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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

FINAL BRIEF OF RESPONDENT

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I.

In light of the law-of-the-case doctrine, is Appellant's appellate challenge to the propriety of the trial judge's ruling denying the suppression motion related to the search warrant sent to Snapchat capable of being successful on appeal when Appellant has not challenged the actual grounds upon which the trial judge denied the suppression motion, which means those unchallenged grounds have now become the law of the case regardless of whether they were right or wrong?

II.

Did the trial judge abuse his broad discretion or otherwise err by finding several Snapchat photographs were properly authenticated when the State authenticated those photographs by establishing in multiple ways a basis upon which a factfinder could reasonably conclude they were what they were purported to be, which was all that was required for those photographs to be authenticated?

III.

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STATEMENT OF THE CASE

In September of 2019, Appellant Marc Yasin Mckeiver was arrested after he sold a large quantity of methamphetamine to a confidential informant during the course of a controlled drug transaction. In November of 2019, the Dillon County Grand Jury indicted Appellant for trafficking in methamphetamine. On January 10, 2022, a jury trial was commenced in the Dillon County Court of General Sessions with the Honorable Paul M. Burch, circuit court judge, presiding.[1] At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a mandatory twenty-five-year term of imprisonment and $50,000 fine. A few days later, Appellant filed a motion seeking a new trial, and, on March 10, 2022, the trial judge conducted a hearing on the matter in the Dillon County Court of General Sessions. At the conclusion of the hearing, the trial judge orally denied the motion. Appellant then timely filed a notice of appeal.

[1] By the time of his trial on the trafficking in methamphetamine charge, Appellant—in total—had nine pending charges in Dillon County stemming from four distinct incidents, and he was facing a potential sentence of up to 135 years as a result of those charges. (R. pp. 29-30; p. 108; p. 365).

STATEMENT OF FACTS

Over the course of several months in 2019, Agent James Martin of the South Carolina State Law Enforcement Division ("SLED") spearheaded a drug investigation targeting Appellant, who was suspected of being a drug dealer, in conjunction with a number of other law enforcement entities.[2] (R. pp. 95-96; p. 104; pp. 107-108; pp. 141-142). As part of that investigation, Agent Martin decided to attempt to surreptitiously purchase narcotics from Appellant with the assistance of a cooperating informant. (R. pp. 142-143; p. 206).

In carrying out that plan, Agent Martin met up on September 9, 2019, with both SLED Agent Alex Blake, who was working in an undercover role, and the confidential informant at an arranged location. (R. p. 95; p. 143; p. 146; p. 206; p. 213). Upon meeting together there, Agent Blake—in Agent Martin's presence—searched the informant and verified he was not in possession of any concealed drugs, weapons, or money. (R. pp. 144-145; pp. 167-168; pp. 207-209; p. 217). Agent Martin then equipped the informant with a hidden camera to record the transaction along with a separate device designed to allow the transaction to be live-monitored, and he also gave the informant $700 in pre-recorded government funds. (R. p. 145). Following that, the informant got into Agent Blake's vehicle, and the two set out to conduct the controlled narcotics buy. (R. p. 95; p. 145).

Along the way, the informant called a particular phone number he identified as Appellant's—whom he referred to both by name and as "Duke"—and, with Agent Blake listening in, Appellant responded by inviting the informant to come to a particular address. (R. pp. 96-97; p. 100; p. 109; p. 159; pp. 209-211; p. 215). Agent Blake then drove the informant to

[2] Specifically, in addition to SLED, the United States Drug Enforcement Administration, the Dillon Police Department, and the Dillon County Sheriff's Office were all involved in the investigation. (R. p. 142).

that address, which was the address of a double-wide trailer home located in Hamer, South Carolina. (R. p. 104; pp. 209-212; State's Ex. # 1 (Transaction Recording)).

Upon arriving there, the informant exited Agent Blake's vehicle, approached the home, and announced his presence. (R. p. 211; State's Ex. # 1). Seconds later, Appellant greeted the informant at the door, allowed him inside, and escorted him to a back room. (R. p. 223; State's Ex. # 1). The two briefly conversed in that location, and, as they did, the informant's recording equipment captured images of Appellant with a plastic bag in the palm of his hand. (R. p. 229; State's Ex. # 1). Following that, the informant quickly left the residence and returned to Agent Blake's vehicle, and, as he was doing so, Agent Blake personally observed Appellant peer out from the residence and look in their direction. (R. pp. 104-105; p. 212).

Once he was safely back inside the vehicle, the informant confirmed to Agent Blake he had successfully been able to purchase two bags containing $500 worth of uniquely-shaped multi-colored pills from Appellant.[3] (R. p. 105; pp. 196-197; pp. 212-213; pp. 239-241; pp. 212-213; State's Ex. # 6 (Photograph)). The two then drove away from the scene and met back up with Agent Martin. (R. p. 213). When they did, Agent Martin took possession of and secured two plastic bags containing approximately 500 pills along with the remaining $200 in government funds. (R. p. 150; p. 173; pp. 213-214). Likewise, the confidential informant was again searched, and, at that time, he was not in possession of anything. (R. p. 215).

A few days later, Appellant was arrested for selling the pills to the confidential informant. (R. p. 426). Subsequent to that, Appellant was indicted for trafficking in methamphetamine, and he elected to proceed forward to trial. (R. p. 6; pp. 427-428).

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[3] Regarding their shapes, some of the pills were shaped like skulls, some were shaped like mushrooms, some were shaped like the Batman logo, some were shaped like a "mud flap girl," and some were shaped like the ghost from the Snapchat logo. (R. pp. 196-197; pp. 202-203; pp. 212-213; pp. 239-241).

During the course of Appellant's trial, Agent Martin and Agent Blake recounted the details of the controlled buy and confirmed the informant—who was carefully searched prior to the transaction—returned with two bags of distinctively-shaped multi-colored pills after meeting up with Appellant as had been arranged.[4] (R. pp. 141-185; pp. 192-229). In addition to that, a recording of the transaction was admitted into evidence over objection and played for the jury.[5] (R. pp. 154-155). On that recording, the informant was depicted entering a residence after being greeted at the door by Appellant, following Appellant—who had a plastic bag in his hand consistent with what was ultimately purchased from him—to a back room, conferring briefly with Appellant, and then promptly leaving the residence within less than two minutes of his arrival. (R. pp. 154-157; p. 173; p. 212; p. 229; State's Ex. # 1). Furthermore, a few photographs depicting both Appellant and bags of pills identical in shape to the ones purchased by the informant were admitted into evidence over objection and identified as having been obtained from a Snapchat account associated with the same phone number used to call Appellant prior to the transaction. (R. pp. 158-159; pp. 161-162; pp. 192-197; pp. 209-210). Beyond that evidence, Maribeth McCormack, a forensic chemist at SLED, testified about her analysis of the pills purchased during the controlled buy and confirmed they constituted at least 108.69 grams of methamphetamine.[6] (R. pp. 233-237; p. 242; pp. 247-248; pp. 372-375).

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[4] By the time of trial, Agent Blake was working for the Federal Bureau of Investigation. (R. p. 95).

[5] Significantly, the recording was played for the jury without sound because the informant was murdered at some point after the incident date and, thus, was obviously not present for trial. (R. p. 143; p. 155).

[6] McCormack conducted her analysis by separating pills from each of the two plastic bags into like groups based on color and shape and then testing a representative sample from each like group. (R. pp. 239-241; p. 245; p. 255). Pursuant to policy, McCormack stopped her analysis once she reached a total threshold weight exceeding 100 grams. (R. p. 241). However, her

Following the presentation of all that evidence, the parties rested their cases, and the case was ultimately submitted to the jury. (R. p. 274; p. 284; p. 346). After deliberating on the matter for a little over two hours, the jury convicted Appellant as indicted. (R. pp. 352-353).

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preliminary testing prior to reaching the threshold weight suggested the remaining untested pills were indicative of methamphetamine. (R. p. 243).

ARGUMENT

I.

Pursuant to the law-of-the-case doctrine, Appellant's appellate challenge to the propriety of the trial judge's ruling denying the suppression motion related to the search warrant sent to Snapchat cannot be successful on appeal as a matter of law because Appellant has not challenged the actual grounds upon which the trial judge denied the suppression motion, which means those unchallenged grounds have now become the law of the case regardless of whether they were right or wrong.

Appellant contends the trial judge erred by refusing to suppress a number of photographs obtained from Snapchat pursuant to a search warrant issued by a magistrate in Dillon County. As support for that contention, Appellant maintains the search warrant was invalid because the magistrate did not have authority to issue a search warrant to Snapchat—an out-of-state entity—for records not physically located in South Carolina. Likewise, Appellant maintains the search warrant was also invalid because the State purportedly failed to provide sufficient evidence establishing Snapchat was in possession and control of property our state's search warrant statute permits to be seized pursuant to a South Carolina warrant. Importantly though, the trial judge did *not* deny the suppression motion upon finding the search warrant was a valid one. Instead, the trial judge—who did not have the benefit of our Supreme Court's recent decision in State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022), for guidance—*agreed* with defense counsel's argument about the invalidity of the search warrant and explicitly found the magistrate's jurisdiction ended at the county line.[7] Nevertheless, the trial judge denied the suppression

[7] In Warner, our Supreme Court—subsequent to Appellant's trial—analyzed our state's search warrant statute to determine whether a magistrate in South Carolina can validly issue a search warrant to an out-of-state entity for digital data or records not physically located in the state. State v. Warner, 436 S.C. 395, 402, 872 S.E.2d 638, 641 (2022). Upon analyzing the language of Section 17-13-140 of the South Carolina Code of Laws, the Supreme Court found the issuance of such a search warrant was not beyond the power of a South Carolina magistrate. Id. at 403-404, 872 S.E.2d at 642. In reaching that conclusion, the Supreme Court determined limiting language in the statute concerning jurisdiction was *not* applicable to the portion of the statute

motion not based on a finding the search warrant was valid but based on his independent conclusions: (1) the investigating officers acted in good faith in obtaining and relying upon the judicially-issued search warrant because their actions were consistent with common practices in South Carolina at that time;[8] and (2) Appellant had no expectation of privacy in the information obtained from the search warrant under the specific circumstances involved.[9] Critically, since

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concerning magistrates. Id. at 402 n. 5, 872 S.E.2d at 641 n. 5. The Supreme Court then analyzed the circumstances of Warner's case and found the magistrate in Anderson County could validly issue a search warrant to T-Mobile for data and records potentially stored in New Jersey because T-Mobile did business in Anderson County and, thus, was "subject to the jurisdiction of our courts[.]" Id. at 403-404, 872 S.E.2d at 642. Furthermore, as part of its analysis, the Supreme Court noted the search warrant sought records for information generated in South Carolina. Id. at 403, 872 S.E.2d at 642.

[8] Particularly in light of our Supreme Court's explanation the language of the search warrant statute does not preclude magistrates in South Carolina from issuing search warrants to an out-of-state entity for records being stored out of state, the officers in Appellant's case unquestionably acted in good faith by seeking the search warrant from the magistrate in Dillon County and by relying on that judicially-issued warrant to obtain the photographs from Snapchat, which—just as the trial judge correctly recognized—meant there was no legitimate reason for that evidence to be suppressed. See United States v. Leon, 468 U.S. 897, 922-923 (1984) (instructing the exclusionary rule should ordinarily not be applied when an officer who conducted a search acted in objectively reasonable reliance on a judicially-approved search warrant issued by a detached and neutral magistrate that was only later determined to be invalid); see also Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in objective good faith." (citation and internal quotations omitted)); Massachusetts v. Sheppard, 468 U.S. 981, 989-990 (1984) ("[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) (explaining exclusion is the appropriate remedy *when* the State cannot "demonstrate a good faith attempt to comply with the [search warrant] statute")

[9] During trial, testimony was presented establishing all the photographs admitted into evidence were *publicly* posted to Snapchat, which allows for both private communications between users and public postings to a user's "story." (R. pp. 192-193). In light of that, it remains unclear—just as the trial judge recognized—how Appellant could have possessed a *legitimate* expectation of privacy in those publicly-posted photographs. See State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (explaining criminal defendants bear the burden of demonstrating "they

the trial judge's ruling denying the suppression motion was based on multiple grounds completely independent from the validity or invalidity of the search warrant, Appellant was required to challenge all those grounds in order for his appellate challenge to the trial judge's ruling to be conceivably valid, but he has wholly failed to do so. As a result, the ruling denying the suppression motion must be affirmed because the unchallenged grounds upon which it was based have now become the law of the case.[10] Appellant's conviction should be affirmed.

Relevant Facts

Toward the outset of Appellant's trial, defense counsel moved to suppress the evidence obtained as a result of the search warrant sent to Snapchat. (R. pp. 66-67). As support for that

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have a legitimate expectation of privacy" before they can properly raise a constitutional challenge to a search); cf. United States v. Hoeffener, 950 F.3d 1037, 1044 (8th Cir. 2020) ("A defendant has no legitimate expectation of privacy in files made available to the public through peer-to-peer file-sharing networks."); United States v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) ("While Colon undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation that his 'friends' would keep his profile private. And the wider his circle of 'friends,' the more likely Colon's posts would be viewed by someone he never expected to see them. Colon's legitimate expectation of privacy ended when he disseminated posts to his 'friends' because those 'friends' were free to use the information however they wanted—including sharing it with the Government." (citations omitted)).

[10] Notably, in light of the Warner decision, the trial judge's finding the search warrant issued in Appellant's case exceeded the magistrate's jurisdictional authority was obviously incorrect. See Warner, 436 S.C. at 404, 872 S.E.2d at 642 (recognizing a county magistrate could validly issue a search warrant for an out-of-state company's records regardless of whether those records were physically stored in South Carolina). And, because Snapchat obviously does business with South Carolina's citizens and the evidence presented during trial supported a conclusion the photographs obtained from Snapchat were created by Appellant in Dillon County since some depicted the very drugs he sold in that county after using the same phone number associated with the Snapchat account to arrange the transaction in which they were sold, the search warrant issued by the magistrate in Appellant's case was not invalid for the same reasons the search warrant in Warner's case was not invalid. See S.C. Code Ann. § 17-13-140 (instructing "[a]ny magistrate . . . may issue a search warrant to search for and seize" various types of property, including "property constituting evidence of crime or tending to show that a particular person committed a criminal offense"); cf. Warner, 436 S.C. at 404, 872 S.E.2d at 642 ("T-Mobile is a 'person' doing business in Anderson County. Thus, T-Mobile is subject to the jurisdiction of our courts, and we find it was not beyond the power of the magistrate to issue the warrant.").

motion, defense counsel asserted a magistrate in South Carolina could not validly issue a warrant authorizing a search outside the magistrate's jurisdictional boundaries while noting Snap Inc.—the corporation behind Snapchat—was not a company located within Dillon County. (R. pp. 66-68). As a result, defense counsel argued the search warrant was purportedly void since it was issued by a Dillon County magistrate. (R. pp. 67-68).

Immediately in response to those remarks, the trial judge expressed agreement and instructed the solicitor the warrant was "not gonna hold water" if it was issued for Snapchat records. (R. p. 68). The solicitor then attempted to explain why he believed the warrant would "hold water," but, before he could offer that explanation, the trial judge interrupted and reiterated his view a magistrate could not issue a warrant for digital evidence held on a server unless the specific server was physically located in the magistrate's county.[11] (R. p. 69).

Following that, the solicitor—in addition to noting the issue was currently pending before the South Carolina Supreme Court in the Warner case—noted the evidence was created in Dillon County in the magistrate's jurisdiction and, thus, clearly had a connection to Dillon County. (R. pp. 69-70). Moreover, the solicitor asserted the officers acted in good faith and the evidence would inevitably be obtained through other means if the warrant issued by the magistrate in Dillon County was not valid. (R. pp. 69-70; pp. 73-74; pp. 83-87). Beyond that, the solicitor noted the records in question stemmed from "posts" Appellant "put out for all of his followers to see" and, thus, were not truly private. (R. p. 86).

Ultimately, after considering the matter overnight, the trial judge denied the suppression motion. (R. p. 74; p. 76; p. 91). In so doing, the trial judge found "there was good faith on the

[11] Later on, the trial judge reiterated he had been instructed magistrates in South Carolina could not "issue on a server that's not within that particular county where the magistrate has jurisdiction." (R. p. 71).

part of law enforcement" in obtaining the search warrant because the officers' actions were consistent with common practices in South Carolina at the time the warrant was obtained. (R. pp. 88-89). Furthermore, the trial judge concluded Appellant did not have a reasonable expectation of privacy in the photographs while analogizing Appellant's posting of them for "a mass of people" to view to placing an ad in a printed newspaper.[12] (R. pp. 89-91).

Subsequent to that, the trial proceeded forward, the solicitor sought to admit a number of the photographs obtained from Snapchat, and defense counsel renewed his objection to their admission. (R. pp. 193-194). However, once again, the trial judge declined to suppress those photographs. (R. p. 194).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). When conducting appellate review of an issue hinging on interpretation of a statute, the appellate court will review the matter de novo and is free to decide it without affording any deference to the trial judge because questions of statutory interpretation are questions of law. State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). Meanwhile, when reviewing a ruling on a constitutional search-and-seizure issue on appeal, the appellate court will "review the trial court's factual findings for any evidentiary support" and treat "the ultimate legal conclusion" as "a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633, 879 S.E.2d 762, 766 (2022).

Argument

Pursuant to the law-of-the-case doctrine, a ruling becomes the law of the case regardless of whether it is right or wrong when it is not appealed. State v. Black, 400 S.C. 10, 28, 732

[12] Based on the evidence presented during trial, all the relevant photographs were *publicly* posted to the Snapchat account associated with the search warrant. (R. pp. 192-193).

S.E.2d 880, 890 (2012). In light of that doctrine, an appellant is necessarily required to appeal *all* the grounds upon which a ruling is based when one is based on multiple independent grounds. State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010). Significantly, "should the appealing party fail to raise all of the grounds upon which a [trial judge]'s decision was based, those unappealed findings—whether correct or not—become the law of the case." Dreher v. S.C. Dep't of Health & Env't Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015). Therefore, when an appellant only *partially* appeals a trial judge's ruling based on more than one ground, the ruling automatically must be affirmed on appeal regardless of its actual correctness. Hicks, 387 S.C. at 379, 692 S.E.2d at 920; see Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." (citation and internal quotations omitted)); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

In the case sub judice, the trial judge's ruling denying the suppression motion related to the search warrant sent to Snapchat was *not* based on a finding of the warrant was properly issued or valid. Instead, in declining to suppress the incriminating photographic evidence obtained from Snapchat, the trial judge—who agreed with defense counsel's argument a magistrate in South Carolina could not properly issue a search warrant authorizing a search outside the magistrate's particular county—found suppression was not warranted in Appellant's case *despite the purported invalidity of the warrant* because the good faith exception to the

exclusionary rule was applicable under the circumstances involved and because Appellant did not have a legitimate expectation of privacy in the publicly-posted photographs.

Now, on appeal, Appellant contends the trial judge erred by denying the suppression motion. (App. Br. pp. 11-12). However, in doing so, Appellant does not maintain the trial judge was wrong to find the good faith exception to the exclusionary rule was applicable and does not maintain the trial judge erred by concluding he had no legitimate expectation of privacy in the photographs. (App. Br. pp. 11-12). In fact, Appellant does not even *acknowledge* the trial judge made such rulings at all. (App. Br. pp. 8-9; pp. 11-12). Instead, Appellant *solely* maintains the trial judge's suppression ruling should be reversed based on the supposed invalidity of the search warrant standing alone. (App. Br. pp. 11-12).

Critically, since the ruling denying the suppression motion was based on grounds independent of the validity or invalidity of the search warrant, Appellant was fundamentally required to appeal all the grounds upon which the ruling was based in order for it to be conceivably possible for his appellate challenge to the ruling to be a viable one. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a trial court's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."), abrogated on other grounds by Repko v. County of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018). However, Appellant has not done so on appeal and, instead, has only challenged the validity of the search warrant itself as opposed to the *actual* grounds upon which the trial judge based his decision to deny the suppression motion. Cf. Hicks, 387 S.C. at 379, 692 S.E.2d at 920 ("In this case, the Court of Appeals erred in addressing the merits of petitioner's argument regarding the revocation of probation based on [one ground] because the probation revocation

judge revoked petitioner's probation on two additional grounds, *which petitioner did not challenge*." (emphasis added)). As a result, the unchallenged portion of the ruling denying the suppression motion has become the law of the case, and, thus, there can be—and is—no proper basis upon which to reverse that ruling on appeal since the unappealed independent grounds upon which it was based must be treated as correct pursuant to the law-of-the-case doctrine. See Black, 400 S.C. at 28, 732 S.E.2d at 890 (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); cf. Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) ("[T]he trial judge ruled against Paul on two grounds. . . . Paul has only challenged the second ground. Because he has not appealed on all grounds, the trial court's decision is affirmed."); State v. Galloway, 305 S.C. 258, 263, 407 S.E.2d 662, 665 (Ct. App. 1991) ("[T]he unappealed alternative ruling that the motion was untimely constitutes an independent ground for upholding the judgment."). Accordingly, Appellant's appellate challenge to the suppression ruling—which was not directed at the basis upon which suppression was actually denied—must be rejected. See Hicks, 387 S.C. at 379, 692 S.E.2d at 920 ("Where the ruling of a trial judge is based on more than one ground, an appellate court must affirm unless the appellant appeals all grounds upon which the ruling was based."); cf. Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) ("[T]he trial court ruled the statement was admissible under Rule 803(3), SCRE. Because [Sheppard] does not appeal the trial court's ruling that the statement is a Rule 803(3) exception to the hearsay rule, that ruling is the law of the case. Accordingly, the trial court did not err by admitting Lynch's testimony." (citation and footnote omitted)). Appellant's conviction should be affirmed.

II.

The trial judge did not abuse his broad discretion or otherwise err by finding several Snapchat photographs were properly authenticated because the State authenticated those photographs by establishing in multiple ways a basis upon which a factfinder could reasonably conclude they were what they were purported to be, which was all that was required for those photographs to be authenticated.

Appellant contends the trial judge reversibly erred by finding a number of Snapchat photographs were sufficiently authenticated to be admissible. In support of that contention, Appellant maintains those photographs were not properly authenticated because the State failed to present any witness who had personal knowledge he posted the photographs to Snapchat, failed to provide evidence the photographs were distinctive "enough" such that a reasonable juror could conclude he had ownership or control over the Snapchat account to which they were posted, and failed to subpoena a record custodian from Snapchat to authenticate the records. To the contrary, the evidence presented during trial was sufficient for a reasonable factfinder to conclude the photographs were exactly what they were purported to be—photographs posted by Appellant to a Snapchat account around the time of the incident, which was all that was required for the photographs to be properly authenticated. Under those circumstances, the trial judge committed no error by finding the photographs were sufficiently authenticated and admissible. Appellant's conviction should be affirmed.

Relevant Facts

During in limine discussions conducted toward the outset of trial, the solicitor alerted the trial judge a number of photographs had been obtained from a Snapchat social media account, including a photograph of the pills purchased during the drug transaction that was posted to the account on the very same date as the transaction. (R. pp. 32-33). The solicitor further noted numerous photographs from the account depicted Appellant, but he confirmed the State did not

intend to introduce them unless the defense sought to dispute Appellant's identity as the holder of the Snapchat account. (R. pp. 33-34).

Following that, defense counsel moved to suppress the photographs obtained from the Snapchat account due to the State's purported inability to authenticate them. (R. p. 47). As support for that motion, defense counsel initially argued a records custodian from Snapchat had to be present and the State was likewise required to establish a chain of custody for all the records. (R. p. 48; p. 50).

In response to defense counsel's arguments, the solicitor confirmed Snapchat had provided a certificate of authenticity for all the records while referencing Rule 902(8) of the South Carolina Rules of Evidence, and he further noted that certificate had already been provided to the defense in advance of trial.[13] (R. pp. 50-51). Moreover, the solicitor emphasized authentication was not a high bar and only required some foundational showing the evidence was what it was purported to be. (R. pp. 51-52).

In rebuttal, defense counsel conceded circumstantial evidence could be used to authenticate social media content but nonetheless maintained establishing ownership of a social media account alone was not sufficient. (R. pp. 53-55). As opposed to simply establishing account ownership, defense counsel maintained something had to be presented to establish the defendant authored the content in order for it to be properly authenticated.[14] (R. pp. 56-57).

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[13] Although he referenced it during the in limine discussion, the solicitor did *not* end up introducing or actually relying upon the certificate of authenticity to authenticate the Snapchat records in Appellant's case. (R. pp. 141-232).

[14] As part of his remarks, defense counsel also referenced his own social media accounts and began discussing his wife's ability to post things to those accounts due to the access she had been provided. (R. p. 57). However, the trial judge promptly interrupted and explained he believed those particular arguments constituted arguments for the jury. (R. p. 57).

In response to that, the solicitor explained he intended to connect the photographs from the Snapchat account to Appellant in a variety of ways. (R. pp. 58-59). Specifically, the solicitor indicated he could do so through the fact Appellant posted hundreds of photographs of himself to the account and through the fact the account was associated with the same phone number used by the confidential informant to call Appellant. (R. pp. 58-59; pp. 62-64).

At that point, defense counsel indicated he intended to "leave" the matter for the time being. (R. p. 64). However, before doing so, he reiterated his view evidence of account ownership "normally" would be provided by a records custodian. (R. pp. 64-65).

As the trial continued forward, testimony was presented from Agent Martin establishing: (1) he personally received records—including 2,804 photographs—from Snapchat associated with an account in the name of "duke_ttg" in response to a search warrant he had obtained for those records; (2) he believed that particular account was Appellant's because he had seen multiple videos and photographs of Appellant posted to it and knew Appellant's nickname was "Duke;" (3) the account information provided by Snapchat identified the phone number associated with the account as a particular number that he believed to be Appellant's based on his investigation; (4) one of the photographs from the account depicted pills consistent in appearance and packaging with the uniquely-shaped multi-colored pills purchased during the drug transaction, and it was posted to the account on the same date as the transaction; (5) another photograph from the account posted on the same date as the transaction depicted Appellant; and (6) numerous other photographs of Appellant were posted to the account between August 24, 2019, and September 14, 2019. (R. pp. 158-162; pp. 196-197; p. 199; p. 202). Likewise, testimony was presented from Agent Blake establishing: (1) he verified the informant called the same number on the date of the incident as the one Agent Martin identified as being linked to the

Snapchat account; and (2) he heard Appellant's voice during the conversation that ensued after the informant placed the call to that particular number. (R. p. 159; pp. 209-210; p. 226).

Ultimately, in addition to the agents' testimony, just ten of the thousands of photographs obtained from the targeted Snapchat account were admitted into evidence over defense counsel's objection. (R. pp. 161-162; pp. 194-196). Of those admitted photographs, one depicted several bags of distinctive uniquely-shaped multi-colored pills, one depicted Appellant along with text reflecting the date of the incident, one depicted Appellant seated in a vehicle, and the other seven depicted "selfies" of Appellant from varying angles. (R. p. 162; pp. 194-196; State's Ex. # 4 (Photograph); State's Ex. # 5 (Photograph); State's Ex. # 11 (Photograph); State's Ex. # 13 (Photograph); State's Ex. # 14 (Photograph); State's Ex. # 15 (Photograph); State's Ex. # 16 (Photograph); State's Ex. # 17 (Photograph); State's Ex. # 18 (Photograph); State's Ex. # 19 (Photograph)).

Beyond that, law enforcement's post-controlled-buy photographs of the pills purchased during the transaction were introduced, and the pills in those photographs indeed appeared to be identical to the pills depicted in the photograph from the Snapchat account. (R. pp. 202-203; State's Ex. # 6; State's Ex. # 8 (Photograph)). Similarly, the recording from the transaction was admitted into evidence along with two still shots from that recording, and Appellant's physical appearance in those items was also consistent with his appearance in the photographs from the Snapchat account. (R. pp. 154-155; p. 157; State's Ex. # 1; State's Ex. # 2 (Photograph); State's Ex. # 3 (Photograph)).

Standard of Review

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). On appeal,

appellate courts give "great deference" to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). Moreover, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted)).

Argument

In general, evidence must be authenticated before it can be admitted. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003); see State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) ("Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force."), aff'd as modified on other grounds, 432 S.C. 97, 851 S.E.2d 440 (2020). For evidence to be authenticated, the party offering the evidence must provide a sufficient basis upon which the jury *could* reasonably find the evidence is what it is claimed to be. United States v. Kaixiang Zhu, 854 F.3d 247, 257 (4th Cir. 2017); see Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

Importantly, the requirement for authentication can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge the matter is what it is purported to be and through things like "[a]ppearance, contents, substance, internal

patterns, or other distinctive characteristics, *taken in conjunction with the circumstances*." Rule 901(b), SCRE (emphasis added). Meanwhile direct proof is *not* required in order to authenticate a particular piece of evidence, and, instead, evidence can be authenticated through indirect or circumstantial evidence. Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-577, 201 S.E.2d 372, 376 (1973); see State v. Anderson, 386 S.C. 120, 131, 687 S.E.2d 35, 41 (2009) (recognizing evidence can be authenticated through a "more generalized approach").

Significantly, no matter what method is used to authenticate, the burden for doing so is *not* a high one. Deep Keel, LLC v. Atl. Priv. Equity Grp., LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015); see Kaixiang Zhu, 854 F.3d at 257 ("The burden to authenticate under Rule 901 is not high—only a prima facie showing is required." (citation and internal quotations omitted)). Ultimately, once the low threshold requirement of authentication has been met, the evidence can then properly be admitted during trial if it is otherwise admissible. State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 282 (1987); see United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) ("[T]he burden to authenticate under Rule 901 is not high—only a prima facie showing is required, and a district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." (citation and internal quotations omitted)).

In the case at bar, the State offered a limited number of photographs while purporting them to be photographs posted by Appellant to a Snapchat account around the time of the incident. Significantly, in light of the many available avenues through which any evidence can be authenticated and looking to what was presented during Appellant's trial, the evidence and testimony offered to authenticate the photographs was sufficient to constitute a prima facie showing those photographs were, in fact, exactly what they were purported to be. See Green,

427 S.C. at 231, 830 S.E.2d at 715 (recognizing there are many ways in which evidence can authenticated and the specific means identified in our state's evidentiary rules are "non-exclusive"); see also Commonwealth v. Meola, 125 N.E.3d 103, 114 (Mass. App. Ct. 2019) (recognizing "digital evidence may be authenticated circumstantially based on its contents and the surrounding circumstances").

Supporting just such a conclusion, the photographs were authenticated through the connection established between Appellant and the "duke_ttg" Snapchat account through their distinctive contents depicting Appellant himself, through the evidence connecting Appellant to the exact same phone number associated with that particular social media account, and through the evidence indicating the account name was consistent with Appellant's own nickname. See United States v. Perez, 61 F.4th 623, 626 (8th Cir. 2023) ("[A] party may authenticate social media evidence with circumstantial evidence that adequately links a particular person to the social media account."); cf. Johnson v. United States, 290 A.3d 500, 512 (D.C. Cir. 2023) (concluding Instagram evidence was sufficiently linked to Johnson and properly authenticated for admissibility purposes based in part because the phone number connected to the Instagram account was also connected to Johnson and because the account contained numerous photographs of Johnson). Similarly, the photographs depicting Appellant were authenticated as actually being photographs of Appellant through both the testimony establishing he was the individual in the photographs and through the fact they could be compared both to his appearance in the courtroom and to his appearance in the recording and associated images captured during the controlled buy involving him. See Gilliam v. Foster, 75 F.3d 881, 897 (4th Cir. 1996) ("[U]nder South Carolina law, normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly

represent the scene involved." (citation, internal quotations, and brackets omitted)); cf. State v. Campbell, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) ("The photographs offered in evidence were identified by a police officer who saw the scene depicted and who testified that they were correct representations of the area they portrayed. Argument that the photographer himself should have been present for cross-examination under the facts of this case is without merit. Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved."). Likewise, the photographs were connected to Appellant through the fact he was repeatedly depicted in the images, which supported a conclusion he was the one posting the photographs since so many of them were of him and appeared to have been taken by him personally. See State v. Benton, 435 S.C. 250, 263, 865 S.E.2d 919, 926 (Ct. App. 2021) (recognizing the contents of a message sent through social media can demonstrate a particular individual was in possession of the phone used to send it when it was sent); see also United States v. Davis, 918 F.3d 397, 402 (4th Cir. 2019) (recognizing "contextual evidence" may be sufficient to make the prima facie showing necessary to authenticate evidence); cf. Meola, 125 N.E.3d at 114-115 (concluding sufficient confirming circumstances had been presented to authenticate a message sent through a social media account such that it could be admitted into evidence because the account used to send the message was in the defendant's name, the video recording attached to the message depicted the defendant, and the recording was "self-authored" by the defendant as reflected by its contents). Relatedly, the authenticity of the photograph of the exceedingly-distinct pills posted to the very same account as the numerous photographs of Appellant—including one with the date of the incident identified on it—was established through the fact unique pills identical in appearance to the ones depicted in the photograph were sold to the informant by Appellant. See Rule 901(b)(3), SCRE

(instructing evidence can be authenticated through comparison with an authenticated specimen); Rule 901(b)(4), SCRE (instructing evidence can be authenticated through proof of distinctive characteristics); cf. Williams v. Illinois, 567 U.S. 50, 75 (2012) (plurality opinion) ("[T]he fact that the Cellmark profile matched Williams—the very man whom the victim identified in a lineup and at trial as her attacker—was itself striking confirmation that the same that Cellmark tested was the sample taken from the victim's vaginal swabs."); State v. Hall, 437 S.C. 107, 120, 876 S.E.2d 328, 335 (Ct. App. 2022) ("While there is a risk the video messages were not contemporaneously recorded at the time they were sent, a reasonable jury could find the messages were what Jackson said they were[.]"). Furthermore, the photographs' connection to the "duke_ttg" Snapchat account was further authenticated by the testimony establishing Agent Martin received them directly from Snapchat in response to his search warrant for the "duke_ttg" account records. Cf. Braswell v. United States, 487 U.S. 99, 118 (1988) ("The Government may offer testimony—for example, from the process server who delivered the subpoena and from the individual *who received the records*—establishing that the corporation produced the records subpoenaed. The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena." (emphasis added)).

In light of the multiple ways the Snapchat photographs were authenticated in Appellant's case, both the trial judge and the jury could reasonably and reliably conclude those photographs—which depicted both Appellant himself and what appeared to be the exact same highly-unique pills he sold to the informant—were, in fact, exactly what they were purported to be—photographs posted by Appellant to a Snapchat account around the time of the incident—even if contrary arguments could be made by the defense. See Johnson, 290 A.3d at 513

(explaining the requirement of authentication does *not* require the prosecution to prove with absolute certainty the defendant was using a social media account and, instead, only requires the prosecution to demonstrate "the reasonable possibility that he did so"); Meola, 125 N.E.3d at 113 (explaining "the mere possibility that a digital communication was fraudulently sent by someone other than the person associated with a particular social media or e-mail account from which the communication originated is not a bar to its authentication"); see also Winburn, 261 S.C. at 576-577, 201 S.E.2d at 376 (instructing evidence can be authenticated by indirect or circumstantial evidence); cf. United States v. Recio, 884 F.3d 230, 237 (4th Cir. 2018) ("[W]hat matters is not whether a jury could find that Recio did *not* author the [Facebook] post in question, but rather whether the jury could reasonably find that he *did*."); Kaixiang Zhu, 854 F.3d at 257 ("The reasons identified by Zhu to doubt the authenticity of the email go to its weight, not its admissibility, and counsel for Zhu was free to highlight these deficiencies during cross examination of Officer Butler. The district court's job was not to find that the evidence was necessarily what the proponent claimed, but only that there was sufficient evidence that the *jury* ultimately might do so." (citation, internal quotations, and brackets omitted)). Therefore, under such circumstances, the trial judge did not abuse his broad discretion or otherwise err by finding the challenged evidence was sufficiently authenticated to be admissible. See State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (recognizing trial judges have wide latitude in ruling on the admissibility of evidence and instructing trial judge's evidentiary rulings will not be disturbed on appeal absent a showing of a prejudicial abuse of discretion). Appellant's conviction should be affirmed.

III.

The trial judge correctly declined to suppress the recording captured on the informant's hidden camera because Appellant voluntarily relinquished any expectation of privacy he may have had in the home where the drug transaction was conducted by inviting the informant inside and, thus, his constitutional right to be free from unreasonable invasions of privacy was not violated merely because his trust in the informant proved to be misplaced.

Appellant contends the trial judge reversibly erred by refusing to suppress the recording captured on the confidential informant's recording equipment while he was inside the residence conducting the drug transaction. As support for that contention, Appellant maintains an unreasonable invasion of privacy was committed because the informant "provided a live feed for law enforcement to invade [his] home." Importantly though, Appellant voluntarily invited the informant into the residence for the purpose of conducting a drug transaction and, thus, relinquished any expectation of privacy he may have had in that constitutionally-protected space by knowingly exposing it to a third-party. Under such circumstances, Appellant's rights pursuant to the South Carolina Constitution were not violated as no unreasonable invasion of privacy occurred, and, therefore, the trial judge correctly declined to suppress the recording captured on the informant's hidden camera. Appellant's conviction should be affirmed.

Relevant Facts

Toward the outset of Appellant's trial, defense counsel moved to suppress the recording captured on the confidential informant's hidden equipment pursuant to both the state and federal constitutions. (R. pp. 39-40). As support for that motion, defense counsel contended the informant was an agent of the State and, thus, purportedly could not do anything a law enforcement officer could not also do. (R. pp. 40-41). Defense counsel further maintained an officer could not have gotten into the residence without either "*permission*" or a warrant. (R. p. 43) (emphasis added). Resultantly, defense counsel asserted the informant's entry into the

residence with a camera constituted an unreasonable and unconstitutional invasion of Appellant's privacy. (R. p. 44).

In rebuttal, the solicitor noted informants are routinely and commonly used in South Carolina. (R. pp. 44-45). Furthermore, the solicitor argued nothing existed suggesting a warrant was necessary in order for a confidential informant to be able to go inside a private residence under circumstances like the ones involved. (R. pp. 44-45).

Upon considering the matter, the trial judge denied the motion. (R. p. 45). In so doing, the trial judge explained the application of the warrant requirement to the circumstances involved in Appellant's case would functionally eliminate the ability of law enforcement to employ confidential informants to fight crime. (R. p. 45).

Following that ruling, the trial continued forward, and the solicitor sought to admit the recording from the confidential informant's camera into evidence. (R. p. 154). At that time, defense counsel renewed his earlier objection, and the recording was admitted subject to that objection and played for the jury.[15] (R. p. 154).

Standard of Review

When reviewing a ruling on a motion seeking the suppression of evidence based on a purportedly unconstitutional search or seizure, an appellate court in South Carolina generally

[15] Following the trial judge's pre-trial ruling on the matter, defense counsel clarified he was *only* arguing a "live feed wire" with an officer "watching on the other end" could not be used on a confidential informant who entered a residence, and the solicitor quickly followed that clarification by explaining he was not seeking to admit any evidence from the "live feed" device equipped to the informant, who was equipped with both live and non-live devices. (R. pp. 46-47). In light of defense counsel's clarification, it is questionable whether any issue with the recording actually admitted into evidence was properly preserved for appellate review since that particular recording was not captured through the use of the "live feed" device. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot be asserted later on appeal); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (instructing an appellant "is limited to the grounds raised at trial").

must now employ a two-step analysis. Frasier, 437 S.C. at 633, 879 S.E.2d at 766. Pursuant to that "dual inquiry," the appellate court will review the trial judge's factual findings for "any evidentiary support" and will treat the ultimate legal conclusion as a question of law subject to de novo review. Id. at 633-634, 879 S.E.2d 762, 766.

Argument

Much like the Fourth Amendment of the United States Constitution, the South Carolina Constitution provides protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("The 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[.]"). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding 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). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are *unreasonable*. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378,

237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."). Accordingly, just as is true of the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.").

Historically, an analysis of whether an unconstitutional privacy invasion occurred has involved two distinct components. Bond v. United States, 592 U.S. 334, 338 (2000); see Smith v. Maryland, 442 U.S. 735, 740 (1979) (explaining the application of constitutional protections to a claimed invasion of privacy depends on whether a justifiable, reasonable, or legitimate expectation of privacy was invaded by government action). First, it must be determined whether the individual exhibited an actual expectation of privacy such that the individual sought to preserve something as private. Bond, 592 U.S. at 338. That determination is key because an individual does not and cannot possess an actual—and constitutionally-protected—expectation of privacy in something the individual "knowingly exposes to the public, *even in his own home* or office[.]" Katz v. United States, 389 U.S. 347, 351 (1967) (emphasis added); see State v. Herring, 387 S.C. 201, 209 n. 4, 692 S.E.2d 490, 494 n. 4 (2009) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). Critically, that is equally true—as has long been recognized—of something voluntarily revealed to a confidential informant even if that informant turns out to be secretly working in conjunction with law enforcement. See Hoffa v. United States, 385 U.S. 293, 302 (1966) (explaining "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" is not entitled to constitutional protection); United States v. Davis, 326 F.3d 361, 365 (2d Cir. 2003) ("[A] defendant does not have a privacy interest in matters voluntarily revealed to a government agent, including a confidential

informant."); State v. Vanderford, 980 S.W.2d 390, 401 (Tenn. Crim. App. 1997) ("When the suspect permits a confidential informant into his residence, and he freely and voluntarily talks to the confidential informant, the suspect has no expectation of privacy regarding the conversation."). Second, if the individual did have an actual expectation of privacy, it must be determined whether that expectation was one society is prepared to recognize as reasonable. Bond, 592 U.S. at 338; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate only if it is one society accepts and recognizes as reasonable). In making such a determination, "the test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead whether the government's intrusion infringes upon [constitutionally-protected] personal and societal values[.]" California v. Ciraolo, 476 U.S. 207, 212 (1986). Significantly, societal values do not afford constitutional protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." United States v. White, 401 U.S. 745, 749 (1971) (citation and internal quotations omitted).

In the case at hand, Appellant invited the informant to travel to and enter a constitutionally-protected space—a private residence—for the purpose of conducting a drug transaction involving the sale of a large quantity of methamphetamine. Due to the consent afforded by Appellant's invitation, the informant's presence inside the residence to discuss and complete the transaction was entirely constitutionally proper, and Appellant voluntarily relinquished any expectation of privacy he may have had in anything the informant heard or saw while the informant was inside the residence with his express permission. See Lewis v. United States, 385 U.S. 206, 211 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes

contemplated by the occupant."); cf. United States v. Brathwaite, 458 F.3d 376, 381 (5th Cir. 2006) (explaining an individual relinquished any constitutionally-recognized expectation of privacy he may have otherwise had in things he allowed a confidential informant to hear or see after he invited that informant into his home).

Meanwhile, since Appellant necessarily relinquished any subjective privacy expectations he may have had inside the home by choosing to allow the informant inside and, thus, revealing to him the contents of that up-until-then private space, no *legitimate* or *reasonable* expectation of privacy was or could have been violated merely because the informant, who obviously had eyes and ears, was—unbeknownst to Appellant—also outfitted with hidden electronic monitoring and recording equipment at that time.[16] See White, 401 U.S. at 751 ("If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks."); cf. Lopez v. United States, 373 U.S. 427, 439 (1963) ("[T]he device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent,

[16] Notably, through legislation enacted by our state's elected representatives, South Carolina's citizens have recognized and endorsed the reasonableness of a conversation being intercepted and recorded so long as the intercepting individual is a party to the conversation or just *one* of the people involved in the conversation has consented to its interception. See S.C. Code Ann. § 17-30-30(B) ("It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception."); cf. Whitner, 399 S.C. at 558, 732 S.E.2d at 866-867 ("Appellant . . . contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protections afforded by our state's constitution. . . . Because the Wiretap Act provides for vicarious consent of a minor child, Appellant's constitutional argument *must be rejected*." (emphasis added and citation omitted)).

and it neither saw nor heard more than the agent himself."). Accordingly, since the South Carolina Constitution only prohibits *unreasonable* invasions of privacy, Appellant's constitutional rights pursuant to our state's constitution were not violated merely because his trust in the confidential informant to keep their illegal dealings between the two of them proved to be misplaced. See White, 401 U.S. at 749 ("No warrant to search and seize is required . . . when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused . . . or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence." (citation and internal quotations omitted)); cf. United States v. Thompson, 811 F.3d 944, 949 (7th Cir. 2016) (rejecting as "frivolous" Thompson's argument he had a reasonable expectation of privacy in information captured by a recording device equipped to a confidential informant invited into his apartment for a drug transaction).

Under such circumstances, there were and are no legitimate reasons for the evidence uncovered by the informant to be suppressed, and, therefore, the trial judge properly declined to suppress the evidence obtained from the informant's consensual entry into the residence. See White, 401 U.S. at 753 (explaining courts should *not* "be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable"); cf. Lopez, 373 U.S. at 439 ("We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."); On Lee v. United States, 343 U.S. 747, 756 (1952) ("No good reason of public policy occurs to us why the Government should be deprived on the benefit of On Lee's admissions because he made them to a confidante of shady character."). Appellant's conviction should be affirmed.

IV.

The trial judge did not abuse his broad discretion or otherwise err by denying the new trial motion and by declining to grant an additional evidentiary hearing in response to Appellant's post-trial claim of jury misconduct because no credible evidence was presented to support the claim and the claim was not timely raised at Appellant's first opportunity to do so as was necessary for it to conceivably be a valid one.

Appellant maintains the trial judge reversibly erred by declining to grant the post-trial new trial motion and by failing to grant an additional evidentiary hearing on his claim of jury misconduct. As support for that contention, Appellant maintains the seven "affidavits" presented to the trial judge established two jurors intentionally concealed material information during voir dire and would have been struck from the jury but for their failures to provide truthful responses. To the contrary and just as the trial judge concluded, Appellant failed to present any *credible* evidence to support his claim of jury misconduct and, instead, relied solely upon sketchy unsworn "affidavits" prepared by his friends that—because they were unsworn—were not truly affidavits at all. Furthermore, under the circumstances involved, the alleged jury misconduct discussed in the "affidavits" was not brought forth at Appellant's first opportunity to do so, which constituted a waiver of Appellant's ability to raise a valid jury misconduct claim. Accordingly, the trial judge did not abuse his broad discretion by denying the new trial motion and by declining to conduct any further evidentiary hearings on the matter since he was not presented with any credible or admissible evidence that would have necessitated either of those actions. Appellant's conviction should be affirmed.

Relevant Facts

At the outset of Appellant's trial, the trial judge conducted voir dire of the prospective jurors. (R. pp. 6-15). During voir dire, the trial judge asked the prospective jurors—amongst other things—if any of them: (1) were related by blood or marriage or had "any business, social,

religious, or fraternal relationship" with Appellant—who was personally present for trial and stood for the jury panel—or any of the potential witnesses, including one identified as Winter Bennett; (2) had any personal knowledge or had developed an opinion about the case; (3) had an opinion, bias, or prejudice toward Appellant that would prevent them from being fair and impartial; and (4) knew of any reasons why they should not serve on the jury. (R. pp. 6-7; pp. 9-10). Notably, neither Juror # 6 nor Juror # 53 responded to any of those questions, and both were ultimately seated on the jury that convicted Appellant as indicted at the conclusion of trial. (R. pp. 6-10; pp. 17-18; p. 25; pp. 79-80; p. 91; pp. 352-356).

Shortly after Appellant was convicted, defense counsel filed a motion seeking a new trial. (R. pp. 384-396). As support for that motion, defense counsel maintained Juror # 6 and Juror # 53 intentionally concealed information during voir dire concerning their knowledge and bias toward Appellant, which he maintained entitled Appellant to a grant of a new trial due to jury misconduct. (R. pp. 384-396).

To bolster his claims, defense counsel included seven "affidavits"—none of which contained any statements indicating the affiant was sworn or the affiant attested to the information contained within under oath—from a variety of individuals. (R. pp. 384-396). In one dated just three days after the verdict, an individual identified as Treasury Smith claimed Juror # 6 knew who Appellant was, had at some point in the past found him with Winter Bennett, responded to that by telling him he needed to get tested for sexually-transmitted diseases because "Duke" had given Bennett one she could not "get rid of," spoke with him at some unspecified point on the preceding week, advised him she knew her verdict was going to be guilty due to her knowledge of Appellant, and indicated her close friend's family wanted her to find Appellant guilty. (R. pp. 384-396). In another dated a single day after the verdict, an individual named

Terrell McBride claimed Juror # 53 was his neighbor, both Juror # 53 and Appellant had been to his home, and the two "might" have spoken there. (R. pp. 384-396). In one notarized *the same day as the verdict*, a different individual claimed Juror # 53 was aware of Appellant and sometimes looked at him "with a face of disgust." (R. pp. 384-396). In another dated one day after the verdict, an individual identified as Davonte Ladson claimed Juror # 53 greeted Appellant at McBride's house, knew Appellant, "would acknowledge" Appellant, and constantly made social media posts about the trial. (R. pp. 384-396). In yet another dated a day after the trial's end, Winter Bennett claimed Juror # 53 had spoken to her and Appellant numerous times and had "even" shaken Appellant's hand. (R. pp. 384-396). In an unnotarized one dated five days after the trial, an individual identified as Demetris Johnson claimed he was present in support of Appellant throughout trial and believed Juror # 53 should not have served on the jury because he "saw and shook" Appellant's hand numerous times and knew Appellant well. (R. pp. 384-396). Finally, in one dated seven days after the verdict, an individual named Christopher Stackhouse-Bey claimed he was present for some of the trial, thought he recognized Juror # 53 during jury polling, and alleged Juror # 53 seemed upset one day after a purported fight involving Appellant that Stackhouse-Bey admittedly did not personally witness. (R. pp. 384-396). Likewise, Stackhouse-Bey further claimed Juror # 6 was a classmate of his, she was "very close" with the deceased informant's family, people in the community had reached out to him "stating things as if [Juror # 6] was biased in her vote as a juror," and Appellant had arguments with Juror # 6's child's father. (R. pp. 384-396).

In response to the motion and accompanying "affidavit," the trial judge convened a hearing on the matter. (R. p. 398). During that hearing, defense counsel—relying solely on the "affidavits"—repeated his assertion Juror # 6 and Juror # 53 had intentionally concealed

information during voir dire. (R. pp. 398-409). Based on that, defense counsel contended the trial judge should grant Appellant a new trial or, in the alternative, conduct an evidentiary hearing on the matter. (R. pp. 411-412). In rebuttal, the solicitor noted all the "affidavits" were written by Appellant's friends while many of the affiants were present in the courtroom for some or all of Appellant's trial, which he maintained rendered the "affidavits" suspect since those individuals only came forward with their claims *after* being disappointed in the verdict. (R. p. 413; pp. 417-418). Moreover, since the jurors were not asked during voir dire if they simply knew who Appellant was, the solicitor questioned whether the contents of the "affidavits"—even if true—actually established the jurors intentionally concealed any information sought by the specific voir dire questions posed.[17] (R. pp. 414-416; p. 419).

Following those remarks from counsel, the trial judge confirmed he had reviewed defense counsel's motion, the "affidavits" included along with it, and the questions asked during voir dire. (R. p. 422). In light of his review, the trial judge explained he had "great concern" about the fact many of the affiants were present during trial, supposedly possessed important information about the two jurors "to the degree" now alleged, and yet nonetheless remained silent throughout the entirety of the multi-day trial. (R. p. 423). Ultimately, the trial judge concluded neither the "affidavits" nor anything presented had "enough credibility" to warrant either a grant of a new trial or any further action on the part of the court. (R. p. 423).

[17] Supporting the solicitor's argument in that regard, the information in the "affidavits" about handshakes and acknowledgements did *not* suggest Juror # 53 had a "social relationship" with Appellant. Cf. State v. Guillebeaux, 362 S.C. 270, 275-276, 607 S.E.2d 99, 102 (Ct. App. 2004) ("Juror's knowledge of who Smith was and the rare exchange of greetings with him in her community did not constitute a 'social relationship.' Juror answered the questions posed to her during voir dire honestly, her failure to reveal her knowledge of Smith was a reasonable response to the question posed, and her failure to respond did not amount to intentional concealment.").

Accordingly, the trial judge denied the new trial motion and declined the alternative request for an additional evidentiary hearing on the matter. (R. pp. 423-424).

Standard of Review

On appeal, an appellate court will review a ruling on a new trial motion predicated upon alleged juror concealment solely for an abuse of discretion. State v. Eubanks, 437 S.C. 458, 484, 878 S.E.2d 335, 349 (Ct. App. 2022). Relatedly, due to the broad discretion afforded to trial judge as to how to handle a claim of jury misconduct, an appellate court will also review a ruling on whether to hold an evidentiary hearing in response to a new trial motion for an abuse of discretion. See State v. Tucker, 423 S.C. 403, 414, 815 S.E.2d 467, 472 (Ct. App. 2018) ("The trial judge may consider affidavits and, *if it finds them credible*, should convene an evidentiary hearing." (emphasis added)); see also United States v. Willis, 277 F.3d 1026, 1034 (8th Cir. 2002) ("The trial court has broad discretion in handling allegations of juror misconduct."); United States v. Anderson, 76 F.3d 685, 692 (6th Cir. 1996) ("The question of whether to hold an evidentiary hearing before deciding a motion for a new trial is in the discretion of the trial court."); cf. State v. Emory, 178 S.C. 461, __, 183 S.E. 323, 330 (1936) ("[T]he method adopted by the trial judge in ascertaining the truth regarding the fitness of the two jurors in question was largely a matter of discretion on his honor's part. It was not incumbent upon his honor to examine the affiants who made the affidavits in question, even if they were present, if his honor thought that course unnecessary. We see no abuse of discretion on the part of his honor in following the course his honor adopted."). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling

does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

Argument

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008); see State v. Harris, 340 S.C. 595, 627, 30 S.E.2d 62, 63 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Significantly, a juror's intentional concealment of material information during voir dire can jeopardize a defendant's right to fair trial and, therefore, may justify the grant of a new trial under certain circumstances. Woods, 345 S.C. at 587-588, 550 S.E.2d at 284; see State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) ("Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict.").

When confronted with a new trial motion based upon purported juror concealment, the trial judge should look to several factors to determine if the juror's failure to disclose the identified information could have affected the impartiality of the jury. State v. Coaxum, 410 S.C. 320, 328-329, 764 S.E.2d 242, 246 (2014); cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial."). Specifically, the trial judge should first determine whether the juror intentionally concealed the information, which is significant because a juror's unjustified concealment of material information supports

an inference the juror is not impartial. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246; see Woods, 345 S.C. at 587-588, 550 S.E.2d at 284 ("Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial."). Second, if—and only if—a finding of intentional concealment is made, the trial judge should determine if the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246. Necessarily, that particular analysis involves a "fact intensive determination." Sparkman, 358 S.C. at 496, 596 S.E.2d at 377.

Importantly though, for such an analysis to even be warranted, "a defendant must do more than simply raise the possibility of bias." United States v. Lawrence, 735 F.3d 385, 441 (6th Cir. 2013) (citation and internal quotation omitted); see Billings v. Polk, 441 F.3d 238, 245 (4th Cir. 2006) (explaining a trial judge is *not* "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias"). Due to the important interests at stake, the defendant bears the burden of presenting *credible* evidence of juror misconduct before inquiry into the potential partiality of a juror will be necessary or warranted. Lawrence, 735 F.3d at 441-442; see Tucker, 423 S.C. at 414, 815 S.E.2d at 472 (explaining a trial judge should convene an evidentiary hearing *if* the trial judge finds credible evidence of misconduct has been presented); see also Tanner v. United States, 483 U.S. 107, 120 (1987) ("Allegations of juror misconduct, incompetency, or inattentiveness raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process."). Relatedly, no inquiry is necessary or warranted if a defendant with knowledge during trial of potential juror misconduct waits until after the verdict to raise the matter because such matters are considered waived if not promptly raised at the first opportunity to do so. See Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986)

(instructing a party seeking a new trial based on information concerning a juror's qualifications to serve must *not* have known that information prior to the verdict); cf. State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) ("In light of Aldret's failure to call the alleged juror misconduct to the trial court's attention at his first opportunity to do so, we hold he is procedurally barred from raising the issue.").

With those principles in mind, the trial judge did not abuse his broad discretion by declining to grant a new trial or an additional evidentiary hearing in response to Appellant's claim of jury misconduct. Initially, that is true because—just as the trial judge found—Appellant did not present *credible* evidence to support his claim. See Tucker, 423 S.C. at 414, 815 S.E.2d at 472 ("Unless the trial judge finds the moving party's affidavits credible, our rules wisely forbid exposing jurors to open-ended inquiries into how they performed their duty."). Instead, Appellant merely presented a number of *unsworn* "affidavits" to the trial judge, and those "affidavits" were not truly affidavits at all since they were unsworn. See McKnight, 291 S.C. at 113, 352 S.E.2d at 472 ("An affidavit is a voluntary ex parte statement reduced to writing *and sworn to or affirmed* before some person legally authorized to administer an oath or affirmation. It differs from an oath in that an affidavit consists of a statement of fact *which is sworn to as the truth*, while an oath is a pledge." (emphasis added and citations omitted)); see also Black's Law Dictionary 66 (9th ed. 2009) (defining "affidavit" as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"). And, because the "affidavits" that constituted the *sole* support for Appellant's new trial motion were not actually affidavits in a legal sense, they did not constitute admissible or credible evidence of any misconduct on the parts of Juror # 6 and Juror # 53 that could have legitimately satisfied Appellant's burden of supporting and proving his claim. See Saro Invs. v. Ocean Holiday

P'ship, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994) ("Of course, post trial motions may be heard on affidavits. However, the facts stated in the affidavits must be admissible evidence." (citations omitted)); Morris v. Jensen, 309 S.C. 153, 157, 420 S.E.2d 710, 712 (Ct. App. 1992) (instructing an unsworn affidavit is *not* evidence); see also State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000) (explaining the defendant bears the burden of proving the alleged misconduct along with resulting prejudice when seeking a new trial on the ground of jury misconduct). Beyond that, any credibility those "affidavits" could have had was further diminished by the fact they were dated just after the trial ended, were rife with hearsay, and were submitted by Appellant's close friends and supporters, who waited until *after* the verdict to come forward with the information despite being present throughout the trial. Cf. Milton v. Sec'y, Dep't of Corr., 347 F. App'x 528, 531 (11th Cir. 2009) (concluding several affidavits were suspect and of questionable reliability because they were written by Milton's friends and family members and contained information the affiants were aware of at the time of trial). Finally, since those "affidavits" alleged misconduct that—if apparent to Juror # 53—would have equally been apparent to Appellant himself, Appellant's decision to wait to come forward with his claim of misconduct until after he learned what the outcome of trial would be constituted a waiver of his ability to validly raise his jury misconduct claim. See United States v. Breit, 712 F.2d 81, 83-84 (4th Cir. 1983) (explaining "[a] defendant who remains silent about known juror misconduct—who, in effect, takes out an insurance policy against an unfavorable verdict—is toying with the court"); cf. Gray v. Hutto, 648 F.2d 210, 211-212 (4th Cir. 1981) (concluding Gray waived any entitlement to a new trial based on jury misconduct despite the existence of evidence establishing one of the jurors told her husband she had already decided Gray was guilty of the charged drug crime even before deliberations began because defense

counsel found about that purported misconduct during trial but the matter was not raised until after the verdict); State v. Ballew, 83 S.C. 82, __, 63 S.E. 688, 690 (1909) ("The defendants with full knowledge of the misconduct of the jury, having chosen not to complain to the court, but rather to take the risk of a verdict in their favor, could not afterwards, because the verdict was against them, have a new trial on this ground.").

For all those reasons, the trial judge did not abuse his broad discretion or otherwise err by declining to grant a new trial and by refusing to hale Juror # 6 and Juror # 53 into court based solely on the contents of sketchy unsworn "affidavits" alleging information that—if true—could have been brought forth prior to the verdict in Appellant's case, and there are no valid grounds that would justify a reversal of the trial judge's ruling—and accompanying credibility determinations—on appeal. See State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959) ("The credibility of newly-discovered evidence offered in support of a motion for new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."); Tucker, 423 S.C. at 415, 815 S.E.2d at 473 ("We grant 'broad discretion' to the trial judge's credibility conclusions in claims of jury misconduct."); cf. Morris, 309 S.C. at 157, 420 S.E.2d at 712 ("The only allegation of bias was an unsworn juror's statement that in her opinion the forelady was prejudiced and might have influenced some other jurors. In the circumstances, an unsworn statement was not competent evidence."). Appellant's conviction should be affirmed.[18]

[18] Moreover, even if the "affidavits" presented could somehow be deemed sufficient to have warranted further inquiry into the matter and Appellant's failure to promptly raise his jury misconduct claim could be ignored, the appropriate relief on appeal would—at best for Appellant—be to remand the matter for an evidentiary hearing where he could attempt to actually prove his claim of jury misconduct with legitimate admissible evidence. See Smith v.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 21, 2023

Phillips, 455 U.S. 209, 215 (1982) (explaining "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"). Notably though, Appellant has not actually requested such relief on appeal and, instead, solely contends he *must* be granted a reversal of his conviction. (App. Br. pp. 25-26).

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2022-000324

THE STATE,

Respondent,

vs.

MARC YASIN MCKEIVER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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