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State v. Brown: Privacy and Abandonment in the Digital Age

In today's increasingly technological world, it is sometimes a challenge for the court system to keep up with the ever-changing high-tech landscape. The legal system must constantly evolve to properly handle new issues related to technology and society's obsession with everything digital. This past summer, the South Carolina Supreme Court issued an opinion in *State v. Brown*, which shows how our thoughts and practices in evidence and criminal procedure must adapt to keep up with modern cellphone use.¹

In this case, the victim of a burglary discovered a cellphone in his home that did not belong to either him or his roommate. A responding officer took the cellphone to the police station, where it was secured in the evidence room for six days. After guessing the cellphone's passcode and searching through the contacts, a detective determined that the phone belonged to the Defendant. The Defendant was then charged and convicted of first-degree burglary.

The issue on appeal was whether the evidence obtained from the cellphone should have been suppressed. The Defendant argued that his Fourth Amendment rights were violated by the detective's unreasonable search of the cellphone. However, both the trial and appeals courts found that the Defendant "abandoned" the cellphone, and thus had no reasonable expectation of privacy. In June, the South Carolina Supreme Court upheld these rulings and confirmed the Defendant's conviction.

The Fourth Amendment, of course, provides protection from unreasonable searches and seizures by the government.² Importantly, courts have established that



one of the exceptions to the Fourth Amendment's protections is abandoned property.³ However, in most cases it seems that personal property must be *intentionally* relinquished in order for it to be considered abandoned.⁴ If this is the case, how did the South Carolina Supreme Court determine the Defendant's cellphone to be abandoned? Surely the Defendant did not intentionally leave this important piece of personal property behind at a crime scene. Additionally, the United States Supreme Court seemingly expanded Fourth Amendment protections for cellphones in its recent *Riley v. California* ruling.⁵

The South Carolina Supreme Court's analysis in *Brown* is fascinating. According to the Court, the Defendant did not volun-

(continued on page 2)

ALSO IN THIS ISSUE

What's Been Happening	2
FAA Reauthorization Act Passes	3

Judicial Spotlight: Hon. Aphrodite K. Konduros, SC Court of Appeals	5
Stars of the Quarter	5
Letter From the President.....	BC

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State v. Brown

(continued from Front Cover)

tarily abandon his cellphone – at first. The fact that the Defendant had a lock on the screen of his phone indicated that he *did* initially have a reasonable expectation of privacy.⁶ However, according to the Court, “when a person loses something of value [...] the person who lost it will normally begin to look for the item” in order to get it back into his or her possession.⁷ In this case, over the course of the six days in which the cellphone was sitting in an evidence locker, the Defendant did not call the phone, text the phone, contact the police station to report the phone missing, or contact his service provider to determine the whereabouts of the phone.⁸ The only affirmative step the Defendant did take was to call his service provider and cancel his cellular service to the phone.⁹ Thus, the Court reasoned, the Defendant’s “decision not to attempt to recover the phone equates to the abandonment of the phone.”¹⁰ Stated differently, while the Defendant did not initially abandon his cellphone, his lack of action over a six-day time span resulted in abandonment of the property and loss of privacy interests. Interestingly, it does not appear that *Riley v. California* made much of a difference in the Court’s analysis.¹¹

I encourage everyone to read Justice John Few’s Opinion, as well as Chief Justice Donald Beatty’s Dissent, as both are very thought provoking. Although this topic is somewhat new territory, there have been a number of similar cases in other courts in the past few years that are worth looking into as well. We may not all agree on what actually constitutes abandonment or a reasonable expectation of privacy, but I think we can all agree that cases like these will become more common – and perhaps more complicated – in the coming years.

Mallory Verner is originally from Mount Pleasant, South Carolina. After attending the University of Georgia and Georgia State University College of Law, she returned to the Charleston area to practice law. She currently works at the Segui Law Firm and focuses on construction defect litigation.

What’s Been Happening



Protecting Our Youth

The Protecting Our Youth committee had two events this quarter – one in Lexington and one in Charleston! The Lexington event involved a one-hour panel presentation to a group of students who are part of the FOCUS program. They discussed “hand of one” laws and consequences of drug charges. They also reviewed the consequences of different teen actions as well as what they should do if they ever find themselves in legal trouble. Many thanks to the panelists: **Mark Jones, Bennett Castro and Melanie Graham**, as well as the moderator, **Samantha Albrecht**, for sharing their time and knowledge with the students!

The Charleston event also involved a panel discussion featuring a solicitor, public defender, officer, DJJ representative and school principal. Topics discussed included “hand of one” law, truancy, social media pitfalls



and criminal records. Students asked questions and became involved with coming up with solutions for the problems they saw. As a result of this event, POY has been invited to speak at four more schools!

11th Circuit happy hour

The 11th Circuit hosted a happy hour for their young lawyers in conjunction with the Lexington County Bar Association. This event was enthusiastically attended and allowed young lawyers to mix and mingle with other members of the Bar! **Sutania Fuller** organized this event at the Old Mill.



Professional Development

The committee combined networking and education this quarter with the latest Brews & News! Professor **Howard Stravitz** provided an update on the Fourth Circuit Court of Appeals while also teaching the attendees how to properly taste wine. The young lawyers present were able to network and otherwise converse with Professor Stravitz and each other. Special thanks to **Daina Riley** and **Briggs Tucker** for planning this event!

Endnotes

¹ *State v. Brown*, 815 S.E.2d 761 (S.C. 2018).

² U.S. Const. amend. IV

³ *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960) (finding government’s search and seizure of items found in vacated hotel room’s trash bin was lawful as items had been abandoned); *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (holding no reasonable expectation of privacy for trash left outside the curtilage of a home because it is vulnerable to public inspection).

⁴ *United States v. Stevenson*, 396 F.3d 538 (4th Cir. 1980).

⁵ *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (finding a warrantless search of an arrestee’s cellphone constituted an unreasonable search and seizure due to the unique privacy concerns the digital devices pose).

⁶ *Brown* at 764.

⁷ *Id.*

⁸ *Id.* at 765.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

FAA Reauthorization Act Passes and FAA Steps Up Enforcement Action Against UAS Operators

Rachel G. McConoughey is Chair of the South Carolina Bar's Drone Task Force and practices real estate litigation, quiet title actions, drone law, and trademark law at McConoughey Law Firm in Greenville.

The past month or so has seen two big new developments having to do with drones:

- 1) The Federal Aviation Administration (FAA) came out with **new enforcement guidance** for drone operations that interfere with wildfires, law enforcement, or other emergency response efforts, and
- 2) Congress **passed the FAA Reauthorization Act of 2018** on October 3, 2018, which has now been sent to the president for his signature.

New FAA Enforcement Guidance

The FAA's news release, titled "FAA Targets UAS Violators for Enforcement," states that the FAA has changed its enforcement guidance, even for first time offenders, for drone operators who interfere with wildfire suppression efforts, law enforcement or emergency response efforts.

From the news release: Under FAA guidance, inspectors generally use non-enforcement methods, including education, for correcting unintentional violations that arise from factors such as flawed systems, simple mistakes, or lack of understanding. However, given the potential for direct and immediate interference with potentially life-saving operations where minutes matter, offenders will immediately be considered for enforcement actions. Enforcement actions can include revocation or suspension of a pilot certificate, and up to a \$20,000 civil penalty per violation.

Civil penalties for these types of violations are in the \$15,000-\$20,000 range. Suspected criminal violations will be referred to the U.S. Department of Transportation or the Office of the Inspector General. Violations will be prosecuted "regardless of the culpability of the operator." This new guidance also applies to model aircraft operations.

I interpret this to mean that the

FAA is basically saying "No more Mr. Nice Guy" when it comes to drone interference in firefighting, law enforcement and emergency response. Please be aware of what is going on around you when you fly and stay away from public safety operations unless you are authorized to help and the public safety authorities are aware that you will be flying in the affected area.

FAA Reauthorization Act of 2018

As of October 4, 2018, the FAA Reauthorization Act of 2018 has been passed by both houses of Congress and sent to the president for his signature, at which point it will become law. The full bill is over 1200 pages long, about 110 pages of which relate specifically to UAS (unmanned aircraft systems), also known as drones.

Changes to Rules for Model Aircraft Operations

One of the most controversial aspects of this new law is that it REPEALS Section 336, the Special Rule for Model Aircraft. Section 336 was an exception to the FAA's authority to regulate aircraft, in that it prohibited the FAA from regulating model aircraft as long as the model aircraft operator followed certain rules.

Section 349 of the new law allows a person to operate a "small unmanned aircraft without specific certification or operating authority" from the FAA ONLY IF the operation follows ALL of the following limitations (items underlined and in bold below are new and/or different from old Section 336):

1. The aircraft is flown only for recreational purposes.
2. The aircraft is flown according to a community-based organization's safety guidelines **that are developed in coordination with the FAA.**
3. **The aircraft is flown within the visual line of sight of the operator or a visual observer co-located with the operator.**
4. The aircraft does not interfere with and gives way to manned aircraft.
5. **In Class B, C, or D airspace or within the lateral boundaries of**

the surface area of Class E airspace designated for an airport, the operator obtains prior authorization from the FAA before operations and complies with all airspace restrictions and prohibitions.

6. In Class G airspace, the aircraft is flown no higher than 400 feet above ground level and complies with all airspace restrictions and prohibitions.

7. The operator has passed an aeronautical knowledge and safety test and maintains proof of passage to show law enforcement upon request.

8. The aircraft is registered and marked and proof of registration is shown to law enforcement upon request.

Other Miscellaneous Provisions

The 2018 law also adds criminal penalties for certain violations that previously were only punishable by fines and civil penalties, and adds stronger civil penalties for other violations. Other provisions of the new law indicate that Congress is interested in stepping up enforcement of certain provisions that have not been enforced very strongly, like the aircraft registration requirement, and also show a renewed focus on privacy protections and a desire to find a balance between efficient drone operations and protecting the privacy of people on the ground. In its comments to Part 107 in 2016, the FAA stated that privacy is a local issue and is not in its purview since the FAA is chiefly concerned with the safety of manned aircraft. I think these new provisions in the 2018 FAA Reauthorization Act show that Congress intends that the FAA should consider privacy issues as it moves forward with drone regulations in the future.

- Sec. 352: Within 30 days of the president signing the law, the FAA must publish on its website a "representative sample of the safety justifications offered by applicants for UAS waivers and airspace authorizations that have been approved for each regulation waived or class of airspace authorized."

Any proprietary or sensitive information, however, shall not be included.

- Sec. 363: Establishes a \$25,000 civil penalty for operating a drone that is equipped with a dangerous weapon.
- Sec. 381: Establishes criminal penalties for knowingly operating a UAS within or above a restricted building or grounds. "Restricted building or grounds" generally means the White House, the vice president's official residence, or buildings or areas where anyone protected by the Secret Service is located.
- Sec. 382: Establishes criminal penalties for knowingly or recklessly operating a UAS in a way that interferes with a wildfire suppression.
- Sec. 384: Establishes criminal penalties for knowingly or recklessly operating a UAS in a manner that interferes with manned aircraft or UAS operations too close to a runway.
- Sec. 357, 358, 375, 378: Various provisions regarding privacy.
- Section 375 makes it an unfair and deceptive trade practice for any commercial UAS operator to violate its own privacy policy. The Federal Trade Commission would therefore have authority to prosecute such violations.
- Sec. 360: The Government Accountability Office will prepare a report about how the FAA can institute fees to recover the costs of regulation and safety oversight of UAS and the provision of air navigation services to UAS.
- Sec. 369: Railroad facilities will now be included as a type of critical infrastructure, making them eligible to petition the FAA for a prohibition on UAS operations in close proximity to them.
- Sec. 371: The Department of Transportation shall assess the level of compliance with the FAA's aircraft registration requirement. I expect that this is setting the stage for an increase in enforcement of the aircraft registration requirement.

Drones are becoming increasingly common in our everyday lives. Lawyers are bound to come across legal issues relating to drones sooner or later, and they should at least have an understanding of where drone regulations come from and know that these regulations are changing rapidly as regulators struggle to keep up with the pace of technology. In addition, remember that

Diversity panel fosters discussion on social justice



The YLD diversity committee and a number of community members took part in lively discussion on Colin Kaepernick's protest on social justice and police violence. Held Nov. 7 at the SC Bar Conference Center, the program started off with a moderated discussion regarding the protest's form of expression and the polarization of the protest. It continued with a discussion on the legal elements—both contractual and constitutional elements of the athletes' choices.

The panel was comprised of former NFL players, a state representative, legal scholars, and members of law enforcement. The discussion was thoughtful, personal and very respectful of the various perspectives. After the moderated questions, the discussion was opened up to members of the audience. A vibrant back and forth occurred with the gallery that included members of the University of South Carolina men's club lacrosse team and a variety of community representatives.

ABA experiences Southern hospitality Charleston style



The American Bar Association Young Lawyers Division and Solo, Small Firm & General Practice Division held their fall conference in Charleston from October 25 to 27, 2018. Our very own Tommy Preston is the 2018-2019 YLD Chair.

The theme for this year's fall conference was, "Where Tradition Meets Innovation." The conference included several networking and CLE opportunities, as well as Charleston's unique Southern charm by way of hospitality dinners hosted in the homes of Charleston attorneys. Fall conference attendees also had the opportunity to attend a special Mother Emmanuel program which included a visit to Mother Emmanuel and featured Jennifer Pickney, the widow of the late Honorable Clementa Pinckney. Mrs. Pickney gave a captivating recount of the Mother Emmanuel tragedy. Conference attendees also participated in a legal history walking tour of Charleston with appearances by Judge Bruce H. Hendricks and attorney Rutledge Young, Jr.

Judicial Spotlight: Honorable Aphrodite K. Konduros, South Carolina Court of Appeals



Born: Sumter, South Carolina

Education: University of South Carolina, B.A. (English), where she won the Canterbury Scholar Award to study in Canterbury, England during her senior year; University of South Carolina School of Law, J.D., where she was the first female Student Bar President.

Career: After graduation from law school, Judge Konduros served as law clerk to the Honorable David F. McInnis, retired, Circuit Judge for the Fourth Judicial Circuit. Thereafter, she was in private practice, deputy general counsel for the South Carolina Department of Disabilities and Special Needs, a county attorney for the South Carolina Department of Social Services and assistant general counsel for the South Carolina Department of Social Services. Judge Konduros was elected to the Family Court in February 2002 to fill the unexpired term of the Honorable Amy C. Sutherland, retired. On February 6, 2008, Judge Konduros was elected to the South Carolina Court of Appeals to finish the unexpired term of the Honorable Donald W. Beatty after he was elected to the South Carolina Supreme Court.

Judge Konduros is a member of the South Carolina Bar, the Greenville Bar, and was vice-president of the Columbia Young Lawyers. She has served on the Safe Harbor Shelter Board, Prevent

Child Abuse Carolina Board, First Steps Board and the Greenville Ballet Board. She currently serves on the Chief Justice's Commission on the Profession and the South Carolina Senate Judiciary Sentencing Reform Commission.

Family: Judge Konduros and her husband Sam Konduros live in Greenville and are members of St. George Greek Orthodox Cathedral. Sam Konduros is the president/CEO of SCBIO.

Q. What has been your most rewarding experience on the SC Court of Appeals?

Working closely with the parade of law clerks and staff attorneys who add so much to the administration of justice. Also working with the pioneers of the COA, Judge Tolbert Goolsby and Judge Jasper Cureton.

Q. What obstacles have you had to face as a female lawyer and judge?

I cannot say that I have faced any obstacles. The generation before me—Chief Justice Jean Toal, Justice Kaye Hearn and Judge Carol Connor—paved the way for that not to be an issue for me.

Q. How do you believe the legal field has changed for female lawyers since you were admitted to practice in 1985?

The real difference I began to see was in the small towns where female practitioners were a rare commodity 30 years ago. When I first practiced in Sumter, Martha Upshur, Sumter's first female lawyer, was still practicing. Now the male/female split is unremarkable.

Q. What is the number one thing you look for when hiring a law clerk?

Someone who is smarter than me who is confident enough to argue his or her position, but diplomatic enough to understand I have the last word.

Q. What makes a good appellate lawyer?

Preparation, preparation, prepara-

tion. The great ones are ready for every eventuality.

Q. What is the worst thing you have seen from an appellate lawyer?

It is rare, but sometimes appellate counsel will blame trial counsel when pressed why they have taken a certain position in their argument.

Q. How do you like to give back to the community?

I believe in the mission of the Upstate Fatherhood Coalition and support their efforts by speaking to their membership about making better life choices.

Q. What do you do for fun?

I'm a born South Carolinian. I believe that everyone should go to the beach at every opportunity.



Stars of the Quarter

Kelly Marie Alfreds

John "Whit" McGreevy

Maisie Osteen

Leslie Simpson



South Carolina Bar

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Letter from the President



Happy New Year Young Lawyers:

As 2019 kicks off, the YLD and its various committees are in the thick of planning events and programming for young lawyers across the state.

The ABA Young Lawyers Division just hosted its fall meeting in Charleston. Congratulations to ABA YLD Chair and South Carolina's own, Tommy Preston, for bringing the ABA to South Carolina and for hosting such a wonderful meeting. From the programming to the hospitality dinners held in lawyers' homes around

Charleston, the conference displayed the best of what South Carolina has to offer young lawyers. The YLD would like to extend special thanks to the many South Carolina lawyers who were instrumental in the planning and execution of the conference, including Steven Blevins, Emily Limehouse and Sheila Willis.

The YLD recently hosted New Admittee Receptions across the state for newly sworn-in South Carolina lawyers. We were excited to welcome these new lawyers into the profession, but we rely on you to share the YLD magic with every new lawyer you meet! If you happen to stumble upon a new lawyer, here are a few talking points to share with them about the YLD:

1. Newly sworn-in lawyers are automatically a member of the YLD—no sign up is necessary.
2. YLD membership is FREE.
3. Being active in the YLD is a great way to network and meet other lawyers.

4. Being active in the YLD is a great way to develop professionally and grow your legal knowledge and skills.

Lastly, in support of our friends across the state who were affected by Hurricane Florence, the YLD has implemented a disaster legal services hotline to provide free disaster-related legal advice to disaster survivors. If you or anyone you know needs assistance, please call 1-877-797-2227 ext. 120 (toll-free) or (803) 576-3815 between 9 a.m. and 5 p.m., Monday through Friday, to request assistance.

The new year is a time for reflection and goal setting. May 2019 be your best year yet!

Cheers,

Ashleigh R. Wilson
YLD President