STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH MILLER,

APPELLANT

APPELLATE CASE NO. 2025-001219

INITIAL BRIEF OF APPELLANT

JORDAN WAYBURN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the trial court incorrectly apply Article I, section 10 of the South Carolina Constitution by denying Appellant's motion to suppress a warrantless search of Appellant's person for gunshot residue where he expressly denied consent?

STATEMENT OF THE CASE

At its October 2024 term, the Charleston County grand jury indicted Appellant for attempted murder and possession of a weapon during the commission of a violent crime. Tr. 7:9-22; R. *. In March 2025, it indicted him for unlawful possession of a firearm by a person convicted of trafficking a controlled substance and assault and battery of a high and aggravated nature. R. *, *.

From June 9 to 12, 2025, the case proceeded to trial before Judge Jennifer McCoy and a jury on both of the possession charges and for assault and battery. Tr. 1. The state did not proceed to trial on the attempted murder indictment. Tr. 9:4-17. Ultimately, the jury convicted Appellant on all three charges. Tr. 487:4-16. The trial court issued a 15-year sentence for the assault and battery of a high and aggravated nature and two 5-year sentences for the firearm charges, all to run concurrently. Tr. 498:12-16.

STATEMENT OF FACTS

Jaunita Dukes, Appellant's aunt, testified at trial that on the morning of January 4, 2024, Appellant visited her at her house in North Charleston. Tr. 172:22-173:3, 178:7-179:6. Dukes testified that he was in a "normal" mood and acting friendly, that he said, "Hi, Aunt Nita, how you doing?" Tr. 179:12-180:9. Apparently, as they were walking towards the den in her house, Appellant seemed to hallucinate and asked Dukes to "open that door," even though there was no door in that location of the house as it had been remodeled. Tr. 181:5-13. Dukes testified that when she tried to tell Appellant there was no door he said, "Well, I'm going to shoot you." Tr. 181:5-13. She testified he then shot her in the knee and left the house. Tr. 181:15-17.

Officers arrested Appellant at his house approximately an hour later. Tr. 69:11-15. They took him to the police station where, over his objection and after interrogation, they collected from his person a sample for a gunshot residue (GSR) test. Tr. 69:16-21, 329:1-3, 390:16-17. SLED Agent Megan Fletcher testified the test indicated he had recently been near a fired gun or had "com[e] into contact with a surface that has gunshot primer residue on it." Tr. 393:4-17. Appellant testified he did not shoot Dukes or even see her that day. Tr. 416:1-6.

Appellant moved prior to trial to suppress the results of the test. Tr. 69:5-11. He argued collecting the sample violated Article I, section 10 of the South Carolina Constitution as a warrantless search and seizure and an unreasonable invasion of privacy. Tr. 70:14-21, 71:10-19, 72:16-20. The solicitor argued it met the exigent circumstance and search incident to arrest exceptions to the warrant requirement. Tr. 73:1-21. The trial court denied the suppression motion without explanation. Tr. 145:23-146:2.

STANDARD OF REVIEW

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court will] review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

The standard of review of a motion to suppress based on Article I, section 10 of the South Carolina Constitution should be the same as under the Fourth Amendment.

ARGUMENT

The gunshot residue test was a warrantless search and an unreasonable invasion of privacy, and therefore the results should have been suppressed.

Article I, section 10 of the South Carolina Constitution guarantees "greater" and "heightened" protections than the Fourth Amendment of the federal constitution. *State v. German*, 439 S.C. 449, 471, 887 S.E.2d 912, 923 (2023) (citing *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)). It provides 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 . . . ." *German*, 439 S.C. at 470, 887 S.E.2d at 923 (quoting S.C. Const. art. I, § 10). Where evidence is obtained by an unconstitutional search or seizure or by an unreasonable invasion of privacy, it should be suppressed at trial. *State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001); *see State v. Ferguson*, 436 S.C. 596, 608, 874 S.E.2d 234, 240 (Ct. App. 2022) (affirming suppression).

I. A gunshot residue test is a search that implicates the constitution; because it was warrantless it was unreasonable.

The gunshot residue collection was a search. *Cf. Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016) ("[T]he taking of a blood sample or the administration of a breath test is a search."). Law enforcement officers collected a sample from Appellant's body to discover evidence they believed might be found. It was a physical trespass upon Appellant's person specifically intended to produce evidence to use against him at trial. That is a search. Officers were therefore required to obtain a warrant before collecting the sample. *See State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015) ("In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." (quoting *Forrester*, 343 S.C. at 643, 541 S.E.2d at 840)). Because they did not, the search is presumptively unreasonable and the results of the test should have been suppressed. *German*, 439 S.C. at 461,

887 S.E.2d at 918 (citing *Riley v. California*, 573 U.S. 373, 382 (2014)); *cf. State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007) ("Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." (quoting *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005))).

II. Collecting the sample without a warrant was an unreasonable invasion of Appellant's privacy.

The collection was also an unreasonable invasion of Appellant's privacy that, in the circumstances, could only be supported by a warrant. "[B]y articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence." *Forrester*, 343 S.C. at 644, 541 S.E.2d at 841. In part, "the drafters of the constitution were concerned with the emergence of new technology increasing the government's ability to conduct a search." *German*, 439 S.C. at 471-72, 887 S.E.2d at 923 (citing *Forrester*, 343 S.C. at 647, 541 S.E.2d at 842).

The sample collection was an unreasonable invasion of Appellant's privacy—of his right to be secure in his own person without intrusion by the government. It was a "type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 U.S. 291, 295, (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). Appellant expressly refused to allow the officers to touch him in this way,[1] and absent a legitimate law enforcement, penological, or other substantial governmental interest—i.e. other than to obtain evidence to use against him at trial—his bodily autonomy and security should not be subjected to

[1] *Cf.* 5 Corpus Juris, *Assault and Battery* § 8, at 619-20 (1916) ("It is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree, which constitutes the battery; and it is unnecessary that the contact by effectuated by a blow, as any forcible contact is sufficient." (footnotes omitted)).

the whims of officers without prior judicial review. *See German*, 439 S.C. at 473, 887 S.E.2d at 924 ("Because [the officer] ordered the blood draw despite Appellant's refusal, he violated Appellant's right to be free from an unreasonable invasion of privacy."). Appellant does not assert that officers could not touch him at all without a warrant—that would be obviously absurd. Officers can, for example, apply or remove handcuffs to secure and transport a defendant under arrest. However, where the *sole* purpose of the contact is to obtain evidence for use against the defendant at trial, state actors must first obtain a warrant. *Compare United States v. Robinson*, 414 U.S. 218, 234-35 (1973) (approving full inventory searches of arrestees at the time of a lawful arrest in part because "the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial" (citations omitted)), *with Riley v. California*, 573 U.S. 373, 386 (2014) (holding search incident to arrest exception does not apply to digital contents of cell phones in part because the risk to officers is nonexistent).

In addition, this test was of the same type as the drafters of the provision imagined: increased technological capacity allows the government to discover and know things not typically exposed to the public. *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 338, 882 S.E.2d 770, 850-51 (2023) (James, J., dissenting) (quoting *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 15 (1969)). Here, no one could have simply looked at Appellant's hands and determined if he had fired a gun earlier that day. Absent this test, that information was invisible and unknowable. Then SLED used an electron microscope to observe individual particles taken with the swabs. Tr. 388:5-22. As the government's capacity to draw information from the world, individuals, and their past increases, courts must stay vigilant to guard every citizen's right to be free from unreasonable invasions of privacy. *Cf. Kyllo v. United States*,

533 U.S. 27, 34 (2001) ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search . . . ." (internal citation omitted)).

As a final point, the state claimed prior to trial that "once [a defendant is] in custody, the police have the right to collect evidence from the Defendant's person." Tr. 73:8-10. Such a broad statement without qualification is not correct. *Riley*, 573 U.S. at 392 ("Not every search 'is acceptable solely because a person is in custody.'" (quoting *Maryland v. King*, 569 U.S. 435, 463 (2013)); *see State v. Ellefson*, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976) ("When a pretrial detainee remains in custody, he is not disrobed of his constitutional rights and laid bare for the zealous investigation of his case.").

III. No exception to the warrant requirement applies.

At trial the state argued the warrantless search and invasion was permissible as a search incident to arrest or under the exigent circumstances exception because GSR evidence "deteriorate[s] rather quickly." Tr. 73:1-21. Neither exception applies here.[2] Fundamentally,

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[2] The state offered no other legal justification or argument below. It apparently accepted that this was a search but then asserted these two exceptions save it. To the extent the state would attempt to support the search with other theories that have developed in interpretation and application of the Fourth Amendment, Appellant contests any further extension of exceptions to the warrant requirement or the exclusionary rule.

This Court should not transplant the entirety of Fourth Amendment jurisprudence onto our state's privacy clause without considering whether the rationale behind a given rule should apply the same to limit the protections afforded by article I, section 10. *See State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("[T]he South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." (citing *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841)). Most importantly, it is not necessary for our appellate courts to take the deterrence-only approach federal courts have taken to the Fourth Amendment's protections and the exclusionary rule. Article I, section 10 is intended to preserve fundamental interests of the individual from governmental overreach with protections that enhance those already guaranteed by the federal Constitution. *See German*, 439 S.C. at 473, 887 S.E.2d at 924; *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 260, 882 S.E.2d 770, 809 (2023) (Few, J, concurring) ("[T]he term

these exceptions exist to protect officers and allow them to act quickly in high-pressure situations, and to prevent the active destruction evidence. They do not exist to eliminate the warrant requirement where government actors intrude upon a person for the purpose of uncovering evidence to use against him. Because Appellant was secured in the police station and a warrant could have been obtained extremely easily, they do not apply to this evidentiary search and invasion of Appellant's privacy.

A. No exigency existed to justify the warrantless search.

The exigency exception to the warrant requirement "always requires case-by-case determinations." *Birchfield v. North Dakota*, 579 U.S. 438, 467 (2016); *see German*, 439 S.C. at 463, 887 S.E.2d at 919 (citing *Missouri v. McNeely*, 569 U.S. 141, 156, (2013)). The exception applies "only where, from an objective standard, a compelling need for official action and no time

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'privacy' means the full panoply of privacy rights . . . ."); *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 294-95, 882 S.E.2d 770, 827 (2023) (Kittredge, J., dissenting) ("Flowing from natural law, privacy is inextricably woven into the very fabric of our nation. Freedom and liberty, terms which necessarily embrace privacy, are the cornerstones of our Constitution, laws, and civil society."). When the state—through investigators, police officers, or whomever it delegates authority—violates that right and those interests, it should not be permitted to use evidence obtained as a result against the person whose right it violated. As a matter of principle, if the government is going to criminally prosecute someone, it must do so while complying with the constitution. That is why unconstitutionally obtained evidence must be suppressed: to preserve as much as possible the constitutional rights of the person violated, and to deprive the state of benefits it unconstitutionally obtained.

In particular, the good-faith exception should not apply to an unreasonable invasion of privacy. Appellant recognizes our Supreme Court has previously held the good-faith exception applied to an alleged violation under Article 1, section 10. *See State v. Carter*, 445 S.C. 157, 163, 912 S.E.2d 264, 267 (2025). It did so relying solely on Fourth Amendment cases where it is clearly established that "the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Carter*, 445 S.C. 157, 163, 912 S.E.2d 264, 267 (2025) (quoting *Davis v. United States*, 564 U.S. 229, 246 (2011)). Importantly, however, the Court noted the defendant there did not specifically allege the search was an unreasonable invasion of privacy. *Carter*, 445 S.C. at 162 n.2, 912 S.E.2d at 267 n.2. That the Court specified the issue raised implies the result may have been different had a more specific challenge been brought. Critically, that more specific challenge as an unreasonable invasion of privacy was raised here.

to secure a warrant exist." *State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015) (quoting *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). Exigent circumstances may exist if there is a risk of "imminent destruction of evidence." *State v. Dobbins*, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017) (citing *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)). Importantly, "the burden is upon the State to justify a warrantless search." *State v. Key*, 431 S.C. 336, 344, 848 S.E.2d 315, 319 (2020) (quoting *State v. Peters*, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978)).

At the pre-trial hearing, the solicitor relied primarily on the exigency exception to the warrant requirement. Tr. 73:19-74:13. She argued—without offering testimony in support of her claims—that gunshot residue tests are "questionable" after four hours and "have a hard deadline after six." Tr. 73:21-24. Appellant argued, however, that "it does not just disappear because of time" but rather it can "go[] away" by "cleaning, wiping, [or] transferring" the residue. Tr. 76:6-11.

The clearest reason the state failed to meet its burden of proving the existence of the exigency is that it had *already* obtained warrants to search Appellant's house, phone, and car. Tr. 69:25-70:5. Thus there indisputably was "time to secure a warrant" before collecting the sample. *Counts*, 413 S.C. at 163, 776 S.E.2d at 65. There was no reason a warrant to search his person or collect the sample could not have been obtained prior to the search. Further, the sample was collected in North Charleston City Hall, which as Appellant argued, is "very conveniently located to judges." Tr. 72:9-10, 417:5-10. But the officers chose not to obtain a warrant. Because there was no exigency, the exigency exception cannot save this warrantless search.

Even if the officers had not yet obtained a different warrant, the collection occurred approximately two and one-half hours after the shooting, Tr. 73:24-74:2, so there was still—at a

minimum—more than an hour in which an officer could have walked down the hallway and found a magistrate. *See State v. McCall*, 429 S.C. 404, 412, 839 S.E.2d 91, 95 (2020) (explaining various difficulties officers faced and affirming the warrantless search because, in part, "We also do not believe obtaining a warrant was practical . . ."). The officers plainly did have time to secure a warrant before collecting the sample. *See State v. Brown*, 289 S.C. 581, 587-88, 347 S.E.2d 882, 886 (1986) ("Lieutenant Ennis gave no explanation as to why the police were unable to obtain a warrant during the approximately two and one-half hour period the motel room was under surveillance. The State has not met its burden of proof to justify the warrantless search under this exception."). Further, the collection was not performed until after officers interrogated Appellant. Another officer could have easily obtained a warrant while that occured. Thus, the state has failed to prove the existence of exigent circumstances sufficient to excuse the warrantless search and invasion. *See German*, 439 S.C. at 464, 887 S.E.2d at 919 ("We cannot sponsor the notion of requiring a defendant to prove that this right—a right she already possesses—exists in any given case. . . . We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement. (quoting *Key*, 431 S.C. at 348, 848 S.E.2d at 321)).

B. The sample collection was not a valid search incident to arrest.

The state also argued below that the search-incident-to-arrest exception applied to support this warrantless search. Tr. 73:3-4. However, this exception does not apply because the collection was not incident to the arrest. A warrantless search incident to an arrest is permissible "only if it is substantially contemporaneous with the arrest." *State v. Freiburger*, 366 S.C. 125, 132, 620 S.E.2d 737, 740 (2005) (citing *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 885 (1986)). If the defendant is moved to another location, it is no longer incident to the arrest. *Shipley v. California*, 395 U.S. 818, 820 (1969) (citing *James v. Louisiana*, 382 U.S. 36, 37 (1965)); *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 885-86 (1986).

At the time officers collected the GSR sample, Appellant had been taken from his home and to the police station where he was then interrogated by the police. Tr. 69:15-16. After the interview, Appellant refused to consent to the collection before officers did so against his wishes, approximately two and one-half hours after the shooting. The collection was neither contemporaneous nor in the same location, so it was not "incident" to the arrest. This was not "a volatile arrest situation" but the calm aftermath following an interrogation at the precinct. *Riley v. California*, 573 U.S. 373, 391 (2014). This is plainly not the same circumstance as, for example, searching an arrestee's physical person and clothing at the time he is arrested. *See Freiburger*, 366 S.C. at 133, 620 S.E.2d at 741 (affirming validity of pat-down search at the time of defendant's arrest). Because the search was not actually incident to the arrest, the warrantless search cannot be supported under this exception to the warrant requirement.[3]

Moreover, the reasons for the exception do not apply in this case. Two underlying rationales support the search-incident-to-arrest exception: "(1) the need to disarm the suspect in

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[3] This case is also unlike *Maryland v. King*, 569 U.S. 435 (2013), where the Supreme Court upheld the mandatory swabbing of an arrestee's cheeks for purposes of confirmatory DNA identification. There it reasoned, in part, that "[t]he need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" 569 U.S. at 447 (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989)) (second alteration original). This is important here because Detective Steinbrunner made a decision to investigate Appellant individually in order to obtain evidence of a crime. That is unlike a defendant having to provide his DNA or fingerprints upon arrest.

None of the other reasons articulated in *King* are applicable either. A GSR test does not go to identification, which serves an important governmental interest when people are being arrested and booked. 569 U.S. at 450-52. It also did nothing to reduce risks to staff or other inmates in the jail. 569 U.S. at 452. Nor could the test support the state's "substantial interest in ensuring that persons accused of crimes are available for trials." 569 U.S. at 452-53. Finally, the test was never going to inform a determination of whether Appellant should have been released on bond, nor could it "have the salutary effect of freeing a person wrongfully imprisoned for the same offense." 569 U.S. at 453-54, 455.

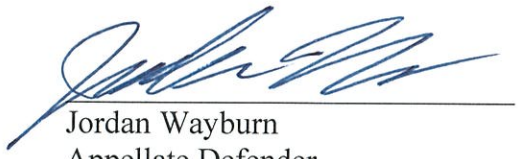
order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Freiburger*, 366 S.C. at 132, 620 S.E.2d at 740 (citing *Knowles v. Iowa*, 525 U.S. 113, 116 (1998)). These reasons are inapplicable here. First, and obviously, the officer safety rationale is of no support. When the GSR sample was collected, Appellant was handcuffed inside a police station. Any potential danger he posed had already been addressed. Further, the simple collection could not reveal or secure anything of danger to the officers—it was a swab of his hands, not a pat-down or search for weapons.

Second, the pressing need to preserve evidence was minimal. This is not like DUI cases where officers and the state have a clear and pressing interest in testing the defendant's blood alcohol content as soon as possible. There, every minute spent waiting for a warrant is another minute where the body naturally and automatically metabolizes the alcohol and, thus, destroys evidence of the crime. *But see McCall*, 429 S.C. at 412, 839 S.E.2d at 95 (noting the United States Supreme Court has rejected the "argument that the natural dissipation of alcohol in the blood created a per se exigent circumstance" (citing *Missouri v. McNeely*, 569 U.S. 141, 152 (2013)). Gunshot residue is not similar. While evidence of alcohol is constantly destroyed by the body, gunshot residue lingers. As Agent Fletcher testified, "These are heavy metal particles, so they're not disappearing into the atmosphere. They're just being transferred from one object to another." Tr. 396:5-7. Fletcher explained that the evidence does not simply deteriorate and vanish but rather rubs or washes off when a person wipes their hands on their clothes, touches objects like when opening a door, or washes their hands. Tr. 389:3-23. Further, Detective Steinbrunner, who collected the sample, testified she knew that sometimes a defendant's hands will be placed in bags to ensure any residue is not lost if it rubs off. Tr. 340:15-25. Officers could have easily put bags around Appellant's hands, which were handcuffed, and also prevented him from using the restroom

for the limited time it would take to obtain a warrant. As explained above, the state could have quickly done so virtually without risk of any residue disappearing. Thus, the risk of evidence being destroyed was minimal.

CONCLUSION

For the reasons articulated above, Appellant respectfully requests this Court reverse his convictions and remand his case to the circuit court.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2026.