STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

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S.C. SUPREME COURT

SARAH D. CARDWELL,

PETITIONER.

APPELLATE CASE NO 2015-002507

Appeal from Georgetown County

Honorable Edward B. Cottingham, Circuit Court Judge

Opinion No. 27860

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsels for petitioner would petition for rehearing on this Court's affirmance[1] of the Court of Appeals' holding[2] that the warrantless police search of a video file extracted from a personal laptop computer located in a repair shop did not violate the Fourth Amendment to the extent that this Court might have overlooked certain points listed below, which show to the contrary, that the Fourth Amendment was violated in this case. In support of this motion, petitioner's counsels would submit the following.

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1 State v. Cardwell, Opinion No. 27860 (January 23, 2019).
2 State v. Cardwell, 414 S.C. 416, 778 S.E.2d 483 (Ct. App. 2015).

(1) Petitioner was convicted of two counts of unlawful conduct towards a child and two counts of first degree sexual exploitation of a minor and received an aggregate five-year prison term. Petitioner handed over her laptop for repairs at a computer technician shop. Police Chief Ron Douglas entered the shop and saw a still image flash on petitioner's laptop as it sat in the shop, and without a warrant, instructed the technician to show him the video file from the screenshot from that computer file and not only watched the video, but also instructed the technician further, again without a warrant, to copy that video file to a disk. Later, the police seized the laptop. On appeal, petitioner raised the following question:

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

(2) The Court of Appeals upheld the trial judge's finding that there were no grounds upon which to suppress the evidence because petitioner had no expectation of privacy in the computer (as it was left with the technician), and further upheld the trial judge's finding that the warrantless search of the evidence was also admissible because it was seen in plain view by a law enforcement official. Upon granting petitioner's petition to review the Court of Appeals' opinion, this Court held that plain view and inevitable discovery doctrines applied in this warrantless search case.

(3.) <u>Plain View and Inevitable Discovery Doctrines</u>

This Court expounded on the applicability to the plain view and inevitable discovery doctrines as follows:

"[T]he two elements necessary for plain view doctrine 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." *State v. Wright*, 391 S.C. 436, 446, 706 S.E.2d 324, 328-29 (2011). As the United States Supreme Court articulated in *Minnesota v. Dickerson*,

> The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and this no "search" within the meaning of the Fourth Amendment – or at least no search independent of the initial intrusion that gave the officers their vantage point.

508 U.S. 366, 375 (1993).

Even assuming the video evidence was unlawfully obtained, the inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means. *Nix v. Williams,* 467 U.S. 431, 444 (1984).

(4.) Plain View Doctrine

The plain view doctrine does not apply because the record does not support the conclusion that Chief Douglas made an immediate and reasonable determination that the still-shot was contraband, and even had he made such a determination, he would only have been authorized to seize the video file, not open and play it.

The Opinion correctly cites *State v. Wright*, 391 S.C. 436, 446, 706 S.E.2d 324, 328-29 (2011) for the proposition that the plain view doctrine requires the incriminating nature of the evidence be immediately apparent to the seizing authority. In *Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993), the United States Supreme Court held that this factual determination must be gleaned from the record and requires considering the point of view of the seizing authority, which is consistent with the Fourth Amendment's rationale of protecting individual privacy interests against unreasonable invasions by law enforcement:

> The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately'" recognized the lump as crack cocaine. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon.

Id. at 378 (citation omitted).

In this case, the record does not support the conclusion that Chief Douglas made an immediate and reasonable determination that the still-shot was contraband. South Carolina Code section 16-15-365 makes it a crime to aid someone in exposing his private parts in a "lewd and lascivious manner"—i.e., reflective of a "'shameful or morbid interest in nudity [or] sex." *State v. Bouye*, 325 S.C. 260, 267 (1997). Section 16-15-395 makes it a crime to cause a child "to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is . . . producing material that contains a visual representation [thereof] when a reasonable person would infer the purpose is sexual stimulation." Section 16-5-70 makes it a crime to put a child "at unreasonable risk of harm affecting the child's . . . mental health." Chief Douglas never testified to his consideration of the still-shot in light of these statutes. He only stated that he saw an image "that concerned [him]," that he asked "what was that," and that he "knew there was something that needed to be looked into." R. 74, l. 15 – R. 75, l. 12. David Marsh testified that Chief Douglas said to him, "I just saw something go across the screen, can you back it up?" R. 54, ll. 1-3. "[T]hat's what [Chief Douglas] said he saw and he wanted to see. So, we clicked play and we watched just a little . . . ." R. 55, ll. 8-11. These statements taken individually and together belie the notion that Chief Douglas immediately recognized the still-shot as sexual or harmful. To the contrary, they establish that he had an unarticulated hunch, and his further manipulating the file by playing it without a warrant was, as in *Dickerson*, unconstutitional.

A careful examination of other parts of the record also shows the still-shot was not reasonably and immediately apparent as contraband. The State did not offer the still-shot into the record. It's only description in the record was that it showed a child wearing a pink bra and "[h]is hands." R. 54, l. 19—R. 55, l. 1; R. 74, ll. 17-19. Nowhere does the record state that the still-shot showed the child's genitals or even below his waist. Even after watching *the entire video*, the trial judge stated he "[did not] know what [e]ffect it will or might have on these children" and that the question would be one for the jury. R. 125, ll. 17-22. In her closing, the assistant solicitor made the following remarks about the video:

> . . . Trust me, if you want to take pictures of your, you know, children or grandchildren running around naked and, you know, doing cute things, you know, **I think we've all got those naked kid pictures** that your parents might throw up during your, I don't know, rehearsal dinner. . . . [O]ne thing I will agree with the Defense is that video is the case. Clearly it is. That video along with the testimony of those children that lived through that video is the entire case.
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> . . .
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> One of the things that [defense counsel does] is he breaks down, "Well, if you take it out of context, then like the pictures that you've seen, if you take it out of context then, of course, you know it looks bad, you know, a snapshot of what's going on with this video." Ladies and gentlemen, that video lasted for two minutes and 30 seconds. In two minutes and 30 seconds I was able to pull of still shots showing nipple stimulation . . . and a child who is either seven or eight years old touching himself in such a manner that all of you can look and determine whether or not you believe that he came up with that himself . . . .
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> . . .
>
> . . . So, yeah, I'm not asking you to take things out of context. I'm asking you to put it in context. **I'm not telling you to look at those individual pictures and make your decision. I'm saying look at the entire video and use your common sense because the video as a whole is what makes it sexual. The video as a whole is what's going to make you all agree beyond a**

> **reasonable doubt** that these parents . . . made a conscious, intentional, maybe reckless decision to videotape those children in a performance that includes sexual activity . . . .

R. 176, l. 13—R. 181, l. 8 (emphasis added). Thus, a careful review of the record reveals that Chief Douglas did not make an immediate and reasonable determination that the still-shot was sexual or harmful and therefore contraband.

Even had Chief Douglas immediately and reasonably determined the still-shot was contraband, he would only have been authorized to seize the video file, not open and play it. The Opinion cites *Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993) for the proposition that plain-view evidence yields "no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave officers their vantage point." This language emphasizes that an invasion of a legitimate privacy expectation does occur when a subsequent search is made *independent* of the intrusion giving the initial vantage point. As explained in *Walter v. United States*, 447 U.S. 649 (1980), the subsequent search is impermissible under the plain view doctrine. That case involved illicit films individually packaged in boxes with labels indicating the films contained obscene matter. The United States Supreme Court held that when FBI agents lawfully seized boxes of film having obscene pictures on the labels, which provided probable cause that the film could not lawfully be traded in interstate commerce, the Fourth Amendment nonetheless required the agents to obtain a search warrant before opening and viewing the film. *Id.* at 657. The boxes were packaged and mistakenly delivered to a third party, which opened the packages, found the boxes therein containing suggestive drawings and explicit descriptions of the contents, and unsuccessfully attempted to examine the film by holding it up to the light. *Id.* at 652. The Court affirmed that "it has been settled that an officer's authority to possess a package is distinct from

his authority examine its contents." *Id.* at 654. Therefore, "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." *Id.* The Court also stated the particular principle that "[w]hen the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement [for a warrant] be scrupulously observed." *Id.* at 654-55. It explained the FBI did nothing wrong by seizing the boxes or examining them to the extent that the third party had already exposed them; however, "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That search was not support by any exigency, or by a warrant even though one could have easily been obtained." *Id.* at 657.

The still-shot in this case is analogous to the label on a film box. The video file underneath the still-shot "label" comprised an additional, independent privacy interest. Chief Douglas's playing of the video file was therefore a subsequent search independent of his initial viewing of the still-shot. This additional search was not support by any exigency or by a warrant even though one could have easily been obtained.

(5.) Inevitable Discovery Doctrine

The inevitable discovery doctrine does not apply because the record does not support the conclusion that absent Chief Douglas's instructions to Marsh, Marsh would have played the video himself for Chief Douglas or reported the video to another law enforcement causing a warrant to issue.

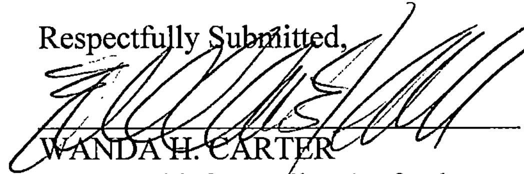
The Opinion correctly cites *Nix v. Williams*, 467 U.S. 431, 444 (1984) for the proposition that "illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means." The Opinion summarily states that Marsh was required to report the still-shot under South Carolina code section 16-3-850 and that Marsh testified that he would have reported the still-shot. By contrast, in *Nix v. Williams*, the United States Supreme Court engaged in a lengthy and detailed review of the record in concluding that the evidence in question would have been found absent the misconduct by law enforcement. *Id.* at 448-450.

In this case, the record does not support the conclusion that absent Chief Douglas's instructions to Marsh to play the video, Marsh would have played the video himself or reported the video to another law enforcement entity causing a warrant to issue. First, the only information in the record as to the cause of Marsh's playing the video was Marsh's own statements that he played it "upon request of Ron" because "[Ron] wanted to see." R. 55, ll. 8-9; R. 223. Second, Marsh made no statements in the record that he would have reported the video to law enforcement based solely on his viewing the still-shot. At trial, immediately after describing watching the *entire* video and reviewing the contents of the *entire* video with the jury, he testified that he would have reported based on that "kind of information . . . and what [he was] doing." R. 63, l. 13 – R. 67, l. 11. Third, even had Marsh reported the video to separate law enforcement, as discussed previously the record does not indicate that more likely than not, other law enforcement would have sought a warrant and a magistrate would have issued one. Again, the State did not offer the still-shot into the record. Nowhere does the record state that the still-shot showed the child's genitals or even below his waist. The trial judge and assistant solicitor's own comments refute the conclusion that the still-shot

created probable cause of any violation of law. Accordingly, a preponderance of the evidence does not justify application of the inevitable discovery doctrine.

WHEREFORE, based on the forgoing points, counsel for appellant would request a rehearing on the issues raised above regarding this Court's holding in this case on appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

Benjamin John Tripp
Beaufort County Assistant Public Defender

This 7th day of February, 2019.

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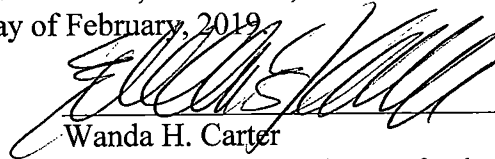
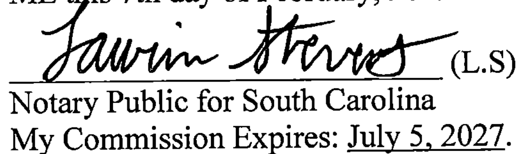
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Sarah D. Cardwell, at P.O. Box 439, Andrews, SC 29510, this 7th day of February, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of February, 2019.


(L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.