No. 16-1224

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, PETITIONER

v.

K.C., A CHILD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

CAREY HAUGHWOUT
Public Defender

GARY LEE CALDWELL*
Assistant Public Defender
* *Counsel of Record*
gcaldwel@pd15.org
appeals@pd15.org

TATJANA OSTAPOFF
Assistant Public Defender
tostapof@pd15.org

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561)355-7600

QUESTION PRESENTED

1. Whether the Court has jurisdiction to consider this petition for writ of certiorari to the decision of an intermediate State court when the State failed to seek review and did not obtain a decision from the highest court of the State in which a decision could be had.

2. Whether, because of the uniquely extensive nature of the personal information it contains, the owner has an expectation of privacy in a cell phone's password protected contents so that a warrantless search of the password protected cell phone is unconstitutional where there is no basis for emergency action.

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 5

This Court does not have jurisdiction to review this case where the State failed to seek review of the decision of the intermediate appellate court in the highest court of a State in which a decision could be had. 5

The state courts never made a finding that the cell phone was abandoned. 10

Because of the uniquely extensive nature of the personal information it contains, the owner has an expectation of privacy in the phone's password protected contents. 11

CONCLUSION 24

AUTHORITIES CITED

Cases

Abel v. United States, 362 U.S. 217 (1960) 18

Atwell v. State, 197 So.3d 1040 (Fla. 2016) 7

California v. Hodari D., 499 U.S. 621 (1991) 18

City of Ontario, California v. Quon, 560 U.S. 746 (2010) 15

Com. v. Martin, 4 N.E.3d 1236 (Mass. 2014) 22

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 11

Gonzalez v. Thaler, 565 U.S. 134 (2012) 8

Huber v. New Jersey Department of Environmental Regulation, 562 U.S. 1302 (2011) 9

In the Matter of an Application of the United States, 809 F.Supp. 113 (E.D.N.Y. 2011) 15

Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960) 5

Norman v. State, __ So.3d __, 42 Fla. L. Weekly S239 (Fla. March 2, 2017) 7

Pennsylvania v. Finley, 481 U.S. 551 (1987) 9

Powell v. Texas, 392 U.S. 514, 517 (1968) 6

R.J. Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 13 (1986) 8

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

State v. K.C., 207 So.3d 951 (Fla. 4th DCA 2016) 1

State v. Samalia, 375 P.3d 1082 (Wash. 2016) 22

Talley v. California, 362 U.S. 60, 62 (1960) 6

Tracey v. State, 152 So.3d 504 (Fla. 2014) 7

U.S. v. Ramos, 12 F.3d 1019 (11th Cir. 1994) 18

United States v. Robinson, 414 U.S. 218 (1973) 19

United States v. Tolbert, 692 F.2d 1041 (6th Cir. 1982) 18

United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) 15

Statutes

28 U.S.C. § 1257(a) 5, 10

Rules

Fla. R. App. P. 9.330 ..... 4, 7

Constitutional Provisions

Amend. IV, U.S. Const. 11

Art. I, § 12, Fla. Const. 11

Art. V, § 3(b), Fla. Const. 4, 6

Art. V, § 4(b), Fla. Const. 6

No. 16-1224

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, PETITIONER

v.

K.C., A CHILD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below can be found at *State v. K.C.*, 207 So.3d 951 (Fla. 4th DCA 2016).

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a) because Petitioner failed to obtain a decision from the highest court in the State.

STATEMENT

A petition was filed seeking Respondent's adjudication as a delinquent for committing burglary of a conveyance (R8-9). He moved to suppress statements he made to police after his identity had been revealed by the unlawful search of a password protected cell phone recovered from a vehicle after a traffic stop (R22-25).

At the hearing on the motion, Lieutenant Williams Gordon of the Lauderhill Police Department testified that on August 2, 2014, he initiated a traffic stop of a black Ford occupied by two individuals (T46). When Gordon activated his emergency lights, the vehicle stopped abruptly, and two individuals fled from the vehicle (T47).

Gordon looked inside the car and saw "a cell phone or two" in the front passenger area (T48). The phone was password protected (T52). Gordon made no attempt to unlock the phone or retrieve information from it (T53). He turned the phones over to Sunrise Police Department (T53-54). Gordon never received a request from anyone to return the phones (T50). The occupants of the vehicle were not apprehended.

Gordon determined that the tag belonging to the vehicle was inside its trunk, and the tag that was displayed on the vehicle did not belong to it (T55).

Detective Jason Jolicoeur of the Sunrise Police Department testified that his department received a phone that was left behind in a traffic stop (T58). No one ever contacted the department to retrieve the phone (T59). Jolicoeur gave the phone to a forensic detective to identify its owner (T60). Several months later, the forensic detective searched the phone and provided Jolicoeur with Respondent's name (T60-61). This information was the only evidence linking Respondent to the car (T61-62). The officer could not identify Respondent as one of the individuals who ran from the car (T65).

The trial court granted Respondent's motion to suppress in an order dated August 17, 2015 (R32). The State timely noticed its appeal therefrom the next day (R33).

On direct appeal to the Fourth District Court of Appeal, an intermediate court of appeal, the trial court's order granting the motion to suppress was affirmed in a written opinion. The District Court relied

on this Court's decision in *Riley v. California*, __U.S.__, 134 S.Ct. 2473 (2014) in reaching its result.

Neither the trial court nor the intermediate appellate court made a finding as whether the phone was abandoned. App. to Petition, A-4.

The State did not seek review in the Florida Supreme Court, although that Court has jurisdiction to review decisions, like the one below, which expressly construe a provision of the United States Constitution. Article V, section 3(b)(3), Fla. Const.

Further, neither in its briefs nor by a post-decision motion for certification under Florida appellate rule 9.330 did the State did ask the Fourth District to certify the case to the state supreme court as one involving a question "of great public importance" under Article V, section 3(b)(4), Fla. Const.

The Fourth District Court of Appeal denied the State's motion to stay its mandate and issued its mandate on January 20, 2017.

REASONS FOR DENYING THE WRIT

This Court does not have jurisdiction to review this case where the State failed to seek review of the decision of the intermediate appellate court in the highest court of a State in which a decision could be had.

The State seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) which allows certiorari review of:

> Final judgments or decrees rendered by *the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court by writ of certiorari where. . . any title, right privilege, or immunity is specially set up or claimed under the Constitution. . . of. . . the United States.

(Emphasis added.)

Thus, this Court is empowered to review the judgments of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a); *Metlakatla Indian Community v. Egan*, 363 U.S. 555 (1960). The highest state court in which a decision could be had will ordinarily be the State's court of last resort, but it could be an intermediate appellate court or even a trial court if its judgment is final under state law *and cannot be reviewed by any higher state court*. *Talley v.*

California, 362 U.S. 60, 62 (1960); *Powell v. Texas*, 392 U.S. 514, 517 (1968).

In the instant case, the decision of which the State now seeks review was rendered by the Fourth District Court of Appeal, a State court of intermediate appellate jurisdiction. Article V, section 4(b), Fla. Const. The State never sought review of this decision in the Florida Supreme Court, the Florida court of last resort. Art. V, section 3(b), Fla. Const.

The State failed to do so even though Florida permits its Supreme Court to review any decision of the district courts of appeal which "expressly construes a provision of the state or federal constitution." Art. V, section 3(b)(3), Fla. Const.

The decision of the Fourth District Court of Appeal below expressly construed the Fourth Amendment, a provision of the federal constitution. The Florida Supreme Court therefore had jurisdiction to review the Fourth District Court's decision. And that Court has not hesitated to grant jurisdiction on this basis in criminal cases. *E.g.*, *Norman v. State*, __ So.3d __, 42 Fla. L. Weekly S239 (Fla. March 2,

2017) (Second Amendment); *Atwell v. State*, 197 So.3d 1040 (Fla. 2016) (Eighth Amendment), including in cases involving the Fourth Amendment. *Tracey v. State*, 152 So.3d 504 (Fla. 2014) (cell phone tracking).

Nor did the State file any motion for rehearing in the appellate court, including in particular a request that the Fourth District Court certify the case to the Florida Supreme Court as involving a question of great public importance under Florida Rule of Appellate Procedure 9.330 and Article V section 3(b)(4), Fla. Const. (review authorized of "any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance. . ."). Such certification provides an alternate basis for review by the Florida Supreme Court.

Because the State rejected every opportunity provided by Florida's court system to obtain review of the instant case in its Supreme Court, this case is consequently unlike those cases where the petitioner has sought review in the court of last resort but review has been denied. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 138-

139 (1986) (treating North Carolina Supreme Court's dismissal of appeal from North Carolina Court of Appeals as a decision on the merits from which this Court's review would lie and dismissing appeal from Court of Appeals on grounds of lack of jurisdiction). When the court of last resort considers the case but declines to exercise jurisdiction, or where no other higher court is able to accept the case for review, the decision of the intermediate appellate court effectively becomes the decision of the highest court of a State "in which a decision could be had," and this Court has jurisdiction.

Instead, in this case the State has intentionally bypassed every opportunity provided to it under the State constitution to obtain review in the Florida Supreme Court. Therefore, as recognized in *Gonzalez v. Thaler*, 565 U.S. 134 (2012), a case where the defendant similarly chose not to seek review of his intermediate appellate court decision in the Texas court of final resort,

> We can review, however, only judgments of a "state court of last resort" or of a lower state court if the "state court of last resort" has denied discretionary review. This Court's Rule 13.1; see also 28 U.S.C. § 1257(a) (2006 ed.). *Because*

> *Gonzalez did not appeal to the Texas CCA, this Court would have lacked jurisdiction over a petition for certiorari* from the Texas Court of Appeals' decision affirming Gonzalez's conviction.

Id. at 154 (emphasis added.) *See also Huber v. New Jersey Department of Environmental Regulation*, 562 U.S. 1302 (2011), in which Justice Alito, in an opinion joined by the Chief Justice, Justice Scalia and Justice Thomas, concurred in the denial of certiorari review of a case even though the lower court decision may have been in error in its application of the Fourth Amendment: "But because this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate." To the same effect is Justice Steven's recognition in his dissenting opinion in *Pennsylvania v. Finley*, 481 U.S. 551 (1987) that

> Before the Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari, it sought review of the Superior Court's judgment in the Supreme Court of Pennsylvania. *Had it not done so, this Court could not have accepted jurisdiction of the petition because cases originating in a state court may not be reviewed here unless the judgment was "rendered by the highest court of a State in which a decision could be had*."

Id. at 571 (emphasis added).

Consequently, the State having failed to obtain a decision from "highest court of a State in which a decision could be had," 28 U.S.C. § 1257, the petition should be denied for lack of jurisdiction.

The state courts never made a finding that the cell phone was abandoned.

Petitioner premises its question presented and its argument on the assumption that the cell phone was abandoned in the car by Respondent. The state court never made that determination. The Fourth District wrote that, in the absence of the trial court's explicit factual findings, the trial court "either found that the cell phone was not abandoned or made the legal conclusion that police could not search the cell phone without a warrant because the abandonment exception is inapplicable to password protected cell phones. We address the latter contention, as it is controlling." App. to Petition, A-3.

Since the petition rests on an assumed fact which neither the trial nor the appellate court actually found to exist, there is no basis for review in this case. The State in essence asks this Court to decide, in

the first instance, whether the phone was abandoned. But that issue is not covered by the question presented in the petition.

> *Because of the uniquely extensive nature of the personal information it contains, the owner has an expectation of privacy in the phone's password protected contents.*

Every citizen has the right to be secure against unreasonable searches and seizures. Fourth Amendment, United States Constitution; Article I section 12, Fla. Const. Warrantless searches are presumptively unreasonable unless they fall within a specific exception to the warrant requirement. The Court has long emphasized the importance of fidelity to the foundational premise of the Fourth Amendment, stating, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971):

> [T]he most basic constitutional rule in this area is 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." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the

> values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

Id. at 454–55 (plurality opinion) (footnotes omitted).

In *Riley v. California*, __U.S.__, 134 S.Ct. 2473 (2014), police made a routine traffic stop and then arrested the driver for driving with a suspended license. Incident to that arrest, they searched the driver and found a cell phone in his pocket. It does not appear that the phone was locked or password protected, since the arresting officer was able to access words on the phone that he believed were references to a gang. Two hours later, a detective examined the phone at the police station and retrieved additional evidence from it.

This Court considered whether a well-settled exception to the warrant requirement (search incident to arrest) applied to permit warrantless searches of cell phones, "which 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." *Id.* 134 S.Ct. at 2484. In particular, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse":

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself a misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.. . .
>
> One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. . . .
>
> But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. . . .
>
> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously

> possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even later. . . .
>
> Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception.

Id. 134 S.Ct. at 2488-90.

Moreover, unlike a wallet or luggage, the 'contents" of a cell phone are not limited to that which is stored in the phone itself:

> To further complicate the scope of privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to n arrest is a bit strained as an individual matter. [Citation omitted.] But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing."

Id. 134 S.Ct. at 2491.

Privacy concerns are further enhanced with the realization that "cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." *City of Ontario, California v. Quon*, 560 U.S. 746, 760 (2010).

The evolving understanding of the expectation of the right to privacy is exemplified in *In the Matter of an Application of the United States*, 809 F.Supp. 113 (E.D.N.Y. 2011), which held that "there are circumstances in which the legal interest being protected from government intrusion trumps any actual belief that it will remain private." 809 F.Supp. at 124. Thus, even where there may not be an actual expectation of privacy by the citizen, "society's recognition of a particular privacy right as important swallows the discrete articulation of Fourth Amendment doctrine. . . ." *Id. See also United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (e-mail subscriber "enjoys a reasonable expectation of privacy in the contents of emails that are

stored with, or sent or received through, a commercial ISP;" even though ISP has control over emails and ability to access them, a warrant based on probable cause is required to compel ISP to turn over subscriber's emails).

As stated in *Riley*,

> In 1926, Learned Hand observed. . .that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." [Citation omitted.] If his pockets contain a cell phone, however, that is no longer true, Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is.

Id., 134 S.Ct. at 2490-91.

In *Riley*, the Court acknowledged the extent of the personal and private information contained in cell phones and held that *even where a defendant was searched incident to his arrest, a warrant would be required before any cell phone lawfully seized from his person could be*

searched: "where privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Id.* at 2488.

In the instant case, the police seized a cell phone from a car, the occupants of which fled after it was stopped by police. The phone was then given to another police agency. It was several months before a forensic detective conducted a warrantless search of the phone despite the heightened concern about the privacy protections due to cell phone searches which provided the foundation for this Court's decision in *Riley*. App. to Petition, A-2. The Fourth District Court of Appeal correctly recognized that this resulted in a violation of respondent's Fourth Amendment rights, requiring suppression of the evidence so recovered.

In opposition to this result, the State relies entirely on an assumption that Respondent abandoned the cell phone in the car, and then argues that he thus automatically gave up all his privacy rights in it. The term "abandonment" as applied to illegal seizures does not refer to the traditional meaning of that term in the context of property law. Within the meaning of illegal seizures, the concept is a Fourth

Amendment issue, and the " 'capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Fourth Amendment has a legitimate expectation of privacy in the invaded place.' " *United States v. Tolbert*, 692 F.2d 1041, 1044 (6th Cir. 1982).

A defendant abandons his expectation of privacy when he leaves property behind in the waste basket of a hotel room, *Abel v. United States*, 362 U.S. 217, 241 (1960) or where he has discarded the property in garbage bags left at the curb, thereby subjecting it to examination by anyone who passes by. *California v. Hodari D.*, 499 U.S. 621, 629 (1991).

On the other hand, where the owner of the property exhibits a reasonable expectation of privacy in it, search of the property is illegal. *See U.S. v. Ramos*, 12 F.3d 1019 (11th Cir. 1994) (fact that defendant failed to remove locked briefcase from rented condominium unit before check-out time did not establish that he had abandoned his reasonable expectation of privacy in it).

In the instant case, the cell phone was password protected,

thereby evidencing an intent by the owner to protect its private contents from being accessed. That protection locked the phone and rendered access to its contents impossible by anyone who did not possess the special forensic tools which the State ultimately obtained. The expectation of privacy in the locked phone is appropriate where the property at issue is as uniquely personal as the contents of a cell phone.

In finding that the exception to the warrant requirement made for searches incident to an arrest as permitted in *United States v. Robinson*, 414 U.S. 218 (1973), did not apply to excuse the failure to obtain a warrant to search the contents of a cell phone, the Court stated in *Riley*:

> Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interest." [Citation omitted.] Such a balancing of interests supported the search incident to an arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless search at issue here.
>
> But while *Robinson*'s categorical rule strikes an appropriate balance in the context of *physical*

> objects, neither of its rationales has much force with respect to digital content on cell phones. On the governmental interest side, *Robinson* concluded that the two risks identified in *Chimel* – harm to officers and destruction of evidence – are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after an arrest as significantly diminished by the arrests itself. Cell phones, however, place vast quantities of person information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.
>
> We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

Riley, 2484-85 (emphasis added).

In the instant case, the extraordinarily comprehensive nature of the private information accessible via the cell phone, coupled with the demonstration of a subjective expectation of privacy in its contents by the use of password protection, likewise requires that a warrant be obtained before the phone's contents can be examined. Access to those contents simply cannot be characterized as a minor intrusion:

> Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read – nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick* rather than a container the size of the cigarette package in *Robinson.*

Riley at 2489.

In the instant case, police found two cell phones inside a vehicle. There was nothing to link Respondent to either of the two individuals who fled the car. Respondent never denied ownership of the phone. Although he failed to claim it while it was held by the police, there was no evidence that Respondent knew that the police had the phone and that he could retrieve it from them – especially since the phone was transferred to a different police agency after being seized. His privacy interest in the contents of the phone exceeded or at least equaled the privacy interest he had in his own home, entitling it to the greatest possible protection. *Riley*, *supra.* And he demonstrated that he retained an expectation of privacy in it by password protecting it.

In *Riley*, the Court noted that there may be exigent circumstances

in which a warrantless search of a cell phone may be appropriate on a case-by-case basis. 134 S. Ct. at 2486. The facts of this case refute any possibility of exigent circumstances. The cell phone was not searched until several months after the phone was seized. App. to Petition, A-2. With no exigent circumstances, the police should not have searched the locked phone without obtaining a warrant.

The State claims a conflict of decisions among state and federal courts on the issue in this case, citing an array of trial court and appellate court decisions across pages 22-24 of the petition. But those cases include only one state supreme court decision that considered an issue of the search of an abandoned cell phone in light of *Riley*. That case, *State v. Samalia*, 375 P.3d 1082 (Wash. 2016), did not involve a password protected phone. The only other state supreme court case cited by the State is *Com. v. Martin*, 4 N.E.3d 1236 (Mass. 2014), which was decided before *Riley*. The state cites no federal Court of Appeals decision applying Riley to the search of an abandoned cell phone.

Finally, the State's assertion that a person does not have a privacy interest in stolen property, petition at 15-16, may well have permitted

search of the stolen vehicle in this case, but that does not authorize the search of the locked cell phone found in the vehicle. There was no evidence that the cell phone was stolen. In fact, the State's prosecution of its charges against Respondent hinged on its theory that the phone belonged to Respondent as its lawful owner.

* * *

In summary, there is no basis for certiorari review. The State failed to seek review of this case in Florida's court of last resort, so that the Court does not have jurisdiction to hear the instant appeal. Further, the petition is based on a factual issue never determined by the state court – whether the cell phone in question was, in fact, abandoned. Respondent had an important privacy right in the password protected cell phone and no exigent circumstances justified the warrantless search.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Respondent requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____
GARY LEE CALDWELL
Assistant Public Defender

TATJANA OSTAPOFF
Assistant Public Defender

Attorneys for Respondent