STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2015-001582

THE STATE,

Respondent,

vs.

WALTER M. BASH,

Petitioner.

BRIEF OF RESPONDENT

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II.

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.

STATEMENT OF THE CASE

In November of 2011, Petitioner Walter M. Bash was arrested after officers located narcotics in Bash's vehicle while conducting an investigation into an anonymous tip about drug activity taking place behind a residence in Moncks Corner, South Carolina. In October of 2012, the Berkeley County Grand Jury indicted Bash for one count of trafficking in cocaine in an amount greater than 400 grams and one count of trafficking in cocaine base. Prior to trial, Bash filed a motion seeking the suppression of the narcotics discovered during the investigation. On June 11, 2013, a hearing was conducted on Bash's motion in the Berkeley County Court of General Sessions before the Honorable Stephanie P. McDonald, circuit court judge. At the conclusion of the hearing, the circuit court judge granted Bash's suppression motion. The State then timely appealed.

Subsequently, following oral argument, the Court of Appeals issued a published opinion in which it unanimously reversed the circuit court judge's ruling. State v. Bash, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015). Thereafter, Bash petitioned the Court of Appeals for rehearing, and the petition was denied. Bash then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on March 4, 2016.

STATEMENT OF FACTS

On November 10, 2011, the drug enforcement unit of the Berkeley County Sheriff's Office received an anonymous tip reporting several men were actively engaged in drug activity behind a residence located on Nelson Ferry Road in Moncks Corner, South Carolina. (R. pp. 20-21; p. 47; pp. 54-55). In response, Sergeant Lee Holbrook and several other officers with the Berkeley County Sheriff's Office traveled to Nelson Ferry Road to follow-up on the tip and investigate whether drug activity was taking place, and they arrived at the residence identified in the tip within ten minutes. (R. pp. 20-21; pp. 45-46; p. 54).

After arriving at the residence, Sergeant Holbrook and the other officers noticed Shine Bash Lane, a public road adjoining Nelson Ferry Road, ran along the side of the specified residence and ended towards the rear of the parcel of property on which the residence was located. (R. pp. 21-22; p. 89; p. 103). Based on the fact the tip indicated the drug activity was occurring behind the residence, the officers drove down Shine Bash Lane, and, when they did so, Sergeant Holbrook observed three men standing in an open grassy area outside of the fenced-in backyard of the residence near a small utility shed, a broken-down car, and a parked black truck.[1] (R. p. 24; pp. 26-27; p. 31; p. 39; p. 47). The officer then pulled his vehicle into the grassy area from the public road, parked approximately twenty feet behind the truck, exited his vehicle, approached the men, and asked them what was going on. (R. pp. 27-30; p. 36; pp. 45-46; pp. 54-55).

Upon seeing Sergeant Holbrook approaching and only moments after the officer had exited his vehicle, one of the men standing in the grassy area threw down a bag containing a white powdery substance the officer immediately recognized to be cocaine while another man

[1] Notably, the grassy area could be seen unobstructed from at least two public roadways and several residences other than the one identified in the anonymous tip. (R. p. 108).

rapidly exited the passenger's side door of the truck and fled into a nearby wooded area. (R. pp. 30-31; p. 36; p. 46). In response, the other officers pursued the fleeing man while Sergeant Holbrook stayed with the remaining men in the grassy area to keep an eye on the bag of cocaine on the ground. (R. pp. 31-32; pp. 56-57).

As Sergeant Holbrook waited with the men, Bash exited the driver's side door of the truck parked in the grassy area and asked the officer what was going on. (R. p. 32; p. 35). When Bash did so, Sergeant Holbrook asked him to step to the rear of the truck with the other individuals who remained in the grassy area, discussed the anonymous tip with them, and asked another officer to come and assist him. (R. pp. 32-33). When the other officer arrived, Sergeant Holbrook arrested the man who had thrown the bag of cocaine onto the ground, temporarily detained Bash and the others, and looked through the driver's side window of the truck to see if anyone else was in the vehicle. (R. pp. 32-34; p. 48). Inside, he saw a digital scale, plastic bags, cocaine, crack cocaine, and an open beer can in plain view. (R. p. 34; p. 51; pp. 90-93). Sergeant Holbrook then verified the truck belonged to Bash and arrested him for possessing the narcotics observed inside.[2] (R. pp. 35-36; pp. 48-49). Subsequently, Bash was indicted on charges of trafficking in cocaine and cocaine base.[3] (R. pp. 85-88).

Thereafter, prior to trial, Bash filed a motion seeking the suppression of the narcotics discovered in his truck, and a hearing was conducted on the motion. (R. pp. 6-7). At the outset of the hearing, defense counsel argued for the narcotics to be suppressed based on an alleged violation of Bash's Fourth Amendment rights, contending Bash's narcotics were discovered after

[2] The entire encounter between Bash and the officers lasted roughly ten minutes. (R. p. 49).

[3] Following Bash's arrest, officers obtained a search warrant for the residence based on the discovery of the drugs in the truck and the bag thrown onto the ground, and the search warrant was executed at 6:50 p.m. later that day. (R. p. 41; pp. 104-107). Inside the residence, officers located quantities of cash, another digital scale, marijuana, and a white powdery substance. (R. p. 61; pp. 104-107).

officers unlawfully entered the curtilage of private property without a warrant before they observed the cocaine and crack cocaine in Bash's vehicle. (R. pp. 9-16). In response, the circuit court judge requested the testimony of the officers involved in Bash's case be introduced so she could evaluate the officers' credibility, and Sergeant Holbrook and Sergeant Kimberly Milks of the Berkeley County Sheriff's Office testified about their investigation into the anonymous tip and their subsequent discovery of the cocaine and crack cocaine in Bash's truck.[4] (R. pp. 18-64).

Following the presentation of the officers' testimony, the circuit court judge indicated she had reviewed both state and federal case law regarding anonymous tips and curtilage, including the United States Supreme Court's decision in Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409 (2013), and concluded "this one's not even close." (R. p. 65). In reaching that conclusion, the circuit court judge found an anonymous tip was not sufficient to permit an officer to enter the backyard area of a residence "when your sole purpose for going there is to search it." (R. p. 65). The circuit court judge further noted she found the dissent from this Court's decision in State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013), to be significant and indicated she believed the officers' actions in Bash's case were much more intrusive than the officers' actions in Taylor. (R. pp. 66-67). The circuit court judge then stated she intended to suppress the narcotics but invited the solicitor to attempt to convince her not to do so. (R. pp. 67-68).

Thereafter, the solicitor argued the officers' actions were entirely proper because the grassy area where the officers approached Bash and his associates was not part of the curtilage of the residence and, instead, was an open field. (R. p. 68). Furthermore, even assuming the grassy area had been part of the curtilage of the home, the solicitor asserted the officers' actions were

[4] During Sergeant Holbrook's testimony, the officer confirmed his intentions in traveling to the residence identified in the tip were to approach the individuals who were there and speak with them about the anonymous tip he had received. (R. pp. 29-30). He further noted no one ever directed him to leave at any point after he ventured into the grassy area located behind the residence. (R. p. 36).

still proper because they were permitted to approach the individuals standing in the grassy area to make contact with them in a reasonable manner just as they were permitted to approach the door of the residence to conduct a "knock and talk." (R. p. 68).

After listening to the solicitor's contentions, the circuit court judge inquired if the officers were going onto the property to speak with someone or were going there to hunt for drugs. (R. p. 68). The solicitor responded the testimony of the officers established the officers entered onto the property for investigative purposes and to speak with the individuals located there about the anonymous tip. (R. pp. 68-69). Furthermore, the solicitor noted law enforcement officers in general are permitted to go anywhere a private citizen might go to engage in a consensual encounter and compared Bash's case to the facts and circumstances from this Court's decision in State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). (R. pp. 71-72). However, after acknowledging the decision in Wright, the circuit court judge found no exigent circumstances existed in Bash's case and the officers in Bash's case could not approach Bash and the others in the backyard area of the residence, which she found to be part of the residence's curtilage, due to the fact the officers had not observed anything suspicious from the street before approaching the men. (R. pp. 72-73). In rejecting the solicitor's contentions, the circuit court judge further explained:

> I think you've made an excellent argument, but the 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. And they should have gotten a warrant, although you can't get a warrant based on an anonymous tip, generally. You've got to have more.

(R. p. 73).

Thereafter, the solicitor again argued the officers were not precluded from entering private property to the same extent as a private citizen would have been able to enter the property in attempting to speak with the individuals located there. (R. pp. 75-77). Furthermore, the solicitor again contended the area where the officers located Bash and his confederates was not within the residence's curtilage and noted it was outside of the residence's fence, it could be seen openly and unobstructed from two different public roads and other surrounding residences, and no attempt had been made to shield the area from observation by others. (R. pp. 75-77). However, the circuit court judge once again rejected the solicitor's arguments, indicated she agreed with the dissenting justices in the Taylor case, and reaffirmed her decision to grant Bash's suppression motion. (R. p. 77).

Subsequently, the State timely appealed the circuit court judge's ruling, and the Court of Appeals reversed and remanded after considering the matter on appeal. (App'x p. 1). In doing so, the Court of Appeals noted this Court had previously recognized in Wright law enforcement officers have investigative authority to go to a person's home to conduct an interview and can lawfully enter private property to investigate a complaint or a report of an ongoing crime. (App'x p. 5). With that law in mind, the Court of Appeals determined the officers involved in Bash's case had a reasonable basis for believing they would find the owner of the home identified in the anonymous tip in the grassy area behind the home based on their own observations and, thus, did not violate the Fourth Amendment by entering the grassy area to speak with the men they saw there. (App'x p. 8). The Court of Appeals further found the circuit court judge erred by improperly considering the officers' subjective intentions in suppressing the evidence. (App'x pp. 8-9). Finally, the Court of Appeals determined the officers' actions remained reasonable after entering the grassy area because exigent circumstances developed at

that point before Bash's drugs were observed in plain view. (App'x pp. 10-11). For those reasons, the Court of Appeals concluded the circuit court judge erred in suppressing the evidence recovered from Bash's truck. (App'x p. 11).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court reviews the circuit court judge's determinations under a clear error standard and will affirm the circuit court judge's determinations if they are supported by any evidence. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). However, the appellate court is **not** barred from conducting its own review of the record to determine whether the circuit court judge's decision in a search and seizure case is supported by the evidence. State v. Cheeks, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App. 2012); see Narcisco v. State, 397 S.C. 24, 28, 723 S.E.2d 369, 371 (2012) ("[T]his Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence.").

ARGUMENT

I.

Assuming for argument's sake the open grassy area constituted part of the curtilage of the residence identified in the anonymous tip, the Court of Appeals properly reversed the trial judge's ruling granting Bash's suppression motion because the law enforcement officers' entry into the grassy area did not violate Bash's constitutional rights under the Fourth Amendment and was conducted in a constitutionally-permissible and reasonable manner pursuant to the implicit license that permits entry onto private property, including the curtilage of a residence, to attempt to initiate contact with an occupant of the property. However, even if the law enforcement officers' entry into the open grassy area had not been made pursuant to the implicit license permitting such an entry, the Court of Appeals nonetheless correctly reversed the circuit court judge's ruling because the law enforcement officers approached Bash in a reasonable manner in an open grassy area visible from multiple public roadways and situated outside of the curtilage of a residence located on the same parcel of property before observing Bash's narcotics in plain view through the window of his truck.

Bash contends the Court of Appeals erred in reversing the circuit court judge's decision to grant his suppression motion. In support of that contention, Bash maintains the circuit court judge correctly determined the law enforcement officers subjectively intended to search the curtilage of a residence when they entered into the open grassy area and correctly determined the entry into the open grassy area violated his Fourth Amendment rights. To the contrary, the Court of Appeals correctly reversed the circuit court judge's ruling because the officers were permitted to enter the open grassy area identified in the anonymous tip even assuming the grassy area constituted part of the residence's curtilage pursuant to the implicit license that allows citizens in the United States to enter the private property of others when attempting to speak with an occupant of the property. Critically, when the officers in Bash's case observed the men congregating in the open grassy area, they approached the men in an attempt to speak with an occupant of the residence about the anonymous tip using the same route Bash had used to drive his truck onto the property in the same manner any private citizen was impliedly permitted to approach the men. Under those circumstances, the officers' entry into the open grassy area was

objectively reasonable, did not constitute a search, and did not violate Bash's Fourth Amendment rights. However, even if the officers' entry into the open grassy area had not been conducted pursuant to the implicit license, the officers' actions nonetheless did not violate Bash's Fourth Amendment rights because the evidence and testimony presented during the suppression hearing established the grassy area where the officers approached Bash, which was an open area visible from multiple public roadways and located outside of a fence surrounding a residence located on the same parcel of property, was not so intimately connected to the residence to be considered a part of the residence's curtilage and, thus, be entitled to the same constitutional protections as the home itself. Therefore, the officers' subsequent discovery of Bash's narcotics in plain view inside of his truck was not the product of a violation of his Fourth Amendment rights. For those reasons, the circuit court judge's ruling granting Bash's suppression motion based on an alleged violation of his Fourth Amendment rights was clearly erroneous and unsupported by the evidence, and the Court of Appeals correctly reversed that ruling. Accordingly, the decision of the Court of Appeals reversing the trial judge's ruling should be affirmed.

A. Propriety of the Court of Appeals' Conclusion the Officers' Entry Into the Open Grassy Area Did Not Violate Bash's Fourth Amendment Rights In Light of the Implicit License that Permits an Approach to a Residence In Order to Make Contact with an Occupant

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976). However, it is **not** designed "to eliminate all contact between the police and the citizenry[.]" United States v. Mendenhall, 446 U.S. 544, 553-554 (1980). As a result, a law enforcement officer generally may approach a citizen in an effort to speak with or question that

citizen without implicating the Fourth Amendment so long as a reasonable person under the same circumstances would feel free to disregard the officer and leave if he or she chose to do so. Florida v. Bostick, 501 U.S. 429, 434 (1991).

In the context of a residence, a person is not generally permitted to enter the private property of another. Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1415 (2013). However, through longstanding customs and practices, the citizens of the United States and South Carolina have extended an implicit license to their fellow citizens, including their fellow citizens serving as law enforcement officers, that permits visitors to approach their homes in an effort to make contact with them. Id. at 1415-1416. Based on that implicit license, law enforcement officers are constitutionally permitted under the Fourth Amendment to enter a home's curtilage and approach a home in an attempt to speak with or question an occupant so long as the officers' entry and approach are conducted in an objectively reasonable manner consistent with the implicit license, and such entries and approaches do **not** constitute searches and seizures for Fourth Amendment purposes. See State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (instructing a law enforcement officer may lawfully go to a person's home and door to interview that person); see also Jardines, 133 S. Ct. at 1417, n. 4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.*").

Pursuant to the implicit license, a law enforcement officer or other person is "**typically**" permitted "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Jardines, 133 S. Ct. at 1415 (emphasis added). However, if reasonable under the circumstances, officers may also attempt to make contact with a resident at a location other than the front door so long as they do so in a

reasonable manner. See Alvarez v. Montgomery County, 147 F.3d 354, 359 (4th Cir. 1998) (holding it was not unreasonable for officers to enter the backyard of a residence "when circumstances indicated they might find the homeowners there"); see also United States v. Raines, 243 F.3d 419, 421 (8th Cir. 2001) ("[L]aw enforcement officers must sometimes move away from the front door when attempting to contact the occupants of the residence."); United States v. Garcia, 997 F.2d 1273, 1279 (9th Cir. 1993) ("This circuit and other circuits have . . . recognized that officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence.").

In the case sub judice, officers received an anonymous tip indicating drug activity was taking place in an area behind a specified residence. Without something more than just the anonymous tip, the officers could not have obtained a search warrant for the location identified in the tip or an arrest warrant for any particular individual. See Alabama v. White, 496 U.S. 325, 329 (1990) (recognizing an anonymous tip will seldom be sufficient to establish even reasonable suspicion). However, the officers were **not** required to abandon any efforts to investigate the anonymous tip and simply allow criminal activity to take place unimpeded merely because they had not yet developed sufficient probable cause for a warrant.[5] See Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). For that reason, the officers decided to drive to the residence in an effort to speak with the homeowner about the tip, and their decision to do so was unquestionably reasonable and constitutionally permissible under the

[5] Notably, abandoning the investigation appears to be exactly what the circuit court judge believed the officers should have done in Bash's case as the circuit court judge concluded the officers should have obtained a warrant before they entered the grassy area but readily acknowledged they could not have done so based on the information known to them prior to their entry into the grassy area. (R. p. 73).

circumstances. Cf. Wright, 391 S.C. at 445, 706 S.E.2d at 328 ("[E]ven absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip.").

Beyond the reasonableness of their decision to go to the residence to investigate the anonymous tip, the officers' actions remained entirely reasonable once they arrived at their destination due to the fact they observed Bash and the others congregating in the open grassy area behind the residence from a public roadway. Unquestionably, after making those observations, it was objectively reasonable for the officers to believe under the circumstances they would be able to make contact with an occupant of the home in the open grassy area instead of at the residence's front door since they actually saw individuals congregating there. See Alvarez, 147 F.3d at 356 ("The Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard **when circumstances indicate they might find him there[.]**" (emphasis added)); see also In re Bazen, 275 S.C. 436, 437-438, 272 S.E.2d 178, 178 (1980) (holding a law enforcement officer did not violate Bazen's Fourth Amendment rights when he responded to Bazen's home in response to a noise complaint, walked to the rear of the house, saw Bazen enter an open garage, followed him into it, and subsequently arrested Bazen for possession of marijuana after smelling marijuana in the garage); see generally Raines, 243 F.3d at 421 (holding a law enforcement officer did not violate a homeowner's Fourth Amendment rights by obtaining a warrant to seize marijuana plants the officer observed growing in plain view in the backyard of the homeowner's residence when the officer legitimately went to the residence to make contact with the homeowner and proceeded into the backyard based upon a reasonable belief he would find the homeowner there). Thus, it was reasonable for the officers to approach the men standing in the open grassy area instead of knocking on the door of the

residence, and, in fact, the officers' interactions with the men in the grassy area were less intrusive under the circumstances than if they had occurred at the doorway of the residence since the grassy area was located significantly farther away from the residence itself. See Alvarez, 147 F.3d at 358 ("[O]fficers who seek to talk to the occupant of a home do not necessarily violate the Fourth Amendment by entering the backyard of a dwelling although they have failed to knock at the front door."); see also Covey v. Assessor of Ohio County, 777 F.3d 186, 193 (4th Cir. 2015) ("Here, the officers claim that they were justified in bypassing the front door because they saw Mr. Covey on the walkout basement patio area, thus giving them an implied invitation to approach him. If the officers first saw Mr. Covey from a non-curtilage area, they may well prevail under the knock-and-talk exception at summary judgment."); cf. State v. Rivens, 198 N.C. App. 130, 134, 679 S.E.2d 145, 148 (N.C. Ct. App. 2009) ("In this case, Officers Correa and Lowe entered the yard – a lesser intrusion than entering the house or doorway – for the purpose of a general inquiry regarding a report that shots had been fired. Officer Correa approached defendant to conduct his inquiry, and defendant did not request that Officer Correa leave the premises. Notwithstanding defendant's house arrest and ankle bracelet, defendant was free to enter his home to avoid dealing with Officers Correa and Lowe. We hold the Officer's presence in the yard was lawful.").

Likewise, not only was their decision to enter the property entirely reasonable, the officers' manner of entry into the grassy area was objectively reasonable and wholly consistent with the manner of entry any private citizen was impliedly permitted to use in approaching the men congregating there. Specifically, the officers approached Bash and the others, who had made no efforts to conceal their presence in the grassy area, in a place that was entirely open, was directly adjacent to a public road, was fully visible from several roadways and residences,

had no obstructions or impediments preventing entry into it, and had no signs warning trespassers not to intrude upon it. As they approached, the officers did not undertake any furtive or stealthy actions and did not make any attempts to conceal their identities as law enforcement officers from the men. Furthermore, they followed the same open path of approach Bash had used to drive his truck into the grassy area when they entered the property directly from the public road, and they parked their vehicles approximately twenty feet behind the location where Bash parked his truck. Cf. State v. Dunn, 340 Mont. 31, 36, 172 P.3d 110, 114 (Mont. 2007) ("The officers here did not 'ignore posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view.' Rather, the officers acted in a manner consistent with investigating an ongoing noise complaint and remained on an open and obstructed path to the backyard. Thus, the nature of the intrusion here was reasonable." (citation omitted)). Under those circumstances, the manner of the officers' entry into the open grassy area was not inconsistent with the manner of entry any private citizen could have used and, thus, was not unreasonable under the Fourth Amendment. See Kentucky v. King, 563 U.S. 452, 469 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

In finding the officers' entry into the grassy area was unreasonable and violative of Bash's Fourth Amendment rights, the circuit court judge concluded the officers were not permitted to enter the grassy area to conduct a search without a warrant while further holding "there's no reasonable interpretation of the officers' testimony other than that's why they were there."[6] (R. p. 73). However, the officers specifically testified they entered the grassy area to

[6] In reaching that conclusion, the circuit court judge relied heavily on the dissent in the Taylor case. (R. pp. 66-68; p. 77). Notwithstanding the fact a dissent in an appellate court decision is **not** the controlling portion of the decision, the issue addressed in the Taylor case involved the propriety of an investigatory seizure conducted on a public street and was, therefore, very different from and unrelated to the issue involved in Bash's case. See State v.

speak with the people they observed congregating in that area about the anonymous tip, and their entry was conducted in an objectively reasonable manner that was entirely consistent with the implicit license.[7] See Brighton City, Utah v. Stuart, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.' The officer's subjective motivation is irrelevant." (citations omitted and brackets in original)); Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."); see generally Provet, 405 S.C. at 108, 747 S.E.2d at 458 ("The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant."). In light of the fact the officers entered the grassy area for a legitimate purpose in an objectively reasonable manner, the officers' entry did not constitute a search and did not violate Bash's Fourth Amendment rights.[8] See Jardines, 133 S. Ct. at 1416, n. 4 ("[I]t is not a Fourth

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Taylor, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013) (holding the Court of Appeals erred in reversing Taylor's conviction after finding that the officers in Taylor's case had reasonable suspicion to conduct an investigatory stop of Taylor on a public street under the totality of the circumstances of Taylor's case); see also Mr. T. v. Ms. T., 378 S.C. 127, 136, n. 6, 662 S.E.2d 413, 418 (Ct. App. 2008) (recognizing the dissent in an opinion is not controlling).

[7] Notably, consistent with the officers' testimony, Sergeant Holbrook **did**, in fact, speak with Bash and the others about the anonymous tip after entering the open grassy area. (R. pp. 32-33).

[8] In seeking a reversal of the Court of Appeals' decision, Bash maintains the officers' entry into the open grassy area was improper because the officers allegedly had the subjective intention of conducting a search when they made that entry. (Pet. Br. pp. 16-18). Bash further maintains the United States Supreme Court's decision in Jardines supports the circuit court judge's decision to consider the officers' alleged subjective motivations when determining whether a constitutional violation occurred. (Pet. Br. pp. 16-18). Significantly though, Bash's contentions misconstrue the decision in Jardines, which determined the officer's conduct was **objectively** unreasonable because the officer's act of bringing a police dog onto Jardines's property "**objectively** reveal[ed] a purpose to conduct a search" in light of the fact the police dog's only possible reason for being here was to perform a sniff search for drugs. Jardines, 133 S. Ct. at 1417 (emphasis added). Thus, the United States Supreme Court's decision in Jardines – which was **not** reached after a subjective examination of the credibility of the law enforcement officers involved in that case – does not support Bash's contentions and, instead, is fully consistent with the longstanding precedent rejecting consideration of subjective factors when determining whether a Fourth Amendment violation has occurred. See Brighton City, 547 U.S. at 404 (expressly recognizing the subjective motivations of law enforcement officers are irrelevant in a Fourth Amendment analysis); Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objection standards of conduct, rather than standards that depend

Amendment search **to approach the home in order to speak with the occupant**, *because all are invited to do that*. The mere 'purpose of discovering information,' . . . in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." (emphasis added)); see also King, 563 U.S. at 464 ("Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances, viewed *objectively*, justify the action. Indeed, we have never held, outside limited contexts such as an inventory search or administrative inspection . . ., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment. The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." (citations and internal quotations omitted)); cf. Brighton City, 547 U.S. at 404-405 ("Our cases have repeatedly rejected this approach [considering the subjective intentions of law enforcement officers]. . . . It therefore does not matter here – even if their subjective motives could be so neatly unraveled – whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."); Alvarez, 147 F.3d at 359 (holding law enforcement officers did not violate Alvarez's Fourth Amendment rights by entering the backyard of his residence to

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upon the subjective state of mind of the officer."); see also State v. Howard, 155 Idaho 666, 671, 315 P.3d 854, 859 (Idaho Ct. App. 2013) (considering whether "an objective view" of the law enforcement officers' conduct in approaching Howard's home revealed a purpose inconsistent with the implicit license in determining whether the officers' actions violated Howard's constitutional rights subsequent to the United States Supreme Court's decision in Jardines); see generally Cressman v. Thompson, 719 F.3d 1139, 1156 (10th Cir. 2013) (instructing courts "should be very careful to suggest the [United States] Supreme Court has implicitly reversed itself, especially because, of course, the Court can and should speak for itself").

speak with him about a report of underage drinking when it was reasonable for the officers to believe they would find the homeowner in the backyard under the circumstances).

For those reasons, the circuit court judge's conclusion the officers' entry into the open grassy area violated Bash's Fourth Amendment rights was clearly erroneous and was unsupported by the evidence even assuming the open grassy area constituted part of the curtilage of the residence identified in the anonymous tip. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard."); see also Bostick, 501 U.S. at 439 (recognizing a court "is not empowered to forbid law enforcement practices simply because it considers them distasteful"). Accordingly, the Court of Appeals correctly reversed the circuit court judge's ruling and remanded the matter for trial. The decision of the Court of Appeals reversing the trial judge's ruling suppressing the evidence should be affirmed.

B. Propriety of the Officers' Entry Into the Open Grassy Area Even Without Consideration of the Implicit License Permitting Such an Entry

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). As a result, **only** unreasonable searches and seizures are constitutionally prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an

individual's possessory interest in property or with the individual's freedom of movement. Id.; see Terry v. Ohio, 392 U.S. 1, 16, n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

In cases involving Fourth Amendment issues, the critical inquiry is "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." Rakas v. Illinois, 439 U.S. 128, 140 (1978). "That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Id.; see also Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.").

Through its express language, the Fourth Amendment specifically delineates persons, houses, papers, and effects as constitutionally-protected areas. Jardines, 133 S. Ct. at 1414. Thus, the Fourth Amendment unquestionably protects an individual's home from unreasonable governmental intrusion, and those protections extend to the home's curtilage. Id. at 1414-1415. "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 v. United States, 466 U.S. 170, 180 (1980) (citation omitted). In determining whether a particular area is part of the curtilage of a home, the following four factors are highly relevant: (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, "th[o]se 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.

Significantly though, outside of a home and the home's curtilage, the Fourth Amendment does **not** prohibit law enforcement officers from conducting investigations on private property. Jardines, 133 S. Ct. at 1414. Even if a particular area intruded upon is located on private property, governmental intrusion upon that area does not constitute an unreasonable search and is not constitutionally prohibited if the area is an open field. Id.; see Hester v. United States, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."). The term "open field" can include "any unoccupied or undeveloped area outside of the curtilage[,]" and an area can be considered an open field even if it is not open and not a field. Oliver, 466 U.S. at 177. Critically, "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." Id. at 179. Accordingly, "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Id. at 181.

In the case at bar, the circuit court judge concluded the grassy area where the officers approached Bash and the other men was part of the curtilage of the residence and based her decision to grant Bash's suppression motion on that conclusion. In reversing the circuit court judge's ruling on appeal, the Court of Appeals expressly declined to address the issue of whether the circuit court judge correctly determined the open grassy area was part of the residence's

curtilage and simply assumed for argument's sake the open grassy area did constitute part of the curtilage in light of its determination the officers had the investigative authority to enter the grassy area **even if** it constituted part of the residence's curtilage.[9] Assuming the Court of Appeals somehow incorrectly determined the officers had the investigative authority to approach Bash and the others in the open grassy area, the Court of Appeals nonetheless correctly determined the circuit court judge's ruling was erroneous because the evidence and testimony presented during the suppression hearing established the grassy area was **not** so intimately connected to the residence to be considered a part of the residence's curtilage and, instead, was an open field. Because the grassy area was not part of the residence's curtilage, the officers did not impermissibly intrude upon a constitutionally-protected area when they approached Bash in the grassy area and, thus, did not violate Bash's constitutional rights prior to discovering Bash's narcotics. See United States v. Jones, __ U.S. __, 132 S. Ct. 945, 953 (2012) ("Quite simply, an open-field, unlike the curtilage of a home, . . . is not one of those protected areas enumerated in the Fourth Amendment. The Government's physical intrusion on such an area . . . is of no Fourth Amendment significance." (citations omitted)).

Turning to the relevant factors identified by the United States Supreme Court in Dunn, one of the key factors to be considered in determining if the grassy area was part of the residence's curtilage was the proximity of the grassy area to the residence. Although no precise testimony was presented during the suppression hearing in regard to the grassy area's exact distance from the home, the grassy area was not immediately adjacent to the residence and,

[9] Specifically, the Court of Appeals instructed: "Because we conclude the conduct of police in this case did not violate the Fourth Amendment even if the grassy area was part of the curtilage, we decline to address the curtilage issue." (App'x p. 4, n. 4). Puzzlingly, despite the Court of Appeals' express refusal to consider the curtilage issue in rendering its decision, Bash repeatedly asserts in his Brief of Petitioner the Court of Appeals implicitly determined the open grassy area constituted a part of the curtilage of the residence. (Pet. Br. p. 10; p.12). Obviously, Bash's contention in that regard is incorrect in light of the express statement of the Court of Appeals to the contrary. (App'x p. 4, n. 4).

instead, was far enough removed from the home that it was separated from the home by a fence and the home's fenced-in backyard. (R. pp. 94-98). Significantly, that distance and clear separation from the residence demonstrated the grassy area was not an area intimately associated with the sanctities of the residence itself and was, thus, not part of the residence's curtilage.

Another key factor to be considered in the analysis was whether the grassy area was included in an enclosure surrounding the home. Critically and tellingly, it was not. Instead, the grassy area was entirely outside of a chain-link fence erected around all sides of the residence. Although the presence of a fence is not always alone dispositive, the fencing surrounding the front yard, side yards, and backyard of the residence served as a clear demarcation of the areas considered by the homeowner to be part and parcel of the residence. See Dunn, 480 U.S. at 301, n. 4 ("Fencing configurations are important factors in defining the curtilage, but, as we emphasize above, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home." (citation omitted)); see also Oliver, 466 U.S. at 182, n. 12 ("[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage – as the area around the home to which the activity of home life extends – is a familiar one easily understood from our daily experience."). The fact the grassy area was undeniably separated from the residence by fencing strongly demonstrated the grassy area was not intimately connected to the residence such that it could be considered a part of it and, instead, showed the grassy area was a separate and distinct part of the parcel of property not associated with the private activities of the home.[10] See United States v. Reilly, 76 F.3d 1271, 1278 (2nd Cir. 1996) ("Typically, the enclosure factor weighs against those who claim infringement of the curtilage when their land is divided into separate

[10] Notably, the fence separating the open grassy area from the fenced-in backyard of the residence did not even appear to have a gate that would have made the open grassy area directly accessible from the residence's backyard. (R. p. 95; pp. 97-98).

parts by internal fencing. In such situations, courts may well view the internal fencing as a boundary that sets the curtilage apart from the open fields."); cf. Dunn, 480 U.S. at 302 ("[I]t is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the home that is readily identifiable as part and parcel of the house. Conversely, the barn – the front portion itself enclosed by a fence – and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence."). Therefore, the grassy area's location outside of the enclosure surrounding the residence established the grassy area was not part of the residence's curtilage.

One of the other important factors to be considered was the steps taken by the resident to protect the grassy area from observation by people passing by. Critically, the evidence and testimony presented during the suppression hearing established **no** steps had been taken by the homeowner to shield that area from outside observation in any way. Specifically, the grassy area itself was situated directly next to a public roadway that ran adjacent to the parcel of property on which the residence was located, and no barrier had been erected or effort made to shield or protect the grassy area from observation by those standing outside of the property, those residing in neighboring homes, or those traveling along at two least nearby public roadways. See California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."); see also Vidos v. State, 367 Ark. 296, 311, 239 S.W.3d 467, 479 (Ark. 2006) ("[T]he land was on an open road in which there is no legitimate expectation of privacy."). As nothing protected the grassy area from outside observation, a person standing in the grassy area could not have reasonably harbored any meaningful expectation their actions in the grassy area were private or unobservable to others. See Oliver,

466 U.S. at 178 ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."); see also Ciraolo, 476 U.S. at 212-213 ("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."). Accordingly, the fact the homeowner of the residence specifically chose to erect fencing around the front yard, side yard, and backyard of the residence while making no effort to protect the grassy area outside of the fencing in any way confirmed the grassy area was not part of the curtilage of the home.

Finally, the last factor to be considered was the nature of the uses to which the grassy area was put. The grassy area itself contained a small utility shed and a broken-down vehicle and was being used at the time of the officers' arrival by several individuals who were congregating around Bash's truck. While use of the area to congregate or socialize with others could be considered an activity associated with the private and domestic activities of a home, an open field could likewise be used as an area for people to congregate and socialize.[11] Cf. Patler v. Slayton, 503 F.2d 472, 477-478 (4th Cir. 1974) (finding a pasture that was used as a play area, picnic area, and shooting range and was located outside of a fence surrounding a home constituted an open field and was not entitled to the same Fourth Amendment protections as the home and its curtilage). As a result, the use for which the grassy area was being put at the time of the officers' arrival did not establish that the grassy area was part of the curtilage of the home,

[11] In seeking a reversal of the Court of Appeals' decision, Bash contends the record establishes he and the others had gathered in the open grassy area for a barbeque. (Pet. Br. pp. 11-12). Significantly though, the evidence and testimony presented during the suppression hearing established Bash's truck did **not** contain hamburgers, hotdogs, buns, potato chips, or other items commonly associated with a barbeque. (R. p. 34; p. 51; pp. 90-93). Instead, it established Bash's truck contained a large quantity of cocaine and crack cocaine along with items involved in the trafficking and distribution of narcotics. (R. p. 34; p. 51; pp. 90-93). Accordingly, it would be more accurate to state the record established Bash and the others had gathered in the open grassy area to engage in a drug transaction under circumstances that might have made it appear to a bystander they were engaged in an innocent activity like a barbeque.

particularly when the other factors taken together strongly showed the grassy area was not "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Dunn, 480 U.S. at 301; see also United States v. Cousins, 455 F.3d 1116, 1123 (10th Cir. 2006) ("As Dunn makes clear, the area in question must be used for the 'intimate activities of the home.' " (citation omitted)).

In finding the grassy area was part of the curtilage of the residence, the circuit court judge did not appear to have considered **any** of the factors identified by the United States Supreme Court as relevant to a determination of whether an area can be considered an open field or part of a residence's curtilage and, instead, simply noted that "[c]urtilage includes outbuildings, the yard around a dwelling, a garden of the dwelling, or the parking lot of a business." (R. p. 73). However, based on the evidence and testimony presented during the suppression hearing, including the critical evidence establishing the grassy area was an unshielded area next to a public roadway and outside of the fencing surrounding the residence and its yard, the grassy area was **not** an outbuilding, a yard around a dwelling, a garden of a dwelling, or a parking lot of a business. Instead, it was an open field outside of the residence's curtilage. Because the grassy area where the officers approached Bash and the others was an open field, it was not entitled to the same constitutional protections as the residence, and the officers were not constitutionally prohibited from entering it. See Jardines, 133 S. Ct. at 1414 ("[A]n officer may (subject to Katz[v. United States, 389 U.S. 347 (1967)]) gather information in what we have called 'open fields' – even if those fields are privately owned – because such fields are not enumerated in the [Fourth] Amendment's text."). As a result, the officers' entry into the grassy area to speak with Bash and the others was not unreasonable under the circumstances, and their subsequent discovery of Bash's narcotics, which were plainly visible through the window of Bash's truck, did not violate

Bash's constitutional rights. See Jimeno, 500 U.S. at 250 ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."); see also State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more."); State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). Both the circuit court judge's conclusion the grassy area was part of the residence's curtilage and her decision to suppress Bash's narcotics on that basis were clearly erroneous and unsupported by any of the evidence presented during the suppression hearing. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard."). Accordingly, the Court of Appeals correctly reversed the circuit court judge's ruling and remanded the matter for trial. The decision of the Court of Appeals reversing the trial judge's ruling suppressing the evidence should be affirmed.

II.

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.

Based on an alleged additional sustaining ground, Bash asks this Court to reverse the decision of the Court of Appeals and affirm the decision of the circuit court judge. In asking this Court to do so, Bash cites to this Court's recent decision in State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), while maintaining the law enforcement officers' entry into the open grassy area in his case constituted an unreasonable invasion of privacy and, thus, violated his rights under the South Carolina Constitution. However, even assuming for argument's sake the officers' actions violated Bash's rights under the South Carolina Constitution, this Court should decline to reverse the decision of the Court of Appeals based on the additional sustaining ground advocated by Bash because the officers fully complied with the controlling state and federal precedent in effect when they entered into the open grassy area. Because the officers' action were in compliance with then-existing state and federal precedent, suppression of the evidence would not be appropriate under the circumstances and would not serve the goals of the exclusionary rule. Accordingly, under those circumstances, the decision of the Court of Appeals reversing the trial judge's ruling suppressing the evidence discovered in Bash's case should be affirmed.

Significantly, in addition to the protections afforded by the United States Constitution, the South Carolina Constitution provides its own protections to our citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

Furthermore, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10. Through that additional provision, "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." Weaver, 374 S.C. at 322, 649 S.E.2d at 483. Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id.

Typically, when a constitutional violation occurs, any evidence seized as the result of that unconstitutional action **generally** must be excluded from trial pursuant to the exclusionary rule, a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. Id. at 319, 649 S.E.2d at 482; see generally State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional action "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, 564 U.S. 229, 236 (2011) (citations omitted); see Stone v. Powell, 428 U.S. 465, 486 (1976) ("[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure[.]"); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair."). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its

application would exact. Brown, 401 S.C. at 88, 736 S.E.2d at 266. As a result, not every constitutional violation warrants the application of the exclusionary rule, and several judicially-created exceptions to the exclusionary rule have been established. See State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 345 (2014) (recognizing the fact a constitutional violation has occurred does **not** necessarily mean the exclusionary rule must be applied and noting several exceptions to the exclusionary rule have been adopted by the courts).

Recently, in State v. Counts, this Court considered whether law enforcement officers' entry into the curtilage of a home to approach the home's door and speak with an occupant for investigative purposes constituted a violation of the South Carolina Constitution. Id., 413 S.C. at 167, 776 S.E.2d at 67. After considering the issue, a majority of this Court determined "there must be some threshold evidentiary basis for law enforcement to approach a private residence" based on "the potential for abuse" that could occur if officers were permitted to approach citizens' homes without restriction. Id. at 172, 776 S.E.2d at 69. Therefore, the majority articulated a new rule of criminal procedure in South Carolina holding "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. The majority then applied that "newly enunciated rule" to the facts of Counts's case before determining the officers did not violate Counts's rights under the South Carolina Constitution.[12] Id. at 173, 776 S.E.2d at 70.

In the case at bar, Bash asks this Court to reverse the decision of the Court of Appeals and affirm the circuit court judge's ruling suppressing the large quantity of cocaine and crack cocaine discovered in his vehicle while urging this Court to find the officers' actions violated his rights under the South Carolina Constitution in light of the decision in Counts. Importantly

[12] Confusingly, despite this Court's express characterization of the rule announced in Counts as a "newly enunciated rule," Bash maintains in his Brief of Petitioner this Court's decision in Counts's case did **not** create a new rule. (Pet. Br. pp. 27-28).

though, this Court's decision in Counts had not been issued at the time of the officers' entry into the open grassy area and, thus, was not available to the officers to guide them in Bash's case. Cf. Davis, 564 U.S. at 235 ("The search at issue in this case took place a full two years before this Court announced its new rule in Gant."). Therefore, even if the officers' actions were not in compliance with the mandates of the new rule articulated by the majority in Counts, suppression of the evidence would not be an appropriate remedy unless the officers' actions were inconsistent with the controlling precedent in effect at the time they entered the open grassy area. Cf. Narcisco, 397 S.C. at 32, 723 S.E.2d at 373 ("[E]xcluding the evidence against [Narcisco] would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." (citations omitted)). Critically, in Bash's case, the officers' actions **were** fully compliant with the controlling precedent in effect at the time of their entry into the open grassy area.

Specifically, approximately nine months before the officers approached Bash and the others in the open grassy area, this Court issued its decision in State v. Wright. In that case, law enforcement officers received an anonymous tip dogfighting was taking place at a mobile home, drove past the residence identified in the tip on a public road to investigate, and observed a large number of vehicles and shining spotlights at the residence. Wright, 391 S.C. at 440, 706 S.E.2d at 325. Based on their observations, the officers stealthily approached the home in multiple

vehicles by driving down a private dirt road and activated their headlights just as they neared the home. Id. at 440, 706 S.E.2d at 326. When they did so, the officers saw people and dogs running away along with a portable dogfighting pit that was being dismantled. Id. In response, the officers detained the people who attempted to flee, arrested Wright and his co-defendants, captured as many dogs as they could, and seized numerous items of evidence related to dogfighting that were found in plain view. Id. at 440-441, 706 S.E.2d at 326. Following their arrests, Wright and the others moved prior to trial to suppress the evidence due to the fact the officers seized the evidence after making a warrantless entry onto private property, and the circuit court judge granted their suppression motions. Id. at 441, 706 S.E.2d at 326. Subsequently, the State appealed the circuit court judge's ruling, and this Court reversed. Id. at 446, 706 S.E.2d at 329. In reversing the suppression ruling, this Court specifically found the officers' entry onto the private road and approach of the mobile home were constitutionally proper because the officers had investigative authority to enter the property **even if** the officers had not developed a reasonable basis for proceeding forward based on the observations they made from a lawful vantage point. Id. at 444-445, 706 S.E.2d at 328.

Based on that decision in Wright, 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 openly gathered in the open grassy area behind the residence identified in the anonymous tip. See id. at 445, 706 S.E.2d at 328 ("[T]hese observations would give a reasonable police officer in the deputies' position cause to go forward. However, even absent these observations, the police had the investigative authority to approach the front door of the mobile home in order to investigate the anonymous tip."). Furthermore, the officers' decision to enter the grassy area to speak with the men was also consistent with federal precedent that had been issued prior to

their actions in Bash's case. See Alvarez, 147 F.3d at 356 ("The Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard when circumstances indicate they might find him there[.]"); see also King, 563 U.S. at 469-470 (recognizing law enforcement officers not armed with a warrant ordinarily do not violate an individual's constitutional rights by approaching a home and knocking on a door).

Because the officers' actions in Bash's case fully complied with then-controlling decisions issued by this Court, the United States Supreme Court, and the Fourth Circuit Court of Appeal, suppression of the narcotics discovered by the officers would in no way serve the deterrent goals of the exclusionary rule under the circumstances. See Davis, 564 U.S. at 249 ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs." (citation omitted)); see also Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."). Therefore, even assuming the officers' action violated Bash's constitutional rights in light of this Court's recent decision in Counts, their actions would not justify or warrant the exclusion of the incriminating evidence during trial.[13] See Davis, 564 U.S. at 241 ("[T]he

[13] In seeking the suppression of the illegal narcotics discovered in his truck, Bash contends this Court's decision in Counts establishes no good faith exception to the exclusionary rule exists for a violation of the new rule articulated in that case based on the fact this Court applied its new rule to the facts of Counts's case but did not expressly state a good faith exception existed and could have potentially been applicable. (Pet. Br. p. 27). Importantly though, this Court did **not** address the applicability of the exclusionary rule itself or any potential good faith exception to that rule in light of the fact it was **entirely unnecessary** for this Court to do so based on its determination the officers' conduct in Counts did not violate Counts's state constitutional rights. Counts, 413 S.C. at 173, 776 S.E.2d at 70. As a result, this Court's decision in Counts did **not** establish either the exclusionary rule must be applied under the circumstances of cases like Counts's case and Bash's case or no good faith exception is ever applicable to a violation of a defendant's state constitutional rights. See Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173,

harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." (citation omitted)); see also Herring, 555 U.S. at 140 ("The fact that a Fourth Amendment violation occurred – i.e., that a search or arrest was unreasonable – does not necessarily mean that the exclusionary rule applies. Indeed, exclusion 'has always been our last resort, not our first impulse,' . . . and our precedents establish important principles that constrain application of the exclusionary rule." (citations omitted)); cf. Brown, 401 S.C. at 96, 736 S.E.2d at 270 ("[W]e hold the Court of Appeals properly applied Gant and found the warrantless police search conducted incident to Brown's arrest for an open container violation was illegal. We further hold, however, pursuant to the Supreme Court's subsequent pronouncement in Davis, that the exclusionary rule is not applicable to this case because the officer relied upon existing appellate precedent at the time he conducted his search."). Accordingly, this Court should decline Bash's invitation to reverse the decision of the Court of Appeals and to affirm the circuit court judge's ruling based on an alleged violation of his rights under the South Carolina Constitution.[14] The decision of the Court of Appeals reversing the trial judge's ruling suppressing the evidence should be affirmed.

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191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.' " (citation omitted)).

[14] Furthermore, as an additional reason to reject Bash's additional sustaining ground argument, this Court should decline Bash's invitation to reverse the decision of the Court of Appeals based on an alleged violation of his rights under the South Carolina Constitution because Bash's own rights were **not** violated by the officers' entry into the open grassy area. Specifically, during the suppression hearing, 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 open grassy area while adopting the circuit court judge's position "there's no evidence put in that [Bash] doesn't have standing." (R. p. 78; pp. 81-82). Notably though, a defendant seeking the suppression of evidence based on an unlawful search or seizure has the burden of establishing he had an expectation of privacy that was unlawfully violated. See State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) (instructing a defendant seeking to challenge the propriety of a search or seizure must establish his own personal constitutional rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule); see also Rakas, 439 U.S. at 132, n. 1 ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or

seizure."); Alderman, 394 U.S. at 174 ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."); cf. United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."). In Bash's case, Bash wholly failed to meet that burden and has done nothing to show his **own** privacy rights were violated by the officers' entry into the open grassy area, which was an area in which he had no legitimate expectation of privacy. See State v. Robinson, 410 S.C. 519, 530, 765 S.E2.d 564, 570 (2014) ("[A]ssuming arguendo that the police officers committed a Fourth Amendment violation when they entered the porch of Apartment 122 without a warrant, the burden rests with [Robinson] to establish that he had a reasonable expectation of privacy in the porch of Apartment 122. . . . At no point did [Robinson] claim to be the renter, an overnight guest, or have any other connection to Apartment 122. Thus, we find that [Robinson] was 'merely present with the consent of the householder,' and as such, did not have a reasonable expectation of privacy on the porch of Apartment 122." (citations omitted)); see also State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) ("A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable."). As a result, this Court should decline to affirm the circuit court judge's suppression ruling based on an allegedly unreasonable invasion of someone other than Bash's state constitutional right to privacy in the open grassy area. Cf. Weaver, 374 S.C. at 326, 649 S.E.2d at 485 (Pleicones, J., concurring) ("Analysis of the facts of this case with our privacy provision in mind reveals no state constitutional violation. Although one's expectation of privacy in his automobile increase when that automobile is parked in the backyard of his private residence, [Weaver] in this case was not the owner of the Jeep that was seized. More importantly, the vehicle was not parked at [Weaver]'s residence. Our 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. However, [Weaver] cannot show he had a reasonable expectation of privacy in the seized Jeep.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals reversing the trial court's ruling should be affirmed.

Respectfully submitted,

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May 25, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Berkeley County
Honorable Stephanie P. McDonald, Circuit Court Judge
Appellate Case No. 2015-001582

THE STATE,

Respondent,

vs.

WALTER M. BASH,

Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Brief of Respondent on Appellant by sending two copies of the same to:

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I further certify that all parties required by Rule to be served have been served.
This 25th day of May, 2016.

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