STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2014-000766

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THE STATE,

Respondent,

vs.

DEVIN JOHNSON,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Rules**



**Other Authorities**

## APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. In violation of Appellant's state constitutional right to privacy and the Fourth Amendment to the United States Constitution, did the trial judge err in admitting text messages and historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where the search warrant failed to establish a nexus between Appellant's cell phone records and the crime and the warrant was overly broad?

II. Did the trial judge err in admitting Appellant's statement to a police officer where the statement was not given knowingly, intelligently, and voluntarily in light of the totality of the circumstances, including the officer's repeated refusal to permit Appellant an opportunity to smoke a cigarette, the officer's statement that cigarettes were for cooperators, and the officer's statement that non-cooperators got prison, not cigarettes?

III. Violating Appellant's right to due process of law, did the trial judge err in instructing the jury concerning "the hand of one is the hand of all" after the jury began deliberating where the evidence did not support the instruction?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Even though the Fourth Amendment did not require a warrant for his subscriber information or the historical cell service location information, whether the trial judge's finding that there was probable cause to issue a search warrant for Appellant's text messages and the historical cell service location information obtained from Appellant's cellular service provider was not clearly erroneous? And whether Appellant's arguments based upon S.C. Const. art. 1, § 10 are not preserved for appellate review, since he failed to present the same arguments to the trial judge?

II. Did the trial judge abuse his discretion by finding that Appellant's June 10, 2011 custodial statement was freely and voluntarily given where the totality of the circumstances was that neither the interviewing officers' refusal to provide Appellant a cigarette nor the officers' statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," caused his will to be overborne and rendered his statement involuntary?

III. Did the trial judge deny Appellant a fair trial by instructing the jury on accomplice liability after the jury had begun deliberating where 1) there was sufficient evidence of accomplice liability in the record to support the State's request-to-charge on this theory, which was originally denied by the trial judge but should have been given; (2) a question from the jury rendered an instruction on accomplice liability appropriate based upon the evidence presented to it, (3) Appellant clearly was not prejudiced by the instruction, since it precluded the jury from convicting him based upon a finding that he was merely present; and (4) the trial judge could not

have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated S.C. Const. art. v, § 21?

**ADDITIONAL SUSTAINING GROUND**

Did the trial judge err by initially denying the State's request-to-charge on accomplice liability because that theory was supported by the record?

## STATEMENT OF THE CASE

Appellant, Devin Jamel Johnson, # 359432 (Appellant)[1] is confined in the South Carolina Department of Corrections (SCDC) as the result of his Charleston County murder conviction and sentence for murdering Akeem Smalls. The Charleston County Grand Jury indicted him on September 12, 2011, for murder (2011-GS-10-5207) and possession of a firearm during the commission of a violent crime (2011-GS-10-5208). **R. pp. 694-695; 697-698**. Beattie Butler and Rhett Dunaway, of the Charleston County Public Defender's Office, represented him in the trial court. Assistant Solicitors Chad Simpson and Drew Evans, of the Ninth Circuit Solicitor's Office, prosecuted him. Appellant received a jury trial before the Honorable R. Markley Dennis, Jr., on March 31 - April 3, 2014. The jury convicted him of both charges. **R. pp. 583-584.** Judge Dennis sentenced him to thirty-six years imprisonment for murder and to a concurrent five years imprisonment for possession of a firearm during the commission of a violent crime. **R. pp. 685, lines 8-14. Sentencing Sheets (R. pp. 696; 699)**.

Appellant timely served and filed a notice of appeal.

## STATEMENT OF FACTS

In June 2011, Appellant lived with Tenika Elmore in Orangeburg, South Carolina. She was gainfully employed in Charleston, but he was unemployed. Appellant's sister, Charmaine Johnson, lived in a Charleston apartment complex. The victim, Akeem Smalls, was her boyfriend. Also, Appellant spent time there when he and Tenika were broken up. Appellant had loaned the victim roughly $400.00, in April or May of 2011. **R. pp. 118-124; 125; 234**.

[1] While Appellant's brief does not use his full name, Respondent has used his full name because this is how he was indicted. Also, the SCDC inmate locator reflects that there are two men incarcerated in SCDC with the name "Devin Johnson" and the use of his full name avoids the potential for confusion. *See* http://public.doc.state.sc.us/scdc-public/.

On the morning of June 8th, Appellant drove Tenika to work in North Charleston before 11 a.m., in her 2008 blue Toyota Camry. Her car had the specialty license plate, "L-1207" and it was missing a hubcap. After he dropped her off at work, he had the car for the remainder of the day.[2] He did not return to pick her up, until 11:15 p.m. He was fifteen minutes late, and this upset Tenika. Appellant, who was wearing a white "wife beater" or tank top shirt and dark jeans, did not appear shaken, upset or rattled. Instead, he was "his same old jokey self." From there, they drove to Summerville and picked up Appellant's daughter. After stopping to buy gas, they went to their Orangeburg home. **R. pp. 126-141**. State's Ex.s 67-68. [3]

On the night of June 8th, DeAngelo Buncum went to visit friends in Building E of the apartment complex in question. Upon arriving at the complex, he saw his close friend, the victim, on the second floor of Building C. The two talked and drank on the porch, for three or four minutes, while the victim worked on a music CD. Eventually, Buncum left Smalls' apartment and went to an apartment in Building E to visit other friends. Sometime later, Buncum saw flashlights moving around outside of the apartments and went out to investigate. He saw police officers, who informed him that the victim had been shot. **R. pp. 169-171; 416-421; 425-426**.[4]

Robert Holmes, another close friend of the victim, testified that Appellant contacted him approximately two days before the murder, which was after the victim had stolen "his stash."

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[2] Tenika did not know where he would go when he dropped her off, but he often went either to Charmaine's apartment in Charleston, or to either Walterboro or Summerville. **R. p. 130**.

[3] In the hour that it took them to get home, Appellant did not tell her of anything startling that happened that day. Tenika learned about the victim's murder on June 9th, and Appellant acted as if this was the first time he heard about it. **R. pp. 139-142**.

[4] When Buncum learned that police were looking for him in connection with the murder, he voluntarily surrendered and gave a statement. Both he and his mother cooperated with the investigation because he was not involved in the murder. **R. pp. 421-433**.

Holmes corroborated that to "wet somebody up" meant to kill them. **R. pp. 155-159**. Contrary to Tenika's testimony at trial, she also told Sgt. Osborne that the expression "to wet someone up" meant to shoot or kill someone. **R. pp. 152-155**.

Charleston City Police Department Officer Matt Jahngen, who responded to the dispatch for gunshots fired on the night of the 8th, found the victim lying on his back on a table, in a lot near the apartment complex. Although still conscious, he had obviously been shot,[5] and he was unresponsive to questions. He had a "significant amount of blood on his upper body, his face and his arms." Also, he had removed all of his clothing, except for his boxer shorts and socks. **R. pp. 160-166**. The Department's crime scene investigators found four fired 9 mm. Luger shell casings and blood drops in the entrance of the hallway for Building C. In the parking lot outside of the building, they found one of the victim's black Nike sandals under a car door. They ultimately found that the trail of blood drops led from the area of the shooting, to and through other Buildings D and E, and into the parking lot. The drops were also an air conditioning unit outside of E. They found bullet fragments in Building D. **R. pp. 168-186**.

Sgt. Osborne collected copies of the apartment complex's surveillance video on the 9th. Although the murder was not caught on video, the videos from "the office, C and D, in between Building C and D and in between Buildings D and E" provided important evidence against Appellant. (State's Ex. 55). In reviewing the videos, Sgt. Osborne discovered that while the videos had consistent time stamps on them, the time stamp was eight minutes slower than real time. Using the videos, police determined that the murder occurred at approximately 10:18 p.m.

[5] The forensic pathologist who performed the autopsy opined that the victim died from a gunshot wound to his back. The bullet entered the middle of the victim's back, just to the left of center. It then traveled through the posterior aspect of the back side of the left sixth rib and continued through the lobes of the left along before exiting the front of the victim's body through the first rib and collarbone. The bullet exited on the upper, left side of the chest. **R. pp. 211-213**.

(or 10:10:30 video time) because the victim is seen running out of Building C shortly after that time. Moments later, another camera shows him running across the parking lot between Buildings D and E, which was consistent with the blood trail that had been found. The office camera shows a car that was missing the rear passenger hubcap backing into a parking space at 10:15:55 p.m., which would enable the driver to make a fast exit.[6] Two men are seen getting out of this vehicle and walking toward the far end of Building C, where the murder occurred. Within fifteen or sixteen seconds of the shooting, both men are seen running back to the car, getting into it and quickly driving out of the complex. The driver was wearing a White tank top and black pants, supposedly over his head. **R. pp. 236-254**.

Police spoke with Tenika on the 10th and she was cooperative with them. **R. pp. 257.** Police located and arrested Appellant, with the aid of the U.S. Marshal's Task force, in Orangeburg. He gave a statement on June 10th. In the portion of his statement that was played for the jury, he repeatedly denied being in Charleston for several hours. When he finally admitted that he had gone to the Charleston apartment complex, he claimed that he had gone to get his clothing from his sister.[7] A "friend," whom he identified only as "Creep," was with him. As they walked to his sister's apartment, Appellant claimed that he saw a dark-skinned black man fire gunshots. Scared, he and Creep ran back to the car and left. He dropped Creep off and later picked up Tenika at her job. **R. pp. 262-285, line 23;** State's Ex. #56. On June 14th, a crime scene investigator found a Luger 9 mm. bullet in a drawer of a nightstand in Charmaine's apartment. **R. pp. 200-202**. Appellant's fingerprint was on this bullet (State's Ex. 53). **R. pp. 207-208; 410**.

[6] The car in the video was consistent with Tenika's car. **R. pp. 249; 258-259**.

[7] He could not give a credible explanation for why he did not park near her apartment.

Appellant's Verizon Wireless cell phone records (State's Exs. 57-58) reflected that he had telephoned Smalls on June 4, 2011, or four days before the murder. Also, he called his sister, Charmaine, at 9:30 p.m. on the night of the murder. **R. pp. 369-372; 379**. Additionally, there were a series of text messages between Appellant and a Terry Stevens on June 8th. At 12:08 p.m., a text message from Appellant's phone to Stevens' phone read, "I gonna need that bread today, at least half." At 12:10 p.m., he texts, "I on my ass, bra, bra." At 12:15 p.m., he texts, "When dat go because I'm almost on E and my girl got to get to work rest of the week." At 1:30 p.m., Appellant asks, "What time you get off? I'm whipping. We can cool it." **At 4:37 p.m., he sends a text message, "hey, I go wet dude ass up tonight."**[8] At 4:44 p.m., he says, "Yeah I take you back to the Chuck," or Charleston. At 8:33 p.m., Appellant says, "Just bring your ass down here because I'll come down there before my 5 work." At 8:59 p.m., "I need you. When you gonna be home." Then, at 9:34 p.m., he tells Stevens, "I can't wait on you. I gotta handle my biz." State's Ex.s 59-60, & 69, **R. pp. 589**.[9]

The Verizon historical cell site location information relating to Appellant's cell phone (State's Ex.s #71, #72, #73, #74, #75) reflected that for most of June 8, 2011, his phone used cell sites in the Summerville and North Charleston area. The one anomaly was a call at 10:02 p.m., when the phone used a tower at the interchange of Cosgrove Road and 1-26. **R. pp. 401-402;** State's Ex. 74.

## ARGUMENTS

[8] Sgt. Craig Kosarko testified that he had previously heard the terms "wet somebody up" and "wet them up." These phrases meant "[t]o shoot somebody or kill someone." **R. p. 378**. Sgt. Jeff Osborne also testified that the phrase means "to shoot somebody. The Urban Dictionary listed five definitions for the phrase, the first three of which refer to killing someone. **R. pp. 291-294.** *See also* http://www.urbandictionary.com/define.php?term=wet+up.

[9] In addition to the prosecution's evidence, Appellant introduced a series of still photographs (Defendant's Ex.s 5-10) that had been taken from the apartment's video, which depict someone holding a cell phone less than two minutes before the victim was murdered. The State's theory was this was Appellant, and he argued that it was someone else because the records of his cell phone activity do not reflect him making or receiving any phone call at that time of the night. **R. pp. 321-325; 466-480**.

**I. Even though the Fourth Amendment did not require a warrant for his subscriber information or the historical cell service location information, the trial judge's finding that there was probable cause to issue a search warrant for Appellant's text messages and the historical cell service location information obtained from Appellant's cellular service provider was not clearly erroneous; and Appellant's arguments based upon S.C. Const. art. 1, § 10 are not preserved for appellate review because he failed to present the same arguments to the trial judge.**

Notwithstanding Appellant's attacks upon the trial judge's ruling, Respondent submits that the record supports the trial judge's finding that there was probable cause to issue a search warrant for Appellant's text messages and the historical cell service location information obtained from Appellant's cellular service provider. Moreover, the State obtained this warrant even though the Fourth Amendment did not require a warrant for his subscriber information or the historical cell service location information. Therefore, the trial judge's finding was not clearly erroneous. Further, Appellant's arguments based upon S.C. Const. art. 1, § 10 are not preserved for appellate review because he failed to present the same arguments to the trial judge. As a result, the trial judge's ruling must be affirmed.

**A. Appellant's motion to suppress, and the trial judge's ruling.**

On June 13, 2011, the Charleston City Police Department obtained two search warrants (Defendant's Ex. 1, **R. pp. 590-597**). One warrant was for Appellant's telephone, and the other warrant was for the records of his cellular provider for his telephone. The warrant for the phone lists the "description of property sought" as "any and all digital files to include but not limited to: history logs, tax messages, photographs, videos and contact list." **R. p. 592.** The warrant for the phone lists the "description of property sought" as "Subscriber information, account comments, but billing records, outbound and inbound calls from 06/4/2011 to 06/09/20114 [Appellant's cell phone], subscriber information on any other varieties and numbers listed in the report." **R. p. 594.**

The portion of the affidavits setting forth the "Reason for Affiant's Belief That The Property Sought Is On The Subject Premises" stated that:

> On 6-8-2011 at approximately 10:15 PM, while at the Georgetown Apartments located at ____ Orangegrove Road., Charleston, SC[,] CPD officers responded to a shots fired call. Upon arrival, officers found the victim, Akeem Moses Smalls with multiple gunshot wounds. EMS responded and transported Mr. Small's to MUSC. Where he later died. Prior to the shooting the victim had been in an ongoing dispute with D Devon Johnson (b/m, 8/21/83) that escalated to the shooting on the 2nd story porch of the apartment building. Devon Johnson was observed was observed by witness Shaoonnar Goff through her bedroom window moments after hearing the gunshots holding the firearm. Devon's family members provided investigators with his cell phone number of 843-217 – 3243. That, investigators believe the information contained in the cell phone will help further investigation.

**R. p. 592**. Additionally, the affidavit for the provider's records states that:

> Through experience and training, The Investigator knows cellular service providers maintain records related to subscriber information, account registration, billing and air time records, outbound and inbound call detail, correction time and dates, Internet routing information (Internet Protocol numbers) and message content, that may assist in the identification of person/s accessing and utilizing the account.
>
> The Investigator is request and subscriber information for any Sprint [(sic)] numbers listed therein.
>
> Through experience and training, The Investigator knows that the cellular service provider maintains records that include cell site information and GPS location. Cell site information shows which cell site a particular cellular telephone was within at the time of the cellular phone's usage. Some model cellular bones are GPS enabled which allows the provider and user to determine the exact geographic position of the phone. Further, the cellular service provider maintains cell site maps show the geographical location of all cell sites within its service area. Using this cell site geographical information or GPS information, officers would be able to determine the physical location of the individual using this cell phone number [for Appellant's phone.] [The] information is necessary to the investigating officers in order to investigate the crime. If it is possible, please email the results to the investigator in an excel format to Investigator Craig Kosarko....

**R. p. 595**.

Prior to trial, Appellant filed a motion to suppress evidence seized pursuant to these warrants. Defendant's Ex. 2, **R. pp. 598-604**, which was heard pretrial. At the hearing, Appellant noted that the Charleston Police Department obtained a warrant two days after interviewing Appellant. He conceded that the affidavits set forth probable cause that a crime had been committed. However, he suggested that "what's missing here in both of these search warrants is any nexus... [or] connection between the cell phone and the cell phone records and the crime itself." He further argued that in order to establish "probable cause", there must be (1) probable cause that a crime occurred, (2) probable cause that the suspect is involved, and (3) "probable cause that evidence of those 2 things, his involvement in the crime, will be found in the location to be searched." **R. pp. 50-52**.

In response, the State observed that Appellant's motion relied upon a 1979 decision that had since been repudiated by at least eleven other Circuit Courts of Appeals.[10] The State noted that Appellant told police, in his interview, that he was carrying his cell phone and that no one else was using it. The interview was before the warrant was issued. The State argued that the affidavit had sufficiently outlined probable cause, and that there was a sufficient nexus. **R. pp. 62-68.**

The State argued that the affidavit had sufficiently outlined probable cause, and that there was a sufficient nexus. Specifically, there was probable cause to believe that a crime had been committed, that Appellant committed the murder, and that at the time of the murder, he was

[10] The case relied upon by Appellant and referenced by the State is *United States v. Charest*, 602 F.2d 1015 (1st Cir. 1979). As discussed in the State's response to the motion to suppress, "this specific holding of the First Circuit has been summarily rejected, and the exact opposite established as the controlling rule of law, by almost every court to address it, including are controlling [Fourth] Circuit Court of Appeals." **R. p. 683.** *E.g.*, *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) (specifically rejecting *Charest* and holding "It was reasonable for the magistrate to believe that the defendant's gun . . . would be found in his residence"); *United States v. Jacobs*, 715 F.2d 1343, 1346 (9th Cir. 1983); *United States v. Sleeves*, 525 F.2d 33, 38 (8th Cir. 1975); *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir. 1973).

"utilizing a specific cell phone." Although the State felt that the warrant, itself, set forth probable cause, it noted that Sgt. Kosarko's supplemental report indicated that he had provided additional information to the magistrate that was not contained in the affidavit in support of the warrant. **R.pp. 68-70.**[11]

Sgt. Craig Kosarko, a member of the City of Charleston Police Department's violent crime unit, testified that he obtained the search warrants for Appellant's phone and phone records, Defendant's Ex. 1. One warrant was directed to Verizon, his cell phone service provider. This warrant was for "call detail records, the text messages, any and information that the carrier would have in their database. The purpose of the search warrant is to obtain that information and provide us with either a CD format or an email with that information." **R.pp. 77-80.**

The other search warrant was for the Police Department's digital evidence unit, which has a program that can be hooked up to a cell phone and retrieve all of the information on the phone in a "phone dump." However, this program was incompatible with Appellant's phone. **R.pp. 80**. Sgt. Kosarko explained that police "learned through his sister Charmaine and then his girlfriend, Tenika, that he was utilizing that phone number on the day of the murder. And when he was arrested, he was in possession of that cell phone." **R.pp. 79.**

The murder occurred on June 8, 2011 and the warrant was not issued until June 13th. By the time Sgt. Kosarko prepared the affidavit in support of the search warrant, Appellant had already given his June 10th statement to police. Sgt. Kosarko was present for that statement. He explained that he had met with the issuing magistrate and, after the magistrate had read the warrant, Sgt. Kosarko advised him of the specifics of Appellant's case. Specifically, he advised the magistrate that Appellant had been arrested; that police had interviewed both Appellant's girlfriend and his sister; that they have provided his cell phone number; that his girlfriend

[11] Sgt. Kosarko's supplemental report was marked for identification as State's Ex. 66 for ID. *See* **R. pp. 82-83.**

indicated that he had been using this phone on the day of the murder, including the time period of the murder; that he was in possession of the cell phone when he was arrested; that Appellant admitted to police in the interview that he had used a cell phone both before and after the murder; that he had also admitted in his statement that he was in Georgetown Apartments on the day of the murder and that he was "actually captured on video with another individual," whom Appellant had identified as "Creep." **R.pp. 82-87; 92-93.**

Sgt. Kosarko testified that the video obtained from the apartment complex reflected that Appellant was looking down at something in his hand that appeared to be a cell phone. Although Sgt. Kosarko did not think that he had provided this piece of information to the magistrate, he had told the magistrate that police were attempting "to identify Creep and that we believed that his cell phone would have information or contact information of Creep. That's what we were looking for" because Appellant had identified the other person with him that night as "Creep." **R. pp. 86-88; 91-93.**

Sgt. Kosarko further testified that he told the magistrate that police were also interested in the cell phone tower information because this information would give police Appellant's "whereabouts before, during and after the murder to help either substantiate or refute his interview with us." Thus, police were interested in this information as well. Sgt. Kosarko often provides a magistrate with information that is not contained in a search warrant, in order to convey as much information as possible. **R.pp. 88-90.** Finally, Det. Osborne had looked at the contact list on Appellant's phone before the warrant was obtained. However, none of the information that he viewed was utilized in support of the application for the search warrant. **R.pp. 93-95.**

Following Sgt. Kosarko's testimony, the State argued that, even if the four corners of the search warrant did not establish probable cause, the additional information provided to the magistrate by Sgt. Kosarko did support the finding of probable cause. The State also noted that it had cited a line of cases in the State's Response to Suppression Motion (Court's Ex. 1) that have held that a magistrate may make common sense assumptions about life as he knows it. The State further argued that it is common knowledge that people routinely carry cell phones and use them to store "a treasure trove of information," and that it was appropriate for the magistrate to consider this when deciding whether or not there was probable cause to issue a search warrant. Also, Sgt. Kosarko's testimony provided the nexus that Appellant claimed was necessary because the magistrate was made aware that Appellant had at cell phone, that he had in his possession on the day of the murder, including the time leading up to the murder, and that he admitted to using it that day. **R.pp. 97-98**.

Appellant claimed, however, that the nexus had not been established. In particular, he argued that "[m]aking cause does not allow them to get ... text messages. And that's really what we're concerned about is the text messages." He further observed that there was no indication that Appellant sent text messages "or any reason to think that he was sending tax messages." Additionally, he maintained that the warrant was overly broad and that police obviously were not looking for anything specific. **R.pp. 98-100**.

The trial judge stated that he understood the degree of specificity that Appellant claimed was necessary, but noted that subsequent cases had expanded the parameters of searches. The trial judge found that the information provided to the magistrate satisfied the requirement of probable cause under the totality of the circumstances. In particular, he noted that there was evidence that Appellant had been seen using this phone, that he had admitted that he was using

his phone on the day of the crime, and that Appellant claimed the other person with him was named Creep but that he did not know Creep's name. The trial judge found that the police were "certainly entitled to get that information,... to try to ascertain whether they could get a [potentially] very significant witness." The trial judge found that this was "good police work," and that Appellant's Fourth Amendment rights were protected by the search warrant. **R.pp. 100-101.**

## B. Discussion

### 1. Appellant lacked a reasonable expectation of privacy, under either the United States Constitution or the South Carolina Constitution, in either the personal subscriber information related to his phone or the cell site location records.

While the State submits that the trial judge properly found that there was probable cause to issue the search warrant in this case, it was unnecessary for the State to obtain a search warrant in order to acquire either the personal subscriber information related to Appellant's phone or the cell site location records from Verizon because Appellant did not have a reasonable expectation of privacy in this information.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures. It provides that no warrants shall be issued except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. iv. After *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967), "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 v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979) (citations to *Katz* omitted).

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, 96 S.Ct. 1619, 1624 (1976)[12] (holding that there was no reasonable expectation of privacy in bank records superseded by statute). It is clear that Appellant did not have a reasonable expectation of privacy in the subscriber information for his cell phone or the numbers dialed and the origin of calls received on it, as opposed to the contents of any conversation(s). *Smith*, 442 U.S. at 741-43, 99 S.Ct. at 2580-82 (telephone users generally had no subjective expectation of privacy in dialed telephone numbers).

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

[12] 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." *Id.* at 440, 96 S.Ct. at 1623. The records "pertain to transactions to which the bank was itself a party." *Id.* at 441, 96 S.Ct. at 1623. 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, 96 S.Ct. at 1624. 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, 96 S.Ct. at 1623.

collecting telephone numbers dialed from the listening device used in *Katz* to record "the *contents* of communications." 442 U.S. at 741, 99 S.Ct. at 2581 (emphasis in original). 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, 99 S.Ct. at 2581.[13]

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, 99 S.Ct. at 2582. (Internal quotation marks omitted).[14] Both the Supreme Court and lower federal courts have applied this same principle in a variety of contexts. *See, e.g., Hoffa v. United States*, 385 U.S. 293, 302, 87 S.Ct. 408, 413-14 (1966) (confidential statements made in the presence of an informant); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743, 104 S.Ct. 2720, 2725-26 (1984) (financial and other records in the hands of third-party businesses); *United States v. White*, 401 U.S. 745, 752-54, 91 S.Ct. 1122, 1126-27 (1971) (plurality opinion) (electronic surveillance of conversations between defendant and informant, by means of radio transmitter concealed on the person of the informant). *See also Donaldson v. United States*, 400 U.S. 517, 522-23, 91 S.Ct. 534, 538 (1971) (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

[13] The Court expressly distinguished collecting the listening device used in *Katz*. As in *Smith*, the contents of the "communications" were not disclosed by the obtaining of any information in this case, other than the information in Appellant's text messages..

[14] 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, 99 S.Ct. at 2582.

production of Acme's records and not the records of the taxpayer"); *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010) (defendant's ISP subscriber information that included the "physical address" of the defendant and IP addresses of websites); *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 billing 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).

In *State v. Drayton*, 411 S.C. 533, 547-50, 769 S.E.2d 254, 262-63 (Ct. App. 2015), this Court held that a defendant does not have a reasonable expectation of privacy in historical cell site location records.[15] This Court's decision in *Drayton* is consistent with the overwhelming majority of cases to consider the issue. *E.g.*, *In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Cell Tower Records Under 18 U.S.C. 2703(D)*, ___ F.Supp.3d ____, 2015 WL 1022018 (S.D.Tex., Mar. 9, 2015); *United States v. Skinner*, 690 F.3d 772, 777-78 (6th Cir. 2012); *United States v. Davis*, 785 F.3d 498, 513 (11th Cir., May 05, 2015) (en banc); *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

[15] The historical cell site location records may be obtained by an Order issued pursuant to The Stored Communication Act, 18 U.S.C. § 2703(d) (Supp.2014). The Act only requires a showing of "specific and articulable facts" for the issuance of an order. *Id. See also Drayton*, 411 S.C. at 547-48, 769 S.E.2d at 262.

prospective cell-site data).[16] *But see United States v. Graham*, ___ F.3d ____, 2015 WL 4637931, *8 (4th Cir. Aug. 5, 2015) ("We hold that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an *extended period of time*") (emphasis added); *accord id.* at 40 (Motz, J., concurring in part and dissenting in part) ("Three other federal appellate courts have considered the Fourth Amendment question before us. Not one has adopted the majority's holding. Two of our sister courts have expressly held, as I would, that individuals do not have a reasonable expectation of privacy in historical CSLI records that the government obtains from cell phone service providers through a § 2703(d) order").

Thus, a search warrant was not required for police to obtain the subscriber information for Appellant's cell phone; the numbers dialed and the origin of calls received on it; or the historical cell site location records because he did not have a reasonable expectation of privacy in this information, as opposed to the contents of any conversation(s). *Id. See also Smith*, 442 U.S. at 741-43, 99 S.Ct. at 2580-82. Appellant has not and cannot present this Court with any sound reason to reach a contrary result in his case.[17]

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[16] *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).

[17] Respondent notes that most of the arguments that he advances, FBOA at pp. 14-18, were not presented to the trial judge. As a result, they are not preserved for appellate review. See *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory in support of motion at trial and a different theory on appeal); *State v. McCray*, ___ S.E.2d ____, ___, 2015 WL 3875353, 8 (Ct.App. June 24,2015) ("we find this argument is not preserved for appellate review because it was not raised to or ruled upon by the circuit court").

Further, without conceding the point, Respondent assumes that Appellant had a reasonable expectation of privacy in the text messages he sent on his cell phone because a warrant supported by probable cause was issued in this case and it is not necessary to address this issue. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 759-60, 764-65, 130 S.Ct. 2619 (2010) (specifically declining to establish the scope of a government employee's privacy expectations in electronic communications but assuming that police officer had an expectation of privacy in text messages he sent from his city-provided pager, even though those messages were routed through and kept by a third-party service provider. The Court concluded that the search of Quon's pager was reasonable); *Riley v. California*, 134 S.Ct. 2473,

### 2. The record supports the trial judge's finding that there was probable cause to issue a search warrant for Appellant's text messages and historical cell service location information.

However, the police did obtain a search warrant before they acquired this information and, despite Appellant's contrary contention, Respondent submits that trial judge's finding that there was probable cause to issue a search warrant for Appellant's text messages and the historical cell service location information was not clearly erroneous because the record supports his finding.

In South Carolina, search warrants may be issued "only upon affidavit sworn to before the magistrate ... establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2003); *see also State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). 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 standard of "probable cause" is a " 'practical, nontechnical conception' " that deals with " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310 (1949)). It is "a fluid concept—turning on the **assessment of probabilities** in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232, 103 S.Ct. at 2329 (emphasis added).

As the Court explained in *Gates*:

> As early as *Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which

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2489-91 (2014) (discussing the privacy interests at stake in searches of cell phones by law enforcement and recognizing the user's expectation of privacy).

> warrant suspicion." More recently, we said that "the quanta ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar*, *supra*, 338 U.S., at 173, 69 S.Ct., at 1309. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." [*Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590 (1969)]. *See* Model Code of Pre-Arraignment Procedure § 210.1(7) (Proposed Off. Draft 1972); W. LaFave, *Search and Seizure*, § 3.2(3) (1978).
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> We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." [*United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1965)]. Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." *See Shadwick v. City of Tampa*, 407 U.S. 345, 348-350, 92 S.Ct. 2119, 2121–2122, 32 L.Ed.2d 783 (1972). The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly, ibid.—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties," *Stanley v. State*, 19 Md.App. 507, 313 A.2d 847, 860 (Md.App.1974), of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause.

*Gates*, 462 U.S. at 235-36, 103 S.Ct. at 2330-31. *See also United States v. Clenney*, 631 F.3d 658, 665 (4th Cir. 2011).

In determining whether there is "probable cause" to issue a warrant, the Fourth Amendment permits a magistrate to consider sworn testimony supplementing the affidavit in support of the warrant. *E.g*, *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990); *State v. Crane*, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988). *Frazier v. Roberts*, 441 F.2d 1224, 1226 (8th Cir. 1971); *United States v. Clyburn*, 24 F.3d 613, 617 (4th Cir. 1994); *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 482

(6th Cir. 2006). Warrants are not to be read in a negative or hyper-technical manner, and great deference should be accorded a magistrate judge's assessment of the facts in determining probable cause. *See Gates*, 462 U.S. at 236, 103 S.Ct. at 2331 ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts." .... 'A grudging or negative attitude by reviewing courts toward warrants' ... is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant 'courts should not invalidate ... warrant[s] by interpreting affidavit [s] in a hypertechnical, rather than a commonsense, manner' " ") (citations omitted).

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a **fair probability** that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *See Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332 (emphasis added). *See also State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) ("In reviewing a magistrate's probable cause determination, circuit court judges must determine whether the issuing magistrate had a substantial basis upon which to conclude that probable cause existed"); *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221.[18] "Under this formula, veracity and basis of knowledge are treated 'as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or

[18] *Accord State v. Herring*, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009); *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990). "The 'experience of a police officer is [also] a factor to be considered in the determination of probable cause.' " *State v. Dupree*, 319 S.C. 454, 459, 462 S.E.2d 279, 282 (1995) (quoting *United States v. Fisher*, 702 F.2d 372, 378 (2nd Cir. 1983)). *See also State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013) (recognizing the well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training) (citing *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004).

evidence is located in a particular place." *Gates*, 462 U.S. at 230, 103 S.Ct. at 2328; *State v. Philpot*, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995); *State v. Adolphe*, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994).

As a result, "[a] warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155. "The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." *Baccus*, 367 S.C. at 48, 625 S.E.2d at 220. Applying this standard to the facts of this case, the trial judge's ruling must be affirmed because the record supports the finding of probable cause.

When the affidavit in support of the warrant is considered together with Sgt. Kosarko's testimony concerning the information that he provided to the magistrate, the magistrate was informed that: (1) when officers responded to the Charleston County apartments, at approximately 10:15 p.m. on June 8, 2011, the officers found the victim, Akeem Moses Smalls, with multiple gunshot wounds; (2) the victim later died from these wounds; (3) the victim had been in an ongoing dispute with Appellant prior to the shooting; (4) Appellant had been observed by a witness, through her bedroom window, holding the firearm moments after the witness heard gunshots;[19] (5) Appellant had been arrested for the murder; (6) police had interviewed both

[19] As to all of the eyewitnesses and nonconfidential informants, generally, Respondent would note that "nonconfidential informants and eyewitnesses have more credibility than confidential informants." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 679 (2000). " '[E]vidence of past reliability is not usually required when information is provided by an eyewitness because, unlike the paid informer, the eyewitness does not ordinarily have the opportunity to establish a record of previous reliability.' " *State v. Thompson*, Op. No. 5341, *8 (S.C. Ct. App., Aug. 12, 2015) (quoting *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996)).

Moreover, this eyewitness's statement was admissible at trial, as an excited utterance under Rule 803(1), SCRE, although she did not testify. *See State v. Hendricks*, 408 S.C. 525, 759 S.E.2d 434 (Ct.App. 2014) (holding that the trial court acted within its discretion by admitting statement made by victim to her mother, in which victim reported details of a sexual assault and identified defendant as the perpetrator, as an excited utterance); *State v. Ladner*, 373

Appellant's girlfriend and his sister; (7) his girlfriend and his sister had provided his cell phone number; (8) his girlfriend indicated that he had been using this phone on the day of the murder, including the time period of the murder; (9) he was in possession of the cell phone when he was arrested; (10) he admitted to police, in the June 10th interview, that he had used a cell phone both before and after the murder; (11) he had also admitted in his statement that he was in the apartment complex on the day of the murder, and was "actually captured on video with another individual;" and (12) he had identified the other person as "Creep." **R. pp. 82-87; 92-93.**

The magistrate was also told that police were attempting "to identify Creep and that [police] believed that his cell phone would have information or contact information of Creep. That's what we were looking for" because Appellant had identified the other person with him that night as "Creep." **R.pp. 86-88; 91-93.** Police were also interested in the cell phone tower information because, utilizing the historical cell site location data, police could determine Appellant's "whereabouts before, during and after the murder to help either substantiate or refute his interview with us." **R.p. 90.**

It is common knowledge that people often keep a veritable "treasure trove of information" on cell phones. Based upon this common sense knowledge and the other information the State provided to the magistrate, it was reasonable for the magistrate to conclude that "there [was] a fair probability that contraband or evidence of a crime [would] be found in

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S.C. 103, 119-20, 644 S.E.2d 684, 692-93 (2007) (holding that "the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness", and explaining that a declarant's inability to testify at trial does not diminish the reliability of that declarant's excited utterance because "the intrinsic reliability of an excited utterance ... 'will normally remain undiluted by faulty memory, inability to understand questions or otherwise to communicate on the witness stand' "); *State v. Sims*, 348 S.C. 16, 23 n. 1, 558 S.E.2d 518, 522 n. 1 (2002) (finding declarant's statement in response to a question did not prevent his answer from being an excited utterance). Because the "the intrinsic reliability of an excited utterance derives from the statement's spontaneity[,] which is determined by the totality of the circumstances surrounding the statement when it was uttered," *Ladner*, 373 S.C. at 119–20, 644 S.E.2d at 693, the magistrate could rely upon this information as part of the totality of the circumstances supporting a finding of probable cause without further proof of the declarant's reliability.

[Appellant's cell phone, calls, text messages and/or historical cell site location information]." *See Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155. In other words, the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332. Rather than a violation of Appellant's constitutional rights, the trial judge astutely observed that this was "good police work" and that Appellant's Fourth Amendment rights were protected by the search warrant.

Moreover, Appellant's position is not supported by *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), *Baccus*, or *State v. Weston*, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). In *Smith*, the defendant moved to suppress a knife, allegedly used in the armed robbery of a Charleston, South Carolina, Master Inn motel that was seized pursuant to a search warrant from his room at a different motel. 301 S.C. at 372, 392 S.E.2d at 183.

The Court found that "[t]his affidavit is defective on its face." *Id.* at 373, 392 S.E.2d at 183. The Court explained that "the affidavit sets forth no facts as to why police believed Smith robbed the Master Host Inn. Although the record reveals that police relied upon information from an informant, there is no indication that this fact was made known to the magistrate, or that the magistrate made any determination of the informant's reliability." *Id.* As a result, the Court remanded the case for the trial judge to the trial court for a hearing to determine whether or not sufficient oral testimony was presented to the magistrate to support a finding of probable cause. *Id.*

The Court reached a similar conclusion with respect to the affidavit in support of the search warrant for the seizure of the defendant's automobile in *Weston*. The affidavit at issue in *Weston* stated that a Claude Crumlin was the victim of an armed robbery and assault with intent to kill on the night of March 18, 1994; that the defendant was a suspect in these crimes and was

the registered owner of the vehicle to be searched; and that a witness stated that the defendant was driving the vehicle at the time of the incident. *Id.* at 289, 494 S.E.2d at 802

The Court found that:

> the affidavit failed to set forth any facts as to why police believed Weston committed the Crumlin crime. The first three sentences of the affidavit were mere conclusory statements. While the fourth sentence provided information linking Weston to his car at the time of the incident, it offered nothing to link Weston or the Datsun to the Crumlin crime itself. Additionally, there was absolutely nothing on the face of the affidavit from which the ministerial recorder could have assessed the veracity and basis of knowledge of the informant. Therefore, based on the totality of the circumstances, we find the affidavit could not have provided the ministerial recorder with a substantial basis for finding probable cause to search Weston's car.

*Id.* at 291-92, 494 S.E.2d at 803.

Finally in *Baccus*, the Court found that the trial court erred by refusing to suppress evidence seized from Appellant's residence because the search warrant was not supported by probable cause. The search warrant sought clothing and forensic evidence possibly connected to the victim's homicide since the supporting affidavit failed to set forth any facts as to why police believed that the appellant had committed the crime. The supporting affidavit merely stated that at the time of the hiss arrest, officers viewed a pile of what appeared to be smoldering clothing lying on the ground beside the appellant's residence, and that the appellant's bloodstained vehicle was located a quarter mile from his residence. *Baccus*, 367 S.C. at 51-52, 625 S.E.2d at 221-222.

The Court concluded that the supporting affidavit failed to set forth any facts as to why police believed that the appellant had committed the murder because "[t]he language in the affidavit lacks specificity and contains conclusory statements. Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause for a search of [a]ppellant's residence, and the trial court erred in admitting evidence seized pursuant to the search warrant." *Id.* at 52, 625 S.E.2d at 222.

Contrary to these cases, the supporting affidavit in Appellant's case provided sufficient information for the magistrate that there was a homicide; that both Appellant and another person, "Creep," were linked to this offense; that the requested information was for Appellant's phone; that he had used the phone on the day of the murder, including both before and after the murder; and that he was still in possession of the phone at the time of his arrest.

Additionally, the State was attempting to locate the person whom Appellant claimed that he was with on the night of June 8th, Creep. This factor further distinguishes *Smith*, *Weston* and *Baccus*. It was reasonable to conclude that information leading officers to Creep's identity might be on the phone. As a result, the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332.

At trial, Appellant conceded that the affidavit set forth probable cause to believe that a crime was committed but suggested that "what's missing here in both of these search warrants is any nexus... [or] connection between the cell phone and the cell phone records and the crime itself." The problem with his argument is that the "nexus" requirement relates only to the nexus between the place to be searched and the relevant evidence for which the police are looking. "In determining where a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." *United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n. 6, 98 S.Ct. 1970, 1976-77 & n. 6 (1978)); *Anderson*, 851 F.2d at 729-30 (4th Cir. 1988) (observing that "[t]he Fifth, Sixth, Eighth, and Ninth Circuits have held that the nexus between the place to be searched and the items to be seized may be established by the nature of the items and the normal

inferences of where one would likely keep such evidence" and adopting that reasoning). Nevertheless, the State presented the nexus that he claims was necessary.

Because police obtained a warrant that was supported by probable cause, his reliance upon the United States Supreme Court's decision in *Riley v. California* is misplaced. In *Riley*, police conducted warrantless searches of the contents of the defendants' cell phones following arrest, as a search incident to arrest. The issue in *Riley* was whether the search incident to arrest exception, first articulated in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), overcame that privacy interest for the contents of an arrestee's cell phone. *Riley*, 134 S.Ct. at 2480-85. The Court determined that it did not because neither the interest in protecting the police officers' safety nor the interest in preventing the destruction of evidence justified dispensing with the warrant requirement before officers could search digital data on the arrestees' cell phones. *Id* at 2485-88, 2491-92. The concerns that the Court expressed in *Riley*, however, are absent in this case, since police obtained a warrant that was supported by probable before they acquired the information at issue.

Likewise, Appellant's reliance on *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") is misplaced. *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 by a magistrate, who found that probable

cause existed to issue the search warrants. 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 limited 5 day span of **records** and cell phone activity (as opposed to electronic monitoring of the defendant's movements for a protracted period of time without any judicial oversight, as in the GPS cases, would satisfy Justice Alito's concurrence in *Jones*, 132 S.Ct. at 957-64 (Alito, J., concurring), as would judicial review of the police action. *See Id.* at 949. These factors 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).

**3. Appellant's claims that article 1, § 10 of the South Carolina Constitution required suppression because it "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment" and because "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" are not properly before this Court on appeal because he did not present these arguments to the trial judge.**

Realizing that his motion to suppress lacks merit under the Fourth Amendment, Appellant claims that S.C. Const. art. 1, § 10 required suppression because it " 'favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.' *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001)." He likewise claims that the South Carolina constitutional right to privacy required suppression because " '[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's

expectation of privacy.' *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007)." **FBOA, p. 15**. However, his arguments that S.C. Const. art. 1, § 10 required suppression are not properly before this Court on appeal because they were not presented to the trial judge. While he referenced S.C. Const. art. 1, § 10 in his motion to suppress (**R. p. 61**) and at the hearing on his motion, he did not argue either that the South Carolina constitutional right to privacy afforded greater protection than the Fourth Amendment or that the state constitution focuses upon whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy. As a result, his arguments are not properly before this Court on appeal. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory in support of motion at trial and a different theory on appeal); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

Alternatively, Respondent submits that his reliance on S.C. Const. art. 1, § 10 is misplaced. In *Forrester*, the first issue before the Court was whether the state constitutional right to privacy provision "require[d] police officers to inform citizens that they have the right to refuse consensual searches and without such admonition, a search is involuntary." 343 S.C. at 645, 541 S.E.2d at 841. The Court concluded that it did not, the Court concluded that "while our state constitution may provide a higher level of protection in the search and seizure context, it

does not go so far as to require informed consent prior to government searches." *Id.* at 645-48, 541 S.E.2d at 841-43.

However, the Court observed that the "[u]nder our state constitution, suspects are free to limit the scope of the searches to which they consent. When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." *Id.* at 648, 541 S.E.2d at 843. Based upon this right, the Court found that the police officer "exceeded the scope of Forrester's consent when he proceeded beyond the visual inspection of the purse granted by Forrester to an intense physical examination of the purse. As a result, the crack cocaine should have been excluded at trial. *Id.*

In *Weaver*, the question was whether S.C. Const. art. 1, § 10 "goes so far as to require a warrant before the search and seizure of a vehicle located in the back yard of a private residence." 374 S.C. at 322, 649 S.E.2d at 483. Although the Court did state that "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched, *id.*, it explained that "[o]nce the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met." *Id.* There Court then held that "the invasion of petitioner's privacy was reasonable because the officers had probable cause to search where petitioner had apparently used the Jeep to leave the scene of a murder and attempted to destroy evidence of the crime that was located inside the Jeep. Accordingly, the search of the Jeep satisfied the requirements of the South Carolina Constitution." *Id.*

As with *Forrester* and *Weaver*, the cases in which the Courts have discussed whether there was a violation of the state constitutional right to privacy have all involved challenges to police action taken without a warrant. *E.g.*, *State v. Counts*, ___ S.E.2d ____, 2015 WL 4099256

(S.C., July 08, 2015) (Police officers had reasonable suspicion of illegal activity prior to conducting a "knock and talk" at defendant's residence, and thus "knock and talk" procedure did not violate defendant's state constitutional right to privacy; law enforcement had received two separate anonymous tips from citizens who alleged that defendant was selling drugs, and that identified vehicles driven by defendant, his phone number and use of multiple identities, and officers had confirmed that defendant had two false identification cards on record and had prior drug convictions); *State v. Moore*, 377 S.C. 299, 306-08, 659 S.E.2d 256, 260-61 (Ct.App. 2008).

As opposed to these cases, the police in Appellant's case obtained a search warrant, after a neutral and detached magistrate determined that there was probable cause to issue the warrant. As a result, Appellant's reliance upon art. 1, § 10 must be rejected because the determination of probable cause under the Fourth Amendment "the state constitution's requirement that the invasion of one's privacy be reasonable [was] met." *Weaver*, 374 S.C. at 322, 649 S.E.2d at 483.

**4. The warrant was not overly broad.**

Nor was the warrant in this case overly broad, as Appellant claims. In *State v. Williams*, 297 S.C. 404, 407, 377 S.E.2d 308, 310 (1989), the South Carolina Supreme Court explained that:

> The "particular description" requirement is aimed at preventing general warrants-those authorizing "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564, 582 (1971). *See also United States v. Sierra*, 585 F.Supp. 1236 (D.N.J.1984), aff'd, 755 F.2d 925 (3d Cir.1984); *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 1017, 94 L.Ed.2d 72, 80 (1987).

*See also State v. Thompson*, 363 S.C. 192, 200, 609 S.E.2d 556, 560-61 (Ct.App. 2005)

In *Thompson*, this Court found the portion of a search warrant authorizing the search of any transportation that the defendant "was riding in or on and any type of luggage in his possession" was overly broad and not supported by probable cause. However, the Court found that "the invalid portions of the warrant relating to the search of Thompson's vehicle and luggage are severable from the authorization relating to the search of Thompson's person." *Id.* at 205, 609 S.E.2d at 563. The Court concluded that "[b]ecause the portion of the warrant allowing the search of Thompson's person remains valid, and because none of the evidence sought to be suppressed was derived from the overbroad portions of the warrant, ... Thompson's request for suppression of this evidence was properly denied." *Id.*

Appellant also relies upon the Second Circuit Court of Appeals' decision in *United States v. Galpin*, 720 F.3d 436 (2d Cir. 2013). However, *Galpin* does not support his claim that the warrant here was overly broad. The problem with the search warrant in *Galpin* is that evidence seized as a result of the warrant was apparently used to charge the defendant with multiple charges, all but one of which were not the crimes for which probable cause had been established when the warrant was issued and on which the warrant was based. *Id.* at 447-48. No similar problem is present with the search warrant challenged by Appellant. Also, notwithstanding *Galpin*, the Second Circuit Court of Appeals has stated that "in a doubtful case, [courts] accord preference to the warrant." *United States v. Irving*, 452 F.3d 110, 125 (2nd Cir. 2006) (citation omitted).

The warrant in this case was not overly broad because it did not authorize "a general, exploratory rummaging in a person's belongings." *Coolidge*, 403 U.S. at 467, 91 S.Ct. at 2038. Rather, it was "limit[ed] ... to the specific areas and things for which there is probable cause to

search," the items to be searched were relevant to the offense charged, including Appellant's involvement therein and locating a possible accomplice whom he identified by nickname only, and the period covered by the warrant was for only five days closely tied to the date of the murder. *See United States v. Karrer*, 460 Fed.Appx. 157, 161, 3 (3rd Cir. 2012) (finding district court properly rejected overbreadth claim where, "the warrant identified particular devices and file types to be searched for evidence of a specific statutory offense" and the warrant "sufficiently identified a time period during which the suspected offenses occurred. *Id.* The Court also concluded that "the warrant's authorization to search and seize virtually all computer-related items in [petitioner's] home [did] not invalidate the warrant." *Id.* See also *United States v. Johnson*, 690 F.2d 60, 64 (3rd Cir. 1982) ("When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant"); *United States v. Richards*, 659 F.3d 527, 5417 (6th Cir. 2011) (Court finding that search warrant was not too broad because "[a]t the time of the seizure, agents did not know how and where the [ ] related content would be stored on the server").

**5. The officers acted in objectively good faith reliance upon the warrant that was issued.**

Even if there was no probable cause to issue the search warrant, Respondent submits that suppression of the evidence was not required because the officers acted in good faith reliance upon it. 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, 104 S.Ct. 3405 (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, 129 S.Ct. 695, 701 (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, 95 S.Ct. 2313, 2318 (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 good faith." [*Leon*, 468 U.S. at 922–923, 104 S.Ct. at 3420]." *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 and suppression is an appropriate remedy only (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) "in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979);" and (3) if there is 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, 104 S.Ct. at 3421.[20] 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"

[20] In *Sachs*, 264 S.C at 559, 216 S.E.2d at 510, 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 *State v. McKnight*, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472 (1987), police officers orally recited the facts upon which the warrant was based, but no affidavit was ever executed. 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); *Weston*, 329 S.C. at 290-293, 494 S.E.2d at 802-804. That did not occur here.

disregard for Fourth Amendment rights," as demonstrated. *Davis*, 131 S.Ct. at 2427. Thus, suppression was not required, *id.*, and the trial judge's ruling must be affirmed.

**II. The trial judge did not abuse his discretion by finding that Appellant's June 10, 2011 custodial statement was freely and voluntarily given where the totality of the circumstances was that neither the interviewing officers' refusal to provide Appellant a cigarette nor the officers' statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," caused his will to be overborne and rendered his statement involuntary.**

Respondent further submits that the trial judge did not abuse his discretion by finding that Appellant's June 10, 2011 custodial statement was freely and voluntarily given, where the totality of the circumstances was that neither the interviewing officers' refusal to provide Appellant a cigarette nor the officers' statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," caused his will to be overborne and thereby rendered his statement involuntary. Rather, the video of the interview reflects that he did not make his statement until more than an hour after cigarettes are last mentioned and following Appellant's private conversations with his girlfriend and his mother, with whom *he had asked to speak* and which lasted for thirty minutes.

### A. The *Jackson v. Denno*[21] hearing and the trial judge's ruling.

The State's only witness at the *Jackson v. Denno* hearing was David Osborne, who testified that he is employed in the Ninth Circuit Solicitor's Office but that he was employed as a in the Charleston Police Department in June 2011, where he was the sergeant in charge of the homicide unit. **R.pp. 6-7**. Sgt. Osborne interviewed appellant on June 10, 2011. Appellant did not appear to have any mental defects, he appeared to be of normal intelligence, he did not appear to be intoxicated, he appeared to understand what Sgt. Osborne said to him and he answered cogently. Appellant did not express any indication of an unwillingness to speak. Also,

[21] *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964).

Sgt. Osborne did not make any threats of violence promises of future leniency, in order to get Appellant to speak. The entire interview lasted for approximately $4^{1/2}$ to 5 hours. **R.pp. 7-10**.

The video of the interview (State's Ex. 56) reflects that Sgt. Kosarko entered the room at approximately 9:18 p.m. (21:18:32). Before the officers began questioning Appellant, Sgt. Osborne first advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Appellant indicated that he understood each right as it was read to him and he signed a form indicating his understanding of these rights, which each officer witnessed. 21:18:47 – 21:20:18. *See also* **R.pp. 9-12**. Sgt. Osborne denied giving Appellant "hints or inclinations" about the answers that he was seeking at first. Instead, Sgt. Osborne allowed Appellant to tell his version of what had occurred. **R.pp. 12-13**.

For most of the interview, Appellant insisted that he was in Orangeburg and that he had never gone to the apartment complex in Charleston, even when confronted with evidence demonstrating that he was lying to the officers about his whereabouts for the night of the 8th and even though Sgt. Osborne became frustrated with his story. After interviewing Appellant for over 3 ½ hours, Sgt. Osborne allowed Appellant to speak to both his girlfriend, Tenika, and his mother, on Sgt. Osborne's cell phone before they continued the interview. **R.pp. 13-21.** It was following this conversation that Appellant changed his story and admitted having been in Charleston on the night of the 8. **R.pp. 21-23**. Eventually, Appellant invoked his right to counsel. **R.pp. 23-24**.

On cross-examination, Sgt. Osborne admitted that Appellant had asked for a cigarette on several occasions during the interview but that he would not allow Appellant to have a cigarette, and he continued with the interview. He even admitted that he told Appellant that cigarettes were

for people who cooperate, and indicated that this was said out of frustration. **Tr. pp. 75-80. R.pp. 27-32.**

In addition to the testimony presented by Sgt. Osborne, the State introduced State's Ex. 56. The video of the interview clearly demonstrates that Appellant's statement was freely and voluntarily given. The video begins at 9:02:00 (21:02:00), which is well before the actual interview. Before the interview begins, Appellant asks if there is any way that he could he get a smoke. 21:05:07. Sgt. Osborne tells him that they might be able to work it out. 21:05:14. Then, as Sgt. Osborne is getting Appellant's clothes, he asked Appellant if Appellant needs to use the bathroom or warranted water. Appellant indicates that he does not need to use the bathroom, but he may want some water after he smokes a cigarette. Sgt. Osborne's reply is "okay. There enough." 21:13:45 – 21:13:56.

As noted, the advice of rights begins at 21:18:47. Roughly fifty minutes into the interview, Appellant asks for a cigarette. 22:11:59. Sgt. Osborne says "No, cigarettes are for guys who cooperate." When Appellant insists that he has cooperated, Sgt. Osborne says, "Guys who don't cooperate end up going to prison for a long time." This exchange ends at 22:12:13 and the officers exit the room.[22] Although another officer thereafter comes into the room and obtains information for the paperwork associated with Appellant's arrest, the interview did not start again until 22:18:40 when Sgt. Osborne re-enters room.

Sgt. Osborne tells Appellant that Tenika did not believe it and wanted to talk to him. In response, Appellant says, "Please let me talk to her." Sgt. Osborne dials the number on his own phone, hands the phone to Appellant and leaves the room at 22:18:50 (10:18 p.m.). Appellant speaks with her, alone, until 22:28:00, when Sgt. Kosarko enters the room. As Kosarko starts to

[22] Sgt. Osborne re-enters the room at 22:13:08 and briefly asks Appellant to identify person in a photograph, but he leaves the room at 22:113:34 after Appellant did not identify person in the photograph.

exit the room after Appellant ended the call, Appellant asks to "please" speak with him again. 22:28:46. Appellant then says that he is a cigarette smoker and asks if he can "have a cigarette to calm myself." He adds that "so much is going through my head." In response to Sgt. Kosarko's reply that he did not have a cigarette, Appellant indicated that "Goldstein do." (Sic). When Sgt. Kosarko questions whether Goldstein has a cigarette, Appellant indicates that he had asked Goldstein. Sgt. Kosarko tells him at this point, "That's just not going to happen, man."

At 22:29:40 (10:29 p.m.), Sgt. Kosarko tells Appellant that having a cigarette will not clear his head. Appellant acknowledges this, but says that it would calm him down. He states that things keep "coming at" him and he realizes that he is in a "whole world of trouble." At 22:30:05, Sgt. Sgt. Kosarko says that "You've done nothing tonight to help yourself, nothing, and a cigarette is not going to change that." Rather, Kosarko tells Appellant that he needs "to do the right thing" to change this. Yet, Appellant refuses to change his story, even after Sgt. Osborne re-enters the office and starts questioning him again.

He persists with this version for almost another hour, despite officers repeatedly confronting him with evidence placing him at the scene with his girlfriend's car.[23] For the most part, his demeanor is very calm, even when admitting (at 23:09:10) that no one could say that he was in Orangeburg that night.[24] At 23:20:10, he says that Sgt. Osborne did not know how tense he was, he says that he is a heavy smoker and I don't know how I'm going to make it … in jail" because of his "nicotine habit." When he says that he has asked for a cigarette, he compares his desire for a cigarette to the craving of methadone or heroin addicts. In reply, Sgt. Osborne says

[23] When Appellant expresses concern about retaliation by the victim's family against his sister (22:55:44), Sgt. Osborne explains that police had done everything to eliminate the possibility of retaliation, and that this was not a concern.

[24] At 23:16:11, Appellant asks for water and Sgt. Kosarko leaves to get it. Sgt. Osborne then asks if Appellant needs to use bathroom and Appellant says no. 23:16:17. Sgt. Kosarko brings in water at 23:18:18. At 23:35:34, he again wants more water and Sgt. Kosarko gets it for him. Sgt. Osborne then asks if Appellant needs to use bathroom and Appellant says no. 23:35:45. He receives water at 23:36:14.

that if he tells police what happened, they will go outside and smoke a cigarette. *See* 23:20:10 – 23:21:10.

Appellant then laughs and says, "We're still back at square one," 23:21:13, and he continues to assert that he was not in Charleston on the 8th. After Sgt. Osborne explains that Appellant doesn't want to walk out of the room with the statement that he had given, Appellant says, "That's what I'm saying right now as far as the cigarette thing." 23:24:45 – 23:24:51. In response, Sgt. Osborne tells him, "We are not going to have a cigarette until we get a truthful story out of you. I'm telling you that right now. It's not going to happen." He also tells Appellant that Appellant is not going to "bargain" or "negotiate" with him. 23:24:52 – 23:25:06.

Yet, Appellant still did not change his story. At 23:46:24 – 23:46:46, Appellant again mentions his "addiction" to cigarettes, in the course of explaining that Osborne will get mad at him if he changes his story. Sgt. Osborne tells him that if he cooperates, he can have a cigarette "right now," but he will not get a cigarette if he does not cooperate. Nevertheless, he did not change his story, even though he is questioned for over thirty-two minutes. At 12:19:08 a.m. on June 11th, 00:19:07, **Appellant asks if he can speak with Tenika** again, and Sgt. Osborne agrees to let him do so.[25] Sgt. Osborne dials her number on his cell phone, hands he phone to Appellant and leaves the room at 00:19:50.[26]

Among other matters, they discuss the evidence placing her car at the scene; evidence of his motive; and that contrary to what police told him, his niece did not see him there. He also asks her, early in their conversation, what she thinks he should do. 00:20:52 – 00:30:05. After the signal for this call is dropped, he redials the number and they resume their conversation at

[25] Contrary to Appellant's assertion that this was Sgt. Osborne's idea, as "a new interrogation strategy," **FBOA at 26**, the video reflects that he, in fact, asked to talk to her and was permitted to do so. The only "strategy" involved was permitting him to do what he wanted.

[26] Apparently, the original call did not connect and Appellant redials the number. Appellant then talks to Tenika.

00:30:34. In this conversation, he asks her if she will support him. At 12:34:01 a.m., he tells her that he saw the shooting but did not shoot. Rather, he walked up and saw what happened. He also says that he did not know the shooter and that he and the shooter were not together. He tells her that he did not admit that he was present because he was scared.

When Sgt, Osborne starts to enter the room at 00:38:15, Appellant pauses in his conversation and tells Osborne, "I'm getting there. I'm getting there … to where you want." Sgt. Osborne immediately leaves the room and Appellant resumes his conversation with Tenika. This call ends at 00:40:38, and he calls his mother. He talks to his mother about the crime from 00:41:39 until 00:49:59, when Sgt. Osborne re-enters the room. In this conversation, he says that police want him to say that the passenger was the shooter but his passenger did not do it. He also reviews the evidence, as he understands it, with his mother, and he admits that he had already given police a statement that "wasn't true." He tells his mother to "hold on" at 00:50:55 and hands the phone to Sgt. Osborne. Sgt. Osborne speaks to her for almost a minute before Appellant asks if the other detective had to be in the room. 00:51:26. Sgt. Osborne tells Appellant's mother that he will call her back in five minutes and ends the call at 00:52:10. Osborne tells Appellant that the other detective did not have to be present. Then, Appellant began speaking.

Starting at 00:52:31, he finally says that he had gone to the Charleston apartment complex with "Creep" to get Appellant's clothes; that he had backed the car into the parking place; that he had seen a man walking a dog while he was there; that he saw the " 'D' dude," a dark skinned man with a "low haircut" shoot the victim; that the shooter was the person in the photograph that he had been shown earlier; that he did not know Creep's name, address or phone number, even though they had been friends for "a couple of months;" that neither he nor Creep

had called the victim that night; and that he had not spoken to the victim in two weeks. Finally, Appellant invokes his right to counsel at 00:58:56.

Counsel for Appellant argued, in relevant part, that under the totality of the circumstances, he was "bothered by the cigarette request," not simply because Appellant asked for a cigarette and was refused one, but because Sgt. Osborne told him that only people who cooperated received cigarettes. **R.pp. 36-37**. The trial judge initially indicated that he understood that cigarettes could possibly be construed as "creature comforts," and that Sgt. Osborne's statement could be construed as promising Appellant something if he gave a statement stating what the officers wanted him to say. However, the trial judge declined to rule on whether this rendered the statement involuntary until after he had read relevant cases. **R.pp. 38-40**.

Following the pathologist's testimony, the trial judge again addressed this matter *in camera*. The State argued that although it may not be "the best policy... [or] practice" it did not render the statement involuntary. Therefore, the State argued that the statement should not be excluded. **R.pp. 217-219**. Trial counsel argued that it was not simply the deprivation of a cigarette that rendered the statement involuntary. Rather, it was the fact that a cigarette was held out as a reward if Appellant cooperated. Further, after this conversation, Sgt. Osborne leaves the room. "Let's him sit a while and comes back and ... starts interviewing again." **R.pp. 219-220.** Counsel observed that if Appellant had been told the same thing in response to a request for water, his subsequent statement would clearly be involuntary. Counsel added that "towards the end he's cold." While counsel admitted that he did not find any case law to support this position, he found many cases which indicated that providing the accused with a cigarette showed that the statement was voluntary. **R.pp. 220-222.**

The trial judge found that counsel's argument was "reasonable" and that an inference could be drawn from the statement that "cigarettes are for those who cooperate" that this was a promise or potential reward. However, he observed that "we also have before he changed his story, an opportunity to talk to persons whom he chose to call. And that's when the story changed. It wasn't before that." Therefore, the trial judge found that Appellant's statement was freely and voluntarily given by a preponderance of the evidence and under the totality of the circumstances. **R.pp. 222-223.**

**Discussion.**

There was no error. " 'Questioning suspects is indispensable in law enforcement.'" *Culombe v. Connecticut*, 367 U.S. 568, 578, 81 S.Ct. 1860, 1865 (1961). The United States Supreme Court in *Culombe* set forth the general test of voluntariness to be applied to the waiver of *Miranda* rights and any issue concerning the voluntariness of confessions generally.

> In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. *No single litmus-paper test for constitutionally impermissible interrogation has been evolved*: neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect—prohibited by several state statutes. ....
>
> *Each of these factors, in company with all of the surrounding circumstances*—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—*is relevant. The ultimate test remains* that which has been the only clearly established test in Anglo-American courts for 200 hundred years: The test of voluntariness. *Is the confession the product of an essentially free and unconstrained choice by its maker*? If it is, if he has willed to confess, it may be

> used against him. *If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.*

*Id* at 601-022, 81 S.Ct. at 1878-79 (emphasis added) (footnote and citations omitted).

The United States Supreme Court has consistently adhered to *Columbe* in subsequent cases. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 2330-31 (2000); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223, 93 S.Ct. 2041, 2045-46 (1973); *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246 (1991). Likewise, the voluntariness test set forth in *Columbe* has been consistently followed by this Court and the South Carolina Supreme Court. *E.g.*, *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001); *State v. Rochester,* 301 S.C. 196, 199-202, 391 S.E.2d 244, 246-47 (1990); *State v. Moultrie*, 273 S.C. 60, 61-62, 254 S.E.2d 294, 294-295 (1979); *State v. Franklin*, 299 S.C. 133, 135-39, 382 S.E.2d 911, 913-14 (1989).[27] "On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion." *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996).

Here, the trial judge properly did not abuse his discretion by concluding that Appellant's statement was freely and voluntarily given under the totality of the circumstances. The evidence reflects that Appellant was not intoxicated; that he did not have any problems communicating with the officers and the officers did not having problems communicating with him; that he appeared to be of normal intelligence; that the officers did not make any threats of violence; and

[27] In South Carolina, a two-fold determination of voluntariness must take place that is not required by *Lego v. Twomey*, 404 U.S. 477, 489 (1972). First, the trial judge must determine, from the context of an *in camera* hearing, whether or not appropriate *Miranda* warnings were given and freely and voluntarily waived. At the *in camera* hearing, it is the State's burden "to prove *by a preponderance of the evidence* that his rights were voluntarily waived" and that the confession or statement was freely and voluntarily given. *State v. Washington*, 266 S.C. 54, 55, 370 S.E.2d 611, 612 (1988) (emphasis in original). Once the trial judge makes a finding that the statement has been made freely and voluntarily, the matter must then be submitted to the jury, who cannot consider the statement on the issue of guilt or innocence until they have found that it was made freely and voluntarily beyond a reasonable doubt. *Id.*

that they did not threaten him or offer any leniency as to the charge or sentence, in order to induce his statement. Nor did the officers withhold any other creature comforts from him, other than cigarettes. To the contrary, they twice provided him water when he requested it.

Also, despite Appellant's repeated requests for a cigarette and the officer's refusal to provide him with one, the video reflects that his demeanor was calm throughout much of the interrogation. Significantly, he never exhibited any signs of physical discomfort, much less signs of withdrawal from an addiction. *See United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (heroin withdrawal and physical discomfort not enough to establish involuntariness of confession). In light of the serious potential charge that he faced, it is almost incredible to believe that he would give a statement in order to obtain a single cigarette. See *People v. Badgley*, 2007 WL 162515, 7 (Mich.App., Jan. 23, 2007) (finding that defendant's statement was not rendered involuntary even though "[d]uring the interview, defendant was denied certain liberties, including his repeated requests to see his fiancée and his family, and a request for a cigarette," where defendant faced serious charges and where defendant had been advised and waived his *Miranda* rights before giving statement).

Moreover, neither the refusal of Sgts. Osborne and Kosarko to provide a cigarette to Appellant nor the Sgt. Osborne's statements to him that "cigarettes were for cooperators" and that "non-cooperators got prison, not cigarettes," caused his will to be overborne and thereby rendered his statement involuntary. To the contrary, State's Ex. 56 reflects that the last mention of cigarettes occurred at 11:46 p.m. (23:46:24 – 23:46:46), or approximately fifty-four minutes before Appellant began his statement. (00:52: 31). See *Wilkes v. State*, 917 N.E.2d 675, 681-82 (Ind. 2009) ("The offer of a cigarette specifically in exchange for information could be viewed as an inducement leading to an involuntary confession. However, given the lapse in time between

the cigarette and this admission and that Wilkes had already admitted to having flashes of Donna in a bloody bed and of Avery facedown and bound in her bed, the trial court had sufficient evidence to conclude that Wilkes's will was not overcome by the promise of a cigarette").

Further, the trial judge correctly recognized that Appellant did not give his statement until after he had spoken to both his girlfriend, Tenika, and his mother. **Contrary to Appellant's argument** on appeal, the video of the interview reflects that **Appellant asked to speak with Tenika** at 12:19:08 a.m. on June 11th, and that he was allowed to speak with Tenika and his mother for almost thirty-one minutes, alone, before Sgt. Osborne reentered the room at 12:49:59 a.m. He then began giving his statement two minutes later.

The argument that his statement was involuntary further ignores that Appellant had explained earlier in the interview (23:30:04 – 23:30:51) that his reluctance to give a statement resulted from evidence that the police had of his motive, and he felt that the police would attempt to blame the murder on him, no matter what he told them. Likewise, Appellant's argument ignores that when Sgt. Osborne began to enter the room during his conversation with Tenika, at 00:38:15, Appellant pauses in his conversation and tells Osborne, "I'm getting there. I'm getting there … to where you want." Sgt. Osborne immediately leaves the room and Appellant resumes his conversation with Tenika. Thus, the trial judge correctly found that Appellant's will was not overborne by the officers' refusal to provide him with an opportunity to smoke a cigarette unless he cooperated. *See Anderson v. Terhune*, 467 F.3d 1208, 1213 (9th Cir. 2006) (statement not involuntary when detectives withheld cigarettes until defendant agreed to talk), rev'd en banc on other grounds, 516 F.3d 781 (9th Cir. 2008); *People v. Badgley*, 2007 WL 162515, 7 (Mich.App., Jan. 23, 2007); *People v. Nelson*, 2003 WL 22890655, 5 (Cal.App., Dec. 8, 2003) ("Detective Stover's admittedly aggressive questioning and her denial of defendant's request for cigarettes

did not rise to the level of coercive conduct tending to produce an involuntary and unreliable statement").

Appellant further contends that his statement was involuntary because it lasted for approximately five hours; that it was during evening hours; that he was physically and mentally exhausted; and that the officers repeatedly used his 6-year-old daughter as leverage in order to induce a statement. However, these arguments are not properly before this Court on appeal because he failed to raise them at trial. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584; *McCray*, ___ S.E.2d at ____, 2015 WL 3875353 at 8.

More importantly, his contention as to the length of the interview and that it occurred at night is without merit. Statements given after much longer interviews have been found to be voluntary. *See People v. Collins*, 106 A.D.3d 1544, 1545, 964 N.Y.S.2d 393, 395 (N.Y.A.D., May 03, 2013) ("Contrary to defendant's contention, ... his statements made during the first 15 hours of interrogation were not involuntary due to police coercion"), leave to appeal denied, *People v. Collins*, 21 N.Y.3d 1072 (N.Y. Sep 12, 2013) (Table); *Torrence v. Ozmint*, 2008 WL 628604, 23 (D.S.C., Mar. 5, 2008); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978); *State v. Chasteen*, 228 S.C. 88, 88 S.E.2d 880 (1955). And, none of the other factors relied upon by him to show that his statement was involuntary because his will was overborne.

**III. The trial judge did not deny Appellant a fair trial by instructing the jury on accomplice liability after the jury had begun deliberating. (Appellant's issues III-IV).**

Appellant contends that the trial judge violated due process by instructing the jury concerning accomplice liability after the jury had begun deliberating because the evidence did not support the supplemental instruction, and because "the timing of the instruction prevented Appellant from addressing the theory in his closing argument." Respondent submits that the trial judge's ruling must be affirmed because (1) there was sufficient evidence of accomplice liability

in the record to support the State's request-to-charge on this theory, which was originally denied by the trial judge but should have been given; (2) a question from the jury (Court's Ex. 2, **R. p. 687**) rendered an instruction on accomplice liability appropriate based upon the evidence presented to it, (3) Appellant clearly was not prejudiced by the instruction, since it precluded the jury from convicting him based upon a finding that he was merely present; and (4) the trial judge could not have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated these South Carolina Constitutional provision prohibiting a trial judge from commenting upon the facts in his jury instructions, S.C. Const. art. v, § 21.

**A. The charge conference and the original charge.**

The State requested an accomplice liability jury instruction because there were two men involved and "we haven't been able to identify a co-defendant." The trial judge interrupted the State, observing that "the whole testimony in this case is [Appellant's] the shooter" and finding that the requested instruction was not supported by the record because the State had not claimed that the passenger with appellant on the night of June 8th was involved in the crime. **R.pp. 461-463**. Following closing arguments by the parties, the trial judge instructed the jury on the law applicable to the case. Consistent with his prior ruling, he did not instruct jurors on accomplice liability. **R.pp. 500-526.** The jury began deliberating at 4:07 p.m., after the trial judge corrected an inadvertent misstatement with respect to his instructions on proof beyond a reasonable doubt. *See* **R.pp. 528-529.**

**B. The jury's question and the supplemental instruction.**

The jury submitted a question at 5:00 p.m. **R.p. 529, line 17**. The jury's asked for the trial judge to "defined murder again" and it asked "if the other individual pulled the trigger can the

defendant still be guilty?" (Court's Ex. 2, **R.p. 687**). The trial judge stated "I think by their requests, they've viewed the facts." The trial judge's concern was that Appellant's mere presence did not make him culpable for the murder. **R.p. 529, line 19- p. 530, line 19.** Appellant objected because this was not addressed in his closing argument and he claimed that he was objecting "based on the possibility of ineffective assistance of counsel." The trial judge offered to allow him to give further closing argument, but Appellant claimed that this would put him "in a box." The trial judge disagreed and explained that he thought that the jury's question was reasonable because presence at the scene "with some prior involvement does make him responsible." **R.p. 530**.

In response to Appellant's suggestion that the trial judge could simply tell the jury that "on the evidence that we have, the answer to that is no in this case," the trial judge stated that this solution would be "commenting on the weight of the evidence, unfortunately and I can't do that." He also rejected Appellant's suggestion to instruct jurors that they had heard all the evidence in the case and that they had been charged law, and he noted Appellant's objection. He explained that he thought that the error was curable and that Appellant was entitled to further argument on the instruction. Appellant, however, thought that if he accepted the trial judge's offer to further argue the case, he would waive the issue. So, he objected to the instruction because the jury had already begun deliberating. **R.pp. 531-533.**

The trial judge understood Appellant's objection, however, he noted that "you have to believe he was there and you'd have to believe he was involved under the evidence." He again observed that he could not simply tell the jury that there was no evidence to support such an instruction because that would be charging under the facts, which is prohibited by the state constitution. **R.p. 533.** After further discussion of the issue, the trial judge indicated that his

initial inclination was to tell jurors that he had already instructed them on the law and that they had to decide the case based on the law that had been charged, and he observed that "the other argument that occurred to me is to declare a mistrial based on my error in not charging the hand of one being the hand of all." He again explained that it was possible for the jury to conclude under the evidence, as presented, that both Appellant and the other person present were acting in concert and that the jury could inferred that Appellant was not the shooter. When Appellant indicated that he would prefer a mistrial instead of a supplemental instruction, the trial judge indicated that Appellant would have to present the trial judge with case law indicating that it was inappropriate to give a supplemental instruction. **R.pp. 466-537; 540-543.**

Ultimately, the trial judge explained that his rationale was that "we've consistently... been [concerned] about educating the jury, making sure they understand the law and applied the law." He observed that he was restricted from charging on the facts, and he was concerned that he could not simply fail to answer the jury's question. **R.p. 543.** The trial judge later addressed the issue again, following a brief recess. He observed that in *Wilds v. State*, 407 S.C. 432, 439-40, 450 SE2d 387, 390-91 (Ct.App. 2014), this Court had found that appellate counsel was ineffective in failing to object to the accomplice liability instruction, where there was no dispute that the defendant was the trigger man in the murder and armed robbery. However, he found that the facts of this case were distinguishable and that the instruction was appropriate. **R.pp. 548-549.**

When the jury returned, the trial judge gave an instruction on accomplice liability, or "the hand of one is the hand of all." **R.pp. 557-560.** Once the jury had left the courtroom, he stated that he intended to send a printed copy of his instructions for murder and accomplice liability to the jury. The trial judge also reiterated that he felt the evidence supported an accomplice liability

instruction. **R.pp. 565-567**; Court's Ex. 4, **R. pp. 690-692.** He changed his mind and did not submit printed charges after the foreperson of the jury indicated that the charge given had answered the jury's questions,. **Tr. pp. 658-59. R.pp. 567-568.**

**C. Discussion.**

There was no abuse of discretion. "The law to be charged must be determined from the evidence presented at trial." *State v. Rivera*, 389 S.C. 399, 404, 699 S .E.2d 157, 159 (2010). The trial judge "has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002). "[A]n alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011).

The Court explained in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 769-70 (Ct.App. 2010), that:

> Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.
>
> *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (internal quotations and citations omitted).
>
> "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct.App.2002) (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98,

> 101 (1999)). In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties. *Id.* at 193, 562 S.E.2d at 324 (stating that under the hand of one is the hand of all theory, "[a] formally expressed agreement is not necessary to establish the conspiracy" which brings the accomplice to the scene of the crime).

*Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 769-70.[28] Finally, "[t]he decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion." *State v. Kelsey*, 331 S.C. 50, 69, 502 S.E.2d 63, 73 (1998).

Respondent submits that the trial judge did not err by giving the supplemental jury instruction for several reasons. First, the State's evidence, as well as the photographs introduced by Appellant as Defendant's Ex.s 5-10, supported an instruction on accomplice liability. Indeed, the trial judge's ruling after he received the jury's question reflects that he recognized that the state's request-to-charge should have been given. *E.g.*, *Gibson*, 390 S.C. at 353-55, 701 S.E.2d at 769-70; *Condrey*, 349 S.C. at 193-94, 562 S.E.2d at 324-25; *Langley*, 334 S.C. at 649, 515 S.E.2d at 101. Second, the jury's question (Court's Ex. 2) rendered an instruction on accomplice liability appropriate, despite the trial judge's earlier ruling, since there was evidence from which the jury could find either that Appellant was guilty under a theory of accomplice liability or that he was merely present. Like the conflicting evidence in *Barber*, 393 S.C. at 236-37, 712 S.E.2d at 438-39 (and unlike *Wilds*), here, the State did not have proof as to whether Appellant or his accomplice fired the fatal shots, only that one of them did so.[29] Appellant clearly was not

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[28] "[P]roof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. .... If 'a person was present abetting while *any* act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal – even 'though [that act was] not the whole thing necessary.' " *State v. Reid*, 408 S.C. 461, 473, 758 SE.2d 904, 910 (2014).

[29] The trial judge correctly noted that jurors could not convict Appellant if it merely found that he was merely present at the scene and the murder was committed by the other person who was present. However, if it found that the other person had shot the victim while acting in concert with and as an accomplice to him, then he could be convicted under a theory of accomplice liability.

prejudiced by the instruction under the circumstances, since it precluded the jury from convicting him based upon a finding that he was merely present.

His claim that he was prejudiced by the trial judge's ruling because he was precluded from addressing accomplice liability in his closing argument ignores both that the trial judge offered to allow him to have further argument and that his closing argument was that the State had failed to prove beyond a reasonable doubt that he was present at the scene. **Tr. pp. 557-71. R.pp. 466-480.** Finally, the trial judge could not have simply answered the jury's question by instructing that there was no evidence supporting an instruction on accomplice liability because this would have violated these South Carolina Constitutional provision prohibiting a trial judge from commenting upon the facts in his jury instructions, S.C. Const. art. v, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law").

## CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment, conviction and sentence.

Respectfully submitted,

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October 13, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2014-000766

THE STATE,

Respondent,

vs.

DEVIN JOHNSON,

Appellant.

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 13th day of October, 2015.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

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**Appellant.**

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## CERTIFICATE OF SERVICE

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I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record,

Susan B. Hackett, Esq.
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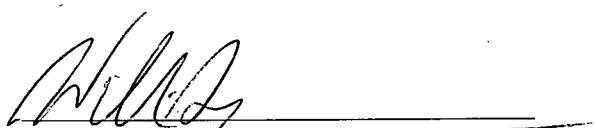
I further certify that all parties required by Rule to be served have been served.

This 13th day of October, 2015.



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