STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

RECEIVED

APR 25 2018

S.C. SUPREME COURT

Certiorari to Supreme Court County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

PETITIONER

APPELLATE CASE NO. 2017-002479

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief 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 by affirming petitioner's conviction based on an inconsistent "inevitable discovery" analysis where the majority agreed petitioner's constitutional rights were violated where the police searched his cell phone without a warrant, yet found on erroneous and inconsistent basis that the fruits of the warrantless search would have been inevitably discovered since the majority opinions circumvent the integrity of the warrant requirement in violation of *Riley v. California*, 134 S.Ct. 2473 (2014) 3

Relevant Facts 3
Suppression hearing 4
Argument of counsel 9
Ruling 10
Trial evidence 11
Eyewitness Barnes 13
Cell phones 14
Forensic cell phone evidence 14
Closing arguments 14
Court of Appeals 15
Discussion 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

California v. Acevedo, 500 U.S. 565 (1991) 20

Katz v. United States, 389 U.S. 347 (1967) 18

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

State v. Brown, 400 S.C. 82, 736 S.E.2d 263 (2012) 20

State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004) 16

State v. DuPree, 319 S.C. 454, 462 S.E.2d 279 (1995) 9, 19

State v. Moore, 421 S.C. 167, 805 S.E.2d 585 (2017) 2, 5

State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011) 16, 17, 18

United States v. Chadwick, 433 U.S. 1 (1977) 20

United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) 19

Wong Sun v. United States, 371 U.S. 471 (1963) 20

ISSUE PRESENTED

Whether the Court of Appeals erred by affirming petitioner's conviction based on an inconsistent "inevitable discovery" analysis where the majority agreed petitioner's constitutional rights were violated where the police searched his cell phone without a warrant, yet found on erroneous and inconsistent basis that the fruits of the warrantless search would have been inevitably discovered since the majority opinions circumvent the integrity of the warrant requirement in violation of Riley v. California, 134 S.Ct. 2473 (2014)?

STATEMENT

Petitioner was indicted by the Spartanburg County Grand Jury for the offense of attempted murder. R. 327. His case came on for trial on July 21, 2014, before the Honorable R. Keith Kelly, and a jury. Andrew Johnston represented petitioner. Derrick Bulsa was the deputy solicitor. R. 1.

On July 23, 2014, the jury found petitioner guilty. R. 320, l. 25 – 321, l. 6. Judge Kelly sentenced petitioner to thirty years' imprisonment. R. 322, ll. 5-6.

The majority of the Court of Appeals affirmed in State v. Moore, 421 S.C. 167, 805 S.E.2d 585 (2017). Chief Judge Lockemy and Judge Konduros both held that petitioner's constitutional rights were violated by the warrantless search by the police of his cell phone. However, Judge Lockemy, based on a different analysis, agreed with Judge McDonald that the information from the cell phone search would have been inevitably discovered. Therefore, petitioner's attempted murder conviction was affirmed. App. 1-15.

Petitioner and the state sought rehearing. App. 16-30. Rehearing was denied. App. 2. Petitioner now seeks certiorari from this Court.

ARGUMENT

The Court of Appeals erred by affirming petitioner's conviction based on an inconsistent "inevitable discovery" analysis where the majority agreed petitioner's constitutional rights were violated where the police searched his cell phone without a warrant, yet found on erroneous and inconsistent basis that the fruits of the warrantless search would have been inevitably discovered since the majority opinions circumvent the integrity of the warrant requirement in violation of *Riley v. California*, 134 S.Ct. 2473 (2014)

Relevant facts

Defense counsel Johnston moved to suppress all of the information derived from the search of petitioner's cell phone, "an AT&T flip phone, which is attributed to the ownership of the defendant." Defense counsel told the judge the court would need to hear the testimony from the investigators who recovered it, and the other law enforcement personnel who were involved "in the forensic evaluation of the phone" before ruling. R. 2, ll. 7-19.

Assistant solicitor Bulsa told the judge this case involved the shooting of the victim, thirty-four-year-old Travis Hall, on February 25, 2013 at a Taco Bell in Spartanburg. Three cell phones were found surrounding the injured victim in his car. Since money and drugs were also found in the vehicle, the police suspected a drug deal gone bad, or a drug deal that was actually the result of a planned robbery that went awry. R. 3, l. 8 – 6, l. 11. Defense counsel cited Riley v. California, 134 S.Ct. 2473 (2014) in support of his motion to suppress the cell phone evidence. R. 6, l. 13 – 7, l. 15.

Bulsa argued that the police discovered the cell phones, and thought they had a potential suspect. The police later got a search warrant after making "preliminary productive discoveries" from the warrantless search of the phone. However, Bulsa maintained a search warrant for the

contents of the cell phone was never required because it had been "abandoned by the defendant." R. 7, l. 16 – 9, l. 6.

Defense counsel Johnston confirmed that petitioner was claiming a privacy interest and an expectation of privacy in his cell phone. Johnston strongly disagreed with the assertion that petitioner had "abandoned" his cell phone. Johnston argued there was a major difference between forgetting one's phone or negligently leaving it behind, and abandoning it, even though the state had the burden of proof, as will be seen infra, the state was unable to state whether the cell phone had a secure password on it that law enforcement was able to get beyond, or whether the forensically "pulled" information was obtained in a less onerous manner. R. 8, l. 2 – 9, l. 14.

Suppression hearing

Investigator Lindsey McGraw testified that three cell phones were collected from the scene of the February 25, 2013 shooting at the Taco Bell in Spartanburg. "I was asked to perform a forensic examination of three cellular telephones that were found at the scene primarily to determine who owned the cell, the cell phones to determine ownership." McGraw identified the phones as an Apple I-phone 3, an Apple I-phone 4, and a ZTE331 flip phone. R. 10, ll. 8-25.

The flip phone was the one at issue here. McGraw did a forensic examination of **"the installed SIM card."** The card contained the call logs stored contacts "things of that nature." R. 10, l. 22 – 11, l. 12. (emphasis added). McGraw was able to recover the cell phone number assigned to the phone from his forensic investigation. He then asked other investigators to find out whom the person was that had that phone number. R. 12, l. 2 – 13, l. 3.

McGraw testified he was able to determine the cell phone number did not belong to the victim. Before he obtained a search warrant, McGraw said he found out the telephone number was

864-494-2573. He also recovered thirty-four contact entries, and he discovered three text messages on the cell phone. R. 12, l. 2 – 13, l. 3.

McGraw testified the stored contract information allowed him to associate a name – petitioner -- with a phone number. McGraw said after he obtained this information, the police got a search warrant and "I did a full forensic examination of the phone, processed it." McGraw maintained he was unable to further recover contacts and images and pictures from the phone. R. 12, l. 2 – 15, l. 9.

On cross-examination, McGraw confirmed he got the phone number for the cell phone *before* the police obtained a search warrant. He said the cell phone could send and receive text messages, and that typically the phone would have a contact name, phone number and "possibly their physical address and email address." McGraw testified that the cell phone had a camera for photographs, and a record of all telephone calls made and received. R. 16, l. 1 – 17, l. 21.

McGraw said that the search warrant was obtained the day after he initially searched the phone without a warrant. R. 17, l. 4 – 18, l. 20. The search warrant affidavit stated:

> On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sherriff's Office responded to 760 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 (864) 494-2573. 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; State v. Moore, 421 S.C. 167, 179, 805 S.E.2d 585, 592 (2017). (emphasis added).

This was the search warrant affidavit that the police used to obtain the warrant. The Court of Appeals found it was a sufficiently detailed affidavit, that it was not conclusory, and that it established probable cause for a complete search of petitioner's cell phone. Petitioner maintains, however, *infra*, that is was improper for one of the affirming Judge's to reason that if the highlighted objectionable language was deleted (based on the initial search of the cell phone) that the evidence would have been inevitably discovered because the search warrant affidavit would have passed "probable cause" muster for a search warrant to be issued anyway.

Detective Tom Clark was the state's next witness at the suppression hearing. Clark testified he was originally contacted by Investigator Williams because multiple (three) cell phones had been found in the vehicle, and Clark said the police determined that the victim himself had multiple cell phones. R. 19, l. 6 – 20, l. 16.

Clark confirmed that he was not the person who conducted the forensic examination on the telephone before a search warrant was obtained. He correctly said he assumed investigator Williams was the person who did the warrantless forensic examination. R. 20, l. 24 – 21, l. 18. Clark then read into the record his affidavit to obtain the search warrant.

> Q. Tell me what you told Judge Willingham.
>
> A. Told Judge Willingham that on February the 25th at approximately 14:30 hours deputy responded to the Spartanburg County – well, excuse me. With the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Highway in reference to a shooting. Upon arrival they found the victim, Travis Hall, had been shot. Travis Hall was transported to Spartanburg Regional Medical Center.
>
> Through further investigation and processing of the, processing of the vehicle, the victims AT&T ZTE model 7331 cell phone with serial number 322213371843 was found inside the vehicle. Through further investigation it was found that this phone number **assigned to this phone was**

> **864-494-2573. Through further investigation it was found that this phone *did not belong to the victim. Through further investigation it was found that this phone belonged to Robert Lee Moore*, that a 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. 21, l. 19 – 22, l. 13. (emphasis added).

Judge Willingham did not have any other information to base his decision about the search warrant on other than that above. R. 22, ll. 14-19. Clark also confirmed that the police used the information from the warrantless search of the cell phone to obtain the search warrant. R. 23, ll. 3-19.

Clark agreed there was **not anything** in the search warrant affidavit which stated why the police thought petitioner may or may not "have shot the victim." R. 23, l. 20 – 24, l. 4. Clark also said he was only told that the cell phone was found "in the vehicle under or near the victim and **that was all the information that I was given** other than the victim, according to the investigation, had several cell phones." R. 24, ll. 10-17. (emphasis added).

On re-cross examination, Clark said he did not recall what he told the judge about **how the police knew** that cell phone was owned by petitioner. He confirmed that the affidavit also did not provide even that most basic information to the magistrate. R. 25, l. 12 – 26, l. 3.

Investigator Lorine Williams was the lead investigator on this case. R. 26, ll. 6-19. Williams confirmed that several cell phones were found in the victim's automobile. The wounded victim had been removed from the scene by the time he arrived at the Taco Bell and observed the two cell phones in the car. Williams said the third cell phone seized was not in plain view. Two of the cell phones "are in the driver compartment floorboard closer to the door." R. 27, l. 3 – 28, l. 1.

Williams testified -- and apparently found significance in the fact -- that no one at the scene was claiming ownership of any of the cell phones. Williams said that although he did not have any documentation, he seemed to remember that McGraw had told them that "he had gotten a phone number from the flip phone I believe it was. That number was run through our data system at the sheriff's office. It was associated to Mr. Moore through that system as a "known phone number that he had used or given either in a previous incident or when he was booked in at the jail or something of that nature. It was associated to him. At that point we realized the phone did not belong to the victim. Therefore, the exam was stopped in order to obtain a search warrant before any further forensic testing was done on the phone." R. 28, l. 23 – 29, l. 14.

Williams said he could not testify whether or not the cell phone was "password protected," and he added that Investigator McGraw's report was no help on the password protected subject either. R. 29, l. 21 – 30, l. 1.

As for "abandonment", Williams confirmed he had never seen petitioner in possession of the cell phone nor had he seen petitioner relinquish possession of the phone. Williams said he had chased suspects in the past who had discarded items during the chase. R. 30, ll. 2-17. Williams said he had never seen petitioner throw the phone down or throw it away. "I never saw Mr. Moore at the scene." Williams said he did not know why petitioner left his cell phone but he opined it was apparent there had been a struggle at the Taco Bell scene, and he said **he was sure the cell phone was left behind by mistake**. R. 30, l. 1 – 32, l. 15.

Another law enforcement officer, Forensic agent Robert Talanges, would take issue with the statement that it was apparent there had been a struggle inside the car. "I can't say there was a struggle." R. 101, ll. 9-17. Williams confirmed that he was aware of other situations where a person may have forgotten or misplaced their cell phone. R. 32, l. 18 – 33, l. 3.

Argument of counsel

Defense counsel Johnston again argued pursuant to Riley v. California that the fruits of the search of the cell phone had to be suppressed. Johnston distinguished State v. DuPree, 319 S.C. 454, 462 S.E.2d 279 (1995) where the defendant had abandoned his property for Fourth Amendment purposes by throwing the crack cocaine to the floor during the search of his mouth. Johnston reminded the judge that "Detective Williams summed it up very nicely when he said I have no doubt that he [petitioner] '*forgot it* and left it behind.'" Johnston argued unintentionally forgetting or leaving behind a cell phone did not mean that it was abandoned. R. 33, l. 24 – 35, l. 9.

Johnston added there was a large amount of money and drugs were found in the victim's car, and this was not a situation where a person would have voluntarily abandoned his cell phone. Johnston argued there was nothing in the search warrant or affidavit to indicate petitioner had anything to do with the shooting, the warrant was conclusory, and it did not provide probable cause for the issuance of a search warrant. Johnston noted the search warrant went so far as to state the search of the cell phone may actually "clear" petitioner. R. 37, l. 4 – 38, l. 11. (Petitioner argued this issue in the Court of Appeals. It is presently subsumed in the argument before this Court that a majority of the Court of Appeal's opinion constituted an incorrect and inconsistent "inevitable discovery" holding.)

Johnston argued Riley v. California was on point about the extraordinarily large amount of private information that was stored on an individual's cell phone. The cell phones provided "potentially all of the person's associates, their addresses, their telephone numbers, email addresses, anything else a person might decide to include with their contact information." The cell phones also contained photographs and other personal data. R. 37, l. 4 – 38, l. 11.

Defense counsel repeated that the cell phone had not been abandoned, and that there was no evidence of a clear intention to abandon the phone. Counsel argued that all the information obtained from the cell phone before and after the search warrant had to be suppressed. R. 38, ll. 12-25.

The solicitor said he had not anticipated the argument that the phone was mistakenly left behind rather than abandoned. The solicitor insisted the search was reasonable, and that the phone had been abandoned regardless, The solicitor also argued that the Riley v. California did not prevent the judge from ruling the telephone had simply been abandoned, and that petitioner had no expectation of privacy in the cell phone once it "was left behind." R. 39, l. 2 – 41, l. 3.

Defense counsel in his colloquy with the court said that the victim was apparently known to carry two cell phones but that three phones were found. Johnston also argued that even if the police thought the phone belonged to the victim they would still have needed to obtain a search warrant to obtain the victim's information since it was known these cell phones contain private communications, and information that is inculpatory. For that reason, a search warrant was required for the personal information on the cell phone. R. 43, l. 4 – 44, l. 23. The judge deferred ruling. R. 44, ll. 22 -23.

Ruling

Following jury selection, the judge denied petitioner's motion to suppress any and all of the information seized from petitioner's cell phone. R. 51, ll. 9-14. The judge ruled that petitioner's cell phone was "abandoned property." The judge said he had read cases that property can "be abandoned even momentarily." The judge reasoned the "property" had been abandoned. The judge ruled he would not suppress any information derived from the search of the cell phone, and

accepted, that an alleged "benign" reason to search a cell phone was permissible. R. 51, l. 9 – 52, l. 24.

Defense counsel quickly tried to correct the judge about the prejudice of the information that law enforcement intended to use from the search of petitioner's cell phone. Counsel correctly predicted the state was going to show a record of phone calls between petitioner and the victim's phone that were in close proximity to the crime. He requested that the judge reconsider his ruling. The judge said he was not changing his ruling: "I have wrestled with that a little bit, Mr. Johnston." The judge and Johnston had a further discussion of Riley v. California, and Johnston argued that the holding in Riley v. California did not "hang on whether or not the person had been arrested." R. 53, l. – 54, l. 11. The judge refused to alter his ruling denying suppression.

Trial evidence

The state's first witness was the victim's mother, Deborah Hall. Her son, Travis Hall, was thirty-four years old when he was shot on February 25, 2013 at the Taco Bell. R. 58, l. 18 – 59, l. 23.

Ms. Hall testified her son came by her house for twenty to twenty-five minutes prior to the incident, and "he kept receiving several phone calls *from the same person.*" (emphasis added). Ms. Hall said she overheard her son talking about picking up his daughter near Highway 29. Highway 29 was near the Taco Bell. Ms. Hall said the next thing she heard from her son was when "I got a phone call that he had got shot in the head from the sheriff's department." R. 59, l. 15 – 61, l. 24.

Ms. Hall testified her son spent a couple of months in the hospital after the shooting. R. 61, l. 7 – 63, l. 20. Ms. Hall then identified photographs showing the damage to her son's Impala. R. 64, l. 1 – 65, l. 21.

Deputy John Hudson to the crime scene off Highway 29 at the Taco Bell. He remembered several people standing around the victim's automobile. R. 68, l. 2 – 70, l. 16.

Hudson recalled the victim had been shot, and he was leaning out of the vehicle "and the seatbelt was supporting his weight." Hudson opined the victim was attempting to get out of the front driver's seat, but the seatbelt was holding him inside. R. 73, l. 5 – 75, l. 16.

Tim Tullock worked for an air conditioning and refrigeration company. He was at the Taco Bell on the day of the shooting, February 25, 2013. R. 80, l. 22 – 82, l. 4.

Tullock was doing paperwork in his van when he heard "some popping sounds." He saw a man "hanging out of the car," and proceeded to walk across the parking lot "to see if he could help him out." Tullock remembered that a "white Chrysler 300 with some rather large rims tore out" of the parking lot "squealing its tires at the same time." R. 82, l. 23 – 84, l. 21.

Marilyn Arthur was a fingerprint identification expert. She testified that Tevin Thomas, a future state's witness, left behind ten fingerprints on the victim's automobile. R. 117, l. 17 – 119, l. 18. None of petitioner's fingerprints were found on the victim's automobile. R. 127, ll. 9-14.

Tevin Thomas' fingerprints were also located on the white Chrysler that Tullock apparently identified as the car quickly leaving the Taco Bell parking lot. Petitioner's fingerprints were found on the Chrysler as well. R. 129, l. 12 – 130, l. 11.

Thomas later testified as a state's witness that Reginald Sanders, Thomas, and petitioner planned to rob the victim during a drug deal. Thomas claimed when Sanders did not show up that he went with petitioner to meet the victim at the Taco Bell without Sanders. Thomas said petitioner parked his car "side by side" with the victim's car. Thomas maintained it was petitioner who got out of his car, and got into the victim's car. Thomas claimed he saw petitioner and the victim get into a struggle with the victim. Thomas said petitioner and the victim were "on top of each other"

when he heard a shot. R. 196, l. 4 – 207, l. 20. Thomas claimed petitioner admitted he shot the victim as he fought with him inside the victim's car.[1] R. 207, l. 16 – 208, l. 11.

Eyewitness Barnes

The defense called eyewitness Chris Barnes during petitioner's trial. Barnes was going through the drive through at the time of the Taco Bell shooting. R. 242, l. 19 – 245, l. 22. Barnes testified he saw the victim's car "rocking back and forth. I was thinking like, what's going on in that car because it was swinging around, and then I heard a pop, and then I saw somebody slumped over and blood like squirting." Barnes saw a man get out of the passenger side of the victim's car, and jump into "another car." R. 245, l. 19 – 246, l. 8.

The description Barnes gave of the man getting out of the victim's car after the shooting matched Thomas, and not petitioner. That is true because Barnes described the black male quickly leaving the car as wearing a dark colored sweatshirt and a dark colored toboggan, and not red clothing. This was significant because Thomas was captured on a Hot Spot convenience store videotape shortly after the shooting wearing dark colored clothing, and a toboggan. Petitioner, on that same videotape, was wearing red clothing. R. 172, l. 1 – 174, l. 17.

The solicitor was left to argue in closing that he did not think Barnes had a good view of the victim's car. The solicitor essentially argued that Barnes misidentified Thomas as the man in getting out of victim's car at the time of the shooting, and maintained Barnes saw Thomas get out of the other car consistent with what state's witness Thomas said. R. 301, ll. 6-19.

---

1 This Court can take judicial notice from the Department of Corrections Inmate Locator Information Service Website of the fact that Thomas was also serving sentences for burglary in the second degree, and he apparently received a ten year sentence for attempted armed robbery in this case. He is scheduled to be released in a little over three years on August 26, 2021.

Cell phones

Robert Talanges was with the forensic department of the Spartanburg County Sheriff's Department. He opined, from the broken glass, that the shots were fired from inside the victim's car "out" that day. There was also a powder burn on the seat. The victim had "a fully loaded gun" inside his car -- with a full magazine with sixteen rounds in it. Talanges opined the victim did not shoot his gun. R. 94, l. 21 – 96, l. 10.

Talanges found three cell phones inside the victim's car. He acknowledged he could not tell from looking at them who owned these cell phones. R. 100, l. 11 – 103, l. 20. Finally, according to Talanges, the gun which fired the shot that hit the victim in the head, and injured him, was never found. R. 106, ll. 11-13.

Forensic cell phone evidence

Forensic analyst Lindsey McGraw testified three cell phones were recovered from the victim's car, and he tried to identify the owners of the cell phones. R. 136, l. 11 – 137, l. 5. McGraw testified that his examination of the SIM card on the AT&T flip phone revealed the phone number was 864-494-2573. He identified the phone numbers from the other two cell phones as well. R. 137, l. 1 – 138, l. 13.

During his investigation, McGraw said he was able to "pull phone calls off of the cell phone log" and he "took pictures of them" with his digital camera. He testified *five calls were made from petitioner's phone to the victim's phone on the day of the shooting.* R. 138, l. 24 – 142, l. 7. (emphasis added).

Closing arguments

In closing, defense counsel Johnston reminded the jury how many times Tevin Thomas had lied to the police to gain an advantage for himself. He told the jury as a strategic matter the

prosecution decided to charge petitioner as a participant in the shooting rather than as an accessory after the fact which petitioner actually was. R. 273, l. 8 – 277, l. 22. Johnston reminded the jury that Barnes was a neutral witness, with nothing to gain or lose, and that he observed a man dressed exactly like Tevin Thomas and not like petitioner get out of the victim's automobile immediately after the shooting. R. 280, l. 16 – 283, l. 16.

The solicitor argued to the jury that the forensic evidence traced the cell phone found in the victim's car to petitioner. The forensic cell phone evidence showed petitioner called the victim five times on the day of the incident. R. 288, l. 21 – 289, l. 14.

When the police went looking for petitioner after removing the information from his cell phone, the solicitor told the jury petitioner could not be found for eleven days before he "conveniently turned himself in." R. 287, l. 18 – 288, l. 20. The solicitor said Tevin Thomas conversely was found the day after the shooting. R. 288, ll. 15-20.

Court of Appeals

There were three distinct opinions in the Court of Appeals.

Judge McDonald authored the "lead" opinion. She found the initial search of petitioner's phone did not violate the Fourth Amendment. In doing so she acknowledged "the police removed the phone's SIM card and processed it . . ." App. 6. Judge McDonald stated she agreed obtaining a warrant before the search was the "best policy" but found a warrant was not required for the first search of petitioner's phone. She finally found, for a different reason than Judge Lockemy, that "inevitable discovery" was applicable as an additional sustaining ground. Judge McDonald ruled that a search of the victim's phone would have led to the discovery of the five phone calls between petitioner and the decedent before their alleged meeting at the Taco Bell. She reasoned that petitioner had no expectation of privacy in the victim's phone. App. 8 – 9.

It was during the first warrantless search, however, that the police discovered that this was petitioner's phone which allowed it to link his phone to the victim's phone.

Chief Judge Lockemy found the first search without a warrant violated petitioner's constitutional rights. App. 11. **Judge Konduros agreed** the first warrantless search violated petitioner's Fourth Amendment rights, *and* that she would reverse and remand for a new trial. App. 13. However, **Judge Lockemy**, for a different reason than **Judge McDonald**, found the evidence would be "inevitably found pursuant to a valid search warrant, regardless of the initially unlawful search." App. 12 – 13.,

Judge Lockemy reasoned:

> I recognize police included information gleaned from the warrantless search in their warrant affidavit. In State v. Spears, this court faced a similar issue regarding illegally obtained information used in a warrant. 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The court excised the offending information from the warrant affidavit, and analyzed the remaining portions of the affidavit to determine if probable cause still existed to support the magistrate's decision to issue the warrant. Id. at 483, 713 S.E.2d at 333.
>
> Here, I would find any information about the owner of the phone should be removed from the warrant affidavit and the remaining language should be considered under our test for probable cause. The affidavit would thus read:
>
> On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's 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 and AT&T ZTE Model Z331 cell phone serial number [Redacted] was found inside the Victim's vehicle. This search warrant is needed for the furtherance of this investigation to obtain information from the phone that can either implicate, or clear any individual from any involvement in this incident.

I agree with the lead opinion that this warrant affidavit would support a finding of probable cause. See State v. Dunbar, 361 S.C. 240, 253, 603 S.E.2d 615, 622 (Ct. App. 2004) ("The task of

the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."). Accordingly, I would find the evidence would have been inevitably found pursuant to the valid search warrant, regardless of the initially unlawful search. App 12 – 13.

Discussion

It was undisputed in this case that the forensics personnel searched petitioner's cell phone without a warrant. It is also undisputed that the information they obtained from this warrantless search allowed them to trace the telephone to petitioner. The state used this information from the illegal warrantless search to obtain a search warrant that led to the discovery of inculpatory evidence linking petitioner to the decedent. Removing the offending information obtained during the warrantless search from the search warrant affidavit, and then finding the "mythical affidavit" sufficient is an improper application of the "inevitable discovery" doctrine, and for that reason alone this Court should reverse.

Further, Judge McDonald respectfully erred in her application of the "inevitable discovery" doctrine as well. She determined that the police would have found out the link to petitioner's phone (the phone exchanges around the time of the robbery) by searching the victim's phone and that petitioner had no right to complain about information she assumed would be found by search of the victim's phone. This is speculative, and not a proper application of the "inevitable discovery" doctrine.

Moreover, State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct.App. 2011) relied upon in Judge Lockemy's inevitable discovery analysis was a case littered with procedural appellate briefing problems wherein the Court of Appeals found that "the evidence recovered from 140

Charlotte Circle was admissible under the inevitable discovery doctrine as the evidence would have been found subject to the valid search warrant, regardless of whether Bantan was coerced to give consent during the initial search." State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct.App. 2011). The reliance on the information found in the warrantless search of petitioner's cell phone here was too great to rely on the "redaction" principle discussed in Spears. Here, the information used from the warrantless search to obtain the search warrant was inextricably entwined with obtaining the search warrant, and the application of the inevitable discovery doctrine here being grounded in Spears was respectfully improper.

The Court of Appeals did correctly assume that petitioner did not abandon his phone. Law enforcement had no way of knowing when petitioner's cell phone was unintentionally left in the victim's vehicle. For all the police knew, petitioner may have ridden with the victim on other occasions, and there was an innocent explanation for the cell phone being forgotten and left behind. Common sense dictated that petitioner did not intentionally relinquish control of his cell phone in this case.

The state used the evidence procured from the search warrant to trace calls from the petitioner's cell phone to the victim's cell phone. The phone calls allegedly showed petitioner and the victim were communicating at a critically inculpatory time on the day of the shooting. The solicitor argued that five calls were made to the victim by petitioner that day, and Tevin Thomas was found the day after the shooting, and that petitioner was not located for eleven days until "he conveniently turned himself in."

Searches without a warrant are *pre se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). It should be apparent that

the abandonment exception does not apply here given the testimony of the state's own witness in this case. The judge erred by finding the cell phone was abandoned. See State v. Dupree, supra.

In Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court eloquently explained how a citizen's cell phone is a storage facility for nearly every aspect of his or her life – from the mundane to the intimate. Riley v. California, 134 S.Ct at 2490. The "historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a specific building." Id. at 2490 (*citing* United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012) (Sotomayer, J., concurring).

Defense counsel correctly argued that the fact the cell phone in Riley was seized incident to arrest was not a distinguishing factor from this case. In fact, it seems intuitive from the case law that a person has a much less expectation of privacy in what is removed from his person incident to arrest than he or she does in a mistakenly left behind cell phone.

Law enforcement knows very well that a search of cell phone may lead to suspicion or probable cause that the owner of the cell phone is, or has been, engaged in criminal activity, or other wrongdoing. Further, intimate information, details, and photographs contained on a citizen's cell phone also raise considerable privacy considerations.

Law enforcement in this case should have obtained a search warrant before it forensically searched petitioner's cell phone. Defense counsel correctly argued petitioner had an expectation of privacy in his cell phone. Although the state had the burden of justifying the search of petitioner's cell phone, they *incredibly* maintained they did not even know if the cell phone was "password protected."

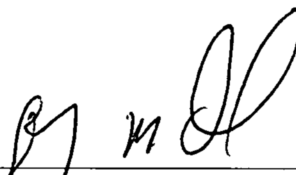
Because illegally procured information from the warrantless search was used to obtain the search warrant the fruits of the search warrant also had to be suppressed. See, Wong Sun v. United States, 371 U.S. 471 (1963). It was simply unreasonable for the police here not to obtain a search warrant for the contents of the cell phone once it was safely in their possession. See United States v. Chadwick, 433 U.S. 1 (1977)[2] See, also, State v. Brown, 400 S.C. 82, 91, 736 S.E.2d 263, 267 (2012). All of the evidence procured from the warrantless illegal search, and then from the search warrant in this case, should have been suppressed as the fruit of the poisonous tree. See, Wong Sun v. United States, 371 U.S. 471 (1963). Because of the improper application of the inevitable discovery doctrine by one or two Judges on the Court of Appeals petitioner's conviction should be reversed and this case remanded for a new trial as urged by the dissenting Judge Konduros.

---

[2] Overruled on other grounds. California v. Acevedo, 500 U.S. 565 (1991).

CONCLUSION

By reason of the foregoing argument, petitioner's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

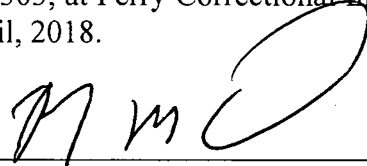
V.

ROBERT LEE MOORE,

PETITIONER

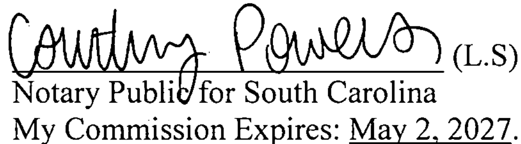
CERTIFICATE OF SERVICE

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 Robert Lee Moore, #320303, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of April, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of April, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.