No. 19-7605

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

VINCENT KANE,

Petitioner

v.

SUPERINTENDENT, SCI PHOENIX ET AL.,

Respondents

RESPONSE TO RESPONDENT'S BRIEF OPPOSING THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Page 1 of the Respondent's Brief assumes the cell phone was abandoned which conflicts with the information which charges crimes based on the theory that petitioner intended to retrieve the cell phone and watch videos of the people using the bathroom. The prosecution's theory of the case depended on the petitioner did not abandon the cell phone.

Page 1 of the Respondent's Brief does not state that the cell phone was off when it was delivered to law enforcement, and it was off when it was searched. The fact that the phone was recording people in the bathroom was unknown to law enforcement when it conducted the warrantless search of the cell phone. Respondent's Brief acknowledges this on page 1, paragraph 2. The results of the warrantless search cannot be used to prove the legality of the search. The fact that the CID officer checked with a Deputy District Attorney who gave bad advice about abandonment is proof of nothing but bad judgment on the part of the CID Officer who should have obtained a warrant to search the phone.

Page 2, paragraph 2 of the Respondent's Brief states the trial court's conclusion that petitioner abandoned the cell phone by leaving it in a public bathroom. This is the legal conclusion the petitioner disputes.

Page 2 criticizes the way the petitioner wrote the brief. What is significant is the Respondent's Brief does not dispute the fact that the cell phone and the files within the cell phone were password protected demonstrating petitioner's intention to protect his privacy interest in the cell phone.

Page 3 states, "Petitioner creates his own facts rather than those found by the trial court and relied upon by the Superior Court..." But what is most important is that the Respondent's Brief does not dispute the fact that the cell phone and the files within the cell phone were

password protected. The Respondent's Brief quibbles with the language used in the petition for allowance of appeal, but it does not deny the fact that the cell phone was password protected exhibiting an expectation of privacy many cases have held is worthy of recognition.

The Court should note that the CID officer had to use Cellebrite software to cut through the passwords protecting the cell phone from intrusion, and protecting the password protected files from intrusion.

This Court held in ***Riley v. California and United States v. Wurie***, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2004) that law enforcement is prohibited from conducting a warrantless search of a cell phone. The Court established one exception, to wit, exigent circumstances. This Court did not give law enforcement a blank check to avoid the categorical rule prohibiting warrantless cell phone searches by claiming the cell phone was abandoned because it was found in a public bathroom.

The questions presented in this petition are as follows:

I. WHETHER THE DOCTRINE OF ABANDONMENT APPLIES TO PASSWORD PROTECTED CELL PHONES FOUND IN A PUBLIC PLACE?

II. WHETHER THE DOCTRINE OF ABANDONMENT APPLIES TO PASSWORD PROTECTED CELL PHONES LEFT IN A PUBLIC BATHROOM WHERE, AS HERE, THE STATE CHARGES THE DEFENDANT WITH CRIMES DEPENDENT ON THE DEFENDANT'S INTENT TO RETRIEVE THE CELL PHONE?

As stated in the petition, the CID had all the time in the world to apply for a search warrant. The CID had exclusive possession of the cell phone. The CID knew that the cell phone was password protected. Otherwise, the CID would not have had to use specialized software to open the cell phone and review the password protected files inside the cell phone.

In an effort to circumvent ***Riley/Wurie***, the Superior Court of Pennsylvania invented an exception for abandonment of a cell phone left in a bathroom even though when it was searched,

the phone was powered off, the cell phone was password protected and each file was password protected. The Superior Court's decision was based on a misguided decision of the trial court, but that does not justify the decision. The Superior Court's decision was tacitly approved by the Supreme Court of Pennsylvania when it rejected the petition for allowance of appeal, and again when it denied the petition for reconsideration.

Page 3 of the Respondent's Brief makes the false claim that "Petitioner creates his own facts rather than using those found by the trial court..." This statement is beyond unreasonable. The record contains ample support for the fact that the cell phone was password protected, and the files within the cell phone were password protected. The argument that petitioner "abandoned" the phone by leaving it in the bathroom is the question this Court will have to decide. But it is an undisputed fact that the cell phone was off when it came into the hands of law enforcement, and it is an undisputed fact that the phone was password protected and the files were password protected. The disturbing fact that the trial judge did not attach significance to the password protections is a significant error that should play no part in this Court's decision to grant certiorari.

Page 4 of the Respondent's Brief begs the question whether a cell hone discovered in a public place is abandoned when the cell phone is password protected.

Page 5 of the Respondent's Brief relies on case law before ***Riley/Wurie*** stating that a defendant loses his expectation of privacy when he leaves an item behind and flees the police. The Respondent's Brief does not deal with the fact that cell phones have a heightened degree of protection because they contain a vast amount of information, and are unique.

Petitioner has directed the Court's attention to some very well-reasoned cases holding that abandonment does not apply to password protected cell phones.

Application of "abandonment" to this set of facts is contrary to the decision of the Supreme Court of North Dakota in ***State v. Valles***, 2019 ND 108, 925 NW 2d 404 (2019) and contrary to ***State of Florida v. K.C.,*** 207 So.3d 951, 958 Court of Appeals of Florida, Fourth District (FLA 2016) which held that law enforcement requires a warrant to search a cell phone even if the defendant abandons it.

REASONS WHY THE COURT SHOULD GRANT CERTIORARI

The Court should exercise its discretion, and grant review under Rule 10(c) because the Kane decision conflicts with ***Riley/Wurie,*** 573 U.S. 373, 134 U.S. 2473, 189 L.Ed.2d 430 (2014) which reads, in pertinent part, as follows:

> In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building. [Id. at 2481].
>
> When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.
>
> *** *** *** ***
>
> Apart from their arguments for a direct extension of Robinson, the United States and California offer various fallback options for permitting warrantless cell phone searches

> under certain circumstances. **Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules. "[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" Id. at 2492…**
>
> **We also reject the United States' final suggestion that officers should always be able to search a phone's call log, as they did in Wurie's case.** The Government relies on Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), which held that no warrant was required to use a pen register at telephone company premises to identify numbers dialed by a particular caller. The Court in that case, however, concluded that the use of a pen register was not a "search" at all under the Fourth Amendment. See Id. at 745-46, 99 S.Ct. 2577, 61 L.Ed. 2d. 220 There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label "my house" in Wurie's case. [Id. 2492-2493]

Riley/Wurie held that the prohibition against the warrantless search of a flip top phone must be "categorical" to foreclose the case by case type of argument advanced by the Respondent's Brief. Furthermore, ***Riley/Wurie*** held that evidence from the warrantless search of the flip top cell phone had to be suppressed even though the police merely opened the phone and examined the call log.

Here, the CID used Cellebrite software to cut though passwords and conduct a complete forensic analysis of the phone, all without a search warrant even though it had all the time in the world to get a warrant.

The Respondent's Brief does not deal with the cases stating that abandonment does not justify the warrantless search of a cell phone. It does not dispute that such cases exist.

State v. Valles, 2019 ND 108, 925 NW 2d 404 (ND 2019) presents the correct analysis and arrives at the right decision. In that case, Valles' cell phone was searched without a warrant on the pretext that the phone was abandoned. According to the prosecution, the phone was abandoned

because it was found in a parking lot by an apartment resident, and brought to the police station the next morning. The cell phone was locked with a grid lock. Police guessed the lock pattern and opened the phone...Police identified the owner and his girlfriend from pictures stored in the phone. Police also discovered pictures of drugs and drug paraphernalia. Based on the contents of the cell phone, police applied for a warrant to search Valles' house which police recognized from photos in the phone. Police found marijuana and marijuana paraphernalia. As stated above, the prosecution justified the warrantless search on the theory that Valles abandoned the cell phone by leaving it in the parking lot in front of apartments. A woman found the phone and gave it to police. Valles did not report the phone lost or stolen. There was no evidence Valles intentionally discarded the phone, and it was password protected. The Court stated, "But it was not Valles burden to prove he maintained a possessory interest in his cell phone. It was the State's burden to justify the warrantless search by showing Valles abandoned his possessory interest in his cell phone prior to the search." The Court stated, "All of the above privacy concerns are heightened and the government's legitimate interest is lowered , when the cell phone is locked…Any search of a cell phone that requires bypassing, password or other security feature of a cell phone must be performed pursuant to a warrant. A security lock on a cell phone signals that the information within is not intended for public viewing."

State v. K.C., 207 So. 3d 951 (Court of Appeal of Florida, 4th Dist. 1996) held that a password protected cell phone is not subject to the doctrine of abandonment. In that case, the State argued that it need not obtain a warrant before searching an abandoned cell phone. In that case a Fort Lauderdale Police Officer initiated a traffic stop for speeding and driving without headlights at night. The individuals in the car stopped the car, got out and fled. It turned out the car was stolen. Police found a cell phone left behind in the car. The officer saw that on the cell phone's locked screen was a picture of an individual who looked like the person who ran from the car. The cell phone had a passcode. The

officer turned the phone over to the Sunrise Police Department. Several months later, a detective with the Sunrise Police Department asked a forensic detective to determine ownership of the phone. He did not obtain a search warrant because he believed the phone was abandoned. The forensic examiner was able to open the phone and discover it belonged to K.C. who was charged with burglary of a conveyance. K.C. moved to suppress the contents of the cell phone. The defense argued that K.C. retained the expectation of privacy by password protecting the phone. The trial court granted the suppression motion, The State appealed. The Court stated, "a warrantless search constitutes a prima-facie showing which shifts to the State the burden of showing the search's legality." The Court further held that police could not search a password protected cell phone without a warrant. The Court held that "abandonment" was not one of the exceptions to the warrant requirement within the ***Riley/Wurie*** holding. The Court held: "As the Supreme Court held that a categorical rule permitting a warrantless search incident to arrest of a cell phone contravenes the Fourth Amendment protection against unreasonable searches and seizures, we hold that a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is likewise unconstitutional."

State v. People, 240 Ariz. 244, 378 P3d 421, 426 (2015)(cell phones are intrinsically private and the failure to password protect a cell phone is not an invitation to snoop). This case held that the defendant has a uniquely broad expectation of privacy in his cell phone. It held that the police must get a warrant to search a cell phone absent exigent circumstances which it defined as pursuing a fleeing suspect, assist seriously injured persons or prevent imminent destruction of evidence. In that case, the defendant left his cell phone in someone else's apartment. The State claimed that the defendant abandoned the cell phone (not password protected) and thereby lost his expectation of privacy in the phone. The Court held that the defendant did not lose his expectation of privacy in a cell phone left behind in a bathroom where others could access it. *Id.* at 425. The Court stated, "Cell phones are

intrinsically private, and the failure to password protect access to them is not an invitation for others to snoop."

State v. Granville, 423 S.W. 3d 399, 405-406 nn. 16-17 (Texas Court of Criminal Appeals)(collecting cases treating expectation of privacy in cell phones as "indisputable"). Granville held that the defendant did not lose is subjective expectation of privacy in a cell phone stored in a jail property room, and that society would consider his expectation reasonable.

The Respondent's Brief correctly states that several courts have approved warrantless cell phone searches of cell phones on a theory of abandonment, but those cases involve flight from a crime scene and the circumstances were such that it was extremely unlikely the owner would come back and retrieve the cell phone. For example, in ***State v. Brown***, 414 S.C. 14, 776 S.E. 2d 917, 923-924 (S.C.Ct.App. 2015), the cell phone was left at scene of burglary. The Court reasoned that it was unlikely the defendant would risk arrest by returning to the crime scene to retrieve the cell phone. In ***State v. Samalia***, 186 Wn 2d 262, 375 P. 3d 1082 (Wash 2016 (en banc), the cell phone was found in an abandoned stolen vehicle. Similarly, ***Martinez v. State***, 2016 Tex. App. Lexis 9232 [phone left at a murder scene], ***People v. Daggs***, 133 Cal. App. 4th 361 [phone dropped during drug store robbery], ***Edwards v. State***, 497 S.W. 3d 147, 154 (Tex. App. 2016) [phone left on stolen vehicle at scene of armed robbery].

In stark contrast to the cases cited in the preceding paragraph, the Respondent's entire case developed around the theory that the petitioner intended to retrieve the phone to get access to the videos. Further, the uncontradicted evidence in this case consisted of the testimony of Detective Pisani, who understood that if the female student's story was true about finding the cell phone in the bathroom in the bathroom taking pictures of people were true, then the owner of the phone intended to come back and retrieve it in order to retrieve the videos.

The Respondent' Brief directs the Court's attention to ***Royson v. State***, 2015 Tex. App. 6171 (Court of Appeals, 14th District, Houston). In that case, the defendant left his cell phone in a ladies' dressing room. According to the ladies' version, the phone was recording people in the dressing room. The ladies eventually gave the phone to law enforcement who wisely obtained a search warrant before searching the cell phone. The defendant claimed the ladies who found the phone violated his rights by opening it and looking at the videos. Significantly, the defendant could not claim that law enforcement violated his 4th amendment rights because law enforcement had the good sense to obtain a search warrant before searching the phone. The case does not deal with whether the phone was password protected or not so it stands out for one thing, to wit, law enforcement had the sense to get a warrant before searching the cell phone.

CONCLUSION

This Court should adopt the well-reasoned decision in ***State v. Valles, supra***. It should reject the abandonment analysis in this case, and reject application of abandonment in all other cases involving cell phones. This approach makes perfect sense. If the cell phone has been abandoned, the defendant is not going to reclaim it. As such, law enforcement has all the time in the world to obtain a warrant. There is no reasonable excuse for the warrantless search of a cell phone absent exigent circumstances. The Court should grant the petition for certiorari.

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CERTIFICATE OF WORD COUNT

The response to Respondent's Brief opposing the petition for certiorari contains 3065 words. The typeface is New Times Roman with 12 point type.

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PROOF OF SERVICE

Cheryl J. Sturm, Esq. certifies that on March 11, 2020, she served a copy of the attached Response to Respondent's Brief opposing the Petition for Certiorari electronically as follows:

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