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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380
S.C. Ct. App. Filed October 12, 2022
Withdrawn, Substituted and Refiled November 16, 2022

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 4, 2023.

QUESTION PRESENTED

1. Did the Court of Appeals err in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone?

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. Byron E. Gipson represented Petitioner at the first trial. 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.

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. 738-763). 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. A timely notice of intent to appeal was served on September 19, 2018.

The petition for writ of certiorari and separately filed brief pursuant to White v. State were filed on March 11, 2019. The State filed a return to the petition for writ of certiorari on July 16, 2019, but not a brief of respondent pursuant to White v. State. 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. Based on the discovery of a factual error, on December 6, 2019, Petitioner moved to withdraw the White v. State brief filed on March 11, 2019, and substitute with a corrected brief pursuant to White v. State. The State had not yet filed a brief of respondent pursuant to White v. State. On January 8, 2020, the Court of Appeals granted the motion to file an amended brief pursuant to White v. State. The brief of respondent pursuant to White v. State was filed on January 26, 2022. The reply brief pursuant to White v. State was filed on February 22, 2022.

On October 12, 2022, the Court of Appels granted the petition for writ of certiorari as to the belated appeal issue and affirmed the convictions. The Court of Appeals denied the petition for writ of certiorari as to the nine (9) allegations of ineffective assistance of counsel. Adonis Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed October 12, 2022). A timely petition for rehearing was filed on October 27, 2022. On November 16, 2022, the Court of Appeals withdrew the former opinion and substituted with a refiled opinion. Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed

November 16, 2022). A second petition for rehearing was filed on November 28, 2022, and denied on January 4, 2023. This petition for writ of certiorari follows.

STANDARD OF REVIEW

Belated Direct Appeal pursuant to White v. State

"Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means [the appellate court] review[s] the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion ... is a question of law subject to de novo review." State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify what the State is required to prove in order to establish that property is abandoned for Fourth Amendment analysis.

ARGUMENT

1. **The Court of Appeals erred in finding that Petitioner abandoned his cell phone and as a result the trial judge properly refused to exclude text messages obtained by a warrantless search of the cell phone.**

The consent to search the Petitioner's girlfriend's home, by the girlfriend, did not extend to a search of the content of Petitioner's cell phone. Petitioner did not abandon his cell phone by leaving it at his girlfriend's house, where he sometimes stayed. The trial judge erred in allowing an investigator to testify as to the content of text messages found on the cell 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 error requires reversal.

On March 22, 2009, Linda Wofford called 911 from the Citgo gas station to report a home invasion and kidnapping. (App. p. 283, line 3 – p. 284, lines 1-21). Petitioner was identified as a suspect and law enforcement obtained arrest warrants for Petitioner. (App. p. 435-436). On March 26, 2009, officers with the fugitive division went to the home of Dawn Shea on True Street to try and locate Petitioner. When asked about the relationship between Shea and Petitioner, Sergeant Robinson with the Richland County Sheriff's Department testified "This was a rekindled girlfriend situation. They had recently rekindled their affair shortly before this happened." (App. p. 489, lines 22-23). Officers located Petitioner at his girlfriend's house but he ran away and was not arrested until the next day. (App. p. 449, line 10 – p. 450 – 453).

Officers returned to the True Street address. (App.pp. 489-490). Sergeant Matt Ellis with the Richland County Sheriff's Department testified that they obtained consent to search the residence from Dawn 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). 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). Sergeant Robinson testified that the phone belonged to Petitioner. (App. p. 491, lines 20-23). Sergeant Robinson testified that after he confirmed that the phone belonged to Petitioner, he went through the phone and looked at text messages. (App. p. 493, lines 25 – p. 494, lines 1-3).

Prior to trial Petitioner moved to suppress text messages obtained from the cell phone. (App. pp. 84-91). 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). During the pre-trial suppression hearing the prosecutor told the judge that Petitioner would sometimes stay with Dawn Shea. (App. p. 85, lines 23-25).

Counsel for Petitioner argued that the search warrant did not cover the **contents** of the phone. (App. p. 86, line 16 – p. 87, lines 1-2). Both the prosecutor and the defense lawyer were mistaken about the existence of a search warrant for Dawn Shea's True Street home. As the officers testified, the search was done by consent from Shea.

As to abandonment, the prosecutor argued:

> 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)

Petitioner 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 asked the prosecutor, "Don't y'all already have flight?" (App. p. 88, line 18). The prosecutor answered, "No, sir. We never have enough." (App. p. 88, line 19). The judge responded, "Well, sometimes you have too much, and that's generally what gets solicitors in trouble because they have too much and they don't need everything that they put in." (App. p. 88, lines 20-23). 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). After the judge ruled pretrial that the text messages were admissible because the phone had been abandoned, trial counsel challenged the admission of the text messages as hearsay and a violation of the confrontation clause. (App. p. 90, lines 1-12). Trial counsel also objected pursuant to Rule 403, SCRE, specifically referencing the "Black power" language in the text message. (App. p. 90, lines 13-17).

The trial judge erred in finding the phone was abandoned. Leaving something at somebody else's house is not sufficient for a finding of abandonment. Without a sufficient finding of abandonment, the police do not have the right to do with seized property as they deem appropriate, especially as it relates to the contents of a cell phone. See Riley v. California, 573 U.S.373, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).

At trial, counsel for Petitioner again objected to the admission of the text messages. (App. p. 491, lines 6-16). The prosecutor told the judge, "We are only introducing those just to show evidence of flight." (App. p. 495, lines 8-9). Trial counsel additionally objected to the admission of the text messages based on hearsay and Rule 403. (App. p. 495, lines 12-18). The trial judge overruled the objections stating:

> All right. I'm going to admit it on the basis that it's not being offered for the truth of the matter of the matter asserted but being offered for the purpose of putting - - that this defendant may have known that the police were looking for him and - - whether that's true or not true, but that he may have had information that the police were looking for him either through t a text message to this phone or a message from this phone.
>
> Now, you can certainly question them - - I think it would go to the weight of the evidence, and you can cross-examine them about whether they have any information that he had the phone when there were – messages were either made or received but that will - - that's the purpose of - - I mean, the basis of admission. All right. Bring the jury in.

(App. p. 495, line 19 – p. 496, lines 1-7). The text messages, however, went beyond the purpose of showing evidence of flight. The text messages including the use of the words "my N-I-G-G-A" and "Black power" are not relevant to flight, not cumulative to other evidence introduced at trial and prejudicial to Petitioner by inserting an arbitrary racial factor into the trial. The error in admitting the text messages was not harmless. Connecting the "I'm about to go into hiding" message with the "my N-I-G-G-A" and "Black power" is far more prejudicial than the other evidence of flight introduced by the State at trial. 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.

In State v. Moore, 429 S.C. 465, 839 S.E.2d 882 (2020), the trial judge denied a motion to suppress evidence seized from the warrantless examination of a flip phone's SIM card, finding the phone had been abandoned. The phone was found in the car of a man who had been shot. The Court in Moore, wrote, "Yet we acknowledge a close question is presented on

the issue of abandonment. We elect to resolve this appeal on other grounds." State v. Moore, 429 S.C. 465, 473, 839 S.E.2d 882, 886 (2020) (n. #4 omitted). The cell phone in the present case was not found at the crime scene. Instead, the cell phone was found in a home where Petitioner sometimes stayed with his girlfriend. The search in the present case was not limited to a SIM card of a flip phone. Instead, highly prejudicial text messages from the cell phone were published to the jury. The cell phone in the present case was not abandoned.

The dissent in Moore discussed abandonment writing:

> In my view, the State failed to establish the abandonment exception to the Fourth Amendment warrant requirement. See State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (recognizing the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement).
>
> When determining whether a defendant abandoned property for Fourth Amendment purposes, "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." Id. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370–71 (1975)). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). In the context of abandonment, intent is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

429 S.C. at 488–89, 839 S.E.2d at 894.

The State failed to establish the abandonment exception to the Fourth Amendment in the present case. While it may have been a close call in Moore, it is not a close call in the present case. Petitioner did not discard his phone under circumstances indicating no future expectation of privacy by leaving the phone at his girlfriend's house where he sometimes stayed.

In affirming the trial judge's refusal to suppress the contents of the cell phone the Court of Appeals wrote:

> We hold Petitioner "relinquished his reasonable expectation of privacy" by leaving his phone in a place where he did not live and making no efforts to recover his phone. See State v. Brown, 423 S.C. 519, 522, 815 S.E.2d 761, 763 (2018) ("Under a standard abandonment analysis, 'the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.' " (quoting State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995))).

Williams v. State, 2022-UP-380 (S.C. Ct. App. Filed November 16, 2022). The Court of Appeals erred.

The State failed to prove that Petitioner abandoned his cell phone by leaving it at his girlfriend's house. Petitioner stayed at his girlfriend's house and the police located Petitioner at his girlfriend's house. Petitioner left the phone at his girlfriend's house when he fled from police. Petitioner did not relinquish an expectation of privacy in the contents of his phone by fleeing from the police. Leaving a cell phone at a friend's house is not abandoning the phone. Leaving his cell phone at his girlfriend's house, where he sometimes stayed is not abandoning the phone. Petitioner was arrested the next day and did not have an opportunity to recover the phone.

In State v. Valles, 2019 ND 108, 925 N.W.2d 404, the North Dakota Supreme Court found that a phone that was found in a parking lot and turned over to the police was not abandoned. The North Dakota Supreme Court found that the warrantless search of the phone's photos, video, Facebook Messenger application, text messages and call log was constitutionally unreasonable. Distinguishing lost property from abandoned property the court wrote:

> Most courts that have faced the issue have allowed warrantless searches of abandoned phones. The typical scenario is where a phone is left at a crime scene under circumstances inconsistent with a lost or misplaced phone that may yet be retrieved by its owner. State v. Brown, 414 S.C. 14, 776 S.E.2d 917, 924 (S.C. Ct. App. 2015) (reasoning that initial privacy interest in a locked container may be abandoned if the container is left at a crime scene, indicating "a superior desire to avoid being arrested for a crime"); State v. Samalia, 186 Wash.2d 262, 375 P.3d 1082, 1084 (2016) (en banc) (phone found in abandoned stolen vehicle); Martinez v. State, No. 08-14-00130-CR, 2016 WL 4447660, at *1-4 (Tex. App. Aug. 24, 2016) (phone left at murder scene); Edwards v. State, 497

> S.W.3d 147, 154, 161 (Tex. App. 2016) (phone left on stolen vehicle at scene of armed robbery); State v. Brown, 414 S.C. 14, 776 S.E.2d 917, 923-24 (S.C. Ct. App. 2015) (phone left at scene of burglary); State v. Dailey, 2010-Ohio-4816, at ¶¶ 3, 13, 16, 2010 WL 3836204 (phone left in pocket of jacket that was abandoned while fleeing from store employees attempting to apprehend defendant for theft); People v. Daggs, 133 Cal.App.4th 361, 34 Cal.Rptr.3d 649, 650-51 (2005) (phone dropped during robbery of drug store). If truly abandoned, a phone is ownerless and thus the former owner lacks a continuing possessory interest to assert a Fourth Amendment claim. But a phone that is lost, dropped, or misplaced is not ownerless, and the owner retains the protection of the Fourth Amendment.

State v. Valles, 925 N.W.2d at 408.

In the present case Petitioner's expectation of privacy in the contents of his phone left at his girlfriend's house, where he sometimes stayed, is even greater than if he had lost his phone and it was handed over to the police as in Valles. In Valles the court noted that the phone was locked. In the present case the officer testified that he downloaded records from the phone but there is no mention in the record that it was locked. As Petitioner left the phone at a place where he sometimes stayed, the fact that the phone may not have been locked should not dimmish the expectation of privacy. The fact that Petitioner did not attempt to recover his phone between the time he fled from the police until the time he was arrested the next day does not establish abandonment. As the North Dakota Supreme Court noted in Valles, "One day passing without the owner having reported a phone missing is insufficient to establish abandonment." 925 N.W.2d at 409. As in Valles, the State in the present case failed to prove that Petitioner abandoned his phone.

One scholar suggests that Riley mandates that police obtain a warrant before searching even an abandoned cell phone. Abigail Hoverman, Note, *Riley and Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 546 (2017). This Court does not have to reach that conclusion in the present case because, as discussed above, under a

traditional abandonment analysis, the State failed to prove that Petitioner abandoned his phone by leaving it at his girlfriend's house.

The error in admitting the text messages was not harmless. The investigator was allowed to testify as to the content of text messages found on the cell 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). As the trial judge cautioned, "Well, sometimes you have too much, and that's generally what gets solicitors in trouble because they have too much and they don't need everything that they put in." (App. p. 88, lines 20-23). The text messages were too much. The portions of the text messages that included a racial slur, a reference to Black power, and a reference to weed were not cumulative to the other evidence of flight presented by the State. The evidence presented by the State was not overwhelming. The error in admitting the text messages requires reversal.

In State v. White, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> In State v. Creech, 314 S.C. 76, 441 S.E.2d 635 (Ct.App.1993), this court reiterated the Supreme Court of the United States' holding in Chapman v. California[4] that error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *Id.* at 86, 441 S.E.2d at 640 (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

Considering the entire record on appeal, the constitutional error in admitting the illegally obtained text messages was not harmless. At trial Petitioner admitted that he heard there were

warrants for him and testified that, "I mean, basically I didn't want to get arrested." (App. p. 599, line 10). Petitioner's testimony at trial and the evidence of flight leading up to Petitioner's arrest were far less prejudicial than the improperly admitted text message, "I'm about to go into hiding." The text messages including the use of the words "my N-I-G-G-A" and "Black power" are not cumulative to other evidence introduced at trial. The admission of the text messages that included racially charged words was prejudicial.

Additionally, the State's evidence linking Petitioner to the burglary and armed robbery was not overwhelming. This was the second trial after the first jury was unable to reach a verdict. A mixture of DNA evidence was found on a cigarette butt that was found on the grassy area near a driveway on Patricia Drive where the witness testified the suspect got out of her truck. (App. pp. 305-307). The DNA expert testified that neither the witness, nor Petitioner could be eliminated as contributors to the mixture of DNA found on the cigarette butt. (App. p. 386, lines 3-19). Petitioner's DNA was not found inside the truck or the house that was burglarized. The fingerprint evidence was found on the outside of the house on a telephone box where the wires had been cut. (App. p. 173, lines 14-23). Petitioner's fingerprints were not found inside the house or the truck. Although the witness described the suspect as having a chickenpox scar near his left eye, (App. p. 195, line 24 – p. 196, line 1), and Petitioner admitted having a mark on his temple, (App. p. 652, lines 13-18), the witness did not identify Petitioner. The State's evidence was not overwhelming. The error was not harmless.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2023.