STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 2016-UP-344 (S.C. Ct. App. Filed June 29, 2016)

2013-GS-40-4547- 4554

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on 8/18/2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that any error by the trial judge in admitting cell phone records, including real time GPS locations as well as historical cell service location information, obtained by law enforcement from a cell phone company without a search warrant or court order was harmless?

2. Did the Court of Appeals err in relying on United States v. Graham, 824 F.3d 421 (4th Cir. 2016), when the South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution?

3. Did the Court of Appeals err in failing to distinguish the present case from United States v. Graham, 824 F.3d 421 (4th Cir. 2016), when the Government in Graham obtained only historical cell-site location information and obtained that information after obtaining an order, based on a showing of specific and articulable facts supporitng that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation, from the federal court pursuant to the Stored Communications Act, 18 U.S.C. §2703I, (d) (2012), but law enforcement in the present case obtained both historical cell-site location information as well as real time GPS locations from the cell phone company without a search warrant or court order?

STATEMENT OF THE CASE

In July of 2013, the Richland County Grand Jury indicted Wallace for two counts of murder, attempted murder, armed robbery and three counts of kidnapping, indictments #2013-GS-40-4547-4554. On August 11, 2014, Wallace proceeded to jury trial before the Honorable Robert E. Hood. A pretrial hearing was held on July 31, 2014, before Judge Hood who was presiding in Kershaw County. Stephen Krzyston, Lucas Hawks and Kris Hines represented Wallace at both the pretrial hearing and at trial. April Sampson, Vance Eaton and Daniel Coble prosecuted the case. After a five day jury trial, the jury returned verdicts of guilty as charged. Judge Hood sentenced Wallace to life imprisonment on all charges, the life sentences for the two counts of murder and the attempted murder count were ordered to be served consecutively. A timely notice of intent to appeal was served on August 21, 2014, and the direct appeal perfected. The Court of Appeals heard arguments in the case on April 12, 2016. In an opinion filed June 29, 2016, the Court of Appeals affirmed the sentence and convictions. A timely petition for rehearing was filed and denied on August 18, 2016. This petition for writ of certiorari follows.

REASON FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari because this Court has not directly addressed the issue of whether the warrantless procurement of cell-site location data including real time GPS locations as well as historical cell service location information violates the Fourth Amendment of both the Federal and State Constitutions.

STATEMENT OF FACTS

On June 28, 2012, James Sturm was driving to a farm off of Bluff Road on Beckham Swamp Road to spray for weeds when a woman flagged him down for help. (R. p. 249, line 20 – p. 250, lines 1-21). The woman's hands were covered in blood and she asked him to take her to the hospital. (R. p. 250, lines 19-21). The woman got in Sturm's car, he turned around and headed back toward Bluff Road. (R. p. 251, line 2 – p. 252, lines 1-19). Sturm called 911 but then was able to get the attention of Deputy Matthew Taylor of the Richland County Sheriff's Department as he was patrolling on Bluff Road. (R. p. 252, lines 20-25).

Deputy Taylor talked with Sturm and rendered aid to the woman who was later identified as Raquel Weston. (R. pp. 260-261). Deputy Taylor testified that Weston told him that she had been shot by the Petitioner, Wallace. (R. p. 264, lines 18-24). Co-defendant, DeAndre Diggs, admitted at trial that he shot Weston but claimed it was at Petitioner's direction. (R. pp. 690-691). Weston survived the shooting and testified at trial that Diggs shot her. (R. p. 996, lines 1-16).

Deputy Andrew D'Antoni, who was with the Richland County Sheriff's Department at the time of the incident, testified, over a hearsay objection, that Weston told Deputy Taylor that there were two additional victims at the Deer Meadow Apartments. (R. p. 277, line 15 – p. 278, lines 1-10). Sergeant Robert Moreland with the Richland County Sheriff's Department testified that he met other members of the Richland County Sheriff's Department at apartment 412 in the Deer Meadow Apartments on Garner's Ferry Road. (R. p.317, lines 11-17; R. p. 335, lines 9-14; p. 318, lines 3-12). Captain Scott McDonald with the Richland County Sheriff's Department testified that he obtained a search warrant for the apartment on Garner's Ferry Road. (R. p. 1040, lines 12-17).

Once inside the apartment the officers found two men with fatal gunshot wounds to the head. (R.pp. 324-325). The men were later identified as Athell Johnson and Jamal Pratt. Weston

testified that Johnson was a drug dealer and she had been dating Johnson for three years. (R. p. 976, lines 9-11; R. p. 978, lines 12-21). Johnson sometimes asked Weston to hold money for him. (R. p. 978, lines 24-25). Weston testified that Johnson was close friends with both Pratt and Petitioner Wallace. (R. p. 977, line 23 – p. 978, lines 1-11; R. p. 986, lines 6-24).

On the morning of the shootings Johnson called Weston and asked her to bring the money and hurry up. (R. p. 982, lines 2-5). When she opened the door to the Garner's Ferry apartment she saw Johnson, who was paralyzed from the waist down, on the floor with his hands and feet bound and his wheel chair in the corner. (R. p. 985, lines 15-21). Weston testified that Petitioner pulled her into the apartment and asked her for the money. (R. p. 987, lines 11-21). According to Weston, she gave the money to Petitioner. (R. p. 987, lines 19-21). Weston testified that Diggs had a knife and was standing near Johnson. (R. p. 986, lines 3-5). Weston testified that she also saw Pratt on the floor tied up with trash bags. (R. p. 987, line 22 – p. 988, lines 1-12).

Weston then testified that Johnson and Pratt were dragged to the back of the apartment where Petitioner Wallace shot them both. (R. p. 990, lines 1-25; R. p. 992, lines 8-14). According to Weston, Wallace walked her to the car where Diggs was waiting and they drove her to the area off of Bluff Road where Diggs shot her. (R. pp. 992-996).

Based on information provided by T-Mobile, Petitioner's cell phone provider, Petitioner was spotted leaving the Burlington Coat Factory off of Bush River Road with a female that same day at about 3:30 PM. (R. p. 347, lines 11-22). Petitioner was arrested without incident. (R. p. 1041, lines 1-16). Wallace initially denied any involvement in the shooting of Johnson and Pratt. (R. p. 1042, lines 1-24). Once confronted, however, with cell phone tower records law enforcement obtained, without a warrant, from T-mobile, Petitioner's cell phone service provider, Petitioner asked to speak with Major Stan Smith. (R. pp. 1043 – 1045).

Once told that his cell phone placed him near a cell tower on Cheval Street, off Leesburg Road and near the crime scene, Major Smith testified that Petitioner told him he was driving, pulled over and met Charlie G., an adversary of Johnson, on Cheval Street. (R. p. 819, line 11 – p. 820, 821, lines 1-16). Major Smith testified that Petitioner told him that one of the men who was with Charlie G. pulled a gun and forced Petitioner in the car and demanded that he take them to Johnson's apartment. (R. p. 821, lines 18-22). Petitioner told Major Smith that when they arrived at Johnson's apartment they saw Weston. (R. p. 822, lines 10-15). Petitioner said that Charlie G. and another gunman held a gun to Weston and used her as a means to enter Johnson's apartment. (R. p. 822, lines 16-25). A third gunman stayed in the car with Petitioner. (R. p. 822, line 25). Petitioner heard shots from inside the apartment and then the third man drove Petitioner back to Cheval Street. (R. p. 823, lines 1-24).

ARGUMENTS

1. The Court of Appeals erred in finding that any error by the trial judge in admitting cell phone records, including real time GPS locations as well as historical cell service location information, obtained by law enforcement from a cell phone company without a search warrant or court order was harmless.

During a motion to compel discovery held on July 31, 2014, approximately two weeks prior to trial, Petitioner asked the Court to require the State to turn over an exigency request sent to the cell phone company, T-Mobile, from the South Carolina Law Enforcement Division [SLED]. (R. p. 11, line 9 – p.. 12, lines 1-16). Agent Samuel Reighley from the SLED fugitive Division testified that they located Petitioner from the GPS location provided by T-Mobile[1]. (R. p. 27, line 2 – p. 28, 29, lines 1-25). Deputy Diego Nova from the SLED fugitive division testified that he made an exigency request for cell phone records of the Petitioner from T-Mobile. (R. pp.31 – 35). The records from T-Mobile were obtained pursuant to the exigency request rather than by the issuance of a search warrant or court order. The judge heard arguments from both sides and then ordered the State to produce the exigency request. (R. pp. 36 – 42, lines 1-16).

At trial on August 11, 2014, after the State provided the exigency request, Petitioner moved to suppress the records obtained from T-Mobile pursuant to the exigency request. (R. p. 191, lines 12-20; R. p. 199, lines 9-12; R. p. 204, line 25, - R. p. 205, lines 1-18). Petitioner argued that the circumstances in the present case did not meet the exigent circumstances exception to the requirement for a search warrant. (R. pp. 212-213). Counsel for Petitioner specifically argued, "And because the exigency request is basically an exception or is used as an exception to the warrant requirement, then - - -" (R. p. 213, lines 15-17). Counsel also noted that law enforcement

[1] There is evidence in the record that Petitioner had a leg monitor as a condition of supervision. This evidence was properly excluded and there is no indication the police used the leg monitor to locate Petitioner. (R. pp. 166-167).

obtained a search warrant for the apartment on Garner's Ferry Road and argued that they had time to obtain a search warrant for the records from T-Mobile. (R. p. 214, lines 16-23). Upon questioning by the Court, Major McDonald with the Richland County Sheriff's Department testified that the exigency request was based on the fact that the suspect was armed and dangerous, three people had been shot and two of the three fatally shot, the suspect was a threat to the community and needed to be taken off the streets as soon as possible. (R. p. 216, line 23 – p. 217, lines 1-14). The judge *sua sponte* added that the suspect was on the run. (R. p. 217, line 15).

The judge then denied the motion to suppress the Petitioner's cell phone records obtained from T-Mobile without a warrant. The judge ruled:

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

(R. p. 231, lines 12-23).

At trial the Agent Nova was asked, "Are you allowed to get records from a cell phone company if there is not an arrest warrant?" (R. p. 495, lines 19-21). Agent Nova responded yes and testified, "We get a court order signed, or if it's a life and death situation, we get an exigent form." (R. p. 495, lines 24-25). When asked about the exigent form, Agent Nova replied, "An exigent form, it's a life and death situation. It's a simple form, you call up the cell phone company and then you fax them that form." (R. p. 496, lines 2-4). The State then moved to admit the exigency form, State's Exhibit #86, in evidence. (R. p. 496, line 12 – p. 497, line 1). Petitioner objected. (R. p. 497, lines 2-4). The judge overruled the objection. (R. p. 497, line 4). Petitioner then withdrew the

objection to the form itself and the exigency form was admitted in evidence, without objection[2]. (R. p. 497, lines 5-11). The exigency form provides the emergency as follows, "Suspect is armed and dangerous, has shot/killed one victim and struck female victim on the head with handgun. Escaped and is threatening the life of surviving victim and family." (R. p. 1198, State Exhibit #86).

There is no information that Petitioner escaped as noted in the form. During pre-trial Captain McDonald testified that when he took the search warrant to the apartment on Garner's Ferry Road, he had no information that any suspects had contacted Weston's family. (R. p. 216, lines 3-15). Evidence of threats being made toward Weston came from co-defendant Diggs who was arrested days after the exigency form was sent to T-Mobile. (R. pp. 737-738).

Major Smith testified that he knew that Captain McDonald had been talking with Petitioner about his cell phone records from T-Mobile placing him near the scene of the crime. (R. p. 819, lines 11-20). Petitioner objected. (R. p. 819, lines 21-22). The judge overruled the objection. (R. p. 819, line 23). Captain McDonald began to testify about the Petitioner's phone records he received from T-Mobile. (R. p. 1043, lines 14-19). Petitioner objected. (R. p. 1043, lines 20-21). Captain McDonald testified that the phone records placed Petitioner near the crime scene. (R. p. 1044, lines 1-13). Petitioner again objected. (R. p. 1044, lines 14-15). The judge overruled the objection. (R. p. 1044, line 20). Captain McDonald then testified extensively in regard to the phone records obtain from T-Mobile without a warrant. (R. pp. 1044 – 1060).

At the close of the presentation of evidence, Petitioner renewed all pretrial motions. (R. p. 1118, lines 9-13). The motions were again denied. (R. p. 1118, lines 14-16). In closing argument the State referenced the Petitioner's cell phone records placing him at the scene of the crime. (R. p.

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[2] It is unclear why counsel for Petitioner withdrew the objection to the exigency form. This issue may need to be raised in post conviction relief.

1124, line 18 – p. 1125, lines 1-6). The judge erred in admitting the Petitioner's cell phone records because the records were obtained from T-Mobile without a search warrant and the exigent circumstances exception to the warrant requirement does not apply. The error in admitting the illegally obtain records is not harmless.

The trial judge erred in finding that the exigent circumstances exception to the warrant requirement applied in refusing to suppress cell phone records, including real time GPS locations as well as historical cell service location information obtained by law enforcement from a cell phone company without a search warrant or court order. Petitioner became a suspect hours after the crimes took place on June 28, 2012. That same day Special Agent Diego A. Nova with the South Carolina Law Enforcement State Surveillance and Intelligence Unit requested information from Petitioner's cell phone provider T-Mobile. (R. p. 1198, State's Exhibit #86). Special Agent Nova did not seek a search warrant or court order or even a subpoena for the cell phone records. Instead, Special Agent Nova obtained the records by use of an "exigency request" which stated, "Suspect is armed and dangerous, has shot/killed one victim and struck female victim on the head with handgun. Escaped and is threatening the life of surviving victim and family[3]." (R. p. 1198, State's Exhibit #86). The request specifically states, "Please provide 48 hour subscriber, cell site, historical information and GPS Locator every 15 min for target number 803-404-8062 to dnova@sled.sc.gov." (R. p. 1198, State's Exhibit #86).

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[3] Again, the record does not support the assertion of threats in the "exigency request." During pre-trial hearings Captain McDonald testified that when he took the search warrant to the apartment on Garner's Ferry Road, he had no information that any suspects had contacted Weston's family. (R. p. 118, lines 3-15). Evidence of threats being made toward Weston came from co-defendant Diggs who was arrested days after the exigency form was sent to T-Mobile. (R. pp. 737-738). Additionally, as Petitioner had not yet been arrested, he certainly had not escaped as alleged in the "exigency request."

In Riley v. California, -- U.S.--,134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014), the United States Supreme Court held that officers must generally obtain a warrant before searching data from a cell phone. The Court then determined that the search incident to arrest exception to the search warrant requirement did not apply to cell phones. The Court noted, however, that the exigent circumstance exception to the warrant requirement may apply to cell phone records. The Court wrote:

> Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " Kentucky v. King, 563 U.S.,at ——, 131 S.Ct., at 1856 (quoting Mincey v. Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. 563 U.S., at —— , 131 S.Ct. 1849. In Chadwick, for example, the Court held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that "if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage." 433 U.S., at 15, n. 9, 97 S.Ct. 2476.

Riley v. California, --U.S.--, 134 S. Ct. 2473, 2494, 189 L. Ed. 2d 430 (2014).

The circumstances in the present case do not constitute exigent circumstances justifying the warrantless search of the real time GPS locations or the historical cell site service locations. While there may be circumstances where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment in regard to GPS location information, See Riley v. California, -- U.S.--, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), such circumstances are not present in Petitioner's case. As to historical cell site service location information, however, it is difficult to imagine any circumstance that would justify a warrantless search based on the exigent circumstances exception.

In the present case law enforcement conducted a warrantless search to obtain the GPS location information. Exigent circumstances did not exist in the present case to justify the warrantless search. The exigent circumstances doctrine provides an exception to the Fourth Amendment protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and **no time to secure a warrant exist**. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)) (emphasis added). In discussing exigent circumstances in the context of a warrantless arrest inside a home the Court in Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 2097-98, 80 L. Ed. 2d 732 (1984), wrote:

> Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," United States v.United States District Court, supra, 407 U.S., at 318, 92 S.Ct., at 2137, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, e.g., United States v. Santana, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 2409–2410, 49 L.Ed.2d 300 (1976) (hot pursuit of a fleeing felon); Warden v. Hayden, 387 U.S. 294, 298–299, 87 S.Ct. 1642, 1645–1646, 18 L.Ed.2d 782 (1967) (same); Schmerber v. California, 384 U.S. 757, 770–771, 86 S.Ct. 1826, 1835–1836, 16 L.Ed.2d 908 (1966) (destruction of evidence); Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

Included in the "few in number and carefully delineated" exceptions where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment are: 1.) hot pursuit of a fleeing felon, United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-2410, 49 L.Ed.2d 300 (1976); 2.) destruction of evidence, Schmerber v. California, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed.2d 908(1966); and 3.) danger to police or to others inside or outside a dwelling, Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1694, 109 L.Ed.2d 85 (1990).

There is no evidence that law enforcement did not have time to seek a search warrant for the cell phone records. The police were able to promptly secure a search warrant for the apartment on Garner's Ferry Road where two victims were located[4]. (Tr. p. 996, lines 12-17). Respondent argues that, "The circumstances of Appellant's identification and apprehension undeniably satisfy the exigency requirement." (Brief of Respondent p. 12). Respondent then argues that, ". . . Appellant remained at- large at the time the exigent request was made and by all indications was armed, a threat to law enforcement, and a threat to the community at large." (Brief of Respondent p. 13).

While Petitioner was "at-large" while the police were attempting to locate and arrest him, they were not in hot pursuit. As discussed above, law enforcement had no information that Appellant was about to flee or was trying to evade arrest. Petitioner was arrested, without incident, after leaving the Burlington Coat Factory on Bush River Road. (R. p. 1041, lines 7-16). There was no evidence that the warrantless search was needed to prevent the destruction of evidence.

While Petitioner was suspected of being involved in a violent crime and police had an arrest warrant for Petitioner, there was no evidence that he was a threat to law enforcement or the community. There was no evidence that Petitioner remained armed. When Corporal Hayhurst was asked if, at the time of arrest, he knew whether the Appellant was armed or not, the Corporal answered, "No, Ma'am." (R. p. 355, lines 21-23). The warrantless search of Appellant's cell phone records constituted a violation of the Fourth Amendment under both the State and Federal Constitutions. The State failed to meet its burden to justify the warrantless search pursuant to the exigent circumstances exception.

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[4] Arguably, the exigent circumstances exception to the warrant requirement would have applied to the search of the Garner's Ferry Road apartment because law enforcement reasonably believed persons within the apartment were in need of immediate aid. MIncy v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

If law enforcement had requested a search warrant for the GPS location information in order to locate and arrest Appellant, without any showing that Appellant was evading arrest or fleeing, the request should have been denied. As the Maryland District Court noted in In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 585 (D. Md. 2011):

> There is no precedent for what the government seeks: the right to obtain location data without any demonstration of the subject's knowledge of, and attempt to avoid, an arrest warrant. While courts routinely authorize location data where there is a demonstration under Rule 41(c)(1) that a defendant is fleeing to avoid prosecution and a few courts have authorized other types of surveillance in aid of an arrest warrant under All Writs Act where diligent law enforcement techniques have failed or been frustrated, no court under any rubric has approved a warrant or order for location data on the simple showing of an outstanding arrest warrant and the possession of a cell phone by the subject of the arrest warrant. See, e.g., In the Matter of the Application of United States for an order: (1) Authorizing Use of a Pen Register and Trap and Trace Device, (2) Authorizing Release of Subscriber and Other Information, (3) Authorizing Disclosure of Location-Based Services, 727 F.Supp.2d 571, n. 22 (W.D.Tex.2010) (stating that, in a case in which the government seeks location data to track a person so that an arrest warrant may be executed, the warrant affidavit must demonstrate the existence of the arrest warrant and probable cause to believe that the phone is in the possession of the *fugitive*) (emphasis added); In the Matter of Application for an Order Authorizing the Installation and Use of a Pen Register, 439 F.Supp.2d 456 (denying government's application for an order authorizing access to prospective cell site information where the government failed to submit an affidavit attesting to the facts in the application, including the defendant's fugitive status).

The Court of Appeals did not address the exigent circumstances finding by the trial judge. Instead, the Court of Appeals found the error, if any, in admitting the cell phone records obtained without a warrant or court order was harmless. The Court of Appeals wrote:

> We find there was overwhelming evidence of Appellant's guilt even without considering the location data provided by his cellular telephone provider. The surviving victim identified Appellant immediately after the incident as the perpetrator. Her identification carried significant weight because she saw and

> spent time with Appellant on a regular basis prior to this incident. Appellant's accomplice, Deandre Diggs, testified he and Appellant committed the crimes. Diggs testified in detail regarding the events and admitted substantial personal liability. The State also presented significant circumstantial evidence linking Appellant to the vehicle and firearm used to perpetrate this incident. Additionally, the State introduced a recording of a telephone call between Appellant and an associate, which was made while Appellant was in the detention center awaiting trial. In the recording, Appellant instructed his associate the surviving victim "need[ed] to be taken care of ASAP."

State v. Wallace, No. 2016-UP-344 (S.C.Ct.App. Filed June 29, 2016). While the evidence discussed above was important, the cell phone information served to corroborate witness testimony. Credibility of the witnesses was an important issue, especially in light of the fact that the deceased was a drug dealer. Petitioner only asked to speak with and provide a statement to Major Stan Smith after Captain McDonald showed Petitioner the cell phone records. (R. p. 1045, lines 1-20). The State referenced the cell phone records extensively throughout the trial. The error in admitting the illegally obtained cell phone records was not harmless.

2. The Court of Appeals erred in relying on United States v. Graham, 824 F.3d 421 (4th Cir. 2016), when the South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution.

In affirming Petitioner's convictions, the Court of Appeals wrote:

> Furthermore, we note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment. See United State v. Graham, Op. No. 12-4659, 4-5 (4th Cir. Filed May 31, 2016) (en banc) ("We now hold that the Government's [warrantless] acquisition of historical [cell-site location information] from Defendants' cell phone provider did not violate the Fourth Amendment."); id. At 5-6 ("All of our sister circuits to have considered the question have held, as we do today, that the government does not violate the Fourth Amendment when it obtains historical [cell-site location information] from a service provider without a warrant.").
>
> State v. Wallace, No. 2016-UP-344 (S.C.Ct.App. Filed June 29, 2016).

While the United States Court of Appeals for the Fourth Circuit recently held in Graham that the Government's warrantless acquisition of historical cell-site location information from Defendant's cell phone provider did not violate the Fourth Amendment under the U.S. Constitution based on the "third-party doctrine," the holding in Graham, based on the U.S. Constitution, is not dispositive in the present case. The South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution. See S.C. Const. art. 1§10; State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

During the motion to suppress counsel for Petitioner argued, "I would also argue that South Carolina's right to privacy is higher than that which is granted by the State, excuse me, the U.S. Constitution. I think that you have a heightened privacy interest in your cell phone simply because, again, the incriminatory nature of the device itself is not readily available." (R. p. 179,

lines 8-14). Although counsel did not specifically cite to the S.C. Const. art. 1§10 or State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), the motion to suppress was based on both the State and Federal Constitutions. In the reply brief Petitioner specifically argued that the trial judge's refusal to suppress the cell phone records obtained in violation of Petitioner's Fourth Amendment rights under both the State and Federal Constitutions was an error of law requiring reversal. (Reply Brief pp. 4-5). The Court of Appeals' reliance on Graham is misplaced given the heightened level of privacy protection provided by the South Carolina Constitution.

Other courts have, contrary to the finding in Graham, found an expectation of privacy in historic cell site location information. See Commonwealth v. Augustine, 4 N.E.3d 846, 861 (Mass.2014) ("CSLI implicates the same nature of privacy concerns as a GPS tracking device."); State v. Earls, 214 N.J. 564, 70 A.3d 630, 642 (N.J.2013) (reasonable expectation of privacy in location of cell phones); Tracey v. State, 152 So.3d 504, 526 (Fla.2014) (objectively reasonable expectation of privacy in "location as signaled by one's cell phone"); In re Application of U.S. for an Order Authorizing Disclosure of Location Info. Of a Specified Wireless Tel., 849 F.Supp.2d 526, 539 (D.Md.2011) ("reasonable expectation of privacy both in [subject's] location as revealed by real-time [CSLI] and in his movement where his location is subject to continuous tracking over an extended period of time, here thirty days"); In re Application of U.S. for an Order Authorizing the Release of Historical Cell–Site Info. *(*In re Application *(E.D.N.Y.))*, 809 F.Supp.2d 113, 120 (E.D.N.Y.2011) ("reasonable expectation of privacy in long-term cell-site-location records").

In State v. Drayton, 415 S.C. 43, 780 S.E.2d 902 (2015), this Court declined to reach the issue of whether an individual has an expectation of privacy in historic cell site location data because, in view of the totality of the circumstances, the affidavits in support of the search

warrants established probable cause for the search. No search warrant or court order was sought in the present case. This Court should find that, pursuant to S.C. Const. art. 1§10, an individual has an expectation of privacy in historic cell site location data as well as real time GPS locations.

The warrantless search of Appellant's cell phone records constituted a violation of the Fourth Amendment pursuant to the South Carolina Constitution and our heightened protection of privacy. The exclusionary rule required suppression of the illegally obtained records and any evidence procured from the illegally obtained records. "Generally, evidence derived from an illegal search or arrest is deemed fruit of the poisonous tree and is inadmissible." United States v. Najjar, 300 F.3d 466, 477 (4th Cir.2002) (citing Wong Sun v. United States, 371 U.S. 471, 484–85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). In State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012), the South Carolina Supreme Court wrote:

> The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. Davis v. United States, ——U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment. Id. at 2423. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.' "Id. at 2426 (citations omitted). "The rule's sole purpose, [the Supreme Court] has repeatedly held, is to deter future Fourth Amendment violations." Id. Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," the Court has stated "the deterrence benefits of suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. Id. at 2427.

Exclusion is proper under the facts of this case to deter the police from unilaterally seeking cell phone records of individuals from cell phone companies without judicial review through the use of a search warrant or court order. The good faith exception to the exclusionary rule should not apply in this case especially in light of the

factual discrepancies contained in the exigency form. The error in admitting the illegally obtained cell phone records is not harmless and requires reversal.

3. The Court of Appeals erred in failing to distinguish the present case from United States v. Graham, 824 F.3d 421 (4th Cir. 2016), when the Government in Graham obtained only historical cell-site location information and obtained that information after obtaining an order, based on a showing of specific and articulable facts supporting that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation, from the federal court pursuant to the Stored Communications Act, 18 U.S.C. §2703I, (d) (2012), but law enforcement in the present case obtained both historical cell-site location information as well as real time GPS locations from the cell phone company without a search warrant or court order.

The Graham case involved only historical cell-site location information and the Government obtained that information after obtaining an order from the federal court pursuant to the Stored Communications Act, 18 U.S.C. §2703(c), (d) (2012)[the Act]. According to the Act, in order to obtain a court order the Government must show "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C.. §2703(d). Law enforcement in the present case did not seek a court order. Instead, claiming exigent circumstances, law enforcement obtained both the historical cell-site location information as well as real time GPS locations from Petitioner's cell phone provider by simply faxing an exigency request. The obtaining of both kinds of information from the cell phone provider constitutes an illegal search requiring suppression of all of the cell phone records under the South Carolina Constitution. Additionally, the failure to obtain any type of court order, as required by the Act, requires suppression of both types of cell phone records in this case. As discussed below, there are additional grounds that require suppression of the real time GPS location information.

Other federal courts that have considered the issue have concluded that real time GPS information may only be obtained pursuant to a warrant supported by probable cause. In re App. of U.S. for an Order Authorizing Disclosure of Location Information, 849 F. Supp. 2d 526, 539-42 (D. Md. 2011); see also United States v. Espudo, 954 F. Supp. 2d 1029, 1035 (S.D. Cal. 2013) (collecting cases); but see In re Application of the United States for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone, 460 F. Supp. 2d 448 (S.D.N.Y. 2006) (warrant not required); In re Application of the United States for an Order (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber and Other Information, 433 F. Supp. 2d 804 (S.D. Tex. 2006) (same).

In discussing the nature of the modern day cell phone the Court in Riley noted:

> Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See United States v. Jones, 565 U.S. ——, 132 S.Ct. 945, 955, 181 L.Ed.2d 911 (2012) (SOTOMAYOR,J., oncurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Riley v. California, 134 S. Ct. 2473, 2490, 189 L. Ed. 2d 430 (2014).

The real time GPS location information obtained by law enforcement, without a warrant or court order, was the functional equivalent of a GPS tracking device. In United States v. Jones, --U.S.--,132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012) the Court wrote, "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" (footnote omitted). In State v. Adams, 409 S.C. 641, 652, 763 S.E.2d 341, 347-48 (2014) (footnote omitted), decided in September of

2014, after the July 2014, pre-trial hearing and August 2014, trial in the present case, the South Carolina Supreme Court wrote:

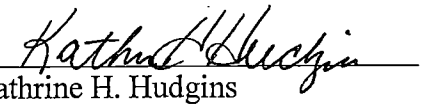
> Prior to Jones, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices. In 2002, as a part of the South Carolina Homeland Security Act, the legislature enacted a statute that provides that "[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State." S.C.Code Ann. § 17–30–140(A). This statutory requirement "provide[s] law enforcement ... with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties." Act No. 339, 2002 S.C. Acts 3625.

Law enforcement's monitoring of Petitioner's movements, through the use of the cell phone GPS and the cell phone provider was the functional equivalent of placing a GPS tracking device on Petitioner's car. The real time GPS location information from the cellphone company provided even more information than if law enforcement had placed a GPS tracking device on Petitioner's car because the information came from the cell phone which is ordinarily carried on the person and was not limited to the car. Pursuant to Jones and S.C. Code §17-30-140, a search warrant or court order was required to obtain the real time GPS location information. The illegal search requires suppression.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 2016-UP-344 (S.C. Ct. App. filed 8/18/2016)
2013-GS-40-4547--4551;
2013-GS-40-4553, 4554

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and William Anthony Wallace, #320396, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 19th day of September, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of September, 2016.

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

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

September 19, 2016

Caroline M. Scrantom, Esquire
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. William Anthony Wallace

Dear Ms. Scrantom:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/smf

Enclosures

cc: Court of Appeals