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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES MONROE BROWN,

APPELLANT.

Appellate Case No. 2021-000469

AMENDED FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

APPELLANT'S QUESTIONS PRESENTED

1. Whether the court erred by refusing to suppress evidence seized pursuant to a search warrant for appellant's phone since the warrant affidavit was vague and overbroad and the state stipulated that the one specific allegation in the affidavit that appellant's phone called the decedent's phone before the murder was false since the state failed to produce the probable cause necessary for a search warrant?

2. Whether the court erred by refusing to direct the verdict as to the charge of murder where there was no direct or substantial circumstantial evidence appellant committed any overt act under the theory of accomplice liability to aid or abet another person or persons in killing the decedent?

STATEMENT OF THE CASE

On January 21, 2017, appellant James M. Brown ("Brown"), along with Jamarcus Sellers, Brenton Davis, and others, murdered James Henderson, Jr. outside of his home in Chesterfield County. The perpetrators were all from Marlboro County. Brown, Sellers, Davis, and several others, were arrested a few days after the crime and charged with Henderson's murder. Brown was then indicted by the Chesterfield County grand jury for the murder (2018-GS-13-0424). Brown proceeded to a jury trial on April 21, 2021, before the Honorable Paul M. Burch.[1] Grant Smaldone, Esquire, represented Brown. Deputy Solicitor Kennard Redmond represented the State. (R. 1-6). On April 22, 2021, the jury found Brown guilty of murder. (R. 346). At sentencing, Brown's attorney conceded Brown's guilt in the murder as an aider and abettor and used this as a basis to plead for mercy from the court. (R. 358, ll. 9-19). Judge Burch sentenced Brown to 35 years. (R. 361). This appeal followed raising 2 issues: (1) Whether CSLI/phone records were admissible and (2) whether Judge Burch erred in denying Brown's motion for a directed verdict. (IBOA, p. 1). This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

On the night of January 21, 2017, at approximately 11:00 p.m., James Henderson, Jr. (hereinafter "victim"), who went by the nickname "S.B.", was murdered in front of his home in Chesterfield County by a gang of men from Marlboro County, which included Brown. The gang of men confronted victim after first calling him out of his home, where he had been with his girlfriend, 8-year old son, and 5-month old infant son. After going outside his home to face the gang of men in his yard, victim was shot 4 times. At least 3, and possibly 4 firearms were used

[1] Co-defendant Jamarcus Sellers was cooperating with the State but was murdered before trial after his identity and cooperation was released through discovery. Brenton Davis pled guilty to Voluntary Manslaughter before trial but refused to cooperate or testify in this case. Two (2) other potential witnesses were also murdered before Brown's trial. (R. 352-58).

by the gang of men in victim's murder based on fired shell casings found at the scene and bullets recovered at autopsy. Victim was able to flee on foot away from his home before he died from blood loss in a wooded area near Hwy. 9. Victim's phone was later found in the path he took fleeing from the gang of men. The victim was also carrying a firearm for his protection, but he was never able to fire the gun because he was shot by the gang of men first.[2] The gun was also recovered in the path victim ran from the gang of men. (R. 41-62; 64-91; 93-103; 107-33; 134-279; 286-315; State's Ex. 17, 18, 25, 35, 36 & 37).

What led to victim's murder

The events leading to victim's murder began by phone calls and text messages from some of the perpetrators of the murder earlier in the day and on the evening of the murder, January 21, 2017.[3] The perpetrators, including Brown, all lived in neighboring Marlboro County near Bennettsville. Victim lived in a mobile home park off of Hillian-Edwards Road between Cheraw and the City of Chesterfield in what is considered the Cheraw section of Chesterfield County. That afternoon, several of the perpetrators called or "texted" victim to come to Marlboro County to meet with them. Victim refused. There was then a text from 1 of the perpetrators, Brenton Davis ("Davis"), to victim questioning why he did not come to Marlboro County and again directing victim to come. Victim again refused. (R. 195-201; 204-07; State's Ex. 2-4, 17, 30, 32-37).

Appellant Brown then called victim's first cousin, Kasean Smalls ("Smalls"), known by the nickname "S-Dot." This call occurred the night of victim's murder at 8:24 p.m. At 8:27 p.m.,

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[2] Victim's gun was a semi-automatic pistol which contained bullets in the magazine but none in the firing chamber. Additionally, victim's gun did not match any of the fired shell casings or fired bullets found at the crime scene and autopsy. (R. 221-23; 183-84; 195; 153-72; 207-08).

[3] Victim's murder was "gang related" but the jury was not told of this information to avoid the risk of undue prejudice to appellant Brown. The victim was trying to leave the gang [the Bloods] at the time of his murder. (R. 352-58 [sentencing hearing]).

Smalls texted victim: "Call me ASAP." Smalls then called victim at 8:28 p.m. Victim called Smalls back at 8:35 p.m. Victim also called appellant's co-defendant Davis at 8:35 p.m. Davis then called victim back at 8:36 p.m. Smalls then "texted" victim the appellant's phone number at 8:37 p.m., but victim did not call appellant back. Victim called Smalls again at 9:12 p.m. Victim called Davis again at 9:21 p.m. (R. 210-12 ; State's Ex. 4, 17, 33-37).

The evidence introduced at trial showed appellant Brown, Jamarcus Sellers ("Sellers"), Davis, and several other men then drove from the Bennettsville area of Marlboro County to victim's mobile home park in Chesterfield County. The group traveled in 2 different cars. The drive was approximately 20 miles. (R. 93-104; 107-133; 210-11; State's Ex. 36-38).

Upon entering the mobile home park, Brown and his fellow perpetrators first mistakenly went to the wrong home. Around 10:30 p.m., Shameika Ingram ("Ingram"), who was a neighbor of victim, had gone to bed and was falling asleep when she was awakened by car lights and a door slamming in front of her home. At first, she believed it was some relatives coming home from an outing, and she told her boyfriend, Thomas Lyles ("Thomas"), to get out of bed and let the relatives in the home. Before Thomas opened the front door, Ingram could hear men outside her home calling out loud for *victim* to come out of the home [Ingram's home] and face them. The men were cursing. The men called out 3 times aggressively: "S.B. [victim], bring your ass outside." Thomas told Ingram to get out of bed. He wanted her to see some guys outside with guns. Thomas opened the front door and went outside to talk to the men who were yelling. Ingram got up and looked out the window and saw that there were 5 or 6 men in front of a dark car parked in front of her mobile home with the headlights shining on her mobile home. Ingram could see several of the men were carrying firearms openly. Brown was 1 of the gang of men

outside of the car talking with Thomas. Brown was 6 feet from Ingram when she saw him out the window. (R. 64-91; 107-133).

Ingram testified Sellers was also 1 of the men. She also testified Davis was another 1 of the men.[4] Ingram testified the armed men in the gang were loading their weapons in her front yard. After the murder, 2 intact shotgun shells were recovered near Ingram's home. (R. 64-91; 107-133; State's Ex 26). Ingram witnessed the gang of men accuse Thomas of being victim. Thomas argued with the gang of men and tried to explain to them he was not "S.B." and that the gang of men were at the wrong home. Ingram heard Thomas yell 3 times to the men: my name is not S.B. According to Ingram, although she could not see a gun on Brown, Brown was part of this gang of men outside of the car carrying firearms confronting her boyfriend, and Brown was actively participating in this discussion with Thomas. Brown was actually standing on the other side of her boyfriend, while 2 of the men talked with Thomas. For a while, the gang of men did not believe Thomas, but eventually he was able to convince them, including Brown, that victim lived elsewhere. Ingram explained to the jury that victim used to live in the mobile home right beside her but had moved to another mobile home in the same trailer park after victim's first mobile home was being repaired. Apparently, based on what occurred next, Ingram's boyfriend showed the gang of men, including Brown, which mobile home victim now lived in. Several of the gang of men, including Brown, got back in the same car and it started up and began to pull off. Ingram witnessed 2 of the men walk in front of the car's head lights as it pulled over to victim's new home which he now lived in, which was also located nearby. (R. 64-91; 107-33).

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[4] Ingram identified both Sellers and Davis from photographic line-ups several days after the murder as 2 of the gang of men who were armed with firearms. (R. 64-91 [Neil v. Biggers, 409 U.S. 188 (1972), hearing]; 107-33 [trial testimony).

Ingram continued to watch the 2 men and the car containing the rest of the gang of men. She testified the car parked in victim's yard with the lights on the front of victim's mobile home illuminating it. Ingram testified a second car was involved in what was occurring and it pulled past the car the gang of men were in and pulled around the back of victim's mobile home, stopped, and shined its headlights, which were on bright, on the back of victim's mobile home illuminating it. No one got out of this car. (R. 64-91; 107-33).

Ingram then witnessed all of the men who had gotten in the dark car at her home, including Brown, get out of the car they were in located in victim's yard. Some of the men began calling victim out of his home. Several of the same men were now carrying firearms openly again but Ingram could not tell if Brown was armed, but she testified he was definitely part of the group with the guns at victim's home, and he was part of and participating in what they were doing. She saw 1 man in front of the same car holding a long gun, and another man on a phone right outside victim's home. She could see victim inside his home standing in front of his bedroom window. The man on the phone was screaming out loud into his phone for victim, S.B., to come outside and "answer to him." This was just like what had previously occurred at Ingram's home with the same gang of men. (R. 64-91; 107-33).

Victim's girlfriend, Monique Ingram [no relation to the neighbor Ingram] (hereinafter "victim's girlfriend") testified victim had 2 children, an 8-year old son and a 5-month old infant son.[5] Victim's girlfriend testified that she and victim and the children used to live in another mobile home in the trailer park but moved into the one where victim was killed a few months earlier. Victim's girlfriend testified when victim came home earlier that evening, before the gang of men arrived, victim was extremely upset and scared. Victim told his girlfriend: "they are

[5] As a result of the common last name and to avoid confusion, victim's girlfriend will be referred to in this brief as "victim's girlfriend" not by her last name.

trying to put me in a box." She understood this to possibly mean he would be surrounded by several men and ganged. Victim arrived home about 20 minutes before the gang of men arrived, after victim had taken a friend home from the trailer park. Victim's girlfriend testified victim received several threatening phone calls in a row, but she could not tell who the calls were from. Later, about 10:30 or 11:00 p.m., victim's girlfriend heard a car outside their mobile home. Because of the car's headlights, she could see clearly only 1 man, but she could not see the faces of the other men. She said several men had gotten out of the dark car with the man she recognized. There were 2 men beside the car on 1 side of the car and 2 or 3 men standing on the other side of the car. The man she saw standing outside her home in front of the car was Brown's co-defendant Brenton Davis (aka Bliz), 1 of the men the neighbor Ms. Ingram also recognized. Victim's girlfriend testified as the last threatening phone call ended, victim said "okay" into the phone and hung up. Victim then hugged his wife and his 8-year old son and said goodbye to his 5-month old child. Victim then went outside to face the men. (R. 93-103; 210-11).

Ms. Ingram, the neighbor, continued to watch what was occurring and witnessed victim come out of his home. She testified when victim came out of his home, he came out of the side where the gang of men were now standing in front of his mobile home. Ingram had witnessed the gang of men, including Brown, walk from their dark car to an area in front of victim's home. Ingram witnessed victim walk into the yard area of his home and the gang of men, including Brown, confronted victim. Victim walked around the gang of men so that he was facing his front door and the gang of men had their back to victim's front door. (R. 64-91; 107-33).

Ingram then heard the gang of men in victim's front yard and victim exchanging words. She then heard someone in the group say something and the word "nigga." Ingram then saw the gang of men confronting victim in his yard shoot victim with firearms. She heard the gunshots

and saw fire coming from the guns. She then saw victim fleeing on foot. She thought she saw someone chasing victim. (R. 64-91; 107-33).

Victim's girlfriend had remained inside her home with her children and did not see the shooting. She was in the children's room and grabbed the children and got down on the floor with them almost immediately after victim walked out the door to face the gang of men in his yard when multiple gunshots erupted. She heard multiple gunshots. (R. 93-104).

The gang of men, including Brown, then left the mobile home park. The other car that had illuminated the back of victim's home also left the mobile home park. Someone from the mobile home park then came to the neighbor Ms. Ingram's mobile home stating that victim was missing. The police were called. (R. 176; 64-92; 93-104; 107-33).[6]

Police were dispatched to the mobile home at 11:03 p.m. on a call of "shots fired." When police arrived, victim could not be found. After a thorough search, victim was found some distance from his home near Hwy. 9. Victim had expired in a wooded area where he had fled after being shot in his yard. (R. 176-82; 64-92; 93-104; 107-33).

While processing the scene, police found multiple [6] fired shell casings where Ingram had witnessed the victim confronted by the gang of men and shot in the yard outside his home. No fired shotgun shell casings were found at the crime scene. Another fired bullet shell casing was also found nearby. These 7 recovered fired shell casings were from handguns. At the autopsy, the pathologist determined victim had been shot 4 times in the back of his body. One (1) shot was just to the left of the center of victim's back, which traveled left to right in victim's

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[6] The following day, 1 of the perpetrators, Jovanni McClain came to Ingram's home with several other young men and threatened Ingram. The Sheriff was contacted, and Ingram identified McClain from a social media photograph, and McClain was arrested. (R. 64-91; 107-33). McClain was also murdered before trial. Ingram also testified she recognized another of the perpetrators, Kurtis Harris, whom she had met before that night. (R. 64-92; 107-33; 194-95).

body, passed through a lung, and then lodged in victim's right arm or armpit area. This was the fatal gunshot wound resulting in victim's death. Consistent with this wound, victim could have run a considerable distance after being shot in his yard before he would have expired from blood loss. The other 3 gunshot wounds to the back of victim's body were not fatal. One (1) gunshot just creased victim's right hip and traveled from back to front. Another gunshot creased victim's back from left to right coming to rest under the skin. Another shot struck victim's left arm from the rear and exited the front of that arm. Two (2) fired bullets were recovered from victim's body. As stated, ballistics determined at least 3, possibly 4 guns, were used to kill victim based on the recovered bullets and the shell casings found at the crime scene. (R. 64-92; 107-33; 134-42; 142-69; 174-85; State's Ex. 18 [autopsy report]; State's Ex. 25 [firearms report); State's Ex. 20 [fired cartridge casings] & 21 [firearm with fired casing].

Police spoke with the neighbor Ms. Ingram and victim's girlfriend at the scene along with other witnesses in the mobile home park. Ingram was shown a series of pictures from social media, and she identified Brown's photograph as 1 of the men involved in the murder. She also identified Brown in court as 1 of the perpetrators.[7] From interviewing witnesses and overhearing discussions of others at the mobile home park, police immediately identified and obtained the names of several suspects all from Bennettsville, including Brown, Sellers, and Davis. Police immediately notified Bennettsville police and began obtaining background information on Brown and his co-defendants and tried to speak with all 3 co-defendants early the following morning in Bennettsville. (R. 41-62; 64-91; 107-33; 93-104; 174-90).

[7] Ms. Ingram was also shown a photo line-up containing Brown's photo several days after the murder, but she was unable to identify him from that line-up because another person in the line-up looked very similar to Brown. However, she had previously identified Brown at the scene from social media photos, and the court admitted her in-court identification of Brown after an *in camera* hearing. The admissibility of her in-court identification is not raised on appeal. (IBOA).

As part of that investigation, police found *victim's* cell phone in the area of his flight, were able to access it, and extracted victim's in-coming and outgoing phone calls and texts. Based on the investigation and interviews, police knew victim had received a series of threatening texts and phone calls the afternoon and night of the crime. Based on what was found in victim's cell phone, police also obtained cell-site location information (CSLI) and cell phone records of appellant Brown *for just 2 days* from Verizon. Police actually obtained Davis's phone when he was arrested and were able to access it [performed an extraction] and obtained his phone records for more than a week. Police also obtained CSLI on Davis's phone for the night of the murder. Police were never able to locate Brown's phone. (R. 193-201; 205-19; 223-26; 229; 231-33; 235-41; 242-79; 280; State's Ex. 2, 3, 4, 17, 27; 28, 32, 33, 34, 35, 36, 37).

Davis's cell phone records showed in the week leading up to victim's death, Brown and Davis contacted each other at least 70 times. This indicated Brown and Davis knew each other and were close personally. (R. 193-201; 205-19; 223-26; 229; 231-33; 235-41; State's Ex. 34-37). Those records also showed Brown's co-defendant Davis texted victim at 5:24 p.m. on the date of victim's death stating: "Yo, you couldn't make it?" Davis then texted victim again at 8:02 p.m. saying: "Yo, you need to get here? As previously stated, Davis lived in or near Bennettsville in Marlboro County. Victim lived in the Cheraw area in Chesterfield County. (R. 212). While Brown did not directly call victim the day of the murder, he did call victim's cousin Smalls ("S-Dot"), and Smalls forwarded Brown's phone number (843) 439-7060 to victim. This was at 8:37 p.m., shortly before the shooting at 11:00 p.m. Brown then called victim's cousin again around 10:24 p.m. shortly before the murder, and victim's cousin called Brown. Davis, Brown's co-defendant, did call victim several times right before victim walked out of his house and was murdered. (R. 196-201; 204-19; 231-32: State's Ex. 2, 3, 4, 17; 32-37).

The CSLI for January 21st, showed Brown left the area of Bennettsville, in Marlboro County, around 10:30 p.m. and traveled to the area of victim's mobile home park arriving around 10:48 p.m. This was a trip of approximately 20 miles. Brown's co-defendant Davis' CSLI showed Davis' phone also did the same thing. It traveled from Marlboro County and ended up in the vicinity of victim's mobile home park at approximately 10:48 p.m. (R. 196-201; 204-19; 357-58; 268-98; 304-05; State's Ex. 2, 3, 4, 17, 30, 32-37).

During the trip from Bennettsville to victim's mobile home park, Davis and Brown, who knew each other well, did not converse over the phone or text at all. This is consistent with them riding together to victim's home. (R. 215-17). However, Brown and another co-defendant, Sellers, did converse by phone or text during almost the entire trip to victim's home, indicating Sellers was in the second vehicle at least until they got near the mobile home park. (R. 214-15; 234-81). Brown called Sellers at 10:34 p.m., 10:45 p.m., and 10:50 p.m. the night of the murder; this would have been during the trip or as they arrived in the mobile home park or shortly thereafter. (R. 214, ln. 22 – 215, ln. 22; 234-81). Victim was murdered around 11:00 p.m. Police received the 911 call of shots fired at 11:03. p.m. (R. 42).

Brown also contacted victim's cousin Smalls [S-Dot] at 10:24 p.m. on the night of the murder. And, Smalls called Brown right back at 10:24 p.m. (R. 217-19). This would have occurred as Brown and his co-defendants were leaving Bennettsville to go to victim's mobile home or during the trip there. (R. 234-81). Smalls is the person who forwarded Brown's phone number to the victim at 8:37 p.m. that night and victim did not call Brown. (R. p. 218).

Brown's co-defendant Davis also called victim at 10:40 p.m., 10:42 p.m., and 10:43 p.m. (R. 211; State's Ex. 33, 35, 36, 37). Davis also called co-defendant Sellers at 10:48 p.m. shortly before victim's murder. (R. 212-14; State's Ex. 33, 35, 36). This also would have occurred as

the gang of men were traveling to victim's mobile home park or as they arrived there or shortly thereafter. (R. 234-81; State's Ex. 33; 35; 36). Again, this indicates Sellers was in the 2nd car. Davis then called Sellers again at 12:25 a.m. January 22, 2017, which would have been 1 hour and a 1/2 after the murder. (R. 214; 234-281; State's Ex. 33, 35, 36).

After the shooting occurred, CSLI and records showed Brown's phone left the area of victim's mobile home park and returned to near Bennettsville. (R. 234-81; State's Ex. 3, 4, 37). Brown called Sellers again at 11:23 p.m. The last call between Brown and Sellers before that was 10:50 p.m. The time period between 10:50 p.m. and 11:23 p.m. was the time period when victim was murdered. (R. 215).

When police went to arrest Davis in Marlboro County, they found Brown's car parked behind Davis's residence. Davis was the same co-defendant who Brown talked to regularly throughout the week until the day of the crime when phone contact stopped. (R. 189; 194).

When Brown was questioned about the murder by police, he denied ever being in Chesterfield County the night of the crime or even near victim's home. He claimed he was at a night club in Marlboro County. When police investigated his claim, it did not pan out. It was a false alibi. (R. 186-94; 218; 226-27; State's 29). During his interview, Brown also **gave police a false cell-phone number** as well. (R. 186-90; 193; 217, ll. 15-19; State's Ex. 29). Police only determined Brown's correct phone number by interviewing his girlfriend. (R. 190; 193). Brown **also falsely told police he had recently lost his cell phone** the day of victim's murder. (R. 193; 199; 217; State's Ex. 29, 3 & 4; R. 202-04). His cell phone records and calls made showed he did not lose his phone the day of the murder. (R. 204-05). Police were never able to locate Brown's phone and as a result obtained subscriber information, 2 days of phone records, and *2*

days of CSLI for Brown's phone from *Verizon,* which incriminated him. (R. 193-218; 242-79; State's Ex. 4 & 37).

Appellate Issue I.

Brown's phone records, subscriber information, and CSLI for 2 days

What occurred below relevant to Issue I.

On ***January 21, 2017***, Brown, along with Sellers, Davis, and others, murdered victim outside of his home in Chesterfield County. Almost immediately, on ***January 24, 2017***, because the crime occurred at *approximately 11:00 p.m.* on *January 21st,* police sought to obtain *only 2 days*, January 21-22, 2017, of Brown's CSLI, subscriber information [ownership information], and phone records [calls made, when they were made, and to whom] from *Verizon* by way of a search warrant issued by a Chesterfield County Magistrate on that date. (R. 11-27; 246-49 State's Ex. 1-4 [pretrial hearing]). The State was never able to locate Brown's phone, so it had to request the records and CSLI through *Verizon.* Contrary to Brown's assertions in his brief, the State never obtained a search warrant for Brown's phone. The State also obtained several other search warrants at the same time from the same magistrate for phone records and CSLI of Brown's co-defendants or to open *their* phones, which were actually recovered. Davis' phone was seized by police when Davis was arrested, and an extraction of his phone records showed Brown had repeated contact by cell phone calls or texts with Davis in the days leading up to and on the day of the murder. When police received the 2 days of CSLI and phone records of Brown, those records showed Brown actually contacted victim's cousin Smalls on the night of victim's murder. Victim's phone records showed Smalls forwarded Brown's number to victim, but victim did not return the call. Importantly, the CSLI also showed Brown traveled from Bennettsville to the area of victim's mobile home park arriving at the time of the murder, and

then left the area of the trailer park after the murder and returned to near Bennettsville. The phone records also showed Brown conversed with co-defendant Sellers on the trip from Bennettsville to the area of victim's home, indicating Sellers was in the second car involved in the crime, as described by Ingram, the victim's neighbor. Those records also showed Brown did not speak or text with Davis during the trip to victim's trailer park at the time of the murder, indicating that co-defendant was in the same car with Brown. Brown was not indicted until ***July of 2018***. (R. 5; Indictment). Brown proceeded to a jury trial on **April 21, 2021**. (R. 1).

A pretrial suppression hearing was held before Judge Burch. (R. 7-27). Brown challenged the search warrant because he alleged it was vague, overly broad, and did not contain probable cause when a false or incorrect statement in the affidavit was removed. At the hearing, Captain Wayne Jordan, the affiant for the search warrant testified. (R. 10-27). Captain Jordan testified police recovered victim's cell phone after the murder and were able to access it on January 23, 2017, at 8:52 p.m.[8] Jordan testified the investigation revealed there were several phone calls and text messages from people threatening or wanting to meet with victim for the purpose of assaulting victim. As a result, police sought phone records and CSLI for all of the suspects or individuals they were able to identify from the investigation as being involved in victim's murder or contacting him by phone before the murder. In victim's phone, police found the cell phone number (843)-439-7060. Jordan testified witnesses informed investigators this number was Brown's phone number and belonged to Brown and investigators confirmed this through a phone book. All of this information was provided to Jordan, who was a Lieutenant and supervisor of investigators at the time, from other investigators. Jordan testified he obtained multiple search

[8] There is some confusion in the testimony at the pre-trial hearing as to which phone the affiant is referring to, victim's phone or appellant Brown's phone. Police recovered victim's phone at the crime scene. Victim's phone used a different service provider than Brown. Police never recovered Brown's phone.

warrants for multiple suspects on this date. The State stipulated there was false or incorrect information in the search warrant affidavit for Brown's CSLI, subscriber information, and phone records. Jordan did not know and still believed at the time of the pre-trial suppression hearing that the information in the affidavit was true and correct. (R. 10-27). Specifically, the affidavit said Brown's phone contacted victim's phone several times the night of the murder shortly before the murder occurred. It was in fact co-defendant Davis's phone which contacted victim's phone several times immediately before the murder around 10:30 to 10:50 p.m. Brown's phone had contacted victim's cousin Smalls the night of the murder and Smalls forwarded or texted to victim Brown's phone number, so Brown's phone number was in victim's phone approaching the time of the murder. Jordan testified he supplemented the search warrant affidavit with sworn testimony before the Magistrate. (R. 13). He testified he informed the Magistrate that based on their investigation Brown's phone number was associated with victim's phone as far as the numerous threats and it was part of an ongoing murder investigation. (R. 13). This sworn supplementary testimony was correct. (R. 41-45; 93-103; 209-18). Jordan testified he sought the CSLI to determine if, as informed by witnesses, Brown was involved in the murder, and his location at the time of the murder. (R. 10-27). After hearing testimony from the affiant, and reviewing the search warrant, Judge Burch, having seen similar search warrants before, upheld the validity of the warrant for **2 days of CSLI**, subscriber information, and phone records of Brown for 2 days. (R. 27).

Argument

At the time the CSLI/phone records/subscriber information was requested from *Verizon*, in January of 2017, a search warrant was not required to obtain the same, and even after Carpenter v. United States was decided in 2018 a search warrant is still not required to obtain 2 days of CSLI, phone records, or subscriber information; therefore, the police properly obtained the CSLI/phone records/subscriber information even if the search warrant

was defective; and, as recognized by this Court; the South Carolina Supreme Court; the United States Supreme Court, and other courts; the exclusionary rule would not apply in this situation to the CSLI and all of the evidence was admissible; further, there was no Franks violation, but a mistake or simple negligence on the part of the affiant, and even striking the incorrect information in the affidavit, there was still sufficient probable cause to issue a search warrant for 2 days of CSLI given the sworn supplemental testimony given to the magistrate.

Brown argues the affidavit for the search warrant sent to *Verizon* for CSLI, subscriber information, and phone records contained false information which if struck pursuant to Franks v. Delaware, 438 U.S. 154 (1978), and its progeny, the remainder of the affidavit does not contain sufficient probable cause to support the search warrant. Therefore, he argues *the 2 days of CSLI and phone records* should have been suppressed. Brown is wrong in several respects. Brown's contention is irrelevant for the reasons discussed herein.[9]

Standard of Review

In Fourth Amendment search and seizure cases, the standard of review is as follows:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

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[9] Additionally, as will be discussed below, the false or incorrect information contained in the affidavit was not intentionally false or made with reckless disregard for the truth, and appellant does not even contend that it was in his brief. (IBOA). Appellant merely argues that if the false or incorrect information is struck there is no probable cause remaining in the affidavit. Id. The affiant understood from speaking with an investigator or investigators on the case that Brown's phone contacted victim's phone on the day of the murder. This was actually incorrect. As stated earlier, and as admitted at the Franks hearing, Brown's phone contacted victim's cousin's phone the night of the murder and the cousin in turn forwarded Brown's number to victim at 8:37 p.m. As a result, Brown's phone number *was in victim's phone* when police searched it shortly after the murder. It was a co-defendant Brenton Davis who contacted victim multiple times right before the murder. The affiant was obtaining several warrants at the same time in the heat and hurry of a criminal investigation and conflated the information about Davis with Brown. The affiant also supplemented the affidavit with sworn testimony which was accurate.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)(citations and internal quotation marks omitted).

I. A search warrant was not required for Brown's subscriber information and phone records of who he called and when he called them.

First, Brown's **subscriber information** and **phone records** of who Brown called and when he called them are not protected by the Fourth Amendment because he has no legitimate expectation of privacy in what he voluntarily turned over to a 3rd party. Carpenter v. United States, 138 S.Ct. 2206 (2018); Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976). As the Court in Carpenter recognized, even after Carpenter this remains unchanged. Id. As a result, Brown cannot challenge the admission of *his subscriber information* or *the record of phone calls he made the day of, the night of, and the day after the murder and what time those calls were made.* Carpenter, 138 S.Ct. 2206; Smith, 442 U.S. 735. A search warrant was unnecessary for this particular information. The issue before this Court is the admissibility of the **2 days of CSLI** requested *in January of 2017.*

II. A search warrant for CSLI was not required because only 2 days of CSLI were requested.

In Carpenter v. United States, 138 S.Ct. 2206, 2217 n. 3 (2018), a sharply divided U.S. Supreme Court held *for the very first time* that individuals have a reasonable expectation of privacy in the record of their physical movements captured by historical CSLI and that acquisition of ***more than 7 days*** of CSLI constitutes a "search" under the Fourth Amendment. Carpenter was a 5-4 decision, and each dissenter filed a separate opinion. Carpenter did not hold that 6 days or less of CSLI requires a warrant; and, as discussed herein, one was not required

here where only *2 days* were requested, January 21st and 22nd, because the crime was committed the night of January 21, 2017 at 11:00 p.m. As a result, the warrant was not overly broad either.

The Court in Carpenter was faced with a situation where the Government had obtained 2 warrants under the Stored Communications Act (SCA). The first order sought 152 days of CSLI and "produced records spanning 127 days." The other order sought 7 days of CSLI and "produced two [2] days of records." Carpenter, 138 S.Ct. at 2212. The **majority** opinion emphasized "this case is not about 'using a phone' or a person's movement at a particular time." Id. at 2220. "It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." Id. The Court reasoned, "Such a chronicle implicates privacy concerns far beyond those considered in Smith and Miller." Id. The same concerns are not present when the prosecution only seeks 2 days of CSLI.

Whether a person has an expectation of privacy in the amount of historical CSLI records accessed turns on the significance of the invasion of a protected privacy interest. *See* Id. at 2217. As the Supreme Court, Bronx County New York, explained in People v. Edwards, 63 Misc.3d 827, 831, 97 N.Y.S.3d 418, 421-22 (N.Y. Sup. Ct. 2019):

> The Supreme Court had good reason to expressly exempt *short-term* CSLI data from its Carpenter decision. Gathering *long-term* CSLI data is much more clearly an invasion of a cellular telephone holder's legitimate expectation of privacy; it is, in a sense, the modern day electronic equivalent of sending a government spy out to follow the defendant both day and night, wherever he or she goes, in public or in private. *See* Carpenter, 138 S.Ct. at 2218 ("Whoever the suspect turns out to be, he has effectively been tailed every moment of any day for five years and the police may—in the government's view—call upon the results of that surveillance without regard to the Constitution or the Fourth Amendment").
>
> By way of contrast, in this Court's view, *short-term* CSLI data that is carefully targeted to a specific time in order to determine whether defendant was present at the scene of a crime that was committed in a public place is *not* a search, and is therefore not subject to Fourth Amendment warrant requirements.

> The difference between long-term and short-term CSLI data is stark: *long-term* data can be likened to filming a person's entire life for weeks, or months, or even years; *short-term* CSLI data is like taking a single snapshot of that person on the street. *See* United States v. Jones, 565 U.S. 400, 418-419, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Alito, J., concurring) (*short-term* GPS monitoring does not constitute a search, but *long-term* GPS monitoring does); *see also* People v. Weaver, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009) (distinguishing *short-term* visual surveillance of a car from far more intrusive *long-term* GPS monitoring).[10]

(Footnote added).[11]

A warrant was not required here– like the 2 days of information in Edwards - the 2 days of CSLI here is not fraught with the concerns that resulted **in the majority decision** in Carpenter. Consequently, a warrant was not required to obtain this information. Id. *See also* Sims v. State, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied*, 139 S.Ct. 2749 (2019) ("Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times"). As a result of the majority's clear rationale and statements of what they were holding in Carpenter, a warrant was simply not required here. Carpenter; Edwards; Sims, *supra*. Simply, put, the United States Supreme Court **even to this day** has not held that a search warrant is necessary to obtain 2 days of CSLI from a phone company such as *Verizon*. And suppression is not a remedy for a violation of the SCA. United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014); United States v. Smith, 155 F.3d 1051 (9th Cir.

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[10] In Edwards, the People obtained an order for a period of 2 days of CSLI. The Court found that "[i]f any case would seem to fall into the category of short-term CSLI data that the Supreme Court expressly carved out from its Carpenter decision, this would appear to be that case." Id. at 831, 97 N.Y.S.3d at 421.

[11] It should be noted Justice Ginsburg was 1 of the 5 Justices in the majority. Thus, it is uncertain that the same result would be reached in the future should it be presented in the appropriate case.

1998); United States v. Ferguson, 508 F.Supp.2nd 7 (D.C. 2007); Sims v. State, *supra*; Holder v. State, 595 S.W.3d 691, 697 (Texas Crim. App. 2020).

III. A warrant was not required on January 24, 2017, when the request for 2 days of CSLI was made, so there was no police misconduct, and the exclusionary rule would not apply.

This murder occurred on *January 21, 2017*. The State obtained the 2 days of CSLI by a search warrant from a magistrate issued on **January 24, 2017**. This warrant was forwarded to *Verizon* immediately. As recognized by the South Carolina Supreme Court in State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022) and by this Court in State v. Warner, 430 S.C. 76, 92–94, 842 S.E.2d 361, 369–70 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022), at the time the 2 days of CSLI were requested from *Verizon* for Brown, the State was not required to obtain a search warrant. *See* Miller, 425 U.S. at 443; United States v. Graham, 824 F.3d 421, 437–38 (4th Cir. 2016). *See* United States v. Pembrook, 876 F.3d 812, 823 (6th Cir. 2017) (finding that as of mid-2014, "no circuit court of appeals had yet held the Fourth Amendment applicable to CSLI data," no Supreme Court, Sixth Circuit, or out-of-Circuit precedent extended Fourth Amendment protections against warrantless seizures of CSLI to criminal defendants), *vacated on other grds*, Calhoun v. United States, 139 S.Ct. 137 (2018). *See also* Carpenter, 138 S.Ct. at 2235-36 (Thomas, J., dissenting) ("The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. .... I agree with Justice KENNEDY, Justice ALITO, Justice GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents").

Long after the CSLI was requested by police in this case, while this case was awaiting trial, **on June 22, 2018**, the Supreme Court decided Carpenter, which held for the first time that a person has a legitimate expectation of privacy in his CSLI held by a third party *of 7 days or*

more. A majority of the Carpenter Court therefore held Miller did not apply to CSLI *of 7 days or more*, and the government could only obtain them by complying with the Fourth Amendment.

Similar to this case, in Warner, the appellant's CSLI was obtained by a warrant prior to the issuance of the opinion in Carpenter. At Warner's trial, Carpenter had still not been decided and the trial court held the search warrant was invalid but admitted the CSLI pursuant to Miller and Graham, *supra*, the controlling law at the time of the police action.

On appeal to this Court, Warner based his claim solely on the Fourth Amendment, so the question became what remedy Carpenter provided him. This Court noted it had no doubt Carpenter was retroactive to Warner's case, however, this Court pointed out the U.S. Supreme Court separated the retroactivity of a decision from the issue of the remedy. Warner, 430 S.C. at 92–94, 842 S.E.2d at 369–70, *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022) (citing Davis v. United States, 564 U.S. 229, 243–44 (2011) ("[T]he retroactive application of a new rule of substantive Fourth Amendment law raises the question whether a suppression remedy applies; it does not answer that question."). In Davis, the U.S. Supreme Court faced the issue of whether the remedy of suppression should be applied where the search of the defendant was authorized at the time it was performed under the automobile exception to the Fourth Amendment recognized by New York v. Belton, 453 U.S. 454 (1981), but became unconstitutional after Arizona v. Gant, 556 U.S. 332 (2009). The search of Davis occurred 2 years before Gant but while Gant's direct appeal was pending. In a 7-2 decision, the Supreme Court refused to apply the exclusionary rule to the retroactive Fourth Amendment violation. The Court noted the single purpose of the exclusionary rule is to "deter future Fourth Amendment violations." Id. at 236–37. And, when the officer's actions are taken in objective good faith or involve only isolated simple negligence, the benefit of deterrence is dwarfed by the

"heavy toll" the exclusionary rule costs the justice system and society. Id. at 237–39. The Court noted there is no deterrent effect when the Fourth Amendment error is made by judges rather than police, as the rule was designed only to redress the officer's misconduct. To apply the Gant rule to the search of Davis authorized by Belton when it was performed, the Court reasoned, would penalize police for the Fourth Amendment mis-readings of appellate courts.

In Warner, this Court noted the South Carolina Supreme Court has followed Davis. Warner, 430 S.C. at 92–94, 842 S.E.2d at 369–70, *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (referencing State v. Brown, 401 S.C. 82, 96, 736 S.E.2d 263, 270 (2012). This Court also noted that although Davis had taken on withering criticism, mainly for what some perceived as its sabotage of retroactivity, *see* LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(h) (5th ed. 2012), "we are obligated to follow it." Warner, 430 S.C. at 92–94, 842 S.E.2d at 369–70, *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638. This Court held:

> Although the officers exceeded the Fourth Amendment when they obtained Warner's cell phone records without a valid warrant, in light of Miller's validity at the time of the search, their conduct was not a deliberate or reckless transgression. Like the search in Davis, the search of Warner's records was not wrongful at the time it was made, and no deterrent value accrues from suppressing the evidence under these specific circumstances. Our conclusion is in accord with many state and federal courts that have confronted the retroactivity of Carpenter and whether CSLI records obtained without a valid warrant before Carpenter should be subject to the exclusionary rule. *See* United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018); United States v. Goldstein, 914 F.3d 200, 203–07 (3d Cir. 2019); Reed v. Commonwealth, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019). We therefore affirm the denial of Warner's motion to suppress.

Warner, 430 S.C. at 92–94, 842 S.E.2d at 369–70, *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022), *reh'g denied* (June 7, 2022).

The South Carolina Supreme Court then granted certiorari and affirmed in part and remanded. State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022).[12] Justice Few wrote the opinion for the 4 Justice majority, in which Chief Justice Beatty and Justices Kittredge and James concurred. In the majority Opinion, Justice Few first laid out the history of the legality of obtaining such CSLI/phone records from a phone company up until 2018 without a search warrant. Id. at , *citing* Fuller; Graham. As to the initial determination the search warrant for the CSLI/phone records was invalid because a state magistrate issued the warrant for records in another state, the Court took up the issue. Id.[13] The Court found the magistrate did have jurisdiction to issue the search warrant because the records and CSLI were generated here in this State by a phone company doing business in this State and as a result the information fell under our search warrant statute and the records were simply stored digitally in New Jersey. Id.

The Court then went on to review the affidavit itself and found the search warrant in Warner's case was invalid because the affidavit did not contain probable cause. Rather than proceeding to whether the exclusionary rule should apply in this situation, the Court remanded to the circuit court for further proceedings to determine whether the officer who obtained the warrant may have supplemented the deficient affidavit. The Court held if the circuit court determined after holding a hearing as directed that there was still not sufficient probable cause in the warrant affidavit; the circuit court could then determine whether the exclusionary rule should

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[12] The Supreme Court affirmed this Court's determination of an unrelated issue, an eyewitness identification issue. Warner, 436 S.C. 395, 872 S.E.2d 638.

[13] The majority of the South Carolina Supreme Court noted the State did not challenge the trial court's ruling the warrant was invalid, leaving only for the Court of Appeals whether the exclusionary rule should apply and that this Court found the exclusionary rule should not apply. Warner, 436 S.C. 395, 872 S.E.2d at 641. The majority stated it took up the issue of the validity of the warrant itself to resolve how South Carolina police officers in the future conducting reasonable investigations could obtain such CSLI information if a magistrate in fact lacks jurisdiction to issue such a warrant. Id. at 641-43.

apply in this situation. The majority of the Court recognized in its opinion that at the time the warrant was obtained, police officers were not even required to obtain a warrant. Warner, 436 S.C. 395, 872 S.E.2d at 641 *citing* Graham; Fuller. In fact, Justice Few pointed out that the Fourth Circuit Court of Appeals specifically held in Graham that at the time of the issuance of the opinion in Graham, *all federal circuits were in agreement* with the Fourth Circuit that a search warrant was not necessary to obtain these records from a phone company. Warner. Justice Few went on to point out that it was not until 2018 that the U.S. Supreme Court in Carpenter, held for the first time that a search warrant was required. Warner.

Justice Hearn dissented, in part. She agreed with the majority that the magistrate who issued the warrant had jurisdiction to issue the same and that the warrant affidavit did not contain probable cause. However, Justice Hearn opined she would not have remanded the case at all, **but agreed with this Court's analysis**, and would have held the exclusionary rule did not apply because the police officers were acting properly at the time they obtained the CSLI since no search warrant was even required in 2017. Id. at 644-45 (citing Davis v. United States; Carpenter; United States v. Miller & United States v. Graham).

Here, there is no necessity for a remand, and the exclusionary rule would not apply. Chavez, 894 F.3d at 608 (4th Cir. 2018); Goldstein, 914 F.3d at 203–07 (3d Cir. 2019); Reed, 834 S.E.2d at 510–12 (Va. App. 2019). At the pre-trial suppression hearing, the officer who obtained the search warrant testified to everything in the warrant affidavit and what was related to the magistrate through further supplementation with oral testimony. But, just like Warner, Chavez, Goldstein, and Reed, at the time this CSLI was requested from the phone company, a search warrant was simply not necessary, **and** the exclusionary rule would not apply even if the affidavit was insufficient. Davis, *supra*; Warner, *supra* (Hearn, J., *dissenting*);

Chavez, 894 F.3d at 608; Goldstein, 914 F.3d at 203–07; Reed, 834 S.E.2d at 510–12. In 2017, the police could obtain these records from the phone company by request and there was no 4th Amendment violation at the time regardless of whether the affidavit contained sufficient probable cause. Warner, *supra* (Few, J., *for the majority*). Since the Fourth Circuit decided Chavez, it reaffirmed its analysis. United States v. Todd, 2022 WL 3210717 (4th Cir. 2022)(Not Reported in Federal Reporter, only Westlaw cite currently available):

> in United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018), we held, post-Carpenter, that cellular site tracking data associated with appellant's cellular phone number obtained through a court order issued pre-Carpenter under both the SCA and related provisions of Virginia state law was properly admitted under good-faith exception to the exclusionary rule because, at the time investigators obtained the data, they had a reasonable, good-faith belief that acquiring such data was lawful.

Todd, *3. As a result, the officers here were acting in good faith at the time and the exclusionary rule should not apply. Chavez, *supra*; Goldstein, *supra*; Reed, *supra*.

Further, the delay in law enforcement receiving the records was as a result of *Verizon's* processing of the lawful request. Furthermore, at the time the CSLI was received, in 2020 a search warrant **was still not required for 2 days of CSLI**. Carpenter. Even after the Carpenter decision, law enforcement would have known from that opinion that they *were not required to obtain a search warrant to obtain 2 days of CSLI.*

These and other precedent recognize the same principle discussed above and those courts have refused to apply the exclusionary rule in the situation presented here. United States v. Felder, 993 F.3d 57, 77 ((2nd Cir. 2021)(Pre-Carpenter historical CSLI data allowed because officers were acting in good faith, at the time their request was lawful); United States v. Hammond, 996 F.3d 374, 385 (7th Cir. 2021)(Pre-Carpenter historical CSLI allowed because officers were acting in good faith at the time); United States v. Walton, 2021 W.L. 3615426, *1

(9th Cir. 2021)(Pre-Carpenter historical CSLI data allowed under good faith); United States v. Green, 981 F.3d 945, 957 (11th Cir. 2020)(Pre-Carpenter CSLI allowed under good faith actions of officers); United States v. Zodhiates, 901 F.3d 137, 143 (2nd. Cir. 2018)(acknowledging the Carpenter decision issued during the pendency of that appeal, but holding "when the Government "act[s] with an objectively reasonable good-faith belief that their conduct is lawful, the exclusionary rule does not apply); United States v. Beverly, 943 F.3d 225, 234 (5th Cir. 2019)("We hold that the [Illinois v. Krull, 480 U.S. 340, 349-50 (1987)] strand of the good faith exception properly applies to the [CSLI at issue], since it was obtained pursuant to a pre-Carpenter warrantless order authorized by statute"); United States v. Carpenter, 926 F.3d 313, 317-18 (6th Cir. 2019) (*"Carpenter II"*) (on remand from Supreme Court, finding government agents reasonably relied on the SCA at the time they acquired certain CSLI), *sentence vacated on other grds. and case remanded*, 788 Fed.Appx. 364 (6th Cir., Dec. 19, 2019); United States v. Curtis, 901 F.3d 846, 847-49 (7th Cir. 2018) (same); United States v. Joyner, 899 F.3d 1199, 1204-05 (11th Cir. 2018) (same).

State courts have recognized the same principle. State v. Burke, 2019 WL 2172718, *5 (Oh. App. 2019)(*not reported in N.E. Rptr.*)(applying good-faith exception to CSLI acquired *by grand jury subpoena*), *appeal not allowed*, 131 N.E.3d 75 (Ohio 2019)(Table); Reed, 834 S.E.2d at 510–12 (2019);[14] State v. Smith, 475 P.3d 558 (Ariz. 2020)(good faith exception applies to historical CSLI that was obtained without a warrant with objective reliability based on a statute before Carpenter was decided; citing Illinois v. Krull, 480 U.S. at 342, 352 (even though a statute

[14] Respondent notes that on February 2, 2021, the South Carolina Supreme Court heard oral arguments in another case in which a panel of the Court of Appeals held in an unpublished opinion the good faith exception to the exclusionary rule applied to the State's pre-Carpenter acquisition of CSLI and the Court dismissed certiorari as improvidently granted in that case on March 10, 2021. *See* State v. Rhodes, 2021-MO-001 (S.C. S.Ct., Mar. 10, 2021)(Unpublished).

is later determined to be unconstitutional, officers can rely on the good faith exception when "officers act[ed] in an objectively reasonable reliance upon the statute authorizing warrantless administrative searches.") and Davis, 564 U.S. at 232 ("Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule")); Martinez v. State, 2022 W.L. 3904699, *10 (Tex. Crim. App. 2022)(Only *Westlaw* cite currently available)("at the time the warrant in this case was applied for, issued, and executed, neither Texas courts nor the Fifth Circuit recognized a reasonable expectation of privacy in the historical cell site location [CSLI] data obtained from the records of a cell phone service provider, and no warrant was required to obtain it.").

Again, to the extent the police violated the SCA in some respect, the exclusionary rule would not apply because it is not a remedy under that Act. United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014); United States v. Smith, 155 F.3d 1051 (9th Cir. 1998); United States v. Ferguson, 508 F.Supp.2nd 7 (D.D.C. 2007); United States v. Sherr, 400 F.Supp.2d 842 (D.MD. 2005); United States v. Kennedy, 81 F.Supp.2d 1103 (D.KA. 2000); 18 U.S.C. Section 2701(b)(allows for criminal punishment); 18 U.S.C. Section 2707 (allows for civil remedies); 18 U.S.C. Section 2708 ("The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter.").

IV. The exclusionary rule should not apply due to the exigency of the situation.

Additionally, this Court should find law enforcement's request for disclosure of Brown's CSLI for 2 days was appropriate at the time it was made given the violent nature of the murder of the victim. *See* United States v. Takai, 943 F. Supp. 2d 1315, 1323 (D. Utah 2013) (emphasizing "the violent shooting of [a store] clerk in the face at point blank range" to support the finding of an exigent circumstance supporting voluntary disclosure by the phone company).

A gang of men called victim out of his home, surrounded him, and then gunned him down in front of his own home. Multiple weapons were used in the murder of the victim. Therefore, the circuit court properly admitted the CSLI placing Brown's phone within the general vicinity of the murders and showing him calling a co-defendant during the same time period.

V. The exclusionary rule should not apply to the police conduct because this Court has not agreed what is a Fourth Amendment violation or an illegal search in this area.

As previously discussed, at the time the CSLI for 2 days was requested, a search warrant was not required because Carpenter had not even been decided. And even after Carpenter was decided, a search warrant was not required to obtain 2 days of CSLI. Carpenter, *supra*. Subsequent to Carpenter, this Court issued a series of published and unpublished Opinions in this area which Respondent submits are not consistent with each other.[15] *See* Warner, 430 S.C. at 92–94, 842 S.E.2d at 369–70, *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638; State v. Javon D. Gibbs, 2020-UP-244 (S.C. Ct. App., Aug. 19, 2020)(**Unpublished**); State v. Rhodes, 2019 W.L. 5797528 (Ct. App. Nov. 9, 2019)(**Unpublished**). As a result, the exclusionary rule should not apply where law enforcement officers, who are not trained legal technicians, obtained the CSLI pre-Carpenter, and this Court has not agreed post-Carpenter on what was legal and illegal in this area at the time these records were requested or obtained.

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[15] Respondent is not citing any Unpublished Opinion by this Court as precedential case authority. Quite to the contrary as will be explained. The point is these Opinions, both published and unpublished cannot be reconciled with each other. As a result, how could law enforcement have intentionally violated a defendant's Fourth Amendment rights when the 9 members of this Court cannot agree when a defendant's Fourth Amendment rights are violated in similar scenarios. *See* Warner; Dobbs, Rhodes. Further, the Unpublished Opinion in Dobbs cannot be reconciled with the majority's opinion in Carpenter, which stated that less than 7 days of CSLI the majority did not consider to be a search. Id. at n. 3. Further, Dobbs is unpublished so no law enforcement officer could rely on an opinion that has no precedential value.

VI. Brown has not alleged a Franks violation much less shown one because the false or incorrect information in the affidavit was not intentionally false or made with reckless disregard of the truth.

Based on the foregoing, no further analysis is necessary; however, Respondent notes even where a search warrant is required, to establish a Franks violation, the defendant must not only show that false or incorrect information was contained in the warrant affidavit but also that the false statement was made knowingly and intentionally, or with reckless disregard of the truth. United States v. Moody, 931 F.3d 366, 371 (4th Cir. 2019). *See also* State v. Parks, 265 N.C. App. 585, 828 S.E.2d 719 (N.C. App. 2019)(defendant must show more than untrue facts in the affidavit; defendant must show those facts were put there in bad faith). Appellant does not even contend in his brief that the false or incorrect information in the affidavit was knowingly false or made with reckless disregard for its truth. (IBOA). He did not argue this below either.

The statements at issue cannot be "an innocent or even negligent mistake by the officer." Moody, 931 F.3d 366 at 371. "[T]he defendant must provide facts . . indicating that the officer subjectively acted with intent to mislead or with reckless disregard for whether the statements would mislead." Moody, 931 F.3d at 371 (referencing United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990). "This court has stated previously that reckless disregard in the Franks context requires a showing that the affiant personally recognized the risk of making the affidavit misleading." United States v. Pulley, 987 F.3d 370, 3777 (4th Cir. 2021)(referencing Miller v. Princ George's Cnty., Md., 475 F.3d 621 627 (4th Cir. 2007). The officer or "affiant must have been subjectively aware that the false statement or omission would create a risk of misleading the reviewing magistrate judge and nevertheless chose to run that risk." Pulley, 987 F.3d 370 at 377. "A district court's resolution of whether a false statement in a warrant affidavit was made with reckless disregard is subject to reversal only upon a finding of clear error." Pulley, 987 F.3d 370, at 377 (see United States v. Brown, 631 F.3d 638, 642 (3d Cir. 2011).

The U.S. Supreme Court did not create a definition for reckless disregard for the truth so the Seventh Circuit Court of Appeals stated, "the meaning of 'reckless disregard for the truth' is not self-evident." United States v. Tubbs, 2022 W.L. 1196713 (7th Cir. 2012)(*Slip Copy*)(quoting United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984). Other circuits apply the recklessness standard by the Supreme Court for libel claims regarding the First Amendment. Tubbs. "Applying this standard, an affiant makes a statement with reckless disregard for the truth if the affiant '"in fact entertained serious doubts as to the truth of [the] statement"'" Tubbs (quoting United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979)(quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968). This can be met "by showing 'actual deliberation'" or by showing "obvious reasons to doubt the veracity of the [statement]" (quoting St. Arman, 390 U.S. at 732). State of mind must be proven circumstantially. Williams, 737 F.2d at 602. "'The criminal law ... generally permits a finding of recklessness only when a person disregards the risk of harm of which he is aware' and that knowledge 'is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.'" Farmer v. Brennan, 511 U.S. 825, 836037, 842 (1994). The Eleventh Circuit found recklessness where the affiant "'should have recognized the error, or at least harbored serious doubts' about the truth of the statement." United States v. Kirk, 781 F.2d 1498, 1503 (11th Cir 1986).

The false or incorrect information contained in the affidavit in the present case was not intentionally or knowingly false. (R. 10-27). Appellant does not contend that it was. (IBOA). Nor does appellant contend that the affiant acted with reckless disregard for the truth. (IBOA). It was the affiant/investigator's understanding from talking to other investigators working on the case that Brown's phone contacted victim's phone on the day of the murder. This was actually incorrect. As stated earlier, and as admitted at the Franks hearing, Brown's phone contacted

victim's cousin Smalls' phone the night of the murder and Smalls in turn forwarded Brown's number to victim at 8:37 p.m. As a result, Brown's phone number *was in victim's phone* when police searched after the murder. It was a co-defendant Brenton Davis who contacted victim multiple times right before the murder. The affiant was a supervisor of detectives, and was obtaining several warrants, 4 or 5 at the same time in the heat and hurry of a criminal investigation. (R. 10-27). The Supreme Court has recognized that law enforcement officers are not legal technicians and draft warrants in the heat and hurry of a criminal investigation. United States v. Ventresca, 380 U.S. 102, 108 (1965); Illinois v Gates, 462 U.S. 213 (1983) *see also* State v. Bowie. 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004)(same)(other citations omitted). The Court has also recognized that an officer affiant may rely on hearsay from other officers engaged in a joint investigation in preparing a warrant affidavit; this is described as the collective knowledge doctrine. Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560 (1971); United States v. Hensley, 469 U.S. 221 (1985). This is a common and routine practice in criminal investigations. Here, the affiant was obtaining search warrants for subscriber information, phone records, and CSLI of multiple co-defendants, was relying on what investigators had told him at a meeting regarding the progress in the investigation and conflated appellant Brown's phone number being forwarded to victim by victim's cousin with Davis contacting victim several times right before his murder. (R. 10-27). This was a simple mistake by the affiant. At most, Brown has shown simple negligence on the part of the affiant, not knowing intentional falsehood or even reckless disregard for the truth. Moody, *supra*. As a result, there is no Franks violation. Id. As a result, this appellate issue has no merit.

VII. Even striking the false/incorrect information from the affidavit, with the supplemented sworn testimony there was still sufficient probable cause to obtain CSLI for 2 days.

Further, the State submits that where the search warrant affidavit is stricken of any incorrect or false information, but was supplemented, the search warrant, the affidavit, and the sworn testimony clearly supports the magistrate's finding of probable cause to issue the search warrant to obtain 2 days of CSLI. *See* Warner, *supra* (recognizing affidavit may have been supplemented by sworn testimony and remanding for determination of the same); S.C. Code Ann. Section 22-3-710; State v. Sachs. 264 S.C. 541, 216 S.E.2d 501 (1975).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 SC. 498, 248 S.E.2d 475 (1978). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). Probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, 540 U.S. 366; Gates. 462 U.S. 213. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with probabilities, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949); State v. Dupree. 319 S.C. 454, 462 S.E.2d 279 (1995). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown. 460 U.S. at 742. Probable cause to issue a search warrant is different than that to issue an arrest warrant. *See* Beck v. Ohio, 379 U.S. 89 (1964); State v. Ellis, 263 S.C. 12, 207 S.E.2d408 (1974)(probable cause to issue an arrest warrant is whether at that moment the facts and circumstances within the officer's knowledge, and of which he had

reasonably trustworthy information, was sufficient to warrant a prudent man in believing that the suspect had committed a criminal offense). Probable cause to issue a search warrant is whether given the evidence available to the issuing magistrate there is reasonable grounds to believe evidence of a crime will be found in the place sought to be searched. Gates, 462 U.S. at 238 (The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched); State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314 (2003)(same); State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002); State *v.* Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). It is not the same standard as to arrest.

In the present case, the affiant supplemented the affidavit with sworn testimony that there were threatening phone calls to victim the day of the crime and approaching the murder, and that Brown's phone was connected to those threatening phone calls. (R. 13). This testimony is not false but true. (R. 41-45; 93-103; 209-18). While Brown did not call victim, he called victim's cousin Smalls and Smalls forwarded Brown's phone number to victim around 8:37 p.m. Brown's phone number was in victim's phone from the time approaching victim's murder. Brown and Smalls also exchanged phone calls at 10:24 p.m., shortly before the murder. (R. 209-18). And, victim had a call with Smalls around the same time, shortly before the murder. Therefore, even if this Court required probable cause, which was not required at the time, or even after Carpenter for 2 days of CSLI, considering the search warrant and the remainder of the affidavit along with the sworn supplemental testimony, there was sufficient probable cause to issue the search warrant **for 2 days of CSLI, i.e. there was reasonable grounds to believe that**

evidence of a crime would be found in Brown's CSLI located at *Verizon* for the 2 days requested, January 21-22, 2017, where the crime occurred at 11:00 p.m. on January 21, 2017. *See* Warner, *supra.*

As a result of all of the above, this appellate issue has no merit and must be denied.

Appellate Issue II.

Directed Verdict Issue

What occurred below relevant to Issue II.

At the close of the evidence, Brown moved for a directed verdict on the basis there was insufficient evidence Brown was guilty under the law of accomplice liability and the State had not proven an overt act. (R. 282). The State responded there was sufficient evidence of appellant's guilt under accomplice liability and that he committed an overt act. (R. 282). Judge Burch denied the motion for a directed verdict based on the testimony of the neighbor Ms. Ingram, the victim's girlfriend, the false statements Brown gave police, and the cell phone site information and cell phone records. (R. 283). Brown now alleges on appeal that Judge Burch erred in denying his motion for a directed verdict on the basis there was insufficient evidence he could be found guilty of murder under accomplice liability including that he committed an overt act. As Judge Burch correctly found, Brown is simply wrong. There was more than sufficient evidence Brown is guilty of murder as an accomplice. State v. Harry, 420 S.C 290, 803 S.E.2d 272 (2017); State v. Larmand, 415 S.C. 23, 780 S.E.2d 892 (2015).

Standard of Review / Directed Verdict
(Appellate)

A defendant may only appeal from a trial judge's denial of a motion for a directed verdict where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). In reviewing a denial of a directed verdict, this Court must view the evidence

and all reasonable inferences in the light most favorable to the State. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016); State v. Bennett, 415 S.C. 232, 781 S.E.2d 352, 753 (2016).

The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliand, 402 S.C. 389, 741 S.E.2d 521, *3 (Ct. App. 2012). If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, this Court must find the court properly submitted the case to the jury. Brown, 740 S.E.2d at 495; State v. Rogers 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013); Gilliland at *3. This Court considers only the existence or non-existence of evidence, not witness' credibility or the evidence weight, in reviewing the denial of a directed verdict. Bennett, 415 S.C. 232, 781 S.E.2d at 353; State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475 (2004); Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5.

Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. State v. Frazier, 386 S.C. 526, 532-33, 689 S.E.2d 610, 613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); Cherry, 361 S.C. at 595, 606 S.E.2d a5 478 (finding circumstantial evidence, when combined, was sufficient for the fact finder to infer guilt); Rogers, *supra*.

If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005). In reviewing the trial judge's denial of a motion for a directed verdict, this

Court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Pearson, 415 S.C. at 473-74, 783 S.E.2d at 907-08; Bennett, 415 S.C. 232, 781 S.E.2 at 354. If examining the evidence in the light most favorable to the State, there is evidence in the record which could induce a reasonable juror to find the defendant guilty, then this Court must affirm the trial judge's denial of the motion for a directed verdict. Pearson, 415 S.C. at 470, 783 S.E.2d at 806; Bennett, 781 S.E.2d at 354.

(Trial Court's Standard)

A motion for directed verdict is properly denied when there is any evidence, direct or circumstantial, that reasonably tends to prove the defendant's guilt. State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. Cherry, 361 S.C. at 593, 606 S.E.2d at 477-78; *see* Rule 19(a), SCRCrP. A trial court should grant the directed verdict motion when the evidence merely raises a suspicion the accused is guilty, as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. Cherry, 361 S.C. at 594, 606 S.E.2d at 478. On the other hand, "a trial judge is not required to find that evidence infers guilt to the exclusion of any other reasonable hypothesis." Pearson, 415 S.C. at 470, 783 S.E.2d at 806; Hepburn, 406 S.C. 416, 753 S.E.2d 402; Bennett, 415 S.C. 232, 781 S.E.2d at 354; Cherry, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge is required to deny the motion for a directed verdict and submit the case to the jury if there is *any* direct evidence or *any* substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. Hepburn, 406 S.C. at 429, 753 S.E.2d 402, *see also* Bennett, 781 S.E.2d at 354; State v. Freiburger, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005)(If there is any direct evidence or substantial circumstantial

evidence reasonably tending to prove the guilt of the accused, the case must be submitted to the jury).

In ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must deny the motion for a directed verdict if the evidence is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. Bennett, 781 S.E.2d at 354. The trial court "...must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." State v. Phillips, 416 S.C. 184, 193, 785 S.E.2d 448, 52 (2016), *quoting* Bennett, 415 S.C. at 237, 781 S.E.2d at 354. If examining the evidence in the light most favorable to the State, there is evidence in the record which could induce a reasonable juror to find the defendant guilty, then the trial judge must deny the motion for a directed verdict. Id.; Pearson, 415 S.C. at 474, 783 S.E.2 808.

Appellant conceded his guilt as an aider and abettor at sentencing so this issue is waived

At sentencing, Brown's attorney conceded Brown's guilt of murder as an aider and abettor and used this as a basis to plead for mercy from the court. (R. 358, ll. 9-19). Brown's attorney stated as follows:

> This is kind of a rare case where the facts were not particularly in dispute. It was almost a legal question towards the end of the trial, your Honor. You know, based on my kind of stiffing [sic] through the evidence, I think we all probably know the case is over, agree that Brenton Davis was the shooter, probably Jamarcus Sellers as well. My understanding is Brenton Davis asked James [appellant James Monroe Brown] to come help out, be basically either backup or fight. And, as your Honor and the jury heard, that things obviously went south and both parties had guns and it did go south.
>
> Your Honor, as you already heard, my client really has no record before this. He's a father. He was working at Mohawk Carpet and just got caught up in this. I think he was doing Brenton a favor possibly and here he stands today. And we know what happens after this, you Honor.
>
> With that, I know James [Appellant] pretty well. I know Bubba pretty well. It's one of those sad things I think in a thousand lifetimes this happened in one. In a thousand different universes, this probably the only time - - he's such a calm guy

> and agreeable guy, easy going. He got caught up in this, no doubt and I hate it for him and that's the law.

(R. 358 ln. 9 – 359, ln. 7). Judge Burch sentenced Brown to 35 years imprisonment accordingly. (R. 361, ll. 9-11). Because Brown conceded his guilt at sentencing, there is no merit to this appeal. *See* State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976)("Any doubt about the correctness of this conclusion is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that he had participated in the robbery with a sawed-off shotgun. Further review of the record, therefore, is rendered unnecessary."); State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010)(defendant's statement "I guess I want to apologize to the Court for getting myself in this trouble. I should have known better than what I was doing. I had numerous opportunities to stop. I just want to apologize to the Court" supporting fact in harmless error analysis).

Argument

There was more than sufficient evidence to overcome the directed verdict motion.

The State more than satisfied the standard to overcome the motion for a directed verdict on the charge of murder. Judge Burch appropriately denied the motion for a directed verdict at the close of the State's case. There was both direct and substantial circumstantial evidence from which the trial judge and the jury could find Brown guilty of murder pursuant to accomplice liability or the law of parties to a criminal offense, i.e. the hand of one is the hand of all and/or as one present aiding and abetting. Considering the evidence, including all inferences, in the light most favorable to the State, Judge Burch did not err, i.e. abuse his discretion, in denying the motion for a directed verdict. As a result, Judge Burch must be affirmed.

The Law

Brown argues the State presented insufficient evidence that he is responsible for the victim's murder under an accomplice theory.

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007)(internal quotations and citations omitted). "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *See* State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002)(*quoting* State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. Id. at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

The Evidence

At the close of the State's case, viewing the *evidence* and *all inferences* in *the light most favorable to the State*, the following was established.

The victim lived in a mobile home park in the Cheraw area of Chesterfield County. Brown and his co-defendants lived in the Bennettsville area of Marlboro County. Brown and co-

defendant Davis were close associates. They spoke to each other at least 70 times during the week prior to the murder and Brown's car was found parked behind Davis's home the day after the murder. (R. 107-33; 93-103; 210-11; 234-81; State's Ex. 3, 4, 17, 33, 34-37).

On the day of victim's murder, victim was receiving threatening phone calls. Victim was so upset he told his girlfriend: "they are trying to put me in a box." Victim received several text messages earlier that afternoon from Brown's close associate and co-defendant Davis requesting victim to come to Marboro County. Victim refused. Then victim began receiving more phone calls throughout the evening from Davis. Victim did not go to Marlboro County. Brown called victim's cousin Smalls (aka S-Dot). Smalls then called victim. Smalls also texted victim Brown's phone number, but victim did not call Brown back. Victim did call Smalls back. At the same time, or later, Brown called Smalls again and then Smalls called victim again. Victim never called Brown back and never went to Marlboro County. But victim continued to receive phone calls from Brown's co-defendant and associate Davis as the night progressed toward the time of victim's murder. The jury could find or infer from these numerous texts and phone calls, based on what victim stated to his girlfriend under extreme distress, and what occurred later to victim, that victim was being told to come to Marlboro County and he was being threatened with a physical assault or death. When he refused to come, the men threatening him, including Brown, came to victim in Chesterfield County. (R. 107-33; 93-103; 234-81; 196-201; 204-19; 330-30; State's Ex. 3, 4,17, 33-37).

The evidence showed that the gang of men threatening victim, including Brown, left Marlboro County and traveled to victim's mobile home park. This is supported not only by CSLI from Davis' phone, but also CSLI from Brown's phone. Both men's phones traveled from the Bennettsville area of Marlboro County to the area of victim's mobile home park in

Chesterfield County at the exact same time. Neither Brown nor Davis talked over the phone or texted each other during the trip, which is consistent with both men being in the same vehicle. However, during the trip to the area of victim's mobile home park, both Brown and Davis communicated by phone with Sellers, another co-defendant in the case, indicating Sellers was riding in another vehicle, and the judge and jury could infer they were communicating about what they were going to do when they arrived at the mobile home park, i.e. shoot or kill victim. The jury could infer this from what the gang of men actually did when they arrived at victim's home, surrounded him, and shot him multiple times in the back of his body with multiple guns. (R. 107-33; 93-103; 210-11; 234-81; State's Ex. 3, 4, 17, 33-37).

Not only do the phone records and CSLI show this is what occurred, but also eyewitness' testimony, which is direct evidence, shows this. Ms. Ingram, the neighbor, was awakened at approximately 11:00 p.m. at night from her bed by car lights and a door slamming outside her home, and men's voices. The voices were angry or aggressive and a person was yelling repeatedly for victim ("S.B.") to come outside of the home and face the gang of men. The person was using profanity. When Ms. Ingram looked outside, she saw Brown, approximately 6 feet away from her, standing in the car lights with Sellers and Davis, who were both armed. She did not see a gun on Brown, but several of the men were armed. One (1) of the men had a handgun and the other *a long gun*, a rifle or shotgun. These guns would have been visible to Brown as well. This does not mean Brown did not have a gun, it was just not visible to Ms. Ingram. One must recall, Ms. Ingram and victim's girlfriend both testified they saw 5 or 6 men outside the car on each instance. Victim was shot, 4 times in the back, and at least **3 firearms**, and **possibly 4** were used to kill the victim. No rifle or shotgun casings were found at the crime scene where victim was shot. Therefore, Brown could have had a firearm hidden on his person at

Ms. Ingram's home. Regardless, as Ms. Ingram testified, there is no question Brown was part of the group confronting her boyfriend Thomas and part of what they were doing at her home. She testified they were all acting together in what they were doing there at her home. (R. 107-33; 93-103; 210-11; 134-69; 174-85; State's Ex. 18; 25; 20, 21.

Ingram testified her boyfriend asked her to come see the men outside with guns, and she got up and looked out the window. In addition to being armed, the gang of men were confronting her boyfriend and accusing him of being victim. By name, they referred to victim. Thomas had to convince the gang of men he was not the victim. Ingram testified the men were loading their weapons outside her home. Two (2) live shotgun shells were later found near her home after the crime. After Thomas convinced the gang of armed men he was not "S.B.", Ingram saw the men leave and drive to victim's home, which was nearby, approximately the distance of the witness stand to the back of the courtroom. Ingram saw a 2nd car which she testified was clearly involved. It pulled past the first car, stopped, and illuminated the back side of victim's home with its high beam headlights, preventing anyone in the home from leaving that direction without being seen. It should be noted here that there were phone calls from Brown and Davis to Sellers at the approximate time the gang of men, including Brown, arrived in victim's mobile home park. The trial judge and jury could infer from this evidence *and* what Ingram witnessed, that Brown, Davis, and Sellers were using their cell phones like walkie talkies coordinating their attack on victim. (R. 107-33; 93-103; 210-11). This was an overt act in furtherance of the crime. State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2020). The men in both cars had now trapped the victim in his own home. (R. 107-33; 93-103; 210-11). This was another overt act in furtherance of the crime. Mattison, 388 S.C. at 479-80, 697 S.E.2d at 584.

Ingram testified all of the men in the car in front of victim's home got out of the car. One (1) of those men was Brown. Another man was on the phone, and he was yelling loudly for victim to come outside and face him. Brown would have heard this as he was standing near the man calling victim out of his home. Ms. Ingram testified she could see victim standing in his bedroom window at the same time this was occurring. Victim's girlfriend corroborated this testimony and identified this man calling victim out of his home as Davis, Brown's close associate. Cell phone records of Davis also corroborated this man was Davis as he called victim several times right before victim walked out of his home and was murdered by the gang of men, which included Brown. Victim's girlfriend saw this man, Davis, in the headlights of the car outside her home. She said there were 4 or 5 men outside the car. She described it was like 2 men on one side of the car and 2 or 3 men on the other side of the car. However, because it was dark and because of the headlights, she could not identify any of these other men except Davis. But, her neighbor, Ms. Ingram could identify several of them. Ingram testified 1 of the men was Brown. Ingram just happened to identify the 3 men who were communicating by phone with each other as they approached and when they arrived at victim's mobile home park. She also identified 1 of the other men as Harris, who she knew before this night. And, she identified another man was Jovanni McClain. McClain came and threatened her the following day; he had dreadlocks. (R. 107-33; 93-103; 210-11; State's Ex. 32-37).

In his brief, Brown attacks the credibility of Ingram's, identification of him. This argument is without any merit. Judge Burch conducted a Neil v. Biggers hearing before Ingram testified, and after considering all the appropriate factors admitted her in-court identification of Brown. (R. 64-91). The admissibility of her in-court identification of Brown as 1 of the perpetrators is not an issue before this court. That issue was not raised on appeal in Brown's

brief. (IBOA, p. 1). As a result, Judge Burch's admission of her identification of Brown as 1 of the perpetrators is the law of the case. Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869 (2000); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993(the trial judge's procedural ruling is the law of the case since it has not been appealed); Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996)(where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the un-appealed ground will become the law of the case); *Appellate Practice in South Carolina*, 2nd Ed., p. 80, Toal, Vafai, Muckenfuss, S.C. Bar (2002); *See* Rule 208(b)(1)(B), SCACR; Calhoun v Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000)(No point will be considered which is not set forth in the statement of issues on appeal). Ingram's identification of Brown as 1 of the perpetrators of the murder was in evidence and before the jury. (R. 107-33).

Further, at the directed verdict stage, the trial judge is concerned with the existence of evidence, not its weight or credibility. Bennett, 415 S.C. 232, 781 S.E.2d at 353 (This Court considers only the existence or non-existence of evidence, not witness' credibility or the evidence weight, in reviewing the denial of a directed verdict); Cherry, 361 S.C. at 593, 606 S.E.2d at 478-79; Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5; Phillips, 416 S.C. at 193, 785 S.E.2d at 52, *quoting* Bennett, 415 S.C. at 237, 781 S.E.2d at 354; *see* Rule 19(a), SCRCrP. Credibility and weight are matters for the jury. Here Ms. Ingram identified not only Brown, but also Sellers and Davis. (R. 107-33). The same 3 men who happened to converse by phone on their way to the mobile home park and as they arrived or shortly thereafter. (State's Ex. 32-37).

Ms. Ingram testified Brown and the rest of the gang of men then walked into victim's front yard. She testified some of the men were armed. Brown would have been able to see the guns being carried by the men he was with. Both Ingram and victim's girlfriend testified victim

came out of his home because this group of men called him out of his home. Before leaving his home, victim said goodbye to his 2 sons. This is evidence that victim anticipated more was going to be done to him than just being beaten or involved in a fight. Ms. Ingram testified the gang of armed men, which included Brown, confronted victim in the yard of his home. Once outside, victim walked around the gang of men so that the gang of men were facing away from victim's home where his wife and children were. This is further evidence victim believed he was not just going to be beaten but shot and killed. The neighbor Ms. Ingram then heard arguing between the gang of men and victim, and then she witnessed the gang of men shoot victim multiple times and saw victim run and believed she saw 1 man chasing him. During the shooting of victim, she saw gunfire coming from the guns when victim was shot. Victim's girlfriend corroborated Ingram's testimony regarding hearing multiple gunshots shortly after victim walked out of his home. Victim ran away from his home until he expired from the gunshot wound to the lung. While Ms. Ingram did not see a gun in Brown's hand, she testified he was part of this gang of armed men that confronted victim, and he was a participant in what they were doing to victim. Again, Brown was not merely present when someone was killed, but he was there aiding and abetting the others and was part of the group that confronted victim and was part of "the box." (R. 107-33; 93-103; 210-11). Brown did commit an overt act in furtherance of the common design and was there by prearrangement for him to be there at least aiding and abetting the entire group. State v. Langley, 334 S.C. 643, 648-49, 515 S.E2d 98, 101 (1999).

Ms. Ingram's testimony [R. 107-33] is further corroborated by what was discovered at the crime scene and at autopsy. Victim was shot 4 times in the back area of his body from different angles. Several fired shell casings [7] from handguns were found at the scene. Several fired bullets were recovered from the victim's body at autopsy. Based on all of the evidence

recovered, ballistics determined at least 3 and possibly 4 firearms were used to murder victim in this case. (R. 134-53; State's Ex. 18 [autopsy report]; 154-69; State's Ex. 25 [firearms report]; R. 174-85; State's Ex. 20 [fired cartridge casings] & 21 [firearm with fired casing]).

After committing the murder of victim, Brown, Davis, Sellers, and the others in the gang that killed victim returned to their cars and then both cars involved in the crime left the mobile home park together and returned to Bennettsville in Marlboro County. (R. 107-33; 189; 194; 242-79; 58-104; State's Ex. 3, 4, 17, 32-37). Flight is evidence of guilt when sufficiently connected to the murder, as it was in this case. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Al Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

Brown also got rid of his mobile phone, claiming when he was interviewed several days after the crime that he had lost his cell phone the day of the crime (R. 193; 199; 202-04; 217; State's Ex. 29). Police had to resort to obtaining his cell phone records and CSLI from *Verizon* not by searching Brown's phone. (R. 193-218; 242-79; State's Ex. 4 & 37). However, the activity on the phone after the murder was consistent with that before the murder indicating Brown did not lose his phone the day of the crime. (R. 199; State's Ex. 3 & 4 [Brown's cell phone records]; R. 202-04). Whether Brown destroyed, threw away his phone, or hid it from police, the destruction or attempted destruction of evidence is evidence of guilt and participation in the crime. Beckham, 334 S.C. 302, 513 S.E.2d 606.

When questioned by police, Brown gave false statements. Brown told police he was in Marlboro County on the night of the murder and never entered Chesterfield County. Ms. Ingram testified Brown was there at her mobile home and was at victim's mobile home. Brown's CSLI and his cell phone records show he was not only in Chesterfield County at the time of the crime but in close proximity to victim's mobile home park talking to the other perpetrators. A judge or

jury can infer guilt from false statements given to the police regarding one's whereabouts at the time of the crime. Brown also falsely told police he met an employee at a night club the night of the crime. This turned out to be false as well. Brown also falsely told police he lost his phone the day of the crime and gave police a false phone number. (R. 186-94; 218; 226-27; 217; State's Ex. 29). Police had to obtain his actual phone number from his girlfriend. (R. 193). The phone records and CSLI incriminated Brown. (State's Ex. 3 & 4; 36 & 37). Again, these false and evasive statements are evidence from which a trial judge or jury can infer guilt.

In his brief, Brown cites to several cases alleging they contained less evidence of the defendant's guilt than this case, and in those cases our appellate courts held a directed verdict should have been granted. However, a simple reading of those cases, and even Brown's statements about the facts of those cases themselves, shows the evidence in those cases in no way approaches the evidence of Brown's guilt presented in this case. *See* State v. Martin, 340 S.C. 597, 533 S.E2d 572 (2000); State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011); State v. Schrock, 288 S.C 129, 322 S.E.2d 450 (1984) and State v. Lollis, 343 S.C. 580, 541 S.E.2d 2454 (2011). Those cases raised a mere suspicion of the defendant's guilt. This case is completely different as set forth in detail above and in the Statement of Facts. The evidence in the record shows Brown was there at the crime scene by pre-arrangement, he committed overt acts in furtherance of the plan, and he was a participant by being a member "of the box" that confronted and killed victim. (R. 93-103; 210-11; 134-53; State's Ex. 18 [autopsy report]; R. 154-69; State's Ex. 25 [firearms report); R. 174-85; State's Ex. 20 [fired cartridge casings] & 21 [firearm with fired casing]; State's Ex. 4; 17, 33, 34, 35, 36, 37 [phone records, phone reports, and CSLI]). At the least, Brown aided and abetted

in the commission of the murder. He was part and parcel to the entire crime, from before the crime, during the crime, and after the crime.

Further, many of Brown's facts cited or argued in his brief are incorrect. First, Brown states the decedent was chased for a considerable period of time before he was shot in the back near Highway 9. (IBOA, p. 26). That is not what happened in this case. Ms. Ingram testified she witnessed the gang of men, including Brown, confront victim in his front yard. She then heard arguing. She then witnessed victim being shot by several men. She saw gunfire coming from the guns. She testified she thought she saw someone chasing victim as he ran, but she did not say he continued to fire at victim as he ran away. (R. 107-33). Her testimony is corroborated by victim's girlfriend who saw the gang of men outside her home and then heard multiple gunshots. (R. 93-103; 210-11). Ingram's testimony is also corroborated by what was found at the crime scene and at autopsy. Several fired shell casings and blood were found at the scene near victim's mobile home. Victim **was not** shot by 1 gun of a lone pursuer. The autopsy and ballistics determined victim was shot by at least 3 and possibly 4 guns. Victim was confronted and shot in his yard by multiple men in a gang of which Brown was a member. (R. 107-33; 134-53; 154-69; 174-85; State's Ex. 18 [autopsy report]; 25 [firearms report]; 20 [fired cartridge casings] & 21 [firearm with fired casing]). So, it does not matter as Brown alleges in his brief that "there was no direct or substantial circumstantial evidence appellant chased the decedent for a considerable period of time before the decedent was shot in the back near Highway 9." (BOA, p. 26, ll. 13-15). This factual statement of Brown is simply not what happened and therefore not true.

Brown also leaves out in the argument section of his brief that he falsely told police he had lost his cellphone the day of the crime, and he falsely told police what his cell-phone number was. (R. 186-94; 218; 226-27; State's Ex. 29). Brown also leaves out Ms. Ingram's testimony

established more than his mere presence, but also that he was part and parcel to the actions of the armed gang of men at her home and again at victim's home. (R. 107-33). Brown also leaves out that he was part of "the box" that confronted victim in his front yard and murdered him. (R. 107-33; 93-103; 210-11; 134-53; 154-69; 174-85; State's Ex. 18 [autopsy report]; 25 [firearms report]; 20 [fired cartridge casings] & 21 [firearm with fired casing]); State's Ex. 4, 17, 33-37 [phone records and phone reports including CSLI]). Brown also ignores his phone calls to Sellers, and Davis's phone calls to Sellers as they approached, arrived at, and were at victim's mobile home park, are circumstantial evidence that he, Brown, and Davis were coordinating the attack on victim with their co-defendant Sellers, and discussed the crime with Sellers after it was over. There were later calls to Sellers after they completed the crime and headed back to Marlboro County and after they were there. (R. 196-201; 204-19; 330-31; 242-72; 278-79; State's Ex. 4, 17, 32-37 [phone records and CSLI])

There was more than sufficient direct and/or substantial circumstantial evidence Brown was guilty of murder under South Carolina's law of parties to a criminal offense to overcome the motion to for a directed verdict. Harry, 420 S.C 290, 803 S.E.2d 272; Larmand, 415 S.C. 23, 780 S.E.2d 892; State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2012); State v. Ward, 374 S.C. 606, 615, 649 S.E.2d 145, 150 (Ct. App. 2007)(holding in a case with similar facts, that evidence the defendant and his co-defendant together chased after 2 men in the melee of a parking lot brawl and fired shots, killing a bystander, was sufficient to overcome a directed verdict motion); *see also* State v. Langley, 334 S.C. 643, 649, 515 S.E.2d 98, 101 (1999)(indicating evidence the defendant and co-defendant were seen together, circumstantial evidence placing defendant at the scene of the crime, and eye-witness testimony, was sufficient to warrant submitting the case to the jury on any theory of liability, including the hand of one is

the hand of all theory). The evidence, and all of its inferences viewed in the light most favorable to the State, especially the actions of Brown and his co-defendants, indicates there was an agreement they were going together to victim's residence at night to assault and kill him. And, victim died as a proximate result thereof. Accordingly, Judge Burch did not abuse his discretion in denying the motion for a directed verdict in this case. Larmand; Gibson; Ward; Langley.

CONCLUSION

For the above stated reasons, Brown's conviction and sentence should be affirmed.

Respectfully submitted,

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February 8, 2024.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge

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RESPONDENT,

v.

JAMES MONROE BROWN,

APPELLANT.

Appellate Case No. 2021-000469

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Amended Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 8th day of February, 2024.

s/ J. Anthony Mabry
J. ANTHONY MABRY
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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PROOF OF SERVICE

I, **Donna D'Alessio**, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Amended Final Brief of Respondent, and Certificate of Compliance, and Proof of Service has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, February 8, 2024 to RDudek@sccid.sc.gov, as well as to his assistant, spollard@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 8th day of February, 2024.

s/ J. Anthony Mabry

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