STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County

The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JUSTIN JAMAL WARNER,

Appellant.

Appellate Case No. 2017-001313

INITIAL BRIEF OF RESPONDENT

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II. Whether the court erred in allowing witness David Church to give very detailed cell phone testimony about appellant's alleged whereabouts according to his interpretation of the cell phone towers evidence, since the state failed to prove this evidence was sufficiently reliable pursuant to the court's gatekeeping function, and in reality the evidence was speculative, and should not have been admitted?

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STATEMENT OF THE CASE

Justin Warner ("Appellant") was indicted by the Anderson County grand jury on charges of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. (Tr. p. 44, l. 2-4). At trial, Appellant was represented by Bruce Byrholdt, Esquire, and Bruce Harvey, Esquire. (Tr. p. 1). Deputy Solicitor Catherine Huey, Esquire, prosecuted the case on behalf of the Tenth Circuit Solicitor's Office. (Tr. p. 1). Appellant was tried before the Honorable R. Lawton McIntosh from May 22nd, to May 25th, 2017. (Tr. p. 1; p. 220; p. 374; p. 519). At the conclusion of the trial, the jury found Appellant guilty as indicted. (Tr. p. 675, l. 22 – p. 676, l. 16). Following the conviction, Judge McIntosh sentenced Appellant to life in prison for murder, twenty years for attempted armed robbery, and five years for possession of a weapon during the commission of a violent crime; all concurrent. (Tr. p. 689, ll. 10-12). Appellant filed a timely Notice of Appeal. Robert M. Dudek, Esquire, Chief Appellant Defender, submitted Appellant's Initial Brief on May 9th, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

Murder of Mradulaben Patel

On April 30th, 2015, the victim, Ms. Patel, was working at the BP gas station that she and her husband, Pravinchandra Patel, owned. (Tr. p. 238, ll. 22-24). The gas station was located off of Interstate-85 on Exit-40 in Anderson County. (Tr. p. 238, l. 24 – p. 239, l. 1). The victim and her husband both worked at the store but on this particular night, she was working the night shift. (Tr. p. 239, ll. 1-3). On April, 30th 2015, Appellant was travelling down I-85 South from Atlanta, Georgia, toward Anderson County, South Carolina. (Tr. p. 391, ll. 3-6; p. 556, l. 17 – p. 558, l. 8) Appellant arrived at the gas station at approximately 10:15 p.m. (Tr. p. 239, ll. 4-5). Appellant entered the BP gas station wearing a hat and sunglasses. (Tr. p. 475, ll. 3-9). He approached the register and asked for a cigar. (Tr. p. 434, ll. 19-23; p. 380, ll. 19-20). Ms. Patel, who was located behind the register, reached behind her to get the product. (Tr. p. 239, ll. 6-8). Prior to ringing Appellant up in the register, Ms. Patel asked to see his I.D. Appellant presents his I.D., which was contained in a flap in his wallet. (Tr. p. 239, ll. 9-12; p. 241, ll. 10-15). Ms. Patel entered his birthday into the register and rung him up. (Tr. p. 230, l. 13; p. 241, ll. 16-20). Appellant paid for the cigar, then abruptly pulled out a 9mm handgun, pointing it at Ms. Patel's face. (Tr. p. 239, ll. 13-14; p. 301, ll. 2-3; p. 380, ll. 21-22). Ms. Patel lifted her hands to protect herself as Appellant fired the gun. (Tr. p. 239, ll. 15-16; p. 380, ll. 22-24). The bullet passed through Ms. Patel's hand and skull before lodging in her brain. The victim collapsed lifelessly to the floor. (Tr. p. 239, ll. 16-18; p. 290, l. 3 - p. 291, l. 17). Appellant then reached over the counter and unsuccessfully attempted to get into the now closed register. Before Appellant fled the scene, he took a moment to wipe off the handle of the entrance to the gas station. (Tr. p. 239, ll. 19-23; p. 380, l. 25 – p. 381, l. 3).

Investigation

Appellant became a person of interest after his name was provided to Crime Stoppers by an anonymous caller. (Tr. p. 97, ll. 18-19). Law enforcement later discovered Appellant was serving probation in Georgia. Appellant was subsequently arrested in Georgia on a probation violation. (Tr. p. 97, ll. 12-15; p. 100, l. 22 – p. 101, l. 15). Upon arrest, Appellant's vehicle was seized and authorities attained a search warrant for the vehicle. (Tr. p. 101, l. 16 – p. 102, l. 12; p. 102, l. 23 – p. 103, l. 15). The vehicle, a Dodge Challenger, bore a close resemblance to the vehicle seen leaving the BP station near the time of the murder by the gas station's surveillance tapes. (Tr. p. 414, l. 19 – p. 418, l. 10; p. 400, ll. 11-16). Inside the vehicle, law enforcement located Appellant's wallet that contained Appellant's I.D. (Tr. p. 113, ll. 4-11; p. 402, l. 5-25). The I.D. confirmed that Appellant's birthdate was the same as the birthdate entered into the register by Ms. Patel during the tobacco transaction immediately prior to her murder. (Tr. p. 388, l. 10 – p. 389, l. 21; p. 403, ll. 1-3). Several cigar wrappers were also found inside the Appellant's vehicle. (Tr. p. 404, l. 25 – p. 408, l. 4-7).

As part of its investigation, law enforcement obtained eight days of Cell Site Location Information (CSLI) from the cellular provider for Appellant's cellphone after obtaining a search warrant authorized by an Anderson County Magistrate Judge. (Tr. p. 359, l. 11 – 360, l. 9; p. 365, l. 14 – p. 366, l. 9; T-Mobile Search Warrant). In summary, the Cell-Site Location Information showed that the defendant's cell phone was in the area of the victim's BP gas station at the time of the murder. Moreover, the cell site records showed Appellant's cell phone travelled from Atlanta on I-85 to the victim's gas station, and returned to Atlanta on I-85 after the murder. (Tr. p. 568, l. 1 – p. 569, l. 2).

Motion to Suppress Cell Site Location Information from Appellant's Cellphone

On May 22, 2017, after the completion of jury selection, Defense Counsel moved to suppress the CSLI that law enforcement acquired during the course of the investigation. (Tr. p. 128, l. 25 – p. 129, l. 2). First, Defense Counsel argued the search warrant was void *ab initio* because the magistrate judge who issued the warrant lacked the requisite jurisdiction to gain cellular records from an out-of-state third-party. (Tr. p. 131, ll. 1-13). Second, Defense Counsel asserted the warrant lacked sufficient probable cause. (Tr. p. 131, l. 19 – p. 132, l. 1). The State responded that law enforcement was simply adhering to the requirements imposed by the cell company. (Tr. p. 133, ll. 4-16). Alternatively, the State relied on the Fourth Circuit opinion of *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016), which held the Government did not violate defendants' Fourth Amendment rights in obtaining historical cell-site location information from defendants' cell phone provider without a warrant because defendants' had no reasonable expectation of privacy in the historical location information, as they voluntarily conveyed such information to the cell phone provider. (Tr. p. 139, ll. 9-11).

The trial judge subsequently found that the allegations contained in the affidavit that accompanied the warrant were sufficient. (Tr. p. 139, ll. 17-21). However, in regards to *United States v. Graham*, Defense Counsel noted that there existed a split in authority among the circuits and that the issue was proceeding to the U.S. Supreme Court for review. (Tr. p. 140, l. 8 – p. 141, l. 9). To this, the trial judge responded:

> I understand what you're saying. Seems to me, though, my job is to apply the law in its current state and not anticipate what may happen on appeal. And at least, although it's nonpublished opinion, as pointed out by Ms. Huey, it appears that South Carolina has adopted through the court of appeals the opinion that currently you don't need to have a warrant to obtain this cell site, or whatever this acronym is, information, because it doesn't implicate the Fourth Amendment rightly or wrongly.

(Tr. p. 141, ll. 10-20).

Based on this, the trial judge allowed the State to introduce the CSLI during its case-in-chief. (Tr. p. 357, l. 20 – p. 360, l. 20).

Motion to Suppress Identification by Appellant's Probation Agent

Defense Counsel also moved to suppress the identification of Appellant's Probation Agent from the gas station's surveillance video. Prior to the motion, the State acknowledged that it would not reference, during the course of trial, that Appellant was on probation in Georgia. (Tr. p. 94, l. 22, - p. 95, l. 10). Defense Counsel then submitted that the identification of Appellant by Agent Nathan Goolsby, was unduly suggestive and should be subject to the requirements of *Neil v. Biggers*, 409 U.S. 188 (1972). (Tr. p. 148, l. 15 – p. 150, l. 3). The trial court denied the motion to suppress after concluding: "I don't believe, as I told you before, this is a *Biggers* situation. You don't have out-of-court identification as far as an eyewitness." (Tr. p. 152 ll. 1-3).

Motion to limit expert testimony pertaining to the cell site data

Defense Counsel also sought to have a hearing as to whether testimony from the State's expert regarding the CSLI was admissible. (Tr. p. 154, ll. 18-24). The trial judge originally informed counsel that he would have an opportunity to *voir dire* the State's expert witness during the trial portion, but Defense Counsel consented to the motions hearing after discovering the expert witness was present. (Tr. p. 154, l. 25 – p. 155, l.17; p. 156, l. 20 – p. 157, l. 6). The State then present FBI Agent David Church for the purpose of proffering his testimony. (Tr. p. 157, ll. 15-19). Agent Church testified he has been with the FBI for over twenty years, and was currently assigned to the Cellular Analysis Survey Team (CAST). CAST specializes in the analysis of historical cellular phone records and cell site analysis, and aids federal and local law enforcement in this capacity when necessary. Agent Church testified in his time with CAST, he

has worked with violent crime cases as well as public corruption and terrorism cases. He testified that since its formation in 2010, CAST agents have testified around 1,300 times throughout the U.S. (Tr. p. 158, l. 11 – p. 163, l. 1). Agent Church then provided a detailed explanation of historical cell site analysis and CSLI. (Tr. p. 163, l. 3 – p. 164, l. 13). He then attested his qualifications included 500 hours of specialized training in the details of how cellular networks operate, and analysis of call detail records from all the major phone carriers. In addition, he stated he was a certified instructor with the FBI and provided basic, as well as advanced, classes on cellular analysis to state, local, and federal agencies. He testified he personally worked over 150 cases and testified in eleven previous cases. (Tr. p. 165, l. 7 – p. 166, l. 19). Lastly, Agent Church attested to the reliability of the analysis he conducted:

> Phone companies keep their record for a number of reasons. One that's very important for them is they need to make sure that their network operates efficiently and that their customers are happy with the service they're getting because, obviously, they're in the business of making money. So they use those records to make sure that their customers are getting connected to the network and being able to -- and they can monitor what's going on so if there are trouble areas, they can improve and fix those and thereby keeping their customers, gaining new customers.
>
> They also do it for billing reasons. You know, now you don't get billed for everything like you used to when cell phones first came out, but you still pay for data and things like that, so they have to keep up with that.
>
> The third thing is as far as like the national 911 system that we have in this nation, they're required -- the carrier is required to at least be able to provide the tower and sector that a phone used when it called 911 so if someone called 911 and couldn't say where they were, they can at least determine the approximate area to get someone help if needed.

(Tr. p. 167, ll. 1-23).

On *voir dire*, Agent Church detailed the complexity of analyzing CSLI. (Tr. p. 168, l. 7 - p. 179, l. 25). The trial judge and Defense Counsel then present several questions to the substantiate reliability of CSLI. (Tr. p. 180, l. 6 – p. 185, l. 25). In response to the trial judge's questions on reliability, Agent Church responded:

> Well, the best way we know it's reliable is because we do this on a daily basis. There's 62 of us now that are doing it, and we regularly find people that we are looking for, or help look for, by analyzing those records. And we do that by mapping, putting it on a map. But there's more to it than that. We actually look at the totality of the record. So it's not just grabbing a lat long and throwing it on a map and guessing where a phone may be.
>
> When we're looking at those records, we can do things with those records to pull out phone numbers that are being talked to, find out addresses for those numbers, plot those against where the phone is being used, and using common sense and investigative knowledge and your expertise in knowing how a network operates, determine where to go look for a phone. And we successfully do that, you know, every week, our unit does. So to me, I mean, the practical application of it is the best study.

(Tr. p. 182, l. 16 – p. 183, l. 9).

At the conclusion of testimony, Defense Counsel attempted to assert that the Agent Church's testimony did not pertain to science and was not covered by SCRE 702. Moreover, counsel asserted that analysis of CSLI was not beyond the understanding of the average juror. (Tr. p. 186, ll. 13-17). The trial judge disagreed with Defense Counsel and concluded:

> I think it does require expert testimony in this particular case. He may be an expert in the area testifying about something that a regular layperson can do, but overall field of historical cell site analysis does require some sort of specialized technical knowledge or otherwise special knowledge that will be helpful to the jury. It is relevant in this case, apparently, and so he is going to be found to be an expert in the field of historical cell site analysis.

(Tr. p. 188, l. 20 – p. 189, l. 3).

Trial

At trial, the State presented video surveillance of the murder. (Tr. p. 97, l. 16 – p. 114, l. 17; p. 295 l. 1 – p. 327 l. 14; p. 342 l. 18 –p. 344 l. 3; p. 345 l. 22 – p. 354 l. 14; p. 380 l. 12 – p. 403 l. 16; p. 407 l. 20 – p. 435 l. 6; p. 445 l. 22 – p. 490 l. 12). In addition, the State presented Appellant's probation agent, Nathan Goolsby. (Tr. p. 98, l. 24 – p. 99, l. 5; p. 350, l. 20 – p. 351, l. 9). Mr. Goolsby testified that he was familiar with Appellant and had known him for between eight and nine months. (Tr. p. 348, ll. 11-23). He further testified that he had viewed the

surveillance video and was able to recognize Appellant as the shooter. Mr. Goolsby asserted that despite the hat and sunglasses worn by Appellant, he was able to recognize Appellant by the way Appellant walked and carried himself. Furthermore, the suspect in the video was the same height and build as Appellant. (Tr. p. 350, l. 20 – p. 351, l. 9).

The State then presented testimony from T-Mobile records custodian, Susan Johnson. (Tr. p. 357, l. 20 – p. 358, l. 13). Ms. Johnson confirmed Appellant was the account subscriber for the cell records. (Tr. p. 360, ll. 13 – p. 360, l. 20).

The State then presented several law enforcement officers with the Anderson County Sheriff's Department. Lead Investigator Voight testified to the resemblance between the suspect's vehicle and the Dodge Challenger Appellant arrived in prior to his arrest. (Tr. p. 412, l. 10 – p. 418, l. 10). Additionally, through law enforcement testimony, the State introduced a palm print that matched Appellant's left hand on the gas station counter protector (Tr. p. 358, l. 1 – p. 360, l. 20), and the receipt from the tobacco sale that matched Appellant's birthdate as found on his I.D. (Tr. p. 282, l. 4 – p. 283, l. 15).

Lastly, the State presented FBI Agent, David Church. Prior to his testimony, Defense Counsel indicated that Agent Church would be using a PowerPoint presentation to present his finding regarding the CSLI analysis (State's Exhibit 20). (Tr. p. 521, ll. 23-25). Defense Counsel noted he believed the presentation contained information not already submitted into evidence. Therefore, Counsel opined that the PowerPoint could only be used as a demonstrative device. He further objected to the jury having the PowerPoint during deliberations. (Tr. p. 522, l. 2 – p. 525, l. 20). The State agreed with some of Defense Counsel's assessment, and the following dialogue took place:

> MS. HUEY: Yes, sir. So, in preparation of that, Your Honor, what I have done is I have printed in color just the pages that summarize the calls and

coordinates. That would be Pages 8, 9, 10, 11 and 12. I have also removed the conclusion that's at the top, Your Honor. The only thing that is left is "arrow indicates travel," which again --

THE COURT: So make sure I understand. Specify what exhibits -- I mean page numbers from the Exhibit 20 that you are wanting to admit.

MS. HUEY: Yes, sir. So the State's plan is to use 20 in its entirety with the testimony as demonstrative evidence. But what I would like to introduce so the jury may view it would be State's Pages 8 from that --

THE COURT: 9, 10, 11, and 12?

MS. HUEY: Yes, sir, which I'll pass up if you would like to see it.

THE COURT: I've got it.

THE COURT: Assuming she lays the proper foundation for it, I don't see any problems with it unless there's some language on there that needs to be redacted.

MR. HARVEY: I was going to ask about the language. I understood the language was being taken out.

MS. HUEY: The language at the top, the conclusion, has been taken out.

MR. HARVEY: What about language at the bottom?

MS. HUEY: That has not been removed.

MR. HARVEY: "Arrow indicates direction of travel"?

MS. HUEY: Again, because that depends on the GPS.

THE COURT: Well, if that is part of the testimony, it comes in based on the telephone records.

MS. HUEY: Yes, sir.

THE COURT: Then I don't find that to be too offensive, but the other stuff I agree with you.

MR. HARVEY: I'm going to still maintain my objection.

THE COURT: Sure.

MR. HARVEY: Especially with the direction of travel. I think, you know, back in the common law days it used to be called a continuing witness, a continuing witness rule. In other words, if you have "arrow indicates direction of

travel," that's part of the testimony that is coming in, so you have a testimonial document, essentially, back to the jury, so I would object to that.

THE COURT: Sure.

MR. HARVEY: But --

THE COURT: I overrule your objection on that basis.

MR. HARVEY: Good. Then that's all I had to raise.

THE COURT: So we're clear, assuming you lay the foundation and the testimony supports it, 8, 9 10, 11 12 would be admitted as exhibits. The remainder of the presentation would be for demonstration only.

MS. HUEY: Yes, sir.

(Tr. p. 526, l. 1 – 528, l. 13).

After being admitted as an expert in historical cell site analysis, Agent Church testified that he prepared a presentation based on the records provided by Appellant's cellular provider that was previously admitted as State's Exhibit 9 and 10. (Tr. p. 359, l. 25 – 362, l. 17; p. 537, l. 10 – p. 541, l. 6). Agent Church also demonstrated, from these records, how he was able extrapolate Appellant's cellphone locations on the day of the murder. He presented his finding, based on the records, that Appellant's cellphone traveled from Atlanta down I-85 to Anderson County and was in the vicinity of the gas station at the time of the murder. (Tr. p. 531, l. 5 – p. 560, l. 6; p. 568, l. 1 – p. 569, l. 2).

ARGUMENT

I. The Search Warrant Issued By The Magistrate Judge Was Valid Because It Was Supported By Probable Cause And Did Not Violate The Statutory Requirements.

Standard of Review

When reviewing a magistrate's decision to issue a search warrant, an appellate court must consider the totality of the circumstances. *State v. Jones*, 342 S.C. 121, 536 S.E.2d 675 (2000). Although great deference must be given to a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause. *Id.* In determining the validity of the search warrant, a reviewing court may consider only information brought to the magistrate's attention. *State v. Bowie*, 600 S.E.2d 112 (S.C. Ct. App. 2004).

Analysis

Appellant first argues that the Cell Site Location Information (CSLI) that originated from his cell phone should have been suppressed because the search warrant issued by the Anderson County Magistrate was invalid. However, the search warrant issued by the Magistrate Judge did not violate South Carolina law. The warrant was supported by probable cause and involved communications which originated in Anderson County, satisfying the requirements of our general search warrant statute. *See* T-Mobile Search Warrant; S.C. Code Ann. § 17-13-140 (providing, in part, search warrants may be issued to search property tending to show a particular person committed a crime where affidavits establish probable cause and the magistrate has jurisdiction over the area where the property to be searched is located). The wireless company requested warrants and further requested they be sent to their out-of-state office, so the State was simply complying with that directive. *See* Tr. p. 133, ll. 4-9.

At trial, Investigator Voight testified that probable cause for the search warrant was based

on an anonymous tip, submitted to Crime Stoppers, which implicated Justin Warner in the gas station murder. Investigator Voight confirmed the tip provided an extremely accurate recitation of what occurred. *See* Tr. p. 97, l. 16 – p. 98, l. 20; *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000) ("[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge."). The affidavit in support of the search warrant, dated May 4, 2015, sought:

> **Any and all subscriber information, call received by, emanating from, copies of text messages sent to or from, along with pages made to or from (404) 935-1872 starting on April 26, 2015 and continuing through May 4, 2015. Also tower locations to include physical addresses and or GPS coordinates.**

The warrant was submitted to:

> **T-Mobile custodian of records located at 2 Sylvan Way, Darsippany New Jersey 07054**

Lastly, the warrant contained the following findings of probable cause:

> **REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES**
>
> **Investigators with this agency are investigating an attempted gas station robbery in this jurisdiction that occurred on April 30, 2015. The suspect in this incident was armed with a handgun and shot the clerk in the face. This action resulted in the clerk losing her life. Information was received through crime stoppers indicating Justin Warner is a possible suspect. The informant's information was corroborated and a record search revealed that Warner has this listed number to him. Investigators believe a search of these records will reveal important evidence in this case.**

(T-Mobile Search Warrant).

Using a totality of the circumstances review, as mandated by our Supreme Court, it is clear the search warrant was properly issued. *See State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("When reviewing a magistrate's decision to issue a search warrant, we must

consider the totality of the circumstances."). The warrant was supported by an affidavit establishing probable cause for the search, included specific facts learned from the investigation and reasons why law enforcement believed Appellant committed the crime. Further, while the records were held at the carrier's out-of-state office, the records were for communications that originated in South Carolina. The cellular provider requested the warrants be sent to their New Jersey address and the State was simply complying with their request. The magistrate had jurisdiction over the property due to the locality of the communication and the cell towers. *See People v. Wilson*, 2013 WL 2360239 1,*9-10 (Mich. Ct. App. May 30, 2013) (finding valid warrants issued in Michigan but served on a Texas wireless carrier where the evidence involved records of communications that occurred locally); *see generally State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015) (per curiam) (finding, in view of totality of circumstances, the affidavits in support of the warrants for historical cell site location data established probable cause for the search). Accordingly, the search warrants were in compliance with S.C. Code Ann. § 17-13-140.

II. Should It Be Determined That The Warrant To Obtain Appellant's Cell Site Location Information Was Invalid, Such Error Was Made In Good Faith And Not Subject To Exclusion.

Standard of Review

"[T]his court[ ] may affirm a trial [court's] decision on any ground appearing in the record and, hence, may affirm the trial [court's] correct result even though [it] may have erred on some other ground." *Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987). The reasoning adopted by the trial court is not binding upon this court if the

record discloses a correct result. *Id.; see also* Rule 220(c), SCACR" *Fay v. Grand Strand Reg'l Med. Ctr., LLC,* 412 S.C. 185, 195, 771 S.E.2d 639, 645 (Ct. App. 2015).

Analysis

During Appellant's trial the judge listened to extensive litigation from both sides regarding the adequacy of the search warrant issued for Appellant's CSLI and, alternatively, whether Appellant had a privacy interest in those records. Inevitably the judge permitted the admission of the CSLI. This decision appeared to be largely based on the 2015 Fourth Circuit decision in *United States v. Graham. United States v. Graham*, 824 F.3d 421, 363 (4th Cir. 2016). In *Graham*, the Fourth Circuit held there is no reasonable expectation of privacy in historic CSLI, and that such information is therefore not protected by the Fourth Amendment. *See id.* at 425 ("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 CSLI from a service provider without a warrant."). *Graham* involved the acquisition of approximately seven months of historic CSLI, *id.* at 434, but the Court nevertheless concluded that the defendants' "very act of disclosure [of the historic CSLI to the cellular service provider] negated any reasonable expectation of privacy, regardless of how frequently that disclosure occurred or how long the third party maintained records of the disclosures." *Id.* at 435-36. "If individuals lack any legitimate expectation of privacy in information they share with a third party, then sharing more non-private information with that third party cannot change the calculus." *Id.* at 436.

This portion of the *Graham* decision was recently reversed in *Carpenter v. United States*, —— U.S. ——, 138 S.Ct. 2206, —— L.Ed.2d —— (2018). There the Court decided that a person maintains a legitimate expectation of privacy for Fourth Amendment purposes in the records of

his physical movements disclosed by CSLI. *See id.* at 2217. The Court declined to say whether there was "a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny," deciding only that accessing seven days' or more worth of information was enough. *Id.* at 2217 n.3. Here, law enforcement acquired eight days of CSLI from the cellular company which puts the issue squarely within *Carpenter's* holding.

Despite the misplaced reliance on *Graham*, the admission of the CSLI at Appellant's trial should be upheld on the Good-Faith Doctrine. "[E]vidence obtained in good-faith reliance on a statute later declared unconstitutional need not be excluded." *United States v. Curtis*, 901 F.3d 846, 848 (7th Cir. 2018) (citing *Illinois v. Krull*, 480 U.S. 340, 349–50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); *United States v. Pembrook*, 876 F.3d 812, 823 (6th Cir. 2017), vacated on other grounds by *Johnson v. United States*, —— U.S. ——, 138 S.Ct. 2676, —— L.Ed.2d —— (2018) (applying the good-faith exception to CSLI obtained under the Stored Communications Act); *United States v. Graham*, 796 F.3d 332, 363 (4th Cir. 2015), reversed on other grounds by *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (same); *United States v. Davis*, 785 F.3d 498, 511, 518 n.20 (11th Cir. 2015) (same)).

In the case of *Davis v. United States*, the U.S. Supreme Court set forth:

> The Fourth Amendment protects the right to be free from "unreasonable searches and seizures," but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. The question here is whether to apply this sanction when the police conduct a search in compliance with binding precedent that is later overruled. Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

Davis, 564 U.S. 229, 229–32, (2011).

Additionally, the U.S. Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) formulated a good faith exception to the exclusionary rule where a police officer acts in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate. Under these circumstances, the Court determined, there would be little deterrent effect from suppression because the "officer is acting as a reasonable officer would and should act in similar circumstances." *Id.*, at 920. The Court ultimately concluded: "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926.

In the recent case of *United States v. Chavez*, the Fourth Circuit Court of Appeals applied the above precedence in making a good-faith finding to the warrantless collection of CSLI.

> In *United States v. Graham*, we held that "the government does not violate the Fourth Amendment when it obtains historical [cell site location information] from a service provider without a warrant." 824 F.3d 421, 425 (4th Cir. 2016) (en banc). In *Carpenter v. United States*, however, the Supreme Court made clear that the government's acquisition of Carpenter's cell site records "was a search within the meaning of the Fourth Amendment." No. 16-402, slip op. at 17, 585 U.S. ——, ——, 138 S.Ct. 2206, —— L.Ed.2d —— (June 22, 2018). While *Carpenter* is obviously controlling going forward, it can have no effect on Chavez's case. The exclusionary rule's "sole purpose ... is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). Thus, when investigators "act with an objectively 'reasonable good-faith belief' that their conduct is lawful," the exclusionary rule will not apply. *Id.* at 238, 131 S.Ct. 2419 (quoting *United States v. Leon*, 468 U.S. 897, 909, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). Objectively reasonable good faith includes "searches conducted in reasonable reliance on subsequently invalidated statutes." *Id.* at 239, 131 S.Ct. 2419. Chavez does not, and cannot, deny that investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here.

United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018).

Here, the record supports good-faith reliance on the issued search warrant. Law enforcement went above and beyond what was required under the prevailing appellant precedent of the time. Despite, *Graham's* holding which advised against needing a warrant, law enforcement officers sought out a search warrant, supported by probable cause and relating to communication records which originated from Anderson County. Considering the warrant, along with Investigator Voight's supplementary testimony, the record supports that law enforcement acted in good faith when issuing the search to Appellant's Cellular Provider. *See* T-Mobile Warrant; tr. p. 97, l. 16 - p. 100, l. 25; *State v. Weston*, 329 S.C. 287, 292, 494 S.E.2d 801, 803 (1997) ("A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony."). Accordingly, under both *Davis* and *Leon*, the exclusionary rule would not apply to the particular circumstances.

III. The Trial Judge Acted Within His Discretion In Admitting Expert Testimony From Agent David Church.

Standard of Review

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (citing *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Analysis

Appellant seeks to assert that testimony by the State's expert witness on historical cell site data was unreliable and should not have been permitted. South Carolina Rule of Evidence 702 sets forth that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

or otherwise." SCRE 702; *see State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) ("This language makes no relevant distinction between scientific knowledge and technical or 'other specialized knowledge. It makes clear that any such knowledge might become the subject of expert testimony.") (internal quotations omitted). "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)

In the case of *State v. White*, the South Carolina Supreme Court dealt with the determination of reliability of technical, non-scientific evidence. There the Court affirmed the trial court's admission of expert testimony by a law enforcement K9 handler regarding dog tracking evidence. *White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). In reaching this conclusion the Court set forth:

> *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) is often cited for the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence. The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.
>
> We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.
>
> We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and

> reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

(*White*, 382 S.C. at 274, 676 S.E.2d at 688).

The trial judge was within his discretion in finding the historical cell site data from Appellant's cellular activity was reliable and admissible. Prior to trial, the court proffered testimony from Agent Church describing his professional expertise and a detailed description of historic cell site data. Then, the trial court permitted a thorough examination of all matters relating to admissibility including reliability. The court subsequently did its own independent evaluation of the substance of Church's testimony to determine if it was reliable. *See* Tr. p. 163, l. 3– p. 189, l. 3; *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citing *White*, 382 S.C. 265, 676 S.E. 2d 684 ("Under *White*, after qualifying [the witness] as an expert, the circuit judge should have then evaluated the substance of [the witness's] testimony to determine if it was reliable, as required by Rule 702, SCRE."). In addition to the trial court's discharge of its gatekeeping role in assessing the admissibility of the CSLI evidence, the court properly instructed the jury that "you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial. *See* Tr. p. 538, ll. 4-10; *White*, 335 S.C. at 271, 515 S.E.2d at 687.

In addition, the use of CSLI has been found reliable and admissible in multiple jurisdictions. *See United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013) ("On the whole, the Court is persuaded that [CAST Agent's] proposed testimony is based on reliable methodology. Indeed, the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts. *See, e.g., United States v. Schaffer*, 439 Fed.Appx. 344, 347 (5th Cir.2011) (concluding that the field of "historical cell site analysis" was

"neither untested nor unestablished"); *United States v. Dean*, 2012 WL 6568229, at *5 (N.D.Ill. Dec. 14, 2012) (finding that expert testimony relating to cell site records was reliable and would assist the trier of fact to determine a fact at issue, and noting that "such testimony is generally accepted in the Seventh Circuit"); *United States v. Fama*, 2012 WL 6102700, at *3 (E.D.N.Y. Dec. 10, 2012) (noting that "[n]umerous federal courts have found similar testimony reliable and admissible" (internal quotation marks omitted)); *United States v. Davis*, No. 11-60285-CR, 2013 WL 2156659, at *4 (S.D. Fla. May 17, 2013) ("As for the reliability of [CAST] Agent's methodology, that, too, satisfies *Daubert's* requirements.").

IV. Any Error In Admitting Records And Testimony Regarding Appellant's Cell Site Location Information Was Harmless Beyond A Reasonable Doubt.

Standard of Review

The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), overruled on other grounds by *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001)). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.' " *Id.* (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Analysis

Any error in admitting the CSLI evidence and permitting the expert testimony by Agent Church was harmless because petitioner's guilt was conclusively established by other competent evidence at trial, such that no other rational conclusion could have been reached. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984); ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result."); *see also State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006) (employing a harmless error analysis in the case of a defective search warrant).

Excluding evidence and testimony regarding Appellant's CSLI, the State presented sufficient evidence for the jury to return a guilty verdict. First, the State presented surveillance video of the murder, from which Appellant's probation agent positively identified Appellant. *See* Tr. p. 350, l. 20 – p. 351, l. 9.The video also captured the suspect's vehicle, which bore a close resemblance to the Dodge Challenger Appellant arrived in immediately prior to his arrest. *See* Tr. p. 412, l. 10 – p. 418, l. 10. Second, the State presented evidence showing Appellant's birthdate was the same as the birthdate entered into the cash register immediately prior to Ms. Patel's murder. *See* Tr. p. 282, l. 4 – p. 283, l. 15. Lastly, law enforcement was able to locate a palm print left by the suspect which was a conclusive matched to Appellant's left hand. *See* Tr. p. 358, l. 1 – p. 360, l. 20. Consideration of this alternative evidence presented at trial overwhelmingly points to Appellant's guilt and was more than sufficient for the jury to convict.

V. The State's Exhibits, Retained By The Jury During Deliberations, Were Proper Summaries Of Evidence Already Admitted At Trial And Therefore Permissible Under South Carolina Rule Of Evidence 1006.

Standard of Review

"[T]he standard for merely showing or exhibiting demonstrative evidence ... would not be higher than the standard for actually admitting demonstrative evidence." *Davis v. Traylor*, 340 S.C. 150, 156–57, 530 S.E.2d 385, 388 (Ct.App.2000). "The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." *Id.* at 157, 530 S.E.2d at 388. "To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct.App.2005).

Analysis

Appellant argues that the trial court erred in permitting the jury to retain certain portions of the presentation submitted by the State's expert witness. In *Crowley v. Spivey*, this court stated that summaries of voluminous records prepared for use at trial were admissible if the records themselves were properly in evidence. Trial Handbook for South Carolina Lawyers § 15:15 (citing *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985); *Butler v. Sea Pines Plantation Co.*, 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984) (a summary of voluminous records prepared for use at trial is admissible if the records themselves are properly in evidence or are made available to the adverse party)). This holding is now contained in Rule 1006, SCRE, which provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Id. (citing SCRE 1006).

After being admitted as an expert in historical cell site analysis, Agent Church testified that he prepared a presentation based on the records he was provided by Appellant's cellular provider that was previously admitted as State's Exhibit 9 and 10. *See* Tr. p. 359, l. 25 – 362, l. 17; p. 537, l. 10 – p. 541, l. 6. Agent Church also demonstrated from the cellular records how he was able extrapolate Appellant's cellphone locations as presented in the presentation. *See* Tr. p. 541, l. 10 – p. 546, l. 1. The State then submitted, and the trial court admitted, Agent Church's presentation for demonstrative purposes. *See* Tr. p. 546, ll. 16-20. As discussed prior to Agent Church's testimony, the State also introduced, as State's Exhibit 23 A-E, redacted portions of the presentation. These comprised of maps indicating the direction of travel of Appellant's cellular communications. *See* Tr. p. 569, l. 4 – p. 570, l. 7.

The Call Detail Records (CDRs) provided by Appellant's cellular provider were both complex and voluminous. *See* Tr. p. 186, l. 11 - 189, l. 3; p. 534, l. 3 – p. 535, l. 4. Accordingly, the State elected to present the CDR contents through a SCRE 1006 summary. Prior to testimony trial judge indicated that he would permit the State to enter the map portions of Agent Church's presentation, assuming the State laid the proper foundation. *See* Tr. p. 526, l. 23 – 528, l. 13. The record clearly reflects the State did just that. *See* Tr. p. 535, l. 2 – p. 570, l. 5. Accordingly, the trial judge was within his discretion to permit the jury to retain the exhibits during deliberations.

Alternatively, should error be found in the jury retaining the exhibits, Appellant is not able to prove the requisite prejudice required for relief. *See Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct.App.2005). The maps were simply a visual depictions of the CDRs (State's Exhibit 10), and Agent Church's testimony regarding

those records. Both were properly admitted. Because these were already within the jury's consideration, the maps reflecting this information can hardly be found have to prejudiced the outcome of Appellant's trial.

VI. The Circumstances Of The Identification By Appellant's Probation Agent Did Not Necessitate A *Neil V. Biggers* Hearing.

Standard of Review

"The admission of evidence is within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of that discretion." *State v. Washington*, 323 S.C. 106, 110, 473 S.E.2d 479, 481 (Ct. App. 1996) (citing *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994). "Moreover, suggestiveness alone does not require the exclusion of evidence." *Id.* (citing *Stovall v. Denno*, 388 U.S. 293 (1967); *State v. Stewart*, 275 S.C. 447, 272 S.E.2d 628 (1980). "Instead, the central question for determining the admissibility of pretrial identification is whether, under the totality of the circumstances, the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Id.* (citing *Simmons v. United States*, 390 U.S. 377 (1968); *Stewart*, 275 S.C. at 450, 272 S.E.2d at 629.

Analysis

Appellant's final claim is the trial judge erred by refusing to hold a *Neil v. Biggers* hearing on the identification of Appellant by his Probation Agent Nathan Goolsby, even though Agent Goolsby was not an eyewitness to the crime and had originally provided the Anderson County Sheriff's Office with photographs of Appellant for their use in identifying him. Appellant asserts the hearing was necessary because Agent Goolsby identified Appellant by the manner in which Appellant walked after officers showed him surveillance video and asked whether he could identify Appellant.

Appellant's claim that he was entitled to a *Biggers* hearing has absolutely no legal support in either United States Supreme Court or South Carolina jurisprudence. His contrary claim ignores the chief concern underpinning the reason for requiring pretrial hearings on the admissibility of out-of-court identification testimony. For fifty-one years, all of the cases from the United States Supreme Court and from this jurisdiction concerning whether an out-of-court identification "'procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,'" *Simmons v. United States*, 390 U.S. 377, 384 (1968), have been limited to the reliability of **identifications by eyewitnesses** to crimes. *E.g.*, *Id.* ("... we hold that each case must be considered on its own facts, and that convictions based on *eyewitness identification* at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification") (emphasis added); *Perry v. New Hampshire*, 565 U.S. 228, 240-41 (2012); *Manson v. Brathwaite*, 432 U.S. 98, 111-12, (1977) ("The driving force behind [*United States v. Wade*, 388 U.S. 218 (1967)], [*Gilbert v. California*, 388 U.S. 263 (1967)] (right to counsel at a post-indictment line-up), and [*Stovall v. Denno*, 388 U.S. 293, 302 (1967)], all decided on the same day, was the Court's concern with the problems of eyewitness identification"); *Biggers*, 409 U.S. at 193-94, 196-201; *Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970); *Foster v. California*, 394 U.S. 440, 441-42 (1969); *Wade*, 388 U.S. at 288 (pointing pointed to the " 'formidable' " number of "miscarriage[s] of justice from mistaken identification" in the history of criminal law and warning of the "vagaries" and "'proverbially untrustworthy'" nature of eyewitness identifications); *State v. Frazier*, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004); *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991) (exclusion of expert testimony on the issue of eyewitness reliability constitutes an

abuse of discretion in cases where "the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability"); *State v. Liverman*, 398 S.C. 130, 138-39, 727 S.E.2d 422, 426 (2012);[1] *State v. Rogers*, 263 S.C. 373, 378, 210 S.E.2d 604, 607 (1974); *State v. Nelson*, 250 S.C. 6, 8, 156 S.E.2d 341, 342 (1967); *State v. Heyward*, 422 S.C. 488, 495, 812 S.E.2d 432, 436 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018).

There is simply no authority for the proposition that the accused is entitled to a *Biggers* hearing when an out-of-court identification is made by a prosecution witness who, like Agent Goolsby, was not an eyewitness to the offense. Nor should this Court create such a right given the facts of this case where identity was conclusively established by the presence of Appellant's palm print on the counter at the crime scene.

[1] Appellant's heavy reliance on *Liverman* ignores that the identification testimony at issue in that case was by an eyewitness to the murders, Tyrone Smith. *Liverman*, 398 S.C. at 134-35, 727 S.E.2d at 424.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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October 23, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County

The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

v.

JUSTIN JAMAL WARNER,

Appellant.

Appellate Case No. 2017-001313

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Robert M. Dudek, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of October, 2018.

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ALAN WILSON
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October 23, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. Justin Jamal Warner
Appellate Case No: 2017-001313

Dear Ms. Kitchings:

Enclosed please find the *Initial Brief of Respondent and Designation of Matter* along with proof of service in the above-referenced case.

Sincerely,

Angela Bennett
Legal Assistant to Samuel M. Bailey
Assistant Attorney General

/ab
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division