STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2015-001582

THE STATE,

Respondent,

vs.

WALTER M. BASH,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

On December 21, 2016, this Court issued a published opinion in which it reversed the decision of the Court of Appeals in Petitioner Walter M. Bash's case and reinstated the circuit court judge's order suppressing Bash's illegal drugs and other incriminating items. State v. Bash, Op. No. 27692 (S.C. Sup. Ct. filed Dec. 21, 2016). In reversing the Court of Appeals, this Court concluded there was evidence in the record to support the circuit court judge's determination the grassy area where the law enforcement officers approached Bash and the others was part of the constitutionally-protected curtilage of an adjacent residence. Furthermore, this Court concluded there was evidentiary and legal support for the circuit court judge's determination the officers' actions in approaching Bash and the others were unconstitutional pursuant to the Fourth Amendment. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended the

facts and the law in finding the officers' entry onto the open grassy area – even assuming for argument's sake that area was part of the curtilage of the adjacent residence – was unconstitutional.[1]

Initially, this Court misapprehended the facts by concluding "all of the circumstances surrounding the officers' entry into the grassy area objectively demonstrate[d] their purpose was to conduct a search of the grassy area, not to speak to the homeowner." In concluding the officers' actions objectively revealed a purpose to search instead of a purpose to engage in a consensual conversation, this Court identified the following four actions in support of that conclusion: (1) the officers radioed other officers to meet them at the residence; (2) the officers put on gear that identified them as law enforcement officers; (3) the officers arrived at the home in multiple cars; and (4) the officers bypassed the front door. Importantly though, the officers' actions in Bash's case were **not** suggestive of an intention to conduct a search. Instead, their actions were fully consistent with the sole purpose for which the implicit license exists, which is to provide a means by which anyone – including law enforcement officers – can attempt to make contact with an occupant of private property. See Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1416, n. 4 (2013) ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.* **The mere 'purpose of**

[1] In seeking rehearing, the State reasserts its position the open grassy area was an "open field" as opposed to a part of the residence's curtilage and, thus, was not entitled to the same constitutional protections as the residence in light of the evidence and testimony presented during the suppression hearing establishing the grassy area was an unshielded area next to a public roadway, was outside of the fencing surrounding the residence and its yard, and was visible from multiple roadways and surrounding homes. See Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1414 (2013) ("[A]n officer may (subject to Katz[v. United States, 389 U.S. 347 (1967)]) gather information in what we have called 'open fields' – even if those fields are privately owned – because such fields are not enumerated in the [Fourth] Amendment's text."); see also United States v. Jones, __ U.S. __, 132 S. Ct. 945, 953 (2012) ("Quite simply, an open field, unlike the curtilage of a home, . . . is not one of those protected areas enumerated in the Fourth Amendment. The Government's physical intrusion on such an area . . . is of no Fourth Amendment significance." (citations omitted)).

discovering information,' . . . in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment." (emphasis added)).

Looking to the actions this Court identified as objective evidence of a singular purpose to search, the officers' act of putting on equipment that identified them as law enforcement officers before entering into the grassy area was an act obviously and logically undertaken to convey their identity to the men they were approaching, which supports a conclusion they were there to speak with the men to whom they were identifying themselves through their actions as opposed to being there solely to conduct a search. See People v. Frederick, 313 Mich. App. 457, 478, 886 N.W.2d 1, 12 (Mich. Ct. App. 2015) ("That the officers wore these vests [bearing their badges and a law enforcement agency logo] conveyed a message similar to the message conveyed by the uniform traditionally worn by an ordinary officer. . . . These facts do not convey a purpose to do anything other than speak with the occupants of the homes."). Similarly, the fact the officers bypassed the front door after actually seeing the men in the open grassy area when they arrived at the residence completely supported a conclusion the officers were there to speak with the men because approaching the men they saw was a logical and necessary step towards attempting to initiate a consensual encounter with them. See Alvarez v. Montgomery County, 147 F.3d 354, 356-358 (4th Cir. 1998) ("The Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard **when circumstances indicate they might find him there**[.] . . . [O]fficers who seek to talk to the occupant of a home do not necessarily violate the Fourth Amendment by entering the backyard of a dwelling **although they have failed to knock at the front door.**" (emphasis added)); see also Covey v. Assessor of Ohio County, 777 F.3d 186, 193 (4th Cir. 2015) ("Here, the officers claim that they were justified in bypassing the front door because they saw Mr. Covey on the walkout basement patio area, thus giving them

an implied invitation to approach him. If the officers first saw Mr. Covey from a non-curtilage area, they may well prevail under the knock-and-talk exception at summary judgment."). Finally, the fact Sergeant Holbrook and Sergeant Milks alerted other officers in separate vehicles to meet them at the residence identified in the tip was entirely consistent with the purpose of the implicit license – making contact with a person or persons at a residence – in light of the fact that license places no limit on the number of individuals, including law enforcement officers, who are permitted to approach in an effort to initiate contact, and, under the circumstances of Bash's case, the officers' decision to proceed with the support of other officers was a prudent safety decision and was entirely consistent with an attempt to engage in a consensual encounter with a group of people that had been identified in a tip regarding criminal activity. See United States v. Crapser, 472 F.3d 1131, 1146-1147 (9th Cir. 2007) (finding a knock-and-talk encounter to be constitutionally proper even though it was conducted by four armed officers); see generally United States v. Thomas, 430 F.3d 274, 280 (6th Cir. 2005) ("Thomas lastly argues that the number of officers involved in his ultimate arrest – five – establishes that the encounter was coercive. But the number of officers involved in this investigation was neither inherently coercive nor unjustified. . . . [O]fficers may take reasonable security precautions in doing their jobs, and bringing several officers to investigate a potential methamphetamine lab would seem to be doing just that.").

Therefore, when considering the logical significance of each of the officers' actions in Bash's case individually and collectively, those actions were **not** suggestive of an intention to conduct a search and, instead, were entirely reasonable and fully suggestive of an intention to safely attempt to initiate a consensual encounter with multiple subjects potentially engaged in

criminal activity in an open and non-furtive manner.[2] See Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Accordingly, this Court's conclusion the officers' actions objectively revealed a singular and impermissible purpose to search was erroneous, and, consequently, the trial judge's determination the officers' actions violated the Fourth Amendment was not supported by the evidence presented during the suppression hearing. See Jardines, 133 S. Ct. at 1416, n. 4 (recognizing officers entering upon the curtilage of a home in order to speak to a homeowner can constitutionally desire to discover information while engaged in that licensed activity and are simply not permitted to enter the protected premises of a residence "in order to do nothing but conduct a search").

Furthermore, this Court misapplied the law in finding the officers' subjective intentions were pertinent to the analysis of whether their actions were in compliance with the implicit license. As the United States Supreme Court has repeatedly made clear, the subjective intentions of officers ordinarily play no role in a Fourth Amendment analysis. See Brighton City, Utah v. Stuart, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.' The officer's subjective motivation is irrelevant." (citations omitted and brackets in original)); Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."). That is true even when determining whether an officer's entry into curtilage was undertaken pursuant to the implicit license. See Jardines, 133

[2] Notably, if approaching a person while dressed in uniform is **not** consistent with an intent to speak with that person, it is unclear how it would be physically possible for a law enforcement officer to evidence an intent to engage in a conversation when attempting to initiate a consensual encounter with another individual. See generally United States v. Mendenhall, 446 U.S. 544, 553 (1980) ("The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry[.]").

S. Ct. at 1416, n. 4 ("The mere 'purpose of discovering information,' . . . in the course of engaging in that permitted conduct [of approaching a home to attempt to make contact with someone there] does not cause it to violate the Fourth Amendment."); see also Frederick, 313 Mich. App. at 472-473, 886 N.W.2d at 9-10 (analyzing both the dissent in Jardines and the majority's response to the dissent in Jardines and concluding the majority's opinion was concerned with the **objective** purpose for which officers enter upon curtilage in determining whether that entry is constitutionally permissible pursuant to the implicit license). Demonstrating that fact, the United States Supreme Court in Florida v. Jardines concluded the officer's act of bringing a police dog onto Jardines's curtilage was not consistent with the implicit license because that act **objectively** revealed **no other possible purpose** but to conduct a search. See Jardines, 133 S. Ct. at 1417 ("Here, their behavior **objectively** reveals a purpose to conduct a search, which is not what anyone would think he had license to do." (emphasis added)). Critically though, the actions of the officers in Bash's case – unlike the actions of the officer in Jardines – involved in their approach of the group of men they observed from a public roadway while dressed in law enforcement attire in no way suggested the officers' sole purpose was to conduct a search and, instead, were fully consistent with an attempt to initiate a consensual encounter, which is the sole and underlying purpose for which the implicit license permitting entry onto private property exists. Cf. Frederick, 313 Mich. App. at 473, 886 N.W.2d at 10 ("The police do not violate the Fourth Amendment by approaching a home and seeking to speak with its occupant. Even if the police fully intend to acquire information or evidence as a result of this conversation, the line has not been crossed. However, if the police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed." (footnote omitted)). As a result, this Court's – along with the trial judge's –

consideration of the officers' alleged subjective intentions was improper when analyzing the constitutionality of the officers' actions. See Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objection standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); see also Cressman v. Thompson, 719 F.3d 1139, 1156 (10th Cir. 2013) (instructing courts "should be very careful to suggest the [United States] Supreme Court has implicitly reversed itself, especially because, of course, the Court can and should speak for itself").

However, even if this Court's determination the subjective intentions of the officers could properly be considered when determining whether officers were acting in compliance with the implicit license, this Court nonetheless misapprehended the facts in concluding the subjective intentions of the officers in Bash's case established they solely intended to search. That is true because, when questioned about his intentions, Sergeant Holbrook testified he intended to "explain the nature of [his] business being there," tell the men they had received a report "there's suspicious drug activity occurring at the residence," and "go from there" while engaging in "just general conversation[.]" (R. pp. 29-30). Moreover, Sergeant Holbrook **did**, in fact, speak with Bash and the others about the tip after entering onto the grassy area. (R. pp. 32-33). Critically, those actions were fully permitted by the implicit license, which exists to allow others – including law enforcement officers – to enter onto private property in an effort to speak with an occupant of that property about whatever matter they may wish to bring to the occupant's attention. See Jardines, 133 S. Ct. at 1416, n. 4 (recognizing the "mere purpose of discovering information" while attempting to initiate a consensual encounter pursuant to the implicit license does not constitute a purpose inconsistent with the implicit license). Therefore, this Court's – along with the trial judge's – conclusion the officers entered onto the grassy area with the

subjective intention of conducting a search as opposed to speaking with the men they observed in the grassy area about the tip they had received was unsupported by the evidence appearing in the record, which is particularly true in light of the fact this Court expressly recognized in its opinion in Bash's case "[t]he officers exited the car **to talk to the men**."

In conclusion, the officers' entry onto the open grassy area to speak with Bash and the others was fully consistent with the implicit license and conducted in an objectively reasonable manner. As a result, that entry did not violate the mandates of the Fourth Amendment, and this Court's conclusion to the contrary was erroneous. For the foregoing reasons coupled with the arguments raised in the Brief of Respondent and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and affirm the decision of the Court of Appeals reversing the circuit court judge's erroneous evidentiary ruling and remanding the matter for trial.

Respectfully submitted,

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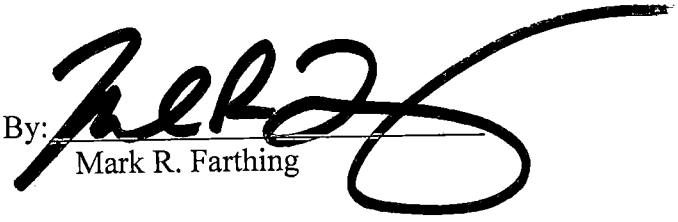
Assistant Attorney General

By: 
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January 10, 2017

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PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 10th day of January, 2017.

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