally searching Dr. Little's vehicle while he was in custody. To date, the State still has not argued to the contrary.

As for the State's argument that Dr. Little's Herring distinctions "fall[] short," Resp. Return at 3, the State notably only addressed one of them. Importantly, in Herring, 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." Id. 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. Deputy Colburn, however, performed a thorough 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 did inculpate Dr. Little.

Nor was this a de minimis intrusion. The State, for instance, was not simply trying to determine the make and model of Dr. Little's vehicle to determine whether he was home. Cf. Herring, 387 S.C. at 211, 692 S.E.2d at 495. Officers ascertained this information from the street. Instead, Deputy Colburn performed a scrupulous search of the vehicle for the objective purpose of finding evidence. This post-hoc justification of exigent circumstances is simply not credible or reasonable. Seeing a vehicle's passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person posed a danger to those on his premises. Perhaps that is why the circuit court noted Deputy

Colburn never explained why it did. (R. pp. 160–61). Further, the State failed to address what “compelling need” existed “for official action” or why it had “no time to secure a warrant.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). The historical facts preceding the search do not support that argument. And a conclusory assertion of officer safety, standing alone, is insufficient to show probable cause for exigent circumstances. But that is all the circuit court had, and this Court affirmed in summary fashion. Respectfully, the Court erred.

When taking all of the circumstances into account, Deputy Colburn’s behavior objectively reveals a purpose to conduct a search—not a welfare check or a safety sweep—“which is not what anyone would think he had license to do.” Jardines, 569 U.S. at 10. At most, the State had a hunch that something was off that evening. But an “inchoate and unparticularized suspicion or hunch” will not do. Maryland v. Buie, 494 U.S. 325, 332 (1990) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). That is not the same as probable cause. With all due respect, no ordinarily prudent and cautious person, under the circumstances, would believe an invasive 90-second search in the curtilage of someone’s home was justified to protect the safety of officers or others. This is particularly true in light of Deputy Colburn’s testimony that he had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543).

In light of these repeated Fourth Amendment violations, all evidence obtained from the unlawful searches should have been suppressed as fruit of the poisonous tree. The circuit court abused its discretion by failing to exclude the evidence, and the panel erred in affirming.

II. The State’s late-breaking preservation argument is manifestly without merit, and the Court should reverse and remand on state constitutional grounds.

In its return in opposition to Dr. Little’s petition for rehearing, the State—for the first time in this case—argues “it is unclear” Dr. Little “even raised” the state constitutional argument. Resp. Return at 4. Not so.

A review of the record and briefs reveals that (1) Dr. Little raised the issue to the circuit court; (2) the circuit court ruled on it 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, (Br. App. at 9–10, 15, 27); (4) the State responded to the state constitutional argument in its brief (Br. Resp. at 14, 20); and (5) Dr. Little’s counsel addressed the issue during oral arguments on January 12, 2021. Put simply, the defense raised this issue at every level.

The State notably fails to cite any case law supporting its blinkered view of preservation in South Carolina. But see Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 284 (2012) (recognizing error preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants”). None exists. Instead, the State relies upon an inapposite case holding that an issue is abandoned on appeal when a party merely makes passing reference to it without citing any authority. See Resp. Return at 4 (citing S. Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012)). Dr. Little cited almost a full page worth of authority on the article I, section 10 issue, and those cases speak for themselves. See App. Br. at 9–10. If the Court disagrees with the federal issue, it can still find—under the facts and circumstances extensively outlined in Dr. Little’s brief—that the state constitutional issue requires reversal. No additional argument was necessary. Accordingly, the issue was not abandoned on appeal.

Procedural technicalities aside, the State is simply trying to run from this argument. In his brief, Dr. Little argued “searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. Br. App. at 10 (quoting State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)). He then continued to argue that the State’s illegal investigative tactics violated both the Fourth Amendment to the U.S. Constitution and the South Carolina

Constitution. Id. at 15, 27. As argued earlier, if the Court was not persuaded on the federal question—as was the case here—then our state constitution can “provide greater protection.” Id. at 10 (quoting State v. Counts, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015)).

The analyses necessarily overlap, and Dr. Little was not required to redundantly argue both separately. Simply put, the argument is that if the Court finds the search was reasonable under our Fourth Amendment jurisprudence, then it should nevertheless find it ran afoul of our state constitution that provides greater protection. See Counts, 413 S.C. at 168, 776 S.E.2d at 68 (quoting State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001)). As Dr. Little noted in the petition for rehearing, it is up to “the state judiciary to construct a precise meaning of this phrase” “unreasonable invasions of privacy” in article I, section 10 of the South Carolina Constitution. 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). The panel, however, overlooked this argument and failed to address it. This was error.

Turning to the merits, the State seeks to compare apples to oranges. Our supreme court’s analysis in Weaver hinged on the fact that, as of 2007, “there ha[d] never been a clear statement by the United States 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 State well knows, that is no longer the case. E.g., Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018) (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 the curtilage”). Further, Weaver was decided under the automobile exception to the warrant requirement. The U.S. Supreme Court made clear in Collins that approach was no longer valid. Here, on the other hand, the State is arguing exigent circumstances justified its unlawful search of Dr. Little’s vehicle parked within the curtilage.

Although Dr. Little is cognizant this Court cannot overrule precedent from our supreme court, the Court need not go so far here. Rather, it can merely distinguish Weaver on the grounds set forth above and leave the question regarding the continued viability of Weaver for another day when that issue makes its way to the Supreme Court of South Carolina. Because the State's actions here did not fit into an exception to the warrant requirement, even if the panel found they satisfied the Fourth Amendment's touchstone of reasonableness, they do not pass muster under article I, section 10 of the South Carolina Constitution. The State's trespass into the curtilage of Dr. Little's home to objectively conduct a search for evidence to use against him constituted an unreasonable invasion of privacy. See S.C. CONST. art. I, § 10.

III. The State's improper reference to the suppressed ring prejudiced Dr. Little.

While the State believes Matthews v. State provides an escape hatch for its improper conduct during closing arguments, that case actually cuts the other way. 350 S.C. 272, 565 S.E.2d 766 (2002). A review of that case shows what happened here was worse. In Matthews, the solicitor sought to vouch for another witness who actually testified, stating in general terms that he had corroborated the witness's testimony. 350 S.C. at 275, 565 S.E.2d at 767. Here, on the other hand, the circuit court forbade the State from mentioning the suppressed ring due to the unconstitutional means by which it was unlawfully seized from Dr. Little following a blatant Miranda violation. The State did so anyway and highlighted the never-before-seen-evidence on a PowerPoint slide that incredulously said "(no ring???)". (R. pp. 1161, 1306).

Thus, it does not matter whether the State said the ring had blood on it. Under South Carolina law, closing "[a]rguments must be confined to evidence in the record." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). Here, the State's closing argument wasn't. The State instead gave "the impression to the jury" it had "evidence not presented to the jury but known

by the prosecution which supports conviction.” Matthews, 350 S.C. at 276, 565 S.E.2d at 768. And the State conceded that the solicitor’s statement “went to the heart of the State’s case: connecting the victim’s blood to [Dr. Little].” Resp. Br. at 23. That is not harmless error. Reversal is thus required. Dr. Little deserves a new trial that is not tainted by such improper conduct in the waning hours of trial.

IV. Outsole footwear impressions testimony is not yet recognized in South Carolina, and the State was not entitled to a pass for failing to establish its admissibility.

When “considering the admissibility of scientific evidence,” 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.” State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Scientific evidence, of course, “is also subject to attack for relevancy and prejudice.” Id. at 19–20, 515 S.E.2d at 517.

In support of reliability, the State simply cites cases from other jurisdictions and summarily argues the Court properly found the evidence reliable. But the State ignores that the Court did not apply all the Council factors. Dr. Little will focus on two in particular. As for the first factor, the Court simply found “Claycomb testified she read publications on the subject and explained she was familiar with others experts’ research on fundamental footwear patterns.” Little, Op. No. 2021-UP-196, at 4. Which ones? The State never told the circuit court. Turning to the fourth factor, the Court concluded Claycomb “explained the procedures and steps she used when comparing footprint impressions.” Id. 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. Again, the State did not elicit testimony from Claycomb to establish consistency with any identifiable scientific laws and procedures.

While the State believes it was entitled to a pass on reliability because other jurisdictions have recognized the admissibility of outsole footwear impressions testimony,¹ the Supreme Court of South Carolina has not done so to date. In fact, in the only related case on the subject, our supreme court found footwear impressions evidence inadmissible in South Carolina. See State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (Jones I); State v. Jones, 383 S.C. 535, 557–58, 681 S.E.2d 580, 592 (2009) (Jones II). Interestingly, in that case, our supreme court rejected the publications and testimony of William Bodziak—the very individual under whom Claycomb trained—as unreliable. See id.; (R. p. 952). And the same holds true here.

In sum, 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. Following this process, Claycomb found in her report a “corresponding tread design,” but due to the quality of the photographs, she was unable to “conduct a further examination.” (Id. at 950). Although she found the “outsole design [was] similar,” she could not say it was the same shoe. (Id. at 976). Claycomb could not even say whether this was a left or right shoe. (Id. at 979). She also could not determine the shoe size. (Id. at 983). That is not reliable scientific testimony, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury. See Rule 403, SCRE.

Because this evidence directly linked Dr. Little to the scene of the crime, this purported expert testimony from one of the State’s investigating officers prejudiced Dr. Little, and the error was not harmless. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that

¹ Notably, those cases were not presented to the circuit court.

a reversal is mandated when a solicitor exploits “the [circuit] court’s imprimatur of [an officer] as an ‘expert’ . . . to the prejudice of the defendant” because a police “officer’s improper opinion [that] goes to the heart of the case is not harmless”). Thus, the Court should reverse and remand.

CONCLUSION

Deputy Colburn was not conducting a sweep to ensure officer safety. Rather, when objectively viewing the totality of the circumstances, Deputy Colburn was indisputably searching the vehicles parked in the curtilage of Dr. Little’s home to obtain evidence. That is illegal. And so the conviction cannot stand. The circuit court also abused its discretion in excusing the State’s misconduct and admitting prejudicial and unreliable expert testimony. The panel should therefore grant rehearing, issue a substituted opinion, and reverse and remand to the court of general sessions for a new trial. Alternatively, the Court should rehear the case en banc and do the same.

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Columbia, South Carolina
 July 13, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

PROOF OF SERVICE

I certify that I have served Appellant General T. Little’s Reply in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc on the following counsel by email on July 13, 2021.

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Columbia, South Carolina
July 13, 2021

The South Carolina Court of Appeals

The State, Respondent,

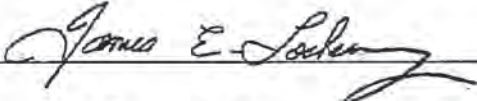
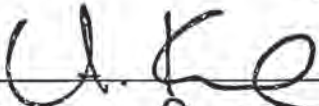
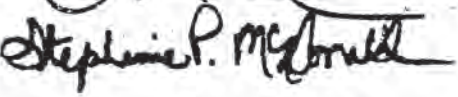
v.

General T. Little, Appellant.

Appellate Case No. 2018-000561

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

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- Alan McCrory Wilson, Esquire
- Vordman Carlisle Traywick, III, Esquire
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FILED
July 21, 2021

Scarlett Anne Wilson, Esquire
The Honorable Thomas L. Hughston, Jr.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

General T. Little, Appellant.

Appellate Case No. 2018-000561

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-196
Heard January 12, 2021 – Filed June 9, 2021
Withdrawn, Substituted and Refiled July 21, 2021

AFFIRMED

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of Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

PER CURIAM: General T. Little appeals his conviction for the murder of his wife, Barbara Little (Victim). Little argues the trial court abused its discretion by (1) refusing to suppress evidence found in Little's vehicle and home because officers conducted a warrantless search by looking through the window of his vehicle while it was in his driveway, (2) denying his motion for a mistrial, and (3) qualifying the State's witness as a footwear expert and admitting her testimony. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. We affirm the trial court's admission of evidence found in Little's vehicle and home. *See State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014) ("Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion."). The record showed Deputy Matthew Colburn was the first to respond to the crime scene, where he found a large pool of blood on the floor, blood on the walls, and towels and a blanket soaked in blood. He located the Victim, who was covered in blood, and was unable to determine whether the killer had used a firearm. Deputy Colburn made contact with Little, who agreed to meet him at the crime scene. When Little failed to appear, detectives sent Deputy Colburn to Little's home to locate him. Due to the exigencies presented by the violence at the crime scene—as well as Deputy Colburn's legitimate officer safety concerns—we find the evidence supports the trial court's ruling that Deputy Colburn's minimally intrusive search was reasonable. *See State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . ."); *id.* ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement."); *id.* ("Protecting the safety of police officers has also been held an exigent circumstance."); *State v. Dobbins*, 420 S.C. 583, 591, 803 S.E.2d 876, 880 (Ct. App. 2017) ("In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." (quoting *State v. Wright*, 416 S.C. 353, 369, 785 S.E.2d 479, 487 (Ct. App. 2016))); *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("The focus in the state constitution is on whether the invasion of privacy is *reasonable*." (emphasis added)); *Dobbins*, 420 S.C. at 592, 803 S.E.2d at 880 ("Exigent circumstances—such as imminent destruction of evidence, the potential for a suspect to flee, or 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." (emphasis added)).

2. We find the trial court did not err in denying Little's motion for a mistrial because he was not prejudiced by the PowerPoint slide. *See State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *State v. Rowlands*, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000) ("Whether a mistrial is manifestly necessary is a fact specific inquiry."); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). During the pretrial suppression hearing, the trial court suppressed the admission of Little's wedding ring, which had traces of blood on it, finding it was obtained from an unlawful search. During the State's closing, it presented a PowerPoint slide, which stated "no jewelry (no ring???)". The slide did not inform the jury of the blood evidence on the wedding band, and the slide was presented to the jury only briefly before the trial court ordered the State to take down the reference to the ring, which the trial court had excluded in its earlier evidentiary hearing. Without the broader context of the ring's blood evidence, the State's error did not prejudice Little, and we are unconvinced by Little's argument that because wedding bands are symbolic, the fact he was not wearing one inherently prejudiced him. *See Harris*, 340 S.C. at 64, 530 S.E.2d at 628 ("[F]or the defendant to be prejudiced, the misconduct must have affected the verdict."); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) ("A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

3. We find the trial court did not err by qualifying Dawn Claycomb as an expert in footwear examination and by admitting her testimony. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). Claycomb testified at length about her experience in footwear examination. She explained she worked in crime scene analysis for five years, trained for three years in footwear examination under the supervision of a qualified footwear impression expert, attended multiples classes, and passed a final competency test on footwear examination. *See State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) ("To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997))). Although she was not certified with the International Association of Identification and had never testified as an expert in footwear examination before, these factors go to the weight of Claycomb's

testimony, not its admissibility. *See White*, 382 S.C. at 273-74, 676 S.E.2d at 688 ("[D]ifferences in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." (quoting *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990))). Thus, the trial court did not err in finding Claycomb qualified to testify as an expert witness.

Further, we hold the trial court did not abuse its discretion in finding the substance of Claycomb's testimony was reliable. *See State v. Hewins*, 409 S.C. 93, 103, 760 S.E.2d 814, 819 (2014) ("An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support."); *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (holding the trial court must weigh the following factors to determine whether the underlying science is reliable: "(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"). First, Claycomb testified she read publications on the subject and explained she was familiar with other experts' research on fundamental footwear patterns. Second, she testified about the method she used in comparing footprint impressions and stated she had previously analyzed footwear evidence in fifteen to twenty cases. Third, Claycomb testified the South Carolina Law Enforcement Division conducts a peer review of her analysis to ensure quality control and to ensure another qualified footwear examiner agrees with her results. Fourth, she explained the procedures and steps she used when comparing footprint impressions. Thus, the trial court did not abuse its discretion in finding the substance of Claycomb's testimony was reliable. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 ("Reliability is a central feature of Rule 702 admissibility . . .").

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

**APPELLANT’S PETITION FOR REHEARING
OF THE COURT’S SUBSTITUTED OPINION**

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Pursuant to Rule 221(a), SCACR, Appellant General T. Little (Dr. Little) petitions the Court rehear its substituted decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed July 21, 2021). For the reasons that follow, the Court should grant rehearing, issue another substituted opinion, reverse Dr. Little’s murder conviction, and remand for a new trial.¹

ARGUMENT

Dr. Little writes only to address the new ground included in the Court’s substituted opinion. See id. at 2 (affirming the circuit “court’s admission of evidence found in Little’s vehicle and home” on statute constitutional grounds as well (citing State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (“The focus in the state constitution is on whether the invasion of privacy is reasonable.” (emphasis added))). Respectfully, the Court erred in relying upon Weaver to find officers’ illegal search in this case was reasonable. It was not.

To begin, the Court overlooked that our supreme court’s analysis in Weaver hinged on the fact that, as of 2007, “there ha[d] never been a clear statement by the United States 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. But that is no longer the case. E.g., Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018) (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 the curtilage”). Further, Weaver was decided under the automobile exception to the warrant requirement, which does not apply when a vehicle is parked on private property. Id. Here, the State argues exigent circumstances justified its unlawful search of Dr. Little’s vehicle parked within the curtilage.

¹ For the sake of brevity, Dr. Little expressly incorporates by reference all arguments raised in his June 24, 2021 petition for rehearing and suggestion for rehearing en banc of the panel’s June 9, 2021 opinion, as well as the July 13, 2021 reply in support, as additional grounds on which the Court should grant rehearing. Because the panel granted the petition for rehearing—instead of denying it when withdrawing and substituting the opinion—this filing is necessary to preserve the state constitutional argument on which this Court did not rule in its initial opinion but did via one sentence in the substituted opinion.

Although this Court cannot overrule precedent from the Supreme Court of South Carolina, the Court need not go there. Rather, it can merely distinguish Weaver on the grounds set forth above and leave the question regarding the continued viability of Weaver for another day.

Deputy Colburn testified he searched the vehicle twice over a 90-second period. And his purported justification was to ensure officer safety. But he could have 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 ascertained nobody was hiding in the vehicle. The State never argued to the contrary. Accordingly, the justification manufactured by the State after the fact is a façade. Deputy Colburn was there 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. And to this day, the State has never articulated any exigent circumstances that purportedly justified Detective Muirhead's subsequent illegal search.

In sum, Deputy Colburn's scrupulous and illegal search of the vehicle parked in the curtilage of Dr. Little's home was not reasonable. 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. Further, Deputy Colburn had backup on the scene. Yet he made multiple laps around Dr. Little's vehicle with a flashlight for over 90 seconds, paying such close attention to the interior of the vehicle that he was able to notice a smudge on the inside of a door and towels in the floorboard. With all due respect, that is not a sweep to ensure officer safety. Instead, he was plainly conducting a search for evidence. Cf. Elkins v. United States, 364 U.S. 206, 223 (1960) (stating "[i]f the government becomes a lawbreaker, it breeds contempt for the law"). And seeing a vehicle's passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person posed a danger to

those on his premises. Perhaps that is why the circuit court noted Deputy Colburn never explained why it did. (R. pp. 160–61). A conclusory assertion of officer safety, standing alone, is insufficient to show probable cause for exigent circumstances. But that is all the circuit court had. Respectfully, this Court erred by affirming in summary fashion. Suppression was required.

CONCLUSION

When objectively viewing the totality of the circumstances, Deputy Colburn was searching the vehicles parked in the curtilage of Dr. Little’s home to obtain evidence, not conducting a sweep to ensure officer safety. His trespass and meticulous 90-second search unconstitutionally invaded Dr. Little’s right to privacy, and it was neither reasonable nor justified under the circumstances. See S.C. CONST. art. I, § 10. The Court should therefore grant rehearing, issue another substituted opinion, and reverse and remand to the court of general sessions for a new trial.

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 July 30, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The StateRespondent,

v.

General T. Little.....Appellant.

PROOF OF SERVICE

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Columbia, South Carolina
July 30, 2021

The South Carolina Court of Appeals

The State, Respondent,

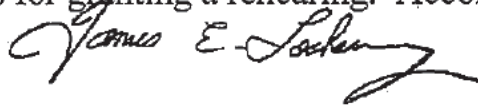
v.

General T. Little, Appellant.

Appellate Case No. 2018-000561

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

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FILED
Aug 23 2021

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