STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

LAMAR SEQUAN BROWN,

APPELLANT

APPELLATE CASE NO. 2013-000725

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Whether admission of evidence gleaned from a warrantless search of the contents of appellant's code-locked cell phone violated the Fourth Amendment and the South Carolina Constitution?

## STATEMENT OF THE CASE

On November 13, 2012, a Charleston County grand jury indicted appellant Lamar Sequan Brown for first degree burglary. R 395. On March 6, 2013, appellant 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 appellant. R. 2. The jury convicted appellant. R. 372, ll. 14 – 18. Judge Nicholson sentenced appellant to eighteen years' imprisonment. R. 387, ll. 17 – 20. On March 14, 2013, appellant filed a motion for a new trial. R. 390. On March 22, 2013, Judge Nicholson denied the motion without a hearing. R. 393. This appeal follows.

## STATEMENT OF FACTS

The facts of this case are simple. 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 appellant 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.

## ARGUMENT

Admission of evidence gleaned from a warrantless search of the contents of appellant's code-locked cell phone violated the Fourth Amendment and the South Carolina Constitution.

The police needed a warrant to search Brown's phone. Searches without a warrant are *per se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). No exception applies, nor did the State argue that any exception applied. Since police did not obtain a warrant, evidence obtained from the search of the phone should be suppressed.

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 any constitutional protections in the phone because it "was either lost or abandoned."[1] R. 89, l. 17 – 90, l. 5.

The categorization of the phone as lost or abandoned property makes no difference to this case. Once the phone came into the possession of the police, it became seized property. This case does not present the situation of a responsible citizen giving police a lost phone for the purpose of identifying its owner. Even in such a situation, it does not necessarily follow that the owner of the phone gives up all expectations of privacy in the phone. See People v. Schutter, 249 P.3d 1123, 1125-26 (Colo. 2011)

[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.

(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).

By placing a password on his phone, Brown maintained his expectation of privacy, 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, ___ S.W.3d ___ 2014 WL 714730, *2 (Tex. Crim. App. Feb. 26, 2014). It is not the device itself that a person wants to keep private—it is the data on the phone. The device is merely a key to unlock the content, which is sensitive and personal. A phone protected with a password should—at a minimum—receive the same protection as a sealed letter. Ex parte Jackson, 96 U.S. 727, 733 (1878). The Fourth Amendment protects people, not places. Katz, 389 U.S. at 351. Nothing in this case shows that Brown intentionally abdicated his privacy interest in his personal data merely because he lost his phone.

Even in the case of a simple physical container lawfully seized by police, a warrant is required. United States v. Chadwick, 433 U.S. 1 (1977) (overruled on grounds related to the automobile exception to the warrant requirement by California v. Acevedo, 500 U.S. 565 (1991)). Chadwick is particularly instructive in this case. Amtrak officials

saw a man load a 200-pound padlocked footlocker on a train in San Diego. Chadwick at 3. The footlocker was leaking talcum powder, a substance used to camouflage the scent of marijuana. Id. When the train arrived in Boston, federal agents watched men retrieve the footlocker and sent a drug dog, who signaled to the agents that contraband was present without alerting the men. Id. at 3-4. The agents watched the men place the footlocker in the trunk of a car, but before the trunk could be closed, arrested them. Id. at 4.

The agents seized the footlocker and transported it and the men (in separate cars) to a federal building for questioning. Id. at 4-5. An hour and a half after the arrest, the agents opened the footlocker and found marijuana. Id. The agents did not obtain a warrant before opening the footlocker. Id.

The United States Supreme Court held that a warrant was required before the government could open the footlocker. Id. at 11. The Court held, "There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." Id. Chadwick emphasized that the ruling was based on the fact that the police had seized the footlocker. "Once the federal agents had seized it at the railroad station and safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained." Id. at 13. The principle that the police need a warrant before searching closed containers seized from an automobile has been recognized by South Carolina. State v. Brown, 401 S.C. 82, 91, 736 S.E.2d 263, 267 (2012).

The Chadwick rule regarding seized, locked containers applies to this case. At the time the police took possession of the phone, regardless of its legal status of lost, abandoned, or any other status, it became seized property just like the footlocker. The password on the phone served the same function as the footlocker's padlock. No exigency required Detective Lester—five days after the phone's seizure—to inspect its contents. Therefore, the police were required to obtain a warrant. Since they did not, the search was illegal and all of the evidence flowing from this search should be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). The State admitted at the suppression hearing, "This entire case arises from this phone. We're not disputing that." R. 32, ll. 9 – 11.

Indeed, cell phones, because of the "almost unlimited amount of private information" they contain should be given even greater protection than a simple locked container like in Chadwick. See Granville at *4 (discussing the "enormous" potential for invasion of privacy and embarrassment inherent in modern cell phones); United States v. Wurie, 728 F.3d 1, 13-14 (1st Cir. 2013) (recognizing that the "most personal 'papers' and 'effects'" protected by the Fourth Amendment are now stored in cell phones); State v. Smith, 920 N.E.2d 949, 955-56 (Ohio 2009) (giving cell phones greater protection than containers and requiring a warrant even when a phone is seized during a search incident to arrest). Because South Carolina's constitution contains an express right of privacy, this Court should adopt an interpretation maximizing citizens' privacy interests in their

cell phones.[2] "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).

In Granville, the Texas Court of Criminal Appeals held invalid a warrantless search of a cell phone seized from an arrestee and placed into a jail property room. Granville, at *7. The Texas court recognized the extreme intrusiveness of a search of a cell phone, stating that "Searching a person's cell phone is like searching his home desk, computer, bank vault, and medicine cabinet all at once." Id. at *6. The phone searched in Granville did not even have a password, but the court nevertheless held police needed a warrant. Id. at *1. Brown had an even greater expectation of privacy than the defendant in Granville because Brown locked his phone with a password. Therefore, the warrantless search was illegal.

The State may argue, as the solicitor did below, that the illegal search was corrected because the police subsequently obtained a warrant. Indeed, without much analysis, the trial court found the subsequent warrant was valid if the first search was valid. R. 32, ll. 1 – 8. In looking at the face of the warrant, it is clear that it is invalid. R. 399. The warrant is not for searching the phone. It is for obtaining records. One only need look at the description of what is to be searched to see that the warrant was directed at the cell phone provider. R. 399. By its own terms, the warrant did not authorize the police to search the phone. R. 399.

[2] Brown argued the application of the South Carolina Constitution to the trial court. R. 47, ll. 7 – 17.

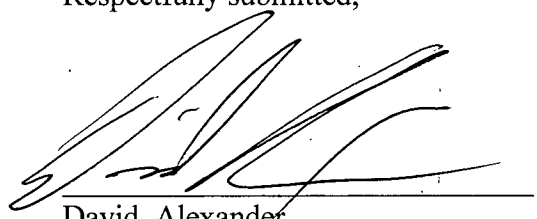
Furthermore, the information in the warrant's description of property includes the cell phone number, which was only obtained when the phone was illegally searched without a warrant. R. 399. This warrant is fruit of the poisonous tree and does not validate the warrantless intrusion into the phone.

In accordance with the United States and South Carolina Constitutions, this Court should recognize the great interest its citizens have in the privacy of their personal data, especially as can be accessed by their cell phones. Even though Brown was not in physical possession of his phone, he never intended anyone to have unlimited access to his personal data. Because the police failed to obtain a warrant, the search of Brown's phone was illegal and all evidence flowing from the phone—which is all of the evidence in this case—should be suppressed.

## CONCLUSION

For the foregoing reasons, Brown's conviction must be reversed.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 2nd day of December, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 2nd, 2014

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