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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2015-000814

THE STATE,

Respondent,

vs.

DARRYL L. DRAYTON,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that Petitioner had no reasonable expectation of privacy in his historical cell service location information obtained from Petitioner's cellular service provider by a search warrant lacking probable cause in violation of Petitioner's right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution?

II. Did the Court of Appeals err in requiring Petitioner to show a reasonable expectation of privacy in his historical cell service information obtained from his cellular provider by a search warrant lacking probable cause in order to invoke the privacy protections afforded by the South Carolina Constitution?

III. Did the Court of Appeals err in finding the trial court's error in refusing to charge the jury with an explanation concerning how to use circumstantial evidence harmless?

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals properly held that the trial judge did not abuse his discretion by denying Drayton's motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone where neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the provider generates and keeps as a business record and which was based upon information that Drayton voluntarily provided to the provider. Alternatively, suppression is not required because the officers acted in good faith reliance upon the warrant that was issued, and any error is harmless beyond a reasonable doubt?

II. Whether Drayton's contention that he did not have a to establish a reasonable expectation of privacy under the South Carolina Constitution is preserved for this Court's review because it was not presented to the trial judge and is contrary to his position at trial?

III. Whether the Court of Appeals properly applied *State v. Logan* in finding that the trial judge did not err by refusing Drayton's request to charge the outdated *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge where this Court has found that the requested language is confusing and has directed that it should not be used, and the trial judge properly charged the then-current and correct circumstantial evidence charge from *State vs. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which this Court had found is the sole appropriate charge in *State vs. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004)?

STATEMENT OF THE CASE

Respondent accepts the Procedural History on p. 4 of the Petition. Also, Respondent accepts the Court of Appeals' discussion of facts for purposes of this Return. *See State v. Drayton*, 411 S.C. 533, 536-42, 769 S.E.2d 254, 255-59 (Ct. App. 2015).

ARGUMENTS

I. The Court of Appeals properly held that the trial judge did not abuse his discretion by denying Drayton's motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone where neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the provider generates and keeps as a business record and which was based upon information that Drayton voluntarily provided to the provider. Alternatively, suppression is not required because the officers acted in good faith reliance upon the warrant that was issued, and any error is harmless beyond a reasonable doubt.

The United States Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976). Even though the Court's holding is some thirty-eight years old and has yet to be repudiated or overruled, Drayton claims that the trial judge erred by denying his motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone. Notwithstanding Drayton's contention that this issue is worthy of a grant of certiorari, Respondent submits that the trial judge did not abuse his discretion by denying Drayton's motion to suppress the records of his cellular service provider, for Drayton's cellular telephone. In addition to the reasons stated by the Court of Appeals, Drayton, Respondent submits that certiorari must be denied because neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the

provider generates and keeps as a business record and which was based upon information that Drayton voluntarily provided to the provider, and the record supports the trial judge's finding that there were reasonable grounds to believe that the records and other information sought were relevant and material to an ongoing criminal investigation, in accordance with 18 U.S.C. § 2703(d). Also, S.C. Code Ann. § 17-13-140 (2003) is inapplicable because the warrant issued was construed as an order authorizing production of the disputed records and not a warrant supported by probable cause; and the order issued to the cellular provider satisfied the Fourth Amendment's very limited requirements for compulsory process. Alternatively, relief should be denied both because the officers acted in good faith reliance upon the warrant that was issued, and because any error in admitting the records was harmless beyond a reasonable doubt.[1]

A. The motion to suppress and the trial judge's ruling.

On September 30, 2012, Drayton filed a pretrial motion to suppress the records of his cellular service provider (Verizon Wireless), for Drayton's cellular telephone, based upon the absence of probable cause to support issuance of the warrant. (Court's Exhibit 2, **R. pp. 545-59**). The trial judge held a pretrial hearing on this motion to dismiss on October 1, 2012, and denied it. **R. pp. 3-48.**[2]

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[1] Respondent has not argued the question of standing in light of the Court's decision in *State v. McKnight*, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987). His Fourth Amendment standing is dubious, at best. However, for the reasons argued, *infra*, the real issue before the Court is whether he had a legitimate expectation of privacy in his location data captured by his cellular service provider, as opposed to whether he had a legal or possessory interest in the property. *See Rakas v. Illinois*, 439 U.S. 128, 148-49 & n. 17 (1978). The indisputable answer to this inquiry is no.

[2] The challenged warrant was for

> 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 6, 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 843-xxx-xxxx.

Court's Exhibit 2, R. p. 558.

Drayton's trial counsel noted that his motion was "under the [fourth] amendment as well as Article I, Section 10 of the South Carolina Constitution, ... our search warrant statute, ... 17-13-140." Counsel amended his "motion to include ... the Interception of Communications Act, which is 17-30-10." (The Wiretap Act). He agreed with the trial judge that the Wiretap Act was very similar to the Federal Storage Communication Act, 18 U.S.C. §§ 2701-2712. **R. pp. 3-4.**[3]

The affidavit in support of the warrant stated that:

> [O]n July 9, 2010, Charleston County Sheriff's Office 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 9, 2010, Alexis J. Lukaitis was reported missing to the Beaufort County Sheriff's Office. The body of the deceased was later positively identified as being Alexis J. Lukaitis. Mike Bartley the fiancée of the victim stated that he last spoke to the victim on August 8, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D".
> A separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in which they discussed the murder of the victim.[2]
> 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 investigation. All evidence being sought will be compared with evidence already obtained in the investigation.

Court's Exhibit 2, R. p. 558.

> The parties stipulated to the following relevant facts:
>
> Shannon [Hooper] was an acquaintance of both the victim Alexis Lukaitis and the defendant Darryl Drayton at the time of Alexis' disappearance.
> Alexis did not come home to Bluffton on the evening of Sunday, August 8, 2010. The next morning, Michael Bartley contacted Shannon [Hooper] to see if she had information about Alexis' whereabouts. Shannon had no information about where Alexis went on Sunday August 8 or where she was on Monday morning, August 9, 2010. ... Shannon [Hooper] had no information at that time about Alexis' movements or activities on Sunday August 8, 2010. Police interviews and phone records establish that Shannon was not contacted by Alexis Lukaitis on Sunday August 8, 2010.
> ...[I]n the calls and conversations between Shannon [Hooper] and Darryl Drayton on Monday August 9 and Tuesday August 10, 2010 that Darryl Drayton denied going to Charleston with Alexis on Sunday August 8 and denied any knowledge or involvement in Alexis' disappearance.
>
> ... [I]n a conversation between Michael Bartley and Shannon [Hooper] on Monday, August 9, 2010 ... Michael Bartley told Shannon that Bartley had been told by Alexis Lukaitis on Sunday August 8, 2010 that Alexis was going to Charleston on Sunday with "D" to buy pills.

Court's Exhibit 1, R. pp. 543-44. *See also* **R. pp. 4-9.**

[3] Because he does not challenge the trial judge's ruling that the Wiretap Act was inapplicable, Respondent has omitted from this brief much of the arguments at trial related to that Act.

Counsel argued that Drayton had a reasonable expectation of privacy in the cellular records and that, under *McKnight*, he did not have to establish standing to challenge the search because the results of the search were being introduced against him. He maintained that the records were protected because they contained both "a transaction record of calls in and calls out by the subscriber" and "specific information about cell tower locations for each call which then can be used to triangulate the location of the cell phone at the time that the call is made."[4] **R. pp. 10-12.** Further, there was no probable cause to issue a search warrant because there was nothing to establish the reliability of informant, Michael Bartley, the victim's husband. "Mr. Bartley ... was the fiancé of the victim, [he] had reported her missing and [he] was not immediately forthcoming to the law enforcement officers about the extent of her drug use." **R. pp. 16-17.**

The trial judge observed that this case did not involve a traditional confidential informant. Instead, this case involved a citizen who came forward without potential gain of possible bias. He further observed that the affidavit (**R. pp. 558**) "very clearly says Mike Bartley, the fiancé of the victim, stated that he last spoke with the victim on August the 8th, 2010, and she informed him that she was traveling to Charleston with Darryl Drayton, also known as 'D.'" **R. pp. 16-18.** Drayton argued that this was insufficient to show probable cause because the affidavit did not indicate that the informant was reliable, the informant is not corroborated and the information he provided is not verified. **R. pp. 18-19.**

When counsel contended that law enforcement included false or inaccurate information to verify the information provided by the informant, the trial judge found that the challenged portion of the affidavit[5] was "really almost innocuous." **R. pp. 19-21.**[6] However, counsel stated

[4] He agreed with the trial judge that his motion was addressed to protected information related to the cell phone and not speech.

[5] Drayton took issue with the following sentence of the affidavit: "[a] separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in

that he had interviewed the affiant, Det. Cooke, a week before trial and learned that "the source of this information never existed." **R. pp. 22-24**. Rather, "it was some sort of rouse to mislead [Drayton] when he got the warrant ... insofar as judging how willing Ms. Shannon [Hooper] was to provide information to the police." Counsel noted that this statement "did not contain anything that was not public information coming from Mr. Bartley." Counsel asserted that this was materially false information that had to be redacted under *Franks v. Delaware*, 438 U.S. 154 (1978), and that, when redacted, there was no indication of the informant's reliability in the remaining portion of the affidavit. **R. pp. 22-24.**[7] Counsel further argued that the informant, Mr. Bartley, did not initially reveal the truth about the victim's drug use until a buccal swab was taken of his mouth, and that he remained a suspect at the time of the warrant and even forty-eight hours later when law enforcement took a second buccal swab for DNA testing. Also, the murder "involves the claim of that they were together and a murder occurred that would not have necessarily have implicated phone use in any way on its face." **R. pp. 24-26**.

The trial judge observed that, with the exception of communications, the standard was whether "there's sufficient reason to believe that evidence of criminal activity will be found in the location specified. Although the trial judge twice asked counsel how one could ever discover "evidence of a murder through a phone record and phone information," counsel dodged

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which they discussed the murder of the victim. *See* **R. p. 558**. The trial judge correctly observed that this sentence did not state what Mr. Bartley and Shannon had discussed. **R. p. 20**.

[6] Counsel offered to present the magistrate as a witness but the trial judge declined his request because the magistrate apparently sought to have his subpoena quashed under *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003).

[7] Counsel maintained that "there was a level of indifference to the responsibilities of accurate swearing, truthful swearing, in this case, by this agency, that is borne out by the murder warrant," since that warrant contained an untrue statement that "Shannon Johnson" had spoken to the victim on the night of the murder and the victim told Ms. Johnson that she was in Charleston with Drayton. Shannon Hooper and Tina Johnson had both been interviewed and their cell phone records examined, and neither woman spoke to the victim on the night she was murdered. Counsel suggested that this supported the defense's claim that there was no probable cause "in nexus as to his phone calls and as to providing reliable information that the magistrate would need to be able to reach a determination of probable cause." **R. pp. 27-28**.

answering the question. **R. pp. 28-30**. Before hearing the State's response to counsel's motion, the judge ruled that the Wiretap Act only applied to intercepted communications and that it was inapplicable to the facts of this case. **R. pp. 30-31**.

The Assistant Solicitor argued that *McKnight* was inapplicable because there was no search in this case and Drayton lacked standing to challenge law enforcement's acquisition of the records. She also cited to *Smith v. Maryland*, 442 U.S. 735 (1979), *superseded by statute*, as well as *United States v. United States District Court*, 407 U.S. 297 (1972). She noted that *Smith* explained that a proper Fourth Amendment analysis under *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967), requires a court to answer two questions. The first question is whether the individual has exhibited an actual subjective expectation of privacy, by his conduct. If so, the next question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. **R. pp. 31-32**.

The Assistant Solicitor pointed out that the Court in *Smith* concluded that even if the petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, his expectation was not one that society is prepared to recognize as reasonable. Also, the Court in *Smith* explained that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. **R. pp. 32-33**.

She likewise pointed out that, in *Miller*, 425 U.S. at 442-43, the Court had held a bank depositor did not have any legitimate expectation of privacy in financial information that he voluntarily conveyed to banks and that was exposed to their employees in the ordinary course of business. She observed that similar reasoning was followed in by the Fourth Circuit Court of Appeals in *United States v. Bynum*, 604 F.3d 161 (4th Cir. 2010), where law enforcement had acquired the defendant's "internet information and phone subscriber information." *In Bynum*, the

Court had held that a defendant does not have a reasonable expectation of privacy in this information. Further, she pointed to *United States v. Graham*, 846 F.Supp.2d 384, 389 (D.Md. 2012), which found that the defendants did not have a legitimate expectation of privacy in the historical cell site location records acquired by the government. She noted that the Court in *Graham* explained that "a majority of courts ... have concluded that the acquisitions of historical site-location data pursuant to the Stored Communications Act to specific and articulable fact standard does not implicate the fourth amendment regardless of the time period involved." **R. pp. 34-35**.

Turning to the warrant in this case, the Assistant Solicitor argued that the affidavit in support of the warrant "survives without that cumbersome sentence that we've been addressing." She noted that Mr. Bartley voluntarily allowed police to take his buccal swab; he had reported the victim missing; "[h]e told the police that she said she was going to Charleston with Darryl Drayton;" the victim's body was found in Charleston County; and Mr. Bartley had spoken to the victim on the phone. The Assistant Solicitor further argued that, when police are seeking records of telephone calls and cell tower information in the course of a murder investigation, the reason they are seeking this information "is obvious to a magistrate." Police were clearly "interested in knowing where he was traveling, if they are asking for cell tower information, ... [and] [t]he magistrate knows by the language in the search warrant that she was traveling from Bluffton to Charleston with Darryl Drayton." Therefore, the warrant was supported by probable cause, even redacted. **R. pp. 35-36**.

The Assistant Solicitor also disputed trial counsel's representation of the interview of Det. Kip Cooke. She noted that "[w]e jointly spoke to Mr. Cooke and, Judge, he indicated that he can't explain why the sentence was written that way." She contended that the affidavit supported

the warrant, even if the poorly written sentence was redacted, and she noted that the same magistrate had signed several warrants on the same day that did not have this sentence in them but that were otherwise identical. Further, "never in that sentence does it say Darryl Drayton told us he did it, Darryl Drayton has given details about the murder, or [said] anything ... inculpating himself." Additionally, she argued that the officers had acted in good faith and that the officers were not attempting to mislead the magistrate. **R. pp. 36-38**.

Finally, the Assistant Solicitor explained how the investigation occurred:

> this is a case where the investigation started out in Bluffton. He reports it to the local Beaufort County officers that his fiancé is missing, the last time he spoke with her was when she was in Charleston with Darryl Drayton, that she was going to be on her way back and thought she would be back in about an hour. She never returned. He fretted all night. In the morning, he started looking for her. The night before, however, he's calling jails, he's calling the hospital. The next morning, he does go over to Shannon Hooper's ... apartment, who's in the same apartment complex with him. He goes over to Tina Johnson's house. And those three people are communicating with each other: Mike Bartley, Tina Johnson, Shannon Hooper. And as you can imagine, they're having phone conversations with each other. So Tina is telling Shannon what Mike told her, Shannon is telling Mike what Tina told her. In the interim, Tina Johnson's child sees Darryl Drayton. He's got an injured finger and scratches.
>
> All of this is being relayed to the detective in Bluffton. That detective is relaying it to the detectives in Charleston and then they are relaying it to Kip Cooke, who is drafting the warrant. So if mistakes were made, they were not made purposefully, they were not made to deceive, and they were not made in an effort to contrive something to get this warrant that they absolutely were entitled to get. ... [T]here was no reason to lie in a warrant to get his records.

R. pp. 38-39.

In reply, Drayton's trial counsel argued that the contested sentence present in the affidavit supporting the warrant for Drayton's cellular telephone records was also present in a warrant issued for Shannon Hooper's records. He also argued that the Assistant Solicitor's discussion "of facts about other information that was potentially known and was known to Beaufort police officers" was not in the affidavit supporting the search warrant and was not presented to the

magistrate. **R. pp. 39-41**. When counsel indicated that he was planning to call Det. Cooke to support counsel's position on his conversation with Cooke, the trial judge indicated that counsel could do so, but he was redacting the sentence Drayton challenged from the warrant because it was "so ambiguous and so confusing." Counsel then argued that, without that sentence, there was no probable cause to support the search warrant. Counsel also observed that, after the Supreme Court's decision in *Smith*, Congress had passed legislation that created an expectation of privacy for pen register records. **R. pp. 41-45**.

The trial judge denied the motion to suppress as follows:

> [T]his warrant was against Verizon, not the defendant in this particular case. Although it was [for] his own records ... I do think he has standing. And the reason I point that out is ... for this reason. Number 1, this Court finds -- and the Court is going to follow the long line of federal cases that have stated there's no expectation of privacy as to records. I'm not talking about conversations, now. I'm not talking about interception of conversation or storing those conversations and obtaining conversations. I'm talking about the records that specifically in this case the Court is going to find that there's no expectation of privacy.
>
> Now, having said that and referring to the [Miller] case, the United States District Court case and the Fourth Circuit cases, the Stored Communication Act... affects all of the carriers. ... whoever is providing the service. So even though this has not been addressed in South Carolina by the legislature or by case law, the Stored Communication Act I think is persuasive argument on this Court ...to this extent: we're not talking about probable cause in this search warrant, we're talking about reasonable grounds to believe that the records and other information sought are relevant and material to an ongoing and criminal investigation. This Court is going to review that warrant in that light primarily because the provider of these records or the holder of these records [has] to be protected from the federal violation law, i.e., the Stored Communication law. So you've either got to go with a warrant in South Carolina or a court order.
>
> There's no statute, there's no case, that provides that mechanism whether it's a warrant or whether it's an order[,] so this Court is going to look at this warrant as obtaining an order from the magistrate to obtain the records to determine ... I'll just read: the identification address of the cellular towers related to the use of the defendant's cellular telephone is relevant to the ongoing and criminal investigation as to this murder charge.

> The language in the warrant that states Mike Bartley, the fiancé of the victim, stated he last spoke to the victim on August the 8th, 2010, and she informed him that she was traveling to Charleston, South Carolina, with Darryl Drayton, also known as "D". Bartley provided the Verizon cellular telephone number 843-xxx-xxxx as a contact number for Darryl Drayton. It goes on to say this -- 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.
>
> They were trying to investigate a murder and with the persuasive argument of federal cases and the persuasive argument of the Stored Communication Act. The Court finds that the order obtained by the magistrate was sufficient to obtain the records and reasonable grounds were proven under that warrant. And this Court specifically finds probable cause is not necessary.

R. pp. 45-47.[8]

B. Discussion.

Respondent submits that the Court of Appeals correctly affirmed the trial judge's ruling because Drayton did not have a legitimate expectation of privacy under either the United States

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[8] Although the trial judge had denied Drayton's motion to suppress, trial counsel submitted additional argument to support it the following day. He stated that in *In re Application of the United States for Historical Cell Site Data*, 747 F.Supp.2d 827, 829 (S.D.Tex. 2010), *vacated*, *In re United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), the district court had reviewed the trends of how federal courts were construing the Stored Communication Act. While the district courts have been giving court orders on findings of reasonable suspicion, this was changing because of indications in United States Supreme Court cases such as *Kyllo v. United States*, 533 U.S. 27 (2001) (police engaged in unlawful "search" by using thermal imaging device, without first obtaining a warrant, to scan home to determine whether heat emanating from home was consistent with use of high-intensity lamps employed in indoor marijuana growing operation), *United States v. Karo*, 468 U.S. 705 (1984) and *United States v. Jones*, 132 S.Ct. 945, 949 (2012) (attaching a global positioning system (GPS) tracking device to a car and monitoring the car's movements for twenty-eight days, without a valid warrant, violated the Fourth Amendment because placing device on car required Government to "physically occup[y] private property for the purpose of obtaining information"). Trial counsel claimed that the Court in *Jones* recognized that individuals have a reasonable "expectation of privacy when the level of surveillance gets so high." He added that the Court in *In re Application of the United States for Historical Cell Site Data* had concluded that "[t]hose refinements in technology where more and more information is now being gathered are having ... a decisive fourth amendment consequence" and that the protections of the Fourth Amendment therefore applied. **R. pp. 51-54.**
When the trial judge asked whether the cases counsel was relying on focused on "the GPS aspect of it," he conceded that they did and that in "those cases ... the level of specificity is greater than what we have here where you're looking at a couple of days of simply cell tower pinging data[,] as opposed to if he had had an iPhone and you could somehow reconstruct movement by movement." However, counsel again contended that the trend was to extend Fourth Amendment protections in this area, and he asserted that "we also have in South Carolina a unique provision about the right of people to be secure from unreasonable invasions of privacy, which is in Article 1, Section 10. While conceding that there was "no precedent," he contended that based upon the State Constitution and the warrant statute, the warrant requirement applied. **R. pp. 54-56.**[8] Drayton later renewed the suppression motion during the testimony of Kenneth Aycock, the witness through whom the challenged evidence was admitted. The trial judge noted that he had overruled the motion. **R. p. 399, lines 14-22.**

Constitution or the South Carolina Constitution. *Drayton*, 411 S.C. at 547-50, 769 S.E.2d at 262-63. 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." After *Katz*, "the touchstone of [Fourth] Amendment analysis has been whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *Oliver v. United States*, 466 U.S. at 170, 177 (1984) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring)). Under the approach taken by Justice Harlan's concurring opinion in *Katz*, a reviewing court must ask two questions. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' .... The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable,' ... —whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (citations to *Katz* omitted).

Both United States Supreme Court precedent and the decisions of the majority of federal courts to consider the issue support the trial judge's conclusion that there is no legitimate expectation of privacy in cell site location records. The Supreme Court " 'has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.'" *Smith*, 442 U.S. at 744 (quoting *Miller*, 425 U.S. at 443). Applying *Katz*, the Court in *Miller* rejected a Fourth Amendment challenge to a third-party subpoena for bank records. The Court explained that the bank's records "are not respondent's 'private papers.' " Instead, they are "the business records of the banks," in which a customer "can assert neither ownership nor possession." *Miller*, 425 U.S. at 440. The records "pertain to transactions to which the bank was itself a party." *Id.* at 441. In rejecting the defendant's challenge to the subpoena, the Court held "that the Fourth Amendment does not

prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.[9]

In *Smith*, the telephone company had installed a pen register, at the request of the police, to record the telephone numbers dialed from the petitioner's telephone. In rejecting the petitioner's challenge to the warrantless use of the pen register, the Court expressly distinguished collecting telephone numbers dialed from the listening device used in *Katz* to record "the *contents* of communications." 442 U.S. at 741 (emphasis added). The Court held that telephone users generally had no subjective expectation of privacy in dialed telephone numbers. "[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 742.[10] Moreover, the Court held that any subjective expectation the petitioner may have harbored "is not one that society is prepared to recognize as reasonable." *Id.* at 743. (Internal quotation marks omitted).

The Court added that "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and the Court held that the user "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." *Id.* at 743-44. The Supreme Court, itself, has applied the same principle to confidential statements made in the

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[9] The Court found that the mandatory record-keeping requirement of the Act did not create a Fourth Amendment interest in bank records "where none existed before" because the records contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 441-42.
[10] The Court expressly distinguished collecting the listening device used in *Katz*. As in *Smith*, the contents of the "communications" were not disclosed.

presence of an informant, *Hoffa*, 385 U.S. 293, 302 (1966), to financial and other records in the hands of third-party businesses, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and to electronic surveillance of conversations between defendant and informer, by means of radio transmitter concealed on the person of the informant. *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion).[11] Lower federal courts have applied this same principle in a variety of contexts, such as defendant's ISP subscriber information and IP addresses of websites, *see Bynum*, 604 F.3d at 164,[12] and telephone billing records. *Reporters Committee for Freedom of Press v. AT&T*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) (rejecting Fourth Amendment challenge to subpoena for telephone records and holding that when an individual transacts business with others, "he leaves behind, as evidence of his activity, the records and recollections of others. He cannot expect that these activities are his private affair"); *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation"); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (email users have no reasonable expectation of privacy in to/from addresses of their messages or in IP addresses of websites visited).

Relying upon *Smith* and *Miller*, 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

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[11] *See also Donaldson v. United States*, 400 U.S. 517, 522-23 (1971) (holding taxpayer was not entitled to intervene in proceeding to enforce summons for his employment records, where "what is sought here by the Internal Revenue Service . . . is the production of Acme's records and not the records of the taxpayer").

[12] The "subscriber information" at issue in *Bynum* included the "physical address" of the defendant. *Id.*

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"); *In re Cell Tower Records Under 18 U.S.C. 2703(D)*, ___ F.Supp.3d ____, 2015 WL 1022018 (S.D.Tex.,2015); *United States v. Skinner*, 690 F.3d 772, 777-78 (6th Cir. 2012); *United States v. Davis*, ___ F.3d ____, 2015 WL 2058977 (11th Cir., May 05, 2015) (en banc); *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).[13] Respondent submits that the Court of Appeals properly followed this majority of federal courts and found that the warrantless acquisition of historical cell-site records without a warrant does not violate the Fourth Amendment or the South Carolina Constitution because there is no legitimate expectation of privacy in those records.

This Court "must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U.S. at 442. *See also Smith*, 442 U.S. at 741. Here the State did not seek conversations, unlike in the situation before the Supreme Court in *Katz*, but cell site location data. Like the pen register numbers in *Smith* and the bank records in *Miller*, the State did not obtain Drayton's "private papers" without a warrant. Instead, it obtained the business records of

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[13] *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).

a third party, Verizon Wireless, and only for a very limited period of time. A historical cell-site record is a phone company's own record of the cell tower and sector it used to handle a customer's call, in a transaction to which it is a party. It is a generated and stored by a cell phone company at its own discretion because federal law does not require phone companies to create or keep such records.[14] *Graham*, 846 F.Supp.2d at 398 & n. 11; *In re U.S. for Historical Cell Site Data*, 724 F.3d at 611-12.

Because these records are created solely by the cellular providers, "individual customers do not generally have access to those records, and could not be expected to produce them in response to a subpoena." *Graham*, 846 F.Supp.2d at 398. Moreover,

> 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.

[14] 47 C.F.R. § 42.6 requires providers to maintain for 18 months "the name, address, and telephone number of the caller, telephone number called, date, time and length of the call." This requirement does not extend to cell-site information.

> 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; *Graham*, 846 F.Supp.2d at 401. *See Drayton*, 411 S.C. at 549, 769 S.E.2d at 263.

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;[15] *see also Graham*, 846 F.Supp.2d at 399. 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.[16]

"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

[15] 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/.

[16] "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.

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.

> Unlike [*United States v. Karo*, 468 U.S. 705, 715 (1984)], where the electronic beeper concealed in the drum of ether disclosed not only the location of defendant's home, but also the fact that criminal activity was afoot (which featured prominently in the search warrant affidavit), there is nothing presumptively illegal about the possession of a cellular phone. The most that the "tracked" cell phone might reveal is that its owner might presently be found in the home (assuming that the phone had not been loaned to someone else). There is nothing, however, about that disclosure that is any more incriminating or revealing than what could be gleaned from the activation of a pen register or from physical surveillance. Moreover, outside of the home it is doubtful that the tracking of a cell phone has any Fourth Amendment implication whatsoever. *See Karo*, 468 U.S. at 713-72.

In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d), 509 F.Supp.2d at 81. *See also United States v. Knotts*, 460 U.S. 276, 281 (1983); *Skinner*, 690 F.3d at 777-78 (defendant had no legitimate expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone and, since he was on public road before stopping at public restroom, police could have obtained same information by visual surveillance). [17]

[17] Drayton previously abandoned his contention that *United States v. Jones, supra*, requires reversal by not arguing this in his Initial 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). *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. Further, and unlike *Jones*, here, the actions of the police were subject to judicial review. *See Graham*, 846 F.Supp.2d at 392. Also, the State did not record the information. *See In re United States for Historical Cell Site Data*, 724 F.3d at 609-10; and, Drayton could have defeated the ability to so locate him by either turning off his cell phone or simply not calling anyone. Thus, 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

The present case is also different 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. Therefore, Drayton did not have a reasonable expectation of the cell site location records and the Fourth Amendment warrant requirement did not apply.

Nor does S.C. Const. article I, § 10 require a different result, even though 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).[18] Art. I, § 10 was not infringed because, for the reasons set forth above, there was no 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*, 442 U.S. at 743 (citing *Katz*, 389 U.S., at 361. *See also Florida v. Riley*, 488 U.S. 445, 696 (1989) (officer's observation,

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protracted period of time without any judicial oversight, as in the GPS cases) would satisfy Justice Alito's concurrence in *Jones*, 132 S.Ct. at 957-64 (Alito, J., concurring), as would judicial review of the police action. *See* 132 S.Ct. at 949 it would also satisfy the concurring opinions in *Jones*, which included *obiter dictum* finding that "use of long[] term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *See Jones*, 132 S.Ct. at 955-57 (Sotomayor, concurring); *id.* at 961-64 (Alito, J., concurring in the judgment). 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).

[18] The Court in *Forrester* refused to hold that the state constitutional right to privacy provision requires police officers to inform citizens that they have the right to refuse consensual searches and that, without such a warning, a search is involuntary. *Id.* at 645-48, 541 S.E.2d at 841-43.

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.[19]

Contrary to Drayton's argument, which is not supported by any authority other than a general citation to the SCA, Respondent submits that law enforcement complied with the provisions of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. Specifically, § 2703(c)(1) provides, in pertinent part, that "[a] governmental entity may require a provider of electronic communication service ... to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity" either (A) obtains a warrant "issued using State warrant procedures ... by a court of competent jurisdiction; ... [or] (B) obtains a court order for such disclosure under subsection (d) of this section." In turn, § 2703(d) provides that:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only *if the governmental entity offers specific and articulable facts showing* that there are *reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.* In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by

[19] 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, his argument lacks merit. *See In re U.S. for Historical Cell Site Data*, 724 F.3d at 613. *See also Smith*, at 742-43; *Graham*, 846 F.Supp.2d at 401.

> the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

Here, the record, including the redacted affidavit in support of the warrant (*see* **Court's Exhibit 2, R. p. 558; R. pp. 45-47**),[20] supports the trial judge's finding that the State complied with these requirements.

'The 'specific and articulable facts' standard 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.[21] Also, the provisions of § 17-13-140 (2003) are inapplicable because neither the Fourth Amendment nor article I, § 10 required a warrant, and the warrant issued was construed as an order authorizing a subpoena for the disputed records under the SCA.[22] Therefore, there was no

[20] 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."

[21] Likewise, 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 cell site location information." **Petition, p. 13**. His argument ignores that the trial judge did not find that the warrant lacked probable cause. Rather, he found that it was unnecessary to obtain a warrant because Drayton did not have a legitimate expectation of privacy in the Verizon records, and he found that the magistrate's issuance of the warrant satisfied the order requirement of the SCA. Drayton's argument also ignores that the warrant issued was an "order."

[22] Likewise, the order, which was narrowly drawn and issued to the cellular provider, satisfied the Fourth Amendment's very limited requirements for compulsory process. A § 2703(d) order for cell-site records is a form of compulsory process, like a subpoena, and the Fourth Amendment sets a reasonableness standard rather than a warrant requirement for compulsory process. *Miller*, 425 U.S. at 444 & n. 6. The Supreme Court has long held that "the Fourth [Amendment], if applicable [to a subpoena], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946). *See also Miller*, 425 U.S. at 445-46.
Compulsory process authority is critical to the truth-seeking function of the criminal justice process. "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *United States v. Nixon*, 418 U.S. 683, 709 (1974).*See also Wilson v. United States*, 221 U.S. 361, 376 (1911) ("there is no unreasonable search and seizure when a [subpoena], suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced").

violation of the Fourth Amendment and Drayton "lacks the requisite Fourth Amendment interest to challenge the [order]." *Miller*, 425 U.S. at 446.

Alternatively, this Court should deny relief both because the officers acted in good faith reliance upon the warrant that was issued, regardless of whether there was probable cause to issue the warrant, and because any error in admitting the records was harmless beyond a reasonable doubt. Although Respondent submits that there was probable cause to issue a search warrant based upon the supporting affidavit,[23] suppression of the records was not required even if there was no probable cause because law enforcement acted in objectively good faith reliance upon the order that was issued. In *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011), the Court explained that:

> The basic insight of the [*United States v. Leon*, 468 U.S. 897 (1984)] line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. [*Herring v. United States*, 555 U.S. 135, 143 (2009)]. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon, supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring, supra*, at 137, 129 S.Ct. 695, the " 'deterrence rationale loses much of its force,' " and exclusion cannot "pay its way." *See Leon, supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting [*United States v. Peltier*, 422 U.S. 531, 539 (1975)]).

"Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective

[23] An affidavit supporting a warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of probable cause. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed under the "totality-of-the-circumstances" set forth in *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221. Respondent submits that this standard was met, notwithstanding Drayton's contention that Bartley's reliability was not set forth in the affidavit. To hold otherwise would preclude warrants based upon information provided by victim's or other individuals who do not have lives that immerse them into criminal activities.

good faith." [*Leon*, 468 U.S. at 922–923]." *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012). A claim of good faith reliance on a warrant issued by a magistrate may be defeated only by a showing that the warrant was "based on an affidavit so lacking in *indicia* of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S., at 923.[24] In spite of Drayton's contrary position, Respondent submits that he cannot meet this standard because the officers did not act in "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights," *id.* at 909, as demonstrated. Thus, suppression was not required. *Id.*

Finally, any error in the introduction of the records or the information gleaned therefrom must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). First, the State presented DNA evidence that established his presence at the crime scene beyond any reasonable, as opposed to chimerical, doubt. The presence of any DNA in the victim's car when he told her husband that the victim did not pick him up on August 9th is damning to him. The DNA evidence more precisely pinpointed his location at the time of the murder than cell site location records or even the GPS monitoring device used in *Jones*. Also, he attempted to destroy any forensic evidence by burning the victim's body; there was repeated evidence of flight to

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[24] In *State v. Sachs*, 264 S.C 541, 559, 216 S.E.2d 501, 510 (1975), the Court found a good faith exception permits the introduction of evidence seized pursuant to a warrant that is defective under § 17-13-140, if the officers have made a good faith attempt to comply with the affidavit requirement. In *McKnight*, police officers orally recited the facts upon which the warrant was based, but no affidavit was ever executed. 291 S.C. 110, 112-13, 352 S.E.2d 471, 472. As a result, the Court found that there was no good faith effort to comply with the statute, but the Court declined to decide whether there is a good faith exception for officers who execute a search with objectively reasonable reliance on a warrant that is ultimately found to be invalid. *Id.* at 114 & n. 2, 352 S.E.2d at 473 & n.2. Other appellate decisions refusing to recognize a good faith exception to § 17-13-140 have - like *McKnight* - involved situations where either there was no effort to comply with the affidavit requirement or there was no effort to supplement a defective affidavit. *E.g.*, *State v. Johnson*, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990); *State v. Weston*, 329 S.C. 287, 290-293, 494 S.E.2d 801, 802-804 (1997). That did not occur here.

avoid prosecution.[25] *E.g.*, *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (evidence of a defendant's flight is admissible as circumstantial evidence of guilt); *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003). Based upon this and the remaining evidence discussed by the Court of Appeals, *Drayton*, 411 S.C. at 536-42, 769 S.E.2d at 255-59, any error was harmless.

II. Drayton's contention that he did not have to establish a reasonable expectation of privacy under the South Carolina Constitution is not preserved for this Court's review because it was not presented to the trial judge and is contrary to his position at trial.

Drayton's argument that the trial judge erred because he did not have to establish a reasonable expectation of privacy in the historical cell site data is not preserved for this Court's review because he argued the contrary position at trial. **R. pp. 10-12.** *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) ("One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered"). Further, however broad the protections of S.C. Const. article I, § 10 may be, they do not provide a privacy interest in business documents that do not contain "communications," which are generated by a third party for that third party's own purposes, as opposed to being governmentally required, and where the person seeking suppression cannot assert either ownership or possession of those records and could not produce the documents in response to a subpoena.

III. The Court of Appeals properly applied *State v. Logan* in finding that the trial judge did not err by refusing Drayton's request to charge the outdated *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge where this Court has found that the requested language is confusing and has directed that it should not be used, and the trial judge properly charged the then-current and correct circumstantial evidence charge from *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which this Court had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

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[25] This included leaving both Charleston and Beaufort Counties and going to Jasper County, as well as attempting to flee South Carolina for Florida. Also, he paid for the motel in Hardeeville but had his cousin sign for the room, and he was spending money.

The Court of Appeals 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. Drayton 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 from *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989) in the circumstantial evidence charge (**Court's Exhibit 14, R. p. 568**).[26] However, this Court has found that the requested language is confusing and has directed that it should not be used. Therefore, the requested charge was properly rejected because it did not and still does not accurately state the applicable law. *Id.* at 544-46, 769 S.E.2d at 259-61.[27]

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[26] The trial judge's circumstantial evidence instruction is at **R. p. 516, line 10 - p. 517, line 3**. He then defined the term "evidence" for the jury. **R. p. 517, line 4 – p. 518, line 5**.

[27] This Court in *Logan* addressed the very argument that Drayton raises here, *i.e.* that their recent cases referencing the *Edwards* charge signaled disapproval of the *Grippon* charge. In rejecting that argument, the Court found that its recent cases referencing the *Edwards* language did not address the jury instructions given. Rather, those cases – including *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009), and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) - the cases upon which Drayton relies - as well as *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), had only made reference to the *Edwards* language in the context of the trial judge's ruling on a directed verdict motion. In short, none of these recent cases citing the *Edwards* language addressed the *Grippon* jury charge at all. *Logan*, 405 S.C. at 91-94 & n. 7, 747 S.E.2d at 448-49 & n. 7. Thus, neither of the cases cited by Drayton announced a retreat from the *Grippon* charge. The evaluation of evidence for a directed verdict motion is not the same as the jury's evaluation of evidence in determining whether the State had met its burden of proof beyond a reasonable doubt. The "**trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis in original). *See also State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 453 (1984) ("The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court."). Critically, there is no mention in either *Hernandez* or *Odems* of the adequacy of the *Grippon* instruction. The Court in *Logan* reaffirmed both the correctness of the *Grippon* charge and its earlier disapproval of the "reasonable hypothesis" language in rejecting the claim that *Cherry* had been implicitly overruled. *Logan*, 405 S.C. at 94, 747 S.E.2d at 449 ("the trial court did not err in providing a circumstantial evidence charge consistent with *Grippon*"). This language remains disfavored. *Logan*, 405 S.C. at 98, 747 S.E.2d at 451-52 ("requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant"). Thus, like the challenge in *Logan*, Drayton's argument fails for the same reasons. *See also State v. Lynch*, 412 S.C. 156, ___, 771 S.E.2d 346, 356-58 (Ct.App.2015).

The Court of Appeals' alternative decision that any error was harmless in light of the reasonable doubt instruction, *Drayton*, 411 S.C. at 545-46, 769 S.E.2d at 261, was a straight-forward and correct application of *Logan*, 405 S.C. at 94, 747 S.E.2d at 449, and that 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. (The Court's Opinion in this case was filed on the same day that this 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.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari.

Respectfully submitted,

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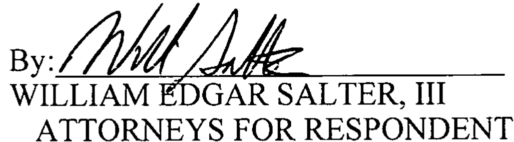
By: 
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ATTORNEYS FOR RESPONDENT

June 8, 2015.

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").

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2015-000814

THE STATE

RESPONDENT,

V.

DARRYL L. DRAYTON,

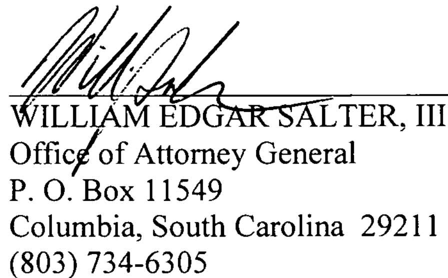
PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari 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 9th day of June, 2015.



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