

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

OCT 19 2016

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Robert E. Hood, Circuit Court Judge

S.C. SUPREME COURT

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

Appellate Case No. 2016-001963

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER’S QUESTIONS PRESENTED 2

RESPONDENT’S COUNTER-QUESTIONS PRESENTED 2

STATEMENT OF THE CASE..... 3

RESPONDENT’S STATEMENT OF THE FACTS..... 5

ARGUMENT 10

 I. The Court of Appeals correctly rejected Petitioner’s claim that the trial court erred in failing to suppress the introduction of Petitioner’s T-Mobile records because, regardless of whether the records were obtained through a valid application of the exigent circumstances exception to the search warrant requirement, their introduction proves harmless due to other compelling and overwhelming evidence of Petitioner’s guilt. 10

 II. Neither lower court based its determination in this case on the recent holding in *United States v. Graham, infra*, nor did any court address whether the South Carolina Constitution offers a higher level of privacy protection than that of the Fourth Amendment to the United States Constitution, leaving Petitioner’s second question presented unpreserved. 15

 III. The Court of Appeals did not err when it did not distinguish Petitioner’s case from *United States v. Graham, infra*, because the trial court properly admitted Petitioner’s T-Mobile records through a valid application of the exigent circumstances exception to the search warrant requirement. 18

CONCLUSION..... 23

PETITIONER'S QUESTIONS PRESENTED

- I. 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?
- II. 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?
- III. 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 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. §27031, (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?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

- I. Did the Court of Appeals correctly reject Petitioner's claim that the trial court erred in failing to suppress the introduction of Petitioner's T-Mobile records where, regardless of whether the records were obtained through a valid application of the exigent circumstances exception to the search warrant requirement, their introduction proves harmless due to other compelling and overwhelming evidence of Petitioner's guilt?
- II. Is Petitioner's second question presented preserved for review by this Court where lower courts neither based its determination in this case on the recently decided *United States v. Graham, infra*, nor addressed whether the South Carolina Constitution offers a higher level of privacy protection than the Fourth Amendment provision of the United States Constitution?
- III. Did the Court of Appeals err in failing to distinguish Petitioner's case from *United States v. Graham, infra*, where the trial court admitted Petitioner's T-Mobile records through a valid application of the exigent circumstances exception to the search warrant requirement?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Petitioner William Wallace for the murders of Athell Johnson and Jamal Pratt, the attempted murder of Raquel Weston, for the kidnapping of all three victims, and for armed robbery. (R. pp. 1210-31). Attorneys Stephen Krzyston, Lucas Hawks and Kris Hines of the Fifth Circuit Public Defender's Office represented Petitioner. (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). Petitioner's Richland County jury trial began August 11, 2014, with Judge Hood presiding, and lasted five days. (R. p. 164).

A jury convicted Petitioner of each charge and Judge Hood sentenced Petitioner to three consecutive terms of life imprisonment without the possibility of parole for each murder and for the attempted murder. (R. p. 1194, lines 13-25). Petitioner 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).

On appeal, Petitioner argued that the trial court erroneously applied the exigent circumstances exception to the search warrant requirement when it allowed the State to present evidence of cell phone records obtained by SLED from T-Mobile with the use of an exigency request form. (Br. of App. pp. 8-16). Respondent countered that exigent circumstances required law enforcement to collect the cell phone record without a search warrant, that the phone records used at trial were not subject to the Fourth Amendment in light of the Court of Appeals' opinion issued in *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. Feb. 4, 2015), and that any error in the trial court's failure to suppress the cell phone records was harmless. (Br. of Resp. pp.

8-19).

Between briefing and oral argument, this Court vacated in part and affirmed in result the Court of Appeals' *Drayton* opinion. 415 S.C. 43, 780 S.E.2d 902 (Dec. 23, 2015); (Supp. Citation Ltr. from Resp. to Ct. App. (Mar. 31, 2016) (on file at Ct. App., Case No. 2014-001786)). Oral argument occurred on April 12, 2016. Following oral argument but prior to the Court of Appeals' opinion, the Fourth Circuit Court of Appeals decided *United States v. Graham*, Op. No. 12-4659 (4th Cir. May 31, 2016) (en banc). (Supp. Citation Ltr. from Resp. to Ct. App. (May 31, 2016) (on file at Ct. App., Case No. 2014-001786)). Both parties cited to the lower court opinion in *Graham* in support of their respective arguments in this case, and the pending en banc disposition of *Graham* was discussed at oral argument. (Br. of Resp., pp. 16-17); (Reply Br. of App., pp. 1-12).

The Court of Appeals thereafter issued an unpublished opinion affirming Petitioner's convictions and sentence only on the basis that the admission of the cell phone location data would constitute harmless error, and merely noting as dicta that "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." (App. pp. 1-3 (citing *United States v. Graham*, Op. No. 12-4659, 4-6 (4th Cir. Filed May 31, 21016) (*en banc*))).

Petitioner sought rehearing on the Court of Appeals' finding of harmless error and the Court of Appeals' failure to distinguish the present case from *United States v. Graham, supra*. (Pet. for Rehearing). Rehearing was denied on August 18, 2016. (App. pp. 4-15). Petitioner now seeks certiorari in this Court, and this Return follows.

RESPONDENT'S STATEMENT OF THE 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 Petitioner 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 Sheriff's Deputy, who rendered roadside assistance until an ambulance arrived. (R. p. 252, line 18 – p. 253, line 7). Weston also told the Sheriff'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 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).

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

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 Petitioner's call T-Mobile call records and corresponding cell tower coordinates, Petitioner first called Diggs on the morning of the murder during the 8:00 AM hour. (R. p. 10517, line 11 – p. 1053, line 15). Petitioner 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). Petitioner'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 Court of Appeals correctly rejected Petitioner’s claim that the trial court erred in failing to suppress the introduction of Petitioner’s T-Mobile records because, regardless of whether the records were obtained through a valid application of the exigent circumstances exception to the search warrant requirement, their introduction proves harmless due to other compelling and overwhelming evidence of Petitioner’s guilt.**

Petitioner first maintains the Court of Appeals erred in applying harmless error to the evidence at issue because the cell phone information obtained and presented at trial served to corroborate witness testimony in a case where Petitioner provided a statement to law enforcement only after he was shown the cell phone records. (Pet. for Writ of Cert. at 16). In response, the State submits that even assuming the trial court erred in admitting the T-Mobile records—which it did not, because exigent circumstances existed that allowed SLED to obtain the records without a search warrant—the Court of Appeals correctly found the admission of the cell phone records harmless in light of overwhelming evidence of guilt such that no other rational conclusion could be reached.

“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).

Not only does the record in this case demonstrate evidence supportive of the Court of Appeals’ harmless error determination, but that court’s harmless error analysis fails to meet any of this Court’s “Considerations Governing Review” as explained in Rule 242(b)(1-5), SCACR. Certiorari should be denied.

The 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 Petitioner 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 Petitioner 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 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 Petitioner 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

² Evidence in the record indicates that Petitioner wore an ankle monitor as part of a probationary requirement. The extent to which law enforcement may have utilized that GPS monitor to locate Petitioner 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).

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,

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).

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 regarding Petitioner's cell phone tower pings in order to relate to the jury that the cell phone records obtained through T-Mobile 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).

Harmless Error Applies

The Court of Appeals correctly affirmed Petitioner's convictions and sentence upon a finding of "overwhelming evidence of guilt even without considering the location data provided by his cellular telephone provider." (App. p. 2). In light of the wealth of inculpatory, corroborative evidence, any error in the admission of the challenged cell phone records could not reasonably have affected the result of the trial.

Admission of erroneously seized evidence may be harmless error. *State v. Herring*, 387 S.C. 201, 215, 692 S.E.2d 497 (2009). The error will be deemed harmless where Petitioner'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

⁴ Petitioner 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).

absence of corroborating testimony. *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994).

Absent the cell phone records' admission, the State presented a case-in-chief demanding a jury to return a verdict of Petitioner's guilt beyond a reasonable doubt. Considering the compelling testimony of surviving victim Weston alone, the jury was presented with enough eyewitness evidence to find Petitioner guilty of each crime charged. (R. p. 974 – p. 1020). As to Weston being shot by Diggs at the direction of Petitioner—Diggs admitted the totality of his actions from the witness stand. (R. p. 662 – p. 741). 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, Petitioner 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 Petitioner 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 Petitioner 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 Petitioner 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 Petitioner traveling closer to the Garners Ferry Road crime scene, where phone records showed that he remained between 10:00 AM and 12:00 PM. (R. p. 1055, line 9 – p. 1056, line 2). This is consistent with Diggs' 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).

The Court of Appeals properly concluded that the cell phone records' admission was harmless when viewed against the entirety of the remaining record. The State presented a case conclusive of guilt. Since the present case warrants the application of harmless error regardless of the propriety of the trial court's admission of the challenged cell phone evidence, the State submits that certiorari should be denied on this issue. *See* Rule 242(b), SCACR.

II. Neither lower court based its determination in this case on the recent holding in *United States v. Graham, infra*, nor did any court address whether the South Carolina Constitution offers a higher level of privacy protection than that of the Fourth Amendment to the United States Constitution, leaving Petitioner's second question presented unpreserved.

Petitioner seeks certiorari to determine whether the Court of Appeals erred in its dicta acknowledging the recent Fourth Circuit holding in *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (holding that the government did not violate the Fourth Amendment when it obtained historical cell-site location information from a cell phone provider without a warrant). (Cert. Pet. pp. 17-20). However, the question presented does not relate to any issue preserved for review by this Court and certiorari should be denied.

In order to seek a writ of certiorari in this Court, the party seeking review must have raised the issued to the Court of Appeals in its briefs lending to that court's ruling, and again in a petition for rehearing. Rule 242(d)(2), SCACR; *see Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding that South Carolina appellate courts cannot address arguments raised for the first time in petition for rehearing). "An issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000). The arguments

relied upon as the premise for Petitioner's second and third questions presented were not initially raised by Petitioner.⁵ The argument lending to these questions presented initially appeared as an additional sustaining ground in the Brief of Respondent. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

The trial judge in this case did not rule that the Fourth Amendment did not apply. (R. p. 231, lines 12-22). Nor did the trial judge rule upon Petitioner's argument "that South Carolina's right to privacy is higher than that which is granted by the . . . U[nited] S[tates] Constitution." (See R. p. 179, lines 8-19). Instead, the State premised an additional sustaining grounds argument upon the Court of Appeal's opinion in *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015), which found, as a matter of first impression in South Carolina, that there exists no reasonable expectation of privacy in historical cell site location data obtained as a business record of the cell phone carrier. The State submitted that the challenged cell phone records were admissible because SLED's warrantless acquisition of that information was not a search: the Fourth Amendment did not apply to the request. (Br. of Resp. pp. 16-17).

Petitioner countered the State's sustaining ground within its Reply Brief, positing that that SLED's obtainment of the cell phone records at issue fell within the purview of the Fourth Amendment because "[t]he real time GPS location information obtained by law enforcement, without a warrant, was the functional equivalent of a GPS tracking device." (Rep. Br. of App., pp. 5-9). Petitioner additionally argued that Petitioner's historical cell service location data was subject to the Fourth Amendment because, despite this Court's recent *Drayton, supra*, opinion,

⁵ To this end Petitioner's third question presented is similarly unpreserved.

the Fourth Circuit had recently held that warrantless obtainment of historical cell site location information over an extended period of time was subject to the warrant requirement. (Rep. Br. of App., pp. 9-12 (citing *United States v. Graham*, 796 F.3d 332 (4th Cir. Aug. 5, 2015), *overruled by United States v. Graham*, 824 F.3d 421 (4th Cir. May 31, 2016) (en banc))).

By the time of oral argument, the parties and the court awaited publication of the above-referenced en banc opinion in *Graham*, which was issued prior to the Court of Appeals' opinion in this case. Also by the time of oral argument, this Court vacated the portion of *Drayton, supra*, which had formed the basis for the State's additional sustaining ground the Petitioner's reply. This Court found that the Court of Appeals reached the novel issue in error "because, in view of the totality of the circumstances, the affidavits in support of the warrants established probable cause for the search." *State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (Dec. 23, 2015). This Court also found any error in the issuance of the warrants in *Drayton* harmless and upheld the conviction and sentence in a similar manner as done by the Court of Appeals in the present case. *Id.*

Considering all of the above, neither the trial court nor the Court of Appeal's dispositions in this case relied upon the State's additional sustaining ground. Instead, the Court of Appeals opinion included only dicta regarding the Fourth Circuit's recent decision in *United States v. Graham*, 824 F.3d 421 (4th Cir. May 31, 2016) (en banc), a holding which, had it been in existence at the time of Petitioner's trial, may have applied to the trial court's decision regarding the admissibility of the cell phone records at issue. The Court of Appeals opinion stated:

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 States 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.”).

(App. pp. 2-3).

The Court of Appeals did not base its disposition on *United States v. Graham*, 824 F.3d 421 (4th Cir. filed May 31, 2016) (en banc), as Petitioner argues. The court rather merely noted that this Court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violated the Fourth Amendment. (App. pp. 2-3). Absent an express reliance on the above-cited rule from the Fourth Circuit, there exists no novel question of law which is properly before this Court’s consideration. *See* Rule 242, SCACR. Heretofore, the only reviewable issue Petitioner has raised relates to whether the trial court properly applied the exigent circumstances exception to the search warrant requirement to SLED’s warrantless acquisition of Petitioner’s T-Mobile records, and whether the Court of Appeals’ subsequent application of harmless error was valid. Accordingly, certiorari should be denied.

III. The Court of Appeals did not err when it did not distinguish Petitioner’s case from *United States v. Graham*, *infra*, because the trial court properly admitted Petitioner’s T-Mobile records through a valid application of the exigent circumstances exception to the search warrant requirement.

“It is within the appellate court’s discretion whether to address any additional sustaining grounds.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). The Court of Appeals did not error when it did not distinguish Petitioner’s case from the recently decided *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (holding that the government did not violate the Fourth Amendment when it obtained historical cell-site location information from a cell phone provider without a warrant). In its initial brief, Respondent made

an additional sustaining ground argument that Petitioner lacked a reasonable expectation of privacy in the T-Mobile records sought and that, therefore, the Fourth Amendment did not apply to the evidence at issue. (Br. of Respondent, pp. 16-17). The Court of Appeals instead applied harmless error and affirmed of Petitioner's convictions and sentence, finding "the error, if any, of admitting the location data could not reasonably have affected the result of the trial." (App. p. 2).

The application of harmless error does not, however, preclude the propriety of the trial court's admission of the challenged cell phone records. At trial, the court ruled Petitioner's real-time GPS and historical cell service location data admissible, finding SLED obtained that information through a validly executed exigency request. (R. p. 231, lines 12-22). Respondent submits that regardless of whether the Fourth Amendment applies to the information sought to be suppressed in this case, the trial court did not admit the records in error when it applied the exigency exception to the facts of Petitioner's case.

"Because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *State v. Herring*, 387 S.C. at 210, 692 S.E.2d at 494-95 (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507(1967)); *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (requiring suppression of evidence seized in violation of the Fourth Amendment's prohibition of unreasonable search and seizure). The warrant requirement "may be overcome when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, ___ U.S. ___, ___, 131 S.Ct. 1849, 1856 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414 (1978)).

"Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." Faulting the police for failing to apply for a search warrant at the

earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

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

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

First, probable cause existed to pursue Petitioner 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 Petitioner who shot Johnson and Pratt. Furthermore, Weston was present when Petitioner 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 Petitioner, whom Weston demarcated as the shooter.

Second, Petitioner 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 (holding that exigent circumstances justified an officer's looking through the suspect's garage window "for a suspected murderer whom they knew was likely to be armed with a deadly weapon").

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.

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*.⁶ 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, gleaned probable cause from Weston that Petitioner was involved as a suspect, McDonald dispatched officers to the Garners Ferry Road apartment as well as initiating outside attempts to physically locate Petitioner. (R. p. 1040, line 1 – p. 1041, line 10). As stated in the exigent request form, law enforcement had information to believe Petitioner was armed and dangerous. He had gone after three victims in a violent manner. (R. p. 1198 – 1199). There existed reason to consider Petitioner may be on the run, attempting to discard evidence of the crimes, or pursuing additional criminal activity. The possibility of Petitioner undertaking additional injury was made more likely if Petitioner learned that Weston had survived. Law enforcement had ample reason to act hastily given these circumstances,

⁶ *Riley's* distinct application to the present case is inapposite. Petitioner'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 as they were in *Riley*. The United State Supreme Court's analysis in *Riley* only relates to the governance of warrantless searches and seizures of property found on or near an arrestee. *Riley* at 2487.

wherein additional lives may have been endangered. They also had additional reason to fear for their own safety in apprehending him.

Law enforcement possessed sufficient justification to seek out Petitioner's real-time T-Mobile records without first obtaining a warrant.⁷ *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"). Thus, the trial court did not err when it admitted the evidence pursuant to the exigency exception to the search warrant requirement. Furthermore, the Court of Appeals did not err when it applied harmless error and did not distinguish this case from the recently decided *United States v. Graham*, *supra*, because that court was not required to address Respondent's additional sustaining ground argument regarding the existence or non-existence of a reasonable expectation of privacy in the records obtained. *I'On, L.L.C. v. Town of Mt. Pleasant*, *supra*.

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari to the Court of Appeals. For the reasons discussed above, the Court of Appeals was correct when it applied established case law concerning harmless error in affirming Petitioner's convictions and sentence.

⁷ 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.

Respectfully Submitted,

ALAN WILSON
Attorney General

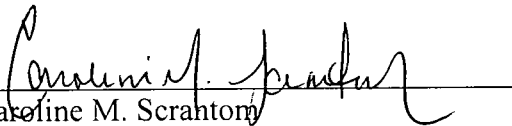
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General
S.C. Bar No. 101357

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188


Caroline M. Scramton
ATTORNEYS FOR RESPONDENTS

October 19, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

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

Appellate Case No. 2016-001963

RECEIVED

OCT 19 2016

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

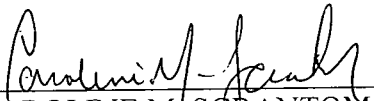
PETITIONER.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two (2) copies of the same via inter-agency mail, addressed to his attorneys of record at:

Katherine H. Hudgins, Esquire
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

I further certify that all parties required by Rule to be served have been served. This 19th day of October, 2016.


CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357