ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

SEP 07 2017

S.C. SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAMAR SEQUAN BROWN,

PETITIONER

APPELLATE CASE NO. 2015-002360

BRIEF OF PETITIONER

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAMAR SEQUAN BROWN,

PETITIONER

APPELLATE CASE NO. 2015-002360

BRIEF OF PETITIONER

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The Court of Appeals erred in affirming petitioner's conviction where the circuit court admitted evidence gleaned from a warrantless search of the contents of petitioner's code-locked cell phone which violated the Fourth Amendment and the South Carolina Constitution 3

Introduction 3
Factual and Procedural Background 3
Discussion 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Kyllo v. United States, 533 U.S. 27 (2001) 7

People v. Daggs, 34 Cal. Rptr.3d 649 (Cal. Ct. App. 2005) 5

People v. Schutter, 249 P.3d 1123 (Colo. 2011) 7

Riley v. California, 134 S.Ct. 2473 (2014) .... passim

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

State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015) 8

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 8

State v. Granville, 423 S.W.3d 399 (Tex. Crim. App. 2014) 8

State v. Smith, 636 A.2d 1097 (N.J. Super. Ct. Law Div. 1990) 5

United States v. Oswald, 783 F.2d 663 (6th Cir. 1986) 5

United States v. Robinson, 414 U.S. 218 (1973) 5

Wilson v. State, 966 N.E.2d 1259 (Ind. Ct. App. 2012) 5

Constitutional Provisions

S.C. Const. art. I, § 10 8

U.S. Const. ammend. IV 3, 8

ISSUE PRESENTED

Whether the Court of Appeals erred in affirming petitioner's conviction where the circuit court admitted evidence gleaned from a warrantless search of the contents of petitioner's code-locked cell phone which violated the Fourth Amendment and the South Carolina Constitution?

STATEMENT

On November 13, 2012, a Charleston County grand jury indicted petitioner Lamar Sequan Brown for first degree burglary. R 395. On March 6, 2013, petitioner was tried before the Honorable J.C. Nicholson, Jr. and a jury. R. 1. Kelly Ann Flynn and Chad Simpson of the Ninth Circuit Solicitor's Office represented the State. R 2. Victoria Anderson and Lori Proctor represented petitioner. R. 2. The jury convicted petitioner. R. 372, ll. 14 – 18. Judge Nicholson sentenced petitioner to eighteen years' imprisonment. R. 387, ll. 17 – 20. On March 14, 2013, petitioner filed a motion for a new trial. R. 390. On March 22, 2013, Judge Nicholson denied the motion without a hearing. R. 393.

A panel of the Court of Appeals consisting of Judges Thomas, Konduros, and Geathers heard oral argument on petitioner's appeal on May 5, 2015. App. 1. On September 23, 2015, the Court of Appeals issued a published opinion affirming petitioner's conviction. App. 1. State v. Brown, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015). Judge Thomas authored the majority opinion. App. 1. Judge Konduros dissented. App. 13. On October 19, 2015, the court denied the petition for rehearing. App. 22. On August 8, 2017, this Court granted certiorari and this brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming petitioner's conviction where the circuit court admitted evidence gleaned from a warrantless search of the contents of petitioner's code-locked cell phone which violated the Fourth Amendment and the South Carolina Constitution.

Introduction

At stake in this case is our citizens' right of privacy in what is increasingly becoming a digitally recorded life. The Court of Appeals ignored the distinction drawn by Chief Justice Roberts in Riley v. California, 134 S.Ct. 2473 (2014) between the physical object of a cell phone and the data it contains. Riley rejected using analogies between cell phones and physical containers. In Riley, the Court scoffed at the government's argument that cell phones and containers are materially indistinguishable: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon." Riley at 2488. Yet, in petitioner's case, the Court of Appeals used the old container cases that Riley rejected to conclude that petitioner abandoned all of his expectation of privacy in all of the data on his cell phone "from the mundane to the intimate." Id. at 2490.

The dissent at the Court of Appeals correctly distinguished petitioner's data from the phone itself and interpreted Riley as the United States Supreme Court intended—that before police officers may search a phone's contents, they must get a warrant. Requiring a warrant announces an easy, bright-line rule that police officers can understand and follow and protects the rights of privacy as intended in the Fourth Amendment and the South Carolina Constitution.

Factual and Procedural Background

On December 22, 2011, the resident of a condominium returned from an evening on the town to find his apartment burglarized. R. 102, l. 24 – 106, l. 18. His bedroom window was

broken. R. 104, ll. 18 – 20. On the floor of his bedroom he found an unfamiliar cell phone. R. 104, l. 11 – 105, l. 11. When the police arrived, he gave the cell phone to them. R. 105, ll. 18 – 19. The police did not find fingerprints or any other physical evidence at the scene. R. 143, l. 22 – 146, l. 18. The police admitted the cell phone was "the only connection to whoever may or may not have been in that apartment." R. 39, ll. 1 – 3.

Detective Jordan Lester was assigned the case. R. 33, l. 24 – 34, l. 1. Five days after the burglary, Detective Lester opened the phone and guessed the code (1-2-3-4) to unlock its contents. R. 38, ll. 19 – 21. R. 34, ll. 13 – 18. Detective Lester did not get a search warrant before examining the data contained in the cell phone. R. 35, ll. 14 – 16.

Using the information in the phone, Detective Lester developed petitioner Lamar Sequan Brown ("Brown") as a suspect. R. 34, l. 13 – 35, l. 19. R. 37, l. 23 – 38, l. 4. Detective Lester candidly admitted that without searching the phone's data, he would not have been able to determine its owner. R. 39, ll. 17 – 23. Another officer interviewed Brown who admitted the phone was his. R. 189, ll. 18 – 22. Brown told the police he lost the phone the day after the burglary. R. 182, ll. 18 – 25. He denied committing the robbery. R. 183, ll. 9 – 25.

When Brown moved to suppress any evidence gleaned from the warrantless search of Brown's phone, the State only argued that Brown lost any expectation of privacy in the phone because it was abandoned. R. 23, l. 15 – 30, l. 6. Judge Nicholson held that Brown had an expectation of privacy in the phone because of his privacy code. R. 89, ll. 17 – 21. However, the trial judge ultimately held that Brown lost his constitutional protections in the phone because it "was either lost or abandoned."[1] R. 89, l. 17 – 90, l. 5.

---

[1] Brown renewed his pretrial suppression motion when the phone was entered into evidence, when Detective Lester testified about his search of the phone's data, and again in his motion for a new trial. R. 124, ll. 6 – 21. R. 237, l. 10 – 238, l. 3. R. 390.

The Court of Appeals affirmed the trial judge's ruling. App. 12. The majority stated that Riley recognized that searches of modern cell phones are categorically different than searches of other items. App. 5. Citing Riley, the majority stated that "the immense storage capacity of modern cell phones presents privacy concerns that have not arisen in searches of other physical items." App. 5-6. Despite this recognition, the majority then treated Brown's cell phone as just another physical container. The cases cited by the majority involved a cigarette package (United States v. Robinson, 414 U.S. 218 (1973)), a briefcase (United States v. Oswald, 783 F.2d 663 (6th Cir. 1986)), a car (Wilson v. State, 966 N.E.2d 1259 (Ind. Ct. App. 2012)), and a desk and file cabinets (State v. Smith, 636 A.2d 1097 (N.J. Super. Ct. Law Div. 1990)). The principal case relied upon by the majority involved a cell phone, but did not involve a cell phone's data. App. 9, *citing* People v. Daggs, 34 Cal. Rptr.3d 649 (Cal. Ct. App. 2005).

The dissent believed that the majority's cases concerning locked physical containers were inapplicable after Riley. App. 13-15. Hewing close to Riley, the dissent stated, "While under these circumstances I would not find a reasonable expectation of privacy existed in the physical object of the phone, I believe a person preserves their reasonable expectation of privacy in its *contents*, which is precisely what provides a phone its significance." App. 16. Because the dissent correctly recognized the distinction between a physical phone and its contents, Judge Konduros concluded that reversal of Brown's conviction was required.

Discussion

Brown did not abandon his expectation of privacy in the data on his phone. Using the Court of Appeals' reasoning, Brown intentionally abandoned (1) the physical phone; (2) access to the names of all of his friends and relatives; (3) photographs; (4) text message conversations between Brown and his friends and family; (5) emails; (6) his appointments and calendar; (7)

records of all of his telephone calls; (8) social media history; and (9) anything else on his phone. No reasonable person would conclude—especially if they had placed a code lock on their cell phone—that losing or throwing away a cell phone means giving away all of this information for the world to see. The Court of Appeals failed to understand this crucial distinction between the phone and Brown's private data which could be accessed by the phone.

Riley compels courts to focus on the data of a phone when conducting a Fourth Amendment analysis. Brown had a code lock on his cell phone and never relinquished his expectation of privacy in the data contained on the phone or that could be accessed from the phone. As Chief Justice Roberts wrote in Riley, cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." Riley at 2489. The storage capacity differentiates cell phones from other items. Id. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ." Id. The Court noted that "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." Id. at 2490.

Nothing in Riley justifies the court's limitation of its holding to searches incident to arrest or, in this case, an allegedly abandoned physical phone. The Court stated: "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, even when a cell phone is seized incident to arrest." Id. at 2493. The Court's own language in stating its holding creates a rule that the police must obtain a warrant before searching a phone. The Court could have limited its holding to the search incident to arrest situation, but explicitly chose not to do so. Reading such a limitation

into Riley ignores Chief Justice Roberts' long discussion of the categorical difference of cell phones and the greater privacy concerns regarding their treatment by the police.

Whether the physical phone was abandoned did not absolve the police of the necessity of obtaining a warrant. Nothing in Riley or the facts of this case support that opinion. As noted in Riley, the information on the phone is what is important, not the physical object itself. Even if the physical object is abandoned, it cannot be argued that the "intimate" and "mundane" details of Brown's life were abandoned for all the world to know.

The fact that Brown maintained a lock on his phone demonstrates that he did not want anyone to access his phone. Abandonment theory may be relevant when the object itself is what is abandoned. But when the item is more than a physical object—which is the entire thrust of the Riley opinion—abandonment theory does not apply, especially when a citizen has a lock code on his phone. See People v. Schutter, 249 P.3d 1123, 1125-26 (Colo. 2011) (holding that owner of phone left behind at gas station maintained an expectation of privacy and upholding suppression of warrantless search of phone's contents).

The United States Supreme Court's decision in Kyllo v. United States, 533 U.S. 27 (2001) further instructs that courts should rule on the side of privacy when it comes to technological advancements. In Kyllo, the police used a thermal imaging camera to scan a home. Id. at 30-31. The Court held that the thermal data contained in the home was protected by the Fourth Amendment's right to privacy. Id. at 35-41.

Just as technology did not strip the occupants of the home in Kyllo of their privacy rights, Brown maintained his expectation of privacy in the data on his phone because of his password, even if it were lost, abandoned, or stolen. One of the primary reasons for placing a password on a phone is to prevent anyone but the owner from accessing its contents. A person with a

password-protected phone would likely hope that any unauthorized person coming into possession of the phone would be unable to learn anything about its owner. Many reasonable people who have their phones lost or stolen would prefer to never recover the phone rather than have unknown persons access a device that contains a wealth of sensitive personal information. Hoping for the phone's destruction is more likely in this day when the contents are increasingly backed up to a computer elsewhere, such as a cloud. State v. Granville, 423 S.W.3d 399 (Tex. Crim. App. 2014). The lack of sophistication of Brown's password cannot weigh against Brown because the government likely will have the ability to break all but the most high-tech encryption. The right to privacy does not depend on the police's ability to crack your code.

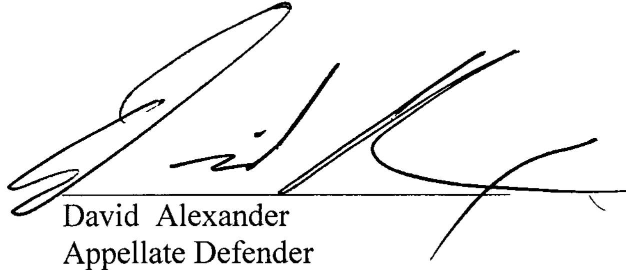
Furthermore, the express right of privacy in the South Carolina Constitution supports the idea that a citizen's personal data is still protected even if the physical phone is lost. S.C. Const. art. I, § 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001); see also State v. Counts, 413 S.C. 153, 167-70, 776 S.E.2d 59, 67-69 (2015) (holding the South Carolina Constitution required reasonable suspicion before conducting a "knock and talk"). In Counts, this Court reaffirmed South Carolina's constitutional guarantee of greater privacy rights to its citizens. Id.

Applying South Carolina's greater right of privacy in this case, Brown did not abandon his rights to all of the intimate details of his life contained on his phone. Even in the event that this Court determines that Riley does not require a warrant, South Carolina's greater right to privacy should provide citizens with the buffer of a neutral and detached magistrate before the police are allowed to invade every aspect of their digital lives.

Finally, requiring a warrant gives police a bright-line rule that is easy for them to follow and easy for trial judges to apply. Applying abandonment theory here would encourage police shenanigans to circumvent the warrant requirement. Unscrupulous police could claim that they found a cell phone near a suspect and that the suspect denied owning the phone—transforming the phone and its data into abandoned property with no constitutional protections. Requiring a warrant prevents such problems and forecloses the need for extensive jurisprudence in the future on abandoned data.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals and the trial court.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of September, 2017.

RECEIVED

SEP 07 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

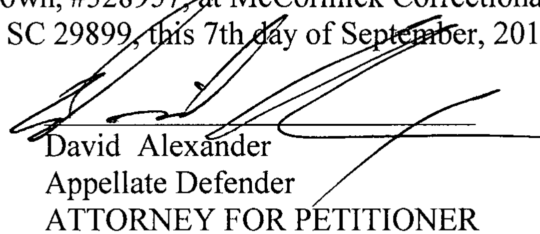
V.

LAMAR SEQUAN BROWN,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Lamar Sequan Brown, #328957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 7th day of September, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of September, 2017.

_________________________ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.