

STATE OF SOUTH CAROLINA
In the Court of Appeals

PENDING IN RICHLAND COUNTY
Court of General Sessions

Indictment Nos. 2014GS4005760, -5761, -5762, -5763
2015GS4004641, -4642

RECEIVED
OCT 24 2017
SC Court of Appeals

State of South Carolina. Respondent.

v.

Caleb Blocker..... Movant.

MEMORANDUM SUPPORTING MOTION TO SUPPRESS

Caleb Blocker ("Blocker"), the defendant in the above-referenced matter, hereby moves before this Honorable Court, in its Original Jurisdiction, pursuant to South Carolina Code Annotated Section 17-30-110, and *State v. Whitner*, 732 S.E.2d 861, 863 (S.C. 2012) and *State v. Rosier*, 2013-002259, 2015 WL 3536564 (S.C. Ct. App., June 3, 2015), for an Order suppressing intercepted jail calls. As evidenced by the attached Exhibit A, on or about May 16, 2016, a CD was presented to counsel for Blocker which, for the first time, revealed that telephone calls were intercepted. Pursuant to South Carolina Code Annotated Section 17-30-110(A):

Prior to any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority, any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the:

(1) communication was unlawfully intercepted;

- (2) order of authorization or approval under which it was intercepted is insufficient on its face; or
- (3) interception was not made in conformity with the order of authorization or approval.

The South Carolina Supreme Court has outlined in *State v. Whitner, supra*, that this Court has exclusive jurisdiction to entertain such motions, and that the trial court has no jurisdiction. As such, Blocker respectfully moves before this Honorable Court for an Order suppressing these calls, and otherwise prohibiting their admission into evidence during the trial of this case.

THE HOMELAND SECURITY ACT

Pursuant to the Homeland Security Act (the "Act"), South Carolina Code Annotated Section 17-30-10 to Section 17-30-145, the interception of wire, electronic, or oral communications is authorized only in the manner permitted by the Act. *See* S.C. Code Ann. 17-30-10. It is lawful under the Act for a person to:

- (1) intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;
- (2) intercept any radio communication which is transmitted by:
 - (a) any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
 - (b) any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including any police or fire communications system, readily accessible to the general public;
 - (c) a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or
 - (d) any marine or aeronautical communications system;
- (3) engage in conduct which is:
 - (a) prohibited by Section 633 of the Communications Act of 1934; or
 - (b) excepted from the application of Section 705(a) of the Communications Act of 1934 and by Section 705(b) of that act;

(4) intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station of consumer electronic equipment to the extent necessary to identify the source of the interference;

(5) intercept, if the person is another user of the same frequency, any radio communication that is not scrambled or encrypted made through a system that utilizes frequencies monitored by individuals engaged in the provision of the use of the system;

(6) intercept a satellite transmission that is not scrambled or encrypted and that is transmitted:

(a) to a broadcasting station for purposes of retransmission to the general public; or

(b) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, when the interception is not for the purposes of direct or indirect commercial advantage or private financial gain; or

(7) intercept and privately view a private satellite video communication that is not scrambled or encrypted or to intercept a radio communication that is transmitted on frequencies allocated under Subpart D of Part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, if the interception is not for an unlawful purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(B) It is lawful under this chapter for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

S.C. Code Ann. § 17-30-35.

None of the foregoing apply in this instance, and thus an Order was required to intercept the calls.

See S.C. Code Ann. § 17-30-70. No evidence of any such Order, or application for such Order has been produced.

Additionally,

(A) It is lawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public must not utilize service observing or random monitoring except for mechanical or service quality control checks.

(B) Notwithstanding any other provision of law, a provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person may provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if the provider, or an officer, employee, or agent thereof, or landlord, custodian, or other person, has been provided with:

(1) a court order directing such assistance signed by the authorizing judge; or

(2) a certification in writing by a person specified in Section 17-30-95 that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required.

(C) A provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person must not disclose the existence of any interception or the device used to accomplish the interception with respect to which the person has been furnished an order under this chapter, except as may otherwise be required by legal process and then only after prior notice to the Attorney General or his Assistant Attorney General. Any such disclosure renders the person liable for the civil damages provided under Section 17-30-135, and the person may be prosecuted. An action shall not be brought against a provider

of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person for providing information, facilities, or assistance in accordance with the terms of a court order under this chapter.

S.C. Code Ann. § 17-30-25.

Thus, even if the facility at which Blocker was housed was authorized to intercept the calls, which is not acknowledged, the facility could not disclose the intercepted calls absent compliance with South Carolina Code Annotated Section 17-30-25(B), which was not done.

Stressing the importance of this prohibition of unlawful interception, the Act goes so far as to criminalize the interception and disclosure of such communication.

Except as otherwise specifically provided in this chapter, a person who commits any of the following acts is guilty of a felony and, upon conviction, must be punished as provided in Section 17-30-50 of this chapter:

- (1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication;
- (2) intentionally uses, attempts to use, or procures any other person to use or attempt to use any electronic, mechanical, or other device to intercept any oral communication when:
 - (a) the device is affixed to or otherwise transmits a signal through a wire, cable, or other like connection used in wire communication; or
 - (b) the device transmits communications by radio or interferes with the transmission of the communication;
- (3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
- (4) intentionally uses or attempts to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the

information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection:

(5) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by Section 17-30-70 or Section 17-30-95 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation and the disclosure is not otherwise authorized under this chapter; or

(6) intentionally uses, attempts to use, or procures any other person to use any electronic, mechanical, or other device or service that causes the telephone network to display a telephone number on a phone call recipient's caller identification display that is not the number of the originating device. This provision shall not apply to:

(a) the legitimate law enforcement use of this procedure by the South Carolina Law Enforcement Division;

(b) a person or entity that places a call and blocks or otherwise prevents the delivery of a telephone number to a call recipient's caller identification display;

(c) a person or entity that places an authorized call on behalf of another person or entity and inserts a telephone number identified with the person or entity on behalf of whom the call is being placed; or

(d) a communications service provider that delivers a call originated by another person or entity.

S.C. Code Ann. § 17-30-20.

"Whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the State, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for

criminal interception in violation of the provisions of this chapter.” *See* S.C. Code Ann. § 17-30-65. Even if an Order had been issued in this case, the Act requires that “[w]ithin a reasonable time but not later than ninety days after the termination of the period of an order or extensions of the order, the issuing or denying judge must cause to be served on the persons named in the order or the application, and those other parties to intercepted communications as the judge may determine in his discretion to be in the interest of justice, an inventory which must include notice of the:

- (1) fact of the entry of the order or the application;
- (2) date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and
- (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, must make available to the person or the person’s counsel for inspection the portions of the intercepted communications, applications, testimony, recordings, and orders that would otherwise be discoverable under the South Carolina Rules of Evidence, unless otherwise provided by federal law or Rules of Court. On an *ex parte* showing of good cause to a judge of competent jurisdiction, the serving of the inventory required by this paragraph may be postponed.” S.C. Code Ann. § 17-30-100(E). No such disclosure has been made. Similarly,

As required by federal law, the contents of any intercepted wire, oral, or electronic communication or evidence derived therefrom must not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding unless each party, not less than ten days before the hearing or proceeding and not less than thirty days prior to trial, has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved. These time periods may be waived by the judge if the judge finds that it was not possible to furnish the party with the above information within the specified time periods before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving the information. In determining prejudice, the judge must specifically consider the complexity of the case, the duration of the recordings, and the party’s need to retain experts to review the material and

must also take these factors into consideration when deciding a motion for continuance made by a party furnished with these materials after the time periods set out above. Upon filing of a motion by an aggrieved person, the judge must make available to the aggrieved person or his counsel for inspection the portions of the intercepted communication or evidence derived therefrom that would be otherwise discoverable under South Carolina law.

S.C. Code Ann. § 17-30-105.

This likewise was not done, and the contents of the intercepted calls was not furnished within the 30 day window noted in this Section.

Based upon the foregoing, Blocker respectfully requests this Court suppress the subject calls as being intercepted in violation of the Act. Furthermore, Blocker would request this Court Order the State to produce, pursuant to South Carolina Code Annotated Section 17-30-110(A), copies of any and all Orders or Applications submitted pursuant to the Act, as well as any and all disclosures to the Administrative Office of the United States Courts which were made pursuant to South Carolina Code Annotated Section 17-30-130 and 18 United States Code Section 2519. Thereafter, Blocker would respectfully request a hearing to confirm the multiple violations of the Act by the State, and further requests that said intercepted calls be precluded from admission in evidence in the above-captioned matter.

May 27, 2016

Respectfully Submitted,



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Attorneys for Caleb Blocker

EXHIBIT A

DISCOVERY CHECKLIST
State v. CALEB BLOCKER

1. Jail Phone Calls – On Disc

Assistant Solicitor Joanna McDuffie #154
Prepared by Dana M. Outen, Paralegal 05/13/16
Receiving Attorney: Overture Walker, Esq.
Please Sign & Date: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below she served the following respondent(s) in this action with a copy of the *Motion to Suppress* and *Memorandum in Support of Motion to Suppress* via United States Mail with first class postage prepaid to the following address(es):

Joanna A. McDuffie
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May 27, 2016



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May 27, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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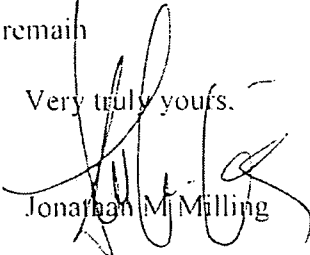
RE: State of South Carolina v. Caleb Blocker
Indictment Nos. 2014GS4005760, -5761, -5762, -5763, 2015GS4004641,
-4642

Dear Clerk Kitchings:

Enclosed please find one (1) original and one (1) copy of the Motion to Suppress, Memorandum Supporting Motion to Suppress and Certificate of Service to be filed in the above referenced matter. Please file the original and return the clocked copy to me in the enclosed, self-addressed, stamped envelope. Should you have any questions, please do not hesitate to contact me.

With kind regards, I remain

Very truly yours,


Jonathan M. Milling

Cc: Joanna A. McDuffie
The Honorable Clifton Newman