STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Aiken County
Honorable Doyet A. Early, III, Circuit Court Judge

Opinion No. 5954 (S.C. Ct. App. Filed November 30, 2022)

THE STATE,

RESPONDENT,

V.

RASHAWN VERTEZ CARTER,

PETITIONER.

APPELLATE CASE NO. 2018-000358

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 22, 2023.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err in upholding the trial court's refusal to suppress evidence gleaned from the police's warrantless use of petitioner's cell phone as a tracking device to obtain his real-time location in violation of the Fourth Amendment and the privacy clause of the South Carolina Constitution, and in finding such errors harmless?

2.

Did the Court of Appeals err in finding harmless the admission of an unredacted video of petitioner's interview with police, which was replete with hearsay, accusations petitioner was lying, and burden-shifting comments, in violation of State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015)?

STATEMENT OF THE CASE

Petitioner Rashawn Vertez Carter was indicted in Aiken County for first-degree burglary, kidnapping, armed robbery, and two firearm charges. R. 656. On February 12, 2018, petitioner was tried before the Honorable Doyet A. Early, III, and a jury. R. 16. Elizabeth B. Young and Heather M. DeLoach represented the State. R. 16. Michael W. Chesser represented petitioner. R. 16. The jury convicted petitioner, and Judge Early imposed concurrent sentences amounting to thirty-five years' imprisonment. R. 599. Petitioner filed a notice of appeal.

On October 14, 2020, a panel of the Court of Appeals consisting of Judges McDonald, Konduros, and Lockemy heard oral argument on petitioner's appeal. On November 30, 2022, the court issued a published decision affirming petitioner's convictions. State v. Carter, 438 S.C. 463, 884 S.E.2d 195 (2022). On March 22, 2023, the court denied petitioner's petition for rehearing. Id. This petition for certiorari follows.

STANDARD OF REVIEW

"Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022), reh'g denied (Nov. 17, 2022). The same standard of review is used to analyze the state constitutional question. State v. German, Op. No. 28149, ___ S.C. ___, ___ S.E.2d ___ (April 5, 2023).

The standard of review for Issue 2 is abuse of discretion. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015) (internal quotation omitted).

ARGUMENT

1.

The Court of Appeals erred in upholding the trial court's refusal to suppress evidence gleaned from the police's warrantless use of petitioner's cell phone as a tracking device to obtain his real-time location in violation of the Fourth Amendment and the privacy clause of the South Carolina Constitution, and in finding such errors harmless.

Reasons for Granting Certiorari

This Court should take petitioner's case to consider the substantial and novel questions presented. Instead of getting a warrant, the police sent an "exigency request" to petitioner's cell phone company. The company then gave the police petitioner's real-time location. The state converted petitioner's phone into a real-time tracking device.

The police's warrantless use of petitioner's phone to track his real-time location is a question of first impression in South Carolina. Rule 242(b)(1), SCACR. The question of whether exigent circumstances applies to real-time tracking was specifically left open by the United States Supreme Court in Carpenter v. United States, 138 S.Ct. 2206 (2018). The propriety of the state's warrantless conversion of private property into a tracking device is a substantial state and federal constitutional question and is a vitally important privacy question concerning the government's surveillance powers. Rule 242(b)(4), SCACR. Finally, the Court of Appeals' finding the error harmless under both the first and second issues on appeal directly conflicts with this Court's decision in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). Rule 242(b)(3), SCACR.

Factual and Procedural Background

The police obtained petitioner's real-time information from his cell-phone provider without a warrant by claiming an exigent circumstance. R. 221-230. They claimed this exigent

circumstance existed and bypassed the warrant requirement despite lacking any probable cause to arrest or even detain petitioner Rashawn Carter. R. 30-34, 42-44, 48-52. When they found Carter by converting his personal property into a tracking device, they did not arrest him and repeatedly testified that Carter was free to leave at any point as they drove him from Columbia to Aiken for an interview. R. 30-34, 42-44, 48-52. Even after the interview, the police did not arrest Carter and he left with a friend. R. 39.

The police ignored the warrant requirement of the Fourth Amendment and the privacy clause of the South Carolina Constitution in response to a robbery and shooting at a drug "stash house" in Aiken. R. 446-447. Melvin Chandler dealt cocaine and crack in Aiken. R. 428. His girlfriend was Elizabeth Miller. R. 427. Chandler used Miller's house to keep the majority of his cocaine and money (the "stash house") and another location to deal drugs to the public (the "trap house"). R. 446-447. R. 435-436.

Miller knew Chandler was a drug dealer. R. 92. In the early morning hours of May 9, 2015, Miller was sleeping when she heard a "big kaboom." R. 97-98. Three men came into her room with guns, demanding to know where the "bread" was. R. 98-99. Their faces were covered except for their eyes. R. 98. She could not identify any of the intruders. R. 122.

Keith Byrd lived near Miller and was on his back porch for a smoke when he saw the intruders heading to Miller's house. R. 133-137. Byrd called Chandler and told him what he saw. R. 138. Byrd did not go to Miller's house, but then heard multiple gunshots. R. 139-140. Before the police arrived, Chandler came to Byrd's house and gave him a sandwich bag of money to hold. R. 140.

After Chandler got Byrd's call, he called his friends "G" and "Trill." R. 432-433. He said they were his friends and he called them for help. R. 433.

During the middle of the intruders' assault on Miller in her bedroom, things suddenly "got really quiet." R. 102-103. She heard one of the men say, "Oh, shit," and realized none of them were in her room. R. 102-103. Using the opportunity to escape, she looked out of her bedroom door and saw a body "laying out of the bathroom." R. 103. Miller ran to her neighbor's house and then heard gunshots. R. 104.

One of the first officers on the scene arrived in time to hear the gunshots. R. 144. He met up with "two other officers" who were clearing the house. R. 146. Inside he saw a dead black male who had been shot in the head. R. 146-147. The police took a phone and ID from the dead man, who turned out to be Darius Scruggs. R. 147. R. 83. The solicitor told the jury in her opening that Scruggs was shot by an unknown person. R. 83. Petitioner was charged with crimes related to the invasion of Miller's house, not with anything related to the death of Scruggs.

Investigator William Cameron was one of the officers who went to Miller's house and talked to the witnesses on the scene. R. 458-461. The solicitor asked Officer Cameron if "different investigators [were] doing a bunch of different things at the same time." R. 462-463. Officer Cameron responded, "There was a lot of people doing a lot of different things at the same time, yes, ma'am." R. 463.

Officer Cameron went from the scene to the hospital and met with Darius Scruggs' family. R. 463. He met Darius Scruggs' brother, Patrick Neely. R. 276. R. 463-464. Neely gave Cameron "information on the timeline of his evening, who he was with, where he was at, gave me a couple of phone numbers of a subject who had called him that morning and told him that his brother was shot. . . ." R. 463. He also gave Cameron a phone number "related to" Carter. R. 463. Officer Cameron relayed the information to officers in Aiken "which stated

some balls rolling in Aiken, on—on—you know, finding out who these phone numbers belonged to and what have you." R. 464.

One of these officers, Matthew Morlan, testified during the Denno hearing that another officer, Detective Jeremy Hembree, found Carter based on tracking his phone. R. 41-42. Defense counsel asked whether the police got a search warrant to track Carter and Officer Morlan replied, "It was an exigent order." R. 42. Defense counsel asked if the "exigent order" was "obtained from a judge" and Officer Morlan replied, "No, sir, we can do an exigent order through the phone companies if the carriers agree with what we want as far as—due to the circumstances." R. 42-43.

The officers used Carter's phone to track his movements and confronted him in Columbia. R. 30. Officer Morlan and Detective Colindres, who was part of an ATF task force, saw a rental car they suspected was involved in the home invasion and saw Carter walking around talking on his cell phone. R. 30-31. They approached Carter and he agreed to ride with them to Aiken for an interview. R. 30-34. Officer Morlan stated that Carter was not under arrest, went with the officers voluntarily, and was free to leave at any time. R. 33-34. After the interview, Carter was still free to leave and left with a friend who followed him to Aiken. R. 38, 44, 52. Defense counsel asked Detective Colindres "what was exigent if you weren't even going to require him to come back with you to Aiken?" R. 52. The detective replied, "Well, it's just the nature of the case itself." R. 52. Judge Early admitted the statement taken by the police in Aiken. R. 59-60.

At the beginning of a day of court during the middle of the trial, defense counsel moved to suppress Carter's statement based on the Fourth Amendment and the South Carolina Constitution. R. 218-221. Petitioner argued that using his phone to track his whereabouts

constituted a warrantless, illegal search. R. 218-221. Defense counsel informed Judge Early that the United States Supreme Court heard oral argument the previous November on this issue in Carpenter v. United States, which was decided after the trial. R. 219-221. R. 231-236. Carpenter v. United States, 138 S.Ct. 2206 (heard Nov. 29, 2017; decided June 22, 2018).

In response, the State proffered the testimony of Officer Hembree about how he obtained Carter's real-time location without a warrant. R. 221-236. Officer Hembree sent an "exigent request" to Carter's cell phone company. R. 221-222. R. 639 (Court's Ex. 2). On the form, it states:

> I hereby certify that I am a member of the above named government agency and **have been granted authority by that agency** (or as a 911 operator, am acting on behalf of someone granted that authority) **to determine and declare an exigent circumstance involving:**
>
> a) immediate danger of death or serious physical injury to any person,
> b) conspiratorial activities threatening the national security interest, or
> c) conspiratorial activities characteristic of organized crime

R. 639 (Court's Ex. 2) (emphasis added). Officer Hembree described the basis of the request on the form:

> On 05/09/2015 the Aiken Department Public Safety responded to a home invasion in which shots were fired. Upon arrival a male was located with a gunshot wound to the head. The investigation has provided us with a telephone number for an unknown individual who was involved in the incident. The male located with the gunshot wound has seen [sic] deceased as a result of the gunshot wound.

R. 639 (Court's Ex. 2). Officer Hembree asked the phone company for current subscriber information, call detail records and "Real-Time Location of the Mobile Device (E911 Locator). R. 639 (Court's Ex. 2).

Describing the reason for using extrajudicial path during the proffer, Officer Hembree said, "We believed [petitioner] was a part of the the, the group that had committed the home invasion," and after stating his belief that the group was armed said, "So we felt that there was a

need to get them off the street as soon as possible." R. 224. The phone company complied with Officer Hembree's request and began sending emails every fifteen minutes to him with the location of the device. R. 225. Carter's phone became a tracking device accurate to "within 11 meters." R. 233.

Officer Hembree acknowledged the police did not get an arrest warrant for Carter before going to Columbia. R. 228. When asked why the police did not get a search warrant instead of the "exigent order," he replied:

> It was a fluid scene that morning. We were still actively investigating the scene. **So it wasn't feasible for me to go away for a certain amount of time to obtain a search warrant, locate a judge,** just for call detail records because search warrant won't provide us with location information . . . at the time.

R. 229-230 (emphasis added).

The State argued using Carter's cell phone to track him in real-time was not a search, but "strictly an attempt to gain the information from the company to locate the person." R. 232. Petitioner argued that getting a person's location from the phone was a search and protected by the Fourth Amendment and the South Carolina Constitution. R. 234. Petitioner asked that the interview and information from the encounter with police in Columbia was fruit of the violation of Carter's rights and should be suppressed. R. 234. Judge Early analogized the police's activity to a pen register and said the police were "simply asking for pings." R. 235-36. He reasoned that because the police did not listen to any communications, they did not invade Carter's privacy and denied the motion to suppress. R. 235-36.

The Court of Appeals' Opinion

The Court of Appeals held that the exigent circumstances exception to the warrant requirement applied to this search. State v. Carter, 438 S.C. 463, 471-72, 884 S.E.2d 195, 199-200 (Ct. App. 2022). The court credited Officer Hembree's testimony that it was not feasible to

get a warrant. Id. The court also stated the warrantless request to the cell phone provider "was not a standard criminal investigation seeking cell phone data; rather this request sought to address an ongoing emergency because Carter was potentially armed and dangerous, had been involved in a violent crime only hours prior to the request, and left his co-conspirator for dead when he fled Hahn Village." Id.

In a footnote, the court, in conclusory fashion, stated that the good faith exception to the warrant requirement from Davis v. United States, 564 U.S. 229 (2011) applied. Id. at n.6. The court's analysis of the South Carolina Constitution was contained in one sentence in this footnote, concluding that its ruling was "dispositive" of this ground for relief. Id.

Legal Analysis

Fourth Amendment

The police needed a warrant. The Court of Appeals' Opinion omits several key facts that undercut its exigent circumstances analysis. The central factual mistake is assuming the police knew that Carter was a participant in the home invasion when they converted his cell phone into a tracking device. The police did not arrest Carter when they found him in Columbia. They did not approach Carter with guns drawn. The police repeatedly insisted Carter was not under arrest and that he voluntarily accompanied them to Aiken. Finally, even after they finished interrogating Carter, **they let him go**. At no point did the police treat Carter as if he were a fleeing suspect who presented a great danger to the community. The court omitted these important points from its analysis.

During Officer Hembree's proffer, he first said, "We believed [petitioner] was a part of the, the group that had committed the home invasion." R. 224, l. 1 – 9. He then said that Patrick Neely gave them the number used to make the exigency request. R. 224, l. 18 – 225, l. 3. On

cross-examination, Officer Hembree said they did not know the phone number belonged to Carter at the time they got Carter's real-time location from T-Mobile. R. 227, l. 11 – 17. This fact was omitted from the court's opinion.

The court mistakenly said that getting a search warrant was "not feasible" because a warrant for historical CSLI "would not have provided Carter's real-time location." Carter at 472, 884 S.E.2d at 199. Nothing limits the police from seeking a warrant for real-time location information. The police get warrants for GPS trackers and wiretaps that provide real-time information. This assertion by Officer Hembree makes no sense. R. 230, l. 2 – 7. To the extent that Officer Hembree meant getting a warrant was not feasible because of the time involved, multiple officers were at the scene, Officer Hembree had time to fill out the T-Mobile forms and communicate with the company, two officers tracked Carter, an officer went to the hospital, and the ATF task force was involved. R. 30-31. R. 41-42. R. 144. R. 462-464. The police had the manpower and the time to get a warrant.

The court failed to distinguish the violent circumstances of the crime from the exigency of finding Carter. A violent crime with an unknown perpetrator does not give the police *carte blanche* to claim an exigency with respect to every action they take. The exigency must relate to the action taken. For example, if the police find the body of someone who has been murdered, the police cannot obtain real-time information for every person or phone number contained in the dead man's phone without a warrant. The murder may be an exigency, but finding the real-time whereabouts of an acquaintance in the victim's phone is not an exigency. Without enough information to arrest or even detain Carter, no exigency existed with respect to Carter.

The court erred in applying the Davis good-faith exception to this case. Id. at n.6. In order for Davis good-faith to apply, the police must rely on "binding appellate precedent." Davis

at 232. The Court cites a Fourth Circuit case, but Fourth Circuit precedent is not "binding appellate precedent" in South Carolina. South Carolina's courts are bound by decisions of our state's appellate courts and the United States Supreme Court, not the federal intermediate appellate courts. The Circuit Courts' decisions cannot form the basis of Davis good-faith. No decision specifically authorized this kind of warrantless search.

The opposite is true. As the Court said in Carpenter v. United States, 138 S.Ct. 2206, 2220-23 (2018), in which it relied heavily on decisions available to the police at the time of this search, (Riley v. California, 134 S.Ct. 2473 (2014) and United States v. Jones, 565 U.S. 400 (2012)), the Court held that "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Carpenter, 138 S.Ct. at 2217. "Whether the Government employs its own surveillance technology as in Jones or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search." Id. The United States Supreme Court—in Jones, Riley, and Carpenter—has demonstrated its clear intent to require judicial approval when the government seeks to use new developments in technology to maintain constant surveillance over its citizens. See also, Kyllo v. United States, 533 U.S. 27, 35 (2001) (stating that the Court would not leave homeowners "at the mercy of advancing technology"). It also seems clear that after Jones, which held that the police needed a warrant to use a GPS tracker, converting a cell phone into a tracker without a warrant is an illegal search and Davis should not apply. Regardless, the police should not get a free illegal search every time technology makes an incremental advancement.

South Carolina Constitution

The court erred in failing to conduct a full legal analysis under the South Carolina Constitution. The sum of the court's state constitutional analysis is a single sentence equating it to the federal constitution. Carter at n.6. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "The genesis of the privacy provision related solely to modern technology and the ever-increasing volume and acquisition of data and personal information." Planned Parenthood South Atlantic v. State, 438 S.C. 188, 310, 882 S.E.2d 770, 835 (2023) (Kittredge, J., dissenting). An example of the greater protection is the requirement of reasonable suspicion before conducting a "knock and talk." State v. Counts, 413 S.C. 153, 161, 776 S.E.2d 59, 63 (2015).

Just as our Supreme Court recognized a greater privacy protection in the home in Counts, a strict interpretation of exigent circumstances as it relates to digital privacy comports with our state constitutional right. Forrester cited the study of the state constitution by the West Committee and its conclusion that greater protection was needed from "the emergence of new electronic technologies that increased the government's ability to conduct searches." Forrester at 647, 541 S.E.2d at 842 (citing Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting 6 (Sept. 15, 1967)). The West Committee suggested revising the constitution "to take care of the invasion of privacy through modern electronic devices." Id.

The Legislature was concerned with the potential of electronic devices to deprive citizens of their privacy—**in 1967**. That concern was well-founded as every citizen of this state now

carries in their pocket an electronic device that the police can convert to a real-time tracker. If the state right to privacy is to mean anything, the police should not be able to use this technology without a warrant. Under the greater state right of privacy—which was drafted to protect citizens from the exact type of technological intrusion that occurred in this case—a stricter application of the exigent circumstances requires suppression.

Davis Good-Faith Should Not Apply Under the State Constitution

The court erred in assuming that the Davis good-faith exception exists under the state right to privacy or that it would be interpreted as broadly as under the federal constitution. The expansion of the good faith exception by the federal courts in Davis has been greatly criticized by legal scholars for allowing police a grace period during which they do not need to seek warrants when they use a new technology. See generally Wayne R. LaFave, 1 Search & Seizure § 1.3(h) (5th ed. 2012); Orin S. Kerr, Fourth Amendment Remedies and Development of the Law: A comment on Camreta v. Greene and Davis v. United States, 2011 Cato Sup. Ct. Rev. 237 (2011). The Davis rule gives the police little incentive to seek the approval of a magistrate because they know that an appellate court must give them explicit warning that their behavior violates the Fourth Amendment before the exclusionary rule will apply.

The most reasonable interpretation of our state right to privacy would be to require a warrant every time a new advance in technology is made. The police should not assume, under our state constitution, that if a court has not expressly prohibited the warrantless use of a technology that they can use it with impunity. The erosion of privacy by technology has gotten exponentially worse since 1967. The members of the West Committee would be shocked and horrified at law enforcement's ability to penetrate the private lives of South Carolinians through their cell

phones. Cameras are on street corners and doorbells. License plate readers log and store forever the comings-and goings of citizens on our highways.

The rate of technological advance far outstrips the ability of the law to keep pace. Under the Davis regime, the police have every incentive to use technology to invade citizens' privacy until an appellate court forbids it. The gap between the use of a new technology and an appellate decision restricting its use will be years. The Court of Appeals erred in finding that Davis good-faith applies, especially when dealing with a technological advance leading to a privacy intrusion. This Court should grant certiorari and order full briefing on this important privacy issue.

2.

The Court of Appeals erred in finding harmless the admission of an unredacted video of petitioner's interview with police, which was replete with hearsay, accusations petitioner was lying, and burden-shifting comments, in violation of *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015).

Prior to trial, petitioner filed a motion in limine to suppress and redact the video of petitioner's interrogation. R. 640 (Court's Ex. 4). Petitioner provided a lengthy list of objectionable statements by the investigators, including hearsay, accusations of lies, and burden shifting. R. 640 (Court's Ex. 4). The trial court heard argument on the motion at a pretrial hearing and again at trial. Hearing R. Jan. 8, 2015, 4 – 5. R. 71-73. The Court denied all of petitioner's motions and the unredacted video was played for the jury. R. 71-73. R. 337-43. State's Ex. 9.

The Court of Appeals correctly found that admission of the video was error under Brewer, but incorrectly found the error to be harmless. When this Court reviews the video of this interrogation, they will see the close similarity to the interview in Brewer. In Brewer, the

defendant was arrested following two separate shootings at a night club in Beaufort. 411 S.C. at 403-404, 768 S.E. at 657. The first shooting occurred when the night club owner confronted Brewer over the gun he was carrying. Id. Brewer responded by pulling out his pistol and pointing it at the owner's head. Id. Brewer then fired a shot inside the night club, hitting a nearby bystander. Id.

The second shooting occurred while Brewer and his friends fled the night club. Shots were fired by at least two individuals, including Brewer and one other identified person. Id. Another bystander was struck during the second shooting and killed. For unknown reasons, police only pursued Brewer for the second shooting. Id. at 405, 768 S.E.2d at 658.

Beaufort County Sheriff's Deputies Interrogated Brewer. He waived his Miranda rights and denied any involvement in the shootings. Id. Investigators repeatedly told Brewer that numerous witnesses had identified him as the shooter in what the Court described as "hearsay-laden questions and comments." Id. Brewer attempted to stop the interrogation on several occasions, but the police persisted. During the interrogation, investigators repeatedly urged Brewer to "prove his innocence" and to produce his gun so that they could clear him from suspicion. Id.

This Court reversed Brewer's conviction for the fatal, second shooting holding that the investigators repeated references to eyewitness identifying Brewer as the shooter constituted inadmissible hearsay. Id. at 406-407, 768 S.E.2d at 659. "During the interrogation, investigators frequently referenced and quoted many purported eyewitnesses . . . . This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." Id.

This Court specifically rejected the State's argument that the investigators questions were necessary to understand the context of the interrogation. Id. While not creating a categorical rule against allowing investigators' questions to be played before the jury, Brewer stressed that "caution must be exercised in the admission of such evidence to ensure that all out of court statements" are properly admissible. Id.

Despite not being raised by the defense on appeal, this Court made clear that the admission of investigator's repeated insistence that Brewer prove his innocence was a "grave Constitutional error." Id. at 408, 768 S.E.2d at 659.

This Court also rejected the State's contention that the admission of the interrogation video was harmless error with respect to Brewer's murder conviction. Id. at 409-410, 768 S.E.2d at 660. Evidence of Brewer being the second shooter was circumstantial and there were at least two shooters. Under these circumstances, the improper admission of the interrogation was not harmless.

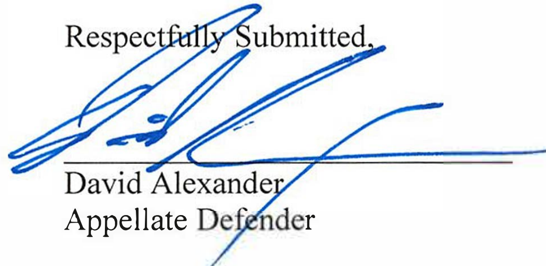
In a concurring opinion, Chief Justice Beatty held that the admission of the interrogation video constituted a structural error, rendering harmless error analysis improper. Id. at 410-412, 768 S.E.2d at 661-662. "[T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent." Id.

The video admitted in this case contains the same types of inadmissible statements in Brewer, as thoroughly delineated in defense counsel's motion. R. 640 (Court's Ex. 4). For example, the officers tell Carter they have "some of your people saying they were with you at 2 and 3 in the morning" and asks why these people would lie. R. 640 (Court's Ex. 4). This statement is hearsay and pitting witnesses. The police tell petitioner to "cut the bullshit" and that he "started lying to us right off the bat." R. 640 (Court's Ex. 4). The police tell petitioner, "But

you got to answer for what you did, the best thing you can do is say you know what guys," which is burden-shifting. R. 640 (Court's Ex. 4). They recount petitioner's lies and ask him to start over with the truth. R. 640 (Court's Ex. 4). Many of the references to hearsay are unattributed. R. 640 (Court's Ex. 4). The video is replete with these kinds of statements by the officers and should have been suppressed or thoroughly redacted. The Court of Appeals erred in finding the admission of the video harmless and this Court should grant certiorari and reverse.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari, order further briefing, and ultimately reverse petitioner's convictions and remand for a new trial.



Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2023.