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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The State ....Respondent,

v.

General T. Little...Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Rule 221(a), SCACR, Appellant General T. Little (Dr. Little) petitions the three-judge panel to rehear its decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021). For the reasons that follow, the panel should grant rehearing, issue a substituted opinion, reverse Dr. Little's murder conviction, and remand to the court of general sessions for a new trial. Alternatively, because the case presents "a question of exceptional importance," Rule 219(a), SCACR, the Court rehear the case en banc and do the same.

BACKGROUND

This appeal arises out of an officer's unlawful intrusion into the curtilage of Dr. Little's home that set off a series of State action that infringed upon Dr. Little's constitutional rights and ultimately secured his murder conviction.

On September 22, 2015, Barbara Little was found dead in her home in Charleston, South Carolina. (R. pp. 341, 344). Barbara's brother discovered her body in the bathroom after her daughter had asked him to check on her. (R. pp. 342, 344). Investigators spoke with the two immediately upon arrival to Barbara's home. (R. pp. 345, 514). An hour later, law enforcement was sent to the home of Barbara's ex-husband,[1] Dr. Little, to locate him. (R. p. 514).

Dr. Little lived in an upper-middle-class neighborhood in West Ashley. (R. pp. 547, 161). The driveway ran from the street up to the garage on the left side of the house. See (R. pp. 1265, 1286–87). Before the front threshold of the house was a sidewalk that fed into the driveway. All vehicles were parked beyond the sidewalk in the back part of the driveway. Because the vehicle on the left was hugging the middle of the driveway, Dr. Little's vehicle was parked farther to the right. His right rear tire rested in the mulch beside the driveway as a result. The vehicle was less than a car's width from the side of the dwelling.

[1] They had been divorced for almost twenty years and "didn't fight." (R. pp. 336, 485). Respectfully, the panel erred in referring to Barbara as Dr. Little's wife.

Seeing a vehicle that he knew belonged to Dr. Little parked slightly off the driveway, Deputy Matthew Colburn of the Charleston County Sheriff's Department approached it. (R. p. 514). In doing so, Deputy Colburn traversed beyond the portion of the driveway feeding into the sidewalk where a visitor might pass to reach the front porch. See (R. pp. 1265, 1286–87 & 553). He then purportedly performed a safety sweep of all vehicles in the driveway using a flashlight. (R. pp. 516, 555). Although he quickly ascertained from the driver's side window that no one was hiding in Dr. Little's vehicle, which was parked and not running, Deputy Colburn nevertheless approached it again after checking the other vehicles. (R. pp. 551, 554 & 70). He walked around to the other side of Dr. Little's vehicle and discovered the front passenger window rolled down. (R. pp. 516–17). The search warrant affidavits indicate Deputy Colburn observed the window down during his sweep, (R. pp. 1257, 1262), but he testified at trial he could see the window down from the street as he pulled up to the home. (R. p. 516). Deputy Colburn arrived after 11:00 P.M. that evening. Id. No overhead lights were on inside the car. (R. p. 549).

During the subsequent search of Dr. Little's vehicle, Deputy Colburn noticed a brownish stain that appeared to be blood on the exterior of the open center console lid. (R. p. 517). Using his flashlight, Deputy Colburn further searched the vehicle and discovered towels that were similar to those found at Barbara's home. (Id.). While Deputy Colburn was snooping through his vehicle, Dr. Little exited the residence. (Id.). Deputy Colburn asked Dr. Little if he would accompany him to the law enforcement center to speak with detectives, and Dr. Little obliged. (R. p. 557). Deputy Colburn conceded he had neither a warrant nor probable cause to search Dr. Little's property. (R. p. 548). According to Deputy Colburn, Dr. Little was not even a suspect at the time. (R. p. 543).

Deputy Colburn subsequently transported Dr. Little to the law enforcement center in the back of his vehicle. (R. p. 557). Upon arrival, Deputy Colburn turned Dr. Little over to Detective

Dustin Turner, to whom he privately divulged his findings from the search of the vehicle. (R. p. 518). Detective Turner then proceeded to interrogate Dr. Little about Barbara's death. (R. p. 644). Meanwhile, Detective Will Muirhead received a call to meet Deputy Colburn back at Dr. Little's residence. (R. p. 663). Following this second illegal search of Dr. Little's vehicle, Detective Muirhead relayed his findings to Detective Jason Bowen. (R. pp. 663–64). Detective Bowen was tasked with "constructing" a probable cause affidavit to present to a magistrate for purposes of obtaining a search warrant. (R. p. 664). In the interim, Detective Muirhead asked Dr. Little's wife, Carla Little, for permission to enter the home for a "walk-through." (R. p. 665).

Shortly thereafter, Detective Muirhead returned to the station and took his turn with Dr. Little. (R. p. 666). In all, Dr. Little was interrogated at the station for almost four hours by three different detectives before someone finally read him Miranda warnings. (R. p. 206). During this time, detectives searched Dr. Little's person for scratches and any evidence of a struggle. (R. pp. 649–50, 1075). Over his objection, detectives also required Dr. Little to remove his clothes and place them in an evidence bag. (R. pp. 217, 225). Detectives had no search warrant for his clothing and never bothered to obtain one. (R. pp. 226–27). In the back pocket of his pants, detectives discovered Dr. Little's wedding ring. (R. p. 203). While the ring tested positive for blood, it was never matched to any known DNA. (Id.). Detective Turner gave him a ride home. (R. p. 645).

Detectives later executed the search warrants obtained pursuant to Deputy Colburn's unlawful search of Dr. Little's vehicle and seized various items, including the vehicle, from Dr. Little's home. (R. pp. 669, 739). They also searched his phone and computer records. (R. pp. 669, 386 & 903). Investigators were fixated on the fact that Dr. Little was behind in alimony payments and was served with a rule to show cause on the day of Barbara's death. (R. pp. 652,

673). But this was nothing new. Dr. Little had been hailed into family court on numerous prior occasions to account for his delinquent alimony payments. (R. pp. 647, 336).

In May of 2016, a Charleston County grand jury indicted Dr. Little for murder. (R. pp. 1255–56). The case was initially called for a jury trial in February of 2018. Before trial, the circuit court held a lengthy hearing on Dr. Little's motions to suppress as well as various other pre-trial issues. (R. pp. 5–246). The circuit court granted Dr. Little's motion to suppress his wedding ring, finding it was obtained in an illegal search following a Miranda violation. (R. pp. 233–34). But the court denied Dr. Little's motion to suppress the blood evidence found in his vehicle and all related evidence. (R. pp. 159–62). Following jury selection, the State turned over video evidence the defense had been requesting for months. (R. p. 287). The circuit court elected to continue the case to the next term of general sessions. (R. pp. 289–90).

The case was recalled for a jury trial on March 19–23, 2018. After jury selection and opening statements, the State presented a smattering of law enforcement and fact witnesses to discuss the crime scene, the searches of Dr. Little's vehicle and home, the investigation, cell tower records, the family court's rule to show cause, Dr. Little's interrogation, blood forensics, and Dr. Little's computer records. (R. pp. 321–943). The State also proffered Dawn Claycomb, a crime scene agent with SLED who investigated Barbara's death, to testify as an expert in footwear examination. (R. pp. 960, 968). Dr. Little challenged Claycomb's qualifications, as well as the substance of her testimony, but the circuit court permitted her to testify over his objection. (R. pp. 944–55, 963). Claycomb testified that she found the "outsole design" from Dr. Little's shoe was "similar" to an impression taken from the scene, but she could not say it was the same shoe. (R. p. 976). A forensic pathologist from the Medical University of South Carolina also testified regarding her findings from Barbara's autopsy. (R. pp. 1010–49).

After the State rested, Dr. Little moved for directed verdict. (R. pp. 1061–64). The circuit court denied his motion and instructed the defense to call its first witness. (R. pp. 1066, 1071). Dr. Little called three witnesses to the stand. Detective Matthew Downing, who questioned Dr. Little along with two other detectives at the station, testified that he did not observe any physical injuries on Dr. Little's body on the night in question. (R. pp. 1074–75). He confirmed that Dr. Little was questioned for at least two or three hours, starting after midnight. (R. pp. 1085, 1073). When asked about Dr. Little's demeanor during this questioning, Detective Downing stated he was aware that Dr. Little had been up since 4:30 A.M.—for almost twenty-four hours. (R. p. 1085).

Next, Kimberly Mears, a fingerprint examiner with SLED, testified she was given five latent fingerprint lifts from the crime scene and attempted to compare them with Barbara's and Dr. Little's fingerprints. (R. pp. 1087, 1096–97). She determined four latent lifts were of "no value for comparison," and the fifth one—which was taken from the interior of the glass storm door at Barbara's home—did not match Dr. Little's fingerprints. (R. p. 1097). Finally, Deputy Robert Haslip testified regarding his recollection of events at the crime scene. (R. pp. 1108–20). Following his testimony, the defense rested and renewed all prior motions. (R. p. 1135). They were denied, and the parties proceeded with closing arguments. (R. pp. 1135, 1137–1224).

During its closing argument, the State heavily relied upon the blood discovered in Dr. Little's vehicle and the testimony of its footwear impressions expert. (R. pp. 1138–39, 1144–45, 1147–48 & 1171–72). The State then referenced Dr. Little's suppressed wedding ring both verbally and via a PowerPoint slide published to the jury that said, "No jewelry (no ring???)." (R. pp. 1161, 1306). Dr. Little immediately moved for a mistrial. (R. p. 1162). The circuit court denied his motion, instructing the State—outside the presence of the jury—to take down the slide and not mention the ring anymore. (R. p. 1163). But the damage was already done.

The defense delivered its closing argument, and the State briefly replied. (R. pp. 1181–1218, 1219–24). After receiving instructions, the jury retired for deliberations. (R. pp. 1225–37). The jury struggled with this case. Four hours into deliberations, the jury asked for a copy of the charge. (R. p. 1240). When the circuit court asked the foreman to be more specific, the jurors instead decided to return to their room and resume deliberations. (R. pp. 1240–41). Ultimately, following five hours of deliberations, the jury returned a guilty verdict. (R. p. 1243). The circuit court denied all renewed motions and then sentenced Dr. Little to thirty years in prison. (R. pp. 1243, 1247–52). Dr. Little appealed.

A three-judge panel heard oral arguments in the case on January 12, 2021. On June 9, 2021, the panel affirmed in an unpublished opinion. This petition for rehearing and suggestion for rehearing en banc follows.

STANDARD

Rule 221(a), SCACR, allows a party to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it," Arnold v. Carolina Power & Light Co., 168 S.C. 163, ___, 167 S.E.2d 234, 238 (1933). And the Court will only order a rehearing en banc "(1) when consideration by the full court is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

ARGUMENT

"In law, the ends do not justify the means." State v. Adams, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). Yet the State—in its quest to secure a conviction at any cost—violated Dr. Little's constitutional rights from the outset of the investigation all the way through trial. The

panel erred in finding no abuse of discretion in the circuit court's rulings because (1) no exigent circumstances justified the State's two illegal searches of Dr. Little's vehicle in the curtilage of his home; (2) the State's improper reference during closing argument to a ring that the circuit court suppressed prior to trial prejudiced Dr. Little; and (3) the testimony of the State's unqualified footwear impressions expert was unreliable and prejudicial. The panel should grant rehearing and issue a substituted opinion, or the Court should rehear the case en banc and reverse and remand.

I. The panel misapprehended the applicability of the exigent circumstances exception to the warrant requirement and erred in invoking it to justify the intrusion into the curtilage of Dr. Little's home to conduct an illegal search of his vehicle.

While the appellate court "applies a deferential standard of review" in Fourth Amendment cases, "this deference does not bar th[e] Court from conducting its own review of the record to determine whether the [circuit court]'s decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). Further, when deciding "appeals from a motion to suppress based on Fourth Amendment grounds," the appellate court "reviews questions of law de novo." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017) (quoting Adams, 409 S.C. at 647, 763 S.E.2d at 344).

Viewed in this prism, the panel erred in four respects. First, the panel overlooked that the warrantless search occurred in the curtilage of Dr. Little's home—as the State conceded—which is entitled to heightened protection under the Fourth Amendment to the U.S. Constitution. Second, the panel misapplied the exigent circumstances exception given that Deputy Colburn testified Dr. Little was not a suspect, he had no reason to believe Dr. Little was armed and dangerous, he had backup on the scene, and Dr. Little was not arrested on the evening in question. Third, the panel overlooked that State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), is distinguishable here.

Fourth, the panel did not address Dr. Little's argument that the State's actions also violated his right to privacy enshrined in article I, section 10 of the South Carolina Constitution.

A. Curtilage is a critical missing piece in the panel's analysis of the search issue.

Taking them in order, Dr. Little would note as a threshold matter that the word "curtilage" did not appear in the panel's opinion.

Curtilage is "the land immediately surrounding and associated with the home" and is "part of the home itself for Fourth Amendment purposes." Oliver v. United States, 466 U.S. 170, 180 (1984). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 212–13 (1986). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo v. United States, 533 U.S. 27, 31 (2001). And the Fourth Amendment extends this protection to "the curtilage of the home." Bash, 419 S.C. at 268, 797 S.E.2d at 723 (quoting Herring, 387 S.C. at 209, 692 S.E.2d at 494).

Here, the State conceded the vehicle in the driveway that officers searched was within the curtilage of Dr. Little's home. Because the search took place in the curtilage, this area of the home was entitled to heightened constitutional protection. See Ciraolo, 476 U.S. at 212–13. In overlooking this uncontested issue, the panel failed to account for the significance of the location where the illegal search occurred in analyzing the Fourth Amendment issue. And this error colored the panel's conclusion "that Deputy Colburn's minimally intrusive search was reasonable." Little, Op. No. 2021-UP-196, at 2. Trespassing upon the curtilage of one's home to conduct an illegal search is not minimally intrusive. After all, "searching a vehicle parked in the curtilage involves

not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage." Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018).

Given that officers' illegal search of the vehicle took place in the curtilage, this was no different than them peering in the windows of Dr. Little's home with a flashlight and no warrant. That is unreasonable, and so is what happened here. See U.S. CONST. amend. IV (guaranteeing the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) ("Private residences are places in which an individual normally expects privacy free of government intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable.").

Respectfully, the panel erred in overlooking this important piece of the Fourth Amendment puzzle in analyzing the reasonableness of the unlawful search.

B. The exigent circumstances exception to the warrant requirement is inapplicable.

The State conceded a search within the meaning of the Fourth Amendment occurred and put all its eggs in the exigent circumstances basket. But the exception is inapplicable, and the panel erred in accepting the State's argument on this ground.

"Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011); see also Herring, 387 S.C. at 209, 692 S.E.2d at 494 (holding "searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances"). Here, the panel and the State focused on the exigent circumstances doctrine, which only applies when, "from an objective standard, a compelling need for official action and no time to secure a warrant exists." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). "[A]bsent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present." State v.

Dobbins, 420 S.C. 583, 592, 803 S.E.2d 876, 880 (Ct. App. 2017). "The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause."[2] Ornelas v. United States, 517 U.S. 690, 696 (1996).

This case does not fit neatly into any of the exceptions to the warrant requirement. Indeed, the protective sweep doctrine does not apply because the search of the premises was not conducted "incident to an arrest," and Dr. Little's property was not an "arrest scene." Maryland v. Buie, 494 U.S. 325, 327 (1990) (noting that "[a] 'protective sweep' is a quick and limited search of the premises incident to an arrest and conducted to protect the safety of police officers or others" (emphasis added)); id. at 334 (asserting "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene" (emphasis added)).

Even when putting aside the "incident to an arrest" requirement, no exigent circumstances justified a security sweep. The State argued that Deputy Colburn's thoughts as to whether Dr. Little was a suspect were irrelevant because that goes to the subjective intent of the officer. Not so. Indeed, the U.S. Supreme Court has expressly rejected this argument. In Florida v. Jardines, the Court clarified its precedent "merely hold[s] that a stop or search that is objectively reasonable

[2] At the outset, Deputy Colburn conceded he had no probable cause during trial, and the State conceded the protective sweep doctrine was inapplicable during the pre-trial hearing. (R. pp. 548, 156). Therefore, the State could not rely upon these arguments on appeal. See I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421 n.11, 526 S.E.2d 716, 724 n.11 (2000) (asserting that "the failure to present an additional sustaining ground to the lower court reduces the likelihood that an appellate court will rely on it to affirm a judgment"); State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (asserting that an issue conceded in the circuit court cannot be argued on appeal (citing State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007))).

is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." 569 U.S. 1, 10 (2013). So a "defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment." Id. In Jardines, however, "the question before the court [was] precisely whether the officer's conduct was an objectively reasonable search." Id. As the Court recognized, "that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." Id. And "their behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." Id.

So too here. In this case, the question is whether Deputy Colburn's conduct was an objectively reasonable search. That depends on whether he had an implied license to enter the driveway, which in turn depends on the purpose for which he entered. The State offered two justifications for its warrantless search. According to the State, it was necessary to conduct a welfare check on Dr. Little and to protect officer safety. As the panel recognized during oral arguments, the welfare check argument was "nonsense." Nor did anything pose a risk of danger to the police or others at Dr. Little's property. The uncontested historical facts were that (1) the crime scene contained a lot of blood, (2) Kimberly had spoken with Dr. Little on the phone multiple times that evening, (2) Dr. Little did not show up to the crime scene, (3) officers were told to locate him an hour later, (4) Dr. Little was not a suspect, (5) officers did not believe he was hiding, (6) officers did not think he was armed and dangerous, and (7) officers had backup on the scene.

Seeing a vehicle's passenger side window down and its right rear tire parked slightly off the driveway could not have given an officer a good faith belief Dr. Little or any other person

posed a danger to those on his premises.[3] And Deputy Colburn's testimony that he could not see the floorboard of the passenger side during the initial search of the vehicles is simply not credible. See (R. p. 554). In any event, the State failed to address the argument that no one could have fit into such a small area to hide. The State also failed to address what "compelling need" existed "for official action" or why it had "no time to secure a warrant." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. And the reason is obvious. The State had no grounds for a warrant until it created the need for one by performing an illegal search within the curtilage of Dr. Little's home.

When taking all of that into account, Deputy Colburn's behavior objectively reveals a purpose to conduct a search—not a welfare check or a safety sweep—"which is not what anyone would think he had license to do." Jardines, 569 U.S. at 10. Deputy Colburn conceded he had no probable cause to conduct the search, and the Court should reverse and remand for a new trial on this ground alone. Further, as the circuit court noted, Deputy Colburn never explained why he found certain things odd about Dr. Little's property. At most, the State had a hunch that something was off that evening. But an unparticularized hunch will not do. That is not the same as probable cause. Respectfully, no ordinarily prudent and cautious person, under the circumstances, would believe a search was justified to protect the safety of officers or others. Deputy Colburn had backup on the scene, and Dr. Little was not a suspect. (R. pp. 513, 543).

During oral arguments, the panel was perplexed as to why the State had its officer testify Dr. Little was not a suspect. But the panel did not wrestle with this fact in the opinion. It was an important one too. Although the State sought to distract the Court with a detailed description of the murder scene, a review of the record reveals that "nothing occurred at the residence to create

[3] The photographs in the record, see (R. pp. 1265, 186–87 & 553), plainly refute the State's claim that Dr. Little had "plenty of room to park completely within the driveway," Resp. Br. at 15–16, given the position of the car on the left.

an exigency to justify a warrantless search." Herring, 387 S.C. at 218, 692 S.E.2d at 499 (Kittredge, J., concurring) (emphasis added). Thus, contrary to the panel's findings, Deputy Colburn's officer safety concerns—when viewed with the totality of the circumstances—was not legitimate. And the panel failed to address what exigent circumstances justified the subsequent unlawful searches of Dr. Little's vehicle parked in the curtilage of his home. None existed.

The circuit court erred in not taking Deputy Colburn at his word, and the panel erred in finding no abuse of discretion. Dr. Little was not a suspect, and officers had no probable cause to search his home. For the same reasons, they had no probable cause to trespass and conduct an unlawful search of a vehicle parked within the curtilage of his home. No exigent circumstances justified this first illegal intrusion. Indeed, the doctrine only applies when, "from an objective standard, a compelling need for official action and no time to secure a warrant exists." Abdullah, 357 S.C. at 351, 592 S.E.2d at 348. To this day, no one has explained why officers had no time to secure a warrant. The reason is obvious. As Deputy Colburn conceded, he had no probable cause. Thus, he could not have gotten a warrant. But that did not give him license to conduct an illegal search. And certainly, no exigent circumstances excused the second illegal search conducted by Detective Muirhead, and the State does not even try to argue to the contrary.

In light of these repeated Fourth Amendment violations, all evidence obtained from the unlawful searches should have been suppressed as fruit of the poisonous tree. The circuit court abused its discretion by failing to exclude the evidence, and the panel erred in affirming.

C. The panel misapprehended the applicability of Herring.

Next, the panel's reliance upon the Herring case was misplaced because it overlooked critical distinctions in this case.

In Herring, the officer's "peek into the garage yielded no evidence against Herring" because "[p]olice already had knowledge of the make, model, and license plate number of the vehicle the suspect drove." Id. at 211, 692 S.E.2d at 495. Because the officer's "observation of the vehicle in the garage yielded no evidence which further inculpated Herring," the court found "the de minimis intrusion to secure the officers' safety did not necessitate suppression." Id. Deputy Colburn, however, performed an intrusive search of Dr. Little's vehicle with a flashlight, and Detective Muirhead later followed up with another unlawful search to confirm his findings, all without a warrant. (R. pp. 554, 663–64). As a result of these unlawful searches, the State obtained physical evidence that did inculpate Dr. Little. This was not a de minimis intrusion.

Further, in Herring, "officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon." 387 S.C. at 211, 692 S.E.2d at 495. Indeed, prior to arriving at the suspect's residence at 2:00 A.M., officers had "responded to a shooting at Chastity's nightclub at which the manager of the club was shot and killed," "watched the video which showed the suspect as he entered and departed from the nightclub," and were "given a description of Herring's black SUV." Id. at 209, 692 S.E.2d at 494. Thus, under these exigent circumstances, our supreme court found that the "minimal intrusion" of peeking into "the garage window to see if the suspect was there" was "objectively reasonable" and did not violate the Fourth Amendment.[4] Id. at 209, 211, 692 S.E.2d at 494, 495 (emphasis added). By contrast, Dr. Little was not a suspect at the time of the unlawful search, and officers testified they had no reason to believe he was armed and dangerous. (R. pp. 543, 547).

[4] But see id. at 218–19, 692 S.E.2d at 499 (Kittredge, J., concurring) ("disagree[ing] that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring's residence two hours after the shooting of John Johnson at Chastity's strip club" and stating that the peek into the garage was "an unwarranted trespass and warrantless search" but finding this search yielded no evidence).

Accordingly, Herring did not justify the State's actions in this case, and the panel erred in relying upon it to find the State's actions were reasonable.

D. The panel failed to address the state constitutional argument.

What is more, the panel overlooked Dr. Little's argument under article I, section 10 of the South Carolina Constitution and failed to address it in the opinion.

"In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Counts, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015) (quoting State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)); see also S.C. CONST. art. I, § 10 (asserting that "[t]he 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").

"By 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." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). In other words, the failure to address this argument is important because "this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." Counts, 413 S.C. at 164, 776 S.E.2d at 65 (quoting Forrester, 343 S.C. at 644, 541 S.E.2d at 840).

In failing to address the privacy argument under the state constitution, the panel overlooked that this was an independent ground for reversal. Given the "scant" authority interpreting the state constitutional right to privacy, this Court essentially has a blank canvas. Counts, 413 S.C. at 167, 776 S.E.2d at 67; see also Jaclyn L. McAndrew, Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants, 62 S.C. L. REV. 671, 694 (2011) (interpreting the

history of article I, section 10 and concluding "the drafters were depending upon the state judiciary to construct a precise meaning of this phrase"). That said, our state constitution "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Counts, 413 S.C. at 168, 776 S.E.2d at 68 (quoting Forrester, 343 S.C. at 645, 541 S.E.2d at 841).

Because the State's actions here did not fit into an exception to the warrant requirement, even if the panel found they satisfied the Fourth Amendment's touchstone of reasonableness, they do not pass muster under article I, section 10. The people of South Carolina, together with the General Assembly, have determined that privacy is so important that it should be enshrined in our state constitution. Here, however, the State trampled on Dr. Little's right to privacy by performing multiple illegal searches of his vehicle, which was parked within the curtilage of his home. The State then used unlawfully obtained evidence to secure a murder conviction against one of its citizens. And that was only one of the many constitutional violations plaguing this case. But South Carolinians demand more of their criminal justice system. This was a classic trespass into an area entitled to heightened constitutional protection. If the Fourth Amendment did not protect Dr. Little, then the state constitution does and should.

Under these circumstances, the panel erred in overlooking that the State violated article I, section 10 of the South Carolina Constitution by invading Dr. Little's right to privacy.

* * * *

In short, because Deputy Colburn had no probable cause to believe exigent circumstances were present to justify a warrantless search of the vehicle, the unreasonable search violated Dr. Little's rights under the Fourth Amendment and the South Carolina Constitution. Accordingly, the panel should issue a substituted opinion reversing and remanding for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle, the towel, the

bloody shoes found in the home, and any and all evidence obtained pursuant to these two search warrants as fruit of the poisonous tree.[5] See Adams, 409 S.C. at 648, 763 S.E.2d at 345 (quoting United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002)). Alternatively, the en banc Court should reverse the panel and do the same.

II. *The circuit court erred in denying Dr. Little's motion for a mistrial when the State improperly referenced the suppressed ring during its closing argument.*

Although the panel seemed to agree the State crossed the line by mentioning evidence suppressed prior to trial during its closing argument, see Little, Op. No. 2021-UP-196, at 3 (finding "the State's error did not prejudice Dr. Little"), the Court overlooked the prejudicial effect of this concerning move.

It is well-settled that closing "[a]rguments must be confined to evidence in the record." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). "[T]o receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). An appellate court's ruling "must hinge on whether there was a manifest necessity for declaring a mistrial." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). The court must also consider whether a "mistrial was dictated by . . . the ends of public justice," which is "defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010).

Here, the State's closing argument and the PowerPoint slide focused on the ring were some of the last things presented to the jury before deliberations. (R. pp. 1161–62, 1306). The State

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[5] The State never contested Dr. Little's fruit of the poisonous tree analysis and, thus, agrees that suppression was required if the Court finds the exigent circumstances exception to the warrant requirement inapplicable.

"convey[ed] the impression to the jury" it had "evidence not presented to the jury but known by the prosecution which supports conviction." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). As the panel noted at oral arguments, that was "clearly misconduct." Indeed, the fundamental unfairness of the State's inappropriate reference to the ring during closing argument is underscored by the fact that the circuit court had already suppressed the ring due to the unconstitutional means by which it was obtained in the first instance. Referencing the suppressed ring only added insult to injury, creating two layers of a constitutional violation.

That this evidence was a wedding ring only compounded the prejudice.[6] A jury likely would have attached great significance to learning for the first time during closing argument that Dr. Little was not wearing his wedding ring when police questioned him about the death of his ex-wife. Although the panel concluded the mention of the suppressed evidence was not prejudicial because the PowerPoint slide did not say the ring had blood on it, respectfully, that is setting the bar too low. Certainly, the mention of a bloody ring would have been beyond the pale. But that is not the question before the Court. The question is whether the State can give "the impression to the jury" it had "evidence not presented to the jury but known by the prosecution which supports conviction" for the first time during closing. Matthews, 350 S.C. at 276, 565 S.E.2d at 768. And the answer is no.

And the circuit court failed to exhaust other methods to cure possible prejudice to alleviate the need for a mistrial. Cf. Bantan, 387 S.C. at 417, 692 S.E.2d at 203–04 (asserting that "[a]n instruction to disregard the objectionable evidence is usually deemed to cure the error in its admission"). Instructing the State—outside the jury's presence—to take down the PowerPoint

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[6] See generally Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 VA. L. REV. 1901, 1917 (2000) ("By exchanging wedding rings and ceremonial promises, the couple bind themselves to one another in a way that signals both the seriousness of their intentions to undertake the many obligations of marriage and their nonavailability for other intimate relations.").

slide that referenced the ring was insufficient to cure the taint of the State bringing up a symbolic piece of evidence that was excluded from the record due to the State's illegal investigative tactics. Taking the slide down did nothing—the cat was already out of the bag. As to the prejudice prong, the Court need look no further than the State's concession in its brief that the solicitor's statement "went to the heart of the State's case: connecting the victim's blood to [Dr. Little]." Resp. Br. at 23. That is not harmless error.

Dr. Little was entitled to a mistrial, and the circuit court erred in denying his motion in light of the State's misconduct in the final hours of a weeklong murder trial. The Court should therefore issue a substituted opinion reversing and remanding for a new trial based upon the State's reference to evidence outside the record.

III. The circuit court erred in admitting prejudicial testimony from the State's purported footwear examination expert.

Next, the panel overlooked that Dawn Claycomb was not qualified to offer expert testimony regarding outsole footwear impressions. See App.'s Final Br. at 36–38.

Although Dr. Little recognizes "the expert need not be a specialist in the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Respectfully, the circuit court did not perform the requisite gatekeeping function here. And the panel overlooked that the circuit court's error cannot be harmless because Dr. Little was necessarily prejudiced by Dawn Claycomb—a SLED agent—being imbued with the imprimatur of an expert and confusingly testifying that Dr. Little's shoes were very similar to the prints found at the murder scene. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding that a reversal is mandated when a solicitor exploits "the

[circuit] court's imprimatur of [an officer] as an 'expert' . . . to the prejudice of' the defendant" because a police "officer's opinion [that] goes to the heart of the case is not harmless").

Even if she was qualified, the panel misapprehended the reliability test in upholding the circuit court's decision to give the State a pass on this testimony. In State v. Council, our supreme court held that, when "considering the admissibility of scientific evidence under the Jones standard," an appellate court generally looks at the following factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (citing State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)). Scientific evidence, of course, "is also subject to attack for relevancy and prejudice." Id. at 19–20, 515 S.E.2d at 517.

Applying the Council factors here, the circuit court should have excluded Claycomb's footwear impressions testimony. While Claycomb indicated her report was confirmed via peer review, (R. p. 960), she named no publications citing with approval the technique she employed. She merely confirmed she "read articles." (Id. at 963). Claycomb testified she had fifteen to twenty cases involving footwear impressions, (id. at 958), but she never indicated whether the same method was employed each time. And although Claycomb testified in detail about the chain of custody for the DVD containing the digital photographs, (id. at 970), she failed to indicate what quality control measures were employed to ensure the photography department accurately enlarged photographs used to compare impressions. Nor did she indicate the consistency of this method with recognized scientific laws and procedures.

In 2001, our supreme court rejected the State's effort to present testimony from a "barefoot insole impressions" expert, holding this type of evidence was inadmissible because it was not

scientifically reliable. State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (Jones I). The case was retried and reversed again based upon the circuit court's admission of unreliable barefoot insole impression evidence. State v. Jones, 383 S.C. 535, 557–58, 681 S.E.2d 580, 592 (2009) (Jones II). Interestingly, the court there rejected the publications and testimony of William Bodziak—the very individual under whom Claycomb trained—as unreliable. See id.; (R. p. 952). Although this case involves "outsole impressions" and tread design, the same analysis applies. Here, as in Jones I, the circuit court "erred in permitting expert testimony purporting to demonstrate that '[footwear outsole] impression' testing revealed" Dr. Little's shoe "to be consistent with the impression" found at the crime scene. 343 S.C. at 574, 541 S.E.2d at 819.

Claycomb created an ink impression from a shoe, placed it onto a clear transparency, and then had another department enlarge and print a photograph of the unknown footprint to compare footwear impressions. That is not scientifically reliable, and the circuit court erred in permitting the State to publish this prejudicial and confusing testimony to the jury. See Council, 335 S.C. at 19–20, 515 S.E.2d at 517; Rule 403, SCRE. Like insole footwear impressions testimony, outsole footwear impressions testimony is speculative and unreliable. With all due respect, Ms. Claycomb was unable to answer some of the most basic questions about the alleged science behind footwear impressions to give even an indicia of reliability. Because her testimony was introduced solely for the purpose of linking Dr. Little to the scene of the crime, it cannot be harmless. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491. Dr. Little was prejudiced by the introduction of Claycomb's misleading testimony because—semantics aside—she directly linked him to the scene of the crime. And the prejudice outweighed what probative value, if any, the testimony offered. See Rule 403, SCRE. So the circuit court's "admission of this evidence mandates reversal of" Dr. Little's murder conviction. Jones I, 343 S.C. at 574, 541 S.E.2d at 819.

CONCLUSION

In sum, the panel should grant rehearing, issue a substituted opinion, and reverse and remand to the court of general sessions for a new trial. Alternatively, the Court should rehear the case en banc, reverse the panel, and remand for a new trial.

Respectfully submitted,

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Columbia, South Carolina
June 24, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of General Sessions

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2018-000561
Lower Court Case No. 2016-GS-10-02883

The State ....Respondent,

v.

General T. Little..Appellant.

PROOF OF SERVICE

I certify that I have served Appellant General T. Little's Petition for Rehearing or Suggestion for Rehearing En Banc on the following counsel by email on June 24, 2021.

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From: Lisle Traywick
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Subject: State v. Little (App. No. 2018-000561) Petition for Rehearing or Suggestion for Rehearing En Banc
Attachments: State v. Little (App. No. 2018-000561) Appellant's Petition for Rehearing or Suggestion for Rehearing En Banc(37536132.1).pdf; State v. Little (App. No. 2018-000561) Proof of Service for Petition for Rehearing or Suggestion for Reh(37536138(37536139.1).pdf

All,

Pursuant to In re Operation of the Appellate Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2020-05-29-02, ¶ (g)(3) (S.C. Sup. Ct. filed May 29, 2020), attached for service upon you is Appellant General T. Little's Petition for Rehearing or Suggestion for Rehearing En Banc, as well as a Proof of Service, being filed in the Court of Appeals today.

Should you have any questions or concerns, please don't hesitate to contact us. Thanks and have a great afternoon.

Best,

Lisle

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