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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARELL ONEIL BOSTON,

PETITIONER.

APPELLATE CASE NO. 2021-000549

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the trial court err in denying Petitioner's motion to suppress drug evidence that was discovered as a result of law enforcement conducting a "knock and talk" without reasonable suspicion of criminal activity at the targeted residence in violation of Petitioner's right to privacy under Article 1, Section 10 of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015)?

STATEMENT OF THE CASE

Procedural History.

Petitioner Boston was indicted for manufacturing crack cocaine, possession with the intent to distribute crack cocaine, and possession with the intent to distribute a controlled substance within proximity of a school. (R. pp. 509-514).

Prior to the trial, Petitioner and his co-defendant, William Holmes, moved to suppress evidence seized in violation of their Fourth Amendment rights under the United States Constitution and their right to privacy under Article I, Section 10 of the South Carolina Constitution, after the police conducted a knock and talk without reasonable suspicion. The trial court held a hearing on the motion on November 30, 2017. (R. pp. 1-152). Petitioner Boston was represented by Taylor Seman and Teresa Norris. (R. p. 2). Co-Defendant Holmes was represented by Benjamin Lewis and Nicholas Smit. (R. p. 1). Nina Savas and Truc Tran represented the State. In its January 10, 2018 Order, the trial court denied Defendants' motion to suppress. (R. pp. 608-610).

The case was called to trial on February 5, 2018, before the Honorable R. Markley Dennis, Jr., Circuit Court Judge, and a jury. (R. p. 153). Assistant Solicitors Nina Savas and Truc Tran represented the State. Taylor Seman and Pete Shahin represented Petitioner. (R. p. 153). Benjamin Lewis and Nicholas Smit represented Holmes.

On February 7, 2018, the jury found Boston guilty of manufacturing crack cocaine. (R. p. 481). The trial court imposed a sentence of 17 years. (R. p. 500).

On February 14, 2018, Petitioner filed a Motion for a New Trial. The trial court denied the motion at a short hearing on March 15, 2018. (R. pp. 505-507).

On March 10, 2021, the Court of Appeals affirmed Petitioner's conviction. *State v. Boston*, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021) (App. pp. 1-9).

Petitioner filed and served his Petition for Rehearing on March 23, 2021. (App. pp. 10-18). The Court of Appeals denied the Petition by Order filed April 23, 2021. (App. pp. 19-20).

On May 21, 2021, Petitioner filed a Petition for Writ of Certiorari asking this Court to review the decision of the Court of Appeals. In the Petition, Petitioner presented the following question:

> Whether the Court of Appeals erred in affirming the decision of the trial court to deny Petitioner Boston's motion to suppress evidence where law enforcement conducted a "knock and talk" without reasonable suspicion that criminal activity was occurring at the Holman's residence in violation of Petitioner's right to privacy under Article I, Section 10 of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).

On July 12, 2021, Respondent filed its Return to the Petition for Writ of Certiorari and framed the second issue as follows:

> Did the Court of Appeals correctly affirm the trial judge's ruling denying Boston's motion to suppress the crack cocaine and other incriminating evidence found inside someone other than Boston's residence when, under the totality of the circumstances, the officers who approached the residence and knocked on the door possessed reasonable suspicion of criminal activity at the time they did so? Furthermore, even assuming the officers lacked reasonable suspicion of criminal activity when they approached the residence and knocked on the door, did the Court of Appeals nonetheless correctly affirm the trial judge's decision declining to suppress any of the incriminating evidence discovered as a result of the "knock-and-talk" when the officers' actions were fully consistent with the controlling state and federal precedent in effect at the time they approached and knocked on the residence's door?

On January 13, 2022, this Court granted Boston's Petition for Certiorari. In compliance with this Court's Order, Petitioner now files his brief.

Facts Developed During the Motion to Suppress Hearing.

Officer Joseph Sherwood from the North Charleston Police Department ("NCPD") testified that on March 6, 2015, at around 5:25 p.m., he was dispatched to a service call in the Chicora Cherokee community. (R. p. 10, ln. 6-7; p. 11, ln. 17-22; p. 14, ln. 14-16). He did not remember the specific reason he had been dispatched to the area, but he admitted the reason was

completely unrelated to Petitioner Boston or the apartment of Denise Holman, where Officer Sherwood eventually conducted the knock and talk at issue in this case. (R. p. 14, ln. 14-16; p. 51, ln. 20-p. 52, ln. 2).

Officer Sherwood testified the neighborhood had long been a "hot spot for narcotics activity." (R. p.13, ln. 4-9). He stated there had recently been "several complaints about the drug activity [and] illegal trespassing *in the area.*" (R. p.13, ln. 4-9 (emphasis added)). He later clarified and admitted that the complaints were not about Holman or her apartment. (R. p. 50, ln. 24-51, ln. 14). Officer Sherwood explained that some of the apartments in that area were single-occupancy housing for people with mental impairments who needed assistance and who could "easily [be] taken advantage of." (R. p.13, ln. 12-17).

Officer Sherwood, along with two other NCPD officers, stayed in the area after their service call, "just keeping a presence." (R. p. 14, ln. 2-20). While doing so, they saw two men exit a taxi cab and walk into the apartment where Officer Sherwood knew Denise Holman lived. (R. p.14, ln. 21-p. 15, ln. 3). Officer Sherwood testified that he recognized the two men, Petitioner Boston and his co-defendant Holmes, from several previous "run-ins with them." (R. p.15, ln. 12-17). The only specific detail Sherwood offered regarding these prior "run-ins" was recalling that he had seen Petitioner Boston and Holmes at a house on Osceola Street, where the NCPD had "done several search warrants" due to "a lot of run-ins with drug activity at that address." (R. p.16, ln. 1-8). Sherwood admitted he did not know whether Boston and Holmes lived at that house, only that he had seen them there. (R. p.16, ln. 3-4).

Officer Sherwood also testified he knew Denise Holman and was familiar with her "mental status." (R. p. 15, ln. 1-11). He indicated that he had stopped her once and had a "couple of little run-ins with her" on narcotics issues, but "nothing too serious." (R. p. 15, ln. 9-11; p. 50, ln. 21).

Officer Sherwood referred to Holman as "mentally handicapped," though he admitted he was using that term "loosely." (R. p. 48, ln 19-25). He speculated that due to her mental condition, she may not have fully understood what was occurring on that day. (R. p. 50, ln. 7-11). He also admitted there was no prior drug complaint or any other complaint about Holman's apartment specifically. (R. p. 51, ln. 1-14).

Officer Sherwood testified he knew Boston and Holmes did not live with Holman. (R. p. 15, ln. 5-6). He explained that he "found it odd just because of where he knew them from" that the two men would go inside Holman's apartment. (R. p. 15, ln. 1-11). Officer Sherwood testified that for the next 15 minutes or so, he and another officer continued having a conversation during which Sherwood told his colleague about Holman and that it was "kind of weird to see those two gentlemen go inside the apartment." (R. p. 15, ln. 18-24). Officer Sherwood admitted that during those 15 minutes, he saw nothing to suggest that someone in that apartment was committing a crime. (R. p. 68, ln. 22-p.69, ln 16). Officer Sherwood was thoroughly questioned on this point by Holmes's defense counsel:

> Q. . . . I want to talk to you about your initial approach to the residence. What you testified to was that you sat by your car for about 15 minutes thinking about it, right?
>
> A. Well, we were talking so.
>
> Q. So the gentlemen [Boston and Holmes], these two guys that you have identified had already gone into the house and had been inside for 15 minutes or so.
>
> A. Approximately.
>
> Q. Did you hear any screams?
>
> A. No, sir.
>
> Q. Did you see them carrying any firearms or any contraband as they approached the residence?

A. Not that I observed, no.

Q. Okay. So at the time you approached to conduct the knock and talk you saw nothing that suggested someone was committing a crime.

A. No, sir.

Q. Nothing?

A. No, sir.

(R. p. 68, ln. 22-p. 69, ln. 16).

Nevertheless, despite having seen nothing to indicate criminal activity, Officer Sherwood decided to conduct a knock and talk at the residence. (R. p. 15, ln. 23-24; p. 17, ln. 5-6). According to Sherwood, the purpose of conducting the knock and talk was to "make sure that, one, [Holman] is ok and two, see if there is any possibly any crime or if she had any information for us." (R. p. 17, ln. 7-12).

Officer Sherwood testified that he knocked on the door, Holman opened the door, and he stepped inside. (R. p. 16, ln. 18-20). Officer Sherwood testified that she opened the door in an inviting way, "almost made a motion of come on in kind of thing" and "moved out of the doorway itself as if to let somebody in." (R. p. 17, ln. 22-p. 18, ln. 1). Despite being aware that Holman had some mental impairments, Officer Sherwood testified he believed her actions constituted valid consent to enter the residence. (R. p. 18, ln. 22-23).

Once in the apartment, Officer Sherwood testified he saw Petitioner Boston and Holmes "huddled around the microwave," which was on, and plastic baggies on the kitchen counter next to the microwave with white residue on them, which Sherwood immediately believed to be cocaine residue. (R. p. 23, ln. 4-14; p. 56, ln. 21-p. 57, ln. 3). Officer Sherwood stated the two men then ran to the bathroom but came right out after he told them to do so. (R. p. 28, ln. 18-24). After that, Officer Sherwood performed a protective sweep of the kitchen and bathroom and ultimately

obtained a search warrant. (R. p. 29, ln. 5-8). During the sweep, Sherwood testified he found items consistent with manufacturing crack cocaine, including a Pyrex cup and baggies with white powder. (R. p. 30, ln. 14-p.31, ln. 4). Boston and Holmes were arrested; Holman was not. (R. p. 48, ln. 19-22).

Boston denied this version of events, and testified that he was sitting on the couch when the police came in. (R. p. 113, ln. 2-25). Boston testified that he had known Holman for about 15 years and that he had visited her on prior occasions and at prior addresses. (R. p. 104, ln. 14-p. 105, ln. 5). His reason for going to Holman's apartment on the day of the incident was to upload music onto his phone. (R. p. 106, ln. 3-7). He denied he came to Holman's apartment to manufacture crack cocaine. (R. p. 106, ln. 11-13). No drugs or paraphernalia were found on Mr. Boston's person. (R. p. 359, ln. 2-20). Holman testified that Boston and Holmes had permission to be at her house. (R. p. 97, ln. 24-p. 98, ln. 6).

Following testimony, defense counsel argued that the evidence collected in Holman's apartment was the result of an unconstitutional knock and talk and that the evidence should be suppressed. Specifically, defense counsel argued that Officer Sherwood did not have reasonable articulable suspicion of illegal activity occurring at Holman's residence and therefore, the knock and talk was improper under the South Carolina Constitution Article I, Section 10 and *State v. Counts*. (R. p. 139-140; p. 534). Defense counsel noted that while Sherwood's incident report incorrectly stated that he approached Holman's apartment because of a "drug complaint," his testimony was that there was no such complaint, and his reason for being in the neighborhood was unrelated to Petitioner Boston, Holmes, or Holman. (R. p. 132, ln. 13-14; p. 535). Counsel further argued that Sherwood's limited and generic knowledge of Boston's prior run-ins with the law, and his recollection that Boston had, at some undetermined point in the past, been seen at another house

where NCPD had conducted a drug search was not sufficient to demonstrate reasonable suspicion of illegal activity justifying a knock and talk at Holman's apartment. (R. p. 536). Defense counsel argued that unlike the facts in *Counts*, there was no complaint regarding Holman's apartment, no complaint regarding either defendant, and no indication that criminal activity was occurring in Holman's apartment. (R. p. 150-151).

The Trial Court's Ruling on the Motion to Suppress.

In its January 10, 2018 Order, the trial court denied Defendant's motion to suppress the drug evidence found in Holman's residence as a result of the knock and talk. Initially, the trial court determined that under the South Carolina Constitution, Defendants Holmes and Boston had standing to contest the admissibility of the evidence collected by Sherwood and the NCPD. (R. p. 610). However, the trial court found Sherwood had reasonable suspicion to conduct a knock and talk at Holman's residence. (R. p. 610). The trial court cited the following facts to support its finding that Officer Sherwood had the requisite reasonable suspicion: "there were complaints about ongoing drug activity at [Holman's apartment] complex and officers were assigned to patrol the area;" Officer Sherwood "noticed Defendants exiting a taxi and walking to [Holman's apartment];" Sherwood "was familiar with Defendants through prior interactions involving drug activity;" Sherwood knew Holman "as the sole occupant of the apartment and that she had a history of drug use;" and Sherwood "was also aware of her vulnerable mental state." (R. p. 609).

Motion for New Trial.

On February 14, 2018, Petitioner Boston filed a Motion for a New Trial with an accompanying legal memorandum, arguing that the trial court should have granted the motion to suppress the drug evidence because NCPD officers did not have reasonable suspicion to approach Holman's apartment and knock on the door as required by *State v. Counts* and the South Carolina

Constitution. (R. pp. 611-620). Defense counsel further argued Officer Sherwood's testimony that he saw nothing suggesting that a crime was being committed at Holman's apartment during the 15 minutes prior to the knock and talk conclusively demonstrated that he did not have reasonable suspicion. (R. pp. 616-618).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

On appeal from a motion to suppress, "this Court applies a deferential standard of review and will reverse only if there is clear error." *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015) (quoting *Robinson v. State*, 407 S.C. 169, 180-181, 754 S.E.2d 862, 868 (2014)); *see also State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (recognizing that in criminal cases an appellate court sits to review errors of law only and are, therefore, bound by the trial court's findings unless clearly erroneous).

ARGUMENT

The Court of Appeals erred by holding the trial court did not abuse its discretion when it denied Petitioner's motion to suppress evidence seized by law enforcement after officers conducted a "knock and talk" without reasonable suspicion that criminal activity was occurring at the targeted residence in violation of Petitioner's right to privacy under Article I, Section 10 of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).

The Court of Appeals properly relied on this Court's decision in *State v. Counts* for the proposition that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence" prior to conducting a knock and talk. 413 S.C. at 172, 776 S.E.2d at 70. The *Counts*

decision was premised on the express right to privacy contained in Article 1, Section 10 of the South Carolina Constitution, which states:

> The 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, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

This Court has long held it "can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d 837, 840 (2001). This Court applied this principle in *Counts*, finding that the South Carolina Constitution requires that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.*

The fundamental question presented in this case is straightforward: Did law enforcement have reasonable suspicion of criminal activity at Holman's residence before conducting a knock and talk there? The answer is equally straightforward. According to Officer Sherwood's testimony, which was the basis for the lower court's decision to deny Petitioner's motion to suppress, as well as the Court of Appeals' decision to affirm, law enforcement did not have any reasonable suspicion that criminal activity was occurring in Holman's residence when they conducted the knock and talk.

Reasonable suspicion "requires a particularized and objective basis that would lead a person to suspect another of criminal activity." *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (citing *United States v. Cortez,* 449 U.S. 411, 418 (1981)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Kotowski*, 427 S.C. 119, 828 S.E.2d 605 (Ct. App. 2019), *aff'd in part, vacated in part on other grounds*, 430

S.C. 318, 844 S.E.2d 650 (2020) (per curiam) (*quoting State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007)). Although an officer's experience and intuition is one factor to consider in the reasonable suspicion analysis, "a wealth of experience will [not] overcome a complete absence of articulable facts." *Kotowski,* 427 S.C. at 129, 828 S.E.2d at 610. (internal citations omitted). "[A]n officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion." *Id.* (internal citations omitted). Accordingly, law enforcement officers "must have more than an 'inchoate and unparticularized suspicion' or 'hunch.'" *United States v. Slocumb*, 804 F.3d 677, 682 (4th Cir. 2015) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)); *see also State v. Spears*, 429 S.C. 422, 455, 839 S.E.2d 450, 467 (2020) (Beatty, C.J., dissenting) ("The Fourth Amendment requires a police officer to have more than a mere, unsupported hunch before subjecting a citizen to police intrusion.").

In finding that Officer Sherwood had reasonable suspicion of criminal activity at Holman's residence, the Court of Appeals cited Sherwood's "objective knowledge of the apartment community and the three people inside the apartment." *State v. Boston*, 433 S.C. 177, 185, 857 S.E.2d 27, 31 (Ct. App. 2021). Specifically, the court noted Officer Sherwood's familiarity with the area as "a hot spot for narcotics activity;" the fact that he recognized Boston and Holmes "from a previous incident at another location;" that he was aware that Holman had "some undefined limitations," lived alone, and "used narcotics in the past;" and that he was knowledgeable that sometimes people use another person's apartment to manufacture drugs. *Id.*

Sherwood's knowledge may have been objective, in that his knowledge of the neighborhood and the individuals involved was first-hand, but this knowledge was vague, generic, and not at all particularized. Sherwood testified he had a "couple of little run-ins with [Holman]" on narcotics-related issues, but "nothing too serious." (R. p. 15, ln. 9-11; p. 50, ln. 21). Sherwood

did not specify what those "run-ins" entailed or the nature of the narcotics issues. Officer Sherwood testified he recognized Petitioner Boston and Holmes from previous "run-ins with them," but he did not state the nature of these "run-ins." He recalled having seen them at a house where the NCPD had conducted several warrant searches. (R. p.16, ln. 1-8). Officer Sherwood admitted he did not know whether Boston or Holmes lived at the house where the searches occurred, only that he had seen them there. (R. p.16, ln. 3-4). He did not say whether Boston was at the house when the searches were conducted or whether Boston was the subject of a search. He also did not say whether these searches found any drugs. He did not say whether these searches led to any arrests or even any further investigations.

In short, Officer Sherwood knew the reputation of the neighborhood; he was somewhat familiar with Holman and her history; and he vaguely remembered that Boston had, at some unidentified point in the past, been in physical proximity to a house where suspected drug activity had occurred.

Generally, the reputation of the neighborhood and the criminal history of a suspect are problematic in the reasonable suspicion analysis. Regarding the dangerousness of the neighborhood, the Fourth Circuit Court of Appeals has said: "Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control." *See United States v. Perrin,* 45 F.3d 869, 873 (4th Cir. 1995). While our courts have acknowledged that, though never dispositive, being in a high crime area can be considered in the totality of the circumstances analysis, it "does not provide police officers carte blanche to stop any person they meet on the street." *State v. Anderson*, 415 S.C. 441, 448, 783 S.E.2d 51, 55 (2016). Surely, the same principle should apply even more strongly where the police approach a residence and knock on the door. Unlike *Terry*

stops or automobile stops, both of which occur while a person is in public, a knock and talk seeks information on what is occurring within a residence.[1] The fact that a person is in a residence in a neighborhood deemed a high crime area should not result in a lower bar for establishing the requisite reasonable suspicion to conduct a knock and talk.[2]

Regarding prior criminal activities, the Fourth Circuit has held that "[a] prior criminal record is not, standing alone, sufficient to create reasonable suspicion." *United States v. Foster*, 634 F.3d 243, 246-47 (2011) (citing *Sprinkle*, 106 F.3d at 617); *see, e.g.*, *State v. Fowler*, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996) (finding that officers did not have reasonable suspicion to perform a *Terry* frisk on an individual who was acting suspiciously, had a prior drug conviction, and was known to carry weapons). Prior knowledge of a suspect's criminal record must be paired with "some more concrete factors to demonstrate that there was a reasonable suspicion of current criminal activity." *Id.* (internal quotation marks and citations omitted).

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[1] The cases cited by the Respondent regarding the relevance of a person's presence in a high crime neighborhood involve *Terry* or investigative stops of people who were in public, not in a private residence, and who, importantly, also exhibited other suspicious behavior. *See United States v. Sprinkle*, 106 F.3d 613, 617-618 (4th Cir. 1997) (defendant's face was huddled together with another man in the car with their hands close together and with subsequent evasive conduct); *Milledge v. State*, 422 S.C. 366, 371, 811 S.E.2d 796, 799 (2018) (traffic stop in high crime area for driving with a cracked windshield and missing rearview mirror, driver exhibited extreme nervousness, attempted to make a phone call during the stop, and refused to answer questions); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (*Terry* stop when "it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police"); *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) (late night *Terry* stop in high crime neighborhood where a group of men were gathered around defendant looking down into his open palm with subsequent evasive conduct).

[2] Although Boston did not live in Holman's residence, the trial court correctly determined that there were facts sufficient to demonstrate that Boston had a reasonable expectation of privacy in Holman's home. Thus, the trial court determined Boston had standing to challenge the evidence found as a result of the search. (R. p. 610). The Court of Appeals did not discuss the issue of standing.

Here, there was no specific testimony about Boston's criminal record; only Officer Sherwood's recollection that Boston had been seen at a house where NCPD had executed a search warrant. Such vague information should be accorded even less weight than actual and specific knowledge of a person's official criminal record. Additionally, and as noted throughout, there were no other additional "concrete factors" to demonstrate that there was a reasonable suspicion of criminal activity happening at Holman's residence.

Finally, Officer Sherwood's general knowledge that sometimes people let others use their residence to manufacture drugs is of little relevance here because this was not coupled with testimony that Officer Sherwood knew that Boston or Holmes was suspected of manufacturing illegal drugs or that Holman had previously allowed her apartment to be used for such purposes. At best, Sherwood's testimony was merely a description of what *can* sometimes happen in this *kind* of neighborhood. There was nothing observed that this was occurring at Holman's residence.

In sum, Officer Sherwood's general knowledge about the neighborhood and his non-specific recollections about Boston, Holmes and Holman may technically constitute 'objective knowledge' but it lacks any particularity. Instead, his testimony is comprised and non-specific memories, uninformed by documentation or investigation into the individuals' criminal records. There was also no additional suspicious activity noted, as has been required by those courts that have considered factors such presence in a high crime neighborhood and prior criminal history.

Not only was there no other suspicious activity noticed, there was no other activity noticed whatsoever. Sherwood admitted he did not observe any behavior by Boston, Holmes, or Holman during the 15 minutes that he watched the residence that was indicative of criminal activity.

> Q. Okay. So at the time you approached to conduct the knock and talk you saw nothing that suggested someone was committing a crime.
>
> A. No, sir.

Q. Nothing?

A. No, sir.

(R. p. 69, ln. 11-16). Although Officer Sherwood apparently had an impression or hunch that criminal activity might be occurring in the house, he witnessed nothing that hinted at, much less provided confirmation, that there was reasonable suspicion that criminal activity was occurring in Holman's residence. *See Kotowski*, 427 S.C. at 129, 828 S.E.2d at 610 ("[A]n officer's impression that an individual is engaged in criminal activity, *without confirmation*, does not amount to reasonable suspicion." (emphasis added) (internal citations omitted)).

Factually, Petitioner's case is readily distinguishable from *Counts* and *Kotowski* which are the only two cases in which this Court has considered the reasonable suspicion analysis in the context of a knock and talk.[3] In both cases, law enforcement conducted investigations based on anonymous tips of criminal behavior and observed some particularized behavior indicative of criminal activity prior to conducting the knock and talk.

In *Counts*, this Court pointed to the following findings of fact which it found sufficient to establish that law enforcement had reasonable suspicion of illegal activity occurring at the targeted residence:

> [L]aw enforcement received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities. Through their investigation, the officers confirmed that Counts had two false identification cards on record and had prior drug convictions.

[3] In a *per curiam* opinion, this Court did not recite the facts but rather "adopted the court of appeals well-reasoned opinion" regarding the knock and talk. *Kotowski*, 430 S.C. at 318, 844 S.E.2d at 650.

Id. at 173, 776 S.E.2d at 70. At one point, law enforcement's investigation also included an attempted drug buy at Counts' residence. *Id.* at 157, 776 S.E.2d at 62.

In *Kotowski*, the Court of Appeals' opinion cited facts which, as in *Counts*, included an anonymous tip followed by further investigation which revealed behavior indicating criminal activity. 427 S.C. at 129, 828 S.E.2d at 610. Specifically, the law enforcement officer in *Kotowski* received an anonymous tip on June 13, 2014, that a house on Marsh Point Road was a meth house. *Id.* at 125, 828 S.E.2d at 608. The officer searched the NPLEX system, which showed pseudoephedrine purchases by the owner of the Marsh Point Road house. *Id.* The officer set up an alert on NPLEX and began to conduct "spotty surveillance" consisting of drive-by viewings of the house. *Id.* During one such viewing, the officer recognized a vehicle belonging to the son of a convicted methamphetamine cook parked at the house. *Id.* On October 29, 2014, the officer received NPLEX notifications indicating the owner of the Marsh Point Road house had attempted to purchase pseudoephedrine three separate times. *Id.* The officer referred to the NPLEX records as showing "a substantial amount of purchases" and attempted purchases at different pharmacies. *Id.* The officer, who had extensive training in methamphetamine labs and had been "clandestine meth lab certified" since 2004, testified that these purchases and attempted purchases were consistent with the actions of illicit drug manufacturing. *Id.* at 129, 828 S.E.2d at 610.

In this case, there was no anonymous tip regarding Boston, Holmes, Holman or Holman's apartment. There was no testimony indicating any sort of investigation took place. Instead, in the 15 minutes between Boston and Holmes going into Holman's apartment and the knock and talk, Officer Sherwood was merely engaged in conversation with his colleague. He did not use this time to run criminal records checks on these individuals or this apartment to confirm his vague recollections. Importantly, Officer Sherwood did not observe any behavior suggesting, indicating,

or confirming criminal activity. In reality, the only behavior law enforcement observed was Boston and Holmes exiting a taxi and walking into Holman's residence. There is no testimony that Boston and Holmes acted suspiciously, evasively, or even nervously when they pulled up in the taxi cab at Holman's residence. They merely exited the cab and walked into Holman's residence. (R. p. 14, ln. 21-25).

Further, the trial court and the Court of Appeals overlooked the significance of Officer Sherwood's candid statement that his reason for approaching Holman's door was to, "see if there is any, possibly any crime or if she had any information for us." (R. p.17, ln. 7-12). The phrase, "any, possibly any crime" indicates that Sherwood rather clearly had no reasonable suspicion that illegal activity was occurring at Holman's residence. Rather, he was looking to discover *any crime* or the *possibility of any crime* that was not readily apparent based on his observations. This testimony, at best, describes the kind of "inchoate and unparticularized suspicion" or "hunch," which courts have held is not sufficient to support a finding of reasonable suspicion. *See Slocumb,* 804 F.3d at 682.

Additionally, the facts of this case implicate the very same policy concerns that motivated this Court to adopt a reasonable suspicion standard in its *Counts* ruling. This Court asserted that without the requirement for reasonable suspicion, there was a real "potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with the hope of discovering contraband without a search warrant." *Id.* Additionally, the *Counts* opinion noted the coercive nature of these knock and talks: "Although the State maintains these encounters are entirely consensual, we cannot ignore the nature of the "knock and talk" procedure. In contrast to a routine sales call, the "knock and talk" technique is inherently coercive as it is conducted by law enforcement and not a private citizen." *Id.* at 172, 776 S.E.2d 59, 69–70.

The concerns expressed in the *Counts* opinion are present in this case. Law enforcement targeted a high-crime neighborhood; knocked on the door of a woman they knew to have drug and mental health problems and who, therefore, might be more easily convinced to open the door and allow law enforcement to enter; and did so without observing any criminal behavior with the explicitly stated intent of looking for evidence of "any possib[ilit]y [of] any crime."

It is true, as the Court of Appeals noted, that Officer Sherwood "did not randomly knock on Holman's door." *Boston*, 433 S.C. at 185–86, 857 S.E.2d at 31. However, the bar for conducting a knock and talk is not that low. While officers were not indiscriminately knocking on every door in the community, Officer Sherwood's testimony that he knocked on the door for the express purpose of looking for "any possib[ilit]y [of] any crime" strongly resonates with the valid and important policy concerns expressed by this Court in its *Counts* opinion.

If the test for reasonable suspicion is so low that the trial court's ruling in this case is upheld, it is unclear whether a person like Holman, who lives in a high-crime area, can have any social guests who might be known to law enforcement, without being subject to a police knock and talk. Similarly, it is unclear whether a person in Boston's situation can be in the residence of anyone living in a high-crime neighborhood without subjecting his host to a knock on the door from the police. It seems axiomatic that if reasonable suspicion exists on the very thin factors cited in this case, there will be an increase in knock and talks, and such increase will disproportionately impact poor, urban, minority communities. *See* Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C.J.L. & Soc. Just. 119, 119 (2012) (discussing the impact of the knock and talk procedure on low income and minority individuals who are most frequently targeted).

Additionally, the Court's analysis in this case should not be impacted by Sherwood's statement that he was concerned about Holman's welfare. According to Officer Sherwood's testimony cited above, there was no behavior observed that indicated a welfare check was necessary, just as there was no behavior observed indicating criminal activity was afoot. Moreover, and critically, Officer Sherwood's asserted concern for Holman's welfare is inextricably linked with his hunch that Boston might be engaged in illegal activity and his interest in finding "any possib[ilit]y [of] any crime."

In sum, law enforcement did not have reasonable suspicion to conduct a knock and talk at Holman's residence. Thus, the trial court should have excluded the drug evidence that was found after the unconstitutional knock and talk, and the Court of Appeals should have reversed the trial court's ruling on Boston's motion to suppress.

Respondent contends that even if this Court finds that law enforcement conducted an unconstitutional knock and talk, it can still affirm the trial court's decision not to exclude the evidence. Respondent's theory is heavily influenced by the Supreme Court's decision in *Davis v. United States*, 564 U.S. 229, 235 (2011). A brief synopsis of the procedural facts of *Davis* is necessary in order to distinguish it from the present case and explain why this court should not apply *Davis*'s good faith exception to the exclusionary rule in this case. Defendant Davis was a passenger in a car that was the subject of a traffic stop, and he was arrested for giving the police a false name. 564 U.S. at 235. While Davis was handcuffed and in the back of a police vehicle, the officer searched his jacket (which was still inside the car) and found a revolver in the pocket. *Id.* At the time of the search, it was widely understood that the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 458–459 (1981) authorized "automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching

distance of the vehicle at the time of the search." *Id.* at 233. However, while Davis's case was on appeal before the Eleventh Circuit Court of Appeals, the United States Supreme Court issued its opinion in *Arizona v. Gant,* 556 U.S. 332 (2009). *Id.* at 236. The decision in *Gant* limited *Belton's* holding to situations where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343.

In light of the the decision in *Gant*, the Eleventh Circuit Court of Appeals was constrained to agree that the search in *Davis* violated the Constitution. However, the court concluded that the exclusionary rule did not apply because the officers were operating in good faith based on the prevailing understanding of *Belton*. *Davis*, 564 U.S. at 236. The Supreme Court affirmed the Eleventh Circuit's ruling, stating that "when binding appellate precedent specifically *authorizes* a particular police practice," such that the officer has acted in an objectively reasonable manner, the exclusionary rule should not apply. *Id.* at 241 (emphasis added).

The Court should not apply Davis's ruling in this case for several reasons. First, the exclusionary rule is rather clearly the remedy for violations of Article I, Section 10 of the South Carolina Constitution. *See State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 840–41 (2001) (finding that seizures that do not offend the federal Constitution may still offend the South Carolina Constitution, and determining that evidence collected in violation of the state Constitution should have been excluded at trial). It does not appear that this Court has applied a *Davis*-style "good faith" approach to searches which are unconstitutional under the South Carolina Constitution nor should it. *See State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991) (stating "as a general proposition of law, we have the right to reject the rationale of [*United States v. Leon,* 468 U.S. 897 (1984)] and determine that no good faith exception exists under our Constitution" and collecting similar cases from other states).

Second, when this Court considered *Counts*, it did not apply the *Davis*-style approach Respondent encourages now. On the contrary, the Court clearly and expressly applied the reasonable suspicion rule to the facts of that case. 413 S.C. at 173, 776 S.E.2d at 70 ("Applying the above-outlined principles to the facts of the instant case, we find . . ."). Presumably, if a good faith exception were available, this Court would have said so.

Third, unlike in *Davis*, at the time the officers approached Holman's residence and knocked on her door, there was no binding precedent under the South Carolina Constitution authorizing knock and talks without reasonable suspicion. Moreover, at the time of the search, this Court was considering the *Counts* case, indicating that the constitutionality of knock and talks under the heightened protections of the South Carolina Constitution was not settled. Instead, binding precedent was that the South Carolina Constitution's right to privacy provided "a higher level of privacy than the Fourth Amendment." *Forrester* 343 S.C. At 645, 541 S.E.2d at 841.

The State's reliance on dicta from *State v. Wright,* 391 S.C. 436, 706 S.E.2d 324 (2011) to assert that the knock and talk procedure was presumed valid in South Carolina is without merit. *Wright* did not involve a knock and talk procedure, and the case was not analyzed under Article I, Section 10 of the South Carolina Constitution. At issue in *Wright* was whether law enforcement's warrantless intrusion onto private property was lawful when law enforcement received an anonymous tip about an illegal dogfight on the property and the officers observed other conduct (large numbers of vehicles, spotlights) consistent with the tip. *Id* at 440-42, 706 S.E.2d 324-26. In its summary of Fourth Amendment jurisprudence, this Court made passing reference to a First Circuit Court of Appeals opinion, stating that "a policeman may lawfully go to a person's home to interview him." However, this Court went on to cite South Carolina law stating "[a] police officer without a warrant is privileged to enter private property *to investigate a complaint or a report of*

an ongoing crime." *Id.* at 444, 706 S.E.2d at 328 (emphasis added) (quoting 24 C.J.S. *Criminal Law* § 2404 (2006)). This case does not involve the investigation of a complaint or report of an ongoing crime. Thus, *Wright* does not establish prior binding precedent specifically authorizing knock and talks without reasonable suspicion, and law enforcement could not rely on that case to violate the State Constitution.

Finally, to apply a new good faith exception like the one in *Davis* would leave Boston, and potentially others claiming protection under the South Carolina Constitution, with a right, but not a remedy. *See Davis*, 564 U.S. at 253 (BREYER, J. *dissenting*). It seems a certainty that cases alleging a violation of Article I, Section 10 are likely to be brought when the much more developed Fourth Amendment jurisprudence forecloses a defendant's evidentiary challenge. Consequently, if the court were to apply a *Davis*-style good faith exception in situations where the Fourth Amendment allows the search, but the issue has not been decided under our state Constitution, a defendant who is successful in challenging the practice under the State Constitutional principles would be left without a remedy. The notion that our State Constitution provides "a second layer of constitutional rights" would be undermined and rendered ineffectual, at least as to the defendant bringing the initial challenge. *See Austin*, 306 S.C. at 16, 409 S.E.2d at 815 (stating that under the principals of federalism, states may develop state law to provide their citizens with "a second layer of constitutional rights").

Rather than trying to determine the officer's reasonableness by guessing at what the officer knew of the law at the time he conducted the knock and talk, this Court's focus should be on effectuating Petitioner's Constitutional rights as recognized in *Counts.* The only way to effectuate Petitioner's rights are to exclude the evidence discovered as a result of the unconstitutional knock

and talk. To do otherwise would be to endorse the unconstitutional conduct of the officers in this case.

CONCLUSION

Petitioner respectfully requests this Court reverse the decisions below and remand this case to the Charleston County Court of General Sessions for further consideration consistent with this Court's opinion.

Respectfully submitted:

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