THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIORARI TO THE REVIEWING AUTHORITY

Court of Appeals Case No. 2023-001376
Related Case No. 2022-DR-10-03072

Justin McGee .....Petitioner-Respondent,

v.

Lindsay F. McGee.....Respondent-Petitioner.

Petition for a Writ of Certiorari

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Introduction

This case arises from the purported original jurisdiction of the South Carolina Court of Appeals under the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 *through* -145 ("the Homeland Security Act"). Under Section 17-30-110 of the Homeland Security Act, the "Reviewing Authority"—defined in S.C. Code Ann. § 17-30-10(9) as a three-judge panel of the Court of Appeals—may suppress evidence if a litigant establishes that a respondent unlawfully intercepted her *audio* communications and that she is otherwise entitled to suppression. Whether the State's intermediate appellate court has original jurisdiction to order suppression outside of the criminal context—much less the authority to stay divorce and custody proceedings for over three years while it exercises that original jurisdiction—is a novel question warranting review.

The summary and conflicting procedure used by the Court of Appeals also presents novel questions worthy of this Court's attention. Since Respondent-Petitioner Lindsay F. McGee ("Wife") filed her original Motion to Suppress in August 2023, and the Court of Appeals stayed the parties' divorce and custody proceedings—a separate action filed in the Charleston County Family Court in October 2022 by Petitioner-Respondent Justin McGee ("Husband")—the Court of Appeals improperly applied both the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure, and improperly appointed a Family Court judge as a special referee to "take testimony and report thereon" under S.C. Code Ann. § 14-8-280. Yet, despite repeated requests, both the Court of Appeals and the special referee prohibited Husband from conducting needed discovery and depositions, and refused to hold an evidentiary hearing.

These procedural abnormalities ultimately led the Court of Appeals to reach the wrong result, all while the parties' three-year divorce was stayed. In the 40 months since the divorce was filed, the Family Court has not addressed legal or primary custody of the parties' three children.

This Court should issue a Writ of Certiorari to the Court of Appeals to vacate the erroneous decisions of the lower court and return the parties' divorce and custody proceedings to the Family Court.[1] This Court's intervention to address the jurisdictional, legal, and procedural errors is needed under S.C. Const. art. V, § 5, S.C. Code Ann. § 14-3-310, and Rule 242 and 245, SCACR.

Questions Presented

The questions presented are:

I. Jurisdictional: Whether the Court of Appeals has original jurisdiction to review motions under the Homeland Security Act arising from divorce and custody proceedings, rather than criminal proceedings, under S.C. Code Ann. § 17-30-110.

II. Procedural: Whether the Court of Appeals and the special referee it appointed to "take testimony" under S.C. Code Ann. § 14-8-280 improperly refused Husband's requests for discovery and depositions—including those of Wife's key expert witnesses—and refused to hold an evidentiary hearing on Wife's ever-shifting claims, resulting in an incomplete record and leaving Husband without a meaningful ability to contest the evidence submitted against him.

III. Legal: Whether the Court of Appeals erred in concluding that a device purchased by Husband after it was advertised as *not being capable of* recording audio amounted to a violation of the Homeland Security Act and in refusing to address Husband's arguments about whether his lack of intent, the lack of contemporaneous recordings, and the other defenses to suppression applied.

[1] Alternatively, the Court may issue a Writ of Prohibition "to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure . . . ." *New S. Life Ins. Co. v. Lindsay*, 258 S.C. 198, 200, 187 S.E.2d 794, 796 (1972).

Statement of the Case and Facts

Husband and Wife were married on March 10, 2012. (App'x at 59, ¶ 1.)[2] They have three children and lived together in Charleston County until their June 2022 separation. (App'x at 341, ¶ 18.) In October 2022, Husband filed for divorce. Wife admitted to committing adultery and drug use in filed affidavits. (App'x at 328, ¶ 12.) Husband moved for temporary relief, requesting that the Family Court issue an order detailing a set parenting plan and awarding temporary financial relief. (App'x at 341, ¶ 23.) Wife moved for temporary relief of her own.

After hearing the parties' motions, the Family Court issued a Temporary Order that required the Guardian *ad Litem* to conduct an initial investigation and the parties to return for a supplemental hearing by September 13, 2023. (App'x at 342, ¶ 25.) This hearing *never* occurred, the children's issues have not been addressed in any way, there is no primary legal custodian for the children, and the children have been left in legal limbo with no ability for redress for over three years. (App'x at 197–98.) For the parties' youngest child, now age six, nearly 40% of her life has been tied up by these "expedited" proceedings before the Court of Appeals.

A. Wife's Motions to Suppress

On August 30, 2023, Wife filed a Motion to Suppress with the Court of Appeals under the Homeland Security Act; the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §§ 2510–23 ("the Federal Act"); the Stored Communications Act, 18 U.S.C. §§ 2701–13; and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. (App'x at 45.)

[2] In light of the summary procedure employed by the Court of Appeals, the record in this matter is split between the Court of Appeals and the Charleston County Family Court, with no designations of matter being served and no Record on Appeal having been developed. As a result, Husband has compiled a large number of the filings below, but not all of them from this sprawling record, into an Appendix with this Petition, cited as "App'x at ___" throughout.

Two days later, Wife amended the Motion to Suppress to "clarify the relief requested" therein. (App'x at 58.) There, Wife made three broad claims. *First*, Wife alleged Husband violated the Homeland Security Act by (1) accessing Wife's email account to intercept emails; (2) intercepting Wife's text messages; and (3) monitoring and recording Wife's communications using a camera found in the parties' garage. (App'x at 65.)[3] Wife supported these claims with affidavits from Steven Marc Abrams and John Bumgarner, purported experts in computer forensics. (App'x at 370, 398.)[4] Mr. Abrams testified that, the original camera found in the garage that served as the impetus for these proceedings had audio capabilities: "I can confirm that there was video, *and audio* recorded by the camera, and that Petitioner was frequently recorded in her garage making or receiving phone calls." (App'x at 375, ¶ 5 (emphasis added).) Mr. Bumgarner agreed that the camera "allowed someone to listen to her private conversations . . ." (App'x at 401, ¶ 38.)

For relief, Wife sought (1) to suppress all evidence relating to illegally obtained audio and video recordings and the information derived therefrom; (2) immediate listing and disclosure of all audio and video recording devices and documents and/or records; (3) factual findings about how Husband obtained certain evidence; and (4) other relief including attorneys' fees and expert fees. (App'x at 58.) Later Wife expanded the relief requested to essentially seek dismissal of the divorce based on her request to suppress the Complaint itself. (App'x at 496, No. 3.)

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[3] Wife has since abandoned her claims under the Federal Act, Stored Communications Act, and the Computer Fraud and Abuse Act because the Court of Appeals lacks jurisdiction to entertain those claims in its purported original jurisdiction under the Homeland Security Act. *See Cronin v. Cronin*, Case No. 2023-000959, Order at 2 n.1 (Ct. App. Sept. 6, 2023) (explaining that as the Court of Appeals lacks jurisdiction to entertain claims under anything but the Homeland Security Act in response to a Motion to Suppress). And as detailed below, Wife has also abandoned claims that all but one camera—a device the parties call the "Camduck"—is cognizable under the Homeland Security Act because those cameras do not record audio. (App'x at 17, n.1.)

[4] These were the first of 14 different affidavits filed by Wife's purported experts over the course of these proceedings.

Husband timely moved to dismiss Wife's Amended Motion, arguing the Court of Appeals lacked jurisdiction to entertain Wife's claims in its original jurisdiction. (App'x at 71.) In response, Wife moved to confirm that her Amended Motion automatically stayed the parties' divorce proceedings. (App'x at 79.) In September 2023, Chief Judge H. Bruce Williams denied Husband's Motion to Dismiss, relying on Section 17-30-110(A) as well as this Court's dicta in *State v. Whitner*, 399 S.C. 547, 551, 732 S.E.2d 861, 863 (2012). (App'x at 7.) The Court of Appeals also stayed all family court proceedings pending its review of Wife's Amended Motion to Suppress. (*Id*.) That divorce and custody action has been stayed since September 2023.

B. Wife's Motions to Supplement the Record

After Husband filed his Return to Wife's Amended Motion to Suppress on September 29, 2023, (App'x at 82), Wife filed a Reply. Thereafter, Wife moved the Court of Appeals to file a Supplemental Reply, which Husband opposed.

After briefing on that motion, Wife again moved to supplement the record. (App'x at 186.) Wife alleged that two days prior, she found a USB charging device with an embedded camera in her bedside cabinet, referred to by the parties as the Camduck. (App'x at 189–90.) Wife filed supplemental affidavits from her purported experts alleging that the Camduck was located in Wife's bedroom, had audio-recording capabilities, and had connected to the Wi-Fi network at the parties' home located at 664 McCutchen Street, Charleston, SC 29412 ("McCutchen House").[5] (App'x at 379, 418.) Husband responded by confirming that he purchased the device, but denying that he placed the Camduck in McCutchen House. (App'x at 360.) He also challenged the

[5] The parties dispute whether they lived together at McCutchen House. Before February 2021, the family lived together at 7312 Eddy Farm Road, Meggett, South Carolina. In February 2021, Wife leased a separate property, McCutchen House, and told Husband she wanted to separate. After marriage counseling and several family vacations together, Wife agreed to reconcile, and in June 2021, Husband moved to McCutchen House. The parties purchased that property in May 2022.

applicability of the Homeland Security Act to the Camduck because it did not record audio, and argued that the factual disputes about the device were exactly why the proceedings should be dismissed in favor of them being addressed by the Family Court in the first instance. (App'x at 191.) Wife filed a Reply in which she submitted more affidavits to the Court of Appeals.

In November 2023, the Court of Appeals granted Wife's motions to supplement the record, citing to Rules 15 and 26 of the South Carolina Rules of Civil Procedure. (App'x at 9.)

C. Proceedings Before the Special Referee

Thereafter, the Court of Appeals certified issues to the Honorable Spiros Ferderigos, Family Court Judge ("Special Referee") for resolution. (App'x at 11.)[6] Before the Special Referee, Husband again moved to dismiss and filed jurisdictional and related objections. (App'x at 311.) The Special Referee denied the motion to dismiss. The parties then engaged in written discovery and appeared six times before the Special Referee. During this time, Husband requested permission to subpoena Wife's purported experts, to depose Wife and her witnesses, and for an evidentiary hearing. (App'x at 25, ¶ 16.) The Special Referee allowed certain written discovery but refused depositions and to hold an evidentiary hearing. (*Id*.) Instead, the Special Referee instructed Wife to file proposed findings of fact, which she did on February 23, 2024. (App'x at 313.) Husband responded by addressing the merits, objecting to the summary procedures used, and again requesting an evidentiary hearing. (App'x at 219.)

[6] The Court of Appeals did so under S.C. Code Ann. § 14-8-280, which gives the court "the same powers as are now possessed by the circuit courts of the State for the appointment of referees to take testimony and report thereon, under such instructions as may be prescribed by the court, in any cases arising in the Court where issues of fact shall arise."

D. The Special Referee's Report and Proposed Findings

After roughly five months of limited discovery, all during which the underlying family court proceedings were stayed, Special Referee issued his Report and Proposed findings dated May 3, 2024 (the "Report"). (App'x at 31.) Husband timely filed exceptions and objections to the Report. (App'x at 205) Wife did not. As a result of the failure to file exceptions, Wife has conceded two key findings from the Special Referee's Report:

- "That there is no direct evidence presented to the Family Court that [Husband] has intercepted or attempted to intercept any audio records from the CAMDUCK or other spying device."
- "That there is no circumstantial evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK."

(App'x at 33, ¶¶ I(k)–(*l*).)

A month after the Report was issued, the Court of Appeals *again* certified issues to the Special Referee for resolution. (App'x at 13.) This time, however, the certification contemplated 120 days, plus any period of extensions approved by the Court of Appeals. (*Id.*)[7]

After another hearing before the Special Referee, Wife filed a Notice of Motion and Motion for Expedited Hearing to Clarify this Court's Prior Order. After briefing on that motion, the Court of Appeals issued an Order stating that "the contents of the recordings may be necessary for ruling on Petitioner's motion to suppress and, without this information, dismissal of the motion may be the only appropriate course of action." This Order requested the parties brief whether the recordings' contents were necessary for the action.

[7] Shortly thereafter, Husband moved to lift the appellate stay. (App'x at 196.) The Guardian *ad Litem* for the parties' children filed an affidavit in support. (App'x at 202.) Wife did not oppose the motion, but the Court of Appeals never ruled on the motion.

E. The Court of Appeals' Order

Over a year after filing these briefs, the Court of Appeals issued an order addressing the merits without having received the contents of the recordings or briefing on the merits of the proceedings or holding argument. (App'x at 1.) In this order, the Court of Appeals confirmed that it reviews motions under the Homeland Security Act in its original jurisdiction, (App'x at 1 n.1), and that its order applied only to the communications from the Camduck, (App'x at 3 n.3). It cabined its Order to the Camduck because "the only intercepted communications provided to this Court were those found on the" Camduck. (*Id*.) That said, Wife has provided no communications or recordings of any sort to the Special Referee or the Court of Appeals. (App'x at 280–81.)

In any event, the Court of Appeals concluded that Husband placed the Camduck in Wife's bedroom and was "responsible for using it to intercept Wife's oral communications." (App'x at 3.) It further concluded that Husband used that information "as a basis for his divorce action," but declined to specify which communications or information needed to be suppressed. It instead ruled that "Wife may present any intercepted oral communications from the [Camduck] to the family court to demonstrate which portions of Husband's allegations were derived from the intercepted communications," and ruled that any "further motions concerning these cases should be addressed to the family court." (App'x at 3.) The Court denied Wife's requests for attorneys' fees and to seal any communications. (App'x at 3.)

On September 2, 2025, Husband timely petitioned for rehearing, rehearing *en banc*, reconsideration, and a stay. (App'x at 263.) On January 21, 2026, the Court of Appeals issued its Order denying Husband's rehearing petition in full. (App'x at 5.)

Husband now timely petitions this Court for review. Because of the convoluted procedure employed by the Court of Appeals and its ruling that it was acting in its original jurisdiction, the

procedural mechanism to enable this Court's review is unclear. Out of an abundance of caution, Husband files this Petition under Rules 242 and 245, SCACR. He likewise files a Notice of Appeal of the Reviewing Authority's Orders directly with the Court of Appeals and seeks transfer and consolidation of these proceedings under Rules 204 and 214, SCACR.

Argument

Under the Homeland Security Act, Wife must establish that Husband unlawfully intercepted her *audio* communications. The Family Court or Circuit Court, but not the Court of Appeals, should have entertained Wife's claims through plenary proceedings, not through the summary procedure employed by the Court of Appeals in some sort of quasi-original proceeding. Because of the lack of jurisdiction and the improper proceedings employed here, the Court of Appeals ignored arguments Husband made and the lack of evidence presented by Wife. Thus, the Court should grant Husband's Petition to address these novel issues, vacate the erroneous decisions of the lower court and return the parties' divorce and custody proceedings to the Family Court.

I. Certiorari is proper to address the novel issue of whether the Court of Appeals has original jurisdiction over civil claims under the Homeland Security Act.

South Carolina courts must assure themselves of jurisdiction before entertaining the merits of any action. *See Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) ("The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, as is fundamental."). Although Husband moved to dismiss for lack of subject matter jurisdiction, (App'x at 71), the Court of Appeals denied the motion by short reference to this Court's dicta in *State v. Whitner*, (App'x at 7). The Court of Appeals later concluded that it had original jurisdiction to entertain Wife's claims, (App'x at 1 n.1), and then it denied rehearing

on Husband's jurisdictional objections, (App'x at 5). Doing so was in error, warranting either a writ of certiorari or prohibition from this Court.

Under the South Carolina Constitution, the Court of Appeals "shall have such jurisdiction as the General Assembly shall prescribe by general law." S.C. Const. art. V, § 9. General state law provides the Court of Appeals "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission." S.C. Code Ann. § 14-8-200(a). These two authorities make no provision for the State's intermediate appellate court to entertain an action in its original jurisdiction.

In contrast with this Court, no constitutional provision, state law, or rule provides the Court of Appeals with original jurisdiction. This Court's jurisdiction in our Constitution specifically references that court's ability to entertain *original* proceedings. *See* S.C. Const. art. V, § 5; *see also* S.C. Code Ann. § 14-3-310. A court rule similarly provides for original proceedings but only in the Supreme Court. Rule 245, SCACR. Husband knows of no such similar grant of original jurisdiction to the Court of Appeals. In fact, state law confirms the Court of Appeals' jurisdiction "is appellate only." S.C. Code Ann. § 14-8-200(a).

The Homeland Security Act does not expand the Court of Appeals' jurisdiction in civil matters. Passed in 2002 and placed in Title 17 (Criminal Procedures), Section 17-30-110 establishes the requirements for moving to suppress: "Prior to any trial, hearing, or proceeding in or before any court, . . . any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the . . . communication was unlawfully intercepted[.]" S.C. Code Ann. § 17-30-110(A)(1). The motion to suppress "must be made before the reviewing authority and must be decided on an

expedited basis." S.C. Code Ann. § 17-30-110(A). The Act defines "reviewing authority" to mean "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

Reading Section 17-30-110 in full confirms it is intended to apply to criminal matters only:

- "Upon receiving the motion, the reviewing authority must notify the issuing judge who must transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization." S.C. Code Ann. § 17-30-110(A).
- "After reviewing the materials, the reviewing authority must first determine whether all materials otherwise discoverable under South Carolina law were made available to the aggrieved person." *Id.*
- "the reviewing authority must decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter." *Id.*

Put another way, the Court of Appeals may only entertain a motion to suppress after a judge (1) receives an application from a qualified individual for an order authorizing or approving the interception of certain communications, and (2) issues an order authorizing or approving the interception of such communications. *See* S.C. Code Ann. §§ 17-30-70(A), -80(A)(1), -80(D). Only then may the Court of Appeals "decide whether the order of authorization was issued *and* the communications were intercepted in conformity with the requirements of this chapter." *Id.* (emphasis added). That cannot happen in the civil context. Here there is no "issuing judge" or an "order of authorization," so there is no way for the Court of Appeals to determine whether an "order of authorization was issued" before the interception. S.C. Code Ann. § 17-30-110(A).

The requirements for obtaining such an "order of authorization" are set forth in earlier sections. An application for the order "must be initiated by the Chief of [SLED,]" reviewed by "the Attorney General or his designated Assistant Attorney General[,]" and submitted "to a judge of competent jurisdiction . . . ." S.C. Code Ann. § 17-30-70(A); *see id.* § 17-30-80(A)(1). Upon application, the judge may grant "an order authorizing or approving the interception of wire, oral, or electronic communications" by SLED to investigate certain offenses. S.C. Code Ann. §§ 17-30-70(A)(1)-(3); *see id.* 17-30-80(D). This entire process is criminal, and not civil.

The Homeland Security Act's structure, specifically its appellate review provisions, confirms its application is limited to criminal matters. The phrase "reviewing authority" implies there must be an order for the Court of Appeals to review in the first instance. *Cf.* S.C. Code Ann. § 17-30-15(9); *id*. § 17-30-110(B) (explaining that although the Court of Appeals en banc has initial appellate jurisdiction over the State's appeal of an order granting a motion to suppress, all "other appellate procedures remain in force and effect"). And even in its references to appellate review, Section 17-30-110 only guarantees *the State* the right to appeal orders of authorization or approval and orders granting a motion to suppress. *See* S.C. Code Ann. § 17-30-110(B) ("*The State* has the right to appeal an order granting a motion to suppress made under subsection (A)." (emphasis added)). No provision is made for appellate review in civil matters.

In this case arising out of a divorce and custody proceeding, there is neither an application nor an order addressing the admissibility of the evidence within the jurisdictional parameters of Section 17-30-110. Thus, there was nothing for the Court of Appeals to review.[8] There was also no ruling for the Court of Appeals to review because Wife made no objection under the Homeland

[8] And there still remains nothing for the Court of Appeals or this Court to review because Wife has never presented the alleged illegal recordings to the Special Referee or the Court of Appeals.

Security Act below. Even if she had, her recourse would have been to appeal in the normal course, not through an interlocutory, original proceeding.

Additional provisions of the statute confirm the Court of Appeals' jurisdiction to entertain suppression proceedings is limited to criminal matters. Section 17-30-110 indicates suppression is an appropriate remedy only in cases involving interception by a State agent or employee. This interpretation is bolstered by several factors. As noted above, Title 17—which encompasses the Homeland Security Act—is entitled "Criminal Procedures." Although the Homeland Security Act references civil actions for wrongful interceptions in a separate section, S.C. Code Ann. § 17-30-135,[9] there are no references to civil liability in section 17-30-110 under which Wife brought her Amended Motion to Suppress. *See* S.C. Code Ann. § 17-30-135; *see also, e.g.*, *State v. Bixby*, 388 S.C. 528, 548–49, 698 S.E.2d 572, 583 (2010).

This Court's decision in *State v. Whitner* does not require a different result. *Whitner* confirms that the Homeland Security Act "parallels" the Federal Act. *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864. The Federal Act imposes similar limitations on the scope of a motion to suppress and the federal government's right to appellate review. *See* 18 U.S.C. § 2518(1), (10)(a) (permitting a motion to suppress "the contents of any wire or oral communication intercepted" pursuant to an order of authorization or approval obtained from "a judge of competent jurisdiction" by an "investigative or law enforcement officer"); *id.* § 2518(10)(b) ("In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection . . ."). Unlike the Homeland Security Act,

[9] Wife is aware of the civil claims available under this separate subsection. She also filed a civil action in the Court of Common Pleas, proceedings that have been removed to federal court. *See McGee v. McGee*, No. 2:24-cv-01659-RMG (filed Feb. 28, 2024, and timely removed April 2, 2024). This action is currently stayed, though Wife has already filed the Court of Appeals' Order with the federal court despite these proceedings not having concluded.

however, the Federal Act allows a judge of competent jurisdiction—defined to include "a judge of a United States district court or a United States court of appeals"—to both issue the order of authorization or approval *and* rule on the motion to suppress. *See id.* §§ 2510(9), 2518(1).

Whitner is also factually distinguishable because it arose from a criminal prosecution, which more squarely falls under the criminal procedure provisions of Title 17. For that reason, it makes sense that this Court noted, in dicta, that the Court of Appeals had previously conducted a suppression hearing to address the petitioner's challenges to the State's interception of the disputed call recording. *Whitner*, 399 S.C. at 551, 732 S.E.2d at 863. Again, those circumstances are not present here, as the collateral action here is a family court divorce proceeding.

Thus, the Court should grant Husband's Petition to address the Court of Appeals' lack of subject matter jurisdiction.

II. This Court should review the summary proceedings employed by the Court of Appeals and its Special Referee, which are novel in that they depart so clearly from established civil procedure.

The summary proceedings used by the Special Referee and the Court of Appeals are both fundamentally unjust—in that Husband was not permitted regular discovery or an evidentiary hearing—and confusing—in that the courts below applied both the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure. This has resulted in a loss of Husband's fundamental rights to due process and a jury trial on Wife's claims. What's more, the summary proceedings will have far-ranging impacts on the parties' divorce and custody action, and even possibly the civil litigation pending in federal court. This Court should grant certiorari to address the novel question of the appropriate procedure to be used in actions under the Homeland Security Act should it conclude the Court of Appeals had jurisdiction in the first place.

A. Despite Husband's requests and objections, he has not been allowed appropriate discovery or even an evidentiary hearing.

Husband asked to depose or examine Wife and her witnesses and for an evidentiary hearing. (App'x at 214–15, ¶¶ 29–30.) The Special Referee and the Court of Appeals refused those requests. Given the potential preclusive effect of the Court of Appeals' Order, the Court should grant certiorari to correct the use of the summary proceedings by the courts below.

Wife's case hinges on the testimony from two purported experts. Wife provided 14 affidavits from them over the two years this case has been pending, including two filed *after* the Special Referee issued his Report. (App'x at 384, 485.) The Court of Appeals relied on these experts. (App'x at 2–3.) Yet Wife refused to provide documents relied on by her experts, and the courts below refused Husband's requests to depose or examine those experts. The courts below conducted no evidentiary analysis of their qualifications or opinions, which Husband has objected to under Rules 702, 703, and 705, as well as various others.[10] (App'x at 212.)

The inability to seek discovery from Wife's experts or to secure their testimony is not harmless. Their testimony is central to Wife's claims. So too is their credibility. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (discussing court's view of the witnesses' testimony and assessment of credibility). That credibility, however, has already been undermined in these proceedings. Wife's purported experts have provided conflicting testimony at various points. For example, Wife's claims were originally based on an SCS camera device reportedly found in the garage. Mr. Abrams provided sworn testimony that this camera recorded audio of Wife's oral communications. (App'x at 375.) Mr. Bumgarner provided similar testimony. (App'x at 407.)

[10] These evidentiary rules apply. *See* S.C. Code Ann. § 17-30-110 ("Unless otherwise provided by federal law or Rules of Court, all South Carolina Rules of Evidence apply.").

The Special Referee concluded the purported experts' representations were false, noting this device was "without audio." (App'x at 42, ¶ V.c.) Wife conceded this point, providing verified interrogatory responses that the device did not record audio, directly contradicting her experts' testimony. (App'x at 502.) To date, however, Mr. Abrams and Mr. Bumgarner have not corrected this testimony or withdrawn it, calling into question their veracity as purported experts in this case on a pivotal issue: whether particular devices are actionable because they recorded audio. *See Allen v. Brown*, 320 F. Supp. 3d 16, 38 (D.D.C. 2018) ("Indeed, every federal appeals or district court to have considered the question has concluded that silent video surveillance is not covered by the federal wiretapping statute."); *see also State v. Guerrero-Flores*, 402 S.C. 540, 534, 741 S.E.2d 577, 580 (Ct. App. 2013)(explaining the Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting provisions of the Homeland Security Act"). Yet the Court of Appeals relied upon these same purported expert witnesses when they offered similar testimony about the Camduck without giving Husband the ability to challenge their qualifications or explore that testimony through cross-examination to see whether similar inconsistencies on these key issues exist.

Other conclusions presented by these purported experts were contradicted by independent evidence. For example, the router logs on which Wife's purported experts heavily relied were found to be unreliable when two third parties—Daniel Walden and Madison Lamp—provided affidavits confirming that their devices could not have connected to Wife's home network as indicated by the router logs because they were out of the state or otherwise not anywhere near the router at the time. (App'x at 491–95.) Despite these factual disputes and credibility issues, the Court of Appeals and the Special Referee refused to hold any evidentiary hearing, much less allow

Husband the ability to test these experts' theories through cross examination. The Court should grant certiorari to address the procedural shortcomings.

B. The Court of Appeals erred in concluding that Wife had produced recordings from the Camduck, when Wife refused to provide those recordings to Husband, the Special Referee, and the Court of Appeals.

In the Order, the Court of Appeals states that, "following discovery, the only intercepted communications provided to this court were those found on the [Camduck] Device; accordingly, this order applies only to those communications." (App'x at 3 n.3.) While the Court of Appeals is correct that Wife has abandoned any claims about alleged interceptions other than those related to the Camduck, the Court of Appeals' statement is incorrect about the communications being "provided" to the court. Wife has not "provided" any court with the communications allegedly found on the Camduck. At best, Wife's purported experts provided some information about what *they* allegedly saw on the videos they claim to have extracted from the Camduck.[11]

Despite the communications having never been submitted to the Court of Appeals or the Special Referee, the Court of Appeals appears to have credited Wife's allegations about what was on those communications. Adopting a just-trust-me standard of review without requiring evidence of the communications being submitted was in error. This is basic due process and implicates a host of evidentiary concerns Husband raised to this Court. *See*, *e.g.*, Rule 106, SCRE (Rule of Completeness); Rule 802, SCRE (Hearsay); Rule 1002, SCRE (Best Evidence Rule). These objections were never addressed by the Special Referee or the Court of Appeals. The Court should

[11] The Court of Appeals may have misunderstood a "Stipulation Regarding Camduck Recordings" unilaterally filed by Wife on June 19, 2024. That Stipulation asserts that Wife's counsel has "approximately 833 hours of undeleted video with audio contained on the Camduck," which Wife calculates as 5,000 videos of 10 minutes each. Husband did *not* join that stipulation, and it was submitted to the Court of Appeals unsigned.

grant certiorari to correct these procedural and evidentiary shortcomings directly related to the summary nature of the proceedings improperly imposed by the Court of Appeals.

C. The Court should intervene to confirm that Wife's failure to file exceptions to the Special Referee's Report is fatal to her claims.

After the Special Reference issued his Report, (App'x at 31), Husband timely filed exceptions and objections, (App'x at 205). Wife did not. As a result of her failure to file exceptions, Wife conceded two key findings from the Special Referee's Report:

- "That there is no direct evidence presented to the Family Court that [Husband] has intercepted or attempted to intercept any audio records from the CAMDUCK or other spying device."
- "That there is no circumstantial evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK."

(App'x at 33, ¶¶ I(k)–(*l*).)

By failing to file exceptions, Wife waived any adverse findings in the Report. *See In re Mathis*, 258 SC 321, 188 S.E.2d 466 (1972) (requiring exceptions to Master's report to be filed with the certifying court for error preservation); *Carsten v. Wilson*, 241 S.C. 516, 520, 129 S.E.2d 431, 434 (1963) (requiring exceptions to Special Referee's report to be filed with the certifying court for error preservation); *White v. Livingston*, 231 S.C. 301, 311, 98 S.E.2d 534, 539 (1957) (applying ten-day requirement for exceptions to equity cases). Husband pointed out to the Court of Appeals that these adverse findings were fatal to Wife's claim, yet the Court of Appeals never addressed Husband's exceptions, nor addressed Wife's failure to file her own exceptions. The Court should grant certiorari to confirm the appropriate procedure for addressing exceptions from a special referee's report, a novel question of South Carolina law as it applies to the Court of Appeals appointing special referees in suppression proceedings.

III. The Court's attention is warranted to address the novel legal issues about the interpretation of "interception" under the Homeland Security Act and the defenses applicable to these proceedings.

Husband denies the allegations Wife has made over the course of this almost three-year-long proceeding. Wife and her purported experts have made factual and legal claims that they now distance themselves from given they have been debunked by documentary evidence and third-party testimony. The sole remaining focus is on the CamDuck, which was not part of Wife's Amended Motion to Suppress. The Camduck, however, does not establish liability as a matter of law because Husband did not know the device recorded audio—it was advertised as only recording video—and the record is devoid of any evidence that he accessed any recordings on the device contemporaneously or otherwise. The Court should grant certiorari to address the novel questions of intent and the applicable legal standard under the Homeland Security Act.

A. This Court has not yet spoken to the applicable intent standard under the Homeland Security Act.

Under the Homeland Security Act, Wife bears the burden of establishing an *intentional* interception of her *audio* communications and use of those communications by Husband. She has not done so. "Congress made clear that the purpose of the amendment [of the Federal Act in 1986] was to underscore that inadvertent interceptions are not a basis for criminal or civil liability under the [Federal Act]. An act is not intentional if it is the product of inadvertence or mistake." *In re Pharmatrak, Inc*., 329 F.3d 9, 23 (1st Cir. 2003) (citation omitted). "And 'the plain meaning of § 2520(a) [of the Federal Act] requires that an aggrieved person must have suffered an actual illegal interception, disclosure, or use of his or her communications before that person may initiate a civil suit." *Fiore v. City of Detroit*, No. 19-10853, 2019 WL 3943055, at *3 (E.D. Mich. Aug. 21, 2019) (quoting *DirecTV, Inc. v. Wallace*, 347 F. Supp. 2d 559, 565 (M.D. Tenn. 2004)), *aff'd sub nom. B & G Towing, LLC v. City of Detroit, MI*, 828 F. App'x 263 (6th Cir. 2020).

Again, the focus of the Homeland Security Act is on interceptions of audio communications. *See Allen*, 320 F. Supp. 3d at 38 (D.D.C. 2018); *Thompson v. Johnson Cnty. Cmty. College*, 930 F. Supp. 501, 505 (D. Kan. 1996) ("Virtually every circuit that has addressed the issue of silent video surveillance has held that [the Federal Act] does not prohibit its use."). The Camduck's advertising explained it did not record audio. (App'x at 507–16.)[12] Even the Special Referee agreed that, when "purchased, the sound function for the CAMDUCK charger was closed due to Amazon's policy." (App'x at 38, ¶ III.j.) Wife's purported expert also agreed that the Camduck's microphone was "*disabled when shipped from Amazon*," (App'x at 476, ¶ 22.), and then speculated "that the vendor intentionally omitted information about the camera having audio to comply with Amazon's policies in the US." (App'x at 487, ¶ 7; *id.* at 456–57, ¶ 39).) Although Wife's experts conjectured that the device could have been placed into "engineering mode" with the manufacturer's assistance, "special software is needed to activate audio recording on the Cam Duck." (App'x at 388, ¶ 7.)[13]

Husband expressly testified he had never heard of "engineering mode," had no idea the Camduck even had a microphone, and never contacted the manufacturer to do so. (App'x at 365, ¶ 18.) Indeed, the version information for the application associated with the Camduck explains that it did not have the infamous "engineering mode" until update 1.3.1 released May 26, 2024. (App'x at 306.) This is long *after* Wife claims to have found and disabled the device on November 1, 2023. (App'x at 332, ¶ 2.) The record is also devoid of any evidence that Husband engaged

[12] Even one of the reviews with the purchase records states that "there is no sound" with the Camduck. (App'x at 514.) The same review states that if the device is unplugged and plugged back in, the device cannot be accessed remotely until it is reconfigured. (*Id*.)

[13] Wife improperly filed this affidavit and Bumgarner's Eighth Supplemental Affidavit *after* the Special Referee issued his Report and Husband was given no opportunity to rebut this belated testimony from Wife's purported experts.

this engineering mode to record audio with the Camduck.[14] On this point, the Special Referee said it best, finding there was no direct or circumstantial evidence that Husband "intentionally intercepted audio recordings from the CAMDUCK." (App'x at 33, ¶¶ I(k)–(*l*).) The Court of Appeals, however, did not wrestle with these key shortcomings in Wife's proof.

Just because Wife claims Husband *could have* recorded audio unbeknownst to him is not sufficient to state a claim, nor is an attempt to intercept actionable. *See Carson v. Emergency MD, LLC*, 621 F.Supp.3d 610, 618 (D.S.C. 2022) (rejecting argument that an "alleged ability to access and review" communications was sufficient under the Homeland Security Act and granting summary judgment on that claim), *vacated as to the Stored Communications Act claim and remanded*, No. 22-1139, 2023 WL 1861053, at *2 n.5 (4th Cir. Feb. 9, 2023). Because the "party seeking protection under [the Federal Act] against the use or disclosure of the unlawfully intercepted communications bears the burden of proving that a particular communication was intercepted intentionally in violation of [the Federal Act]," *In re HIPAA Subpoena*, 961 F.3d 59, 65 (1st Cir. 2020), the Court of Appeals erred in granting Wife's Amended Motion to Suppress because Wife did not prove that an audio interception actually occurred and that it was intentional.

The Court of Appeals' Order sets dangerous and novel precedent that this Court should correct. If anyone could violate the Homeland Security Act by using a device that merely has the ability to record audio, even though the individual does not actually access that audio or intend to intercept any audio, then a whole host of everyday activities could fall under the auspices of this statute and flood the Court of Appeals' original-proceedings docket with more motions to suppress, especially in the family law context. Under the Court of Appeals' reasoning, anyone

[14] What the record is clear on, however, is that Husband did not place the Camduck in Wife's bedroom—Wife admits she did so. (App'x at 333, ¶ 4.) And there has been no evidence of an actual recording from any location other than the location where Wife admits she placed the device.

who was not a party to a conversation but has even potential online access to something within earshot of that conversation could violate the Homeland Security Act even if they do not access that communication or intend to intercept it. This cannot be the standard under the Homeland Security Act. That Act cannot impose civil and potential criminal penalties merely because of what someone *could* have done. *See Carson*, 621 F. Supp. 3d at 618 (rejecting argument that an "alleged ability to access and review" communications was sufficient under the Homeland Security Act and granting summary judgment on that claim).

The Court should grant certiorari to address the applicable intentionality standard under the Homeland Security Act, which it has not addressed to date.

B. The Court has not yet addressed the requirement that any interception be contemporaneous, which the Court of Appeals' precedent requires, but it did not address.

Consistent with other courts, our Court of Appeals requires that interceptions be contemporaneous to be actionable under the Homeland Security Act. *See* Order, *Fulmer v. Buckhannon,* No. 2022-000330 (Ct. App. Sep. 2, 2022);[15] *Ducharme v. Madewell Concrete, LLC*, No. CV 6:20-1620-HMH, 2021 WL 2141728, at *8 (D.S.C. May 26, 2021) ("a qualifying 'intercept' occurs only where the acquisition of the communication occurs contemporaneously with its transmission by its sender."); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir. 2003) ("Every circuit court to have considered the matter has held that an 'intercept' under

[15] The Court of Appeals' orders under the Homeland Security Act are not published and are not available on services like Westlaw. Unless one knows where to look on C-Track, they would not know that the Court of Appeals has created a potential body of law otherwise unavailable for citation. This body of law includes *Fulmer*, an unpublished case not available on C-Track but obtained from the Clerk of Court in light of Wife's repeated references to it in hearings before the Special Referee. At that time, C-Track only made available 21 cases under the Homeland Security Act after filtering for Motions to Suppress. An unknown number of other non-public cases and orders may exist, just as *Fulmer* is not available on C-Track.

the [Federal Act] must occur contemporaneously with transmission."). Yet this Court has not spoken to this requirement.

Wife did not allege that Husband acquired the audio contemporaneously with its transmission. The Special Referee expressly concluded that "there is no evidence that [Husband] contemporaneously intercepted or attempted to intercept any audio recording made by the Camduck," even if he was alleged to have the ability to do so. (App'x at 33.) This lack of contemporaneousness should have been fatal to Wife's claims, yet the Court of Appeals did not address Husband's contemporaneousness argument or the Special Referee's Report in this regard.

C. The Court has not before addressed the independent source, inevitable discovery, and unclean hands defenses to interception claims.

Courts have concluded that although illegal recordings cannot be used as evidence in a criminal prosecution, this prohibition does not mean that the underlying facts cannot be presented. *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920). If knowledge of these facts can be gained from an independent source, the facts can be proved through such independent evidence. *Id.* A similar concept exists under the Homeland Security Act. *See* S.C. Code Ann. § 17-30-65; *see also Resha v. United States*, 767 F.2d 285, 287–88 (6th Cir. 1985) (citing 18 U.S.C. § 2515 and discussing limitations of suppression under the Federal Wiretap Act).

Although Husband raised the independent-source and inevitable discovery defenses, the Court of Appeals instead concluded without citation to anything in the record and without having reviewed any alleged recording that "Husband used information derived from these communications as a basis for his divorce action." (App'x at 3.) This makes little sense when Wife openly admitted her adultery, including in a voluntary affidavit she provided to the Court of Appeals with her original Motion to Suppress. (App'x at 328, ¶ 12 ("I committed adultery with

Dan Fowler (D.F.) on September 4, 2022 . . .").)[16] This admission is independent of any alleged interception, so it makes little sense that the Court of Appeals would still send the case to the trial court to "demonstrate which portions of Husband's allegations were derived from the intercepted communications, and the family court should consider the content of any such information suppressed." (App'x at 3 n.4.) This is especially true because Wife does not dispute that Husband retained a private investigator around June 15, 2022, who witnessed Wife's admitted affair, which continued long after Wife filed these proceedings. (App'x at 364–65, ¶¶ 8–15.)

Husband also raised the issue of Wife's unclean hands, which was not addressed by the Court of Appeals. Courts have also routinely applied the unclean hands doctrine in equitable proceedings. *See Ingram v. Kasey's Assocs*., 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000). In the parties' divorce and custody action, Husband alleged of his own direct and personal knowledge that Wife abused illegal drugs around the minor children. (App'x at 528–29.) Discovery responses—and Wife's failed drug tests—provided independent evidence of those allegations. Relevant to the unclean hands defense, however, is a text message of Wife admitting to her paramour that she consumed Molly (ecstasy) and later directed her paramour to "delete this" evidence, which he confirmed he did: "All this got deleted." (App'x at 517.) Fortunately, Wife's counsel produced a backup of her text messages during discovery containing these messages, although they did not appear in paramour's subpoena response because he had, in fact, followed Wife's directive to delete evidence relevant to these proceedings.

Overlooking these defenses could have dangerous ramifications. For example, if, on remand, Wife may provide the Family Court with a video of her using illegal drugs allegedly

[16] She made the same admission in her affidavit filed before the Temporary Hearing in the parties' divorce.

captured by the Camduck and request the Court ignore that evidence and prohibit Husband's testimony of his independent knowledge of Wife's illegal drug use despite the potential harm to the children.[17] This type of evidence may appear to be suppressed in light of the Court of Appeals' vagueness on the appropriate remedy, which it largely abdicated to the Family Court. (App'x at 3.) This Court should grant certiorari to address the appropriate defenses to an action under the Homeland Security Act, which it has not addressed to date.

Conclusion

For these reasons, the Court should grant Husband's Petition to address these novel issues, vacate the erroneous Suppression Order of the Court of Appeals and its related orders, and return the parties' divorce and custody proceedings to the Family Court.

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[17] Husband has not been provided with the Camduck videos, so he has no idea what is on them. He gives these as potential examples in light of the Court of Appeals' Order.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON APPEAL FROM THE REVIEWING AUTHORITY
The Honorable Chief Judge H. Bruce Williams

Case No. 2023-001376
Related Case No. 2022-DR-10-03072

Justin McGee .....Appellant,

v.

Lindsay F. McGee.....Respondent.

Proof of Service

I, the undersigned partner of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent Justin McGee, certify that I have served all counsel in this action with a copy of the document(s) set forth below by email under *In re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules*, Appellate Case No. 2020-000447 (April 24, 2024):

Document(s):	**Petition for a Writ of Certiorari** **Motion to Transfer or Certify**
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