STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

APPELLANT

APPELLATE CASE NO. 2014-001786

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

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

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. This appeal follows.

STATEMENT OF FACTS

On June 28, 2012, James Sturm was driving out to a farm off of Bluff Road on Beckham Swamp Road to spray for weeds when a woman flagged him down for help. (R. 249, line 20 – R. 250, lines 1-21). The woman's hands were covered in blood and she asked him to take her to the hospital. (R. 250, lines 19-21). The woman got in Sturm's car, he turned around and headed back toward Bluff Road. (R. 251, line 2 – R. 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. 252, lines 20-25).

Deputy Taylor talked with Sturm and rendered aid to the woman who was later identified as Raquel Weston. (R. 260-261). Deputy Taylor testified that Weston told him that she had been shot by the Appellant Wallace. (R. 264, lines 18-24). Co-defendant, DeAndre Diggs, admitted at trial that he shot Weston but claimed it was at Appellant's direction. (R. 690-691). Weston survived the shooting and testified at trial that Diggs shot her. (R. 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. 277, line 15 – R. 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. 317, lines 11-17; R. 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. 1040, lines 12-17).

Once inside the apartment the officers found two men with fatal gunshot wounds to the head. (R.. 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. 976, lines 9-11; R. 978, lines 12-21). Johnson sometimes asked Weston to hold money for him. (R. 978, lines 24-25). Weston testified that Johnson was close friends with both Pratt and Appellant Wallace. (R. 977, line 23 – R. 978, lines 1-11; R. 986, lines 6-24).

On the morning of the shootings Johnson called Weston and asked her to bring the money and hurry up. (R. 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. 985, lines 15-21). Weston testified that Appellant pulled her into the apartment and asked her for the money. (R. 987, lines 11-21). According to Weston, she gave the money to Appellant. (R. 987, lines 19-21). Weston testified that Diggs had a knife and was standing near Johnson. (R. 986, lines 3-5). Weston testified that she also saw Pratt on the floor tied up with trash bags. (R. 987, line 22 – R. 988, lines 1-12).

Weston then testified that Johnson and Pratt were dragged to the back of the apartment where Appellant Wallace shot them both. (R. 990, lines 1-25; R. 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. 992-996).

Based on information provided by T-Mobile, Appellant's cell phone provider, Appellant was spotted leaving the Burlington Coat Factory off of Bush River Road with a

female that same day at about 3:30 PM. (R. 347, lines 11-22). Appellant was arrested without incident. (R. 1041, lines 1-16). Wallace initially denied any involvement in the shooting of Johnson and Pratt. (R. 1042, lines 1-24). Once confronted, however, with cell phone tower records law enforcement obtained, without a warrant, from T-mobile, Appellant's cell phone service provider, Appellant asked to speak with Major Stan Smith. (R. 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 Appellant told him was driving, pulled over and met Charlie G., an adversary of Johnson, on Cheval Street. (R. 819, line 11 – R. 820, 821, lines 1-16). Major Smith testified that Appellant told him that one of the men who was with Charlie G. pulled a gun and forced Appellant in the car and demanded that he take them to Johnson's apartment. (R. 821, lines 18-22). Appellant told Smith that when they arrived at Johnson's apartment they saw Weston. (R. 822, lines 10-15). Appellant said that Charlie G. and another gunman held a gun to Weston and used her as a means to enter Johnson's apartment. (R. 822, lines 16-25). A third gunman stayed in the car with Appellant. (R. 822, line 25). Appellant heard shots from inside the apartment and then the third man drove Appellant back to Cheval Street. (R. 823, lines 1-24).

ARGUMENT

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

During a motion to compel discovery held on July 31, 2014, approximately two weeks prior to trial, Appellant 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]. (July 31, 2014, R. 11, line 9 – R. 12, lines 1-16). Agent Samuel Reighley from the SLED fugitive Division testified that they located Appellant from the GPS location provided by T-Mobile[1]. (July 31, 2014, R. 27, line 2 – R. 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 Appellant from T-Mobile. (July 31, 2014, R. 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. (July 31, 2014, R. 36 – 42, lines 1-16).

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

[1] There is evidence in the record that Appellant 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 Appellant. (Tr. pp. 166-167).

as an exception to the warrant requirement, then - - -" (R. 213, lines 15-17). Counsel also noted that law enforcement 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. 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. 216, line 23 – R. 217, lines 1-14). The judge *sua sponte* added that the suspect was on the run. (R. 217, line 15).

The judge then denied the motion to suppress the Appellant'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. 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. 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. 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. 496, lines 2-4). The State then moved to admit the exigency form, State's Exhibit #86, in evidence. (R. 496, line

12 – R. 497, line 1). Appellant objected. (R. 497, lines 2-4). The judge overruled the objection. (R. 497, line 4). Appellant then withdrew the objection to the form itself and the exigency form was admitted in evidence, without objection[2]. (R. 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. 1198, State Exhibit #86).

There is no information that Appellant 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. 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. 737-738).

Major Smith testified that he knew that Captain McDonald had been talking with Appellant about his cell phone records from T-Mobile placing him near the scene of the crime. (R. 819, lines 11-20). Appellant objected. (R. 819, lines 21-22). The judge overruled the objection. (R. 819, line 23). Captain McDonald began to testify about the Appellant's phone records he received from T-Mobile. (R. 1043, lines 14-19). Appellant objected. (R. 1043, lines 20-21). Captain McDonald testified that the phone records placed Appellant near the crime scene. (R. 1044, lines 1-13). Appellant again objected. (R. 1044, lines 14-15). The judge overruled the objection. (R. 1044, line 20). Captain McDonald

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

then testified extensively in regard to the phone records obtain from T-Mobile without a warrant. (R. 1044 – 1060).

At the close of the presentation of evidence, Appellant renewed all pretrial motions. (R. 1118, lines 9-13). The motions were again denied. (R. 1118, lines 14-16). In closing argument the State referenced the Appellant's cell phone records placing him at the scene of the crime. (R. 1124, line 18 – R. 1125, lines 1-6). The judge erred in admitting the Appellant'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.

A search occurred in the present case when the police obtained Appellant's cell phone records from T-Mobile. In Riley v. California, -- U.S.--,134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014), the United States Supreme Court wrote:

> The Fourth Amendment provides:
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant." Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See Kentucky

v. King, 563 U.S. ——, 131 S.Ct. 1849, 1856–1857, 179 L.Ed.2d 865 (2011).

In Riley the 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).

Unlike Riley, the present challenge does not involve a motion to suppress data obtained from Appellant's phone after he was arrested based on a search incident to arrest. Instead, the challenge in the present case involves the search of the Appellant's cell phone records, without a warrant, in order to locate, arrest, and place Appellant near the scene of the crime. Exigent circumstances did not justify the warrantless search in the present case.

In discussing the nature of 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., concurring) ("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 GPS information obtained from the records T-Mobile provided law enforcement, without a warrant, allowed law enforcement to locate and arrest Appellant as well as place him near the crime scene.

In State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494-95 (2009), the South Carolina Supreme Court discussed the exigent circumstances exception writing:

> However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The United States Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." Scott v. United States, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement. Schmerber v. California, 384 U.S. 757, 770–771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. Johnson v. United States, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Protecting the safety of police officers has also been held an exigent circumstance. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d

276 (1990); cf. State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct.App.2004).

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.

In State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (S.C. Ct. App. 2004), the South Carolina Court of Appeals wrote:

> The exigent circumstances doctrine provides an exception to the Fourth Amendments 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)). For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individualposing a danger to those on the arrest scene); see also Brown, 289 S.C. at 587, 347 S.E.2d at 886 (agreeing that police may be justified in conducting a protective sweep of a crime scene where the potential for danger exists). Additionally, the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.

Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).(Footnote omitted).

None of the factors discussed as justifying a warrantless search in Welsh, Herring or Abdullah are present in Appellant's case. There is no evidence that the police did not have time to obtain a search warrant. The police were able to promptly secure a search warrant for the apartment on Garner's Ferry Road. (R. 1040, lines 12-17). While police were attempting to locate Appellant, they were not in hot pursuit. There was no evidence that the warrantless search was needed to prevent the destruction of evidence. The warrantless search of Appellant's cell phone records constituted a violation of the Fourth Amendment. The State failed to meet its burden to justify the warrantless search.

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

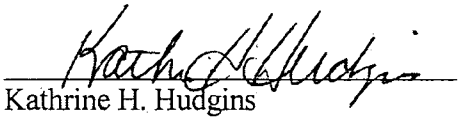
suppression must outweigh its heavy costs" for the exclusion to be deemed appropriate. Id. at 2427.

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.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of October, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 7th, 2014

Kathrine H. Hudgins
Appellate Defender

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of April, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2015.

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
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THE STATE,

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v.

WILLIAM ANTHONY WALLACE,

Appellant,

Appellate Case No. 2014-001786.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

Appellant William Wallace was indicted by the Richland County Grand Jury on two charges of murder, three charges of kidnapping, and one charge each for attempted murder and armed robbery. (R. pp. 1210-31).

Attorneys Stephen Krzyston, Lucas Hawks and Kris Hines of the Fifth Circuit Public Defender's Office represented Wallace. (R. p. 1). April Sampson, Vance Eaton and Daniel Coble of the Fifth Circuit Solicitors Office prosecuted the case. (R. p. 1). A pre-trial motions hearing took place on July 31, 2014, in Kershaw County before the Honorable Robert E. Hood. (R. p. 1). Wallace's Richland County jury trial began August 11, 2014, with Judge Hood presiding, and lasted five days. (R. p. 164).

Wallace was convicted of all charges, and Judge Hood sentenced Wallace to three consecutive terms of life imprisonment without the possibility of parole for each murder and the attempted murder. (R. p. 1194, lines 13-25). Wallace received additional life sentences for each of his three kidnapping convictions and the single armed robbery conviction. The latter four life sentences were issued to run concurrent to the third consecutive life sentence. (R. p. 1194, line 25 – p. 1195, line 1).

This appeal follows.

STATEMENT OF FACTS

Around 10:00 AM on June 28, 2012, Raquel Weston received a phone call from her boyfriend Athell Johnson telling her to "bring the money and hurry up." (R. p. 982, lines 2-5). Johnson was wheelchair bound, having been paralyzed from the waist down, and Weston helped care for Johnson at their Garners Ferry Road apartment. (R. p. 976, line 9 – p. 977, line 18). Weston also held Johnson's money; Johnson was a drug dealer and regularly asked Weston to store cash in a backpack at Weston's second apartment. (R. p. 978, line 12 – p. 979, line 15).

That morning, Weston grabbed the backpack and drove to the Garners Ferry Road apartment. (R. p. 984, lines 17-25). When she arrived, the door was locked, and when she used her key to open it, she found Johnson "laying on the right side of the living room. His feet were tied up. His hands w[ere] tied behind his back. His wheelchair was in the corner[.]" (R. p. 985, lines 4-19). She tried to step back, but was forcefully pulled inside by Appellant William Wallace. (R. p. 985, lines 19-21). Weston knew Wallace because she had seen him with Johnson "almost every day" in recent months. (R. p. 986, lines 17-24).

Wallace had a gun and was not acting alone. Another man, DeAndre Diggs, was standing by Johnson with a knife. (R. p. 986, lines 1-5). Wallace took Weston's cell phone, instructing her to put down her belongings and sit on the couch. (R. p. 987, lines 11-21). Weston sat down on her sectional sofa noticing that Jamal Pratt, a longtime friend of Johnson's, was also tied up with trash bags on the floor nearby. (R. p. 978, lines 1-9; R. p. 987, line 23 – p. 988, line 14).

Next at the Garners Ferry Road apartment, Weston looked on as Wallace asked Johnson "if that was all the money." (R. p. 988, lines 16-17). Wallace walked around the apartment. (R. p. 988, lines 23-2). Diggs took Weston's hot iron and burned Johnson's leg, then face. (R. p. 988, lines 10-16). Wallace told Weston that Johnson was going to die, and then Weston watched as Diggs pulled paralyzed Johnson, now with a trash bag tied over his mouth, to another room. (R. p. 990, lines 1-15). Wallace made Pratt walk to another back room in the apartment. (R. p. 683, lines 20-24; R. p. 990, lines 20-21). Diggs tied Weston's hands as she remained on the living room sofa. (R. p. 991, lines 2-8). Wallace "kept going back and forth outside" and returning. (R. p. 991, lines 13-16). Diggs left the apartment for good. (R. p. 684, lines 11-24; R. p. 992, lines 1-7). Wallace walked down the hallway to the back of the apartment, and Weston heard four gunshots. (R. p. 992, lines 8-18).

Wallace emerged from the back of the apartment and led Weston to the "white old car" in the parking lot. Diggs and Weston held onto handguns, and there was another "big shotgun" in the passenger seat. (R. p. 993, lines 1-25). Wallace regularly drove his Aunt's white 1999 Buick LeSabre, which was missing a passenger's side mirror, and security footage showed that car arriving at the Garners Ferry Road complex around 10:00 AM. (R. p. 459, line 14 – p. 460, line 20; R. p. 1066, lines 1-23). Wallace next drove Diggs and Weston from Garners Ferry to Bluff Road and crossed "into a wooded area." (R. p. 994, lines 1-16). When Diggs asked Wallace about Johnson and Pratt, Wallace announced their fate by stating that "they were asleep." (R. p. 688, lines 14-21).

They arrived at a swampy area and Wallace instructed Diggs to "get rid of Ms. Weston." (R. p. 690, lines 1-22). Wallace instructed Weston to get out of the car and

walk with Diggs. (R. p. 995, lines 19-25). She walked down a dirt road until Diggs told her to walk into the woods. She hesitated. He pushed her. She ran and tripped and fell. "Then he shot at [her] more than once." After two or three shots, she was laying in the woods, eyes closed. (R. p. 996, lines 10-19).

Wallace and Diggs drove to Wallace's residence. (R. p. 694, lines 4-15). Wallace unloaded the car of guns, drugs and money, and they changed their shirts. (R. p. 694, line 24 – p. 695, line 24). Wallace's friend Kimberly Cox picked them up, taking Diggs back to work at the chicken farm. (R. p. 656, lines 7-11; R. p. 697, lines 7-12). Cox and Wallace then ran some errands around Broad River Road, ending up at the Burlington Coat Factory. (R. p. 657, lines 6-24).

Back in the woods, Weston opened her eyes, took stock of her physical condition and walked out to the nearest road. (R. p. 996, line 21 – p. 997, line 6). A farm worker in a Jeep saw Weston "waving her hands covered in blood" and he picked her up to take her to the hospital. (R. p. 250, line 2 – p. 251, line 4). Weston told him that she had been shot by William Wallace and that there were two other victims at her Garners Ferry Road apartment. At the time, she did not know Diggs' name. (R. p. 997, lines 9-25). The Jeep's driver called 911 and was successful in flagging down a passing Sherriff's Deputy, who rendered roadside assistance until an ambulance arrived. (R. p. 252, line 18 – p. 253, line 7). Weston also told the Sherriff's Deputy that Wallace had shot her. (R. p. 264, lines 18-24).

Based upon information gleaned from Weston, law enforcement responded to the Garners Ferry Road apartment. (R. p. 768, lines 17-25). Corporal Robert Moreland led the entry into the apartment, unlocking the door and leading law enforcement in clearing

the apartment. (R. p. 321, lines 3-23; R. p. 323, lines 8-25). They first found a victim in the back bedroom straight down the hallway . . . leaning back against the bed." (R. p. 324, lines 4-14). The nonresponsive victim appeared to have suffered a gunshot wound to the head; he made "a death gurgle." (R. p. 324, lines 14-24). The second victim was found "lying face down in the bathroom. He also had the death gurgle . . . ." (R. p. 325, lines 4-10).

At the hospital, Weston was lucid despite sustaining gunshots in the head and arm. She made positive photo-lineup identifications of both Wallace and Diggs from a gurney. (R. p. 443, line 1 – p. 444, line 25; R. p. 998, line 22 – p. 1003, line 4). Weston underwent a successful surgery to remove and repair three gunshot wounds to the head and a fourth to an arm; she testified to the entirety of her experience at trial.[1] (R. p. 537, line 3 – p. 540, line 5).

The other two victims, Johnson and Pratt, each suffered gunshot wounds to the right side of the head resulting in irreversible brain damage and death. (R. p. 533, line 5 – p. 535, line 11; R. p. 575, lines 1-3). Johnson suffered a graze wound to the back of his head in addition to the fatal shot. (R. p. 567, lines 1-16). Stippling evident on each victim's head indicated that the shots were fired downward from a distance of only one-to-two feet. (R. p. 554, line 18 – p. 566, line 10; R. p. 572, line 21 – p. 573, line 6; R. p. 574, lines 21-23).

Richland County Fugitive Task Force simultaneously worked to locate William Wallace, seeking assistance from SLED. (R. p. 345, line 11 – p. 346, line 20). Special

[1] Diggs also testified in great detail to the entirety of he and Appellant's involvement. (R. pp. 662-740).

Agent Diego Nova of SLED's fugitive unit received the call from Richland County and submitted an exigent form to T-Mobile in order to obtain Wallace's cell phone records. (R. p. 495, line 9 – p. 496, line 23; R. pp. 1198 – 1199). Nova received real-time call information which placed Wallace "somewhere around the Bush River Road area" near "Dutch Square Mall." (R. p. 499, lines 2-25; R. pp. 1200 – 1209). Law enforcement assigned to Wallace's apprehension were radioed to that area and "were able to see Mr. Wallace coming out of Burlington Coat Factory." (R. p. 500, lines 12-25). Wallace was apprehended on Bush River Road, where the Fugitive Task Force was "told over the radio basically to go to this area, fan out and start looking for the Crown Vic" that they believed Wallace to be driving. (R. p. 347, line 6 – p. 350, line 14).

A few days later on July 3, 2012, Investigator Michael Laurita responded to a call to Tashonda Toatley's residence off of Rosewood Drive, where he recovered a Hi-Point nine millimeter handgun from underneath her mattress. (R. p. 291, lines 10-22). Toatley called to report finding the firearm after receiving "several phone calls from Mr. Wallace's family where they were telling her that they had to come over to her house to retrieve something of Mr. Wallace's," and searching her house for a reason why. (R. p. 307, lines 19 – p. 308, line 2; R. p. 744, lines 1-25). She recalled Wallace visiting her apartment on June 28, 2012. (R. p. 743, lines 3-24). She let him inside unattended and told him to lock the door on his way out. (R. p. 308, lines 2-8). That nine millimeter Hi-Point recovered from underneath Toatley's mattress ultimately conclusively tested as a match for the gun that fired the bullets retrieved from Johnson and Pratt's heads. (R. p. 928, line 21 – p. 929, line 14; R. p. 931, lines 9-25).

At trial, the cell phone records obtained pursuant to the exigency request corroborated the testimony of other witnesses, including that of Weston and Diggs. Richland County Captain Scott McDonald testified that according to Appellant's call T-Mobile call records and corresponding cell tower coordinates, Appellant first called Diggs on the morning of the murder during the 8:00 AM hour. (R. p. 10517, line 11 – p. 1053, line 15). Appellant made that call near the location where he dropped his Aunt off at work that morning. (R. p. 1053, lines 13-22). The next "significant" call McDonald testified to came from the area near the chicken farm where he next picked Diggs up from work. (R. p. 1054, line 20 – p. 1055, line 5). Appellant's next phone calls came between 10:00 AM and 12:00 PM near the Garners Ferry Road apartment complex late in the morning, placing him at the crime scene. (R. p. 1055, lines 21-25; R. p. 1058, lines 1-7).

ARGUMENT

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

Appellant's Suppression Motion

Following jury selection, defense counsel moved to suppress an exigency request and T-Mobile records. (R. p. 106, lines 2-9; R. p. 204, line 24 – p. 205, line 4). SLED served the exigency request on T-Mobile while attempting to locate and apprehend Appellant on the afternoon of the incident. [2] (R. p. 27, line 23 – p. 28, line 8; R. p. 10, lines 15-20; R. p. 11, lines 12-18). The trial court previously ordered the State to turn over "the exigency order and any records obtained from T-Mobile" to the defense based upon those records' relevance in placing Appellant at or near the incident location at the time of the crimes. (R. p. 39, lines 15-24). The State intended to use those cell phone coordinates as circumstantial evidence at trial. (R. p. 38, lines 15-22).

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

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

said she could report to her tenants that no ongoing threat existed; (2) that there were three victims with gunshot wounds to the head; (3) that two victims were in the process of dying; (4) and that the third victim had identified Appellant as the shooter. (R. p. 207, lines 1-19; R. p. 212, line 1 – p. 215, line 14). Additional testimony was taken from Richland County Captain Scott McDonald who testified that he "translated . . . the facts of the crime as [he] knew them at that time" to another officer who would then seek SLED's assistance. McDonald testified that he relayed the following facts in support of the exigent request: (1) the suspect was armed and dangerous; (2) three people were shot; (3) two were "gravely" wounded; (4) the suspect "was a threat to the community"; and (4) they "needed to get him off of the streets A.S.A.P." (R. p. 217, lines 1-14). The trial court added yet another reason: "that he was out on the run." (R. p. 217, line 15).

Defense counsel furthered that the "emergency" listed on the exigent circumstances request form did not match the facts known at the time the request was made. (R. p. 212, line 16 – p. 213, line 11; R. pp. 1198 – 1199). That form reads: "suspect is armed and dangerous, has shot/killed one victim [and] struck female victim on the head with handgun. Escaped and is threatening the life of surviving victim and family." (R. p. 1198 - 1199).

The trial court denied the motion to suppress, articulating:

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

(R. p. 231, lines 12-22).

At trial, Agent Nova testified that he submitted the exigency request form in "a life and death situation" as an alternative to obtaining a search warrant.[3] (R. p. 495, lines 18 – 25). Nova then testified that he served the exigent form on T-Mobile via fax, and that T-Mobile complied with providing records including "a tower and a sector or a GPS coordinate latitudes and longitude where the [defendant's] device is located." (R. p. 496, line 17 – p. 497, line 24). Next, the cell phone records were introduced into evidence over defense counsel's renewed objection.[4] (R. p. 498, lines 2-22).

Nova testified that he forwarded the T-Mobile records to Richland County, and that the real-time locations assisted him in locating and Petitioner for purposes of apprehension. (R. p. 499, lines 2-14). Later during the State's case at trial, Chief McDonald testified that Appellant's cell phone records placed him at the Garners Ferry Apartment crime scene between 10:00 AM and 12:00 PM. (R. p. 1055, lines 21 – 25; R. p. 1058, lines 1-7).

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings,* 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v.*

[3] Upon the State's introducing the exigent form, defense counsel initially renewed its objection, which the court overruled, and which defense counsel ultimately withdrew. (R. p. 496, line 24 – p. 497, line 11).

[4] Appellant renewed this objection at each relevant point during trial, and again at the close of evidence. (R. p. 819, lines 11-23; R. p. 1043, lines 14-21; R. p. 1044, lines 1-20; R. p. 1118, lines 9-16).

Carrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

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

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

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

"Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *State v. Herring,* 387 S.C. 201, 210, 692 S.E.2d 490, 494-95 (2009) (citing *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507(1967)). The warrant requirement "may be overcome when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King,* __ U.S. __, __, 131 S.Ct. 1849, 1856 (2011) (quoting *Mincey v. Arizona,* 437 U.S. 385, 394, 98 S.Ct.

240[illegible] 2414 (1978)).

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

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

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

The circumstances of Appellant's identification and apprehension undeniably satisfy the exigency exception. First, probable cause existed to pursue Appellant as the shooter. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Wortman v. City of Spartanburg,* 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). At the time of the exigency request's issuance, law enforcement had direct knowledge from Weston, a surviving victim and eyewitness, that it was Appellant who shot Johnson and Pratt. Furthermore, Weston was present when Appellant directed co-defendant Diggs to shoot and kill her, even though she did not learn Digg's name until after the crimes' completion. Weston

articulately identified Wallace both at the time of her roadside recovery and again at the hospital. Based upon that information, law enforcement immediately departed to the apartment Weston identified. There, they found the two victims left in grave condition, just as Weston had pinpointed. Because Weston provided accurate, articulable facts describing the crimes committed, probable cause also existed to pursue Appellant, whom Weston demarcated as the shooter.

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

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

> police or others inside or outside a dwelling. *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

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

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

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

The specific discussion of cell phone data found within *Riley,* however, is not persuasive in the manner argued by Appellant. *Riley* explicitly dealt with the seizure of a

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

Respondent submits that the present case indeed aligns with *Riley's* dicta excerpted above, and even more closely aligns with the reasoning evident in *Herring.* Law enforcement was moving quickly and with reliable information from a surviving victim. Chief McDonald testified to a simultaneous dispatching of officers. First, they arrived at the location of Weston's rescue on Beckham Swamp Road. Then, gleaning probable cause from Weston that Appellant was involved as a suspect, McDonald dispatched officers to the Garners Ferry Road apartment as well as initiating outside attempts to physically locate Appellant. (R. p. 1040, line 1 – p. 1041, line 10). As stated in the exigent request form, law enforcement had information to believe Appellant was armed and dangerous. He had gone after three victims in a violent manner. (R. p. 1198 – 1199). There existed reason to consider Appellant may be on the run, attempting to discard evidence of the crimes, or pursuing additional criminal activity. The possibility of Appellant undertaking additional injury was made more likely if Appellant learned that Weston had survived. Law enforcement had ample reason to act hastily given these circumstances, wherein additional lives may have been endangered. They also had additional reason to fear for their own safety in apprehending him.

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

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

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

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

> We recognize recent United States Supreme Court and South Carolina Supreme Court cases are more stringently viewing electronic *surveillance* vis-à-vis the right to privacy. *See United States v. Jones,* ——U.S. ——, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (2012) (finding a global positioning system tracking device installed on and monitoring a vehicle for twenty-eight days without a valid warrant violated the Fourth Amendment); *Kyllo v. United States,* 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)

> (finding a thermal imaging device used to scan a home for levels of heat, utilized without a warrant, was an unlawful search); *State v. Adams,* 409 S.C. 641, 646, 763 S.E.2d 341, 344 (2014) (recognizing the court of appeals found a constitutional violation when a GPS device was installed and monitored without a court order, a finding the State did not appeal). However, the evidence sought in this case was not obtained via electronic surveillance; rather, it was sought as business records of Verizon. The South Carolina appellate courts have not addressed historical cell site location data under the South Carolina Constitution. Accordingly, we rely on the federal precedent and find Drayton did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the ordinary course of business. *See* [*United States v. Graham,* 846 F.Supp.2d 384, 389 (D.Md. 2012)] (explaining courts that have found no expectation of privacy in historical cell site location data "have concluded that because people voluntarily convey their cell site location data to their cellular providers, they relinquish any expectation of privacy over those records").

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

Agent Nova sought Petitioner's "48 hour subscriber, cell site, historical information and GPS Locator" directly from T-Mobile in his exigent request form. (R. p. 1198 – 1199). Where Appellant cannot make a threshold determination of a legitimate expectation of privacy in connection with the business records obtained without a warrant, *Drayton* dictates that Appellant was not actually subject to any warrantless search which he now challenges. *See id.* Thus, Appellant is not entitled to relief on this issue.

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

Admission of erroneously seized evidence may be harmless error. *State v. Herring, supra* at 215, 692 S.E.2d at 497. The error will be deemed harmless where Appellant's "guilt has been conclusively proven by competent evidence such that no

other rational conclusion can be reached." *State v. Gillian,* 373 S.C. 601, 610, 646 S.E.2d 872, 876 (2007). A determination of harmless error requires a consideration of the case's particular facts and other various factors including, *inter alia,* whether testimony was cumulative and the presence or absence of corroborating testimony. *State v. Clark,* 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994).

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

Moreover, the cell phone records were merely cumulative and fully corroborative of earlier witness testimony. McDonald's trial testimony utilized the cell phone records to show that on the morning of the murders, Appellant first dropped off his aunt at work at a location near the intersection of Two Notch Road and Beltline. (R. p. 1053, lines 12-22). That aunt, Vernell Wallace, had already testified that Appellant drove her white Buick LeSabre to drop her off at work "off Two Notch Road" around 8:00 that morning. (R. p. 459, line 18 – p. 461, line 6). Next, McDonald testified that Appellant made a phone call shortly before 9:00 AM which placed him near Digg's workplace. (R. p. 1054, line 21 – p. 1055, line 5). Diggs testified that Appellant picked him up from work shortly after Diggs clocked in; Diggs usually clocked in around 8:20 AM. (R. p. 667, line 16 – p. 668,

line 23). The next phone calls show Appellant traveling closer to the Garners Ferry Road crime scene, where phone records showed that he remained between 10:00 A and 12:00 PM. (R. p. 1055, line 9 – p. 1056, line 2). This is consistent with Digg's testimony as well. (R. p. 669, line 9 – p. 670, line 7). Weston also testified that she received Johnson's "bring the money and hurry up" phone call between 10:00 and 10:30 AM. (R. p. 981, line 16 — p. 982, line 5).

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

CONCLUSION

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

Respectfully submitted,

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

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October 7, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

v.

WILLIAM ANTHONY WALLACE,

Appellant,

Appellate Case No. 2014-001786.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent, complies with Rule 211(b), SCACR, and the August 13, 2007, Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

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

Katherine H. Hudgins, Esq.
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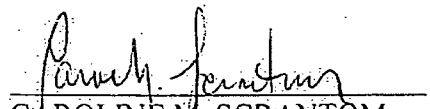
I further certify that all parties required by Rule to be served have been served.
This 7th Day of October, 2015.



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STATE OF SOUTH CAROLINA

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THE STATE,

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WILLIAM ANTHONY WALLACE,

APPELLANT

APPELLATE CASE NO. 2014-001786

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Did the trial judge err in finding that the exigent circumstances exception to the search 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?

Appellant 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 Appellant's cell phone provider T-Mobile. (R. 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[1]." (R. 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. 1198, State's Exhibit #86).

Appellant moved to suppress the records obtained from T-mobile pursuant to the "exigency request." (R. 191, lines 12-20; R. 199, lines 9-12; R. 204, line 25, - R. 205, lines 1-18). Appellant argued that the circumstances in the present case did not meet the exigent

[1] 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. 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. 737-738). Additionally, as Appellant had not yet been arrested, he certainly had not escaped as alleged in the "exigency request."

circumstances exception to the requirement for a search warrant. (R. 212-213). The judge denied the motion to suppress. The judge **did not** rule, nor did the State argue that a search warrant was not needed because Appellant did not hold a legitimate expectation of privacy in the cell phone records. Instead, 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. 231, lines 12-23).

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. "In criminal cases, this Court only reviews errors of law." State v. Gamble, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)). However, this Court reviews questions of law de novo. State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted). The trial judge's refusal to suppress the cell records in

violation of Appellant's Fourth Amendment rights under both the State and Federal Constitutions is an error of law requiring reversal.

Respondent argues that the exigent circumstances exception to the warrant requirement applies because, ". . . 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." (Initial Brief of Respondent p. 13). 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 Appellant'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.

Real Time GPS Location Information

The real time GPS location information obtained by law enforcement, without a warrant, 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). Respondent's reliance on State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015) reh'g denied (Mar. 19, 2015), in regard to the real time GPS location information is

misplaced because Drayton involved only historical cell service location information rather than GPS information. The historical cell service location information obtained in the present case is discussed below. The present case is also distinguished from Drayton by the fact that law enforcement in Drayton obtained search warrants for the historical cell service location information. The records in the present case were obtained by a faxed "exigent request."

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).

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 Amendments 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.

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).

First, 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[2]. (R. 1040, 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." (Initial Brief of Respondent p. 13).

While Appellant 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. Appellant was arrested, without incident, after leaving the Burlington Coat Factory on Bush River Road. (R. 1041, lines 7-16). There was no evidence that the warrantless search was needed to prevent the destruction of evidence.

While Appellant was suspected of being involved in a violent crime and police had an arrest warrant for Appellant, there was no evidence that he was a threat to law enforcement or the community. There was no evidence that Appellant remained armed. When Corporal Hayhurst was asked if, at the time of arrest, he knew whether the

[2] 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).

Appellant was armed or not, the Corporal answered, "No, Ma'am." (R. 355, lines 21-23). The warrantless search of Appellant's cell phone records constituted a violation of the Fourth Amendment. The State failed to meet its burden to justify the warrantless search pursuant to the exigent circumstances exception.

Historical Cell Service Location Information

In addition to the GPS location information, law enforcement also obtained historical cell service location information without a warrant. The historical cell service location information placed appellant near the scene of the crime. Respondent argues, relying on State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), reh'g denied (Mar. 19, 2015), that Appellant had no expectation of privacy in the historical cell site location data obtained without a warrant from his cell phone. (Brief of Respondent p. 16). In Drayton the Court of Appeals wrote:

> Under our analysis of the cases interpreting the United States Fourth Amendment, we find Drayton did not have a legitimate expectation of privacy in his historical cell site location records. First, the Stored Communication Act requires only a showing of "specific and articulable facts" is necessary for the issuance of a search warrant. *See* 18 U.S.C. § 2703(d) (Supp.2014); see generally Elizabeth Elliott, United States v. Jones: The (Hopefully Temporary) Derailment of Cell–Site Location Information Protection, 15 Loy. J. Pub. Int. L. 1, 3 (2013) ("Currently under the Stored Communications Act., criminal investigators can obtain cell-site location data with only a showing of 'specific and articulable facts'." (quoting § 2703(d))).
>
> Second, the federal courts have found no expectation of privacy in historical data records. See United States v. Graham, 846 F.Supp.2d 384, 389–90 (D.Md.2012)(stating "[a] majority of courts ... have concluded that the acquisition of historical cell site location data pursuant to the Stored Communications Act's specific and articulable facts standard does not implicate the Fourth Amendment"). But see Tracey v. State, 152 So.3d 504, 515 (Fla.Sup.Ct.filed Oct. 16, 2014) (noting "as to 'historical' cell site location information, the federal

> courts are in some disagreement as to whether probable cause or simply specific and articulable facts are required for authorization to access such information").

411 S.C. at 547-48, 769 S.E.2d at 262. The finding by the Maryland District Court cited in Drayton, United States v. Graham, 846 F.Supp.2d 384, 389–90 (D.Md.2012), was reviewed by the Fourth Circuit Court of Appeals in United States v. Graham, No. 12-4659, 2015 WL 4637931, at *8 (4th Cir. Aug. 5, 2015). The Fourth Circuit wrote:

> We hold that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI [cell site location information] for an extended period of time. Examination of a person's historical CSLI can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user. Cell phone users have an objectively reasonable expectation of privacy in this information. Its inspection by the government, therefore, requires a warrant, unless an established exception to the warrant requirement applies.

The Fourth Circuit found the privacy concerns with historical cell site location information were even greater than the privacy concerns addressed in Jones with regard to GPS monitoring writing, "The privacy interests affected by long-term GPS monitoring, as identified in Maynard and the Jones concurrences, apply with equal or greater force to historical CSLI for an extended time period. 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.")." United States v. Graham, No. 12-4659, 2015 WL 4637931, at *11 (4th Cir. Aug. 5, 2015). The Court noted that the cell phone was carried on the person rather than the GPS device in Jones that was attached to the automobile.

Other courts have come to similar conclusions. 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").

The Eleventh Circuit found a distinction between the GPS monitoring information and historical cell site location information finding, as the South Carolina Court of Appeals found in Drayton, no expectation of privacy in the later. See United States v. (Quartavious) Davis, 785 F.3d 498 (11th Cir.2015). The Fifth and Sixth Circuits reached a similar conclusion. See In re Application of U.S. for Historical Cell Site Data , 724 F.3d 600 (5th Cir.2013); United States v. Skinner, 690 F.3d 772 (6th cir. 2012). The present case is distinguished from the federal cases because in each of those cases the records were obtained pursuant to a court order. The orders in Davis and In re Application of U.S. for Historical Cell Site Data were issued pursuant to 18 U.S.C. § 2703(c) requiring a showing of specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation. There was no court order in the present case. The records in Drayton were obtained by a search warrant. There was no search warrant in the present case. Based on the Fourth Circuit's ruling in Graham, this Court should find

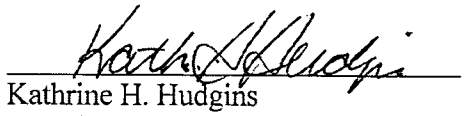
that a person has a reasonable expectation of privacy in historical cell site location information and require law enforcement to seek a search warrant in order to obtain these records.

In the present case Special Agent Nova circumvented the search warrant process, the court order process and even the subpoena process to obtain Appellant's cell phone records. The exigent circumstances exception to the warrant requirement does not apply to the historical cell site service locations. As to the real time GPS location information, there is no evidence that police did not have time to seek a search warrant and no evidence that Appellant was about to flee or was trying to evade arrest. The unlawfully seized records should have been suppressed at trial. The failure to suppress requires a new trial.

CONCLUSION

Based on the above argument and the argument contained in the inital brief, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



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ATTORNEY FOR APPELLANT.

This 7th day of October, 2015.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of October, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2015.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .