STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-002360

The State, Respondent,

v.

Lamar Sequan Brown, Petitioner.

State v. Brown, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

On November 13, 2012, Petitioner was indicted for First-Degree Burglary (2012-GS-10-7545). He was tried before a jury on March 6-8, 2013, with the Honorable J.C. Nicholson, Jr., presiding. [R. 1.] On March 8, the jury returned a verdict of guilty, and Petitioner was sentenced to 18 years in prison. [R. 372, 387.] On March 14, 2013, Petitioner filed a motion for a new trial, which was denied without a hearing on March 22, 2013. [R. 390-393].

Petitioner filed and served Notice of Appeal. After briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence on September 23, 2015. Petitioner filed a Petition for Rehearing which was denied on October 19, 2015. Petitioner served his Petition for Writ of Certiorari on November 30, 2015, and the State served and filed a Return on December 18, 2015. This Court granted the Petition for Writ of Certiorari on August 8, 2017. Petitioner served and filed his Brief of Petitioner on September 7, 2017. This Brief of Respondent follows.

Factual Background

On December 22, 2011, Richard Poole returned to the condominium he shared with two other roommates to open Christmas presents with his girlfriend. [R. 101-103]. When he came home, he heard a strange phone ringing in his bedroom. [R. 103; 114]. After it rang several times, Poole got up and investigated the bedroom. He discovered his window had been smashed, his television was gone, all of the drawers had been pulled out and searched, and three laptops were missing. [R. 104; 106; 155]. Poole also found an older red T-Mobile phone lying on the bedroom floor. [R. 105]. No one knew to whom the phone belonged. [R. 104].

When the police arrived fifteen minutes later, Poole showed them the phone. [R. 105; 123]. No other evidence was found at the scene of the crime. [R. 38; 143-147; 158-159; 167]. The phone was taken to the police department, where it was held in evidence until December 28, 2011, when Detective Jordan Lester opened the cell phone without a warrant. [R. 34; 123-125, 235-237]. The phone was password protected, but unlocked when Lester typed in "1234." [R. 34; 289; 307] After guessing the password, Lester noted that the background picture on the phone was of a black male with dreadlocks. [Id.; 343] He accessed the contacts list and identified a number that appeared to belong to the owner's grandmother. [R. 34; 238]. After collecting these two pieces of information, Lester closed the phone and entered "Grandma's" number into the Accurint system. The Accurint system provided Lester with a list of relatives, associates, and neighbors. The system also lists birthdates and names, which he used to narrow down the list to possible matches to the photograph background on the phone. He then took the names and birthdates into the SCDMV database to pull driver's license photos. [R. 34-36; 238-239]. Lester determined that the phone belonged to Petitioner. [R. 34-41;239.] Petitioner was located less than a half mile from Poole's condominium. [R. 241].

On the same day, another police officer contacted Petitioner and took his statement. [R. 405]. When questioned, Petitioner admitted the cell phone belonged to him but claimed he was going to the store in a car, and the cell phone must have fallen out somewhere because when he returned to the car it was missing. [R. 181, 405]. Petitioner also claimed he had turned off the phone in December before talking to the police. [R. 182,405]. Petitioner claimed this incident occurred on December 23, one day after the burglary. [R. 182.] However, the cell phone was

found at the scene of the burglary one day before Petitioner claimed to have lost it, and Petitioner did not turn his phone off until January 22, 2012. [R. 207]

Thereafter, Detective Lester applied for and received a search warrant for the phone records from T-Mobile on November 5, 2012. [R. 399]. As a result of the search warrant, he received call logs, contact information, and other information regarding the cell phone found at the scene. (State's Exhibits 12-14).

During a pretrial suppression hearing, the trial court heard argument on the issue of whether Petitioner's Fourth Amendment expectation of privacy in his cell phone had been violated. [R. 9-50, 74-90]. Both parties fully litigated the issue, and the trial court ultimately concluded that, while Petitioner had a reasonable expectation of privacy in the cell phone based upon the password, he lost that right by discarding the phone at the scene of the burglary and making no efforts to retrieve the phone. [R, 89-90]. Petitioner renewed his objections when later data obtained from the cell phone or cell phone records were introduced. [R. 124, 206, 226; 390].

The State introduced testimony from Poole, Detective Lester, as well as the crime scene technician and a T-Mobile employee, who testified about the phone records. The State also presented Van Horn, a forensic analyst who testified about the phone records. At the conclusion of trial, Petitioner chose not to testify, and did not put on a defense. He was convicted and sentenced to 18 years in prison. Afterwards, Petitioner made a motion for a new trial in which he renewed the Fourth Amendment objections he had made at trial. [R. 390.]

ARGUMENT

I. The trial court properly denied the motion to suppress evidence of Petitioner's identity found through a warrantless search of Petitioner's abandoned cell phone located at the scene of a burglary. Further, Petitioner waived any argument regarding the privacy established by his perfunctory code protection. Finally, the information found through the warrantless search could still be properly obtained today, and was obtained, through a properly issued search warrant. Therefore, there is no basis to suppress the evidence.

The trial court properly denied Petitioner's motion to suppress the information obtained through the warrantless search of Petitioner's abandoned cell phone found at the scene of a burglary. Initially, the intrusion into the cell phone's data in an attempt to determine the owner of the cell phone was a reasonable intrusion and did not implicate the Fourth Amendment's protection against unreasonable searches. Even if the Fourth Amendment is triggered, the warrantless search was made pursuant to an exception to the warrant requirement of the Fourth Amendment because the cell phone and its contents were abandoned by Petitioner when he left the phone at the site of a burglary and made no attempt to locate or reclaim the phone. Additionally, any argument regarding the expectation of privacy resulting from Petitioner placing a perfunctory pass code on the phone was waived by Petitioner's counsel during arguments. Further, the use of a pass code does not prevent the warrantless search of property in which a person has abandoned any expectation of privacy. Finally, even if the identity of the owner of the phone was obtained unconstitutionally in the warrantless search, the identity was obtained through the independent source of the records obtained through the search warrant that was issued for the phone and would have been, and still can be, inevitably discovered through a search warrant based on the probable cause that undoubtedly existed at the time Detective Lester searched the phone.

Standard of Review

"'On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.'" State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, [the appellate] court is bound by the circuit court's factual findings if any evidence supports the findings."). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling." Id. "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court reviews questions of law *de novo*." State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017) (quoting Adams, 409 S.C. at 647, 763 S.E.2d at 344).

Law and Analysis

"The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, ..." U.S. Const. amend. IV (emphasis added). This guarantee protects against unreasonable searches and seizures. "The touchstone of the Fourth Amendment is **reasonableness**." Florida v. Jimeno, 500 U.S. 248, 250 (1991) (emphasis added).[1]

[1] The analysis that follows for determination under the Fourth Amendment should be the same under the South Carolina Constitution. The South Carolina Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." S.C. Const. Art. I §10. While the South Carolina Constitution contains the "invasions of

When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant has the burden of showing a legitimate expectation of privacy in the area searched. See United States v. Rusher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his "own rights" have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). "Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).

Thus,

> in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n. 12 (1978)).

Identification of Owner

First, the search by Detective Lester to determine ownership of the phone which was found abandoned at the site of a burglary and turned over by the residents of the house was

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privacy" language, it still conditions violations on a ground of unreasonableness. As will be discussed, the State submits the actions by Detective Lester were entirely reasonable and should be affirmed under both the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution.

entirely reasonable and so it does not implicate the warrant requirements of the Fourth Amendment. "When containers have been turned over to the police, an officer 'may validly search lost property to the extent necessary for identification purposes.'" United States v. Wilson, 984 F. Supp. 2d 676, 683 (E.D. Ky. 2013) (quoting State v. Ching, 678 P.2d 1088, 1093 (Haw. 1984)). In Wilson, officers searched a suitcase containing the personal effects and electronics of the defendant in order to identify ownership. Id. at 681. The district court found officers acted reasonably in searching a suitcase for identification of the owner when the suitcase was found in the woods and turned over to them. Id. at 683.

As the California Court of Appeals, First District, explained in an analogous situation in which the Court found no Fourth Amendment violation in searching a jacket for identification:

> An individual who places a jacket at an empty table in a restaurant must reasonably expect that the coat will be touched or handled by either an employee or by a member of the public who wishes to clean up or sit at the table. Indeed, an individual who leaves behind an article of clothing at a public place most likely hopes that some Good Samaritan will pick up the garment and search for identification in order to return it to the rightful owner.

People v. Juan, 175 Cal. App. 3d 1064, 1069, 221 Cal. Rptr. 338 (Ct. App. 1985). The same consideration would apply to a cell phone left behind in someone's home—probably even more so given the fact the cell phone should not have been in the home at all.

Very recently, the Ohio Supreme Court considered the reasonableness of searching unattended book bags on a school bus. The Court found even if someone retained an expectation of privacy in a lost item, that expectation was "diminished to the extent that the finder may examine the contents of that item as necessary to determine the rightful owner." State v. Polk, 78 N.E.3d 834, 843 (Ohio 2017) (citing State v. Hamilton, 2003 MT 71, 314 Mont. 507, 67 P.3d 871; accord Ching, at 110, 678 P.2d 1088; State v. Kealey, 80 Wash. App. 162, 173, 907 P.2d

319 (1995)); see also, U.S. v. Sumlin, 909 F.2d 1218, 1220 (8th Cir.1990) (holding officer's search of defendant's stolen property for the purpose of identifying ownership was a "legitimate governmental interest" that outweighed defendant's reasonable expectation of privacy in that property); Chrispen v. Sec'y, Florida Dep't of Corr., 246 F. App'x 599, 602 (11th Cir. 2007) (finding either briefcase left on trunk of third-party's automobile was abandoned or the search by officers of the briefcase "constituted a reasonable inventory-like administrative search conducted for the purpose of identifying the seemingly abandoned briefcase's owner"); Wayne R. LaFave, 3 Search & Seizure § 5.5(d) (5th ed.) (2016 Supp.) ("Similarly, there is authority that police may inventory effects which they find apparently abandoned or which are turned over to them by persons who found them or who by mistake took or received possession of them. Even if such full inventory authority is not granted, courts recognize a police obligation to undertake to find the owner of property they find or which a finder turns over to them, and on this basis an examination of contents is permissible but only to the extent needed to discover the owner's identification.") (footnotes omitted).

Detective Lester, in his initial warrantless search of the phone, did not search through the entirety of the contents of the phone. He indicated his sole intention was to determine ownership of the phone and set about in the least intrusive means of establishing ownership by trying to find contacts which would lead him to the owner's information. It is difficult to imagine how police would obtain owner information from an unidentified cell phone in a less intrusive way than what occurred here. Most phones do not have their numbers emblazoned across the startup-screen; therefore, some investigation was necessary to determine the identity of the owner. Finding the identity of the owner of a lost item, whether a wallet, a briefcase, or a cell phone should be a reasonable endeavor by law enforcement. Anyone that has lost an item would hope

that a Good Samaritan or law enforcement would undertake to find its rightful owner so that it can be returned. The determination should not be different because the person who lost the item is a criminal hoping not to be found instead of an average citizen hoping for the return of the lost item. The investigation undertaken by Detective Lester was entirely reasonable and not in violation of the Fourth Amendment.

Abandonment

Consistent with Katz, the United States Supreme Court has uniformly held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a reasonable expectation of privacy that has been invaded by government action. U.S. v. Knotts, 460 U.S. 276 (1983), citing Smith v. Maryland, 442 U.S. 735 (1979). The reasonable expectation of privacy inquiry involves two discrete questions: First, whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy." Knotts at 281 (citations omitted). Second, whether the individual's expectation, viewed objectively, is one society is prepared to recognize as reasonable under the circumstances. Id.

It is the "basic rule that '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.'" Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz, 389 U.S. at 357). As this Court has explained:

> The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.' " "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." Because "[e]xclusion exacts a heavy toll on both the

> judicial system and society at large," the Court has stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate.

State v. Brown, 401 S.C. 82, 88–89, 736 S.E.2d 263, 266 (2012) (citing and quoting Davis v. United States, 564 U.S. 229 (2011)). However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). This Court has "recognized the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing Fernandez v. State, 306 S.C. 264, 411 S.E.2d 426 (1991)).

"Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." Id. (citing California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988)). "When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it." United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005) (citing United States v. Leshuk, 65 F.3d 1105, 1111 (4th Cir.1995)); see also Abel v. United States, 362 U.S. 217, 241 (1960) ("There can be nothing unlawful in the Government's appropriation of ... abandoned property"). "Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent." Friedman v. United States, 347 F.2d 697, 704 (8th Cir.1965). "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." United States v. Hoey, 983 F.2d 890, 892, 1993 WL 3973 (8th Cir. 1993). "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and

other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered." United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973).

"[T]he proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the [property] alleged to be abandoned." United States v. Haynie, 637 F.2d 227, 237 (4th Cir.1980) (internal quotation marks and citation omitted). This Court thoroughly explained the determination of abandoned property, indicating a very clear distinction between abandoned property in a property-law sense and abandoned property in a Fourth Amendment sense:

> The 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.

Dupree, 319 S.C. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 370–71 (1975)).

The trial court paid significant attention to this issue—over fifty pages of the record are devoted exclusively to the Fourth Amendment analysis. [R. 9-50, 74-90.] The trial court held the pivotal question was whether the reasonable expectation of privacy in the phone had been extinguished when Petitioner discarded the phone by leaving it behind in the residence he

burglarized. Id. Further, the trial court found that, while Petitioner did have a reasonable expectation of privacy in the phone **before** the phone was discarded, he lost that expectation by discarding the phone. [R. 74; 89-90].

Petitioner's phone was left in a burglarized apartment, an apartment he had no right to be in. Petitioner argued at trial that the intent to abandon the property is less clear here, and that, according to property law, the property had not been "abandoned," merely "lost." [R. 47-49]. The only way this case varies from the Dupree test is the phone was not found in a public place, but instead in someone else's private residence. If anything, this strengthens the argument that the property was abandoned: Petitioner had no right to be in the victim's home in the first place and made absolutely no effort to return to claim the phone. The police presence was lawful and Petitioner's cell phone was discarded in another person's private residence. There is no indication on the record that Petitioner knew the victim, or that Petitioner had been a guest at the time, such that he could have merely "lost" or accidentally left his phone. Instead, the cell phone was discarded by Petitioner fleeing the scene of the crime.

Further, Petitioner failed to make any effort to reclaim the phone between December 22, when he left the phone in the residence, and December 28, when Detective Lester searched the phone. In those five days, Petitioner never went back to the location where the phone was lost, reported it lost, sought to have it turned off by the cellular carrier, or even called the phone to see who might have found it. Petitioner took no further action regarding the cell phone even after being contacted by police regarding the whereabouts of the phone until January 22, 2012, when he finally turned off the phone. [R. 207]. His actions clearly exemplify an intent to abandon his expectation of privacy in the phone. His actions are those of someone who does not care who finds the phone, or what they do with the phone; otherwise he would have taken some action to

retrieve the cell phone. As far as Petitioner was concerned, especially as expressed by his actions, the cell phone was "*bona vacantia*." See Abel, 362 U.S. at 241. As the trial court found, this case squarely fits within the definition of abandonment of a reasonable expectation of privacy as provided by Dupree and Petitioner cannot now claim any protection under the Fourth Amendment. [R. 89.]. See also, United States v. Sanders, 130 F.3d 1316, 1318 (8th Cir. 1997) ("The Fourth Amendment only protects privacy. It does not immunize people who, finding themselves in a compromising situation, voluntarily trade their interest in privacy for a chance to escape incrimination, no matter how unwise the decision may seem in retrospect.").

It is entirely unreasonable for someone to discard a cell phone and not expect the person who finds it to go through the content of the phone, whether that person is an individual just looking to see who owns the phone, someone looking to see if there are pictures or other information on the phone which can be exploited for nefarious gain, or the police looking to determine the owner who left it at the scene of a burglary. It is entirely unreasonable to believe the content of that phone will not be examined when you do nothing to turn off service to the phone or prevent the accessibility of the content. See e.g., United States v. Powell, 732 F.3d 361, 374 (5th Cir. 2013) ("As a consequence of her statements abandoning the cell phone, she lacks standing to challenge the admissibility of the phone **and the records contained therein.**") (emphasis added).

Petitioner claims he retained his privacy interest in the digital content of the cell phone, and the United States Supreme Court case of Riley v. California, 134 S.Ct. 2473 (2014), should be read to hold his privacy right to the digital content cannot be abandoned because of its significant difference from other physical items, such as purses or suitcases. Petitioner ignores the key distinction between this case and Riley, which is the expectation of privacy and its

continued assertion in a phone seized subject to an arrest, versus a phone which was entirely abandoned with no intent of reclaiming the physical phone or any digital content contained on it.

In Riley, the United States Supreme Court discussed the significant privacy interests associated with today's cell phones. The Court explained cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Riley, 134 S. Ct. at 2484. The Court explained the difference between a physical object and what it can carry versus a cell phone and the vast digital data it contains: "many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Id. at 2489.

However, Riley does not establish special rules or exceptions to the exceptions for cell phones. Instead it recognized that the privacy concerns of cell phones were analyzed under the already existing framework for Fourth Amendment analysis and no need for special consideration was present. Riley analyzed a search of a cell phone incident to an arrest under the same balancing test used to originally establish the exception. It considered the two prong basis for the exception: law enforcement's need for officer safety and the preservation of evidence. The Court found neither factor justified the invasion of privacy present in a search incident to arrest. The Court specifically stated: "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." Id. at 2485. The Court concluded other possible exceptions could still apply to better serve officer safety under a specific set of circumstances:

> Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board.

> To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.

Id. at 2486.

The Court then went on to examine the second prong, the need to preserve evidence. The Court recognized the need to seize the phones in order to prevent the arrestee from being able to destroy any evidence on the phone. However, the Court found: "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." Id. Again, the Court indicated other exceptions may be considered in preventing data loss under certain circumstances:

> If "the police are truly confronted with a 'now or never' situation,"—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. Such a preventive measure could be analyzed under the principles set forth in our decision in McArthur, 531 U.S. 326, 121 S.Ct. 946, which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant.

Id. at 2487-2488.

Notwithstanding the extensive discussion of the search incident to arrest and the privacy concerns implicated in the search of the data of a cell phone, the Court specifically recognized: "Our holding, of course, is **not** that the information on a cell phone is immune from search; it is instead that a warrant is **generally** required before such a search . . . ." Id. at 2493 (emphasis added). The Court articulated: "Moreover, even though the search incident to arrest exception does not apply to cell phones, **other case-specific exceptions may still justify a warrantless search** of a particular phone." Id. at 2494 (emphasis added).

One such exception should be the abandonment exception. Unlike in the case of a cell phone in a person's pocket in which the person still maintains a clear expectation of privacy, even upon arrest, abandonment of a cell phone evidences no expectation of privacy. As discussed above, the person discarding a cell phone—whether by throwing it away or by failing to make any attempt to find and recover it for days—has expressed a lack of an expectation of privacy which clearly distinguishes the analysis from that of the search incident to arrest. As the Supreme Court of Washington explained in a case very similar to the one at hand and decided after Riley:

> Neither Riley nor Hinton [a case involving Washington's invasion of private affairs provision of the state's constitution] can be read for the proposition that the abandonment doctrine should not apply to cell phones or should be limited in its application to cell phones. The Riley holding that cell phones may not be searched incident to arrest without a warrant was based on the fact that such cell phone searches do not fall into the particular justifications for the search incident to arrest exception. . . . But in this case and for the abandonment doctrine, there has been no advancement in technology to cause one to abandon property in stolen vehicles while attempting to flee from police [or in this case abandon a cell phone in an apartment the person just burglarized]. Moreover, the rationale driving the abandonment doctrine fits cell phone searches. When an individual voluntarily abandons an item, not as a facet of modern communication but to elude the police, that individual voluntarily exposes that item—and all information that it may contain—to anyone who may come across it. Cell phones are no different in this respect than for any other item; the abandonment doctrine applies to all personal property equally.

State v. Samalia, 375 P.3d 1082, 1089 (2016).

Petitioner also asks this Court to consider the case of People v. Schutter, 249 P.3d 1123 (Colo. 2011), and similarly find Detective Lester was not entitled to search the phone in this case for evidence of its owner. The facts of Schutter demonstrate the extensive difference between a case in which someone has clearly not abandoned their expectation of privacy in a phone and this

case where all of Petitioner's actions demonstrate a clear lack of assertion of his rights. In Schutter, the defendant left their phone in a restroom of a store. The defendant, upon realizing it was left, made an immediate demand for its return, which was denied by the clerk because he was too busy to unlock the restroom. Schutter, 249 P.3d at 1126. The defendant was told he would have to come back later to retrieve the phone. Prior to the defendant's return, and officer entered the store and was given the phone. As the Court explained:

> Whether or not he knew the defendant's name, Officer Burg was aware from the moment the iPhone came into his possession that the defendant inadvertently left it in the store's locked restroom and knew precisely where it was; that his immediate demand for its return had been refused by the store clerk, who controlled access to the restroom; and that he left the area only when he was told by the clerk that he would have to come back later to retrieve his phone.
>
> According to Officer Burg's own undisputed testimony, the store clerk told him all of this when he handed over the phone. Officer Burg also testified that it was 4:20 in the morning, and at that time, the defendant had been gone from the store for at most an hour. Under these circumstances, the officer had no grounds to believe the property's safe return required the discovery of any further information.

Id. These facts are certainly distinguishable from the underlying facts in the case *sub judice* when Petitioner left his phone at the apartment he just burglarized, fled the scene to evade capture and prosecution for the crime, never made an attempt to retrieve the phone, never attempted to secure the phone's privacy by turning off the phone, and did not even attempt to have the phone service ended after learning the phone was in the possession of law enforcement. Schutter demonstrates that under a case by case analysis a person can leave a phone and still maintain their expectation of privacy by demonstrating a desire to reclaim the phone and protect the data on it. Petitioner on the other hand demonstrated no desire to maintain his expectation of privacy and should be found under Dupree to have voluntarily abandoned his expectation of privacy such that he cannot

now have standing to seek to have the evidence found in the search of the phone suppressed. See e.g., Dupree, 319 S.C. at 457, 462 S.E.2d at 281 ("Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment."); Stevenson, 396 F.3d at 546 ("When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it.").

This case is much more similar to the case of United States v. Quashie, 162 F. Supp. 3d 135 (E.D.N.Y. 2016). The District Court explained the facts as follows:

> During the course of the robbery that occurred on July 10, 2009, one of the robbers dropped a cellphone in the apartment where the robbery occurred. A robber attempted to recover the cellphone but was unable to reenter the apartment. A few hours later, the victim found a cellphone in his apartment and called the NYPD, which came and recovered it. The Government has stipulated that an employee of the NYPD went into the telephone and obtained the number without obtaining a warrant. Using this phone number, the police were able to determine that the phone belonged to defendant.

Id. at 140. The Court found: "If defendant's phone was simply abandoned by him at the apartment where the robbery occurred, he has clearly relinquished his expectation of privacy in the property." Id. at 141. The Court further concluded:

> By leaving the phone behind in the apartment, the robbers did not protect the property and did not evince an intent to maintain an expectation of privacy in it. Even if the robbers did not intentionally abandon the phone when they first left the apartment, they returned to the scene of the crime to retrieve it, and found the door locked. At that point, the robbers voluntarily abandoned the phone and left the crime scene, rather than risk getting caught.

Id. The behavior of the robber in Quashie evidenced an even greater desire to protect his privacy interest than Petitioner because he went back for the phone one time. Petitioner never made an attempt to recover the phone after leaving it in the burgled apartment.

The District Court also analyzed the impact of Riley on the determination of whether the phone was abandoned. The Court issued a well-reasoned conclusion:

> [Riley] outlines the standard to be applied to a search of a cellphone incident to arrest. It has nothing to do with an abandoned cellphone or even a stolen cellphone. Although Riley includes language about the vast amount of information contained on cellphones and how the expectations of privacy in the contents of a phone have shifted, any objective expectation of privacy in a cellphone must go hand-in-hand with an individual's demonstration of a subjective expectation of privacy. Whether it was defendant or the robbers who left the phone in the victim's apartment, they gave up that subjective expectation of privacy.

Id. at 141-42. Just as the District Court found, this Court should conclude that by abandoning his expectation of privacy, any analysis under Riley is inapplicable to Petitioner's case.

Petitioner also contends his perfunctory password of "1234" established an expectation of privacy to the digital content of the phone. Even if the password may have provided some evidence of a subjective expectation of privacy it does not establish one in the context of discarded and abandoned property that society should be willing to accept. When someone abandons their possession, whether it is a locked suitcase or a password protected phone, it is unreasonable to believe a person who finds the item will not attempt to open it. In the case of an abandoned phone, Petitioner did nothing to prevent whoever found the phone from typing in pass codes until they found the correct one to have access to the phone. The fact that a police officer ultimately attempted to access the phone does not change the analysis from the situation if it had been just an individual in the residence. Further, the "default" password of "1234" should not be found to demonstrate even a minimal subjective expectation of privacy given how simple it is to access.

Accessing the "locked" phone is no different than accessing other locked items, and when they are abandoned there is no expectation of privacy to protect under the Fourth Amendment

even in the locked item. See, e.g., United States v. Busic, 592 F.2d 13, 22-23 (2d. Cir. 1978) (no reasonable expectation of privacy when defendant left her locked suitcase, an item in which citizens have a high expectation of privacy, in an airplane which she and her associates had illegally hijacked); United States v. Levasseur, 816 F.2d 37, 44 (2d Cir. 1987) (upholding warrantless search of abandoned locked footlocker because defendant had forfeited their reasonable expectation of privacy by abandoning their property prior to the search); United States v. Oswald, 783 F.2d 663, 666-667 (6th Cir. 1986) (holding police action in breaking into a locked suitcase full of cocaine found in a burning car did not violate defendant's Fourth Amendment rights because Petitioner had abandoned the property.).

Additionally, Petitioner waived any argument regarding establishment of an expectation of privacy by virtue of having the phone password protected. At the suppression hearing, Petitioner's counsel stated: "But what [the State] did was go into the contacts and get information on different people that were identified as family members. And we argue that is the information that is entitled to privacy. **Not the number of the phone; that would be minimally intrusive.**" R. 14 (emphasis added). Petitioner's counsel, by his argument to the trial court, admitted Detective Lester could search the data of the phone for some information, i.e., the phone number, and it would not violate the Fourth Amendment. He merely asserted the search for the contacts was not allowable. His argument belies his current argument that any search was prohibited because he had the phone password protected at the time of the search. Because of his concession at trial, he cannot now argue the password established the necessary expectation of privacy. See, e.g., State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (holding an issue conceded at trial may not be argued on appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on

appeal); State v. Rios, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding a defendant could not argue an issue on appeal when the defendant waived appellate review of the issue by conceding it at trial).

This Court should find Petitioner voluntarily abandoned his cell phone and all of its contents when he left it inside the apartment he burglarized, failed to make any attempt to reclaim the phone, and failed to take any steps to prevent access to the phone or its data. As a result, this Court should find he lacked the requisite expectation of privacy to be able to assert a claim for suppression of the evidence obtained through the warrantless search of the phone.

Independent Source

Any evidence seized as the result of an unreasonable search and seizure typically must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the United States Supreme Court held the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. "The holding of Silverthorne was carefully limited, however, for the Court emphasized that such information does not automatically become 'sacred and inaccessible.'" Nix v. Williams, 467 U.S. 431, 441 (1984) (citations omitted). The Court explained: "If knowledge of [such facts] is gained from an independent source, they may be proved like any others . . . ." Silverthorne, 251 U.S. at 392. The Court in Nix further explained: "The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix, 467 U.S. at 443; see also, State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (finding "challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct").

On November 5, 2012, Detective Lester obtained a search warrant for the T-Mobile phone records.[2] In the warrant, Detective Lester swore "[t]hat the victim, Richard Poole, located a red in color Samsung T-Mobile (**Serial # RQ3Z182459W, Model #SGH-T239**, number (843)345-8868) cell phone on his bedroom floor that was left behind." [R.399-403] (emphasis added). The serial number is unique to that specific phone. Even without the provided phone number, T-Mobile could have provided Petitioner's account information to Detective Lester, including his name and phone number based solely on the serial number. This information was provided to the State by T-Mobile, and the State introduced it at trial. [State's Exhibits 12-14; R. 206, 226.].

Petitioner does not contest the propriety of Detective Lester keeping the physical cell phone in evidence after it was turned over by Poole. He only contends the digital content should not have been searched. The serial number and other information necessary for the warrant obtained by Detective Lester were entirely found on the physical phone without resort to the digital content. The cell phone's serial number was obtained wholly independently of the warrantless search and would have been obtained regardless of the complained of search. Petitioner's identity and phone number in this case were lawfully obtained from T-Mobile, an independent source.

Further, the information obtained through this independent source is very similar to the information found properly obtained in the case of People v. Daggs, 133 Cal.App.4th 361, 34 Cal.Rptr.3d 649 (2005), cited by the State during the suppression hearing and the Court of Appeals in the majority opinion. In Daggs the defendant abandoned his cell phone by leaving it

[2] The State acknowledges the information in the Affidavit of the search warrant obtained by Detective Lester which states the identity of the owner of the phone would need to be excised in order to make a proper analysis under the independent source doctrine. The State submits the remaining information, especially the serial number and model number of the phone, would be sufficient to establish probable cause to obtain the phone records related to that phone from T-Mobile.

at the scene of a robbery inside a drug store. Id. at 650. The phone was taken into evidence and remained unclaimed for one week. Id. Law enforcement obtained the serial number and other numbers from the phone by removing the battery. Id. at 650–51. Using these numbers, the detective procured a search warrant to release the subscriber's name, telephone number, and telephone records; however, the detective did not obtain a search warrant before removing the battery. Id. at 651. The information ultimately leads to the discovery of the defendant as the owner of the phone. The Court found the defendant had abandoned any expectation of privacy in the phone and the search was reasonable and not in violation of the Fourth Amendment.

As Petitioner conceded at trial, issuing a warrant for the records of this phone under these circumstances was proper. (R. 16). Accordingly, even if this Court finds the search of the digital content unconstitutional, the evidence need not be excluded because it was obtained from an independent source.

Inevitable Discovery

The inevitable discovery doctrine, similar to the independent source doctrine, has been adopted as an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). Pursuant to that doctrine, if the prosecution can establish by a preponderance of the evidence that information or evidence would inevitably have been discovered by lawful means, then the discovered evidence, even if obtained by unlawful means, should not be excluded during trial. Id. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id. at 446. Thus, while the exclusionary rule is designed to ensure the prosecution will not be placed in a better position than it would have been without an illegal search or some police misconduct, the inevitable discovery doctrine

ensures the prosecution is not placed in a worse position simply because of some earlier police error or misconduct. Id. at 443.

In the instant case, even if this Court were to find the warrant obtained by Detective Lester insufficient or tainted, the information regarding the owner of the cell phone found after the burglary of Poole's apartment could and would be properly obtained. At the time of the initial search, Detective Lester knew a burglary had occurred at the apartment in Charleston and officers responded to the scene. He knew a phone had been located by the victim in the room which was burglarized that did not belong to any of the residents of that apartment, and the phone was turned over to the officers at the scene of the burglary. Those facts alone provide law enforcement sufficient probable cause to obtain a warrant to search the phone for information related to the ownership of the phone. The State demonstrated its intent to obtain a search warrant for the phone because one has already been obtained in this case.

Further, the digital data contained in the phone is not subject to change or degrade over time. So the same data exists today on the phone as existed at the time of the initial search. If the case were remanded for any reason, it is certain the State would obtain a search warrant based on the information known at the time of the warrantless search, thus allowing the State to obtain the same information previously obtained by either the warrantless search or the warrant to T-Mobile. As a result, even if this Court concludes the information regarding the identity of the owner of the phone was improperly obtained, the evidence should not be excluded because the State could still obtain that information today based entirely on probable cause known at the time of the original search. See e.g., State v. Workman, 52 N.E.3d 286, 298 (2015) (finding evidence obtained from a digital memory card admissible under the inevitable discovery doctrine because the same information could be obtained through a later warrant that was obtained

through an impermissible search). Accordingly, this Court should not exclude the evidence regarding ownership of the cell phone because the information would have inevitably been discovered through investigation, and could still to this day be discovered, under the probable cause that existed at the time of the initial warrantless search.

Davis Good Faith

Finally, even if this Court finds the United States Supreme Court's opinion in Riley altered the landscape when it comes to warrantless searches of cell phones that have been abandoned, Detective Lester properly operated under the law existing at the time of the warrantless search in the instant case. As a result, this Court should not apply the exclusionary rule because it would have no deterrent effect of future behavior.

Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. Stone v. Powell, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). "Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." Davis v. United States, 564 U.S. 229, 237 (2011) (citing Stone, 428 U.S. at 490-491). As this Court noted in State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014):

> In Davis v. United States, the United States Supreme Court stated that the exclusionary rule does not apply in cases where "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." The Davis court explained, "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." "But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." This is so because "[a]n officer who conducts a search in reliance on binding appellate precedent does no more than 'ac[t] as a reasonable officer would and should act' under the circumstances."

Adams, 409 S.C. at 650, 763 S.E.2d at 346.

In the instant case, the applicable law regarding abandonment made no distinction in the type of property abandoned and merely indicated if the property was reasonable deemed abandoned by an officer, then he could search that property without a warrant. See e.g., Abel, 362 U.S. at 241 (Finding items left behind in a wastebasket in a vacated motel room were abandoned and holding: "There can be nothing unlawful in the Government's appropriation of ... abandoned property"); United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005) (finding the search of a vacated apartment to be proper based on the fact the defendant abandoned his expectation of privacy when he vacated); Dupree, 319 S.C. at 457, 462 S.E.2d at 281. It is well settled that "[t]here is no reasonable expectation of privacy in containers or contraband dropped or abandoned by a suspect fleeing from law enforcement officials." United States v. Clemons, 72 F.3d 128 at *3 (4th Cir.1995) (citing California v. Hodari D., 499 U.S. 621, 629 (1991)). Accordingly, Detective Lester reasonably believed the cell phone was abandoned property after it sat unclaimed in evidence for five days and acted reasonably in searching the phone and its contents. As a result, even if this Court finds the actions were unconstitutional post-Riley, the Court should not apply the drastic measure of excluding the evidence when Detective Lester operated consistent with the applicable law in effect at the time of the search.

Accordingly, because Detective Lester's actions were entirely reasonable in performing the warrantless search, and even if not reasonable the information was obtained through an independent source or would have been inevitably discovered, this Court should find the trial court properly admitted the identification evidence obtained through the phone under both the Fourth Amendment to the United States Constitution and Article I section 10 of the South Carolina Constitution.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed and Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

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October 30, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case Tracking No. 2015-002360

The State, Respondent,

v.

Lamar Sequan Brown, Petitioner.

PROOF OF SERVICE

I, ANNE A. MUELLER, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 30th day of October, 2017.

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