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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Thomas L. Hughston, Jr. Circuit court Judge

Opinion No. 2021-UP-196 (S.C. Ct. App. filed June 9, 2021)

THE STATE,.....RESPONDENT

v.

GENERAL T. LITTLE,.....PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2021-001043

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PETITIONER'S QUESTIONS PRESENTED

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2. 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?

3. Did the Court of Appeals err in affirming the Circuit court's denial of Dr. Little's motion for 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?

4. 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Circuit court's finding that the exigent circumstances exception to the Fourth Amendment exists when law enforcement conducted a wellness check into the Petitioner's vehicle to determine if there was any person that could endanger the Petitioner or the officer himself? In their appellant brief the Petitioner just made a glancing reference to the South Carolina Constitution, so was the Court of Appeals obligated to fully address that issue?

2. Did the Court of Appeals err in affirming the circuit court's decision that the search by law enforcement was lawful pursuant to article I, section 10 of the South Carolina Constitution, and since the same exceptions exist for the South Carolina Constitution as do the Fourth Amendment?

3. Did the Court of Appeals err in affirming the Circuit court's denial of Petitioner's motion for mistrial when the State referenced during closing argument a ring that was suppressed during pre-trial, when everything mentioned by the State was in evidence, and the Petitioner suffered no prejudice?

4. Did the Court of Appeals err in affirming the Circuit court's admission of the qualifications and expert testimony from the State's outsole footwear impressions expert?

STATEMENT OF THE CASE

On May 9, 2016, the Charleston County Grand Jury indicted Petitioner for the offense of murder. (R. pp. 1255-1256). This case was initially called for trial on February 12, 2018, before the Honorable Thomas L. Hughston, Jr. After several pre-trial motions were presented to the trial court, the case was continued. On March 19, 2018, the case was called again for trial before Judge Hughston. Appearing before the trial court representing the State of South Carolina, were Assistant Solicitors Jessica Baldwin and Whit Sowards of the Ninth Circuit Solicitors Office, representing the Petitioner, attorneys Mason West, Ryan Schwartz, and Aimee Zmroczek.

After a weeklong trial, Petitioner was found guilty by a jury of his peers for the offense of murder. (R. p. 1243 line 17). After the guilty verdict, Petitioner appeared before the trial court and received a sentence of thirty years. (R. p. 1252 line 1-3). Petitioner filed a timely notice of appeal on March 27, 2018.

On June 9, 2021, the Court of Appeals filed an unpublished opinion affirming the decision of the trial court. *State v. Little,* 2021 WL 3085417 (2021). Within this opinion the Court of Appeals unanimously decided that the trial court did not err in allowing blood evidence found in the Petitioner's automobile; denying a mistrial after the State mentioned evidence that was excluded during pre-trial motions; and, in allowing expert testimony of South Carolina Law Enforcement (SLED) footwear examination expert, Dawn Claycomb.

Petitioner now requests a writ of certiorari seeking review from this Honorable Court. The Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242, so this petition should be subject to dismissal. The return by the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews Court of Appeals by writ of certiorari only where special reasons justify exercise of that power. *Douglas v. State,* 369 S.C. 213, 216, 631 S.E.2d 542, 544 (2000). Pursuant to rule 242 of the South Carolina rules of the Appellant Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to review.

There have been numerous United States and South Carolina Supreme Court decisions allowing warrantless searches for the protection of law enforcement or the public. This is considered an exigent circumstance, an exception to the Fourth Amendment. There were no grounds for a mistrial due to the fact everything the State mentioned was in evidence, and the Petitioner suffered no prejudice. The State revealed sufficient training and knowledge for the

footwear examiner to be considered an expert within that field. Footwear impressions are largely used by law enforcement all over the county so it is an accepted investigation tool. These factors reveal there is not a novel question of law regarding this decision.

This Constitutional question has already been raised before this court and decided, there was no dissenting opinion by the Court of Appeals; this decision was not in conflict with any prior decisions made by this court; and there was no federal question included within this opinion that conflicted with a prior decision made by the United States Supreme Court. The Court of Appeals decision was lawful, so their opinion should not be subject to review.

STATEMENT OF FACTS

Ms. Barbara Little (victim) was the ex-wife of the Petitioner. She lived with her adult daughter Kim. (R. p. 442 line 11-15). On September 22, 2015, Petitioner telephoned Kim around 8:00pm offering an invitation to dinner at the International House of Pancakes (IHOP). He wanted to meet at 9:15. (R. p. 447 lines 14-15; p. 673 line 10). Kim agreed to the invitation and left the residence at approximately 8:30pm. (R. p. 447 line 24-25). As Kim left the victim locked the front glass door behind her. (R. p. 448 lines 10-11).

When Kim arrived at IHOP, she sat and waited on the Petitioner. (R. p. 449 lines 2-5). After waiting for a while she telephoned Petitioner, however, he did not answer. (R. p. 449 lines 19-22). She called several more times, but Petitioner never answered his phone. (R. p. 449 lines 21-22). Since she failed to get a response, she decided to call the victim, however, she failed to get an answer from her also. (R. p. 449 lines 6-7). As closing time approached, Kim decided to place a to-go order. (R. p. 451 lines 9-12). The receipt indicated that she paid for the meal at 9:43pm. (R. p. 1309). After she paid, she texted the Petitioner to inform him that IHOP closes at 10:00pm. (R. p. 452 lines 5-6). Petitioner finally returned Kim's call, and told her he wanted to meet at a Waffle House instead. (R. p. 452 lines 8-12). Confused, Kim wondered why the Petitioner wanted to go to Waffle House since she had already gotten him a to-go order, however, she agreed to meet him.(R. p. 452 lines 20 – p. 453 line 1).

Kim then called her uncle, A.J. McConnell to ask him to go check on the victim. (R. p. 342 lines 17-19). A.J. only lived a quarter of a mile from her house. (R. p. 340 line 12-13). While speaking to Kim on his cell phone A.J. traveled to the house and rang the front doorbell. (R. p. 342 lines 24-25). He did not attempt to open the front glass door because he knew the victim always kept it locked. (R. p. 343 lines 1-2). When he heard no response A.J. checked the bedroom window,

the garage, and the back porch, and he did not find the victim. (R. p. 343 lines 3-13). He returned to the front and to his surprise was able to pull the glass door open. (R. p. 343 lines 16-17). As he entered, he saw a pink towel lying between the glass door and the main door, he also saw blood everywhere. (R. p. 343 lines 20-25). A.J. followed the blood trail down the hall to the bathroom where he found the victim's body. (R. p. 344 lines 1-5). A.J. immediately hung up the phone with Kim and dialed 911. (R. p. 344 lines 5-6). Kim then called the Petitioner to inform him that she could not meet at the Waffle House because something was wrong with the victim. The Petitioner's response was just, "okay." (R. p. 453 lines 4-15).

Deputy Matthew Colburn of the Charleston County Sheriff's Department was dispatched to the scene around 10:00pm. (R. p. 542 line 21). When he opened the front door he immediately saw a pool of blood on the floor and blood on the walls. (R. p. 49 lines 23-25; p. 511 lines 14-15). There were towels and a blanket on the floor as if someone had attempted to clean the crime scene. (R. p. 511 lines 23-25; p. 1307). As Deputy Colburn walked through the house he saw blood in the hallway, and living room. There were also blood smears on the wall leading to the back. (R. p. 512 lines 2-7). He found the victim's body on the bathroom floor. (R. p. 512 lines 13-14). Her head lay in a pool of blood, and she was nude from the waist down with one leg propped up on the edge of the bathroom tub. (R. p. 512 lines 17-19; p. 553 lines 17-23; pp. 1310-1311). Deputy Colburn then secured the scene for detectives. (R. p. 514 lines 2-4).

Lead Detective Will Muirheid arrived at the scene around 10:30pm. (R. p. 661 line 19). When he got there he learned that Petitioner had already been contacted and had agreed to come to the scene. (R. p. 89 lines 16-18; p. 662 lines 1-4). Detectives found no evidence of forced entry, however, the scene inside the house appeared "very chaotic." (R. p. 662 lines 8-16). By 11:20pm Petitioner still had not appeared at the scene even though he only lived five minutes away. (R. p.

89 lines 19-24). Since Petitioner had not arrived detectives requested that Deputy Colburn go to the Petitioner's residence to make contact. (R. p. 89 lines 22-24; p. 542 lines 21-22; p. 663 lines 1-3).

When Deputy Colburn drove past the Petitioner's residence he noticed that the front passenger window of Petitioner's Toyota Sequoia was rolled down. (R. p. 51 lines 11-12). The vehicle was also parked partially in the driveway, and partially in the mulch adjoining the Petitioner's home. (R. p. 51 lines 15-16; p. 1265). Deputy Colburn thought this was strange because there was plenty of room to park completely in the driveway. (R. p. 51 lines 23-24; p. 516 lines 16-17). Deputy Colburn drove past the Petitioner's house and parked his patrol vehicle. (R. p. 53 lines 9-10). He looked inside the rear and driver's side windows before approaching the other vehicles in the driveway. (R. p. 72 lines 19-23). As he walked by the passenger side, he looked through the front passenger window, which was rolled down. Inside he saw a dark stain on the center console that appeared to be blood. (R. p. 54 lines 1-6). He also observed a burgundy towel on the passenger seat, this towel was similar to the ones he saw at the crime scene. (R. p. 54 lines 1-9).

Deputy Colburn later testified that he looked in the windows of the Toyota Sequoia for officer safety to ensure no one was inside. (R. p. 51 lines 1-2). He did not open a door, or even touch the vehicle. (R. p. 53 lines 21-24). The Petitioner argues that Deputy Colburn had been on the property looking in the Toyota Sequoia for a full ninety seconds, this is untrue. He testified that he was on the property between ninety seconds and two minutes looking at all three vehicles when he observed the stain and towel. (R. p. 73 lines 11-16; R. p. 72 lines 5-6).

As Deputy Colburn was looking into the Toyota Sequoia Petitioner came out of the front door of his house. (R. p. 517 lines 6-7). The two men met at the front porch, and Petitioner told

Deputy Colburn that he knew he was there in regards to the victim's murder. (R. p. 85 lines 3; p. 517 lines 15-16). Petitioner agreed to speak with detectives at the Sheriff's Department, Deputy Colburn drove him there in his patrol vehicle. (R. p. 518 lines 3-14). Deputy Colburn later informed detectives about the apparent blood stain and towel he found in Petitioner's Toyota Sequoia. (R. p. 518 lines 14-23).

Toward the end of Petitioner's interview a detective collected Petitioner's clothing in order to preserve any evidentiary value it might have. (R. p. 220 lines 2-7). The detective found a wedding ring inside his back pocket. (R. p. 203 line 11-12). Analysis at SLED later revealed the presence of human blood on the ring, although there was not enough DNA on it to develop a profile. (R. p. 203 lines 11-15). Also found in Petitioner's clothing was a Walmart receipt from earlier that evening for the purchase of rubbing alcohol and a burgundy towel. (R. p. 203 lines 5-8). The Petitioner was not arrested that night, a detective drove him back home after the interview. (R. p. 645 lines 21-22).

While Petitioner was being interviewed law enforcement executed a search warrant on his home and vehicle. Inside the foyer of his home officers found a Wal-Mart bag containing a pair of men's shoes. (R. p. 580 lines 17-19). DNA testing by SLED revealed the victim's blood were on those shoes. (R. p. 995 lines 18-21). Testing at SLED later revealed that blood found on the driver's door and passenger's seat of the Toyota Sequoia belonged to the victim. (R. p. 989 lines 15-21; p. 994 lines 13-14). Detectives also noticed that the compartment containing the tire iron and tire jack was empty. (R. p. 670 lines 7-14). In Petitioner's bedroom, officers smelled bleach or cleaning solution, which they felt was unusual because the bathroom did not appear to have been recently cleaned. (R. p. 665 lines 15-25; p. 790 lines 4-5). The shower also appeared moist. (R. p. 796 line 15). On Petitioner's bedroom dresser officers found a "Rule to Show Cause." This was filed in

family court due to the Petitioner's failure to pay the victim court ordered alimony. (R. p. 580 lines 16-17). Petitioner owed the victim some sixty eight thousand one-hundred and fifteen ($68,115.00) dollars, with seventeen thousand seven hundred and fifty ($17, 750.00) dollars past due from a recent family court order. (R. p. 503 lines 18-21). Petitioner had been served the "Rule to Show Cause" earlier that day. (R. p. 583 lines 19-21).

The Federal Bureau of Investigation (FBI) also analyzed Petitioner's cell phone records. According to geolocational data on the day of the victim's murder, Petitioner's cell phone was in Beaufort near his employment at the Naval Hospital from 8:00am to 5:24pm. (R. p. 380 lines 5-14). At 5:48pm, Petitioner left Beaufort and arrived at his residence in Charleston at 7:13pm. (R. p. 380 lines 17-21). From 7:37pm to 10:28pm, Petitioner's phone was connecting to two towers that encompassed the area around both the crime scene and the Petitioner's house. (R. p. 381 lines 1-7). Significantly between 9:19pm to 9:45pm, Petitioner received ten incoming calls, all of which went unanswered. (R. p. 382 line 24 – p. 383 line 1).

Surveillance footage from a gas station captured Petitioner pulling up in his Toyota Sequoia at 10:35pm. (R. 679 line 3). By that time Petitioner had told law enforcement that he was going to come down to the crime scene. (R. p. 662 lines 1-4). The surveillance revealed Petitioner entering the store, hailing an employee, and removing some type of white envelope from his pocket. (R. p. 680 lines 10-15). The employee shook her head and Petitioner exited. (R. p. 680 lines 18-25). He never purchased any gas. (R. p. 680 line 25).

Law enforcement also searched Petitioner's cell phone, revealing several deleted text messages that he received earlier on the day of the murder. Although the texts had been deleted from the Appellant's phone, law enforcement could recover them because they had not yet been overwritten. (R. p. 908 line 18). Several minutes after being served the Family Court "Rule to

Show Cause," Petitioner's current wife Carla Washington sent him the following text: "I'm not giving her a nickel if she sues your estate." (R. p. 720 lines 3-4). Minutes later she texted "the only asset you have close to that amount is your mom's house." (R. p. 720 lines 4-5). She further stated, "I'm not giving her a nickel of the life insurance. She will never come before my kids. She's trying to give you a heart attack." (R. p. 720 lines 7-9).

Investigation of the Petitioner's finances revealed he was heavily in debt. Although he earned around two hundred thousand ($200,000.00) dollars per year, he had tax liens totaling at approximately three hundred thousand ($300,000.00) dollars, and seventy-one different debts that were over ninety days past due. (R. p. 647 lines 7-16). The Petitioner's Toyota Sequoia was also subject to a title loan through Title Max (R. p. 647 lines 19-21).

The day after the victim's murder Petitioner called his son Chris in an effort to reach Kim. (R. p. 433 lines 13-15). The two had not spoken since the murder. Petitioner explained to Chris that "the cops think I did this to your mother. I need to talk to Kim to see what timeline she gave them." (R. p. 433 lines 22-24). Chris was shocked because Petitioner gave no condolences and expressed no emotion whatsoever. (R. p. 433 line 24 – p. 434 line 2). Shortly thereafter, Petitioner called A.J. and asked him when he found the victim's body. (R. p. 346 line 25 - p. 347 line 1).

Additionally, a search of Petitioner's computer revealed a web browsing history that included internet searches for "forensic science blood detection," "forensic test for blood," "false positives for blood," and, "tests for the presence of blood." (R. p. 906 lines 1-8). The browsing history occurred on the day following the victim's murder. (R. p. 906 lines 7-8). On October 14, 2015, the Petitioner was arrested and charged with the offense of murder. (R. p. 213 line 24).

ARGUMENTS

1. **The Court of Appeals did not err in affirming the Circuit court's finding the exigent circumstance exception to the Fourth Amendment existed when law enforcement conducted a wellness check into Petitioner's vehicle to determine if there was any person that could endanger the Petitioner or the officer himself. Within their appellant brief the Petitioner just made a glancing reference to the South Carolina Constitution; therefore, the Court of Appeals was under no obligation to fully address that issue.**

Prior to trial, Petitioner moved to suppress the evidence seized pursuant to the search warrants on his home and vehicle. Specifically, Petitioner argued that the evidence was the fruits of an illegal search. The Petitioner argued that Deputy Colburn's looking inside his vehicle prior to making contact with him violated his rights under the United States and South Carolina Constitutions. (R. p. 149 – 154). The State argued that Deputy Colburn's actions were reasonable both as a welfare check on the Petitioner and for the officer's own safety. At the conclusion of the pre-trial hearing the trial court held that given the circumstances Deputy Colburn's actions were reasonable under both the United States and South Carolina Constitutions. The trial court further stated:

> "As a footnote, it's unusual to have a car parked like that with the window down at that time. I know in my own circumstances, any time I leave my window down in my car – sometimes I do. Sometimes I do it on purpose. And sometimes I do it not on purpose. But even in the secure garage here at the Charleston County courthouse, when I leave my window down, it's not unusual for the officer that sees that or another judge who sees that or whatever to come to report it to me, you know, your window is down. So I think he certainly had reason to look to see what's going on as far as that window being down under those circumstances." (R. p. 162 lines 1-12).

Standard of Review

In criminal cases, appellate court only review errors of law. *State v. Baccus,* 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). On appeals from a motion to suppress on Fourth Amendment

grounds, appellate courts review questions of law de novo. *State v. Bash,* 419 S.C. 263, 268, 797 S.E.2d 721, 723-724 (2017). With respect to a circuit court's findings of facts, appellate courts, "must affirm 'if there is any evidence to support it,' and 'may reverse only for clear error.'" *Id.* The "clear error" standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. *State v. Pichardo,* 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

Analysis

Fourth Amendment

The Fourth Amendment protects, "[t]he right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV. The South Carolina Constitution additionally prohibits, "unreasonable invasions of privacy." S.C. Const. art. I, §10.[1] "However, a warrantless search may nonetheless be proper under the Fourth Amendment if it falls within one of the well-established exceptions to the warrant requirement." *State v. Counts,* 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015), *quoting, Robinson v. State,* 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014).

One recognized exception to the warrant requirement are exigent circumstances. *Eg. State v. Brown,* 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986); *See also, Collins v. Virginia,* 138 S.Ct.

[1] Although in some limited situations the South Carolina constitution prohibits searches and seizures that would not otherwise violate the Fourth Amendment, *see, State v. Counts,* 413 S.C. 153, 776 S.E.2d 59 (2013), there appears to be no precedent recognizing enhanced state constitutional protection in a factual scenario similar to the case at bar. In fact, in *State v. Weaver,* 374 S.C. 313, 649 S.E.2d 479 (2007), the South Carolina Supreme Court rejected a claim that the state constitution created an additional layer of protection in a case involving a warrantless search of a car parked in the back yard of a private residence.

1663, 1675 (2018)("We leave for resolution on remand whether [the officer's] warrantless intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement.")Exigent circumstances occur when there is, "a compelling need for official action and no time to secure a warrant." *State v. Abdullah,* 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004). In *Minnesota v. Olson,* the United States Supreme Court stated:

> "The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that 'a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect's escape, or **risk of danger to the police or to other persons inside or outside the dwelling.**" *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 1690 (1990)(emphasis added)

The United States Supreme Court also stated, "we do not question the right of the police to respond to emergency situations." *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 2413 (1978).

The circuit court correctly found that Deputy Colburn acted reasonably given not only the exigencies he faced on the night of the murder, but also the limited scope of the search. When Deputy Colburn first arrived at the murder scene he immediately saw a large pool of blood on the floor and blood on the walls. (R. p. 49 lines 23-25; p. 511 lines 14-15). In the foyer, there were towels and a blanket soaked in blood, apparently from an apparent attempt to clean up. (R. p. 511 lines 23-25; p. 1307). There was blood in the hallway, blood in the living room, and blood on the walls leading to the back of the residence. (R. p. 512 lines 4-7). In the bathroom, Deputy Colburn witnessed the victim's dead body. Her head lay in a pool of blood, she was nude from the waist down, and one leg was propped on the edge of the bathroom tub. (R. p. 512 lines 17-19; p. 533 lines 17-23; p. 1310; p. 1311). Detective quickly made contact with the Petitioner, and he agreed to come to the scene. (R. p. 89 lines 16-18; 543 lines 10-11; p. 662 lines 1-4). After waiting almost

an hour, detectives sent Deputy Colburn to the Petitioner's residence to look for him. (R. p. 89 lines 16-24; p. 542 lines 21-22; p. 543 lines 1-11; p. 663 lines 1-3).

As Deputy Colburn arrived at the scene this only enhanced his already legitimate safety concerns. As he drove by the house, Deputy Colburn observed Petitioner's car parked partially in the driveway and partially in the mulch area adjoining the house. (R. p. 51 lines 15-16; p. 1265). The car's position was strange because there was plenty of room to park within the driveway. (R. p. 51 lines 23-24, p. 53 lines 17-18; p. 516 lines 16-17). It was past 11pm and the front passenger window was rolled down. (R. p. 51 lines 11-12). At this point Deputy Colburn was justified in approaching the front door for dual purposes of conducting a welfare check and asking the Petitioner if he would be willing to speak with detectives about the victim's murder.

Given all these circumstances it was reasonable for Deputy Colburn to look inside each vehicle before approaching the front door. The sheer amount of violence he observed at the murder scene; Petitioner's unexplained absence from the crime scene after agreeing to meet law enforcement there; and the strange scene at the Petitioner's house made it reasonable for Deputy Colburn to believe there was a risk of danger to himself or to others. Someone could have been inside the car either injured, dead or waiting to ambush him and the other officer at the scene. It would be unreasonable to present law enforcement with the dilemma of either obtaining a search warrant to look inside the vehicle or ignoring a potential threat.

The search was also narrowly tailored for Deputy Colburn's safety. He did not open a door or even touch any vehicle. (R. p. 53 lines 21-24) Deputy Colburn stood approximately one foot away as he looked inside the front passenger window. (R. p. 81 line 8). According to Deputy Colburn's testimony the entire episode from initially walking on to the property to meeting

Petitioner on the porch lasted between ninety seconds and two minutes. (R. p. 72 lines 5-6).[2] Furthermore one can infer reasonableness from law enforcement's subsequent decision to obtain a search warrant for the car. *See, State v. Johnson,* 410 S.C. 10, 20, 763 S.E.2d 36, 42 (Ct. App. 2014)(noting "the reasonableness of the deputies conduct can be inferred from their decision to obtain a search warrant before fully searching the room."); *State v. Abdullah,* 357 S.C. 344, 351, 592 S.E.2d 344, 348 n.3 (Ct. App. 2004)("The reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and exigent circumstance unquestionably ceased to exist.").

Petitioner argues that exigent circumstances did not exist because he was not a suspect and was not a danger to deputies at the time of the search. But this argument ignores the context in which Deputy Colburn was responding. A brutal, fresh homicide had just occurred in which the Petitioner had failed to show for an agreed meeting with detectives at the crime scene that was five minutes from his house. Deputy Colburn was walking into the unknown when he approached Petitioner's house. One individual had already been brutally murdered which he was the first officer to respond. The potential danger to police and others was not some abstract idea. Although the Petitioner claims that there was no reason to believe anyone was hiding in the car, the officer on the ground assuming that risk disagreed, noting, "honestly sir, you do not know." (R. p. 550 line 13). Law enforcement officers never know the danger around the next corner, and on this particular night, those dangers were even more real. That is why the Courts have ruled that reasonableness must be from the mind of the responding officer. "The Fourth Amendment does

[2] Unlike what is stated within the petition. The entire search of all three cars took ninety seconds, there was no ninety second search of the Toyota Sequoia. That means there was a thirty second search of each vehicle, which should be considered reasonable considering the circumstances.

not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Mincey,* 437 U.S. at 392, 98 S.Ct. at 2413.

Deputy Colburn's actions mirror those taken by law enforcement in *State v. Herring,* 387 S.C. 201, 692 S.E.2d 490 (2009). In *Herring,* this Court decided it, "was objectively reasonable for [the officer] to take precautions to protect his own safety, and the safety of the officers around him, by looking into the garage to see if the suspect was there." *Id.* 387 S.C. at 211, 692 S.E.2d at 495.

The Petitioner argues that *Herring* is not similar to the present case. However, there are several key similarities between *Herring* and the present case. First, both involved fresh homicide investigations with rapidly developing situations. In *Herring,* the police arrived at the defendant's house within two hours of the initial shooting, whereas, in this case the police arrived at the Petitioner's house approximately an hour and twenty minutes after first being dispatched to the murder scene. (R. p. 65 lines 21-22; p. 542 lines 21-24). Second, both cases involved malicious levels of violence. *Herring* involved a shooting death in a parking lot, and the present case involved a gruesome crime scene with the victim being found by Deputy Colburn covered in blood. Third, both involved the narrowly tailored action of looking inside a window located on the curtilage of the home. Fourth, law enforcement in both cases had an obligation to approach a home with little time to act. In *Herring,* the police were trying to locate a suspect of a murder committed in public. In the present case law enforcement had two reasons to locate the Petitioner, to interview him and to conduct a welfare check. Upon waiting an hour for Petitioner to arrive at the crime scene as he agreed, although he only lived five minutes away, (R. p. 89 lines 23-24) law enforcement needed to ensure he was safe.

Petitioner argues that *Herring* does not apply because in *Herring,* they were going after a suspect who was considered armed and dangerous. Officers in the present case had no reason to believe the Petitioner was armed and dangerous. However, the relevant inquiry is the objective of reasonableness of Deputy Colburn's actions in light of the danger posed. Here it was reasonable for Deputy Colburn to understand that: (1) someone was acting with malice that night; and (2) approaching Petitioner's house carried a real risk of coming face to face with that person. Regardless if Deputy Colburn believed Petitioner was a suspect, he believed he was entering a dangerous situation, and that is all you need for an exigent circumstance to exist.

Within his Petition the Petitioner argues that the Court of Appeals failed to mention the word curtilage within their opinion. This argument is without merit. The Court of Appeals compared this case with the *Herring* decision, where a law enforcement officer looked into the window of a garage. In *Herring* this Court decided the Fourth Amendment extends that same protection to outbuildings in the curtilage of the home. *Herring,* 387 S.C. at 209, 692 S.E.2d 494, *citing, United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134 (1987). So the Court of Appeals agrees that a curtilage falls within Fourth Amendment protections. The Court of Appeals never ruled that the viewing was legal because it was a curtilage. They ruled it was legal due to the exigencies presented at the crime scene and Deputy Colburn's legitimate safety concerns.

South Carolina Constitution

The Petitioner also asserts that the Court of Appeals did not fully analyze the State Constitutional argument. The State Constitution also allows for these exceptions. In their initial brief the Petitioner only made a mere passing reference to the State Constitution. And he never raised any argument that the South Carolina Constitution imposes additional restrictions on top of the Fourth Amendment while acting in the context of exigent circumstances. Within their initial

brief they argued that "[u]nder both constitutions" warrantless searches are impermissible absent a recognized exception. Since they only made a glancing argument at best regarding the State Constitution, the Court of Appeals was under no obligation to address an issue that was not clearly presented in the initial brief. *See, Southern Glass &Plastics Co., Inc. v. Kemper,* 399 S.C. 483, 498, 732 S.E.2d 205, 213 (Ct. App. 2012)(An argument was abandoned because a litigant only made a passing reference without supporting case law.)

2. The Court of Appeals did not err in affirming the Circuit court's denial of Petitioner's motion for mistrial when the State referenced during closing argument a ring that was suppressed during pre-trial, because the State's mentioning of this ring did not cause Petitioner any prejudice?

In their closing argument, the State mentioned that the wedding ring of the Petitioner was not present. Assistant Solicitor Baldwin mentioned the testimony of Detective Turner who testified that he asked the Petitioner if he was wearing any jewelry and he didn't really remember him wearing that. (R. p. 1161 lines 13-16). There was also a PowerPoint presentation revealing the words "no jewelry, no ring" (R. p. 1162 lines 15-16). The mentioning of this statement immediately drew an objection from the Petitioner. (R. p. 1161 lines 17-18). At that time the Petitioner moved for a mistrial. He argued that the State was trying to introduce a fact there was no ring when it was something that was specifically excluded by the trial court. (R. p. 1162 lines 3-7). The trial court denied Petitioner's motion for a mistrial, but the trial judge did order that the PowerPoint be taken down. (R. p. 1162 lines 23-25). The State immediately complied with the order of the trial court and removed the PowerPoint. (R. p. 1163 line 4). The Petitioner now argues that the Court of Appeals erred in affirming the trial court's decision to deny the motion for mistrial.

Standard of Review

It is well settled that the decision to grant or deny a mistrial is within the sound discretion of the trial judge. *State v. Prince.* 316 S.C. 57, 67, 447 S.E.2d 177, 183 (1993). Declaring a mistrial "is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *Earley v. State,* 418 S.C. 255, 267, 792 S.E.2d 226, 233 (2016), *quoting, State v. Patterson,* 337 S.C. 215, 277, 522 S.E.2d 845, 851 (Ct. App. 1999). The circuit court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Stanley,* 365 S.C. at 33, 615 S.E.2d at 460.

Analysis

The circuit court has wide discretion in handling the propriety of the solicitor's closing argument to the jury, and ordinarily those rulings will not be disturbed on appeal. *State v. New,* 338 S.C. 313, 318, 526 S.E.2d 237, 240 (Ct. App. 1999). The State's closing argument must be confined to evidence contained in the record, and any reasonable inferences drawn therefrom. *Id.* The solicitor has the right not only to argue the State's version of the facts, but also to comment on the weight the jury should give those facts. *Id.* at 319. Furthermore, failure to confine arguments to evidence contained in the record does not automatically warrant a mistrial. *State v. Huggins,* 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). A new trial will be granted only when the solicitor's "comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* On appeal, the defendant bears the burden of showing an improper comment deprived him a fair trial. *Johnson v. State,* 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997).

The circuit court properly denied appellant's motion for a mistrial because the solicitor confined her argument to facts contained in the record and reasonable inferences therefrom. As discussed above, during appellant's interview at the Sheriff's Department, a detective collected

appellant's clothing in order to preserve any evidentiary value it might have. That detective subsequently found a ring, although there was not enough DNA on it to develop a profile. (R. p. 203 line 4-15). During pre-trial hearings, the circuit court ruled that Petitioner's statements during the interview were admissible, but the search of his clothes was inadmissible because it was not incident to arrest or consensual. (R. p. 232 lines 15-22, 233 lines 18-25). Officers further testified that during execution of the search warrant, Petitioner's bathroom smelled like bleach even though the bathroom did not appear to have been recently cleaned. (R. p. 665 lines 15-19).

Facts contained in the record were: (1) Petitioner was not wearing jewelry; (2) Petitioner was married to Carla Washington; and, (3) Petitioner's bathroom smelled like bleach but had not been recently cleaned. One could reasonably draw the inference that Petitioner was cleaning up after the murder and had removed his ring. The State rightfully made that argument because it was confined to reasonable inferences contained in the record. As the State noted to the circuit court, Assistant Solicitor Baldwin did not reference collecting a ring, blood on a ring, or Petitioner's clothing. (R. p. 1162 lines 11-14).

The State limited their argument to evidence contained in the record, but Petitioner also suffered no prejudice. As confirmed by the Court of Appeals in *Little,*

> "The slide did not inform the jury of the blood evidence on the wedding band, and the slide was presented to jury only briefly before the trial court ordered the State to take down the reference to the ring, which the trial court had excluded in its earlier evidentiary hearing. Without the broader context of the ring's blood evidence, the State's error did not prejudice Little, and we are unconvinced by Little's argument that because wedding bands are symbolic, the fact he was not wearing one inherently prejudiced him." *Little,* 2021 WL 3085417.

If Petitioner had the victim's blood on his hands he would have needed to remove his ring in order to wash the blood off. An adequate argument was made by the State that included the evidence in the record. The Petitioner was not prejudiced, so no mistrial was necessary.

The State's case against the Petitioner was also overwhelming. On appeal the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including . . . whether there is overwhelming evidence of the defendant's guilt. *Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 165 (1998). Law enforcement found the victim's blood on the driver's door, and passenger seat of Petitioner's vehicle, as well as on the Petitioner's shoes. (R. p. 989 line 14-21; p. 994 lines 12-13). At the time of the murder Petitioner was not answering his phone calls from his daughter, even though he has just arranged to meet her for dinner. (R. p. 449 lines 20-22). He avoided law enforcement for over an hour, and his house still smelled of bleach when it was searched later that night. (R. p. 665 lines 15-19; p. 790 lines 4-5). There was also a motive to kill, after being served that day with a rule to show cause for failure to pay over sixty-eight thousand ($68,000.00) dollars in alimony. (R. p. 583 lines 9-21).

For the above mentioned reasons the circuit court was justified in not granting the Petitioner a mistrial. The Court of Appeals was correct in affirming the lower court's decision. This matter should not be subject to review by this Honorable Court.

3. The Court of Appeals did not err in affirming the Circuit court's admission of qualifications and expert testimony from the State's outsole footwear impressions expert.

During trial the State offered as an expert witness, SLED agent Dawn Claycomb. Before Agent Claycomb testified to the jury, the State proffered testimony regarding her qualifications and the reliability of the field of footwear examination. (R. pp. 946-955). After hearing arguments the trial court overruled Petitioner's objections as to her qualifications and the reliability of the

subject matter. (R. p. 955 lines 11-13). Agent Claycomb testified that she compared a photograph of a bloody shoe print taken at the crime scene with inked impressions taken from shoes found in Petitioner's house. (R. 969 lines 1-22). She found the two had corresponding tread designs, but could not match them because the photograph of the blood shoe print had not been taken at precisely a ninety degree angle. (R. p. 975 lines 12 - p. 976 lines 1-15).

Standard of Review

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. White,* 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court' factual conclusions. *Stokes-Craven Holding Corp. v. Robinson,* 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016). Error is harmless when it could not reasonably have affected the result of the trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018).

Analysis

A witness is competent as an expert when he or she has acquired knowledge, skill or experience so that he or she is better able than the jury to form an opinion on the subject matter. *State v. Robinson,* 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Ct. App. 2012). The circuit court properly qualified Agent Claycomb as an expert in footwear examination. She testified that she initially received between eight months and a year of basic crime scene training which involved recovery, collection, enhancement and preservation of footwear evidence. (R. p. 947 lines 17-20). She also completed three years of footwear specific training, consisting of research, written examinations and supervised casework. (R. p. 947 lines 21-24). She also received training with an internationally recognized expert in the field and completed a class with the International

Association of Identification. (R. p. 959 lines 8-18). In addition to her training she has been the lead agent on fifteen to twenty cases of footwear examination. (R. p. 962 line 15). Her results were also peer reviewed by SLED Agent Melinda Worley (R. p. 961 line 6).

Footwear identification has also been a widely accepted form of identification in numerous jurisdictions all over the country. *See, United State v. Ford,* 481 F.3d 215 (3d. Cir. 2007)(District Court did not abuse its discretion by admitting the expert testimony regarding the shoeprint evidence.); *United States v. Allen,* 390 F.3d 944 (7th Cir. 2004)(Expert shoe-print testimony proffered in bank burglary prosecution satisfied the reliability prong of *Daubert.*); *State v. Gray,* 145 A.3d 1066(N.H. 2016)(Expert testimony regarding footwear comparison, which indicated that murder defendant's shoes could have made impressions found at the crime scene, was relevant and thus admissible.) As the Second Circuit court of Appeals observed, "[c]ourts have admitted shoeprint identification evidence for a long time." *Ford,* 481 F.3d at 218 n.4.

Even if the Petitioner could reveal that the Court of Appeals committed an error in allowing this testimony into evidence, this error should be considered harmless. The agent testimony that the Petitioner's shoes had a similar tread design as the print at the crime scene was cumulative to other evidence. (R. 979 lines 18-19). The victim's blood was found on those pairs of shoes. (R. p. 992 lines 14-15; R. p. 994 lines 12-14). The victim's blood was also found in the Petitioner's vehicle. There was more than enough evidence without the shoe print analysis to prove the Petitioner's guilt beyond a reasonable doubt. A trial court's error is harmless when "it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Trapp.* 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012), *quoting, State v. Charping,* 313 S.C. 147, 437 S.E.2d 88 (1993).

CONCLUSION

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. This Court should deny this petition for writ of certiorari and let stand the decision of the Court of Appeals.

Respectfully submitted,

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