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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

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THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT.

APPELLATE CASE NO. 2013-001208

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# BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in asking the lower court to determine if petitioner/respondent "had a legitimate expectation of privacy in the trunk of Creel's car..." when the Fourth Amendment violation occurred at the moment the police seized the car keys in petitioner/respondent's apartment without his consent and without a search warrant?

II. Whether the Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and it is the job of the reviewing court to determine if an error is harmless?

III. Whether the Court of Appeals erred in asking the lower court to make additional findings when the State failed to present an adequate record when it had the chance to do so?

## STATEMENT OF THE CASE

Petitioner/Respondent was convicted of murder after a jury trial held before the Honorable Thomas A. Russo on August 8, 2011, in Florence County. A life sentence was imposed.

Petitioner/Respondent appealed his conviction and submitted a final brief on May 23, 2012. Respondent submitted its final brief on June 12, 2012. Oral argument was heard in the Court of Appeals on January 9, 2013. On April 3, 2013, the Court issued an opinion remanding this case for additional findings. State v. Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013). A petition for rehearing was filed on April 18, 2013, and was denied on May 6, 2013.

Petitioner/Respondent (Roger Bruce) filed a petition for writ of certiorari on June 4, 2013. Respondent/Petitioner (The State) filed a petition for writ of certiorari on June 5, 2013. On June 12, 2014, this Court issued an order granting both petitions for writ of certiorari.

This brief of Petitioner and Respondent (Roger Bruce) follows.

## STATEMENT OF ISSUE ON DIRECT APPEAL

Whether the trial court erred in refusing to suppress evidence seized from petitioner/respondent's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

## STATEMENT OF THE FACTS AND ARGUMENT BELOW

On October 12, 2009, around 11:00 PM, Officer Gary Beckett with the Florence Police Department was dispatched to 1450 King Avenue for a welfare check on the victim, Laura Creel. (ROA p. 112, line 16 – p. 113, line 5). The victim's son had called the police and told them he had not seen or spoken to the victim in about three days. (ROA p. 115, line 20 – p. 116, line 3). The victim lived in a garage apartment with petitioner/respondent. The apartment was behind the main house on 1450 King Avenue. Her vehicle was there. (ROA p. 113, lines 3-23). Officer Beckett walked to the apartment with Cpl. Hobgood and Officer Starling. Beckett said he saw someone looking out a screened door. He shined a flashlight and it was petitioner/respondent. The police explained they were doing a welfare check on the victim and asked if she may be inside. Petitioner/respondent told them she was not inside and they asked if they could come in and take a quick look. Petitioner/respondent gave them permission to come inside. Beckett said he did not notice anybody else inside. (ROA p. 116, line 19 – p. 117, line 24). They asked petitioner/respondent when was the last time he may have talked to the victim or seen her. Petitioner/respondent said he and the victim had an argument a few days earlier and then she left. He didn't know where she went. (ROA p. 118, lines 14-23).

Officer Beckett then said they noticed a cell phone and some keys which were consistent with the vehicle outside. They asked whose phone and petitioner/respondent said it was the victim's. Then Cpl. Hobgood picked up the keys and went outside to the vehicle. He shined a flashlight through the windows and everything appeared fine inside. He attempted to open the trunk. At this point defense counsel objected and the jury was sent out. (ROA p. 119, lines 1-25). Defense counsel objected to the evidence concerning police opening the trunk and finding the victim's body. The police had no search warrant and did not get consent from petitioner/respondent

to search the vehicle. The trial court questioned about petitioner/respondent's standing to raise the issue, but defense counsel noted that the car was on his property parked on the driveway at the back of his house and the keys were in his house. The police did not ask permission to take the keys. (ROA p. 120, line 6 – p. 121, line 21).

The solicitor then tried to argue that previously Cpl. Hobgood had testified that petitioner/respondent went for the keys to show them which key to open the trunk with before the police used the trunk release button. (ROA p. 121, line 22 – p. 122, line 11). Contrary to the solicitor's assertion, a review of Cpl. Hobgood's testimony from the day before does not show that petitioner/respondent went for the keys to show them how to open the trunk. (ROA p. 33, line 7 – p. 38, line 2). Later in the trial, Cpl. Hobgood did testify that petitioner/respondent tried to grab the keys and Hobgood did not know what petitioner/respondent's intentions were so he pulled the keys back. (ROA p. 144, line 10 – p. 145, line 18).

Even though the trial court did not have the correct information before it, it held the issue was one of inevitable discovery: "but/for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was going to open the trunk for them, or at least was providing the keys to do so." (ROA p. 122, lines 12-16).

The trial court's ruling on this matter was in error. The prosecution bears the burden of showing by a preponderance of the evidence that the items seized would ultimately have been discovered lawfully even though it was obtained by an illegal seizure. Nix v. Williams, 467 U. S. 431, 444, 104 S. Ct. 2501 (1984). The prosecution has not met that burden. See, State v. Brown, 389 S.C. 473, 698 S.E.2d 811, 817 (Ct. App. 2010). The prosecution has also not shown why they could not have obtained a search warrant for the car keys or why they could not have asked for consent in accordance with the Fourth Amendment to the United States Constitution. The trial court

did not even address the fact that the initial seizure of the keys was in violation of the Fourth Amendment.

In the United States v. Allen, 159 F. 3d 832 (4th Cir 1998) the court dealt with the question of whether the existence of probable cause triggers the inevitable discovery doctrine. It wrote:

> The existence of probable cause for a warrant in and of itself and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid. The inevitable discovery doctrine applies to alleviate "formalistic" and "pointless" applications of the exclusionary rule, Nix, 467 U.S. at 445, 104 S. Ct. 2501, but it does not and cannot eliminate Fourth Amendment protections.

159 F. 3d at 841.[1]

Where "no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place." Id at 841 (emphasis in original).

Finally:

> To permit the presence of evidence establishing probable cause to whitewash the unlawful search would eviscerate the warrant requirement. As Judge Posner has noted, "a warrant is a condition precedent to a lawful search or seizure, other than in exceptional circumstances of which superfluity is not one." United States v. Cardona-Rivera, 904 F. 2d 1149, 1155 (7th Cir. 1990).

Id at 843.

All of the evidence obtained as a result of the illegal seizure of the car keys was the fruit of the poisonous tree and should not have been admitted. Wong Sun v. U.S., 371 U. S. 471, 83 S. Ct.

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[1] See, also United States v. Cabassa, 62 F. 3d 470, 472 – 474 (2d Cir. 1995) and United States v. Cherry, 759 F.2d 1196, 1206 (5th Cir. 1985) where there was no warrant and the inevitable discovery doctrine did not apply.

407 (1963); State v. Brown, 389 U.S. 473, 698 S.E. 2d 811 (Ct. App. 2010); Commonwealth v. Benoit, 382 Mass. 210, 415 N.E. 2d 818 (1981).

## ARGUMENT I

The Court of Appeals erred in asking the lower court to determine if petitioner/respondent "had a legitimate expectation of privacy in the truck of Creel's car..." when the Fourth Amendment violation occurred at the moment the police seized the car keys in petitioner/respondent's apartment without his consent and without a search warrant.

The Court of Appeals reasoned that the inevitable discovery doctrine does not come into play until it is first determined if a defendant's Fourth Amendment rights have been violated. The Court went on to note that this case was not the type of case in which the inevitable discovery doctrine is properly applied. The Court wrote:

> In admitting the evidence of the discovery of Creel's body, the trial court stated, "It appears that this is inevitable discovery." The court's statement suggests it admitted the evidence under the inevitable discovery doctrine, which is an exception to the exclusionary rule. State v. Jenkins, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct.App. 2012). However, a trial court has no need to consider whether the exclusionary rule applies until it has first determined the police violated the defendant's Fourth Amendment rights. The record does not indicate the trial court ever made that determination
>
> Moreover, this does not appear to be a situation in which the inevitable discovery doctrine is properly applied. *See State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct.App. 2011) (stating evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained *inevitably*." (emphasis added) (quoting *Nix v. Williams*, 467 U.S. 431, 447, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377, 389 (1984))). In this case, the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirement of the doctrine, we may not affirm on that basis.

The Court then went on to say the case should be remanded to determine if petitioner/respondent had a legitimate expectation of privacy in the trunk of the victim's car.

402 S.C. at 626, 741 S.E.2d at 592-593.

It should be noted that the trial court asked where the car was parked. The solicitor said it was parked on the driveway at the back of the apartment where petitioner/respondent and the victim lived. They had lived together for at least 14 years. These facts should be sufficient to establish that petitioner/respondent had a reasonable expectation of privacy. In State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), the Court held all of the defendants had standing to object to the validity of a search that revealed drugs that were found in a mobile home because the State was attempting to introduce those drugs against the defendants. In State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004), the Court held that a defendant had a reasonable expectation of privacy in his friend's apartment. An overnight guest has a reasonable expectation of privacy in another's home. Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990). Fourth Amendment protections apply not to just a house, but to property in the curtilage of the home. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). And in Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007), it was held that a passenger in a vehicle had standing a challenge to stop.[2]

More recently, the Supreme Court of the United States has abandoned the reasonable expectation of privacy analysis and has instead held that a vehicle is an "effect" for search or seizure purposes under the Fourth Amendment. In United States v. Jones, __U.S.__, 132 S.Ct. 945 (2012), a GPS tracking device was placed on a vehicle registered to the defendant's wife. The government went after the defendant for conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. The placing of the GPS device and the monitoring of it constituted a warrantless search under the Fourth Amendment. Cell phones and cell phone data are also now protected from

[2] Respondent/petitioner cites Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) for the proposition that petitioner/respondent had no standing to challenge the search of the victim's car. The cases cited above clearly show that Rakas is no longer good authority.

warrantless searches. Riley v. California, WL 2864483, __S.Ct.__, 2014.

Petitioner/respondent should be protected by the Fourth Amendment under the reasonable expectation of privacy analysis because he lived with the victim for 14 years in the same household and vehicle was on their property in the backyard. He should also be protected because the vehicle is an "effect" under the Fourth Amendment.

The real reason the evidence should be suppressed is that the police seized the keys to the car from inside the apartment without a warrant and without consent.[3] It was this seizure that the Court of Appeals ignores. Anything found as a result of that seizure was the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

[3] The State argues that Mr. Bruce gave consent for the police to take the keys. That is not supported by the record. He only consented to a limited search of the apartment, so the police could see that the victim was not there. The idea that he later gave consent when they were outside by the car is pure speculation.

## ARGUMENT II

The Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and it is the job of the reviewing court to determine if an error is harmless.

The Court of Appeals concluded its opinion in this case with the following:

> We remand with instructions that the trial court make findings consistent with this opinion. *See Austin*, 306 S.C. at 19, 490 S.E.2d at 817 (remanding for determination of whether the defendant "had a reasonable expectation of privacy" because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); *State v. Richburg*, 250 S.C. 451, 461, 158 S.E.2d 769, 773 (1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); *Jenkins*, 398 S.C. at 230-31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied). If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

402 S.C. at 626-627, 741 S.E.2d at 593. (Emphasis added).

This Court has previously ruled that a trial judge is not to sit in judgment of his own decision. Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) (A judge who presided at petitioner's trial may not preside over a subsequent post-conviction proceeding). It is the job of the reviewing court to determine if an error is harmless. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (Supreme Court held trial court's error in admitting remote manslaughter convictions of defense witness to impeach his credibility was harmless); Mason v. State, 756 P.2d 612 (Okla. Crim. App. 1988) (The erroneous admission of a prior manslaughter conviction was harmless where the witness was already impeached by other evidence of prior convictions); State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012) (Trial court's error in admitting into evidence two pieces of wood that were

found on defendant's trash can outside of her house was harmless); Ex Parte Crymes, 630 So.2d. 125 (Ala. 1993) (Error is admission of victim-impact evidence was harmless error); Driver v. Com., 361 S.W. 3rd 877 (Ky. 2012) (Admission of evidence of defendant's prior assaultive behavior toward his former wife was not harmless error).[4]

In State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct.App. 2012), the court held the error in admitting DNA evidence that was collected pursuant to an invalid warrant was not harmless. Petitioner/respondent would submit the error in the admission of evidence of the victim's body in his case was substantial, was not harmless, and that issue should not be decided by the trial court. It was both essential and critical to the prosecution.

[4] A whole book has been written on this subject by Justice Roger J. Traynor in The Riddle of Harmless Error (Ohio State University Press, 1970).

## ARGUMENT III

The Court of Appeals erred in asking the lower court to make additional findings when the State failed to present an adequate record when it had the chance to do so.

The Court of Appeals remanded this case so additional findings could be made concerning the search and seizure issue under the Fourth Amendment. It should be noted that the State bears the burden of proof beyond a preponderance of evidence that the police conducted a lawful search and/or seizure. Lego v. Tuomey, 404 U.S. 477, 92 S.Ct. 619 (1972); United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). The Court of Appeals wrote that "the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirements of the doctrine, we may not affirm on that basis." 402 S.C. at 626, 741 S.E.2d at 593. Double jeopardy precludes additional evidence of this issue, as supported by the authorities cited below.

The State also should not be permitted to present any additional evidence concerning what may or may not have been petitioner/respondent's reasonable expectation of privacy in the trunk of Creel's car because the State already had the opportunity to present their evidence. Any attempt to raise additional evidence raises questions of double jeopardy and collateral estoppel. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) (once the Court of Appeals determined that the Government had failed to rebut petitioner's proof as to insanity, the resolution of factual issues, double jeopardy clause prohibited a second trial); Southern v. State, 371 Md. 93, 807 A.2d 13 (2002) (State was not entitled to a limited remand to introduce new evidence on whether police had probable cause to make initial stop and arrest of defendant); Hopkins v. State, 661 So.2d 774 (Ala.

Crim. App. 1994) (holding that although the record before it left unanswered many questions, that court was not authorized to resolve those questions by remanding for another hearing because the State was presented with an opportunity to establish its case, failed to do so, and under the Double Jeopardy Clause, it does not get a second chance).

The State, like a defendant, gets only one bite. To allow otherwise would be to violate due process of law and the equal administration of justice. Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973); State v. Hart, 306 S.C. 344, 412 S.E.2d 380 (1991).

## CONCLUSION

Petitioner/respondent's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT.

This 14th day of July, 2014

STATE OF SOUTH CAROLINA
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THE STATE,

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CERTIFICATE OF SERVICE

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I certify that a true copy of the brief of petitioner, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of July, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT

SWORN TO BEFORE ME this 14th day of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022