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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 5294
10-GS-10-8551

THE STATE,

RESPONDENT,

V.

DARRYL L. DRAYTON,

PETITIONER

APPENDIX

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INDEX

INDEX.....i

STATE V. DRAYTON, OP. NO. 5294 (S.C. Ct. App. FILED FEB. 4, 2015).....1

PETITION FOR REHEARING.....16

RETURN TO PETITION FOR REHEARING.....30

ORDER DENYING PETITION FOR REHEARING.....41

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Darryl L. Drayton, Appellant.

Appellate Case No. 2012-213295

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5294
Heard November 3, 2014 – Filed February 4, 2015

AFFIRMED

Appellate Defender Susan B. Hackett, of Columbia, for Appellant.

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Assistant Attorney General W. Edgar Salter, III, all of
Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

SHORT, J.: Darryl L. Drayton appeals his murder conviction, arguing the trial court erred in (1) refusing to charge the jury concerning how to consider circumstantial evidence; (2) admitting evidence when the search warrant lacked

probable cause; and (3) limiting Drayton's cross-examination of the pathologist concerning the victim's toxicology report. We affirm.

FACTS

Michael Bartley testified he was engaged to the victim, Alexis Lukaitis, and had given her an engagement ring. Bartley and the victim had twenty-two-month-old twin boys. Bartley testified the victim took unprescribed medication and received the pills from "D," whom he identified in the courtroom as Drayton. Bartley explained the victim had received pills from Drayton in the past in exchange for driving him places.

Bartley testified the victim was friends with a neighbor, Shannon Hooper, who lived in their apartment complex in Bluffton. According to Bartley, Drayton was "always" at Hooper's apartment. Hooper's former sister-in-law, Tina Johnson, was also at Hooper's apartment, and the victim would "get pills from them."

On Sunday, August 8, 2010, Bartley prepared the twins to go to his mother's house for dinner, which was a recurring family event for Bartley, the victim, and the twins. The victim experienced an allergic reaction to a fabric softener dryer sheet and did not accompany Bartley. According to Bartley, the victim called him at 6:00 p.m., indicating she was going to drive "Darryl" to Charleston to get pills. Bartley testified he last spoke to the victim at 8:19 p.m. that evening. At the time, the victim was on the road. Bartley testified the victim confirmed she was with "D"; she said "make a right here" as though speaking to someone in the vehicle; Bartley heard a person speak to her in a voice too muffled for him to distinguish; and she told Bartley she loved him and would be home soon. At approximately 10:00 p.m., Bartley called the victim's cell phone, and it appeared to answer and sounded muffled, "like I thought she was digging her phone out of the purse. And then it got quiet. And I was like hello, hello. And then it hung up, and that was it." Bartley attempted "all night" to reach the victim by phone and also called hospitals, jails, and police stations looking for her.

The following morning, Monday, August 9th, Bartley reported the victim missing to the police and Detective Todd Calhoun of the Beaufort County Sheriff's Office (BCSO) responded. Both Calhoun and Bartley attempted to reach Drayton by phone. Calhoun called Drayton's cell phone, and Drayton identified himself and agreed to meet Calhoun at Drayton's house, but he did not show. After numerous

attempted calls by Bartley, Drayton answered and denied going to Charleston with the victim.

Bartley drove with Hooper along Highway 17 looking for the victim's vehicle. After he returned home, Bartley saw an internet report that a body had been found in Charleston, and he called the Charleston police. He described the victim, including two small tattoos. He also shared the cell phone numbers of the victim, Hooper, and Drayton.

Johnson testified she met the victim through Hooper. On Monday, Bartley arrived at her house very early looking for the victim. Johnson told her eleven-year-old son about the visit and that the victim had allegedly driven Drayton to Charleston and was missing. The son knew Drayton from meeting him at Hooper's house.

Johnson further testified Drayton lived in a brick house next door to a Bluffton self-help facility, and she and the victim had been there to meet Drayton. Later on Monday, Johnson, her son, and other family members were at the self-help facility. Johnson's son told her he saw Drayton. Johnson notified the police. At trial, the son testified Drayton was in the parking lot at the self-help facility. According to the son, Drayton had scratches on his face, a bandage on his finger, and a hospital bracelet.

Jackie Seward, a professional logger in Hollywood, South Carolina, testified he was driving onto his family's property on Monday, August 9th, when he saw the victim's body on the side of the road. He notified the police. Deputy William Shepherd of the Charleston County Sheriff's Office (CCSO) and James Thomas Milz, a forensic investigator for the CCSO, responded. Milz testified the victim suffered a large laceration to the throat and her clothing and limbs were charred. It appeared she had been moved because a bloody handprint was on her ankle.

Milz photographed footprints and tire marks at the scene. Milz also took cast impressions of the tire marks. Vicki Hallman, a South Carolina Law Enforcement Division (SLED) employee in the latent prints crime scene unit, testified the tests on the tire impressions were not totally exclusive and the tracks could have been made by the victim's vehicle, a 2001 white Pontiac Grand Prix, or another vehicle with Michelin Symmetry tires. Paul McManigal, the supervisor of forensic services for the CCSO, testified he was at the scene with Milz. McManigal testified no usable fingerprints were obtained from the victim's body.

Stephen Edwards of Bluffton testified he was Drayton's cousin. On Monday morning, August 9, 2010, Drayton knocked on Edwards' door, waking him and asking for a ride to the hospital. Drayton's hand was wrapped in bloody tissue, and he told Edwards he had been in a fight with three men from Beaufort and suffered a cut on his finger. Edwards did not have gas in his car so Drayton left, returning approximately ninety minutes later with five dollars for gas. Edwards took Drayton to the emergency room at a hospital in Hilton Head. When they left the hospital, Edwards took Drayton to a jewelry store because Drayton claimed he wanted to pawn a class ring. At Drayton's request, they registered and checked into a motel in Hardeeville for that night.

On Tuesday, Edwards drove Drayton to a plastic surgeon for further treatment on his finger, and they spent a second night at the motel. According to Edwards, Drayton requested a ride to Florida, but Edwards refused, and on Wednesday morning, he dropped Drayton off at the library in Bluffton. Edwards spent the day receiving medical treatment for high sugar levels. When he arrived at his home on Wednesday evening, he discovered bloodied, foreign trash on his porch, including a spare tire, speakers, diapers and a diaper bag, a blanket, and a CVS bag filled with clothes. He called 911 from a neighbor's apartment and reported the bloody trash. Detective Calhoun responded, and retrieved the trash. Bartley identified numerous items found at Edwards' house as belonging to the victim, including the diaper bag and blanket. He also testified numerous items did not belong to the victim, including the CVS bag, clothing, and a speaker box.

Dr. Luca Delatore testified he treated Drayton on the morning of August 9th for a finger laceration, reportedly inflicted by a saw the previous evening. An x-ray revealed a fracture of the bone, which was exposed from the laceration. Delatore prescribed an antibiotic and pain medication. Maggie Mae Furchak testified she knew Drayton, and he came to the pharmacy where she worked on Monday to fill two prescriptions. Drayton told her he cut his finger at work that morning on a piece of glass.

Christopher Golis testified he worked at Golis Family Jewelers in Bluffton. He knew Drayton and testified he purchased an engagement ring from Drayton on August 9, 2010. Golis testified Drayton claimed he found the ring at a gas station. Golis described the ring as a unique, three-stone "past, present, future" ring. Golis noticed Drayton's bandage, and Drayton told Golis he cut his finger on a saw working for a fence company. Golis later received a telephone call from Detective

Calhoun. Golis identified Drayton from a photographic line-up and surrendered the ring. Bartley identified the ring as the victim's engagement ring.

Sargent Robert DiCarlo of the BCSO testified he responded to a call on August 10, 2010, regarding the Bluffton Police Department finding what was suspected to be the victim's vehicle parked on Wharf Street in Bluffton. Upon arrival at the scene, he noticed what appeared to be blood near the trunk. Bartley identified the vehicle as belonging to the victim.

Kimberly Dinh, then of SLED, testified she specialized in processing crime scenes and processed the vehicle. She located suspected blood on numerous surfaces of the vehicle, including in the interior, inside the driver's door, on the passenger seat, on the back of the car, on the license tag, below the tag, and on the passenger side door of the vehicle. She also located strands of hair. The trunk had been "mostly cleaned out", the spare tire was missing, and there was water in the trunk. Dinh collected twenty-one swabs of suspected blood or DNA, including two DNA swabs from the steering wheel and two swabs from the driver-door pull.

Drayton was arrested Wednesday, August 11th. Investigator John G. Adams of the BCSO photographed Drayton the day of his arrest, noting scratches around his neck, in the center of his chest, on his forearm, on the palm of his hand, and noting the injury to his finger. Adams admitted the photographs did not show scratches on the right side of Drayton's face.

Catherine Leisy, a SLED forensic scientist, testified she tested DNA from the victim, Bartley, and Drayton. With probabilities of one in 3 million and one in 1.9 trillion, Drayton's DNA was found on the victim's driver's side rear window; the driver's door; and the driver's doorframe. DNA from the steering wheel was a mixture of two individuals with the major contributor matching Drayton and the minor contributor not exclusive of the victim. Leisy also tested cuttings from the diaper bag and tire cover found in Edwards' trash and concluded they contained the victim's DNA and had a matching probability of one in 50 quadrillion. As to the DNA on the victim's shoes found at the crime scene, the DNA matched the right shoe with a matching probability of one in 340 million and the left shoe with a matching probability of one in 1.9 quadrillion. Finally, the CVS bag contained DNA from at least two individuals, with Drayton's DNA the major contributor and the minor contributor insufficient for reliable interpretation.

Subject to Drayton's objection to admissibility, the parties stipulated to Drayton's cell phone number, and the State called Kenneth Ray Aycock, Jr., of the Army National Guard's counter-drug task force as a witness. Aycock testified he primarily analyzed cellular phone analysis and tracking for the FBI. Aycock created maps to illustrate his findings regarding the use of Drayton and the victim's cell phones.

Aycock testified the review of the victim's cell phone use on August 8th showed use beginning in the Bluffton area. The cell phone was used between 8:19 and 9:49 p.m. in the Ravenel area. Calls after 9:49 p.m. were unanswered or went to voicemail and did not contain cell-site data. At 8:19 p.m., the victim's phone made an eighty-six second call, and at 9:49 p.m., the phone received an unanswered call that went to voicemail but contained cell-site data. Both calls were to or from Bartley's phone. There were also seven calls from Bartley's number that went to the victim's voicemail. After 9:49 p.m., there was no cell-site data.

As to Drayton's cell phone, Aycock testified calls on August 8th between 9:08 a.m. and 6:36 p.m. were made in the Bluffton area. At approximately 7:20 p.m., Drayton's phone began hitting towers along Highway 17 into Charleston. Between 7:20 and 7:52 p.m., his phone registered in Ravenel, showing travel between Charleston and the Ravenel-Hollywood area. At 9:13 p.m., the phone tower near the victim's body registered his phone. At 9:26 p.m., the tower closer to Charleston registered. Every call after 9:26 p.m. registered closer to Charleston until the last call at 11:38 p.m. On August 9th, the phone registered in Bluffton at 6:48 a.m. Text messages originated from Drayton's cell phone on August 10th at 5:11 p.m., stating: "[B]aby, do you have a credit or a debit card to get me a room over the phone. I have eighty bucks and I want to save that so I can get on the road in the morning" and "Come up there in the morning. I've got to get away from here." Aycock admitted cell phones occasionally pick up a routed call, appearing to be outside of the normal sphere of travel. He explained a cell phone will pick up the strongest signal and if the frequencies are being used up at that tower, it will go to another tower. He also explained that at the edge of the radius of a tower's reach, a cell phone begins searching for the next tower.

Dr. Susan Erin Presnell, a forensic pathologist, testified she performed an autopsy on the victim. She had several abrasions and bruises on her face, lacerations on her upper and lower left lip, cuts and/or scrapes on her chest, bruises on her arms and knees, and bruising and contusions on her lower legs. Presnell testified the victim also suffered puncture injuries resulting from a pointed object such as a knife,

screwdriver, or icepick. The victim suffered two punctures and a cut to her lower right chest, a cut through the web of the left thumb down to the bone, and small cuts on the right hand. The victim also suffered gaping cuts to her neck that severed the carotid artery, the neck muscles, the thyroid gland, the trachea, and the esophagus. Of the punctures to the victim's neck, Presnell opined the injury to the carotid artery caused the victim's death. Presnell also testified hemorrhages across the victim's eyes and face indicated strangulation. Thus, Presnell "felt pretty comfortable that cause of death . . . [was] carotid artery transection from the sharp-force injury. But there . . . was likely some amount of neck compression or . . . strangulation." Presnell also described thermal injury to the victim's skin from burning, but she opined it likely occurred after death.

During cross-examination, Drayton's counsel questioned Presnell regarding the toxicology report performed on the victim. The State objected when counsel asked Presnell about buprenorphine, a narcotic. Outside the presence of the jury, the parties argued about the admissibility of the toxicology report, which indicated the victim "had a blend of different drugs that included not just the kind of opiates that she was allegedly going to look for, but that she had somehow acquired a significant quantity of amphetamines that were in her system at the time and other depressants like . . . Prozac and marijuana" Counsel argued the existence of unexplained drugs in her system "undercuts the State's circumstantial evidence." The State argued it was irrelevant and proffered Presnell's testimony that she would not be comfortable testifying as to when the victim had ingested the drugs and a toxicologist would be more appropriate to testify regarding the matter. Citing Rule 403, SCRE, the trial court excluded the evidence.

The jury convicted Drayton of murder, and the trial court sentenced Drayton to life imprisonment without the possibility of parole. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial

court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

I. Jury Charge

Drayton argues the trial court erred in denying his request for the "reasonable hypothesis" circumstantial evidence jury charge. We disagree.

The trial court instructed the jury on circumstantial evidence as follows:

There are two types of evidence which are generally presented during trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a fact to be proven.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence[,] if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Drayton objected to the charge on circumstantial evidence, arguing the trend in the cases was to return to the "reasonable hypothesis" language used for directed verdict issues. He further argued it was "patently misleading" to instruct jurors that there was no difference between direct and circumstantial evidence. In requesting his jury charge, Drayton relied upon the "reasonable hypothesis" language discussed in *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004)

(holding that the language in *State v. Grippon*, 327 S.C. 79, 83-84, 489 S.E.2d 462, 462 (1997), "is the sole remaining charge to be utilized by the courts of this state in instructing juries in cases relying, in whole or in part, on circumstantial evidence"). Citing *Edwards*, Drayton requested the following jury charge:

Every circumstance relied upon by the state [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilty [sic] of the accused, the proof has failed.

(emphasis added). The court denied the request.

In reviewing jury charges for error, this court reviews the charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). A jury charge is correct if when read as a whole, it adequately explains the law. *Id.* A jury charge that is substantially correct and covers the law does not require reversal. *Id.*

Our supreme court found no error by the trial court in *Grippon*, 327 S.C. at 82, 489 S.E.2d at 463, when it refused to charge the phrase "to the exclusion of every other reasonable hypothesis," and in *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 447 (2013), our supreme court found the circuit court did not err in providing a circumstantial evidence charge consistent with *Grippon*. The *Logan* court also noted that "erroneous jury instructions are subject to harmless error analysis" and that due to other jury charges provided by the circuit court, the "instruction, as a whole, properly conveyed the applicable law." 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8.

The court in *Logan* held the following circumstantial evidence charge, and a proper reasonable doubt charge, should be given when requested by a defendant:

There are two types of evidence which are generally presented during a trial—direct evidence and

circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. *The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.*

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

405 S.C. at 99, 747 S.E.2d at 452 (emphasis added).

The court explained its holding did "not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. The court continued:

Our *Grippon* and *Cherry* decisions commendably sought to remove confusion from the jury's consideration regarding the weight and value afforded to circumstantial evidence. However, at times, a separate framework is necessary to the jury's analysis of circumstantial evidence. Thus, we modify *Grippon* and *Cherry* to allow the additional language provided above if requested by a defendant.

Id. at 100, 747 S.E.2d at 453.

Initially, we agree with Drayton's argument that he should benefit from the *Logan* rule because his case was pending on direct review and the issue was preserved. See *State v. Jenkins*, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014) (finding *Logan* applies to "cases pending on appeal at the time the *Logan* opinion was published"). However, this court in *Jenkins* nevertheless affirmed, applying the harmless error analysis and explaining, "Our supreme court has excluded the 'reasonable hypothesis' language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary." *Id.* at 572-73, 759 S.E.2d at 766 (finding "any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law). The court next reviewed the trial court's jury instruction on reasonable doubt, which immediately preceded the circumstantial evidence charge, and found it to be a correct statement of the law. *Id.* at 573, 759 S.E.2d at 766. The court concluded the instructions, "as a whole, properly conveyed the applicable law." *Id.* at 573-74, 759 S.E.2d at 766.

The trial court in this case charged the jury on reasonable doubt immediately before charging the law on circumstantial evidence, and we find the reasonable doubt instruction to be a correct statement of the law. As this court concluded in *Jenkins*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. Accordingly, we find no reversible error in the jury charge.

II. Admission of Cellular Data

Drayton argues the trial court erred in admitting the historical cell service location information obtained from his cellular service provider because the trial court construed the warrant as a court order and there was not probable cause to issue a warrant. We disagree.

There were five warrants issued to obtain cell records: Drayton's primary cell number, Drayton's alternate cell number, and the records regarding Bartley, the victim, and Hooper. Drayton argued all five warrants violated his right to privacy. The court (1) found the warrant was against Verizon; (2) found Drayton had standing to challenge the warrant; and (3) followed "the long line of federal cases that have stated there's no expectation of privacy as to records." The court found reasonable grounds for the warrant under the Federal Stored Communications Act and probable cause was not necessary to obtain the records.

The warrant sought:

Any and all information in reference to the Verizon cellular telephone number 843-[xxx-xxxx] to include but not limited to subscriber information, account comments, billing records, outbound and inbound calls to include blocked call information from August 06, 2010 to August 10, 2010. Subscriber information on other numbers listed in the report, call origination location, physical address of cell sites and coverage map, all stored communications, or files, including voice mail, email, digital images, text messages, buddy lists, and any other files associated with the cellular target number

The affidavit in support of the warrant read as follows:

That on July^[1] 09, 2010, Charleston County Sheriff's Office Deputies responded to Old Jacksonboro Rd near Hwy 174 in reference to a deceased person. Upon arrival deputies discovered the body of a female victim on the side of Jacksonboro Rd. On August 09, 2010, [the victim] was reported missing to the Beaufort County Sheriff's Office. The body of the deceased was later positively identified as being [the victim]. Mike Bartley[,], the fiancée of the victim[,], stated that he last spoke with the victim on August 08, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D." . . . Bartley provided the Verizon cellular telephone number 843-[xxx-xxxx] as a contact number for Darryl Drayton. It is believed that the call log and information contained therein will provide information that is pertinent to the death [i]nvestigation. All evidence being sought will be compared with evidence already obtained in the investigation.

"To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the

¹ This appears to be a typographical error in each of the search warrant affidavits.

place searched." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). "A legitimate expectation of privacy is both subjective and objective in nature; the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *Id.*

Under our analysis of the cases interpreting the United States Fourth Amendment, we find Drayton did not have a legitimate expectation of privacy in his historical cell site location records. First, the Stored Communication Act requires only a showing of "specific and articulable facts" is necessary for the issuance of a search warrant. *See* 18 U.S.C. § 2703(d) (Supp. 2014); *see generally* Elizabeth Elliott, *United States v. Jones: The (Hopefully Temporary) Derailment of Cell-Site Location Information Protection*, 15 Loy. J. Pub. Int. L. 1, 3 (2013) ("Currently under the Stored Communications Act . . . , criminal investigators can obtain cell-site location data with only a showing of 'specific and articulable facts'." (quoting § 2703(d))). Second, the federal courts have found no expectation of privacy in historical data records. *See United States v. Graham*, 846 F. Supp. 2d 384, 389-90 (D. Md. 2012) (stating "[a] majority of courts . . . have concluded that the acquisition of historical cell site location data pursuant to the Stored Communications Act's specific and articulable facts standard does not implicate the Fourth Amendment"). *But see Tracey v. State*, 2014 WL 5285929 at *9 (Fla. Sup. Ct. filed Oct. 16, 2014) (noting "as to 'historical' cell site location information, the federal courts are in some disagreement as to whether probable cause or simply specific and articulable facts are required for authorization to access such information").

Drayton next argues even if he did not have an expectation to privacy in historical cell site location information under the Federal Constitution, he did under the South Carolina Constitution, which our supreme court in *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), interpreted as "offering a higher level of privacy protection than the [Federal] Fourth Amendment."

In South Carolina, the right to privacy is specifically imbedded in our State Constitution, and our supreme court has recognized that "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 622 n. 13 (1997). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *Forrester*, 343 S.C. at 647, 541 S.E.2d at 842; *id.* at 643, 541 S.E.2d at 840 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with

the emergence of new electronic technologies that increased the government's ability to conduct searches.").

We recognize recent United States Supreme Court and South Carolina Supreme Court cases are more stringently viewing electronic *surveillance* vis-à-vis the right to privacy. *See United States v. Jones*, 132 S.Ct. 945, 949 (2012) (finding a global positioning system tracking device installed on and monitoring a vehicle for twenty-eight days without a valid warrant violated the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding a thermal imaging device used to scan a home for levels of heat, utilized without a warrant, was an unlawful search); *State v. Adams*, 409 S.C. 641, 646, 763 S.E.2d 341, 344 (2014) (recognizing the court of appeals found a constitutional violation when a GPS device was installed and monitored without a court order, a finding the State did not appeal). However, the evidence sought in this case was not obtained via electronic surveillance; rather, it was sought as business records of Verizon. The South Carolina appellate courts have not addressed historical cell site location data under the South Carolina Constitution. Accordingly, we rely on the federal precedent and find Drayton did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the ordinary course of business. *See Graham*, 846 F.Supp.2d at 389 (explaining courts that have found no expectation of privacy in historical cell site location data "have concluded that because people voluntarily convey their cell site location data to their cellular providers, they relinquish any expectation of privacy over those records").

Because we find Drayton did not have a reasonable expectation of privacy in the historical cell site location data, we need not reach his argument that there was no probable cause to issue the warrant. *See State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988) (finding because the appellant could not "make the threshold demonstration of a legitimate expectation of privacy in connection with the searched premises," he was not entitled to challenge whether the magistrate had probable cause to issue the warrant). We also find no merit to Drayton's argument that the trial court erred in designating the search warrant as a court order rather than a warrant. *See State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal."); *see also* Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

III. Limitation of Cross-Examination

Drayton lastly argues the trial court erred in limiting his cross-examination of the pathologist concerning the toxicology report relating to the victim. We disagree.

The trial court found the evidence was not relevant under Rule 403, SCRE, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The decision to admit or exclude evidence "is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011).

We find no error in the exclusion of the evidence. Furthermore, any error in its exclusion was not reversible because the evidence was cumulative to numerous other references in the record regarding the victim's illegal drug use. *See State v. Patterson*, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (finding any error in the exclusion of evidence that was cumulative to other evidence entered was harmless beyond a reasonable doubt).

CONCLUSION

For the foregoing reasons, Drayton's conviction and sentence is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

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Opinion No. 2015-UP-5294

PETITION FOR REHEARING

On February 4, 2015, this Court affirmed Appellant's conviction and sentence in a published opinion. State v. Drayton, Op. No. 5294 (S.C. Ct. App. filed Feb. 4, 2015). Pursuant to Rule 221(a), Appellant respectfully requests this Court rehear the matter based upon the following points overlooked and/or misapprehended in the opinion.

Concerning the first issue regarding the circumstantial evidence jury instruction, Appellant asks this Court to hold the error in failing to give clarifying instructions regarding how the jury should consider circumstantial evidence was not harmless error. This Court based its harmless error analysis on (1) the trial judge having instructed the jury on reasonable doubt immediately before

charging the law on circumstantial evidence and (2) the reasonable doubt instruction being a correct statement of the law. Thus, this Court held “the instructions, as a whole, properly conveyed the applicable law.”

In arriving at this conclusion, this Court failed to consider that the entire case against Appellant was circumstantial. The state presented no direct evidence that Appellant committed the charged offense of murder; the only evidence connecting Appellant to the crime was circumstantial. Thus, this jury’s understanding of how to analyze circumstantial evidence to arrive at a just verdict was critical.

Further, the reasonable doubt instruction charged to the jury included both “a reasonable doubt is the kind of doubt that would cause a person or a reasonable person to hesitate to act” and that “[p]roof beyond a reasonable doubt is doubt (sic) that leaves you firmly convinced of the defendant’s guilt.” The judge further instructed:

There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you’re firmly convinced the defendant is guilty of the crime charged, you must find the defendant guilty. On the other hand, if you think there’s a real possibility the defendant is not guilty, you must give the defendant the benefit of the doubt and find the defendant not guilty.

R. 515, line 14 – R. 516, line 9. In light of the multiple definitions of reasonable doubt given and the use of the “real possibility” language, the circumstantial evidence charge following the reasonable doubt instruction was confusing to the jury without the clarifying instruction mandated in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Although the trial judge defined circumstantial evidence for the jury, the trial judge failed to inform the jury of how to use the circumstantial evidence presented to arrive at a verdict. The Logan instruction explains to jurors that when the state relies on circumstantial evidence, all of the circumstances must be consistent with each other and point conclusively to the guilty of the accused beyond a reasonable doubt. This

language was critical to the jury's understanding of how to evaluate circumstantial evidence in order to determine whether the evidence caused a juror to "hesitate to act," left a juror "firmly convinced" of Appellant's guilt, or left a juror with "a real possibility" that Appellant was not guilty.

Appellant also asks this Court to rehear the second issue regarding the admissibility of historical cell site location information. This Court held Appellant did not have a "legitimate expectation of privacy" in his historical cell site location information; therefore, no violation of Appellant's Fourth Amendment rights occurred. Additionally, this Court held there was no violation of the South Carolina Constitution, relying upon federal precedent to find Appellant "did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the ordinary course of business." Appellant asks this Court to rehear this matter concerning both aspects of his claim – the Fourth Amendment and the South Carolina Constitution. Additionally, Appellant asks this Court to address his argument that there was no probable cause to issue the warrant.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170,

177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

[I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding that evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).¹

This is an open question federally since Circuits disagree regarding whether an individual has a reasonable expectation of privacy under the Fourth Amendment in his historical cell site location information. However, the United States Supreme Court's recent decision in Riley v. California, 134 S.Ct. 2473 (2014) supports Appellant's contention, which is shared by a growing number of federal courts, that individuals have an expectation of privacy in these records. The Supreme Court held that that a search warrant is required to search a cell phone, even when the phone is seized incident to arrest. Id. at 2493. The Court rested its opinion upon the "quantitative and qualitative" difference between cell phones and other items of personal property. Id. at 2489.

¹ The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

“One of the most notable and distinguishing features of modern cell phones is their immense storage capacity.” Id. “Cell phones couple that capacity with the ability to store many different types of information.” Id. One of the Court’s many concerns with cell phones was the ability of the cell phone to allow the reconstruction of the sum of an individual’s private life, including the person’s whereabouts on particular dates. Id. The Court explained “[h]istoric location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.” Id. at 2490 (citing United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012)(Sotomayor, J., concurring)).

Certainly, if the police must obtain a search warrant to search a cell phone – even when conducting a search incident to arrest – due to the expectation of privacy an individual has in his phone, then a fortiori, the police may not circumvent this warrant requirement by going to the cellular service provider seeking the same information. In other words, if an individual has an expectation of privacy in the information contained on the phone itself, then an individual has an expectation of privacy in the information stored by the cellular service provider. The phone is useless without the cellular service provider.

This Court attempts to distinguish the acquisition of historical cell site location information from cellular providers, as in this case, from the line of United States Supreme Cases finding violations of the Fourth Amendment based on acquisition of location information using electronic surveillance. According to this Court, the fact that the records sought were business records of Verizon, the law governing electronic surveillance was inapplicable. However, Justice Alito has explained that technology can change what is considered a reasonable expectation of privacy: “[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes.” United States v. Jones, 132 S.Ct.

945, 962 (2012)(Alito, J. concurring). Continuing, Justice Alito recognized that cell phones and other wireless devices permit wireless carriers to track and record the location of users, shaping the average person's expectations about privacy. Id. at 963.

This Court's reliance upon the Stored Communication Act (SCA) for the proposition that an individual does not have an expectation of privacy in historical cell site location information stored by the cellular provider is misplaced. Fearful that the "third party doctrine" used by courts when interpreting the Fourth Amendment would not protect stored internet communications, Congress enacted the SCA. Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending it, 72 GEO. WASH. L. REV. 1208, 1209-1210 (Aug. 2004). Thus, the entire purpose of the SCA is to recognize the privacy interests of information, including historical cell site location information, stored by third parties.

Appellant requests this Court rehear his Fourth Amendment argument relative to the historical cell site location information in light of the recent United States Supreme Court opinion in Riley, supra, and the growing trend among courts to find an expectation of privacy in this data.

Next, Appellant seeks rehearing of this Court's determination that the South Carolina Constitution does not protect the historical cell site location information at issue here. Specifically, this Court analyzed the issue under a "reasonable expectation of privacy" test and the "third party doctrine." The reasonable expectation of privacy test and the third party doctrine are creatures of the Fourth Amendment, not South Carolina's Constitution. To the extent the reasonable expectation of privacy plays a role in understanding South Carolina's Constitution, it serves only to establish the floor of the protection, not the ceiling.

South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable

invasions of privacy shall not be violated.” S.C. Const. Art. I, Section 10. “The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.” State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). “[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling.” Id. at 647, 541 S.E.2d at 842. Our Supreme Court explained, “the drafters of our state constitution’s right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government’s ability to conduct searches.” Id. at 647, 541 S.E.2d at 842.² According to the South Carolina Supreme Court, “[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person’s expectation of privacy” in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007).

Without question, South Carolinians consider historical cell site location information maintained by cellular service providers to be private information and obtaining of such information without a warrant is an invasion of that privacy. To understand just how much of an invasion occurs, it is necessary to understand how cell phones work and how the information can be used to track individuals. Of obvious note is the fact that consumers contract with cell phone providers for the provision of certain services. These contracts include provisions for privacy protection of information. “When a cell phone is turned on, it identifies its location to nearby cell towers, every seven seconds, on a continuous basis.” Eric Lode, Validity of Use of Cellular

² In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that “the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives.” State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013)(Hearn, J. dissenting).

Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under State Law, 94 A.L.R.6th 579 (2014). This sort of tracking “may identify a cell phone’s location to within about 200 feet.” Id. Using information received by multiple cell towers, the location can be determined even more precisely. Id. If a phone has GPS capabilities, and more than 90% do, a phone may be tracked to within fifty feet. Id.

Recognizing how cell phones work and the increasing view that cell phones are necessary to social interactions and business, the Massachusetts Supreme Court held that “[c]learly, tracking a person’s movements implicates privacy concerns.” Commonwealth v. Augustine, 4 N.E.3d 846, 859-860 (2014). The Massachusetts court held the third-party doctrine was not applicable to historical cell site location information under the state constitution’s protection against unreasonable searches and seizures. The court distinguished the historical cell site location information from the record of telephone numbers dialed as maintained by the telephone company. As explained by the court, the user knowingly provided the telephone numbers dialed to the telephone company. “No cellular telephone user, however, voluntarily conveys [cell site location information] to his or her cellular service provider” because such information “is purely a function and product of cellular telephone technology. Id. at 862. The court noted the police were “not seeking to obtain information provided to the cellular service provider by the defendant” but were looking “only for the location-identifying by-product of the cellular telephone technology – a serendipitous (but welcome) gift to law enforcement investigations.” Id. at 863.

The ability of law enforcement to obtain historical cell site location information falls squarely within our state constitution’s prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct

searches of its citizens. Therefore, Appellant had an expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

Finally, Appellant respectfully requests this Court reach his argument regarding the lack of probable cause contained within the warrant. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." S.C. Code Ann. § 17-13-140 (1985); State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

As explained, supra, a search warrant issues only upon probable cause. South Carolina's

search warrant statute permits a search warrant to search for and seize “property constituting evidence of crime or tending to show that a particular person committed a criminal offense.” S.C. Code Ann. § 17-13-140. Appellant assumes the prosecution proceeded under the theory that Appellant’s historical cell-site location information was evidence tending to show that Appellant committed a criminal offense. However, the affidavit supporting the search warrant was devoid of any facts to support the theory.

An affidavit that is submitted in support of the issuance of a search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Baccus, 367 S.C. at 52, 625 S.E.2d at 222; Dupree, 354 S.C. at 684, 583 S.E.2d at 441; State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995).

In State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), the South Carolina Supreme Court held a search warrant affidavit was defective where the affidavit set forth no facts as to why the police believed the defendant robbed the motel. The affidavit provided a conclusory statement that the defendant had robbed the motel and the police sought to search his room at another motel for a knife used in the robbery. Id. at 372, 392 S.E.2d at 183. The Court found “[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.” Id. at 373, 392 S.E.2d at 183.

In Baccus, the Court found the affidavit in support of the search warrant failed to set forth any facts as to why police believed the defendant had committed the crime. The search warrant sought clothing and forensic evidence possibly connected to the homicide of the victim. The basis for the search warrant was that at the time of the defendant’s arrest, a pile of what appeared to be clothing was lying on the ground beside the residence smoldering and the defendant’s bloodstained

vehicle was located a quarter mile from his residence. Baccus, 367 S.C. at 51-52, 625 S.E.2d at 221-222. The Court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. The Court explained that “[t]he language in the affidavit lack[ed] specificity and contain[ed] conclusory statements.” Id. at 52, 625 S.E.2d at 222. Thus, the Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant’s residence. Id.

Similarly, the South Carolina Supreme Court found a search warrant defective where the affidavit “failed to set forth any facts as to why police believed [the defendant] committed the Crumlin crime.” State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). The affidavit provided that Crumlin was the victim of an armed robbery at a certain date, time, and location. It further provided that the defendant was a suspect and the registered owner of the vehicle to be searched. A witness stated that the defendant was driving the vehicle at the time of the incident. Id. at 289, 494 S.E.2d at 802. The Court found the first three sentences to be “mere conclusory statements.” Although the fourth sentence linked the defendant to his car at the time of the incident, it failed to link the defendant or his car to the crime itself. Id. at 291-292, 494 S.E.2d at 803.

Furthermore, it is necessary to examine the reliability and credibility of an informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and “[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” Id.

As previously noted by our Supreme Court,

[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, 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 a particular place.

Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting Illinois v. Gates, 462 U.S. 213, (1983)).

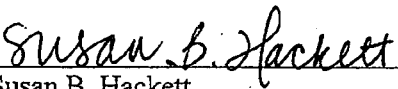
The affidavit used to obtain the search warrant for Appellant’s historical cell site location information failed to set forth any facts to establish probable cause that Appellant’s historical cell site location information constituted evidence of the deceased’s death or tended to show that Appellant was responsible for the deceased’s death. Inexplicably, the affidavit stated that a body was found on July 9, 2010, which was identified as that of the deceased.³ Then, a month later, the deceased was reported missing. The only non-conclusory statement in the affidavit was that Bartley stated that he last spoke with the deceased on August 8, 2010 and “she informed him that she was traveling to Charleston SC with [Appellant].” R. 545. In a conclusory statement, the affiant stated “[i]t is believed that the call log and information contained therein will provide information that is pertinent to the death investigation.” The affiant provided absolutely no basis for this statement. There was no indication that the deceased and Appellant had communicated using Appellant’s cell phone prior to the deceased’s death, that the phone had been used in the commission of a crime, or that the phone contained evidence of a crime. The affidavit provided no reason to believe Appellant’s historical cell site location information was related at all to the deceased’s death or disappearance.

³ At first blush, it appears this was merely a typographical error; however, it was repeated in each of the search warrant affidavits signed by the magistrate on August 10, 2010. The prosecution presented no evidence to indicate this error was corrected by the affiant to the magistrate. See R. 560; 562; 564; 566.

The affidavit failed to establish that the hearsay information provided by Bartley was reliable. Although the affidavit identified Bartley, and therefore, he was not a confidential informant, Bartley was an informant nonetheless. It was necessary to establish his reliability relative to the information he was providing and on which law enforcement was relying. The affidavit provided no reason to believe Bartley – no indication that law enforcement checked Bartley’s phone records to corroborate his story that he had spoken to the deceased at a certain time or attempted to corroborated his story with other witnesses or records.

Appellant requests rehearing of this matter based upon the points misapprehended and/or overlooked concerning the circumstantial evidence jury instruction and Appellant’s privacy rights to his historical cell site location information.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 19th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRYL L. DRAYTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Darryl L. Drayton #238403, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of February, 2015.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 19th day
of February, 2015.

[Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE, Respondent,

v.

DARRYL L. DRAYTON, Petitioner.

Appellate Case No. 2012-213295

Opinion No: 5294

RETURN TO PETITION FOR REHEARING

This Court issued a published opinion in this on February 4, 2015, affirming Petitioner's Charleston County murder conviction and sentence of life without the possibility of parole (LWOP), for murdering of Alexis Lukaitis. *State v. Darryl L. Drayton (Drayton)*, Opinion No. 5294, 2015 WL 446693 (S.C. Ct.App. filed Feb. 4, 2015). On February 19, 2015, Petitioner filed a petition for rehearing. This Court directed Respondent file a return to the petition in an Order filed 23, 2015. Pursuant to Rules 221 and 240, SCACR, and at the direction of the Court, Respondent now makes its return and submits that the petition for rehearing should be denied for the following reasons:

I.

In its Opinion, the Court rejected the three issues that Drayton had raised on appeal:

1. The trial court's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable

doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence?

II. In violation of Appellant's state constitutional right to privacy and statutory right to protection against defective search warrants, the trial judge erred in admitting the historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where Appellant had standing to challenge the search warrant and the trial judge required only a showing of a reasonable grounds to obtain the records.

III. In violation of Appellant's right to present a complete defense and to due process of law, the trial judge erred in limiting Appellant's cross-examination of the pathologist concerning the toxicology report relating to the deceased, which demonstrated the deceased had high levels of drugs in her system at the time of her death.

Respondent submits that this Court's Opinion correctly rejected each of the issues presented. Also, Respondent incorporates by reference the arguments from the Final Brief of Respondent.

II.

Drayton first asks this Court to hold that the trial judge's failure to grant Drayton's request to charge the outdated "reasonable hypothesis" language from *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989), in the circumstantial evidence charge, was not harmless error. He further argues that "[t]he state presented no direct evidence that Appellant committed the charged offense of murder; the only evidence connecting Appellant to the crime was circumstantial. Thus, this jury's understanding of how to analyze circumstantial evidence to arrive at a just verdict was critical." Respondent submits that this Court correctly rejected Drayton's argument that there was reversible error. *Drayton*, 2015 WL 446693 at *5-*7.

First, this Court correctly applied *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) to the facts of this case and found that there was no error. did not want an instruction such as that set forth in *Logan*. Rather, he wanted the trial judge to instruct jurors on the "reasonable

hypothesis” language of *Edwards*. Therefore, the requested charge was properly rejected because it did not and still does not accurately state the applicable law. As a result, this Court’s decision was correct.

This Court’s alternative decision that any error was harmless in light of the reasonable doubt instruction, *Drayton*, 2015 WL 446693 at *7, was a straight-forward and correct application of *Logan*, 405 S.C. at 94, 747 S.E.2d at 449, and this Court’s decision in *State v. Jenkins*, 408 S.C. 560, 573-74, 759 S.E.2d 759, 766 (Ct.App. 2014), *cert. denied*, Feb 4, 2015. (Thus, this Court’s Opinion in this case was filed on the same day that the South Carolina Supreme Court denied certiorari in *Jenkins*). Nor is there merit to Drayton’s claim that the more significant the amount of circumstantial evidence, the greater the need for a *Logan* charge. The suggestion that there is a greater need for a Logan charge here because of the amount of circumstantial evidence presented is inconsistent with *Logan*. See *Logan*, 405 S.C. at 99, 747 S.E.2d at 452 (proposed charge stating that “The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence”). It is likewise inconsistent with *State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004) (“[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not”).

Likewise, his suggestion that there could not be harmless error because there was more than one definition of the term “reasonable doubt,” ignores that the definition given was constitutional and is taken almost *verbatim* from that endorsed by the Federal Judicial Center, see Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (Instruction 21), and it has been approved by the South Carolina Supreme Court’s decision in *State v. Darby*, 324 S.C.

114, 115-16, 477 S.E.2d 710, 710-11 (1996), and in Justice Ginsberg's concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 26-27(1994) (Ginsburg, J., concurring in part and in judgment) ("This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly").

III.

Drayton further contends that this Court also erred in rejecting his claim that historical cell site location information was improperly admitted. Again, Respondent disagrees and submits that this Court's rejection of this allegation, *Drayton*, 2015 WL 446693 at *8-*10, is firmly supported both factually and legally. In particular, Respondent submits that Drayton did not have a *reasonable* expectation of privacy in the non-disclosure of those records under either the Fourth Amendment or the South Carolina Constitution. The records were not Drayton's private papers. Rather, cell site location records are business records that were generated by a "third party" - Drayton's cellular service provider - for the company's own purposes and without governmental requirement that the records be made. More importantly, he cannot assert either ownership or possession of those records, and he could not produce them in response to a subpoena.

As noted by the judge, the Order in this case also did not involve the disclosure of any "communications," *i.e.*, the substance of the actual calls. So, *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967), and similar cases are distinguishable. Nor is the present case like the situation before the United States Supreme Court in *Riley v. California*, 134 S.Ct. 2473 (2014), where police conducted warrantless searches of the contents of the defendants' cell phones following arrest, as a search incident to arrest. *Riley* is distinguishable because the defendants in *Riley* indisputably had a reasonable expectation of privacy in the contents of their personal cell

phones, and the issue in *Riley* was whether the search incident to arrest exception overcame that privacy interest for the contents of an arrestee's cell phone.

Relying upon the United States Supreme Court's decisions in *Smith* and *United States v. Miller*, 425 U.S. 435, 443 (1976), the overwhelming majority of federal courts to consider the issue now before this Court have held that acquisition of historical cell-site records without a warrant does not violate the Fourth Amendment because there is no legitimate expectation of privacy in those records. *See, e.g., In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) ("Cell site data are business records and should be analyzed under that line of Supreme Court precedent. Because the magistrate judge and district court treated the data as tracking information, they applied the wrong legal standard. Using the proper framework, the SCA's authorization of § 2703(d) orders for historical cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not *per se* unconstitutional"); *United States v. Skinner*, 690 F.3d 772, 777-78 (6th Cir. 2012); *Graham*, 846 F.Supp.2d at 389-90, 397-99; *In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F.Supp.2d 76, 81 (D.Mass. 2007) (no Fourth Amendment interest in prospective cell-site data). *See also United States v. Dye*, 2011 WL 1595255, *9 (N.D. Ohio April 27, 2011) (denying motion to suppress historical cell-site data); *United States v. Velasquez*, 2010 WL 4286276, *5 (N.D. Cal. Oct. 22, 2010) (same); *United States v. Benford*, 2010 WL 1266507, *3 (N.D. Ind. Mar. 26, 2010); *United States v. Suarez-Blanca*, 2008 WL 4200156, *8-*11 (N.D. Ga. Mar. 26, 2008) (same); *Mitchell v. State*, 25 So.3d 632, 635 (Fla. Dist. Ct. App. 2009) (same). *But see In re Application of United States*, 809 F. Supp. 2d 113, 2011 WL 3678934 *9-*11 (E.D.N.Y. Aug. 22, 2011) (holding a warrant is required to compel disclosure of historical cell-site records).

Respondent submits that Drayton has abandoned any reliance upon *United States v. Jones*, 132 S.Ct. 945 (2012), by not arguing *Jones* in his brief. See Rule 208(b)(1)(D), SCACR (each “particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority”); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal); 4 *C.J.S. Appeal & Error* § 619 (2005) (“A point raised for the first time in the reply brief will not be considered by the appellate court”). However, *Jones* and cases like *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003), are readily distinguishable from this case because this case did not involve the commission of a trespass by police, or a month-long constant governmental surveillance, without judicial oversight.

Moreover, as opposed to GPS or other forms of electronic monitoring, the information revealed by historical cell site location data “exposes to the government only where a suspect *was* and not where he *is*.” *Graham*, 846 F.Supp.2d at 392. “The data gleaned from toll records or pen registers ... encompassed ‘location’ data with far more precision than the historical cell site location records at issue in the present case, and typically that location would be one in which the user had a Fourth Amendment privacy interest, such as a home or office.” *Id.* at 399.

“At best, the records in this case identify the closest cellular tower, whereas the pen register records at issue in *Smith* indicated the physical address of the defendant’s telephone. The concept of a legitimate expectation of privacy in one’s location or movement simply was not contemplated in those early telephone cases.” *Graham*, 846 F.Supp.2d at 399. Also, Drayton has not argued that these records revealed his movement in protected areas, such as his home, and he did not have any “subjective expectation of privacy that society is prepared to recognize as reasonable,” see *Katz*, 389 U.S. at 361 (Harlan, J., concurring), either while traveling along the

streets and highways or in committing his crime and the cover-up in an open area visible to the public.

Another reason this Court properly rejected his claim is that Drayton voluntarily used his phone, *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613-14 & n. 13, and - unlike the GPS cases - Drayton could have defeated the cell-site location data by merely turning off his phone while engaging in criminal activity. At least one court has recognized that "cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy and such expectation would not be reasonable in any event." *In re Smartphone Geolocation Data Application*, 2013 WL 5583711, *16 (E.D.N.Y., May 1, 2013).

Further, whatever qualms some members of the United States Supreme Court may have about whether they may need to rethink certain older Fourth Amendment jurisprudence based upon technological advances, none of those concerns are present here. The same is true of the concerns voiced by Justice Hearn, in her dissent in *State v. Dykes*, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013) (Hearn, J. dissenting). To the contrary, the 5 day span of records (not recordings of conversations, as in *Katz*, or electronic monitoring of the defendant's movements for a protracted period of time without any judicial oversight, as in the GPS cases) would satisfy Justice Alito's concurrence in *United States v. Jones*, 132 S.Ct. 945, 957-64 (2012) (Alito, J., concurring), as would judicial review of the police action.

IV.

Additionally, even though article I, § 10 of the South Carolina Constitution extends greater protections than the Fourth Amendment because it specifically protects the people's right to privacy, *State v. Forrester*, 343 S.C. 637, 643-45, 541 S.E.2d 837, 840-41 (2001), that provision does not require a different result. Art. I, § 10 was not infringed because - for the

reasons set forth above in this Court's decision and this Court's opinion – Drayton did not have any legitimate expectation of privacy in Verizon's cell site location records to be protected by this state constitutional protection of his right to privacy. In other words, to the extent Drayton may have had a subjective expectation of privacy while voluntarily using his cell phone in public places, in and around the time that he murdered the victim, "this expectation is not 'one that society is prepared to recognize as 'reasonable.' " *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (citing *Katz*, 389 U.S., at 361), *superseded by statute*. See also *Florida v. Riley*, 488 U.S. 445, 696 (1989) (officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required, because " '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' "). There is simply no valid reason for extending the protections of the state constitutional right to privacy to protect the cell site location data, where the other state and federal cases rejecting Fourth Amendment challenges have all focused upon the right to privacy provided by the Fourth Amendment and the absence of a legitimate expectation of privacy, there are records of a third party that he could not produce in response to a subpoena and there is simply no right to privacy that society recognizes as reasonable.

Drayton did not argue in his brief that "[t]o understand just how much of an invasion occurs [by disclosing cell site location records], it is necessary to understand how cell phones work and how the information can be used to track individuals. Of obvious note is the fact that consumers contract with cell phone providers for the provision of certain services." He also has not heretofore relied upon the Massachusetts Supreme Court's decision in *Commonwealth v. Augustine*, 4 N.E.3d 846, 859-860 (2014). As a result these arguments are not properly before

this Court because they cannot be raised for the first time on rehearing. 4 *C.J.S. Appeal & Error* § 619 (2005) (“A point raised for the first time in the reply brief will not be considered by the appellate court”). Moreover, and contrary to *Augustine*, as well as the other procedurally barred points:

A cell service subscriber, like a telephone user, understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call. See *United States v. Madison*, No. 11-60285-CR, 2012 WL 3095357, at *8 (S.D.Fla. July 30, 2012) (unpublished) (“[C]ell-phone users have knowledge that when they place or receive calls, they, through their cell phones, are transmitting signals to the nearest cell tower, and, thus, to their communications service providers.”). Cell phone users recognize that, if their phone cannot pick up a signal (or “has no bars”), they are out of the range of their service provider's network of towers. And they realize that, if many customers in an area attempt to make calls at the same time, they may overload the network's local towers, and the calls may not go through. Even if this cell phone-to-tower signal transmission was not “common knowledge,” *California v. Greenwood*, 486 U.S. 35, 40, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Government also has presented evidence that cell service providers' and subscribers' contractual terms of service and providers' privacy policies expressly state that a provider uses a subscriber's location information to route his cell phone calls. In addition, these documents inform subscribers that the providers not only use the information, but collect it. See also *Madison*, 2012 WL 3095357, at *8 (“Moreover, the cell-phone-using public knows that communications companies make and maintain permanent records regarding cell-phone usage, as many different types of billing plans are available.... Some plans also impose additional charges when a cell phone is used outside its ‘home area’ (known commonly as ‘roaming’ charges). In order to bill in these different ways, communications companies must maintain the requisite data, including cell-tower information.”). Finally, they make clear that providers will turn over these records to government officials if served with a court order. Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in *Smith* understood that the phone company recorded the numbers they dialed.

In re U.S. for Historical Cell Site Data, 724 F.3d at 613. See also *Smith*, at 742-43; see also *Graham*, 846 F.Supp.2d at 401. Further, Drayton voluntarily used his phone, *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613-14 & n. 13; *Skinner*, 690 F.3d at 777 (“There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy

in the data given off by his voluntarily procured pay-as-you-go cell phone”), and he voluntarily provided his cell site location information to Verizon. This is clear both from the reasoning of *Smith and Miller*, and from the provisions of his contractual agreement with Verizon. *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613;¹ *see also Graham*, 846 F.Supp.2d at 399.

Therefore, neither the Fourth Amendment, nor art. I, § 10 of the S.C. Constitution, required a warrant and an order under the Stored Communications Act was sufficient.

V.

Equally unpersuasive is Drayton’s argument that probable cause was needed to obtain the records of a third party. Assuming without conceding standing, his argument lacks merit. Here, the record, including the redacted affidavit in support of the warrant (*see Court's Exhibit 2, R. p. 558; R. pp. 45-47*),² supports the trial judge’s finding that the State complied with the requirements of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. Specifically, § 2703(c)(1) & (d). ‘The ‘specific and articulable facts’ standard of this Act is a lesser showing than the probable cause standard that is required by the Fourth Amendment to obtain a warrant.’” *In re U.S. for Historical Cell Site Data*, 724 F.3d at 606; *see also Graham*, 846 F.Supp.2d at 396. Respondent submits that this standard was satisfied. Further, a magistrate is a court of competent jurisdiction, and there is no merit to Drayton’s contention that police “obtained a search warrant, not a court order, and must be held accountable to the chosen method for pursuing the historical

¹ Verizon’s privacy policy states that “[w]e collect information about your use of our products, services and sites. Information such as call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information, service options you choose, mobile and device numbers, video streaming and video packages and usage, movie rental and purchase data, FiOS TV viewership, and other similar information may be used” *See* <http://www.verizon.com/about/privacy/policy/>.

² The redacted language in the warrant states that Mr. Bartley, the fiancé of the victim, last spoke to the victim on August 8, 2010. She informed him that she was traveling to Charleston, South Carolina, with Drayton, also known as “D”. Bartley also provided the Verizon cellular telephone number of Drayton. Further, the affidavit stated that “it is believed that the call or and information contained in here will provide information as pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in this investigation.”

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2012-213295

THE STATE

RESPONDENT,

V.

DARRYL L. DRAYTON,


PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan Hackett, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

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

This 4th day of March, 2015.



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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Respondent,

v.

Darryl L. Drayton, Appellant.

Appellate Case No. 2012-213295

ORDER

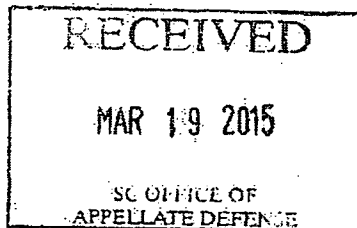
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff J.
Paul E. Short, Jr. J.
[Signature] J.

Columbia, South Carolina

cc:

- Alan McCrory Wilson, Esquire
- Susan Barber Hackett, Esquire
- Donald J. Zelenka, Esquire
- W. Edgar Salter, III, Esquire
- John W. McIntosh, Esquire
- Scarlett Anne Wilson, Esquire
- The Honorable J. C. Nicholson, Jr.



FILED

March 19, 2015