STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER M. BASH

PETITIONER

APPELLATE CASE NO. 2013-001430

BRIEF OF PETITIONER

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ISSUES PRESENTED

I. Did the police violate the Fourth Amendment by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion?

II. Did the police violate the South Carolina Constitution by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion?

STATEMENT OF THE CASE

Procedural history

On October 17, 2012, a Berkeley County grand jury indicted Petitioner for trafficking cocaine (2012-GS-08-1823) and trafficking cocaine base (2012-GS-08-1824). R. 85-88. On June 11, 2013, the Honorable Stephanie McDonald presided over a hearing on Petitioner's motion to suppress the drugs. R. 1. Michael E. Patterson, Jr., and Colleen Dixon represented the state, and Melisa W. Gay represented Petitioner. R. 2. At the conclusion of the hearing, Judge McDonald granted Petitioner's motion to suppress. R. 77, lines 15-17.

The prosecution filed a notice of appeal. The parties briefed the issue in the Court of Appeals. On April 22, 2015, the Court of Appeals reversed and remanded. State v. Bash, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015); App. 1-11. Petitioner filed a petition for rehearing on May 7, 2015. App. 12-20. On June 24, 2015, the Court of Appeals denied the petition for rehearing. App. 21.

On July 24, 2015, 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 two questions:

> (1) Did the police violate the Fourth Amendment by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion?
>
> (2) Did the police violate the South Carolina Constitution by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion?

On September 14, 2015, Respondent filed its return to the petition for writ of certiorari and framed the second issue as follows:

> To the extent Bash is asking this Court to reverse the decision of the Court of Appeals and affirm the circuit court judge's erroneous ruling based on an alleged additional sustaining ground, Bash would not be entitled to suppression of the incriminating evidence even assuming the law enforcement officers' entry into the open grassy area constituted an unreasonable invasion of privacy under the South Carolina Constitution because the officers' actions were fully consistent with the controlling precedent in effect at the time of their entry into the open grassy area.

On February 4, 2016, this Court granted the petition for writ of certiorari. This Court ordered the parties to file briefs addressing the questions in the petition as well as Argument II in the state's return.[1]

In compliance, with this Court's order, Petitioner now files this brief.

Facts Developed During the Motion to Suppress

On November 10, 2011, an *unknown* person at the Beaufort County Sheriff's Office (BCSO) received a phone call from an *unknown* person "stating that there was drug activity at a particular residence." The unknown person at BCSO called Lee Holbrook on his cellular phone, not the police radio, with this information. Holbrook and Kimberly Milks, who "just happened to be in Moncks Corner," "drove over there and handled it." R. 20, lines 10-17; R. 44, line 4; R. 44, lines 16-24; R. 46, lines 4-6; R. 54, lines 11-17; R. 60, lines 14-18. Holbrook had *no idea* who provided the alleged tip. He had no identifying information about this person and had no way of contacting this person. Holbrook had no prior dealings with the unknown person and had no information about the unknown person's credibility and reliability. In other words, the person who provided the tip was a complete mystery to Holbrook. R. 42, lines 11-21; R. 43, lines 1-11; R. 44, lines 13-15. Shockingly, Holbrook could not even provide the name of the person at BCSO who contacted him about the tip. R. 42, lines 11-21; R. 43, lines 1-11; R. 44, lines 13-15.

[1] Petitioner will address Argument II in the state's return as a sub-issue of Argument II in this brief.

When asked for the specifics of the anonymous tip, Holbrook responded, "[T]he tip was actually, *if I'm not mistaken*, that there was drug activity occurring at that exact time, and it was at [redacted address]." He added, "[J]ust specifically, that there was drug activity occurring at that incident." R. 21, lines 19-25; R. 22, lines 1-4 (emphasis added).

Holbrook, Milks, and a number of other unidentified police officers put on their police vests and hats and arrived at the home in unmarked cars. R. 21, lines 13-16; R. 45, lines 14-18; R. 46, lines 7-10; R. 54, lines 18-22. No lights were on in the house, but "there were some males behind the house in a grassy area." According to Holbrook, "instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the backyard where the individuals were – there were several individuals back there - - and simply got out of the vehicle to meet with those folks." R. 22, lines 8-16; R. 54, lines 22-24. He saw no need to make contact with the house because he saw people in the backyard. R. 28, line 25 – R. 29, line 12.

The home "is entirely fenced in, the front and the back." The fence has a "walk-through gate" leading to a small utility shed "on the other side of the fence." R. 27, lines 3-8. Holbrook drove into the home's backyard without using a driveway or any other established access to the home. R. 27, lines 22-24; R. 28, lines 16-23; R. 45, line 22 – R. 46, line 1; R. 55, lines 3-11. Holbrook pulled his car "in behind where the truck was parked in the grass," and parked on the grass as well. He simply drove his car from the road directly into the home's yard. R. 28, lines 16-23. Holbrook parked "twenty feet or so" from the truck. R. 30, lines 14-17.

When Holbrook got out of his car, three people were standing around. R. 31, lines 19-23; R. 36, lines 12-13. Holbrook said, "Hey guys, what's going on." R. 36, lines 18-20; R. 46, lines 20-23. Petitioner was sitting in his parked pickup truck at the backyard barbecue. R. 9, line 22 –

R. 10, line 8. Milks also got out and approached the individuals in the yard. R. 55, lines 10-11. Then, "one individual that was standing in the grass threw down a plastic bag containing a white powder substance." R. 30, lines 8-13. Holbrook was eight or nine feet from the individual who threw the bag to the ground. R. 30, lines 18-23. The passenger door of the truck opened and a person ran into the woods. The agents, except for Holbrook, chased the individual. R. 31, lines 5-18; R. 32, lines 22-25; R. 56, lines 15-19. Holbrook then detained everyone, including Petitioner, who was the driver of the truck. R. 32, lines 10-21; R. 33, line 12 – R. 34, line 2; R. 48, lines 7-14; R. 50, lines 15-24.

Ten minutes later, when the agents returned from the foot chase, Holbrook "peer[ed] into the truck through the window." Holbrook claimed he could see "in plain view what appeared to be cocaine weighing scales." He thought "there may have even been some cocaine base right there in the console area also." R. 34, lines 3-16; R. 48, lines 21-24; R. 51, lines 15-23; R. 56, lines 23-25; State's Exhibit #2; State's Exhibit #3. Milks saw a plastic bag containing white material in the floorboard on the passenger side and "a white bag containing white material" on the floorboard of the truck on the driver's side. R. 58, lines 1-19; State's Exhibit #4; State's Exhibit #5.

Citing Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409 (2013), Petitioner moved to suppress the evidence uncovered during the illegal search of his truck, noting the officers "suited up" prior to going to the residence and saw no suspicious behavior until they were physically in the yard. R. 6, lines 13-24; R. 10, lines 14-24; R. 11, line 5 – R. 12, line 1; R. 74, lines 1-21. The prosecutor argued the area was not "part of the curtilage" and he analogized the encounter to a "knock and talk." R. 68, lines 5-11; R. 75, lines 2-8.

Concluding "this one's not even close," Judge McDonald suppressed the evidence, relying upon Jardines, supra. She held that "[a]n anonymous tip is not enough to allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." R. 65, lines 12-22. She found the backyard was part of the curtilage. R. 73, lines 8-11. Judge McDonald explained there were no exigent circumstances present and that Holbrooks and Milks did not observe anything suspicious from the street. R. 73, lines 3-7. Essentially, Judge McDonald found "they suited up and went into the curtilage of this lady's house based on an anonymous tip alone." R. 81, lines 9-11.

In arriving at her conclusion and in keeping with the dictates of Jardines, supra, Judge McDonald made a credibility determination as well: "[T]he tip was not enough to roll up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any." R. 73, lines 13-21.

ARGUMENT

In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court's review is limited to determining whether *any* evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate court may *only* reverse where there is clear error. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005). The record clearly supports the circuit court's finding that the backyard was curtilage and that the officers exceeded any implied license by approaching the backyard of the residence with intent to search.

I. The police violated the Fourth Amendment by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion.

A. The police intruded upon the curtilage of the home by entering the backyard.

The Court of Appeals made no explicit ruling on whether the police intruded upon the curtilage of the home by entering the backyard. Instead, the Court of Appeals simply assumed the police entered the curtilage of the property. State v. Bash, 412 S.C. 420, 433, 772 S.E.2d 537, 544 (Ct. App. 2015). Respondent's argument on this issue also assumed "for argument's sake the open grassy area constituted part of the curtilage of the residence." Return at 9. Nevertheless, Petitioner addresses the curtilage issue because determining whether the space intruded qualified as curtilage forms the background for the implied license, which was the basis of the trial court's decision and the opinion rendered by the Court of Appeals, and an understanding of the nature of curtilage exposes the overreaching by the police in the present case.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated." U.S. Const. amend. IV. Any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013) (finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment).

The Fourth Amendment's protection to be free from police intrusion and unreasonable searches and seizures extends to the curtilage of the home. Oliver v. United States, 466 U.S. 170, 181 (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 (1986). A warrantless search of a home's curtilage implicates the core of the Fourth Amendment and presumptively is unreasonable. Bleavins v. Bartels, 422 F.3d 445, 451 (7th Cir. 2005).

"At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver, 466 U.S. at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); see also Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001). Curtilage is defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." Oliver, 466 U.S. at 180. "No single factor determines whether an individual may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant." Id. at 177. "In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." Id. at 178 (internal citations omitted).

Additionally, the Court held that curtilage questions should be resolved with particular reference to four factors: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. United States v. Dunn, 480 U.S. 294, 301 (1987). However, the factors are "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id. In short, the inquiry can be boiled down to one question – "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver, 466 U.S. at 182-183.

In Jardines, 133 S.Ct. 1409, the police had "an unverified tip" that Jardines was growing marijuana in his home. Id. at 1413. Without a warrant, the police took a drug dog onto his front porch. Id. In discussing the curtilage, the Court held that the right to be free from unreasonable government intrusion in a home "would be of little practical value if the state's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." Id. The Court held the front porch was "the classic exemplar of an area adjacent to the home and 'to which the activity of the home life extends.'" Id. (quoting Oliver, 466 U.S. at 182, n.12).

Numerous courts have found the backyard to be part of the home's curtilage. See e.g., Bleavins, 422 F.3d at 452 (stating that "[a]reas that are intimately connected with the ... activities of the home include, for example, backyards.")(internal citations omitted); Lundstrom v. Romero, 616 F.3d 1108, 1128-1129 (10th Cir. 2010) (having "little trouble finding that Lundstrom's backyard

qualified as curtilage"); United States v. Struckman, 603 F.3d 731, 739 (9th Cir. 2010) (finding the "backyard" was "unquestionably such a clearly marked area to which the activity of the home life extends and so is curtilage")(internal citations omitted); Feller v. Township of West Bloomfield, 767 F.Supp.2d 769, 774 (E.D. Mich. 2011) (finding the warrantless entry onto the backyard of property violated the Fourth Amendment); State v. Kruse, 306 S.W.3d 603 (Mo. Ct. App. 2010) (suppressing evidence discovered by police entering the defendant's backyard to guard against anyone running from the home when police were knocking on the front door); State v. Morsman, 394 So.2d 408, 408-409 (Fla. 1981)(holding a police officer conducted an illegal search and seizure when the officer walked into the backyard and seized marijuana plants); State v. Frizzelle, 89 S.E.2d 725, 726 (N.C. 1955) (finding that "curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house"); see also Ann K. Wooster, Search and Seizure: Reasonable Expectation of Privacy in Backyards, 62 A.L.R.6th 413 (explaining the "curtilage of a residence means the land immediately surrounding and associated with the home, including the backyard, although the question of where the curtilage ends is determined on a case-by-case basis").

Ample evidence supports the trial judge's finding and the implicit finding by the Court of Appeals that the backyard, where the police trespassed, was part of the curtilage. By all accounts, it was the backyard to the home, and the officers knew they were entering private property when they drove into the backyard. The officers did not use an existing driveway to make their entrance. Thus, even the officers knew the area was curtilage when they made their illegal entry. Consideration of the factors enunciated by the Supreme Court leads to the same result. First, the area was in very close proximity to the home as demonstrated through the photographic evidence. See Defendant's Exhibit #2; Defendant's Exhibit #4; Defendant's Exhibit #5. Several courts have recognized the importance of considering whether the area in question is in a rural, urban, or

suburban setting. See United States v. Johnson, 256 F.3d 895, 902 (9th Cir. 2001) (citing United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996); United States v. Acosta, 965 F.2d 1248, 1256 (3d Cir. 1992); United States v. Seidel, 794 F.Supp. 1098, 1103 (S.D. Fl. 1992)). The Ninth Circuit recognized that in rural areas, the curtilage of a home may extend farther than in urban or suburban areas. The Court explained "[t]he realities of rural country life dictate that distances between outbuildings will be greater than on urban or suburban properties and yet still encompass activities intimately associated with the home; this is the nature of the 'farmstead.'" Johnson, 256 F.3d at 902. The area in question is rural. The curtilage, therefore, extends greater than in more urban areas.

The prosecutor's only argument that the backyard was not curtilage was based on the lone fact that part of it was outside a fence. This argument has been squarely rejected by the United States Supreme Court. In Dunn, 480 U.S. at 301 n. 4, the United States Supreme Court rejected the government's argument that a home's curtilage "should extend no farther than the nearest fence surrounding a fenced house." Further, an enclosure is unnecessary to demarcate the curtilage. See Florida v. Riley, 488 U.S. 445, 454 (1989) (O'Connor, J. concurring)("To require individuals to completely cover and enclose their curtilage is to demand more than the precautions customarily taken by those seeking privacy.")(internal citations omitted); see also, Williams v. Garrett, 722 F.Supp. 254, 261 (W.D. Va. 1989) (explaining that "requiring a person to expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable search is not required by the constitution").

The area was being used in a manner consistent with and intimately connected with activities of the home. The record shows that individuals had gathered for a barbecue. Obviously, the acts of cooking, eating, and gathering of friends and family are intimately connected with

activities of the home. Few events are more American than a backyard barbecue. See Young v. City of Radcliff, 561 F.Supp.2d 767, 784-785 (W.D. Ky. 2008).

Further, the location of the activity occurred in an area protected from the observation of people passing by. The backyard was blocked from the main road by the house, and portions of the backyard were blocked from view by the side road by the shed. See Defendant's Exhibit #2; Defendant's Exhibit #4; Map. The backyard was protected from view by the trees planted as well. The photographs show a clear line of trees and shrubs planted in the backyard area very close to the dirt road on the back side of the house, blocking the view of passersby on the dirt road. See R. 94; R. 96; R. 97; R. 98; Map. Without question, the trees and shrubs evidence the intent to block observation of people passing by on the side road. Thus, the Dunn factors clearly demonstrate that the backyard as part of the curtilage of the residence.

Looking beyond the factors to the ultimate question of whether the government's intrusion infringed upon personal and societal values protected by the Fourth Amendment, see Oliver, 466 U.S. at 182-183, it is clear that having a backyard barbecue with friends free from the police arriving and harassing the hosts and guests is a personal value and societal value protected by the Fourth Amendment. Judge McDonald correctly found and the Court of Appeals correctly, though implicitly, found the backyard was curtilage.

B. The police exceeded any implied license to trespass by entering the backyard for the purpose of searching for drugs.

The Court has recognized an implied license to trespass on property: "'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'" Jardines, 133 S.Ct. at 1415 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)). This implied license "permits the visitor to approach the

home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. The Jardines Court reaffirmed the holding in Kentucky v. King, 563 U.S. 452, 469-470 (2011) that due to the theory of implied license, which is what permits a Girl Scout or trick-or-treater to approach one's home, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any other private citizen might do.'" Id. at 1416.[2]

However, any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013) (finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment). Reasoning "[t]here is no customary invitation to" introduce "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence," the Court held the police engaged in an unreasonable search of Jardines' porch. Jardines, 133 S.Ct. at 1416. The Court compared the dog-sniff scenario to a "visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission." Id. "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." Id.

In doing so, the Jardines Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant." Id. at 1416-17. Jardines explained the question of "whether

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[2] The majority decided the case solely on property rights grounds without resorting to the Katz v. United States, 389 U.S. 347 (1967) reasonable expectation of privacy test. Jardines, 133 S.Ct. at 1417; see also United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012); Bleavins, 422 F.3d at 450. The Court explained that the analysis in Katz concerning a reasonable expectation of privacy "may add to the baseline" protection of property rights, but "it does not subtract anything from the Amendment's protections 'when the Government **does** engage in [a] physical intrusion of a constitutionally protected area.'" Jardines, 133 S.Ct. at 1414 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J. concurring in the judgment))(emphasis in original).

the officers had an implied license to enter the porch," "depends upon the purpose for which they entered." Id. at 1417. Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4.[3] The Court explained:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 1414.

The Supreme Court of Kentucky's discussion of the interplay between "knock and talk" procedures and curtilage in Quintana v. Commonwealth, 276 S.W.3d 753 (Ky. 2009) provides helpful guidance to resolving the present case. After noting that most "knock and talks are typically conducted at the front door" and that the front door is "the main entrance to the home," the Kentucky Court explained that the homeowner's consent to approach the main entrance to the home is assumed. Id. at 758. As long as the officer has legitimate business, he may approach the front door of a residence. Id. When there has been no finding of probable cause to grant a warrant, "the knock and talk is limited to only the areas which the public can reasonably expect to access." Id. at 759. While noting "[t]he back door of a home is not ordinarily understood to be public accessible," the court explained that a side or back door used as primary

[3] See also Powell v. State, 120 So.3d 577, 584-89 (Fla. Ct. App. 2013) (holding that "knock and talk" did not salvage officers' purposeful warrantless intrusion into the curtilage and peering through a window); People v. Galloway, 675 N.W.2d 883, 887 (Mich. Ct. App. 2003)(holding helicopter surveillance and movement by law enforcement officers on the ground directly into the backyard of a private home do not constitute ordinary citizen contact where the police had received an anonymous tip that marijuana was in a container right behind the house).

access by the resident may be appropriate for a "knock and talk" if the officer was aware of the resident's prior use of the door. Id.

The Court of Appeals' reliance upon Alvarez v. Montgomery County, 147 F.3d 354, 358 (4th Cir. 1998) and United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974) is misplaced. First, these cases were decided prior to Jardines and did not employ a trespass analysis. Second, the cases are easily distinguished from the instant matter based upon the intent of the officers upon trespassing on the property. "The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose." Jardines, 133 S.Ct. at 1416. Where the question is "*whether* the officer's conduct was an objectively reasonable search," the reviewing court must determine "the officers had an implied license to enter [the area], which in turn depends upon the purpose for which they entered." Id. at 1416-1417 (emphasis in original). In Jardines, the Court held the officers' "behavior objectively revealed a purpose to conduct a search, which is not what anyone would think he had license to do." Id. at 1417. In Bradshaw, 490 F.2d at 1100, the officers intended to question the homeowner about an abandoned car near his property. Thus, the subjective intent of the officer was not to search. Id. Likewise, the officers in Alvarez were investigating a complaint about underage drinking. Alvarez, 147 F.3d at 356. The officers entered the property simply to notify the homeowner of the complaint – which was a legitimate reason to enter the property *unconnected* with a search of the premises. Id. at 358.

In United States v. Perea-Rey, 680 F.3d 1179, 1186-88 (9th Cir. 2012), U.S. Border Patrol agents watched a man scale the border fence between the United States and Mexico and followed him to Perea-Rey's house. Id. at 1182-83. Uninvited, the agent walked into Perea-Rey's carport. Id. Based on Jones and Jardines, the court determined that the warrantless entry into the carport was an entry into the curtilage and violated the Fourth Amendment. Id. at 1186. The court

stated, "[T]he ability to see into the curtilage or the home does not, absent some other exception to the warrant requirement, authorize a warrantless entry by the government." Id.

The government contended that "the so-called 'knock and talk' exception to the warrant requirement" justified the warrantless trespass. Id. at 1187. The court rejected this contention, based in part on the agent's conduct. Id. at 1187-88. The court noted the agent "did not seek Perea-Rey's consent to enter the property or even to speak with him." Id. at 1188. The agent identified himself and ordered Perea-Rey not to move. Id. Importantly, the court held that "Perea-Rey never had an opportunity to simply ignore a knock on the door to his home by police." Id.

Very recently, the Ninth Circuit discussed how to apply the Supreme Court's holding that "the scope of a license is often limited to a specific purpose." United States v. Lundin, ___ F.3d ___, 2016 WL 1104851 at *5 (9th Cir. 2016)(citing Jardines, 133 S.Ct. at 1416). As the Ninth Circuit explained, "the customary license to approach a home and knock is generally limited to the 'purpose of asking questions of the occupants.'" Id. (quoting Perea-Rey, 680 F.3d at 1187). The Supreme Court made clear in Jardines that "the scope of the license to approach a home and knock 'is limited not only to a particular area but also to a specific purpose.'" Id. at *6. "That is, the application of the 'knock and talk' exception ultimately 'depends upon whether the officers ha[ve] an implied license to enter the [curtilage], which in turn depends upon the purpose for which they enter[].'" Id. (quoting Jardines, 133 S.Ct. at 1417)(alterations in original). "After Jardines, it is clear that ... the 'knock and talk' exception depends at least in part on an officer's subjective intent." Id.

It is beyond question that the Jardines Court required examination of the subjective intent of the officer to determine the scope of a license to enter a homeowner's property. George M.

Dery III, Failing to Keep "Easy Cases Easy": *Florida v. Jardines* Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law By Instead Focusing on Physical Trespass, 47 Loy. L.A. L. Rev. 451, 474 (2014). Examining the facts of Jardines, Dery explained that "[w]alking a dog, even up to someone's porch, is perfectly reasonable" and "can only become unreasonable using Jardine's intent analysis." Id. at 476. "The deeper inquiry – what, exactly, is the purpose for the dog's presence, and why did the person bring the dog to the door – unmasks the true nature of the government action." Id. Another commentator explained that "[t]he final element of the Jardines test turns on a police officer's subjective motivation for entering the property." Kit Kinports, The Dog Days of Fourth Amendment Jurisprudence, 108 Nw. U. L. Rev. Colloquy 64, 72 (2013). "[L]aw enforcement intent is only irrelevant in Fourth Amendment cases involving searches that are 'objectively reasonable.'" Id. at 73. However, in trespass cases the question is "*whether* the officer's conduct was objectively reasonable search," which requires examination of the officer's intent. Id. (internal quotation omitted). Jamesa J. Drake put it simply: "If the police were unambiguously within the curtilage, then the only remaining question is why they were there." Jamesa J. Drake, Knock and Talk No More, 67 Me. L. Rev. 25, 31 (2014).

In the present case, the officers were entering the property with the intent to search, which was a factual finding made by the trial judge. The police exceeded the scope of the implied license for a "knock and talk" by proceeding immediately to and entering the backyard with the intent to search. Judge McDonald made the factual finding that the officers intended to search when they intruded upon the backyard. Based upon her view of Holbrooks and Milks as witnesses and in judging their credibility, Judge McDonald found the officers went into the backyard, not with the purpose of interviewing the occupants of the home. The evidence that the

officers "suited up," drove directly into the backyard of a residence without any attempt to knock on the front door supports the trial court's logical conclusions.

The Court of Appeals held Judge McDonald erred as a matter of law by considering the officers' subjective intent. According to the Court, the officers' subjective intent to search the premises "is not impermissible provided the officers had a reasonably objective basis for their actual conduct." What the Court of Appeals failed to consider was the impact of Jardines, which was not even mentioned in the opinion despite forming the basis for the motion to suppress and the trial court's conclusion. Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4. Here, the conduct was objectively unreasonable and the court's finding that the officers intended to search is amply supported in the evidence. Judge McDonald specifically found the intention of the officers when they arrived was to search for drugs.[4] This Court should affirm Judge McDonald's ruling to suppress the evidence based upon the officers' violation of the Fourth Amendment by trespassing on the property in excess of the implied license to enter.

[4] The Court of Appeals additionally determined the evidence was in plain view. This ruling is premature. The Court of Appeals acknowledged those issues were not reached by the circuit court judge. In fact, the current record is inadequate to make a determination of whether exigent circumstances existed or whether the items seized were in plain view. The motion to suppress was based upon the officers' illegal entry into the backyard of a residence in order to conduct a search. The parties did not develop the record in order for these issues to be addressed. The Court of Appeals' decision to go beyond the scope of the issues raised on appeal and decided by the circuit court judge exceeds the court's appellate authority.

II. The police violated the South Carolina Constitution by entering a residential backyard without a warrant and with intent to search based upon an uncorroborated anonymous tip lacking reasonable suspicion.

During the motion to suppress, the only issue raised to and ruled upon by the trial judge was the Fourth Amendment issue. When the state appealed, the only issue raised concerned the Fourth Amendment. However, due to the ability of the "appellate court to affirm any ruling court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal," Petitioner asks this Court to affirm the trial judge's ruling to suppress the evidence as the officer's search violated the South Carolina Constitution. See Rule 220(c), SCACR.

A. The South Carolina Constitution and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015).

South Carolina's Constitution provides: "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." S.C. Const. Art. I, Section 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. According to this Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches

and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." Id. (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

This Court recently decided a similar issue in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). In reaching the conclusion, this Court noted "'[o]ur state constitution's provision protecting unreasonable invasions of privacy *necessarily requires* some analysis of the privacy interests involved when a warrantless seizure is made on private property.'" Id. at 172, 776 S.E.2d at 69 (quoting State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (Pleicones, J., concurring)). Explaining that "the privacy interests in one's home are the most sacrosanct," this Court required "some threshold evidentiary basis for law enforcement to approach a private residence." Id. Thus, this Court required 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. at 172, 776 S.E.2d at 70

Applying the rule to the facts presented, this Court found law enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The police "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." Id. The police had "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. According to this Court, the specificity of the anonymous tips and the limited corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

In the instant matter, Petitioner challenges whether the officers were conducting a "knock

and talk."[5] As discussed supra, the subjective intent of the officers was to search. Therefore, the officers were not conducting a "knock and talk."[6] Nevertheless, even if the officers were conducting a "knock and talk," the officers lacked reasonable suspicion to trespass on the property. The "reasonable suspicion" language from Counts invokes the standard enunciated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 30 (1968), where the Court held that in the absence of probable cause for arrest, a police officer may stop and briefly detain a person for investigative purposes, so long as the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."[7] "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal

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[5] Petitioner challenges whether the officers were conducting a "knock and talk" in the sense of how that term is understood and reported by the United States Supreme Court. According to Justice Alito, a "knock and talk" is simply "knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence." Jardines, 133 S.Ct. at 1423 (Alito, J., dissenting). To the extent a "knock and talk" is understood as what it truly is – law enforcement arriving at a home with multiple cars or by stealth in an effort to obtain consent to search by "none too subtle intimidation," – then the officers at issue in the present case may have been conducting a "knock and talk." See Jim Hannah, Forgotten Law and Judicial Duty, 70 Alb. L. Rev. 829, 837 (2007). The "knock and talk" has been characterized as "a technique employed with calculation to the homes of people suspected of crimes" and used by police "to gain access to a home without a search warrant by getting the occupant to consent to entry and search." Jamesa J. Drake, Knock and Talk No More, 67 Me. L. Rev. 25, 33 (2014)(internal quotation omitted). Drake explained the Dallas Police Department has a knock-and-talk task force of forty-six officers. Id. The Orange County Sheriff's Office in Florida has an entire division for conducting the estimated 300 knock-and-talks each month. Id. The officers often wear "hit gear: vests or smocks, ... an I.D. badge dangling from their necks and gun belts on their hips." Id.

[6] Officer Holbrook testified he and the other officers with him were *not* conducting a knock and talk: "We actually located the house and noticed that there were some males behind the house in a grassy area. So instead of actually approaching the house and conducting a knock-and-talk investigation, we just simply drove towards the backyard in a grassy spot behind the backyard where the individuals were." R. 22, lines 8-16.

[7] In Reid v. Georgia, 448 U.S. 438, 440 (1980), the Court explained that before an officer can stop and frisk a citizen, the officer must have "reasonable and articulable suspicion that the person seized is engaged in criminal activity."

activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001).

Recently, the Fourth Circuit Court of Appeals addressed the issue of reasonable suspicion in an unreasonable seizure case. United States v. Slocumb, 804 F.3d 677 (4th Cir. 2015). The Fourth Circuit emphasized the required that a seizure for a brief investigatory stop is proper only where the police observe "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot." Id. at 681 (internal quotation omitted). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 682 (internal quotation omitted). "The level of suspicion must be a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. (internal quotation omitted). The Fourth Circuit "warned against" using "whatever facts are present, no matter how innocent, as indicia of suspicious activity." Id. (internal quotation omitted). Behavior is not suspicious simply because the police call it so. Id. Rather, the police "must be able to articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." Id. (internal quotations omitted).

In this case, the police did not have reasonable suspicion supported by articulable facts that criminal activity was afoot prior to trespassing on the property; therefore, this Court should affirm the trial judge's ruling to suppress the drug evidence found in Petitioner's truck. The anonymous tip was uncorroborated and unreliable because the tip was from an anonymous source to an unknown person at BCSO. Thus, the tip was filtered through two layers of anonymity. Obviously, the credibility and the reliability of the tipster were unknown and unknowable. In fact, the credibility and reliability of the unknown officer at BCSO were

unknown and unknowable.[8] The tip was vague except to the extent it provided an address for the location of the alleged drug activity. The tip did *not* provide names of individuals allegedly involved. In fact, the tip did *not* disclose the number of individuals allegedly involved or the races and genders of those allegedly involved. The tip did *not* disclose whether cars were present and if so, any information about those cars. The tip did *not* disclose the types of drugs allegedly involved or the nature of the drug activity. Drug activity is a vague term and could refer to drug manufacturing, such as growing, cultivating, and harvesting marijuana plants, and creating methamphetamine from raw materials. Drug activity could refer to preparation of prepared drugs for sale, such as individuals measuring and dividing cocaine or crack for individual sales. Drug activity could refer to a drug transaction between a buyer and a seller.

The police conducted no surveillance and did not attempt to make any controlled buys to corroborate the tip that drug activity was occurring. The officers' actions illustrated that they were doing more than a simple investigation into a neighborhood complaint. This is evidenced by the officers "suiting up" and using an entire team to trespass upon the property. See United States v. Berry, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006) (noting that at least eight officers took cover positions around the house and found that the officers had a planned effort to evade the warrant requirement because such police action was "overkill" for a "knock and talk").

Comparing the anonymous tip in this case with the anonymous tips in Counts illustrates the point. In the instant matter, an unknown person told an unknown person at the police

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[8] Alabama v. White, 496 U.S. 325 (1990) (holding that in determining whether the informant's tip establishes sufficient probable cause, "the informant's veracity, reliability, and the basis of knowledge are highly relevant."); see also State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000) (providing that reasonable suspicion requires that tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person).

department that drug activity was occurring at a particular residence. The unknown person at the police department relayed the anonymous tip to the police on the street.[9] The tip was devoid of any specifics unlike the tips in Counts.

The police had received two anonymous complaints that Counts was drugs. The first tip indicated Counts was selling marijuana and crack cocaine out of two specific residences. The first "tipster provided Counts' names and aliases, the location of the alleged drug deals, Counts' girlfriend's name, a vehicle license plate number for a white Chevy Malibu, the make and model of the car used by Counts' girlfriend, and Counts' phone number." Counts, 413 S.C. at 157, 776 S.E.2d at 62. When two attempted controlled buys were unsuccessful, the police discontinued their investigation until a second anonymous tip arrived. Id.

The second tipster alleged Counts was selling drugs out of his residence, "provided Counts' name and phone number, the name and phone number of Counts' girlfriend, and identified Counts' vehicle." Id. This second tipster explained that Counts had obtained two false forms of identification through a contact at the Department of Motor Vehicles. Id. Additionally, the second tipster claimed Counts was selling drugs at a specific address and at his girlfriend's

[9] The Court of Appeals misconstrued the record in discussing the nature of the anonymous tip by stating "the Berkeley County Sheriff's Office received an anonymous tip that drug activity was occurring in the backyard of a particular home." The testimony is ambiguous on this point. Initially, Holbrook claimed the tip "was drug activity at a particular residence." R. 20, lines 12-17. Only later did Holbrook make any claim that the drug activity "was supposed to be happening in the - - in the rear of the property." R. 29, lines 6-8. The ambiguity of the tip was further demonstrated when Holbrook testified, "I *believe* the tip said it was behind the residence." R. 47, lines 5-6 (emphasis added). The Court of Appeals compounded this error by claiming the "officers' observations of several individuals in the backyard at the subject property corroborated the anonymous tip." When the anonymous tip is viewed in the correct light, it becomes clear that such equivocation regarding the particulars of the tip could not be used to corroborate the officers' observations. Further, those observations were simply that black males were in the backyard of a residence, which could not corroborate a tip. The tip did not give the race or gender of the individuals allegedly engaged in drug activity.

apartment. Finally, the tipster warned that Counts carried guns. Id. at 158, 776 S.E.2d at 62.

The police reviewed Counts' criminal record and learned he had two prior charges of distribution. The police also confirmed he had two identification cards on record. Id. The police then conducted surveillance on Counts' residence and observed Counts driving into and entering the residence. Id. Only then did the officers attempt a "knock and talk." Id. This Court held that in light of the specificity of the tips and the limited confirmation of the tips through the investigation, "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id. at 173, 776 S.E.2d at 70. The anonymous tip in the instant case is a far cry from the tips in Counts.

Law enforcement lacked reasonable suspicion based on articulable facts to believe that Petitioner was engaged in criminal activity to approach the residence to investigate the anonymous tip. Therefore, law enforcement's conduct violated Petitioner's privacy pursuant to the South Carolina Constitution. This Court should affirm the circuit court's suppression of the evidence based on this alternate sustaining ground in the record.

B. There is No Good-Faith Exception to the South Carolina Constitution's Privacy Provision.

Respondent asks this Court to "decline to reverse the decision of the Court of Appeals based on the additional sustaining ground ... because the officers fully complied with the controlling state and federal precedent when they entered" the backyard. Return at 18. Respondent claims the "officers' action were in compliance with then-existing state and federal precedent." Return at 18. Respondent argued the rule announced in Counts is "a new rule of

criminal procedure in South Carolina." Return at 19.[10] Although Respondent acknowledges this Court applied the rule announced in Counts to the facts presented in Counts, Respondent still argues this Court should not apply the rule to facts presented in Bash's case because this Court had not articulated the rule as clearly and as plainly as it did in Counts previously. See Return at 19-20. This argument is without merit.

In support of this request, Respondent encourages this Court to adopt a Davis-style approach to the rule articulated in Counts. Return at 20. The United States Supreme Court decided in Arizona v. Gant, 556 U.S. 332 (2009) that the Fourth Amendment prohibits an automobile search conducted after the arrest of the vehicle's occupant. Gant, 556 U.S. at 351. Succinctly put, the Court adopted a rule allowing an automobile search incident to arrest only if the arrestee is within reaching distance of the car during the search or if the police have reason to believe the car contains evidence relevant to a crime. Id. Two years later, in Davis v. United States, 131 S.Ct. 2419 (2011), the Court held the exclusionary rule would not apply where the police conducted a search in objectively reasonable reliance on binding judicial precedent prior to Gant. Davis, 131 S.Ct. at 2429. In other words, the Court permitted the "good faith" exception to apply to warrantless searches of an automobile incident to an arrest in violation of

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[10] Although Respondent used language like "a new rule of criminal procedure," Respondent did not urge this Court to engage in a retroactivity analysis. Instead the entirety of Respondent's argument was a request for application of the good faith exception to apply. At any rate, to the extent the Court's pronouncement in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), would be construed as a new rule of criminal procedure, Petitioner would be benefit from it. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final")).

the Fourth Amendment where officers relied upon binding appellate court precedent holding, albeit incorrectly, such searches to be in full compliance with the Fourth Amendment. This Court should reject the state's invitation to apply a good faith exception to police conduct violating the privacy protections afforded by the South Carolina Constitution.

First and foremost, this Court applied the rule to the facts in Counts. In fact, the opinion contains a section entitled "Application" followed by the clear and unambiguous statement of "[a]pplying this rule to the facts of the instant case...." Counts, 413 S.C. at 173, 776 S.E.2d at 70. Tellingly, this Court did not examine whether the police officers' conduct was permissible under any type of good faith exception. Had a good faith exception existed and been applicable, then this Court would have said so. Doing otherwise – applying the rule to the facts – would amount to an advisory opinion.

Secondly, Counts did not create a new rule; rather Counts simply interpreted a provision of the South Carolina Constitution that has been the law since the 1970s. In fact, this Court made clear the ruling was not a radical departure or judicially-created legislation. Instead, this Court was careful to craft a decision that did "not exceed the bounds of [its] judicial authority as conferred by the drafters of the right-to-privacy provision." Counts, 413 S.C. at 172, 776 S.E.2d at 70. As stated by this Court, the ruling in Counts "effectuates the intent of the Legislature to afford heightened protection against intrusions into a citizen's home." Id. The Court's ruling "acknowledge[d] this legislative pronouncement and g[ave] greater protection to South Carolina

citizens than that of the federal constitution." Id.[11] As early as 2001, this Court explained that the South Carolina Constitution's right to privacy provision afforded "a higher level of privacy protection than the Fourth Amendment." Forrester, 343 S.C. at 645, 541 S.E.2d at 841. The decision in Counts was not a new rule or one designed to establish new rights. Instead, this Court simply gave a voice to what the state constitution had provided.

To the extent a good-faith exception may exist, the police could *not* rely on any binding appellate precedent allowing them to approach a citizen's home *with an intent to search* based upon an uncorroborated anonymous tip lacking reasonable suspicion as no such case law existed. The good faith exception announced in Davis requires the police to confirm their conduct to binding existing appellate precedent. Respondent points to State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011) as existing appellate precedent that permitted the trespass at issue in Bash's case. Respondent claims that based on the Wright decision, "it was objectively reasonable for the officers to believe they had the investigative authority to approach Bash and the others after they personally saw them gathered in the open grassy area behind the residence identified in the anonymous tip." Return at 21. Respondent's argument is without merit.

Wright concerned the Fourth Amendment; not the South Carolina Constitution. Wright, 391 S.C. at 442, 706 S.E.2d at 327. Thus, law enforcement could not rely upon the holding in Wright to violate the state constitution. Furthermore, Wright does not allow law enforcement to trespass on private property without reasonable suspicion. The police received an anonymous tip

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[11] 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) (explaining the drafters of the constitution recognized that "'the circumstances are going to change and what might be reasonable today might not be reasonable in the future,'" that the drafters "could not predict the factors surrounding an unreasonable invasion of privacy, and concluded that 'this is something that the courts are going to write'").

about dogfighting at a mobile home. Id. at 440, 706 S.E.2d at 325. The officers responded by driving by the residence on a public road. Id. at 445, 706 S.E.2d at 328. From the public road, the officers "observed a large number of vehicles at the mobile home and saw spotlights shining next to the mobile home." Id. "[T]hese observations would give a reasonable police officer in the deputies' position cause to go forward." Id. Thus, this Court recognized the suspicious behavior permitting the police to investigate further. Additionally, this Court held the police "had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip" even without the corroborating observations. Id. In order to knock on the door to investigate the complaint, the police would have had to drive up a dirt driveway. Id. It was from this dirt driveway, which was private property but shared with another home, that the police observed the dogfighting pit and fleeing people and dogs. Id. Wright simply does not stand for the proposition that the police may approach a home without reasonable suspicion in violation of the state constitution.

Finally, in a footnote, Respondent argued Bash's "own rights were **not** violated by the officers' entry into" the backyard. Return at 23 n. 9 (emphasis in original). Respondent argued "defense counsel made no assertion Bash was the owner of the property where the incident occurred or had any special connection to the property and, instead, simply claimed Bash was willing to testify he was invited to the [backyard] while adopting the circuit judge's position 'there's no evidence put in that [Bash] doesn't have standing.'" Return at 23 n. 9. Respondent waived the issue of standing at the suppression hearing and to the extent the issue may have existed, it was abandoned on appeal.

After Judge McDonald ruled that the evidence would be suppressed, the solicitor stated, "We'd like to raise one issue of standing.... This particular defendant was not the homeowner; he's

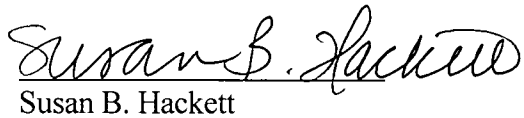
not the property owner. He's merely present on the scene." R. 77, lines 20-24. Judge McDonald invited the parties to send her law on the subject, which she would review. R. 80, lines 17-18. She explained that whether Bash had standing would depend "on what his status as a guest on the property was." R. 80, lines 20-23. She noted no one "put any evidence about that in the record" and as such, the issue was not even before her. R. 80, lines 23-25. She noted that if the state intended to make the argument that Petitioner lacked standing, then evidence on that point needed to be presented because up until that point, the parties appeared to have agreed that Petitioner had standing. R. 80, line 25 – R. 801, line 2. The judge re-iterated her invitation to take supplemental briefing on the standing issue. R. 82, lines 6-7; R. 82, lines 18-20; R. 82, line 25. The state never provided the judge with supplemental briefing or sought a ruling on the standing issue.

Additionally, respondent, who was the losing party at trial and therefore, the appellant at the Court of Appeals, did not argue the lack of standing as an alternative sustaining ground. In effect, the state waived and abandoned the issue, to the extent an issue even exists. See Wilder Corp v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(explaining "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)(explaining a respondent may abandon an additional sustaining ground under the present rules by failing to raise it in the appellate brief); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)(stating that "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review").

CONCLUSION

Petitioner respectfully requests this Court affirm the ruling by the Circuit Court to suppress the evidence seized during the illegal search.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

APR 25 2016

SC SUPREME COURT

Certiorari to Berkeley County

Stephanie P. McDonald, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER M. BASH

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Walter M. Bash, this 25th day of April, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of April, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022