STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 5351 (S.C. Ct. App. filed 9/2/2015)

12-GS-22-00585-586, 558-559.

THE STATE,

RESPONDENT,

V.

SARAH D. CARDWELL,

Petitioner

APPELLATE CASE NO. 2012-213334

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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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 November 25, 2015.

QUESTION PRESENTED

Whether the trial judge erred in denying Petitioner's motion to suppress evidence of a video taken from Appellant's laptop where Petitioner left the computer with a local technician for repairs; where the local police chief entered the technician's shop and saw a still image of Petitioner's unclothed son flash across the screen; and where, without obtaining a search warrant, the chief instructed the technician to locate the file on the computer and play the video that it came from, to copy the video file to a disk, and to provide the video file to another law enforcement officer, who also watched the video file without obtaining a warrant.

STATEMENT OF THE CASE

On December 8, 2010, Johnsonville Police Chief Ron Douglas entered the shop of David Marsh, a local computer technician. Court's Ex. 3. Marsh frequently handled the police department's computer work. R. 50, ll. 3-15. Chief Douglas came from the police station a half a block down the street to drop off some packages. R. 50, ll. 16-18; R. 73, ll. 1-10. The computers on which Marsh was working were visible to Chief Douglas, and he saw flash across the screen of a laptop belonging to Petitioner an image of a boy wearing nothing but a pink bra. R. 53, l. 23 – R. 55, l. 1; R. 74, ll. 15-19.

According to Marsh, Chief Douglas said to him, "I just saw something go across the screen, can you back it up?" At that point, Marsh "had no clue" what Chief Douglas was talking about. Upon seeing the computer, Marsh told Chief Douglas it belonged to Petitioner and had problems booting up, so he was backing up the files to an external hard drive. R. 48, ll. 6-23; R. 74, l. 20 – R. 75, l. 6; R. 217 – R. 229, Court's Ex. 3. "Please back that up just a little bit," Chief Douglas repeated, and when Marsh did, the two saw that the image was a still from a video file with a play button at the top. R. 54, ll. 1-21. "[T]hat's what [Chief Douglas] said he saw and he wanted to see. So, we clicked play and we watched just a little . . . ." R. 55, ll. 8-11. In a written statement Marsh made on December 13, 2010, he reported that Chief Douglas "called me back in to the office and said for me to look at one of the computers. . . . He asked if I would look at one of the last files backed-up, and we saw it was a video. Upon request of [Chief Douglas], [w]e watched the video." R. 217 – R. 229 Court Ex. 3. On the same day, Chief Douglas made a written statement and said that after he asked Marsh about what flashed across the screen, "I then asked to see the file that had just been backed up and he searched until finding it and played it for me." *Id.*

Without Petitioner's consent, the two watched about a minute of the video, which was ostensibly filmed by Petitioner in her home and contained footage of her young son, daughter, and her then-fiancée Michael Cardwell, who was not biologically related to the children. R. 55, l. 15 – R. 56, l. 13; R. 60, ll. 14-22; R. 81, l. 17 – R. 82, l. l; R. 229. Marsh recognized all of them. R. 55, ll. 20-25.

Because Chief Douglas feared that the file would be lost if the computer failed, he instructed Marsh copy the file to a disk:

> Q: [I]n your experience as an investigator as well is one of the things you're concerned about the preservation of potential evidence in a case?
>
> A: Definitely, that's exactly why I told him what I did.

R. 77, ll. 4-8; R. 75, ll. 1-17; R. 217 – R. 229, Court's Ex. 3.

Chief Douglas believed he had no authority to secure the computer himself because Petitioner lived in Georgetown County, which was "not in [his] jurisdiction." Accordingly, he "instructed [Marsh] to . . . secure the computer until [he] could contact someone with Georgetown Sheriff's Office to see if they would assist with the investigation and take over that." R. 75, ll. 13-24; R. 76, ll. 9-16; R. 217 – R. 229, Court's Ex. 3.

Chief Douglas contacted Investigator Phillip Hanna with the Georgetown County Sherriff's Office about the investigation. On December 10, 2010, Investigator Hanna asked Marsh to meet him at the Johnsonville Police Department with the computer and the back-up disk with the video. When Marsh arrived, Investigator Hanna watched the video. He then seized the computer and the disk and obtained a search warrant to search the entire computer. R. 79, l. 12 – R. 85, l. 4; R. 217 – R. 229, Court's Ex. 3.

Based on the video's contents, the Georgetown County grand jury indicted Petitioner on two counts of unlawful conduct towards a child and two counts of sexual exploitation of a minor, first degree. R. 230—R 237. On October 29, 2012, Petitioner proceeded to trial before a jury and the Honorable Edward B. Cottingham. Reuben Goude represented Petitioner and Candice Lively represented the State. R. 1-2.

Prior to trial, Petitioner moved to suppress the video evidence, arguing that the technician's playback of the video at the Johnsonville Chief's instruction constituted a warrantless search. The trial judge denied the motion for two reasons. First, the judge ruled Petitioner had no expectation of privacy in the computer because she left it with the technician. Second, no search occurred because the Johnsonville Chief saw in plain view "evidence of a serious child pornography crime," and he therefore had "every right to pursue his interest in determining where the truth lies." R. 21, l. 3 – R. 25, l. 17. Petitioner also argued that the Georgetown's Investigator's viewing of the video prior to obtaining a warrant was illegal. The judge again ruled that no search occurred because the computer was "in the public domain." R. 26, l. 5 – R. 27, l. 10. Petitioner renewed the motion during the trial, moving to exclude the computer and any files taken from it. The trial judge continued to deny the motion. R. 51, l. 19 – R. 52, l. 12; R. 61, l. 22 – R. 62, l. 1; R. 206, l. 16 – R. 207, l. 4.

At the conclusion of the trial, the jury found Petitioner guilty as charged. R. 199, l. 11 – R. 200, l. 20. For the charges of unlawful conduct, Judge Cottingham sentenced Appellant to concurrent two year sentences. R. 214, l. 24 – R. 215, l. 4. For the charges of sexual exploitation, Judge Cottingham sentenced Appellant to concurrent three year sentences. R. 215, ll. 4-20. Judge Cottingham ordered the three year sentences to run consecutive to the two year sentences. *Id.*

Petitioner timely appealed to the South Carolina Court of Appeals and filed a Final Brief of Appellant on April 7, 2014. Final Brief of Appellant. After arguments, the Court of Appeals issued on September 2, 2015 a published opinion affirming Petitioner's convictions. Opinion No. 5351 (S.C. Ct. App. Sept. 2, 2015). The court held that the trial judge properly denied the motion to suppress the video because Petitioner had no privacy interest in the file and because law enforcement would have inevitably discovered the contents of the video file even if the initial playback was unconstitutional. *Id.* On September 11, 2015, Petitioner filed a petition for rehearing, which the court denied on November 25, 2015.

ARGUMENT

THE TRIAL JUDGE ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS THE VIDEO FILE BECAUSE PETITIONER HAD A REASONABLE EXPECTATION OF PRIVACY IN THE FILES ON HER PERSONAL COMPUTER AND BECAUSE BOTH CHIEF DOUGLAS AND INVESTIGATOR HANNA WATCHED THE VIDEO FILE WITHOUT FIRST OBTAINING A WARRANT WHEN NO WARRANT EXCEPTION APPLIED.

The trial judge erred in denying Petitioner's motion to suppress the video file because Petitioner had a reasonable expectation of privacy in the files on her personal computer and because both Chief Douglas and Investigator Hanna watched the video file without first obtaining a warrant when no warrant exception applied. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). "A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity . . . ." *State v. Morris*, 395 S.C. 600, 609-10, 720 S.E.2d 468, 472 (Ct. App. 2011).

> "Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause."

Id. (quoting *State v. Brown,* 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct.App.2010) (internal citations omitted)).

The United States Supreme Court has emphasized the central concern with warrantless searches and seizures:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 14-15 (1948). Thus, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 91 (1971); *State v. Weaver,* 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation make the course imperative.'" *Coolidge*, 403 U.S. at 91.

For example, to justify a warrantless search based on the destruction of evidence, the State must show a reasonable suspicion of imminent destruction based on the actual circumstances at the time of privacy invasion. *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997); *see also U.S. v. Jacobsen*, 466 U.S. at 114-15. Additionally, the South Carolina Supreme Court has held that under the "plain view" exception, evidence is subject to a warrantless *seizure* if "the initial intrusion which afford the authorities the plain view was lawful and . . . the

incriminating nature of the evidence was *immediately apparent* to the seizing authorities." *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (emphasis added). "The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution." *Bultron,* 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

While the Fourth Amendment does not apply to searches by private parties, it does apply to searches in which a private party acts as instrument or agent of the government. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). Thus, when a private party conducts a search pursuant to an explicit request by a governmental party, the Fourth Amendment applies. *Id.* at 66-67, 528 S.E.2d at 666 (citing *State v. Cohen*, 305 S.C. 432, 434-35, 409 S.E.2d 383, 385 (1991).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule provides that evidence seized in violation of the Fourth Amendment must be excluded from trial. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Id.; see also State v. Sachs,* 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); *State v. Brown*, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010). The exclusionary rule also prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999).

In *Walter v. U.S.*, 447 U.S. 649 (1980), the United States Supreme Court held that when FBI agents lawfully *seized* boxes of film having obscene pictures on the labels, which provided

probable cause that the film could not lawfully be traded in interstate commerce, the Fourth Amendment nonetheless required the agents to obtain a search warrant before opening and viewing the film. *Id.* at 657. The boxes were packaged and mistakenly delivered to a third party, which opened the packages, found the boxes therein containing suggestive drawings and explicit descriptions of the contents, and unsuccessfully attempted to examine the film by holding it up to the light. *Id.* at 652. The Court affirmed that "it has been settled that an officer's authority to possess a package is distinct from his authority examine its contents." *Id.* at 654. The Court also stated the particular principle that "[w]hen the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement [for a warrant] be scrupulously observed." *Id.* at 654-55. It explained the FBI did nothing wrong by seizing the boxes or examining them to the extent that the third party had already exposed them; however, "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That search was not support by any exigency, or by a warrant even though one could have easily been obtained." *Id.* at 657.

In *U.S. v. Barth*, 26 F. Supp. 2d 929 (W. D. Tex 1998), the federal district court discussed its decision to grant a motion to suppress computer evidence based on facts substantially the same as those at hand. The defendant was a computer owner who left his hard drive with a computer technician for repair. *Id.* at 932. During the repair, the technician opened a file and discovered an image containing child pornography, after which he immediately shut down and unhooked the hard drive. *Id.* He then contacted the local police as well an FBI agent for which he happened to be an informant. *Id.* The FBI agent instructed the technician over the phone to copy the hard drive. *Id.*

After the two spoke, the technician reconnected the hard drive and discovered more images of child pornography. *Id.* at 932-33. The next day, the technician took the hard drive to the local police station, and the officers viewed and copied the hard drive. *Id.* The officers then obtained a warrant for the hard drive. *Id.*

The district court stated that closed computer files and hard drives are similar to closed containers and personal effects for purposes of the Fourth Amendment, *id.* (citing *U.S. v. Knoll*, 16 F.3d 1313, 1320 (2d Cir. 1994), and the defendant therefore had a reasonable expectation of privacy in the files. The court also reasoned that the technician became an agent of the government once he spoke to the FBI agent because "[t]o draw the line at any later time would give Kellar, untrained in law enforcement and unrestrained by the responsibilities and duties of officers sworn to protect the Constitution, a free reign to violated the protections of the Fourth Amendment while nonetheless working for the Government." 26 F. Supp. 2d at 936. Thus, while the technician's discovery of the first illicit image was a private search, it only extinguished defendant's privacy interest to that exact extent, and any subsequent viewing of the hard drive by the technician, police, or FBI was subject to the Fourth Amendment. [1] *Id. See also U.S. v. Scott*, 387 Fed. Appx. 334 (4th Cir. 2010) (per curiam) (motion to suppress properly denied where no evidence that government investigator directed computer technician to open files on customer's laptop); *United States v. Payton,* 573 F.3d 859, 864 (9th Cir. 2009) ("[T]he nature of computers makes such searches so intrusive that affidavits seeking warrants for the search of computers often include a limiting search protocol,

[1] The court also found "it is clear that [the technician] did not have actual authority to consent to a search of Defendant's hard drive. [He] was in possession of the unit for the limited purpose of repair. . . . [He] did no have general 'joint access' to the hard drive for most purposes . . . ." *Id.* at 938. *See also State v. Brockman*, 329 S.C. at 121-22, 494 S.E.2d at 443 ("Third party consent may validly be given by one who has common authority over or some other sufficient

and judges issuing warrants may place conditions on the manner and extent of such searches to protect privacy and other important constitutional provisions."); *State v. Sachs*, 372 S.W.3d 56, 61 (Mo. Ct. App. 2012) ("using a mouse and/or keyboard to shuffle between files that are not plainly visible on an active computer screen is just as much of a search as opening and looking through Appellant's filing cabinets or desk drawers.")

In Petitioner's case, the Fourth Amendment generally applied to the searches of her computer because she had the same reasonable expectation of privacy in the files on the personal computer as she would in any other closed container, file, document, or personal effect. As discussed in *Barth*, Petitioner did not relinquish this expectation merely by giving possession of her computer over to Marsh for repair. Further, as explained in *Walter v. U.S.*, when Marsh caused to be displayed on the screen the still image of the video file, it only extinguished Petitioner's privacy interest to the extent of displaying that particular still image. In *Walter*, the third-party recipient opened the packages and boxes of film and attempted to examine them; however, the FBI's projection of the films expanded the third-party's search. Similarly in this case, Petitioner retained a legitimate privacy interest in the video, i.e., the unplayed audio and still images comprising the video, and Chief Douglas conducted a separate search by playing the video.

Furthermore, Chief Douglas's watched the video file in Marsh's shop under color of law and the aegis of the government. First, Chief Douglas explicitly requested that Marsh make the search. Although Marsh caused the still image to display on the screen during his own process of backing up the files, he testified that he "had no clue" about it actually displaying at the time Chief Douglas saw it, and he did not play the video file on his own initiative. Rather, Chief Douglas first

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relationship to the premises or effects searched. Common authority [requires] 'mutual use of the property by persons generally having joint access or control for most purposes' . . . .).

explicitly requested and then instructed Marsh to bring the file back up after the image had lapsed. According to Marsh's testimony, Chief Douglas saw the file was a video, and he wanted to see it, so they played it. According to his written statement just five days after the incident, Marsh said Chief Douglas called him over to the computer, asked him to bring the file back up, and, *upon his request*, they watched the video.

Second, Chief Douglas was acting under color of law and within his authority as a police officer. Marsh knew Chief Douglas in his official capacity as the town's police chief who for some time regularly stopped by from the station down the street to deliver packages. Marsh was also familiar with the police department because he frequently handled its computer work. On the day he viewed the video, Chief Douglas came from the police station to deliver packages. After seeing the video still, Chief Douglas made requests of Marsh and gave instructions ostensibly within his authority. At trial, he expressly testified that he treated the situation as an investigation in seeking help from another law enforcement office, and he acted out of his investigative experience by treating the video as evidence of a crime. He in no way dispelled to Marsh or the court at trial that he was acting outside that authority or without an official motive. Finally, he limited his actions in seizing the computer and backup disk based on his belief that he lacked the jurisdiction and authority to do so as a Johnsonville police officer.

The trial judge held that Chief Douglas did not need a warrant because Petitioner's laptop was in his plain view. The holding was erroneous for two reasons. First, to support a warrant exception, the State still had to establish probable cause. Similarly, the plain view doctrine exception required that the incriminating nature of the video file was *immediately apparent*. The record does not show the satisfaction of either requirement because Chief Douglas merely saw an image of an unclothed boy wearing a pink bra inside of a residence and because, under the

circumstances, he knew or should have known after a reasonable investigation that the boy was the son of the computer's owner.

Second, as the South Carolina Supreme Court has specifically held, the plain view doctrine merely allows warrantless *seizures* of evidence in plain view. Similarly, in *Walter v. U.S.*, although FBI agents lawfully seized the boxes of film having obscene pictures on the labels, which provided probable cause that the film could not lawfully be traded in interstate commerce, the Fourth Amendment nonetheless required the agents to obtain a search warrant before opening and viewing the film. Here, Chief Douglas's authority to seize the computer was altogether distinct from his authority examine its contents, and the Fourth Amendment required that he obtain a warrant or establish some other warrant exception in order to lawfully watch the video.

In his testimony, Chief Douglas also attempted justified his failure to obtain a warrant based on fear that the laptop could shut down and the video would be lost. To sustain such a warrant exception, a reasonable suspicion of imminent destruction based on the actual circumstances at the time of privacy invasion must have existed. However, the record plainly establishes that Marsh had already backed up the video file to an exterior hard drive when Chief Douglas instructed him to play it. Further, Chief Douglas actually secured a copy on a backup disk by instructing Marsh to copy the video file. Accordingly, Chief Douglas could not have had a reasonable suspicion that the contents of the video file would be forever lost if he did not view it immediately.

Not only did Chief Douglas's playing of the video violate the Fourth Amendment, but so did Investigator Hanna's. Investigator Hanna instructed Marsh to meet him at the Johnsonville Police Department with the computer and backup disk. When Marsh arrived, like in *U.S. v. Barth*, Investigator Hanna watched the video file directly, and only then did he seek a warrant. The record

does not disclose any applicable warrant exception or any argument by Investigator Hanna in support thereof.

In the opinion affirming Petitioner's convictions, the Court of Appeals cited *Melton v. State*, 69 So.3d 916 (Ala. Crim. App. 2010) for the rule that Petitioner had no legitimate privacy interest in the file because she took the risk that the file would be disclosed to police based on the still-shot "cover" of the video file. To the contrary, under the United States Supreme Court precedent of *Walter*, Petitioner had a reasonable privacy expectation in the video file on the computer. *Walter* involved illicit films individually packaged in boxes with labels indicating the films contained obscene matter. The films are therefore analogous to the video file with a still-shot "label" in this case. The opinion in *Walter* explained, "[N]otwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy." 447 U.S. at 654. Thus, in this case, Petitioner nevertheless had a protected privacy interest in the video file.

The Court of Appeals erred in relying on the Alabama case of *Melton v. State*. First, its legal analysis is unconvincing. That court held that a computer owner had no legitimate expectation of privacy in files with textual labels "highly suggestive of child pornography." *Id.* at 931. The court analogized the case *United States v. Jacobsen*, 466 U.S. 109 (1984), which held that testing a white, powdery substance to determine whether it is cocaine—"'conduct that can reveal . . . no other arguably "private" fact'"—compromises no legitimate privacy interest. *Melton* at 928 (quoting *Jacobsen*). Of course, opening a computer file or folder that the owner has labeled with an intentionally misleading or facetious name can certainly reveal private, non-illicit material. Second, as explained above, the holding in *Melton* contradicts the United States Supreme Court's holding in

Walter because opening the computer files and viewing the films constituted the same improper police action under the Fourth Amendment.

The opinion from the Court of Appeals also cited *United States v. Williams*, 41 F.3d 192 (4th Cir. 1994) for the rule that the search of a container following its plain-view seizure is permissible if the container's outward appearance make it a "foregone conclusion" that it contains contraband. The Court of Appeals erred in relying on this rule because the trial record contains no arguments, findings, or support for the Court's ruling that the still-shot of the naked child made the conclusion forgone that the video's contents were illicit. South Carolina Code section 16-15-365 makes it a crime to aid someone in exposing his private parts in a "lewd and lascivious manner"—i.e., reflective of a "'shameful or morbid interest in nudity [or] sex." *State v. Bouye*, 325 S.C. 260, 267 (1997). Section 16-15-395 makes it a crime to cause a child "to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is . . . producing material that contains a visual representation [thereof] when a reasonable person would infer the purpose is sexual stimulation." Section 16-5-70 makes it a crime to put a child "at unreasonable risk of harm affecting the child's . . . mental health."

In this case, the only description in the record of the still-shot was that it showed a child wearing only a pink bra. Based on seeing the whole video, the trial judge "[did not] know what [e]ffect it will or might have on these children," which would be a question for the jury. App. 125, lines 17-22. In her closing, the solicitor made the following remarks about the video:

> . . . Trust me, if you want to take pictures of your, you know, children or grandchildren running around naked and, you know, doing cute things, you know, I think we've all got those naked kid pictures that your parents might through during your, I don't know, rehearsal dinner. . . . [O]ne thing I will agree with the Defense is that video is the case. Clearly it is. That video along with the

testimony of those children that lived through that video is the entire case.

. . .

One of the things that [defense counsel does] is he breaks down, "Well, if you take it out of context, then like the pictures that you've seen, if you take it out of context then, of course, you know it looks bad, you know, a snapshot of what's going on with this video." Ladies and gentlemen, that video lasted for two minutes and 30 seconds. In two minutes and 30 seconds I was able to pull of still shots showing nipple stimulation . . . and a child who is either seven or eight years old touching himself in such a manner that all of you can look and determine whether or not you believe that he came up with that himself . . . .

. . .

. . . So, yeah, I'm not asking you to take things out of context. I'm asking you to put it in context. **I'm not telling you to look at those individual pictures and make your decision. I'm saying look at the entire video and use your common sense because the video as a whole is what makes it sexual. The video as a whole is what's going to make you all agree beyond a reasonable doubt** that these parents . . . made a conscious, intentional, maybe reckless decision to videotape those children in a performance that includes sexual activity . . . .

R. 176, line 13—R. 181, line 8 (emphasis added). Thus, the record contradicts the holding of the Court of Appeals that the still-shot showed activity that was sexual, that it was reflective of a morbid or shameful interest in nudity or sex, or that it put the child at an unreasonable risk of mental harm. Because the contents of the video as contraband were not a foregone conclusion based on the still-shot, no plain-view circumstances supported the police officer's opening of the video file without a warrant.

Finally, the Court of Appeals cited *Nix v. Williams*, 467 U.S. 431, 432 (1984) for the rule that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers'

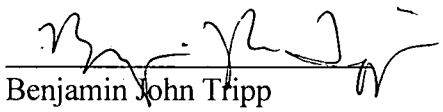
search—then the deterrence rationale has so little basis that the evidence should be received." The Court of Appeals erred because the inevitable discovery doctrine does not apply simply because probable cause would have supported a warrant to open the video file. The cited language appears in a syllabus to the *Nix* opinion promulgated by the reporter. The actual holding of *Nix* is that "when . . . evidence in question would inevitably have been discovered *without reference to the police error or misconduct*, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id.* at 448 (emphasis added). Thus, in this case the inevitable discovery doctrine does not apply because the State adduced no purported channel through which the police would have discovered the contents of the video file independent of the police officer and the computer technician unconstitutionally opening it. Moreover, as the United States Supreme Court stated in *Walter*, "The fact that the labels on the [packages] established probable cause to believe the [contents] were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed." 447 U.S. at 657 n.10.

The Fourth Amendment requires that before conducting a search, a law enforcement officer, if possible, must obtain a warrant supported by independent determination of probable cause from a neutral and detached magistrate. In this case, the reasonable course of action under Fourth Amendment principles was for Chief Douglas to secure the video file and apply for a search warrant based on the still image he saw displayed on the computer. A detached and neutral magistrate could then have determined whether probable cause existed to watch the video by weighing the circumstances of the image and the common-sense inferences to be drawn therefrom with Chief Douglas's reasonable conclusions about the nature of the video based on his experience and training as a police officer. Only this procedure would have properly balanced the interests of the State against the privacy interests of its citizens as required under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for certiorari to allow full briefing.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER.

This 8th day of December, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, and the S.C. Court of Appeals this 8th day of December, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025