STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

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ADONIS WILLIAMS,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001688

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# AMENDED BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?

## STATEMENT OF THE CASE

In July of 2009, the Richland County Grand Jury indicted Petitioner, Adonis Williams, for kidnapping, armed robbery and burglary first degree, indictments #2009-GS-40-2697, 2698, 2701). (App. pp. 722-727). On February 8, 2010, Petitioner proceeded to jury trial for the above listed charges and the additional charges of resisting arrest and assault on an officer while resisting arrest before the Honorable Clifton Newman. The jury found Petitioner not guilty of assault on a police officer while resisting arrest but guilty of resisting arrest. The jury could not reach a verdict on the other charges and Judge Newman declared a mistrial. Judge Newman sentenced Petitioner to one year for resisting arrest. It appears from the indictment that the burglary indictment was amended in March of 2010. (App. p. 726)

On September 6, 2011, Petitioner again proceeded to jury trial. The Honorable James R. Barber presided over the re-trial. Mark E. Schnee represented Petitioner at the re-trial. Kathryn "Luck" Campbell, Dolly Garfield and Meghan Walker prosecuted the case. The jury returned verdicts of guilty this time. Judge Barber sentenced Petitioner to twenty-five (25) years for kidnapping, twenty-five (25) years concurrent for armed robbery and twenty-five (25) years concurrent for burglary first. Petitioner filed a timely notice of intent to appeal. The South Carolina Court of Appeals, however, dismissed the appeal for failing to timely order the transcript as required by Rule 207, SCACR. The Remittitur issued on January 24, 2013.

On April 19, 2013, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 731-737). On October 18, 2013, the State filed a return. (App. pp. 767-772). On July 1, 2015, Petitioner, through counsel, filed an amended application for post-conviction relief. (App. pp. 738-740). On January 21, 2016, Petitioner filed, through counsel, a second amended application for post-conviction relief. (App. pp. 764-766). On February 1, 2016, an evidentiary

hearing was held before the Honorable J. Derham Cole. Kristy G. Goldberg represented Petitioner at the PCR hearing. J. Clayton Mitchell, III represented the State. In a 48- page written order Judge Cole granted a belated appeal pursuant to White v. State but denied relief on the other allegations and dismissed the application. (App. pp. 1139-1186). A timely notice of intent to appeal was served on September 19, 2018. A brief pursuant to White v. State and separately filed petition for writ of certiorari and appendix were filed on March 11, 2019. The State filed a return to the petition for writ of certiorari on July 16, 2019. On July 31, 2019, the South Carolina Supreme Court, pursuant to Rule 243(1), SCACR, transferred the case to the South Carolina Court of Appeals. The State has not yet filed a brief in response to the White v. State issue. Based on the discovery of a factual error, Petitioner moved to withdraw the White v. State brief filed on March 11, 2019, and substitute with this brief. This amended brief pursuant to White v. State follows.

## STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

"Turning to the abandonment analysis the trial court conducted in this case, we review the trial court's decision for clear error. State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016). This means we "must affirm if there is any evidence to support the trial court's [factual] ruling," 415 S.C. at 251, 781 S.E.2d at 900, but we "review[ ] questions of law de novo," State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)." State v. Brown, 423 S.C. 519, 524, 815 S.E.2d 761, 764, cert. denied, 139 S. Ct. 486, 202 L. Ed. 2d 377 (2018)

## ARGUMENT

**The trial judge erred in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned.**

Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). The cell phone was found pursuant to the search of the home of Dawn Shea, where Petitioner would sometimes stay. (App. p. 85, line 13 – p. 86, lines 1-12). During the pre-trial hearing the prosecutor told the judge, "Your Honor, we believe there was a search warrant done on a Dawn Shea's house who is a person the defendant sometimes would stay with I guess is the best way to put it. The defendant wasn't there at the time they took the phone. They then did look at the phone - - " (App. p. 85, lines 23 – p. 86, lines 1-3). Counsel for Petitioner argued that the search warrant did not cover the contents of the phone and the police did not have a search warrant for the contents of the phone. (App. p. 86, line 16 – p. 87, lines 1-2). The prosecutor told the judge:

> At that point, Your Honor, I believe it's abandoned property. I don't know what standing he would even have to object to the search warrant. Furthermore, the search warrant did specify certain things they were searching for. In addition to that, in the end there is a catch-all saying: Any evidence that may be relevant to this investigation. The police then got it. Once the evidence is in their hands pursuant to State versus Sanders, I believe that they can do with it what they want as long as they have obtained it legally.

(App. p. 87, lines 4-14)

The State argued that Petitioner did not have standing to challenge the search of a house belonging to a third party, that no warrant was needed as the phone was abandoned and that the search warrant for the house covered the contents of the phone. (App. p. 87, lines 15-21). Counsel for Petitioner argued that Petitioner had "the lawful authority to challenge a search warrant." (App. p. 88, lines 4-6). Counsel also argued that the phone was not abandoned

property and if it was abandoned the State could not prove who sent the text messages in question. (App. p. 88, lines 3-14). When asked about the purpose of introducing the text messages the prosecutor indicated the messages were evidence of flight. (App. p. 88, lines 15-25). The trial judge denied the motion to suppress stating:

> Well, you know, obviously any time there's a – a defendant's involved in a case, he has a right to make whatever objections or motions he wants to make with respect to any of the evidence or anything else where he thinks his rights are being violated, but, you know, this is not his residence. If he leaves something at somebody else's place and in the course of a lawful search by the police, the police come up with this, I believe it constitutes abandoned property and he doesn't -- and once they take it, they have the right to do with it as they deem appropriate. So I will deny your motion.

(App. p. 89, lines 9-19). The search warrant was not introduced in evidence during the pre-trial hearing. Additionally, counsel for Petitioner did not move to redact specific prejudicial language contained in the text messages and the judge was not aware of the content. This issue was raised during the PCR hearing and is addressed in the petition for writ of certiorari.

During the pre-trial hearing on the motion to suppress text messages the prosecutor told the judge that law enforcement had a search warrant for Dawn Shea's home and defense counsel did not challenge this assertion. Later in trial, however, Sergeant Matt Ellis with the Richland County Sheriff's Department testified that they obtained consent to search the residence from Ms. Shea. (App. p. 438, line 1 – p. 439, lines 1-14). Pursuant to the consent to search Sergeant Ellis testified that he found a phone. (App. p. 439, lines 4-21). The phone was admitted in evidence, over objection, as State's Exhibit #65. (App. p. 439, line 22 – p. 440, lines 1-2). While law enforcement did not obtain a search warrant for Dawn Shea's home, they did obtain a search warrant for Petitioner's sister's apartment on Long Creek Drive. (App. p. 440, lines 7-14).

Sergeant Don Robinson, also with the Richland County Sheriff's Department, testified that they obtained consent to search the residence from Ms. Shea. (App. p. 492, lines 1-19). Sergeant Robinson testified that he took possession of the phone found at Ms. Shea's home and downloaded records from the phone. (App. p. 492, lines 8 – p. 493, lines 1-19). Prior to the admission of photographs taken of the text messages and the investigator testifying as to the contents of the text messages, Petitioner renewed the objection made pre-trial. (App. p. 491, lines 6-7). Petitioner additionally objected based on hearsay, Rule 403 and the fact that the State was unable to prove who sent or received the text messages. (App. p. 494, lines 14-15; p. 495, lines 12-18). The judge overruled the objections and the investigator testified before the jury as to the content of the text messages found on the phone stating, "The police is looking for you. They came back one of a kind." (App. p. 497, lines 7-8). The investigator then testified about another text message stating, "'Are you gonna let me get that weed, my N-I-G-G-A?' There's a question mark. And, 'I'm about to go into hiding.' Then, 'Black power.'" (App. p. 497, lines 19-22). Photographs of the text messages were also admitted in evidence as State's Exhibits #66, #67. (App. p. 496, line 8). The trial judge erred in finding that the phone was abandoned and admitting the text messages obtained without a warrant.

In State v. Brown, 423 S.C. 519, 815 S.E.2d 761, cert. denied, 139 S. Ct. 486, 202 L. Ed. 2d 377 (2018), the South Carolina Supreme Court found that a cell phone found at a burglary scene was abandoned for Fourth Amendment analysis. Recognizing the unique nature of information contained in a cell phone and citing Riley v. California, 573 U.S. ——, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014), the South Carolina Supreme Court wrote:

> In Riley, the Supreme Court described in extensive detail the manner in which "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." 573 U.S. at ——, 134 S.Ct. at 2489, 189 L.Ed. 2d at 446. Among the many observations the Court made to

> explain these differences, the Court stated, "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate," 573 U.S. at ——, 134 S.Ct. at 2490, 189 L.Ed. 2d at 447, "Data on a cell phone can also reveal where a person has been[,] ... and can reconstruct someone's specific movements down to the minute, ... within a particular building," 573 U.S. at ——, 134 S.Ct. at 2490, 189 L.Ed. 2d at 448, and "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," 573 U.S. at ——, 134 S.Ct. at 2491, 189 L.Ed. 2d at 448. The Court concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' " 573 U.S. at ——, 134 S.Ct. at 2494-95, 189 L.Ed. 2d at 452 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751 (1886) ).

State v. Brown, 423 S.C. at 523–24, 815 S.E.2d at 763–64.

While Riley involved a search incident to arrest, the consent to search in the present case did not cover the contents of the cell phone. Petitioner maintained a reasonable expectation of privacy in the phone that he left at a home where he occasionally stayed. The phone was not abandoned.

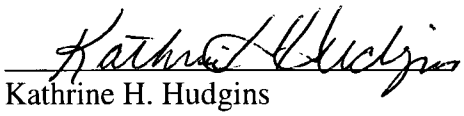
In State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995), the South Carolina Supreme Court wrote:

> Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). In determining whether the defendant abandoned the evidence for Fourth Amendment purposes, [t]he distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue. In the law of property, the question ... is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein. Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure. City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370–71 (1975) (citations omitted).

Petitioner did not discard his cell phone. Instead, the cell phone was in a home where Petitioner sometimes stayed and maintained a reasonable expectation of privacy. Because of the unique nature of information contained in a cell phone, the general consent to search the home given by Ms. Shea was not sufficient to cover the contents of the cell phone. The information from the cell phone was obtained in violation of Petitioner's Fourth Amendment rights pursuant to the State and Federal Constitutions. The South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution. See S.C. Const. art. 1§10; State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). The error is not harmless.

## CONCLUSION

Based on the above argument, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2019.