STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIAM ANTHONY WALLACE,

Appellant

Appellate Case No. 2014-001786.

INITIAL BRIEF OF RESPONDENT

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I. Did the trial judge err in finding that the exigent circumstances exception to the search warrant requirement applied in refusing to suppress records obtained from a cell phone company without a search warrant or court order?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred in admitting Appellant's T-Mobile records because there was no Fourth Amendment violation. At the time the exigency request was made to obtain those business records, Appellant was at-large and had positively been identified by a surviving victim as an armed suspect in an armed-robbery-turned-double-homicide.

STATEMENT OF THE CASE

Appellant William Wallace was indicted by the Richland County Grand Jury on two charges of murder, three charges of kidnapping, and one charge each for attempted murder and armed robbery. (R. pp. *Indictments).

Attorneys Stephen Krzyston, Lucas Hawks and Kris Hines of the Fifth Circuit Public Defender's Office represented Wallace. (Tr. p. 1). April Sampson, Vance Eaton and Daniel Coble of the Fifth Circuit Solicitors Office prosecuted the case. (Tr. p. 1). A pre-trial motions hearing took place on July 21, 2014, in Kershaw County before the Honorable Robert E. Hood. (R. p. *, July 31 Tr. p. 1). Wallace's Richland County jury trial began August 11, 2014, with Judge Hood presiding, and lasted five days. (Tr. p. 1).

Wallace was convicted of all charges, and Judge Hood sentenced Wallace to three consecutive terms of life imprisonment without the possibility of parole for each murder and the attempted murder. (Tr. p. 1150, lines 13-25). Wallace received additional life sentences for each of his three kidnapping convictions and the single armed robbery conviction. The latter four life sentences were issued to run concurrent to the third consecutive life sentence. (Tr. p. 1150, line 25 – p. 1151, line 1).

This appeal follows. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Around 10:00 AM on June 28, 2012, Raquel Weston received a phone call from her boyfriend Athell Johnson telling her to "bring the money and hurry up." (Tr. p. 938, lines 2-5). Johnson was wheelchair bound, having been paralyzed from the waist down, and Weston helped care for Johnson at their Garners Ferry Road apartment. (Tr. p. 932, line 9 – p. 933, line 18). Weston also held Johnson's money; Johnson was a drug dealer and regularly asked Weston to store cash in a backpack at Weston's second apartment. (Tr. p. 934, line 12 0 p. 935, line 15).

That morning, Weston grabbed the backpack and drove to the Garners Ferry Road apartment. (Tr. p. 940, lines 17-25). When she arrived, the door was locked, and when she used her key to open it, she found Johnson "laying on the right side of the living room. His feet were tied up. His hands w[ere] tied behind his back. His wheelchair was in the corner[.]" (Tr. p. 941, lines 4-19). She tried to step back, but was forcefully pulled inside by Appellant William Wallace. (Tr. p. 941, lines 19-21). Weston knew Wallace because she had seen him with Johnson "almost every day" in recent months. (Tr. p. 942, lines 17-24).

Wallace had a gun and was not acting alone. Another man, DeAndre Diggs, was standing by Johnson with a knife. (Tr. p. 942, lines 1-5). Wallace took Weston's cell phone, instructing her to put down her belongings and sit on the couch. (Tr. p. 943, lines 11-21). Weston sat down on her sectional sofa noticing that Jamal Pratt, a longtime friend of Johnson's, was also tied up with trash bags on the floor nearby. (Tr. p. 934, lines 1-9; Tr. p. 943, line 23 – p. 944, line 14).

Next at the Garners Ferry Road apartment, Weston looked on as Wallace asked Johnson "if that was all the money." (Tr. p. 944, lines 16-17). Wallace walked around the apartment. (Tr. p. 944, lines 23-2). Diggs took Weston's hot iron and burned Johnson's leg, then face. (Tr. p. 945, lines 10-16). Wallace told Weston that Johnson was going to die, and then Weston watched as Diggs pulled paralyzed Johnson, now with a trash bag tied over his mouth, to another room. (Tr. p. 946, lines 1-15). Wallace made Pratt walk to another back room in the apartment. (Tr. p. 639, lines 20-24; Tr. p. 946, lines 20-21). Diggs tied Weston's hands as she remained on the living room sofa. (Tr. p. 947, lines 2-8). Wallace "kept going back and forth outside" and returning. (Tr. p. 947, lines 13-16). Diggs left the apartment for good. (Tr. p. 640, lines 11-24; Tr. p. 948, lines 1-7). Wallace walked down the hallway to the back of the apartment, and Weston heard four gunshots. (Tr. p. 948, lines 8-18).

Wallace emerged from the back of the apartment and led Weston to the "white old car" in the parking lot. Diggs and Weston held onto handguns, and there was another "big shotgun" in the passenger seat. (Tr. p. 949, lines 1-25). Wallace regularly drove his Aunt's white 1999 Buick LeSabre, which was missing a passenger's side mirror, and security footage showed that car arriving at the Garners Ferry Road complex around 10:00 AM. (Tr. p. 415, line 14 – p. 416, line 20; Tr. p. 1022, lines 1-23). Wallace next drove Diggs and Weston from Garners Ferry to Bluff Road and crossed "into a wooded area." (Tr. p. 950, lines 1-16). When Diggs asked Wallace about Johnson and Pratt, Wallace announced their fate by stating that "they were asleep." (Tr. p. 644, lines 14-21).

They arrived at a swampy area and Wallace instructed Diggs to "get rid of Ms. Weston." (Tr. p. 646, lines 1-22). Wallace instructed Weston to get out of the car and

walk with Diggs. (Tr. p. 951, lines 19-25). She walked down a dirt road until Diggs told her to walk into the woods. She hesitated. He pushed her. She ran and tripped and fell. "Then he shot at [her] more than once." After two or three shots, she was laying in the woods, eyes closed. (Tr. p. 952, lines 10-19).

Wallace and Diggs drove to Wallace's residence. (Tr. p. 650, lines 4-15). Wallace unloaded the car of guns, drugs and money, and they changed their shirts. (Tr. p. 650, line 24 – p. 651, line 24). Wallace's friend Kimberly Cox picked them up, taking Diggs back to work at the chicken farm. (Tr. p. 612, lines 7-11; Tr. p. 653, lines 7-12). Cox and Wallace then ran some errands around Broad River Road, ending up at the Burlington Coat Factory. (Tr. p. 613, lines 6-24).

Back in the woods, Weston opened her eyes, took stock of her physical condition and walked out to the nearest road. (Tr. p. 952, line 21 – p. 953, line 6). A farm worker in a Jeep saw Weston "waving her hands covered in blood" and he picked her up to take her to the hospital. (Tr. p. 166, line 2 – p. 167, line 4). Weston told him that she had been shot by William Wallace and that there were two other victims at her Garners Ferry Road apartment. At the time, she did not know Diggs' name. (Tr. p. 953, lines 9-25). The Jeep's driver called 911 and was successful in flagging down a passing Sherriff's Deputy, who rendered roadside assistance until an ambulance arrived. (Tr. p. 168, line 18 – p. 169, line 7). Weston also told the Sherriff's Deputy that Wallace had shot her. (Tr. p. 180, lines 18-24).

Based upon information gleaned from Weston, law enforcement responded to the Garners Ferry Road apartment. (Tr. p. 724, lines 17-25). Corporal Robert Moreland led the entry into the apartment, unlocking the door and leading law enforcement in clearing

the apartment. (Tr. p. 277, lines 3-23; Tr. p. 279, lines 8-25). They first found a victim in the back bedroom straight down the hallway . . . leaning back against the bed." (Tr. p. 280, lines 4-14). The nonresponsive victim appeared to have suffered a gunshot wound to the head; he made "a death gurgle." (Tr. p. 280, lines 14-24). The second victim was found "lying face down in the bathroom. He also had the death gurgle . . . ." (Tr. p. 281, lines 4-10).

At the hospital, Weston was lucid despite sustaining gunshots in the head and arm. She made positive photo-lineup identifications of both Wallace and Diggs from a gurney. (Tr. p. 399, line 1 – p. 400, line 25; Tr. p. 954, line 22 – p. 959, line 4). Weston underwent a successful surgery to remove and repair three gunshot wounds to the head and a fourth to an arm; she testified to the entirety of her experience at trial.[1] (Tr. p. 493, line 3 – p. 496, line 5).

The other two victims, Johnson and Pratt, each suffered gunshot wounds to the right side of the head resulting in irreversible brain damage and death. (Tr. p. 489, line 5 – p. 491, line 11; Tr. p. 531, lines 1-3). Johnson suffered a graze wound to the back of his head in addition to the fatal shot. (Tr. p. 523, lines 1-16). Stippling evident on each victim's head indicated that the shots were fired downward from a distance of only one-to-two feet. (Tr. p. 510, line 18 – p. 522, line 10; Tr. p. 528, line 21 – p. 529, line 6; Tr. p. 530, lines 21-23).

Richland County Fugitive Task Force simultaneously worked to locate William Wallace, seeking assistance from SLED. (Tr. p. 301, line 11 – p. 302, line 20). Special

[1] Diggs also testified in great detail to the entirety he and Appellant's involvement. (Tr. pp. 618-96).

Agent Diego Nova of SLED's fugitive unit received the call from Richland County and submitted an exigent form to T-Mobile in order to obtain Wallace's cell phone records. (Tr. p. 451, line 9 – p. 452, line 23; R. pp. *, State's Exhibit 86). Nova received real-time call information which placed Wallace "somewhere around the Bush River Road area" near "Dutch Square Mall." (Tr. p. 455, lines 2-25; R. pp. *, State's Exhibit 87). Law enforcement assigned to Wallace's apprehension were radioed to that area and "were able to see Mr. Wallace coming out of Burlington Coat Factory." (Tr. p. 456, lines 12-25). Wallace was apprehended on Bush River Road, where the Fugitive Task Force was "told over the radio basically to go to this area, fan out and start looking for the Crown Vic" that they believed Wallace to be driving. (Tr. p. 303, line 6 – p. 306, line 14).

A few days later on July 3, 2012, Investigator Michael Laurita responded to a call to Tashonda Toatley's residence off of Rosewood Drive, where he recovered a Hi-Point nine millimeter handgun from underneath her mattress. (Tr. p. 247, lines 10-22). Toatley called to report finding the firearm after receiving "several phone calls from Mr. Wallace's family where they were telling her that they had to come over to her house to retrieve something of Mr. Wallace's," and searching her house for a reason why. (Tr. p. 263, lines 19 – p. 264, line 2; Tr. p. 700, lines 1-25). She recalled Wallace visiting her apartment on June 28, 2012. (Tr. p. 699, lines 3-24). She let him inside unattended and told him to lock the door on his way out. (Tr. p. 264, lines 2-8). That nine millimeter Hi-Point recovered from underneath Toatley's mattress ultimately conclusively tested as a match for the gun that fired the bullets retrieved from Johnson and Pratt's heads. (Tr. p. 884, line 21 – p. 885, line 14; Tr. p. 887, lines 9-25).

At trial, the cell phone records obtained pursuant to the exigency request corroborated the testimony of other witnesses, including that of Weston and Diggs. Richland County Captain Scott McDonald testified that according to Appellant's call T-Mobile call records and corresponding cell tower coordinates, Appellant first called Diggs on the morning of the murder during the 8:00 AM hour. (Tr. p. 1007, line 11 – p. 1009, line 15). Appellant made that call near the location where he dropped his Aunt off at work that morning. (Tr. p. 1009, lines 13-22). The next "significant" call McDonald testified to came from the area near the chicken farm where he next picked Diggs up from work. (Tr. p. 1010, line 20 – p. 1011, line 5). Appellant's next phone calls came between 10:00 AM and 12:00 PM near the Garners Ferry Road apartment complex late in the morning, placing him at the crime scene. (Tr. p. 1011, lines 21-25; Tr. p. 1014, lines 1-7).

ARGUMENT

I. The trial court properly refused to suppress Appellant's T-Mobile records where there was no Fourth Amendment Violation. Exigent circumstances required law enforcement to obtain those records without a search warrant for the purpose of locating and apprehending Appellant, who was armed and dangerous. Also, no search warrant was needed because Appellant held no legitimate expectation of privacy in T-Mobile's business records.

Appellant's Suppression Motion

Following jury selection, defense counsel moved to suppress an exigency request and T-Mobile records. (Tr. p. 106, lines 2-9; Tr. p. 106, line 24 – p. 107, line 4). SLED served the exigency request on T-Mobile while attempting to locate and apprehend Appellant on the afternoon of the incident.[2] (Jul. 31 Tr. p. 27, line 23 – p. 28, line 8; Jul. 31 Tr. p. 10, lines 15-20; Jul. 31 Tr. p. 11, lines 12-18). The trial court previously ordered the State to turn over "the exigency order and any records obtained from T-Mobile" to the defense based upon those records' relevance in placing Appellant at or near the incident location at the time of the crimes. (Jul. 31 Tr. p. 39, lines 15-24). The State intended to use those cell phone coordinates as circumstantial evidence at trial. (July 31 Tr. p. 38, lines 15-22).

In support of suppression, defense counsel argued that at the time of the request to T-Mobile, law enforcement did not possess any information constituting exigent circumstances sufficient to justify SLED's circumventing the warrant requirement. Counsel argued that the following did not meet the exigency requirement: (1) the

[2] Evidence in the record indicates that Appellant wore an ankle monitor as part of a probationary requirement. The extent to which law enforcement may have utilized that GPS monitor to locate Appellant in place of, or in addition to, the real-time T-Mobile records, that information was properly excluded from the trial record. (Jul. 31 Tr. p. 18, line 20 p. 19, line 2; Jul. 31 Tr. p. 167, lines 12-20).

apartment complex manager's testimony that on the date of the incident, law enforcement said she could report to her tenants that no ongoing threat existed; (2) that there were three victims with gunshot wounds to the head; (3) that two victims were in the process of dying; (4) and that the third victim had identified Appellant as the shooter. (Tr. p. 109, lines 1-19; Tr. p. 114, line 1 – p. 117, line 14). Additional testimony was taken from Richland County Captain Scott McDonald who testified that he "translated . . . the facts of the crime as [he] knew them at that time" to another officer who would then seek SLED's assistance. McDonald testified that he relayed the following facts in support of the exigent request: (1) the suspect was armed and dangerous; (2) three people were shot; (3) two were "gravely" wounded; (4) the suspect "was a threat to the community"; and (4) they "needed to get him off of the streets A.S.A.P." (Tr. p. 119, lines 1-14). The trial court added yet another reason: "that he was out on the run." (Tr. p. 119, line 15).

Defense counsel furthered that the "emergency" listed on the exigent circumstances request form did not match the facts known at the time the request was made. (Tr. p. 114, line 16 – p. 115, line 11; R. pp. *State's Exhibit 86). That form reads: "suspect is armed and dangerous, has shot/killed one victim [and] struck female victim on the head with handgun. Escaped and is threatening the life of surviving victim and family." (R. p. *State's Exhibit 86).

The trial court denied the motion to suppress, articulating:

> As to the exigency request, I don't believe there is enough evidence in the record to determine that the exigency request was not appropriate. The testimony of a witness who says that some deputy told her what was going on doesn't fully encompass the exigency circumstances based upon the information contained in the exigency request and the lack of any evidence to the contrary as to what was in Agent Nova's mind at that time.

(Tr. p. 133, lines 12-22).

At trial, Agent Nova testified that he submitted the exigency request form in "a life and death situation" as an alternative to obtaining a search warrant.[3] (Tr. p. 451, lines 18-25). Nova then testified that he served the exigent form on T-Mobile via fax, and that T-Mobile complied with providing records including "a tower and a sector or a GPS coordinate latitudes and longitude where the [defendant's] device is located." (Tr. p. 452, line 17 – p. 453, line 24). Next, the cell phone records were introduced into evidence over defense counsel's renewed objection.[4] (Tr. p. 454, lines 2-22).

Nova testified that he forwarded the T-Mobile records to Richland County, and that the real-time locations assisted him in locating and Petitioner for purposes of apprehension. (Tr. p. 455, lines 2-14). Later during the State's case at trial, Chief McDonald testified that Appellant's cell phone records placed him at the Garners Ferry Apartment crime scene between 10:00 AM and 12:00 PM. (Tr. p. 1011, lines 21-25; Tr. p. 1014, lines 1-7).

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."

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[3] Upon the State's introducing the exigent form, defense counsel initially renewed its objection, which the court overruled, and which defense counsel ultimately withdrew. (Tr. p. 452, line 24 – p. 453, line 11).

[4] Appellant renewed this objection at each relevant point during trial, and again at the close of evidence. (Tr. p. 775, lines 11-23; Tr. p. 999, lines 14-21; Tr. p. 1000, lines 1-20; Tr. p. 1074, lines 9-16).

State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

More specifically, "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." *State v. Provet,* 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence [in the record] to support the ruling." *State v. Wright,* 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011); *see State v. Tindall,* 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

A. Appellant's T-Mobile records were admissible because they were obtained through a valid application of the exigent circumstances exception to the search warrant requirement.

The Fourth Amendment's prohibition of unreasonable search and seizure requires that evidence seized in violation of that Amendment be excluded from trial. *State v. Khingratsaiphon,* 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (citing *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1961)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown,* 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (internal citation omitted).

"Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *State v. Herring,* 387 S.C. 201, 210, 692 S.E.2d 490, 494-95 (2009) (citing *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507(1967)). The warrant requirement "may be overcome when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King,* __ U.S. __,

__, 131 S.Ct. 1849, 1856 (2011) (quoting *Mincey v. Arizona,* 437 U.S. 385, 394, 98 S.Ct. 2408, 2414 (1978)).

> "Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Id. at 1861-62 (holding exigent circumstances rule applies when police do not create the exigency by engaging or threatening to engage in conduct violative of the Fourth Amendment) (quoting *Hoffa v. United States,* 385 U.S. 293, 310, 87 S.Ct. 408 (1966)).

Thus, evidence may be admissible if obtained without first securing a search warrant when the State meets its burden of establishing the existence of (1) probable cause and (2) circumstances constituting an exception to the general prohibition against warrantless searches and seizures. *State v. Gamble,* 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013) (citing *State v. Moore,* 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008)).

The circumstances of Appellant's identification and apprehension undeniably satisfy the exigency exception. First, probable cause existed to pursue Appellant as the shooter. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Wortman v. City of Spartanburg,* 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). At the time of the exigency request's issuance, law enforcement had direct knowledge from Weston, a surviving victim and eyewitness, that it was Appellant who shot Johnson and Pratt. Furthermore, Weston was present when Appellant directed co-defendant Diggs to shoot and kill her,

even though she did not learn Digg's name until after the crimes' completion. Weston articulately identified Wallace both at the time of her roadside recovery and again at the hospital. Based upon that information, law enforcement immediately departed to the apartment Weston identified. There, they found the two victims left in the grave condition, just as Weston had pinpointed. Because Weston provided accurate, articulable facts describing the crimes committed, probable cause also existed to pursue Appellant, whom Weston demarcated as the shooter.

Second, Appellant remained at-large at the time the exigent request was made and by all indications was armed, a threat to law enforcement, and a threat to the community at large. Specifically, the exigent circumstances exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate recognizes that "warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *State v. Brown*, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942 (1978)).

> The United States Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. *Brigham City, Utah v. Stuart,* 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement. *Schmerber v. California,* 384 U.S. 757, 770–771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. *Johnson v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Protecting the safety of police officers has also been held an exigent circumstance. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

> A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

State v. Herring, *supra* at 210, 692 S.E.2d at 494-95.

In *Herring,* our state Supreme Court held that exigent circumstances justified an officer's looking through a lit window in a suspect's garage in the early morning hours where that officer knew the suspect's identity, residence, vehicle make and, and license tag number. *Id.* at 210-11, 692 S.E.2d at 495. In that case, "[p]olice officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon." *Id.* The court's rationale focused on the objective reasonableness of that officer's need to see if the suspect was in the garage in order to "protect his own safety, and the safety of the officers around him.

In *Riley v. California,* __ U.S. __, 134 S.Ct. 2473 (2014), the United States Supreme Court opined: "To the extent that a search of cell phone data might warn officers of an impending danger, *e.g.*, that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances." *Riley* at 2478. *Riley* further cites to *Missouri v. McNeely,* 569 U.S. __, __, 133 S.Ct. 1552, 1561-62 (2013), for the proposition that law enforcement may be able to rely upon exigent circumstances in making a case-by-case determination of impending danger or imminent destruction of evidence as a reason "to search the phone immediately" without first obtaining a warrant. *Riley* at 2487.

The specific discussion of cell phone data found within *Riley,* however, is not

persuasive in the manner argued by Appellant. *Riley* explicitly dealt with the seizure of a suspect's cell phone and a warrantless search of the cell phone's actual contents. *Id.* The United State Supreme Court's analysis in *Riley* therefore only relates to the governance of warrantless searches and seizures of property found on or near an arrestee. *Riley's* distinct application to the present case is inapposite—Appellant's issue on appeal concerns the pre-arrest accumulation of real-time cell phone coordinates directly from the service provider for purposes of apprehension. The actual technological contents of the cell phone are not at issue.

Respondent submits that the present case indeed aligns with *Riley's* dicta excerpted above, and even more closely aligns with the reasoning evident in *Herring.* Law enforcement was moving quickly and with reliable information from a surviving victim. Chief McDonald testified to a simultaneous dispatching of officers. First, they arrived at the location of Weston's rescue on Beckham Swamp Road. Then, gleaning probable cause from Weston that Appellant was involved as a suspect, McDonald dispatched officers to the Garners Ferry Road apartment as well as initiating outside attempts to physically locate Appellant. (Tr. p. 996, line 1 – p. 997, line 10). As stated in the exigent request form, law enforcement had information to believe Appellant was armed and dangerous. He had gone after three victims in a violent manner. (R. p. *State's Exhibit 86). There existed reason to consider Appellant may be on the run, attempting to discard evidence of the crimes, or pursuing additional criminal activity. The possibility of Appellant undertaking additional injury was made more likely if Appellant learned that Weston had survived. Law enforcement had ample reason to act hastily given these circumstances, wherein additional lives may have been endangered. They also had

additional reason to fear for their own safety in apprehending him.

When viewing these facts utilizing guidance found in *Herring, inter alia*, law enforcement possessed ample justification to seek out Appellant's real-time T-mobile records without first obtaining a warrant. *See also State v. Abdullah,* 347 S.C. 344, 592 S.E.2d 344 (2004) (exigent circumstances justified warrantless search of premises following suspect's arrest where officers responded to report of ongoing burglary and gunfire and where search furthered immediately necessary "dual goals of securing the scene against perpetrators and facilitating assistance to possible victims").

B. The records are admissible because the Fourth Amendment does not apply to requests for business records promulgated by T-Mobile

Appellant contends that by summoning his T-Mobile records directly from the cell phone provider without first obtaining a warrant, it constituted an illegal search. To even reach an analysis of whether exigent circumstances allowed SLED to obtain to records without a warrant, however, it must be determined that SLED's request was a search for purposes of the Fourth Amendment's application. Respondent submits that SLED's obtaining those records was not a search.

In this Court's February opinion, *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015), it was established that a defendant has no reasonable expectation of privacy in the historical cell site location data obtained without a warrant from his cell phone carrier:

> 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,* ——U.S. ——, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (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, 121 S.Ct. 2038, 150 L.Ed.2d 94 (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* [*United States v. Graham,* 846 F.Supp.2d 384, 389 (D.Md. 2012)] (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").

State v. Drayton, 411 S.C. at 549, 769 S.E.2d at 262-63, *reh'g denied* (Mar. 19, 2015).

Agent Nova sought Petitioner's "48 hour subscriber, cell site, historical information and GPS Locator" directly from T-Mobile in his exigent request form. (R. p. *State's Exhibit 86). Where Appellant cannot make a threshold determination of a legitimate expectation of privacy in connection with the business records obtained without a warrant, *Drayton* dictates that Appellant was not actually subject to any warrantless search which he now challenges. *See id.* Thus, Appellant is not entitled to relief on this issue.

C. Any error in the trial court's failure to suppress the introduction of the cell phone records is harmless because the records merely corroborated other compelling and overwhelming evidence of Appellant's guilt.

Admission of erroneously seized evidence may be harmless error. *State v. Herring, supra* at 215, 692 S.E.2d at 497. The error will be deemed harmless where

Appellant's "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Gillian,* 373 S.C. 601, 610, 646 S.E.2d 872, 876 (2007). A determination of harmless error requires a consideration of the case's particular facts and other various factors including, *inter alia*, whether testimony was cumulative and the presence or absence of corroborating testimony. *State v. Clark,* 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994).

A survey of the direct and circumstantial evidence demonstrates that the State presented a case-in-chief demanding a jury to return a verdict of Appellant's guilt beyond a reasonable doubt even absent the cell phone records' admission. Considering the compelling testimony of surviving victim Weston alone, the jury was presented with enough eyewitness evidence to find Appellant guilty of each crime charged. As to Weston being shot by Diggs at the direction of Appellant—Diggs admitted the totality of his actions from the witness stand. The jury deliberated, finding Wallace responsible for Weston's attempted murder under the theory of the hand of one is the hand of all.

Moreover, the cell phone records were merely cumulative and fully corroborative of earlier witness testimony. McDonald's trial testimony utilized the cell phone records to show that on the morning of the murders, Appellant first dropped off his aunt at work at a location near the intersection of Two Notch Road and Beltline. (Tr. p. 1009, lines 12-22). That aunt, Vernell Wallace, had already testified that Appellant drove her white Buick LeSabre to drop her off at work "off Two Notch Road" around 8:00 that morning. (Tr. p. 415, line 18 – p. 415, line 6). Next, McDonald testified that Appellant made a phone call shortly before 9:00 AM which placed him near Digg's workplace. (Tr. p. 1010, line 21 – p. 1011, line 5). Diggs testified that Appellant picked him up from work shortly after

Diggs clocked in; Diggs usually clocked in around 8:20 AM. (Tr. p. 623, line 16 – p. 624, line 23). The next phone calls show Appellant traveling closer to the Garners Ferry Road crime scene, where phone records showed that he remained between 10:00 A and 12:00 PM. (Tr. p. 1011, line 9 – p. 1012, line 2). This is consistent with Digg's testimony as well. (Tr. p. 625, line 9 – p. 626, line 7). Weston also testified that she received Johnson's "bring the money and hurry up" phone call between 10:00 and 10:30 AM. (Tr. p. 937, line 16 – p. 938, line 5).

There can be no error warranting reversal where the complained-of evidence merely corroborates other testimony put forward by the State, and where the totality of the evidence against Appellant is so complete that no other rational conclusion can be reached.[5]

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant's convictions and sentences for murder, attempted murder, kidnapping and armed robbery.

Respectfully submitted,

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[5] Though not argued below, the cell phone records are also admissible pursuant to the inevitable discovery doctrine. *State v. Spears,* 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). As delineated above, substantial probable cause existed with which law enforcement could have obtained a warrant for the real-time records. Accordingly, "the evidence would have been found subject to the valid search warrant" regardless of the exigent request. *Id.* at 484, 713 S.E.2d at 334.

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August 7, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 07 2015
SC Court of Appeals

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIAM ANTHONY WALLACE,

Appellant

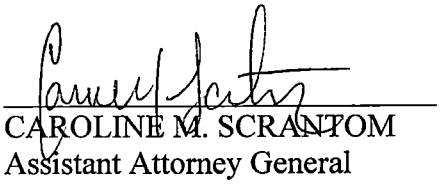
Appellate Case No. 2014-001786.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Katherine H. Hudgins, Esq.
SCCID/Division of Appellate Defense
1330 Lady Street, Suite #401
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 7th Day of August, 2015.



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