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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR A WRIT OF CERTIORARI TO 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

The State .....Respondent,

v.

General T. Little.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioner General T. Little (Dr. Little) petitions this Court for a writ of certiorari to review the court of appeals' decision in State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed July 21, 2021). The Court should grant certiorari because this case presents "novel questions of law" and "substantial constitutional issues are directly involved." Rule 242(b)(1) & (4), SCACR. On certiorari, the Court should reverse the court of appeals' unpublished opinion summarily affirming Dr. Little's conviction and remand for a new trial.

CERTIFICATION

The undersigned certify that a petition for rehearing "was made and finally ruled on by the Court of Appeals" on August 23, 2021. Rule 242(d)(1), SCACR.

QUESTIONS PRESENTED

I. Did the court of appeals err in affirming the circuit court's finding that the exigent circumstances exception to the Fourth Amendment's warrant requirement justified officers' trespass into the curtilage of Dr. Little's home to illegally search a vehicle twice?

II. Did the court of appeals err in affirming the circuit court's finding that the State's illegal searches did not run afoul of article I, section 10 of the South Carolina Constitution?

III. Did the court of appeals err in affirming the circuit court's denial of Dr. Little's motion for a mistrial when the State prejudicially referenced during closing argument a ring that was suppressed before trial due to the unconstitutional means by which officers obtained it?

IV. Did the court of appeals err in affirming the circuit court's admission of prejudicial and unreliable testimony from the State's unqualified outsole footwear impressions expert?

INTRODUCTION

This appeal arises out of officers' trespass into the curtilage of Dr. Little's home to conduct an illegal, unreasonable, and warrantless search of his vehicle. And this happened not once, but

twice in the same night. What is more, the State used the unlawfully obtained evidence to secure Dr. Little's conviction. Indeed, the fruits of the illegal searches were the crux of the State's case. Recognizing as much, the State struggled to get its story straight on what justified officers' unlawful conduct. On appeal, the State finally landed on the exigent circumstances exception. Within this rubric, the State advanced two theories: (1) the search was necessary because officers were performing a welfare check on Dr. Little, and (2) it was necessary to ensure officer safety.

Both are without merit. As one judge on the panel recognized at oral arguments, the former is nonsense. Turning to the latter, the State fares no better. After all, the officer who conducted the first unlawful search testified below that Dr. Little was not a suspect, he did not believe Dr. Little was armed and dangerous, and he had backup on the scene. Yet the officer proceeded to conduct a meticulous 90-second search with his flashlight, taking multiple laps around Dr. Little's vehicle, allegedly to ensure no one was hiding. But he could have figured that out in only a few seconds. And no one could have even fit in the passenger side floorboard where officers found towels on the second lap around the vehicle to search an area they unquestionably saw the first time. That the officer noticed infinitesimal brown smudges on the interior of the vehicle only confirms the pretext of his justification. This was not a sweep to ensure officer safety. Rather, it was a search. It was not reasonable in scope or duration. Further, to this day, no one has even tried to defend the second officer's illegal search that occurred hours later.

As the U.S. Supreme Court has recognized, "[i]f the government becomes a lawbreaker, it breeds contempt for the law." Elkins v. United States, 364 U.S. 206, 223 (1960). The State broke the law. So the only remaining question is whether the judiciary can look the other way because the charge is murder. Respectfully, it cannot and should not. Dr. Little deserves a fair trial. Our criminal justice system demands no less. The Court should grant certiorari, reverse, and remand.

STATEMENT OF THE CASE

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, Dr. Little, to locate him.[1] (R. p. 514).

Dr. Little lived in an upper-middle-class neighborhood in West Ashley. (R. pp. 547, 161). Upon arrival to Dr. Little's home, Deputy Matthew Colburn of the Charleston County Sheriff's Department saw a vehicle that he knew belonged to Dr. Little parked slightly off the driveway and Deputy 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.[2] 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). During a 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

[1] They had been divorced for almost twenty years and "didn't fight." (R. pp. 336, 485).

[2] All vehicles were parked beyond the sidewalk—and front threshold of the house—in the back of the driveway. See (R. pp. 1265, 1286–87). Because the vehicle on the left hugged the middle of the driveway, the right rear tire of Dr. Little's vehicle rested in the mulch. (Id.).

those found at Barbara's home. (Id.). While Deputy Colburn was snooping through the vehicle, Dr. Little exited his 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, however, 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 interrogated 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 a 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 for almost four hours by three different detectives before someone finally read him Miranda warnings. (R. p. 206). In that 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 found Dr. Little's wedding ring. (R. p. 203). While the ring tested positive for blood, it was never matched

to any known DNA. (Id.). Detectives later executed the warrants obtained pursuant to the unlawful searches 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).

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). Because the State belatedly turned over evidence the defense had been requesting for months, (R. p. 287), the circuit court continued the trial. (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, a rule to show cause in family court, 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 outsole footwear impressions. (R. pp. 960, 968). Dr. Little challenged Claycomb's qualifications, as well as the substance of her novel testimony, but the circuit court permitted her to testify over his objection. (R. pp. 944–55, 963). 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 incredulously 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, after 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 of the court of appeals heard oral arguments in the case on January 12, 2021. On June 9, 2021, the panel affirmed in an unpublished opinion. See State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021). Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. On July 21, 2021, the panel granted the petition for rehearing, withdrew its prior opinion, and issued a substituted opinion that still summarily affirmed. State v. Little, Op. No. 2021-UP-196 (S.C. Ct. App. filed July 21, 2021). The only addition was one sentence ruling on Petitioner's state constitutional argument that was not previously addressed. Petitioner filed another petition for rehearing to address the panel's erroneous state constitutional finding. On August 23, 2021, the panel denied that petition for. This petition for a writ of certiorari follows.

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 court of appeals erred in finding no abuse of discretion in the circuit court's rulings because (1) no exigent circumstances justified officers' two illegal searches of Dr. Little's vehicle parked in the curtilage of his home, and suppression was required under both the Fourth Amendment and article

I, section 10 of the South Carolina Constitution; (2) the State's improper reference during closing argument to a ring 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.

I. The court of appeals misapplied the exigent circumstances exception to the warrant requirement and erred in invoking it to justify officers' trespass 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 court of appeals erred in four respects in passing upon these substantial state and federal constitutional issues. Cf. Rule 242(b)(4), SCACR. First, the court of appeals failed to consider or address 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. Second, the court of appeals 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 that night. Third, the court of appeals' reliance on State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009), was misplaced because it is readily distinguishable. Fourth, the court of appeals improperly gave short shrift to Dr. Little's argument that the State's actions also violated his right to privacy enshrined in the South Carolina Constitution.

A. Curtilage is noticeably absent from the court of appeals' search analysis.

Taking them in order, Dr. Little would note as a threshold matter that the word "curtilage" did not appear once in the court of appeals' 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 fact, 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 analysis and ultimate 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"); Herring, 387 S.C. at 209, 692 S.E.2d at 494 ("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 court of appeals erred in omitting 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 court of appeals 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 court of appeals 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."[3] 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 "[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 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

[3] Deputy Colburn conceded he had no probable cause, and the State conceded the protective sweep doctrine was inapplicable at the pre-trial hearing. (R. pp. 548, 156); cf. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421 n.11, 526 S.E.2d 716, 724 n.11 (2000) (stating "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) (stating an issue conceded below cannot be argued on appeal (citing State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007))).

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 amounted to 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. Id. The State offered two justifications on this front. 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 is "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. And a conclusory assertion of officer safety, standing alone, is insufficient to show probable cause for exigent circumstances. 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 historical facts preceding the search do not support that argument. The State had no grounds for a warrant until it created the need for one by performing illegal searches in the curtilage of Dr. Little's home.

When taking all of the circumstances into account, Deputy Colburn's behavior objectively reveals a purpose to conduct a search for evidence—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 a search. As the circuit court noted, Deputy Colburn never explained why he found certain things odd about Dr. Little's property. (R. pp. 160–61). At most, the State had a hunch something was off that evening. But an "unparticularized suspicion or hunch" will not do. Maryland v. Buie, 494 U.S. 325, 332 (1990) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). That is not probable cause. Respectfully, no ordinarily prudent and cautious person, under the circumstances, would believe an invasive 90-second search of a vehicle parked in the curtilage of one's home 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).

Nor was the warrantless search reasonably "limited in scope and duration" when measured against the purported exigent circumstances Deputy Colburn said justified his presence in the first instance. State v. Robinson, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014). If Deputy Colburn were truly clearing vehicles, he could have ruled out Dr. Little's in a matter of seconds. Yet he took multiple laps for a minute and a half, looking meticulously at every inch of the car with his flashlight. Deputy Colburn's testimony that he could not see the passenger floorboard during the initial search simply does not pass the smell test. See (R. p. 554). He had a flashlight. In any event, the State ignores that no one could have even fit into such a small area to hide. Contrary to the court of appeals' finding, this search was not "reasonable" under the Fourth Amendment.

Last, during oral arguments, the panel was perplexed 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" well over an hour later "to create 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, Deputy Colburn's officer safety concerns—when viewed with the totality of the circumstances—were not legitimate. And the court of appeals failed to address at all what exigent circumstances justified Detective Muirhead's subsequent unlawful search of Dr. Little's vehicle in the curtilage of his home. None did.

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 court of appeals erred in affirming.

C. The court of appeals misapplied Herring.

Next, the court of appeals' reliance upon the Herring case was misplaced. 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." 387 S.C. 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 those 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).

Accordingly, the State finds no refuge in Herring, and the court of appeals erred in relying upon it to find the State's unlawful searches were reasonable.

D. The court of appeals wrongly gave short shrift to the state constitutional argument.

What is more, the court of appeal failed to fully analyze Dr. Little's argument under article I, section 10 of the South Carolina Constitution.

"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

[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).

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 fully 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).

Given the "scant" authority interpreting the state constitutional right to privacy, this Court essentially has a blank canvas. Id. 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 the first article of 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.

Nevertheless, the court of appeals relied on Weaver to find officers' illegal searches in this case were reasonable. They were not. To begin, the court of appeals missed that this Court's analysis in Weaver hinged on the fact that, as of 2007, "there ha[d] never been a clear statement by the United State Supreme Court that a warrant is required before a vehicle is searched in a private place." 374 S.C. at 322 n.2, 649 S.E.2d at 483 n.2. But that is no longer the case, which calls into question the validity of Weaver. E.g., Collins, 138 S. Ct. at 1672 (holding that "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 curtilage"). To be sure, Weaver was decided under the automobile exception, which does not apply to a vehicle on private property. Id. Thus, it is arguably distinguishable. But if not, the Court needs to overrule Weaver.

Here, Deputy Colburn testified he searched the vehicle twice over a 90-second period. And his purported justification was to ensure office safety. But he could have ascertained no one was hiding in the vehicles in only a few seconds. By the time he walked around Dr. Little's vehicle the second time, Deputy Colburn undoubtedly had already ascertained nobody was hiding in the vehicle. The State never argued to the contrary. Accordingly, the post-hoc justification manufactured by the State is a façade. Deputy Colburn was there to conduct a warrantless search to discover evidence to use against Dr. Little, and this trespass constituted an unreasonable invasion of privacy. See S.C. CONST. art. I, § 10. And to this day, the State has never articulated any exigent circumstances that purportedly justified Detective Muirhead's subsequent illegal search. and invaded his constitutional right to privacy.

Under these circumstances, the court of appeals erred in overlooking that the State violated Dr. Little's constitutional right to privacy. These scrupulous and illegal searches of the vehicle parked in the curtilage of Dr. Little's home were not reasonable. Suppression was thus required.

* * * *

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 Court should grant certiorari, reverse, and remand for a new trial with instructions to suppress the unlawfully obtained blood evidence from the vehicle and the house, as well as 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)).

II. The court of appeals erred in affirming the denial of Dr. Little's motion for a mistrial when the State prejudicially referenced the suppressed ring during its closing argument.

Although the court of appeals seemed to agree the State crossed the line by mentioning suppressed evidence during closing, it dismissed the prejudicial effect of this improper tactic.

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

[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.

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 focusing on the ring were some of the last things presented to the jury before deliberations. (R. pp. 1161–62, 1306). The State "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. 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.[6] 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, mentioning a suppressed 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

[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.").

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.

Further, 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 (stating "[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 slide referencing the ring was insufficient to cure the taint of 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 out of the bag. As to the prejudice prong, the Court need look no further than the State's concession that the 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.

The circuit court erred in denying Dr. Little's motion for a mistrial in light of the State's misconduct in referencing evidence outside the record in the final hours of a weeklong murder trial. And the court of appeals erred in affirming.

III. The court of appeals erred in affirming the circuit court's admission of prejudicial and unreliable testimony from the State's purported footwear examination expert.

Next, the court of appeals erred in finding Dawn Claycomb was qualified to offer expert testimony regarding outsole footwear impressions. See App.'s Final Br. at 36–38. Further, though the admissibility of outwear footwear impressions testimony is a novel issue in South Carolina, cf. Rule 242(b)(1), SCACR, the court of appeals erred in affirming circuit court's ruling that gave the State a pass on meeting its burden.

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 court of appeals 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 Council, this 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. at 19, 515 S.E.2d at 517 (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.

As noted above, the admissibility of outwear sole impressions testimony is a novel issue in South Carolina. In 2001, however, this Court rejected the State's effort to present testimony from a "barefoot insole impressions" expert, holding this 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. At bottom, 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. 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 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 Court should grant certiorari, reverse the court of appeals, and remand to the court of general sessions for a new trial.

Respectfully submitted,

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September 22, 2021