THE STATE OF SOUTH CAROLINA
In the Supreme Court

ORIGINAL

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2015-002394

THE STATE, RESPONDENT,

V.

MICHAEL LEE CARDWELL,

PETITIONER.

BRIEF OF PETITIONER

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(2) Did the Court of Appeals err by disregarding U.S. Supreme Court precedent and holding that the plain view doctrine was applicable and the law enforcement officer was not required to obtain a search warrant prior to viewing the video on the laptop?

STATEMENT OF THE CASE

On August 22, 2012, the Georgetown grand jury indicted Michael Cardwell on two counts of unlawful conduct towards a child and two counts of sexual exploitation of a minor, first degree. The case proceeded to trial in front of the Honorable Edward B. Cottingham on October 29, 2012, during which Mr. Cardwell was tried alongside his wife, Sarah Cardwell. (App. p. 1). Eric Fox represented Mr. Cardwell and Candice Lively represented the State. (App. p. 2). On October 31, 2012, the jury returned a verdict finding Mr. Cardwell guilty on all counts. (App. p. 200, l. 3—App. p. 201, l. 3). The court sentenced Mr. Cardwell to concurrent two-year sentences for the unlawful conduct toward a minor charges, and concurrent three-year sentences for the sexual exploitation of a minor charges. (App. p. 213, l. 11 – App. p. 214, l. 4). The court stated its purpose was for Mr. Cardwell to serve a total of five years. (App. p. 214, ll. 4-5). Additionally, Mr. Cardwell was required to register as a sexual offender. (App. p. 214, ll. 7-12).

Cardwell appealed his case to the South Carolina Court of Appeals on November 13, 2012. Oral arguments were held at the South Carolina Court of Appeals on September 9, 2014, during which, the panel requested that arguments be combined for Sarah Cardwell and Michael Cardwell, as the cases involved the same legal issues. Therefore, counsel for Sarah Cardwell

argued first, then counsel for Michael Cardwell, and the assistant attorney general then replied to both arguments at one time.

The South Carolina Court of Appeals affirmed the decision of the trial court in an unpublished decision filed on September 9, 2015. Cardwell filed his petition for rehearing on September 23, 2015, which was denied on October 23, 2015.

On November 20, 2015, Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court. On July 12, 2016, Petitioner also filed a motion to consolidate his case with Sarah Cardwell's case if his petition for writ of certiorari is granted.[1] On September 8, 2016, the Court issued an order granting the petition for writ of certiorari. This brief of Petitioner follows.

SUMMARY OF FACTS

Mr. Cardwell met Sarah Cardwell, who was then Sarah Young, at the end of 1988 or 1989 when he was a volunteer firefighter. (App. p. 119, ll. 9-14). They began dating in October 2006. (App. p. 122, ll. 4-5). At the time, she had three children from a prior relationship, Minor Child 1, Minor Child 2, and a newborn. (App. p. 122, ll. 6-10). Mr. Cardwell also had two children from a prior marriage (App. p. 122, ll. 11-16). Mr. Cardwell and Mrs. Cardwell moved in together in 2006 and had a child together. (App. p. 123, ll. 21-25). They later married. (App. p. 117, l. 6).

On an evening in 2007, when Minor Child 1 was seven years old and his sister, Minor Child 2 was six years old, the two children took a bath and ran into the living room naked. (App. p. 113, l. 3, App. p. 126, ll. 7-13, App. p. 127, l. 2). Mr. Cardwell had just gotten home from work and had put on gym shorts. (App. p. 127, l. 2). As the children came out of the bathroom, they ran up to Mr. Cardwell and pulled his shorts down. (App. p. 127, ll. 16-18). Mrs. Cardwell

[1] As of the date of filing of this brief, this motion remains outstanding.

pulled out a video camera and began filming the children and Mr. Cardwell. (App. p. 126, ll. 21-24).

Years later, in November of 2010, Mrs. Cardwell was having problems starting her laptop computer, so she dropped it off with computer technician, David Marsh to be repaired. (App. p. 47, ll. 6-10). The following month, Chief of Police for the City of Johnsonville, Ron Douglas, went over to David Marsh's business to drop off packages. (App. p. 73, ll. 22-25). When Mr. Marsh left the room to take the packages to the garage, Chief Douglas called Mr. Marsh back wanting to see an image that had just flashed across the screen of Mrs. Cardwell's laptop. (App. p. 49, l. 25—App. p. 50, l. 2). Chief Douglas asked Mr. Marsh about the image and Mr. Marsh explained that the computer was not his. (App. p. 74, ll. 21-25). Chief Douglas came into Mr. Marsh's house which also functioned as his office and asked him to "[p]lease back that up just a little bit." (App. p. 54, l. 10). At the time, Mr. Marsh was backing up information that was being downloaded from Mrs. Cardwell's computer. (App. p. 54, ll. 13-16). As he was backing up the files, he and Chief Douglas saw a still image on the screen of Minor Child 1, a male boy, in a pink bra with nothing else on. (App. p. 54, l. 19—App. p. 55, l. 1). At the top of the image was a play button, and Chief Douglas asked Mr. Marsh to play the video for him. (App. p. 55, ll. 4-9). Mr. Marsh and Chief Douglas viewed a minute of the video and saw Minor Child 1, Minor Child 2, and Mr. Cardwell in the video. (App. p. 55, ll. 24-25). Chief Douglas later called Mr. Marsh and asked him to make a copy of the video onto a DVD. (App. p. 66, ll. 9-11). Chief Douglas did not have jurisdiction over Georgetown County, so he contacted the Georgetown Sheriff's Office to assist him. (App. p. 75, ll. 22-24, App. p. 80, ll. 16-22). Detective Phillip Hanna of the Georgetown Sheriff's Office was told that there were images of nude children on a computer that was being worked on by Mr. Marsh and they wanted him "to follow up on it to see if they – if it was, in fact, any kind of illegal pictures or videos." (App. p. 81, ll. 4-5). Chief Douglas told Mr. Marsh to copy the video onto a DVD and bring it with the laptop computer to

the police department (App. p. 66, ll. 9-16). Upon Chief Douglas's request, Mr. Marsh brought the computer and the DVD over to Detective Hanna who took possession of the items on December 10, 2010. (App. p. 62, ll. 20-21, App. p. 68, ll. 11-15, App. p. 80, l. 22, App. p. 83, ll. 9-10). Detective Hanna viewed the video and contacted the Department of Social Services (DSS). (App. p. 85, l. 1, App. p. 86, ll. 6-7).[2]

Prior to trial, counsel for Mrs. Cardwell and Mr. Cardwell moved to suppress the video evidence due to an illegal search and seizure of the laptop computer by Chief Douglas. (App. p. 21, l.3 – App. p. 23, l.2). Counsel also argued a motion to suppress due to Detective Hannah's viewing the video and seizing the laptop without a search warrant. (App. p. 27, ll. 20-23). Counsel argued that Mrs. Cardwell had an expectation of privacy in her laptop computer as she had numerous personal pictures on it of her family and did not relinquish her expectation of privacy by asking Mr. Marsh to repair her laptop. (App. p. 21, l. 3—App. p. 25, l. 9). The trial court denied the motion, stating that Mrs. Cardwell had no expectation of privacy when she voluntarily gave the laptop over to Mr. Marsh, the computer was in plain view when Chief Douglas viewed the image, and there was no search and seizure because at the time the property was in the public domain. (App. p. 21, l. 16 – App. p. 28, l. 4). Defense counsel renewed the motion during trial, asking the trial court once again to suppress the video and anything that was on the computer due to the illegal searches and seizures by Chief Douglas and Detective Hannah. (App. p. 51, l. 19 – App. p. 52, l. 10, App. p. 74, ll. 9-11).[3] The trial court denied the motion again (App. p. 52, ll. 11-12, App. p. 74, ll. 12-13).

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[2] The record indicates that Detective Hanna received a search warrant to search the contents of the laptop computer. (App. p. 83, ll. 17-18). The record does not indicate that the same search warrant applied to the DVD handed to Detective Hanna by Mr. Marsh.

[3] Counsel for Mr. Cardwell joined in on the motion to suppress the video and the use of the laptop computer for illegal searches by Chief Douglas and Detective Hannah during Mr. Marsh's testimony at trial. The trial judge stated that he accepted any motion made generally as being made by both counsel (App. p. 52, ll. 16-21).

At the end of trial, Michael Cardwell was found guilty of all charges against him (App. p. 200, l. 14 – App. p. 201, l.3). Defense counsel unsuccessfully moved for a new trial. (App. p. 207, l. 16 – App. p. 208, l. 4).

ARGUMENTS

I. The Court of Appeals erred in holding that Petitioner did not have a legitimate expectation of privacy in the laptop computer and the contents therein when there was no indication or evidence that the contents of the video could be inferred by a still image.

This case involves a substantial constitutional issue which has never been addressed by this Court. In its opinion in the companion case, State v. Sarah Cardwell, The South Carolina Court of Appeals admits this in footnote 2: "We acknowledge that South Carolina has not specifically addressed whether a reasonable expectation of privacy exists in one's personal computer and its data when voluntarily produced to a third party."

Pursuant to the Fourth Amendment of the United States Constitution, "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. Accordingly, the Fourth Amendment protects citizens from unreasonable searches and seizures and requires evidence which is seized in violation of this protection to be excluded or suppressed at trial. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 788 (2013). "The Fourth Amendment does not bar a search and seizure, even an arbitrary one, effected by a private party on his own initiative. It does, however, bar evidence arising from such intrusions if the private party acted as an instrument or agent of the government." State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (internal

citation omitted).[4] "[T]he United States Supreme Court adopted the federal exclusionary rule to prevent the admission of evidence at trial that was unlawfully seized in violation of the Fourth Amendment and subsequently expanded that rule to apply to the individual states via the Due Process clause." State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)

"A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012). Generally, searches and seizures performed without a warrant are unreasonable unless one of the following exceptions exist: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. Id. at 89, 736 S.E.2d at 266. In this case, the trial court's decision was clear error as Mr. Cardwell had a reasonable interest of privacy in the laptop and the video evidence did not fall within the plain view doctrine. See Narciso v. State, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012) ("This Court will only reverse the circuit court's decision on a motion to suppress when there is clear error.").

First, Mr. Cardwell had a legitimate expectation of privacy in the laptop computer that was illegally searched and seized by Chief Douglas and Detective Hannah. "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." State v. Robinson, 396 S.C. 577, 583-84, 722 S.E.2d 820, 823 (Ct. App. 2012). "A reasonable expectation of privacy exists in property being searched when the defendant has a relationship with the property or property owner." Id. at 584, 722 S.E.2d at 823.

[4] Although the laptop was physically searched by Mr. Marsh, it was done so at the request of Chief Douglas, who, upon seeing a questionable image across the laptop while Mr. Marsh was out of the room, told Mr. Marsh, "I just saw something go across the screen, can you back it up." (App. p. 54, ll. 1-3). Once Mr. Marsh found the file Chief Douglas requested, Chief Douglas asked Mr. Marsh to play the video for him. (App. p. 55, ll. 4-11). Therefore, this was not a private search as it was performed at the direction of law enforcement.

Additionally, it has been held that a person contesting the legality of a search due to lack of a search warrant only has to show that the state is attempting to introduce evidence against him. See State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987). Here, Mr. Cardwell has standing to contest the legality of the search of the laptop because, at the time the video was filmed, he had been dating Mrs. Cardwell and living with her since 2006, and they had a child together. (App. p. 109, l. 15—App. p. 110, l. 3, App. p. 122, l. 3—App. p. 123, l. 25). Additionally, the video was evidence that was being introduced against Mr. Cardwell at trial. See id. ("[O]ne contesting the legality of a search because of a defect under Section 17-13-140 need only show that the State is attempting to introduce the evidence against him.").

Although this precise issue has not been addressed by South Carolina, other states have recognized an expectation of privacy in an electronic repository for personal data. See State v. Ballard, 276 P.3d 976 (N.M. Ct. App. 2012) (stating "society will recognize an individual's expectation of privacy in a person's personal computer and external hard drives . . . [,]" but finding defendant relinquished privacy interest by specifically asking technician to destroy child pornography stored on his hard drives), *rev'd on other grounds by* State v. Olson, 324 P.3d 1230 (N.M. 2014); United States v. Barth, 26 F. Supp. 2d 929 (W.D. Tex 1998) (finding "that the Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person's closed containers and closed personal effects."); United States v. Chan, 830 F. Supp. 531, 534-35 (N. D. Cal. 1993) (finding the defendant's expectation of privacy in a seized pager was analogous to the privacy right a person has in a closed container but still denying the motion to suppress because it was a valid search incident to arrest).

The facts of United States v. Barth are strikingly similar to the facts at issue in the case at hand. In Barth, the defendant was having difficulty with his computer so he sent it to a self-employed computer technician. Barth, 26. F. Supp. 2d at 932. As the technician was opening individual files in search of viruses, he observed a JPEG image which appeared to be child

pornography. Id. The technician was also a confidential informant, and he immediately notified the FBI. Id. The FBI agent told the technician to copy the files on the hard drive onto disks. Id. at 932-33. The technician then took the hard drives to the local police department and informed the police that he had made a copy of the hard drive pursuant to the FBI agent's instructions. Id. at 933. The officers obtained a search warrant to look at the hard drive based on the information obtained by the technician, rather than what they had observed. Id.

The district court in Barth found that while "the protection afforded to a person's computer files and hard drive is not well-defined . . . the Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person's closed containers and closed personal effects." Id. at 936. The court stated that a warrant is generally required to search the contents of a closed container, outside of automobile searches, due to the owner's expectation of privacy in the contents of the container rather than the container itself. Id. Therefore, "by placing data in files in a storage device such as his hard drive, the Court [found] that Defendant manifested a reasonable expectation of privacy in the contents of those files. These files should therefore be afforded the full protection of the warrant requirement." Id. at 936-37. The district court further explained that the defendant did not relinquish his reasonable expectation of privacy in his closed, individual files when he handed the hard drive over to a computer technician. Id. at 937. The district court compared this to a tenant who does not lose his expectation of privacy just because the landlord possesses the key and maintains a limited right to enter the premises for inspection and repair. Id. (citing United States v. Osunegbu, 822 F.2d 472, 478 (5th Cir.1987)).

Likewise, in this case, Mr. Cardwell did not lose his privacy interest in his wife's laptop when she handed it over to Mr. Marsh for the limited purpose of being repaired. Instead, the computer and the pictures and images on the computer were comparable to a closed container as in Barth. The Cardwells used the laptop to store pictures from Christmas and birthday

celebrations once the memory card in their digital camera was full. (App. p. 115, ll. 5-7). By placing these photos onto the laptop hard drive storage, like the plaintiff in Barth, Mr. Cardwell and his wife manifested a reasonable expectation of privacy in the contents of those files. Accordingly, the contents of the laptop computer should be afforded the full protection of the warrant requirement. See id. at 936-37

In its unpublished opinion, the South Carolina Court of Appeals cites United States v. Gardner for the proposition, "[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." United States v. Gardner, 554 F. App'x 165, 167 (4th Cir. 2014). However, the facts of Gardner are strikingly different from the facts in the present case. In Gardner, the court found the incriminating nature of a rifle case to be immediately apparent when it was found "in close proximity to drug paraphernalia." Gardner, 554 Fed.Appx. at 167-68. Based on the two elements of a rifle case and drug paraphernalia, it is reasonable to conclude that the contents of the rifle case could be inferred from its outward appearance. However, the still image of a child in a bra is in no way comparable to a rifle case found in close proximity to drug paraphernalia. Moreover, the contents of the video could not be inferred from the still image. The incriminating nature of this video was not immediately apparent based on the still image and, therefore, the officer should have obtained a warrant prior to playing the video.

Moreover, Commonweatlh v. Sodomosky, 939 A.2d 363 (Pa. Super Ct. 2007), relied upon by the Court of Appeals, is also factually different from this case. In Sodomsky, the court found the incriminating nature of the video files was immediately apparent because the titles assigned to the videos on the computer listed a masculine name, an age of either thirteen-years-old or fourteen-years-old, and a different type of sexual act. Commonwealth, 939 A.2d at 370. Here, no evidence was presented of a descriptive title for the video. Rather, the only description

in the record of the still image was that it showed a child wearing only a pink bra. (App. p. 54, line 19—App. p. 55, line 1). Furthermore, the solicitor's closing statement supports the fact that the incriminating nature of the video was not immediately apparent based on the still image alone:

> 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 . . . .

(App. p. 181, line 24—App. p. 182, line 8).

The case cited by the Court of Appeals, State v. Wright, 391 S.C. 436, 706 S.E.2d 234 (2011) for the proposition "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," is entirely irrelevant. Wright did not concern the search of a laptop computer but, rather, a police sweep of a dog fighting ring. See State v. Wright, 391 S.C. 436, 445-46, 706 S.E.2d 324, 328 (2011) ("While securing the scene, deputies saw in plain view dogfighting paraphernalia, including the dogfighting pit, dog muzzles, drugs, syringes, several injured dogs, and a dog suspension collar. The incriminating nature of this evidence was immediately apparent considering the deputies were there to investigate a tip concerning dogfighting."). Also, State v. Missouri, 361 S.C. 107, 115, 603 S.E.2d 594, 597-98 (2004), which the Court of Appeals cited for the following statement "to claim protection under the Fourth Amendment of the U.S. Constitution, Defendants must show that they have a legitimate expectation of privacy in the place searched," actually supports Petitioner's position. In Missouri, the SC Supreme Court held that the Defendant did in fact have a reasonable expectation of privacy in the apartment that was searched, causing the Court to hold the Defendant who did not live or pay rent for an apartment but visited the home often

"demonstrated a subjective expectation of privacy, and that expectation, [the court held], is one that society is prepared to recognize as reasonable." State v. Missouri, 361 S.C. 107, 115, 603 S.E.2d 594, 597-98 (2004). The cases cited by the Court are factually dissimilar and irrelevant as to whether Petitioner had a reasonable expectation of privacy in the disputed video file.

II. This Court of Appeals erred by disregarding U.S. Supreme Court precedent and holding that the plain view doctrine was applicable and the law enforcement officer was not required to obtain a search warrant prior to viewing the video on the laptop.

Chief Douglas's insistence that Mr. Marsh play the video without first obtaining a warrant was in violation of the Fourth Amendment and does not fall under the plain view exception to warrantless searches. Detective Hanna's subsequent viewing of the illegally seized video was also in violation of the Fourth Amendment as no exception to the warrant requirement was applicable. Under the plain view doctrine, objects which are in the "plain view" of a law enforcement officer who is rightfully in a position to view the objects may be seized without a warrant. State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). "[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Id. The incriminating nature of the evidence was not immediately apparent to Chief Douglas or Detective Hannah. Both had the duty to obtain a search warrant before viewing the video. Their failure to do so violates the Fourth Amendment, and, therefore, Mr. Cardwell's conviction should be reversed.

The Court of Appeals' unpublished decision cites Nix v. Williams, 467 U.S. 431, 444 (1984) for the proposition, "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[,] . . . then the deterrence rationale has so little basis that the evidence should be received." Ultimately, the U.S. Supreme Court held "when . . . the 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." Nix v. Williams, 467 U.S. at 448. 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 opening the file without a search warrant.

The Court of Appeals incorrectly relied on Blair v. United States, 665 F.2d 500, 507 (4th Cir. 1981) and State v. Wright, for the applicability of the plain view doctrine to this case. The video and the contents of the video were not in plain view. Moreover, the still image did not proclaim its contents by its distinctive configuration and allow by its outward appearance an inference to be made of its contents. See Blair v. United States, 665 F.2d 500, 507 (4th Cir. 1981) ("First, if the container is open and its contents exposed, its contents can be said to be in plain view. Second, if a container proclaims its contents by its distinctive configuration or otherwise and thus allows by its outward appearance an inference to be made of its contents, those contents are similarly considered to be in plain view." (citation omitted)); Wright, 391 S.C. at 443, 706 S.E.2d at 327 ("[O]bjects 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." There was no indication by the still image of a child wearing a bra of the contents or nature of the video.

In Walter v. United States, 447 U.S. 649 (1980), the Supreme Court stated that FBI agents were required to obtain a search warrant before they may screen obscene films that had been delivered to the wrong recipients. In Walter, twelve large, securely sealed packages of film depicting obscene activity were mistakenly delivered to the wrong recipient. Walter, 447 U.S. at 651. Employees of the mistaken recipient opened the box and unsuccessfully attempted to view the film by holding it up to the light. Id. at 652. The employees called the FBI who picked up

the packages and, without obtaining a warrant, viewed the films with a projector. Id. The Supreme Court found the following:

> Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding 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. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

Id. at 654. The Court also found that the fact that a private party had already opened the boxes before they were acquired by the FBI did not excuse the failure to obtain a search warrant. Id. at 655.

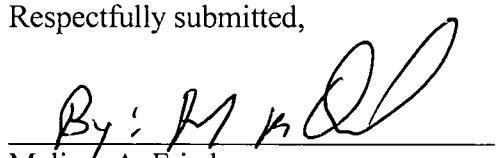
In this case, like in Walter, the incriminating nature of the computer file was not immediately apparent when Chief Douglas saw the image of Minor Child 1 flash across the laptop at Mr. Marsh's residence. Chief Douglas asked Mr. Marsh to manipulate the slideshow back to the image he saw go across the screen of the laptop when Mr. Marsh left the room. (App. p. 54, ll. 1-3). Upon seeing the image, Chief Douglas could have—and *should have*—obtained a search warrant before clicking the play button at the top of the image, but instead he directed Mr. Marsh to play the video (App. p. 55, ll. 8-11). Similar to the facts of Walter, the image Chief Douglas saw, while questionable, was not the video in its entirety. Instead, the image was a means of locating the video, or, like in Walter, similar to a label or description of the explicit video. Additionally, just as Chief Douglas had the duty to obtain a search warrant before asking Mr. Marsh to play the video, Detective Hanna, who only was told what was on the video and knew no search warrant had been issued, also had a duty to obtain a search warrant prior to watching the video. Their failure to do so was in violation of the Fourth Amendment, and as a result, the trial court should have applied the exclusionary rule to suppress the video evidence.

Moreover, the plain view doctrine does not excuse the warrantless search because that doctrine applies only to the *seizure* of evidence by law enforcement, not a *search* for evidence. See State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004) ("Under the plain view doctrine, any object falling within the plain view of a law enforcement officer who is lawfully in a position to view the object is subject to lawful seizure."); In re Thomas B.D., 326 S.C. 614, 620, 486 S.E.2d 498, 501 (Ct. App. 1997) (finding cigarette pack was in plain view when it was seized and therefore was lawful); State v. Brown, 289 S.C. 581, 588, 347 S.E.2d 882, 886 (1986) (stating "objects falling within the plain view of a law enforcement officer who is rightfully in position to view these objects are subject to seizure and may be introduced in evidence," and finding "[t]he plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."). Here, Chief Douglas did not seize the laptop, rather he performed a search of the video as soon as he saw the image flash across the laptop by directing Mr. Marsh to play the video for him. This type of search does not fall within the parameters of the plain view doctrine. Had Chief Douglas seized the laptop computer while waiting for a search warrant to be issued, then the plain view doctrine would more likely be applicable. However, the facts of this case do not warrant the exception. Both Chief Douglas and Detective Hanna's failure to obtain a search warrant before viewing the video violates the Fourth Amendment.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Court reverse the South Carolina Court of Appeals' decision and grant a new trial.

Respectfully submitted,



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This the 10th day of October, 2016.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2015-002394

THE STATE, RESPONDENT,

V.

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PETITIONER.

CERTIFICATE OF SERVICE

I will certify that true copy of the Brief of Petitioner in the above-referenced case has been served upon William Blitch, Jr., Esquire, Assistant Attorney General at S.C. Attorney General's Office, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of October, 2016.

SUBSCRIED and SWORN TO before me
This 10th day of October, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.