ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2017-002479

RECEIVED

MAY 16 2018

S.C. SUPREME COURT

The State, Respondent,

v.

Robert Lee Moore, Petitioner.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural statement of the case.

Factual Background

On February 25, Deputy Hudson responded to a call that shots had been fired at a Taco Bell in Spartanburg. When he arrived, he saw the victim, shot in the left side of the head, hanging out of the victim's vehicle, and hung up in the seatbelt. (T.115; R.73). The victim was barely breathing. EMS arrived to render aid and transport the victim. (T.116-117; R.74-75).

During the suppression hearing and at trial, officers explained three cell phones were located in the victim's vehicle. No one came forward to claim any of the cell phones. (T.36; R. 28). Investigator McGraw was asked to examine the phones to determine ownership. He did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card, which provided him merely a phone number for the phone. (T.19-20; R. 11-12).[1] The phone number was then run through the Sheriff's Department's database and was connected to Appellant. (T.20; 37; R. 12; 29). Appellant presented no evidence he intended to come forward and claim the cell phone as his prior to the suppression hearing. Further, the only evidence presented at trial was the phone number and the phone's connection to Appellant. None of the contents, such as text messages or images, were presented at trial.

[1] The cell phone ultimately connected to Appellant was not password protected. (T.37-38; R. 29-30).

STANDARD OF REVIEW

"On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error." State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755 (2015) (citing State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)); see also, State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (same). "'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)). "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).

ARGUMENT

I. The trial court properly refused to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. The search was not an unreasonable search in violation of the Fourth Amendment. Additionally, Appellant relinquished any expectation of privacy in the phone by abandoning it inside the victim's vehicle and failing to make any effort to retrieve the phone. Even if the search was in violation of the Fourth Amendment, the evidence should not have been suppressed because it would have inevitably been discovered either through the victim's cell phone records or through the subsequently obtained search warrant.

The trial court correctly denied the motion to suppress because there was no violation of the Fourth Amendment. First, the search was entirely reasonable because the officers were merely attempting to locate the owner of property found at a crime scene. Second, the property was abandoned and Appellant no longer retained an expectation of privacy in the property so the officers did not need a warrant to examine the cell phone for its phone number. Third, the only information obtained through the search and presented at trial was the ownership of the phone and this information would have been easily obtained through the independent source of the victim's phone as well as inevitably discovered pursuant to a valid search warrant. Accordingly, this Court should affirm the decision of the circuit court denying the motion to suppress and affirm Appellant's conviction and sentence.[2]

"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

[2] Initially, it is important to note this Court held oral argument in State v. Lamar Brown on March 28, 2018. Appellate Case Number 2015-002360. The issue in Brown is remarkably similar to the issue in the instant case and this Court's holding in Brown is likely to significantly impact the holding in this case even if it is not determinative of the outcome of this case.

the Fourth Amendment is **reasonableness**." Florida v. Jimeno, 500 U.S. 248, 250 (1991) (emphasis added).

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)).

Reasonable Search

Initially, the search of the phone's SIM card to determine ownership of the phone was entirely reasonable and not a violation of the Fourth Amendment. In Riley v. California, the United States Supreme Court reiterated: "As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " Riley v. California, 134 S. Ct. 2473, 2482 (2014) (citing Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)). The Court explained: "Our cases have determined that '[w]here a search is undertaken by law enforcement officials to **discover evidence of criminal wrongdoing**, . . . reasonableness **generally** requires the obtaining of a judicial warrant.'" Id. (emphasis added) (citing Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). As the Court in Acton explained: "But a **warrant is not required to establish the reasonableness of all government searches**; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." Acton, 515 U.S. at 653 (emphasis added).

"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.

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).

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 vehicle.

Investigator McGraw did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card and obtained merely a phone number for the phone to determine ownership. (T.19-20; R. 11-12). The phone number was then run through an internal Sheriff's Department database to determine if it belonged to the victim or someone else—a process which was entirely reasonable given the phone was found in the victim's car. (T.20; 37; R. 12; 29). This process would have been required in order to even verify whether the phone belonged to the victim, who was known to have multiple phones. (T.27; R.19). The fact the phone number connected to Appellant and not the victim does not alter the reasonableness of the initial intrusion into the phone. The mere obtaining of the cell phone number from the SIM card in order to verify whether the phone belonged to the owner of the vehicle in which it was found did not implicate the Fourth Amendment because it was not an unreasonable search, nor one requiring a warrant.

Investigator McGraw 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. (T.10; R.18). 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 front of the phone; 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 of whether the search is reasonable 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 Investigator McGraw was entirely reasonable and not in violation of the Fourth Amendment.

Abandonment

Additionally, the phone in the instant case was abandoned and so Appellant did not retain any expectation of privacy in the phone. 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." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (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 (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)). This Court also made it clear: "Even though Dupree abandoned the drugs in response to police action, when the actions of the police are lawful the abandoned property is not protected by the Fourth Amendment." Dupree, 319 S.C. at 460, 462 S.E.2d at 283.

The distinction set forth in Dupree between property rights and expectation of privacy rights is critical in this case where Appellant's sole argument regarding whether he abandoned the cell phone is that he "forgot it" or "inadvertently" left it behind—as he fled a crime scene. His argument, if believed in full, could be fruitful in the "property-law sense" because he did not voluntarily abandon his interest in the property, such that the police who found it could claim a greater possessory interest. Appellant did abandon his expectation of privacy interest in the cell phone by leaving it at a crime scene and not seeking to reclaim the phone. He did nothing to further protect his expectation of privacy by claiming the phone at the scene, or calling the phone to determine if it had been discovered.

During the suppression hearing and at trial, officers explained three cell phones were located in the victim's vehicle. No one came forward to claim any of the cell phones. (T.36; R. 28). The cell phone ultimately connected to Appellant was not password protected. (T.37-38; R. 29-30). Appellant presented no evidence he intended to come forward and claim the cell phone as his prior to the suppression hearing. As a result, the officers reasonably and objectively believed the cell phone to be abandoned, and the Fourth Amendment did not require a warrant to conduct a search of the phone.

Appellant's 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 in a shooting victim's vehicle.

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 actions demonstrating 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—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).

The case of People v. Schutter, 249 P.3d 1123 (Colo. 2011), is also instructive. 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 in the victim's vehicle at the scene of a shooting, fled the scene to evade capture and prosecution for the crime, never made an attempt to retrieve the phone, and did not secure the phone's privacy by turning off the phone with the carrier.

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 victim's vehicle. 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.

Another remarkably similar case recently was considered by the Eighth Circuit Court of Appeals. See United States v. Crumble, 878 F.3d 656 (8th Cir. 2018). Just a couple months ago, the Court considered the application of Riley to an abandoned cell phone. First, they determined whether the facts supported the conclusion the phone had been abandoned:

> It is well-established that a defendant does not have a reasonable expectation of privacy in abandoned property. Thus, if Crumble abandoned the cell phone, he forfeited his expectation of privacy and cannot raise a Fourth Amendment challenge to the subsequent search.
>
> . . . .
>
> After the crash, Crumble fled the scene, leaving the Buick wrecked on a stranger's lawn. The Buick's key was in the ignition and its back window was shot out—allowing for easy access to the vehicle and its contents—which included a gun on the floorboard and the cell phone on the driver's seat. Crumble claims he was not fleeing from police, but rather attempting to get away from the shooter in the other vehicle. Abandonment, however, does not turn on Crumble's subjective intent, but rather "the objective facts available to the investigating officers."

Id. at 659–60 (Internal citations omitted). After finding the phone abandoned, the Court turned its attention to whether Riley required a warrant for an abandoned phone. The Court explained:

> Crumble urges this Court to categorically deny application of the abandonment doctrine to cell phones. We decline to do so. Crumble points to Riley v. California, where the Supreme Court held that the search incident to arrest exception does not apply to

> cell phone searches, in part because cell phones hold "the privacies of life." However, Riley's holding is limited to cell phones seized incident to arrest. Riley was explicit that "other case-specific exceptions may still justify a warrantless search of a particular phone." Other courts have found abandonment to be one such exception.

Id. As a result, the Court found the phone abandoned and, therefore, it did not need to consider the validity of the warrant because no warrant was required.

This Court should find Petitioner voluntarily abandoned his cell phone and all of its contents when he left it inside the vehicle of the victim he shot, 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/Inevitable Discovery

Even if this Court finds obtaining the phone number of the phone off the SIM card violated the Fourth Amendment, the Court of Appeals correctly determined the information would have inevitably been found. 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").

The only evidence admitted from the search of Appellant's phone was to establish Appellant's ownership and the phone's connection to the victim through the phone calls made directly before the shooting occurred. The officers had the victim's phone in their possession. They had every right to search the victim's phone as part of the investigation, and even if they did not, Appellant could not assert any violation of the right because he did not have a possessory interest in the victim's phones. See 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). As a result of the search of the victim's phone, the officers would have found the number that called five times immediately before the shooting. It would have taken nothing more than running the number through the same database that they ran the number from the SIM card through to determine it belonged to Appellant. A simple call to the number would have verified it was the phone in their possession and would have placed Appellant at the scene of the crime. As a result, any evidence obtained from the search of Appellant's phone would have inevitably been discovered through an independent source, the victim's phone. See Nix v. Williams, 467 U.S. 431, 443-444 (1984) (finding the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule and "[t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of

a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.").

In Nix, officers violated the defendant's Sixth Amendment right to counsel by speaking with him after agreeing with his lawyer not to communicate with the defendant. As a result of the communications, the defendant led the officers to the location of a missing child's body. The United States Supreme Court acknowledged the violation of the Sixth Amendment, but found because individuals were already canvassing the area, the body would have been inevitably discovered. The Court explained its reasons for not excluding the evidence based on the constitutional violation saying:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix, 467 U.S. at 446. The Court continued that exclusion was not necessary to cure an ill or to insure fairness, finding:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Id. at 447.

The Fourth Circuit, in United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970), recognized the inevitable discovery doctrine in a case similar to the one at hand. Officers stopped a vehicle driven by the defendant. After obtaining his wallet and realizing he presented an expired license, the officer continued to search through the wallet for further proof of identification. He found papers with the defendant's real name listed. The trial court suppressed the papers from the wallet, but allowed testimony and evidence that resulted after the individuals were detained. The Fourth Circuit found that the defendant's identity would have been discovered from his co-defendant because they were both wanted as fugitives and the co-defendant had given his actual name. The Fourth Circuit explained:

> [T]he district judge found that the police would have learned of the Baltimore warrants through Rutkowski and that they would have arrested Seohnlein even if they had not discovered the papers in his wallet. Although the knowledge gained from examining the wallet may have accelerated a lawful arrest on the Baltimore warrant, it did not taint the evidence that was subsequently obtained.

Seohnlein, 423 F.2d at 1053.

Similar to Nix and Seohnlein, the information of Appellant's identity would have been discovered by the officers even if they had never pulled the SIM card from his phone. The officers would have matched his name to the phone number that called the victim using the same database they used once they had the phone number off the SIM card. There is no reason to suppress the evidence that otherwise would have been admissibly because it did not taint the investigation.

In addition, this Court can analyze the warrant subsequently obtained and determine that, even when removing any information obtained through an illegal search, probably cause existed to search the phone and obtain the necessary information regarding ownership. The original search warrant affidavit read:

> On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. Through further investigation it was found the phone number assigned to the phone is [phone number]. Through further investigation it was found this phone did not belong to the Victim. Through further investigation it was found this phone belonged to Robert Lee Moore. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear Robert Lee Moore from any involvement in this incident.

(R.324). Once this Court removes the references to Robert Lee Moore which were only obtained through the search of the SIM card, the warrant reads as follows:

> On 2/25/2Q13 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriffs Office responded to 7680 Warren H. Abernathy Hwy, in reference to a shooting. Upon arrival, they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the victim's vehicle. . . . Through further investigation it was found this phone did not belong to the Victim. . . . This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear an individual from any involvement in this incident.

The search warrant indicates the phone was found inside the vehicle belonging to the victim of a shooting. The warrant indicates the phone was not the victims. It provides a fair probability the phone would contain evidence of the crime. If the phone is not the victim's, then it is a fair probability it was left by the shooter. Even if the phone were the victim's phone, it likely still contained evidence of the crime because it may have had the last person contacted by the victim or contacting the victim—at minimum a witness to be interviewed or possibly the shooter. As a result, the officers would have obtained the ownership of the phone through

execution of the search warrant which means the trial court properly refused to suppress the evidence obtained from the SIM card.

Accordingly, this Court should conclude the initial intrusion into the phone was entirely reasonable because it was performed with the intention of determining the owner of the phone. Further, even if not reasonable, the search did not require a warrant because Petitioner abandoned the phone and any reasonable expectation of privacy in the phone when he left it in the automobile of the victim and failed to take any measures to recover the phone or prevent access to the phone. Finally, even if a warrant was required, the information obtained would have been inevitably discovered through the warrant obtained or through the information provided on the victim's cell phones in the possession of the same officers. Therefore, this Court should affirm the trial court's decision and affirm Petitioner's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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May 16, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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MAY 16 2018

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Spartanburg County
Hon. R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2017-002479

The State, Respondent,

v.

Robert Lee Moore, 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 16th day of May, 2018.

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