

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
Letitia H. Verdin, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

GARY M. WIRTZ,

PETITIONER.

Opinion No. 2023-UP-172 (S.C. Ct. App. Filed May 3, 2023)

APPELLATE CASE NO. 2020-001388

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 June 1, 2023. App. 4-9.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in holding the State carried its burden to justify the warrantless inventory search of Petitioner's vehicle where there was a clear investigatory motive on the part of the police rendering the inventory a violation of Petitioner's rights under the United States and South Carolina Constitutions?

II.

Whether the Court of Appeals erred in holding that portions of Petitioner's argument were not preserved for appellate review?

STATEMENT OF THE CASE

During the February 2020 term of the Oconee County grand jury, Petitioner was indicted for one count of trafficking methamphetamine 10 to 28 grams, third offense, and one count of possession of a weapon during the commission of a violent crime. R. 151-152; 155-156. The State, represented by Lindsey Simmons and David Alderman, called the case to trial on October 12, 2020, before the Honorable Letitia H. Verdin and a jury. R. 1. Petitioner was represented by E. Jennings Byford. R. 2. Petitioner was found guilty of both charges on October 13, 2020. R. 148. Judge Verdin sentenced Petitioner to twenty-five years imprisonment on the trafficking charge, and five years imprisonment on the weapons charge, sentences to run concurrently. R. 153.

Petitioner timely filed a notice of appeal on October 15, 2020. Final briefing by the parties was concluded on March 28, 2022. The Court of Appeals issued an unpublished opinion on May 3, 2023. State v. Wirtz, Op. No. 2023-UP-172 (Ct. App. filed May 3, 2023); App. 1-3. A petition for rehearing was filed on May 18, 2023, and subsequently denied on June 1, 2023. App. 4-9. This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

I.

The Court of Appeals erred in holding the State carried its burden to justify the warrantless inventory search of Petitioner's vehicle where there was a clear investigatory motive on the part of the police rendering the inventory a violation of Petitioner's rights under the United States and South Carolina Constitutions.

Relevant Facts

Prior to the start of Petitioner's trial, Counsel Byford made a written motion to suppress the evidence found during the search of Petitioner's vehicle. R. 129. The motion argued two grounds for suppression: 1) that the inventory was pretextual and 2) that the opening of the containers inside the vehicle was in violation of Florida v. Wells, 495 U.S. 1 (1990), because the Oconee County Sheriff's Department (OCSD) did not have a written policy regarding the opening of closed containers found during an inventory. Attached to the motion was a general order from OCSD regarding motor vehicle towing and impoundment procedures, which did not contain any language regarding the search of containers during an inventory. R. 135-137. The State subsequently supplemented the general order with two pages from a 171-page manual of standard OCSD policies and procedures that contained language regarding the search of containers found during an inventory. R. 138-139.

During the hearing on the motion to suppress, Counsel Byford conceded that the pages from the standard policy and procedure manual contained the "magic language" required by Wells, supra. R. 6, ll. 2-6. Counsel Byford instead focused on the first argument in the written motion, that the inventory was a pretext to search the vehicle driven by Petitioner. Counsel Byford argued that United States Supreme Court case law prevents law enforcement from using

inventory searches as “cart blanche to just tear apart a car, look for evidence of a crime, instead of actually inventorying the vehicle.” Counsel Byford pointed to exchanges in the video footage¹ from Officer Pelfrey’s body worn camera where Pelfrey repeatedly asked Petitioner what he would find in the vehicle. Further, Counsel Byford brought to the trial court’s attention that Pelfrey only stated that he would be inventorying the vehicle after Petitioner expressly forbade a search of the vehicle. R. 6, ll. 7-23.

The State² maintained that the inventory was proper, and that Pelfrey’s actions conformed with the caretaker function set forth in case law and in the OCSD policies provided to the court. R. 6, l. 19-R. 7, l. 9. Relevant to this matter, the written policy of OCSD requires officers to tow a vehicle when the “driver has been arrested or charged with an offense which does not allow them to operate that vehicle. Except when the driver/owner of the vehicle designates another person within the vehicle (or close by at the discretion of the deputy) to take possession of the vehicle.” R. 135-137. The trial court agreed with the State, ruling that Pelfrey acted in accordance with the written policy and procedure of OCSD. Further, those policies and procedures comported with the standards promulgated in both state and federal case law. The court ruled that Pelfrey “acted in accordance with the policy and did not act in a pretextual manner in inventorying this vehicle, that a bag such as the nature that this evidence was found in would have to be inventoried.” R. 9, ll. 7-25.

¹The entire encounter between Petitioner and Pelfrey was captured on Pelfrey’s body-worn camera and submitted during the suppression hearing as Court’s Exhibit 3. A copy of this video footage is on file with this Court.

² The State did not call Pelfrey to the stand to elicit testimony regarding his motivations for the stop and Judge Verdin did not request any testimony be taken. Instead, Judge Verdin ruled on defense counsel’s motion after argument by both sides and after indicating on the record that she had reviewed the video footage from Pelfrey’s body worn camera. R. 8, ll. 24-25.

The video recording provides a complete picture of the encounter and search. At no point in the hour-long video does Pelfrey inform Petitioner that the encounter began due to a cracked windshield, despite telling the backup officers that he saw Petitioner “pulling out of a house, waited for him to come, tried to pull³ him over, he jumped in here, I went turned around and got out with him for the cracked windshield.” Court’s Ex. 3 at 37:16. Instead, Pelfrey began the encounter by asking Petitioner why he sped up⁴ when Petitioner passed his patrol vehicle. Pelfrey asked Petitioner for identification and inquired about whether Petitioner had any “weapons or anything” on his person while performing a brief pat down of Petitioner’s shorts. Court’s Ex. 3 at 1:30.

Petitioner did not have any identification on his person. He provided the name Jeremy Wirtz with a date of birth in 1985 along with an address for Pelfrey to check through dispatch. Roughly four minutes into the encounter, Pelfrey asked Petitioner if there was “anything in the vehicle that shouldn’t be in the vehicle,” and a full minute passed before Pelfrey finally asked Petitioner to provide the vehicle registration⁵. Court’s Ex. 3 at 3:58-5:15. While this was occurring, dispatch responded that Jeremy Wirtz had a valid license and that the female passenger had a suspended license. Court’s Ex. 3 at 6:35.

³ Pelfrey did not initiate a traffic stop with lights and/or sirens.

⁴ At trial, Pelfrey testified that the encounter occurred because he “saw a light-colored sedan pass me with a cracked windshield. As soon as the vehicle passed me, it sped up. That seemed a little odd for somebody who just passed a police car, so I left the parking lot and proceeded to try to catch up with the vehicle.” R. 30, ll. 6-12.

⁵ The vehicle was registered to Petitioner’s uncle. Court’s Ex. 3 at 11:43. OCSO policy allows the driver/owner to designate another person to take possession of the vehicle to avoid the tow and inventory process. R. 135-137.

Pelfrey continued to question Petitioner regarding his identity, eventually placing him in investigative detention, because he believed Petitioner was not being truthful about his name. Pelfrey performed a second, more thorough search of Petitioner's shorts, asking him again if he had anything on him before securing Petitioner in his patrol vehicle. Court's Ex. 3 at 7:42-9:30. Pelfrey then began to question the passenger in the vehicle, asking her if there was anything illegal in the vehicle that he needed to know about. Court's Ex. 3 at 10:41. Pelfrey and the passenger had the following exchange:

Pelfrey: The way things are going, something.... he's probably going to go to jail okay if he's not who he says he is.

Passenger: Okay

Pelfrey: Okay. *Now, is there something in this car I need to know about – I'm going to give you one chance to tell me and if nobody tells me anything then both of you can be charged with something.*

Passenger: Not that I know of cause this is not my car

Pelfrey: You understand you are both in it.

Passenger: Are you serious?

Pelfrey: *Do you know if he stashed something? Ask you to hold onto something?*

Passenger: No, I don't, no no, hell no, definitely don't but I mean....is it like a new law or something

Pelfrey: *I'm just saying if he denies it*

Court's Ex. 3 at 12:50 (emphasis added).

Dispatch provided Pelfrey with a picture of Jeremy Wirtz. When Pelfrey confronted Petitioner with the photograph, Petitioner maintained that it was him before he got neck tattoos. Pelfrey then asked if they should "look up what Gary Wirtz⁶ looks like." Pelfrey reviewed the driving record for Gary Wirtz and determined that Petitioner was Gary, not Jeremy, Wirtz. Pelfrey then told Petitioner to "be straight with me, what's in the car," but Petitioner continued to deny that there was anything in the vehicle. Court's Ex. 3 at 14:00-16:20.

⁶ Pelfrey comes up with the name "Gary Wirtz" on his own. No one on scene or through dispatch had provided the name "Gary Wirtz" to Pelfrey. This indicates at least some familiarity by Pelfrey with Petitioner.

At this point, Petitioner had not been told that he was under arrest nor given Miranda⁷ warnings. However, Petitioner did request to speak with Pelfrey, and the following discussion was had:

Petitioner: Listen, listen I was supposed to go pick something up real quick for somebody; somebody told me to go pick it up and that's all I know.

Pelfrey: Uh-Huh Where's it at, what'd you pick up?

Petitioner: No, I gotta go pick it up, you can follow me there, hide down the road do whatever works.

Pelfrey: We can't do that, you ain't being honest with me.

Petitioner: I'm being honest with you.

Pelfrey: What's your name?

Petitioner: I'm being honest with you.

Pelfrey: What...is your name Gary?

Petitioner: Yes.

Pelfrey: Okay, well at least we are getting somewhere. *Is there anything in that car I need to know about?*

Petitioner: *No, no, but there was about to be if you'd work with me.*

Pelfrey: *We're going to search that car real quick, make sure.*

Petitioner: *No, they ain't searching that car.*

Pelfrey: *We are going to inventory it. Are we going to find anything during the inventory?*

Petitioner: *No, they ain't searching that car – I gotta call my uncle to search that car.*

Pelfrey: You're driving, it's being towed.

Petitioner: Yeah, they can tow it.

Pelfrey: Okay, gotta inventory it – watch your legs.

Court's Ex. 3 at 17:35-18:26 (emphasis added).

Dispatch then informed Pelfrey that Petitioner had a pending warrant. Pelfrey returned to Petitioner and read him his Miranda rights. After Pelfrey administered Petitioner his rights, he stated:

Pelfrey: Both of y'all are in the car okay, I'm going to give her the same chance I'm going to give you, if there is something in there now, tell me.

Petitioner: *There's nothing in there, I mean it's not my car for you to search.*

Pelfrey: *We are going to inventory it, if we find something during the inventory it's the same.*

⁷ Miranda v. Arizona, 384 U.S. 436 (1966)

Petitioner: That's an illegal search, I done been through this, that's an illegal search.

Pelfrey: Gary, I'm trying to give you the benefit of the doubt here okay

Petitioner: You ain't trying to give me shit man, you trying to railroad me

Court's Ex. 3 at 21:05 (emphasis added).

One of the assisting officers asked Pelfrey if he "gotta search it" and Pelfrey responded with "inventory it." Court's Ex. 3 at 23:39. Pelfrey then began the search of the vehicle by picking up a beer can and then pulling on some plastic that was jammed into the door handle, but he quickly stopped to get gloves from his vehicle. While Pelfrey is getting gloves, the following can be heard:

Petitioner: Hey I'd like a supervisor down here before y'all search my car.

Pelfrey: This isn't a search this is an inventory.

Petitioner: It's a search, it's a search of my car.

Pelfrey: It's an inventory.

Petitioner: *I don't have nothing in there that needs inventorying, nothing.*

Pelfrey: *Okay that doesn't matter, we gotta do it per policy.*

Petitioner: *No, you don't.*

Court's Ex. 3 at 24:15 (emphasis added).

Pelfrey began the "inventory" a second time, opening a zipped black bag in the driver's seat. A sum of money, cellphones, and what appears to be narcotics are seen inside when the bag is opened. After placing the passenger in investigative detention, Pelfrey continued the "inventory" by shaking out a shirt, lifting the cans in the cup holders, shaking out a cigarette pack, trying to forcefully remove the center console, rummaging through open bags in the back seat, and pulling the trunk lining away from the sides of the trunk. Court's Ex. 3 at 24:45. At no point during this "inventory" does Pelfrey relay what he sees or finds to the other officers, nor does he take down any notations about the items in the vehicle. The backup officer specifically states that he does not "know what you [Pelfrey] want to put on this inventory because I don't know what you pulled out of there." Pelfrey responded by telling him "just a tattoo kit and

ummm.” Court’s Ex. 3 at 37:54. He eventually tells the backup officer “you can just put on the inventory, uh recorded on Axon, Pelfrey.” Court’s Ex. 3 at 39:18. Pelfrey only calls for a tow truck after he has completed the search of the vehicle. Court’s Ex. 3 at 31:14.

Pelfrey then returned to Petitioner to give him his phone and explain what was found during the search of the vehicle. Pelfrey stored the contraband in an unsealed, unmarked evidence bag in the trunk area of his patrol vehicle. Court’s Ex. 3 at 39:44.

Discussion

Despite the eventual characterization of the search as an “inventory,” the sole purpose of the intrusion into Petitioner’s vehicle by Pelfrey was to search for contraband. This is evident in the words used by Pelfrey when he asked numerous times about illegal items in the vehicle and in his actions such as failing to fill out the inventory form and shaking out a cigarette packet, which were not the actions of one inventorying a vehicle but of one searching for contraband. Merely labeling the search an inventory does not diminish the investigatory purpose of the encounter. After being told that there was nothing illegal in the vehicle, Pelfrey stated: “We’re going to search that car real quick, make sure.” These words alone should have indicated to the trial court that Pelfrey’s sole interest was in searching the vehicle for contraband and not in inventorying it for any caretaker purpose.

The basic purpose of the Fourth Amendment, as recognized repeatedly by the United States Supreme Court, is “to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” Cady v. Dombrowski, 413 U.S. 433, 453 (1973) (Brennan, J. dissenting). Through its exclusionary rule, the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. Similarly, the South Carolina Constitution provides protection against unlawful searches and seizures. S.C.

Const. art. I, § 10. In fact, the South Carolina Constitution contains an express right to privacy provision that favors an interpretation *offering a higher level of privacy protection* than the Fourth Amendment. See State v. Key, 431 S.C. 336, 848, S.E.2d 315 (2020) (emphasis added).

When evaluating a search through the framework of the Fourth Amendment, “[t]he ultimate standard set forth...is reasonableness.” Dombrowski at 439. “Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.” S. Dakota v. Opperman, 428 U.S. 364, 375 (1976). Evidence seized in violation of the Fourth Amendment will be excluded in both state and federal court. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

“Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment’s prohibition against unreasonable searches and seizures.” State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). “However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule.” Id. at 331-32, 457 S.E.2d at 621. In such cases, the *burden is upon the State to justify a warrantless search*. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981) (emphasis added).

One of the exceptions to the warrant rule is an inventory search conducted according to standard police procedures. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (stating “if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant” citing Colorado v. Bertine, 479 U.S. 367, 374 (1987))). “For an inventory search to be valid, the vehicle searched should first be in the valid

custody of the law enforcement officers conducting the inventory.” United States v. Brown, 787 F.2d 929, 931-32 (4th Cir. 1986) (citing Opperman, 428 U.S. at 374); See Also State v. Miller, 423 S.C. 95, 111, 814 S.E.2d 166, 175 (Beatty, C.J. Dissenting) (2018). “The question ... is ... whether *the police officer's decision to impound was reasonable under the circumstances.*” Brown, 787 F.2d at 932 (emphasis added).

However, “[a]n inventory search will not be sustained where the court believed that the officers were searching for incriminating evidence of other offenses.” U.S. v. Feldman, 788 F.2d 544, 553 (9th Cir. 1986) citing Opperman, 428 U.S. at 376. In analyzing inventory searches the United States Supreme Court has explained,

[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches *should be designed to produce an inventory*. The individual police officer must not be allowed so much latitude that inventory searches are turned into a ‘purposeful and general means of discovering evidence of a crime.’

Florida v. Wells, 495 U.S. 1, 4 (1990) (emphasis added). The California Court of Appeals for the Fourth District further elaborated on the principle outlined in Wells, *supra*, stating,

Just as inventory searches are exceptions to the probable cause requirement, they are also exceptions to the usual rule that the police officer’s subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis...*courts will explore police officers subjective motivations for impounding vehicles in inventory search cases, even when some objectively reasonable basis exists for the impounding.*

People v. Torres, 188 Cal. App. 4th. 775, 787-788, 116 Cal. Rptr. 3d 48, 57 (4th Dist. 2010) (cleaned up) (emphasis added).

Reasonableness of the Encounter and Impound

As Chief Justice Beatty stated in his dissent in Miller, *supra*, before analyzing the reasonableness of an inventory search, “the Court must first determine whether the predicate seizure was lawful as the inventory search is contingent on the seizure of the vehicle.” Miller at

111, S.E.2d at 175 (Beatty, C.J., Dissenting). In Miller, this Court held that the decision to seize Miller's vehicle from a private parking lot was reasonable because the officers were acting pursuant to lawful authority and in accordance with the requirements set forth in a written police department policy. Id. at 101, 814 S.E.2d at 169. That policy included three requirements that the Court held were "standardized criteria" that limited the officers' discretion to impound a vehicle and "the officers' compliance with the requirements render[ed] the decision to tow it reasonable under the Fourth Amendment." Id. at 102-105, 814 S.E.2d at 170-171.

However, while the exercise of police discretion in towing a vehicle is allowed when that discretion is exercised according to standard criteria, it must also be exercised on the basis of something other than suspicion of evidence of criminal activity. Id. at 113, 814 S.E.2d at 176 (Beatty, C.J., Dissenting). In Miller, Chief Justice Beatty opined that the officer's decision to tow Miller's vehicle when no traffic violation preceded the encounter was based solely on the suspicion of drug activity, and therefore the seizure was improper. Id. He further stated that, even if the stop was justified and the impoundment was not pretextual, "the mere existence of a police department policy is insufficient to satisfy the State's burden of proving the applicability of the inventory search exception to the Fourth Amendment." Id.

Admittedly, Pelfrey was acting according to written departmental procedures that control, to an extent, an officer's discretion in choosing to tow a vehicle. However, unlike the policy in Miller, the OCSD policy allows the officer, in his discretion, to let the driver/owner contact an individual to take possession of the vehicle. It would be reasonable to conclude that if Pelfrey was not acting in an investigatory capacity, he would have at least offered to let Petitioner contact the owner of the vehicle to come claim it prior to the impoundment. Instead, Pelfrey

spent the encounter questioning Petitioner and the passenger about what contraband would be located when he searched the vehicle.

No testimony was elicited during the suppression hearing in Petitioner's case. However, Pelfrey's body-worn camera footage provided invaluable insight. Initially, it should be noted that Pelfrey provided different reasons for approaching Petitioner. He told backup officers that he "got out with him [Petitioner] on the cracked windshield" yet never mentioned the windshield to Petitioner during the hour-long encounter. Instead, he told Petitioner, and later the trial court, that he caught up with him because Petitioner "sped up" when he passed a cop which Pelfrey found "odd." Neither a cracked windshield⁸ nor speeding up are traffic violations. While it was eventually discovered that Petitioner was driving on a suspended license, there was nothing offered at the suppression hearing, in the trial testimony, or on the video that would justify the encounter prior to that discovery.

The Court of Appeals held that, pursuant to State v. Miller, 423 S.C. 95, 925 S.E.2d 166 (2018), the seizure of the vehicle was reasonable under the circumstances because Pelfrey testified at trial that soon after he approached Petitioner, he discovered circumstances that required Petitioner's arrest. Further, because there was no one else at the scene or near the scene who could have lawfully driven the vehicle after Petitioner's arrest, the Court of Appeals concluded that the vehicle had to be impounded and towed. However, the trial testimony of Pelfrey was misleading. As Court's Exhibit 3 clearly showed, Pelfrey did not learn that

⁸ A cracked windshield that is not obstructing the driver's view is not a traffic violation. S.C. Code Ann. § 56-5-5000 only prohibits the driving of a motor vehicle with "any sign, poster or other nontransparent material upon the front windshield...which obstructs the driver's clear view of the highway or any intersecting highway." S.C. Code Ann. § 56-5-5310 requires vehicle equipment to be in "good working order" and the vehicle must be in "safe mechanical condition." At no point during the encounter or later at trial did Pelfrey assert that the cracked windshield obstructed Petitioner's view.

Petitioner was driving on a suspended license, had an outstanding arrest warrant, and had lied about his identity until almost *twenty minutes* into the encounter. Court's Exhibit 3 also showed that Pelfrey had contradictory reasons for approaching Petitioner, that he was immediately suspicious of Petitioner's behavior and demeanor, and that he believed there was contraband in the vehicle. Further, while there was no one on the scene who could have taken possession of the vehicle, the record is silent as to whether there was anyone near the scene who could have taken possession of the vehicle because Pelfrey, despite being explicitly authorized by the written OCSD policies to do so, did not offer Petitioner the opportunity to have someone near the scene come take possession of the vehicle. These actions further supported the conclusion that Pelfrey's motivations were pretextual.

The State did not carry its burden to justify the warrantless search of Petitioner's vehicle as it relied solely on the existence of the written OCSD policies to justify the search. As Chief Justice Beatty opined in his dissent in State v. Miller, 423 S.C. 95, 113, 925 S.E.2d 166, 176 (2018) (Beatty, C.J. Dissenting) the mere existence of a written policy is not sufficient to justify a search or to remove an investigatory taint. See also People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) (“[T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle.” To hold otherwise would grant the police an unlimited ability to evade the requirements of the fourth amendment by promulgating regulations that authorize the use of inventory searches following every arrest.).

The State offered no evidence of Pelfrey's subjective motivations in approaching and detaining Petitioner or in seizing and searching Petitioner's vehicle. However, in watching Court's Exhibit 3, it is apparent that Pelfrey's motivation for the encounter was that he believed

there was contraband in the vehicle. Before he ever requested Petitioner's license and registration, roughly five minutes into the encounter, he performed a frisk of Petitioner's person and questioned Petitioner as to what contraband is in the vehicle. That Pelfrey may have eventually discovered some objectively reasonable basis to impound Petitioner's vehicle did not remove the taint of the investigatory motive that led to the impoundment.

Pelfrey pursued an encounter with Petitioner because he thought it was "odd" that Petitioner sped up as he passed Pelfrey's patrol vehicle. Pelfrey also testified that Petitioner was "very fidgety, trying to move around the vehicle. He was having trouble keeping his train of thought and talking all over the place." R. 34, l. 2-5. Pelfrey's trial testimony revealed that he had a generalized suspicion that Petitioner was engaged in a criminal activity. The video footage of the encounter showed that Pelfrey was not engaged in any community caretaking function but was "engaged in the often-competitive enterprise of ferreting out crime." Opperman, 428 U.S. at 383. The seizure of the vehicle was not reasonable in these circumstances and was violative of both the U.S. Constitution and the South Carolina Constitution. However, even if this Court finds the seizure of the vehicle reasonable, the investigatory search cannot be deemed reasonable.

Reasonableness of the "Inventory" Search

The main purpose of the inventory exception is that police may "search a lawfully impounded vehicle *to compile an inventory list of the vehicle's contents* without violating the Fourth Amendment." United State v. Rowland, 341 F.3d 774, 779 (8th Cir. 2003) citing Opperman, 428 U.S. at 376 (emphasis added). The prevailing justification for inventory searches has been in the "community caretaking duties" ascribed to police officers. Inventory searches are designed to be "totally divorced from the detection, investigation, or acquisition of

evidence relating to the violation of a criminal statute.” Dombrowski at 441. (1976). The Supreme Court of the United States has stated that these “caretaking duties” are made up of “three distinct needs: the protection of the owner’s property while it remains in police custody; the protection [of] the police against claims or disputes over lost or stolen property; and the protection of the police [and the public] from potential danger.” Opperman at 369.

However, the advances in security and technology that have occurred in the last forty years have greatly diminished the need to protect the police against claims of loss or from potential danger. As noted in both the majority opinion and the dissent of Bertine, *supra*, the use of secure impound lots effectively eliminates the last two concerns. Bertine at 382 (Marshall, J., Dissenting). Thus, as Justice Marshall pointed out, the only interest actually served by automobile inventory searches is that of protecting the owner’s property. Id. (Citing to Justice Powell’s concurring opinion in Opperman at 378, which recognizes “there is little danger associated with impounding unsearched automobiles”). However, modern inventory policies do not take into account the vehicle owner/driver’s wishes or even require that police speak with the owner prior to searching the vehicle for an “inventory.”

South Carolina’s Constitution offers its citizenry a higher level of privacy protection than the federal Constitution. While privacy expectations in an automobile are somewhat diminished, “the word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away...” Any search, even of an automobile, is a substantial invasion of privacy. Opperman at 387-88 (Marshall, J., Dissenting). Thus, for an inventory search to be reasonable, there must be other safeguards in place to ensure the privacy of the driver/owner and occupants. For example, one such safeguard would be to require law enforcement to allow the driver to make

arrangements for the vehicle or to deny the inventory search. As Justice Marshall stated in his dissent in Opperman,

The Court makes clear ... that the police may not proceed to search an impounded car if the owner is able to make other arrangements for the safekeeping of his belongings. Additionally, while the Court does not require consent before a search, it does not hold that the police may proceed with such a search in the face of the owner's denial of permission. In my view, if the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search.

Opperman at 392 n.12.

Just prior to searching the vehicle, Pelfrey asked Petitioner, for the sixth⁹ time, if there was something in the vehicle he should know about. Petitioner again told Pelfrey there was nothing in the vehicle, to which Pelfrey replied that they would “search it real quick, make sure.” Petitioner immediately responded that they could not search the vehicle, and that only his uncle could give them permission to search the vehicle. Pelfrey stated it would not be a search but would be an inventory, and Petitioner told him there was nothing in the vehicle that needed to be inventoried. Based on Petitioner's statements to Pelfrey, there was no reason for an inventory to be performed. Again, Pelfrey had the time and opportunity to contact the owner of the vehicle, but he did not do so. This was because Pelfrey was intent on searching the vehicle for narcotics and not on performing his supposed “caretaker” duties.

There were numerous other problems with the alleged “inventory” of Petitioner's vehicle in this case. Most glaring was the fact that Pelfrey does not actually complete a written inventory of the vehicles contents while searching the vehicle or after. When questioned by backup officers about what to include on the inventory, Pelfrey merely said a tattoo gun and then

⁹ Five times prior to this, Pelfrey asked Petitioner, or the passenger, what was in the vehicle or on their persons that would illegal.

later says to put down that it was recorded on his body camera. The body camera footage certainly shows a myriad of items¹⁰ in the vehicle that are never mentioned or written down.

Next was the manner in which Pelfrey “inventoried” the vehicle. He was not looking for valuables to secure. He was, as he stated to Petitioner, checking to see if there was anything illegal in the vehicle. It borders on the absurd to characterize his actions as looking for valuables when he looks underneath a can in the cupholder, shakes out the contents of a cigarette pack, attempts to forcibly remove the center console, and peels back the lining of the trunk to see what might be hidden there, all the while not noting what the contents of the vehicle were.

Petitioner’s case is similar to that of the defendant in U.S. v. Taylor, 636 F.3d 461 (2011). In Taylor, Kansas City police were responding to a request by a fellow officer to follow a green 1500 Chevrolet truck and initiate a traffic stop if the driver committed a traffic violation. Id. at 463. The officers were informed that the driver of the vehicle was a suspect in a drug investigation and that narcotics were believed to be in the vehicle. Officers observed the truck change lanes without signaling and initiated a traffic stop. When Taylor could not provide proof of insurance he was arrested, and the truck was impounded and searched pursuant to Kansas City Police Department’s written policies. Id.

While searching the truck under the guise of an inventory, officers located seventy-four grams of cocaine, along with various clothing, toiletries, tools, equipment, and papers. On the inventory form, the officer merely listed the myriad of items in the truck as “misc. tools.” Id. The Court of Appeals for the Eighth Circuit held that the search of the truck was not justified by the inventory search exception to the warrant requirement because the officer’s description of

¹⁰ Pelfrey removed the narcotics, a sum of money, a cell phone, and a gun from the vehicle. There was also a tattoo kit, paint, clothing, stereo speakers, and other various items seen on the body camera that do not appear recorded anywhere.

“misc. tools” was insufficient to remove the inference that the search was investigatory. Id. at 465. Additionally, the Court of Appeals held that in addition to not adhering to the procedures, the fact that the officers were asked to follow the vehicle suggested that the police were engaging in their criminal investigatory function, not their caretaking function, when they searched the truck. Id.

OCSO policies require the department to “inventory all vehicles towed” and to fill out the inventory form completely. R. 136 (emphasis in the original). “Non-evidentiary items of significant value found in the vehicle should be removed for safekeeping and afforded adequate security. Contraband or evidence found in the vehicle should be immediately seized and preserved in accordance with existing procedures governing the seizure of physical evidence.”

R. 138. Based on the video recording, these policies were not followed in Petitioner’s case.

The inventory form was not filled out, and Pelfrey told officers to put that it was recorded on his body camera, thus the description of the contents of the vehicle was insufficient to remove the inference that the search was investigatory. Additionally, Pelfrey’s apparent knowledge of Petitioner’s name, his conflicting reasons for beginning the encounter, and his repeated and persistent questioning about contraband that would be found in the vehicle showed that he was engaged in his criminal investigatory function and not his caretaking function. Hence, the “inventory” was not reasonable and was a violation of Petitioner’s rights under the U.S. and South Carolina Constitutions.

Finally, during the suppression hearing, the State asserted no other exception to justify the search of the vehicle and did not offer anything outside of the written policy pages to justify the inventory. The State is required to prove the legitimacy of the inventory prior to the evidence being admitted, and merely proving the existence of the policy does not satisfy the State’s burden

to prove that the inventory exception applied in this case. Without more, the reasonableness of the inventory cannot be upheld. See People v. Spencer, 408 Ill. App. 3d 1, 8–9, 948 N.E.2d 196, 203 (2011) ([T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle). Petitioner respectfully requests this Court find the seizure and search of the vehicle he was driving unreasonable under both the United States and South Carolina constitutions.

II.

The Court of Appeals erred in holding that portions of Petitioner’s factual argument were not preserved for appellate review.

The Court of Appeals held that Petitioner’s factual arguments that law enforcement failed to complete the written inventory form and that Petitioner should have been allowed to contact the owner of the vehicle to avoid impoundment were not preserved for review because they were not raised in either the written motion to suppress or during the motion hearing. The record on appeal reflects that Counsel Byford argued below that Pelfrey’s *words and actions* as captured on the body worn camera show that Pelfrey’s motivation in searching Petitioner’s vehicle was to find evidence of a crime.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Jean Hoefler Toal et al., Appellate Practice in South Carolina (2016) 184. “However, [the error preservation requirement] is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants.” Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

“There are four basic requirements to preserving issues at trial for appellate review.” S.C. Dep’t of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefler Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

“The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the Appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” *Id.* The rules of issue preservation do not require exact language to preserve an issue for appellate review. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

At the suppression hearing Counsel Byford argued

But what I want to point out is that I believe the intention of those cases remains the same. And the reason the Supreme Court came to the conclusion that it did is because they didn't want the police to use the inventory search as the ability to have this *cart blanche to just tear apart a car, look for evidence of a crime, instead of actually inventorying the vehicle. And I would still argue to the Court that that is what happened in this case. I know you have reviewed the video, you have heard the exchange between the officer and my client.* And he asks the defendant several times, “What are we going to find in the car, what are we going to find in the car.” And, again, it is not until Mr. Wirtz says, “You can't search that car, I don't consent to a search of that car,” that he switches to use the term “inventory.” *And I think that's very telling of the motivation of the officers.*

Yes, they did eventually do an inventory. And they have a policy governing it, *but their intention before they did it was to find evidence of a crime in that car. A lot of the conversation that is contained on the video prior to the search indicates that that is what the officer is thinking.*

I would just ask the Court to find that *this search -- the inventory -- it was pretext. This was a not-consented-to search of the vehicle.* And the drugs that were found as a result should be suppressed.

R. 6, l. 7-R. 7, l. 8 (emphasis added).

What was argued below, and subsequently on appeal, was that Pelfrey did not act in accordance with the written policies and procedures in conducting an inventory search but instead “cart blanche tore apart the car” searching for evidence of a crime. Relevant to that argument were Pelfrey’s words and actions, such as failing to properly fill out the inventory form or not allowing Petitioner to contact the vehicle’s owner. These were not stand-alone grounds raised on appeal but part and parcel of the argument that Pelfrey, by his words and actions, acted with a clear investigatory motive in searching Petitioner’s vehicle. Considering the totality of

the circumstances, these actions showed that Pelfrey did *not* conduct the search according to the standard OCSD policies but instead rummaged through the vehicle looking for evidence of a crime.

Petitioner is not, for the first time, arguing on appeal that Pelfrey did not conduct the inventory pursuant to the applicable policies and procedures, as this was the main basis for the suppression motion below. Counsel Byford specifically argued that the policies and procedures required by case law existed so that police cannot have “this cart blanche to just tear apart a car, look for evidence of a crime, instead of actually inventorying the vehicle. And I would still argue to the Court that *that is what happened in this case.*” R. 6, ll. 10-15.

Counsel Byford argued that Pelfrey did not conduct an inventory, but he “tore apart” Petitioner’s vehicle looking for evidence of a crime. In considering the motion, the lower court reviewed the video footage that captured Pelfrey’s actions in allegedly inventorying the vehicle and failing to fully fill out the inventory form. Petitioner has not offered new grounds on appeal to support his position but has merely described the portions of the video, which the lower court considered prior to its ruling, that support the argument that Pelfrey had pretextual investigatory motives in searching Petitioner’s vehicle.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to the Court of Appeals to allow full briefing of these issues.

Respectfully Submitted,

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by [Signature] w/permission

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