THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LAMAR SEQUAN BROWN,

APPELLANT

APPELLATE CASE NO. 2013-000725

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 5355

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing. Respectfully, the majority's opinion overlooks key points that necessitate reversal of appellant's conviction.

The majority states that in Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court recognized that searches of modern cell phones are categorically different than searches of other items. Op. at 5. Citing Riley, the majority states that "the immense storage capacity of modern cell phones presents privacy concerns that have not arisen in searches of other physical items." Op. at 5-6. Despite this recognition, the majority then treats appellant's cell phone

as just another physical container. The cases cited by the majority involve a cigarette package (United States v. Robinson, 414 U.S. 218 (1973)), a briefcase (United States v. Oswald, 783 F.2d 663 (6th Cir. 1986)), a car (Wilson v. State, 966 N.E.2d 1259 (Ind. Ct. App. 2012)), and a desk and file cabinets (State v. Smith, 636 A.2d 1097 (N.J. Super. Ct. Law Div. 1990)). Using these cases as authority expressly contradicts the reasoning of Riley.

The principal case relied upon by the majority involves a cell phone, but does not involve a cell phone's data. Op. at 9, *citing* People v. Daggs, 34 Cal. Rptr.3d 649 (Cal. Ct. App. 2005). The majority's statement of the facts shows that Daggs does not support the holding in this case. In Daggs, the police never searched the phone's data, but just examined numbers on the outside of the phone and then obtained a warrant. In appellant's case, the police invaded the data on the phone without a warrant.

In this distinction lies the fundamental error in the majority's opinion. While the physical object of the phone could be abandoned, the data which could be accessed from the phone was not abandoned. The following example shows the flaw in this reasoning. Consider a person who loses their cell phone, decides it will never be found, and "abandons" it in favor of a new phone. The old phone has a code lock on it. Another person finds the phone, guesses the code, and then uses the information on the phone to steal intellectual property contained on the phone or accessible from the phone. Under the majority's reasoning, the thief would have committed no crime because the data on the phone was also abandoned along with the physical device.

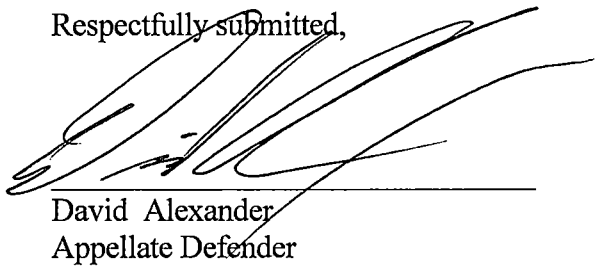
Appellant never relinquished his expectation of privacy in the data contained on the phone or that could be accessed from the phone. As Chief Justice Roberts wrote in Riley, cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." Riley at 2489. The storage capacity differentiates cell phones from other items.

Id. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ." Id. The Court noted that "it is no exaggeration to say that 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." Id. at 2490.

The Fourth Circuit recently recognized the broad applicability of Riley when it held that citizens have an expectation of privacy in their historical cell site location information even though such information was given to and maintained by third parties. United States v. Graham, 796 F.3d 332 (4th Cir. 2015). The court recognized the primacy of the data—not its physical location. If a person maintains an expectation of privacy in data knowingly held by third parties, then appellant certainly maintained an expectation of privacy in his data accessible by and contained in his code-locked cell phone.

Appellant urges the Court to adopt the reasoning of the dissent. The dissent stated, "While under these circumstances I would not find a reasonable expectation of privacy existed in the physical object of the phone, I believe a person preserves their reasonable expectation of privacy in its *contents*, which is precisely what provides a phone its significance." Op. at 16, Konduros, J., dissenting. This case turns on the critical distinction between a physical device and its data. Riley compels courts to focus on the data of a phone when conducting a Fourth Amendment analysis. Respectfully, appellant asks the Court to grant rehearing in this case to correct this flaw in the Court's opinion and reverse appellant's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

This 8th day of October, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Salley W. Elliott, Esquire, this 8th day of October, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of October, 2015.

Susan B. Hackett (L.S.)
Notary Public for South Carolina
My Commission Expires: 7/25/2023.