STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

APPELLANT

APPELLATE CASE NO. 2015-002605

SUPPLEMENTAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

LARA M. CAUDY
Appellate Defender

VICTOR R. SEEGER
Appellate Defender

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

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF FACTS 4

ARGUMENT

The court erred by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of his rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution where law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act 8

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) 10

Carpenter v. United States, ___ U.S. ___, 138 S.Ct. 2206 (2018) .... passim

Commonwealth v. Augustine, 4 N.E.3d 846 (2014) 18, 19

Davis v. United States, 564 U.S. 229 (2011) 16

Illinois v. Krull, 480 U.S. 340 (1987) 16

Katz v. United States, 389 U.S. 347 (1967) 10

Kentucky v. King, 563 U.S. 452 (2011) 14

Kyllo v. United States, 533 U.S. 27 (2001) 11

Mapp v. Ohio, 367 U.S. 643 (1961) 15

Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (2014) 8

Smith v. Maryland, 442 U.S. 735 (1979) 10, 11, 12

State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015) 18

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) 18

State v. Earls, 70 A.3d 630 (N.J. 2013) 19

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) 17

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 7, 16, 17, 18

State v. Hinton, 319 P.3d 9 (Wash. 2014) 19, 20

State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002) 3

State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) 15

State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) 3

State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) 17

State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011) 3

United States v. Calandra, 414 U.S. 338 (1974) 15

United States v. Jones, 565 U.S. 400 (2012) 8, 9, 11

United States v. Miller, 425 U.S. 435 (1976) 11

Wong Sun v. United States, 371 U.S. 471 (1963) 15

Statutes

18 U.S.C. § 2702 .... 4, 5, 6, 14

18 U.S.C. § 2703 .... 6, 9, 13

S.C. Code Ann. § 16-3-910 2

ISSUE PRESENTED

Did the court err by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of his rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution where law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on May 21, 2013 for two counts of murder, two counts of kidnapping, first degree burglary, and four counts of possession of a weapon during the commission of a violent crime. R. 598-601. His case was called to trial on November 30, 2015 before the Honorable John C. Hayes, III, and a jury. R. 1. Solicitor W. Walter Wilkins and Deputy Solicitor Betty Strom represented the state, and John Kenneth Erwin and Stuart Sarratt represented Appellant. R. 1.

On December 3, 2015, the jury found Appellant guilty on all counts. R. 583, l. 15 – 584, l. 14. Judge Hayes sentenced Appellant to life without parole for both counts of murder and first degree burglary, and five years' imprisonment for each count of the weapons offense. No sentence was imposed for kidnapping pursuant to S.C. Code Ann. § 16-3-910 since Appellant was sentenced to life imprisonment for murder. The judge ordered all sentences be served concurrently. R. 585, l. 16 – 586, l. 11.

A notice of appeal was timely filed. On January 30, 2017, Appellant filed his initial brief of appellant. The state filed its initial brief of respondent on March 16, 2017. After the record on appeal and final briefs were filed, oral argument was held before this Court on March 14, 2018. By order filed January 17, 2019, this Court directed the parties to serve and file supplemental briefs in light of the United States Supreme Court's holding in Carpenter v. United States, 138 S.Ct. 2206 (2018).

This supplemental brief of appellant follows.[1]

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[1] Appellant also relies on and incorporates, by reference, his previously filed brief in this case.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (internal citation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)).

STATEMENT OF FACTS

Helen and Gary Wells were brutally murdered in their home on the night of October 1, 2012. Their housekeeper, Shirley Rogers, discovered the bodies on the morning of October 3, 2012. R. 119, l. 6 – 127, l. 6. Rogers immediately became a suspect in the murders after law enforcement discovered there was an ongoing investigation concerning Rogers' fraudulent use of Helen Wells' debit card. Rogers had been fired by the Wellses approximately two weeks before the murders. The police began a "background investigation" on Rogers, which included obtaining her cell phone records. Through this investigation, the police learned that Appellant was a "known associate" of Rogers. R. 194, l. 2 – 195, l. 17. More specifically, law enforcement discovered there had been telephone contact between Rogers and Appellant between September 30, 2012 and October 3, 2012. R. 196, ll. 4-18. Consequently, the Greenville County Sheriff's Office requested Appellant's cell phone records from Sprint using 18 U.S.C. § 2702(c)(4) of the Stored Communications Act (SCA).[2]

This section of the SCA authorized cell phone service providers to disclose, without a warrant, "a record or other information pertaining to a subscriber to or a customer of service . . . to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4). On the "exigent circumstances request" form submitted to Sprint to obtain Appellant's cell phone records, Investigator J.D. Howard claimed the exigent circumstance requiring disclosure was the investigation of a double homicide that occurred on October 2, 2012 with an active suspect. R. 596. He specifically requested the subscriber

[2] The actual subscriber of this telephone was Richard Eric Cade, who was Appellant's "roommate." However, it was undisputed that Appellant was the exclusive user of this cell phone. R. 215, ll. 7-8.

information as well as the call detail records with cell site information and historical location information between the dates of October 1, 2012 and October 4, 2012. R. 596.

After obtaining Appellant's cell phone records, law enforcement used the cell-site location information to track Appellant's whereabouts on the night of the murder. The state called Richard Fennern, who was qualified as an expert in historical call detail analysis, to testify at trial concerning this evidence. R. 377, l. 23 – 378, l. 5. Fennern claimed that based on these records at 10:45 pm and 11:02 pm on October 1, 2012, the location of Appellant's cell phone was consistent with him being at or near the Wells' residence. He further claimed that the location of Appellant's cell phone at 11:45 pm on October 1, 2012 was consistent with him being at or near Shirley Rogers' house. R. 410, l. 8 – 415, l. 8.

Neither Appellant's DNA nor fingerprints were found in the Wells' house. R. 212, l. 20 – 213, l. 24. However, blood belonging to both Helen Wells and Gary Wells was found in Eric Cade's car that was frequently used by Appellant. R. 469, l. 2 – 477, l. 21. Based on this circumstantial evidence, the jury ultimately convicted Appellant of murder, kidnapping, and first degree burglary. R. 583, l. 15 – 584, l. 14.

Appellant moved pretrial to suppress his cell phone records obtained from Sprint and any testimony related to the records under the Fourth Amendment of the United States Constitution and under Article I, Section 10 of the South Carolina Constitution. R. 267, l. 25 – 268, l. 4.

Defense counsel explained that law enforcement obtained Appellant's cell phone records from Sprint through 18 U.S.C. § 2702 of the Stored Communications Act (SCA), which allows a provider to voluntarily disclose a subscriber's records to law enforcement if law enforcement has "a good faith belief that there is some exigent circumstance that risks danger, imminent danger to somebody's life and safety." Counsel stated that "law enforcement did provide an affidavit

which indicated that was the case, and in turn they were provided the records [by Sprint]. The telephone company did choose to voluntarily disclose those." R. 103, l. 14 – 104, l. 2. The exigent circumstance listed by the Greenville County Sheriff's Office to obtain Appellant's records was "investigation of a double homicide." R. 270, ll. 13-16; See R. 596.

Defense counsel argued there were no exigent circumstances that permitted a voluntary disclosure under 18 U.S.C. § 2702. Before requesting Appellant's records from Sprint, the South Carolina Law Enforcement Division (SLED) conducted a criminal profile and determined that "this was a personal attack against the Wellses, that there was no broader danger to anyone else, that this was sort of a personalized thing." See R. 213, l. 25 – 214, l. 6. Consequently, counsel maintained there was no "emergency involving danger of death or serious physical injury to any person" that required voluntary disclosure of Appellant's records under § 2702. He maintained that the "investigation of a double homicide" was not enough. R. 269, l. 1 – 271, l. 2.

Defense counsel argued law enforcement was required to obtain a court order for the records under 18 U.S.C. § 2703, "which governs compelled disclosures of subscriber information," including "call detail records." He asserted, "[T]he government manipulated the cell phone companies in providing this information voluntarily by misrepresenting and exaggerating the exigency that did not exist. Therefore, the cell phone company was manipulated into acting at the government's behest. And that manipulation makes the cell phone company an agent of law enforcement, thereby triggering the Fourth Amendment." R. 271, ll. 3-11.

The state argued Appellant had no "standing" under the Fourth Amendment to challenge law enforcement's acquirement and use of his cell phone records because he had "no contractual

relationship with the phone company" since Eric Cade was the actual subscriber. R. 272, l. 23 – 273, l. 4.

Counsel argued the right that Appellant "is seeking to have protected is his right to privacy in his location . . . therefore, it would not matter if the phone was in his name. The phone essentially acts as a tracking device. And as long as it tracks his movements, then he does have the right to privacy. It's not a right to privacy necessarily in the phone itself, but it's the signals that are sent off of the towers and bounce back and track his location. That's what he has a right to privacy in." R. 273, ll. 8-17. Law enforcement requested four days of records, October 1, 2012, through October 4, 2012. Counsel asserted, "So it would have been four days of essentially surveillance of his location." R. 273, ll. 18-20.

Lastly, defense counsel argued that even if the court finds Appellant's rights under the Fourth Amendment were not violated, it could still find Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution was violated. Citing State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), counsel maintained that the South Carolina Constitution "enumerates a specific privacy right that is more limited than the Federal Constitution" and that "[s]tates are free to . . . enhance" their citizens' rights, and South Carolina has specifically [done so] in its State Constitution." He concluded that Appellant's right to privacy under our state constitution was violated by law enforcement's action in this case. R. 274, l. 22 – 275, l. 9.

The court ultimately ruled Appellant had no "standing." It stated that "if anyone had any right to privacy in the divulging of those records, it would be Mr. Cade [the actual subscriber]. And of course, he [Eric Cade] has not raised that. He's not a party. So I'm going to allow the introduction of the records." R. 275, l. 10 – 276, l. 1. Because the court found Appellant had no expectation of privacy in the records, it made no further ruling on Appellant's arguments.

ARGUMENT

The court erred by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of his rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution where law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act.

Introduction

In United States v. Carpenter, 138 S.Ct. 2206 (2018), the United States Supreme Court was confronted with a case where law enforcement used the Stored Communications Act (SCA) to obtain from the defendant's wireless carrier historic information and data establishing the location of his cell phone for approximately one hundred and twenty-seven days. The Supreme Court held "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle" since "a cell phone—almost a feature of human anatomy—tracks nearly exactly the movements of its owner." Id. at 2218 (quoting Riley v. California, 573 U.S. ___, ___, 134 S.Ct. 2473, 2484 (2014) (internal quotation marks omitted); See United States v. Jones, 565 U.S. 400, 430 (2012). "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." Id. The Court emphasized that "with access to CSLI [cell-site location information], the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years." Id.

After analyzing its prior precedent, the Supreme Court held that individuals maintain a legitimate expectation of privacy in the records of their physical movements as captured through

cell-site location information (CSLI). Id. at 2217. Accordingly, the Court concluded that gathering cell-site location information is a Fourth Amendment search and when police are collecting CSLI under these circumstances, the Fourth Amendment requires a search warrant supported by a judicial finding of probable cause. Id. Obtaining such information through the Stored Communications Act is a direct violation of the Fourth Amendment.

Carpenter grew out of an arrest of four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. Id. at 2212. One of the men confessed that the group had robbed nine different stores in Michigan and Ohio. Id. The suspect identified fifteen accomplices who had participated in the robberies and gave the FBI some of their cell phone numbers. Id. Based on that information, prosecutors applied for and received a court order under the Stored Communications Act (SCA) to obtain cell phone records for Timothy Carpenter and several other suspects. Id. That statute "permits the Government to compel the disclosure of certain telecommunications records when 'it offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.'" Id. at 2212 (quoting 18 U.S.C. § 2703(d)).

The first order regarding Mr. Carpenter produced one hundred and twenty-seven days of records and a second order produced an additional two days. Id. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers arguing that the government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. Id. At trial, the government presented expert testimony about the cell-site data. Id. The expert explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell-site and the particular sector that were used. Id. With this information, the expert produced maps that placed Carpenter's

phone near four of the charged robberies. Id. at 2212-2213. In the government's view, the location records settled the case since they confirmed that Carpenter was right where the robberies occurred at the exact time they occurred. Id. at 2213. In its decision, the Supreme Court held that the use of the Stored Communications Act order, based on the mere finding of relevance to an ongoing criminal investigation, to obtain such detail and extensive information regarding Mr. Carpenter's cell phone location violated the Fourth Amendment.

Expectation of Privacy Under the Fourth Amendment

"The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" Carpenter, 138 S. Ct. at 2213. "The 'basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" Id. (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967)). While the Fourth Amendment search doctrine was originally "tied to common-law trespass," in Katz v. United States, 389 U.S. 347, 351 (1967), the Supreme Court established that "the Fourth Amendment protects people, not places" and expanded the conception of the Amendment to protect certain expectations of privacy as well. Id. "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable . . . official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." Id. (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)) (internal quotation marks omitted).

In reaching its decision in Carpenter, the Supreme Court emphasized that "[a]s technology has enhanced the government's capacity to encroach upon areas normally guarded from inquisitive eyes," the Court "has sought to assure preservation of that degree of privacy

against government that existed when the Fourth Amendment was adopted." Id. at 2214 (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)) (internal quotation marks omitted). In Kyllo, the use of thermal imaging to detect heat radiating from a home was held to be an unconstitutional violation of the Fourth Amendment. Technological advances could not deprive an individual of their reasonable expectation of privacy. Id. In its analysis in Carpenter, the Court also referenced United States v. Jones, 565 U.S. 400 (2012), a GPS tracking case in which the defendant's location was tracked by placing a GPS device on his car without a warrant. The Court in Jones held that such an invasive and pervasive tracking of a vehicle everywhere it went violated the Fourth Amendment. Id. at 2218; See Jones, 565 U.S. at 404.

The Supreme Court in Carpenter squarely rejected the application of the third-party doctrine to historical cell-cite location information. Id. at 2220. While the Court acknowledged "the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle" of United States v. Miller, 425 U.S. 435 (1976)[3] and Smith v. Maryland, 442 U.S. 735 (1979)[4], the Court declined "to extend Smith and Miller to cover these novel

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3 The "third-party doctrine largely traces its roots to Miller." Carpenter, 138 S.Ct. at 2216. "While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could 'assert neither ownership nor possession' of the documents; they were 'business records of the banks.' Id. (quoting Miller, 425 U.S. at 440). "For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were 'not confidential communications but negotiable instruments to be used in commercial transactions,' and the bank statements contained information 'exposed to [bank] employees in the ordinary course of business.'" Id. (quoting Miller, 425 U.S. at 442) (alterations in original). "The Court thus concluded that Miller had 'take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government.'" Id. (quoting Miller, 425 U.S. at 443) (alternation in original).

4 Smith applied the third party doctrine in the context of information conveyed to a telephone company. Carpenter, 138 S.Ct. at 2216. "The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search." Id. "Noting the pen register's 'limited capabilities,' the Court 'doubt[ed] that

circumstances." Id. at 2216. The Court reasoned, "Given the unique nature of the cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Id. at 2217. The Court emphasized, "There is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers today." Id. at 2119. Cell-site location information (CSLI) is able to create a detailed chronicle of a person's physical presence compiled every day, every moment over a period of several years. See Id. at 2220. For these reasons, the Supreme Court ultimately held "that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI and that location information obtained from wireless carriers is the product of a search. Id. at 2117.

The Supreme Court's holding in Carpenter controls in this case. Appellant had a reasonable expectation of privacy pursuant to the Fourth Amendment in his cell phone records, including the call detail records, the cell site location information (CSLI), and the per call measurement data (PCMD), collected by law enforcement through the Stored Communications Act (SCA). Moreover, this collection was the product of a search.

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people in general entertain any actual expectation of privacy in the numbers they dial.'" Id. (quoting Smith, 442 U.S. at 742) (alternations in original). "Telephone subscribers know, after all, that the numbers are used by the telephone company 'for a variety of legitimate business purposes;' including routing calls. Id. (quoting Smith, 442 U.S. at 743) (alternations in original). "And at any rate, the Court explained, such an expectation 'is not one that society is prepared to recognize as reasonable.'" Id. (quoting Smith, 442 U.S. at 743). "When Smith placed a call, he 'voluntarily conveyed' the dialed numbers to the phone company by 'expos[ing] that information to its equipment in the ordinary course of business.'" Id. (quoting Smith, 442 U.S. at 744). "Once again, [the Court] held that the defendant 'assumed the risk' that the company's records 'would be divulged to police.'" Id. (quoting Smith, 442 U.S. at 745).

The state argued below and on appeal that Appellant did not have an expectation of privacy because the actual subscriber of the cell phone was Appellant's roommate, Eric Cade. Unfortunately, the trial judge accepted this erroneous argument. It was undisputed that Appellant was the exclusive user of this cell phone. It was his movements the cell phone was tracking, not Eric Cade's. Consequently, Appellant had a legitimate expectation of privacy in the cell phone records obtained by law enforcement through the SCA. The trial judge erred by denying Appellant's motion to suppress the records and any related testimony based on the finding Appellant did not have a reasonable expectation of privacy.

A Warrant is Required to Obtain Cell-Site Location Information Under to the Fourth Amendment

Having found the acquisition of Carpenter's CSLI was a search, the United States Supreme Court concluded "that the Government must generally obtain a warrant supported by probable cause before acquiring such records." Carpenter, 138 S.Ct at 2221. In Carpenter, the government obtained Carpenter's cell-site records pursuant to a court order issued under the Stored Communications Act, which required the government to show "reasonable grounds" for believing the records were "relevant and material to an ongoing investigation." Carpenter, 138 S.Ct. at 2221; See 18 U.S.C. § 2703(d). The Court found this "showing falls well short of the probable cause required for a warrant." Id. Consequently, the Court held "an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records." Id. Finally, the Court announced, "Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." Id.

"[E]ven though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. One well-recognized exception applies when the exigencies of the

situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Id. at 2222 (citing Kentucky v. King, 563 U.S. 452, 460 (2011)) (internal quotation marks and alterations omitted). "Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." Id. at 2223 (citing King, 563 U.S. at 460). The Supreme Court made clear that while the police must get a warrant when collecting CSLI to assist in a criminal investigation, this requirement does not limit their ability to respond to an ongoing investigation. Id. The Court emphasized that lower courts "have approved warrantless searches related to bomb threats, active shootings, and child abductions. Id.

Appellant's Fourth Amendment rights were violated when law enforcement failed to get a warrant supported by probable cause, and ultimately obtained his cell phone records through Section 2702(c)(4) of the Stored Communications Act. This section of the SCA authorized cell phone service providers to disclose, without a warrant, "a record or other information pertaining to a subscriber to or a customer of service . . . to a governmental entity, if the provider, *in good faith*, believes that *an emergency involving danger of death or serious physical injury to any person* requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4) (emphasis added). This subsection of the SCA is similar to the exigent circumstances exception to the warrant requirement outlined above. However, there were no exigent circumstances present in this case to circumvent the warrant requirement, or to obtain the records pursuant to Section 2702(c)(4) of the SCA. On the "exigent circumstances request" form submitted to Sprint to obtain Appellant's cell phone records, Investigator J.D. Howard claimed the exigent circumstance requiring disclosure was the investigation of a double homicide that occurred

on October 2, 2012 with an active suspect. R. 596. Howard did not allege there was "an emergency involving danger of death or serious physical injury to any person" and there was in fact no such danger. Consequently, law enforcement did not properly comply with Section 2702(c)(4) of the SCA. Moreover, an investigation of a double homicide with an active suspect is not an exigent circumstance permitting law enforcement to circumvent the warrant requirement. Investigators knew this was a targeted attack on the Wellses and that there was no risk to the general public.

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); See also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment of the United States Constitution incorporates the rule excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Because law enforcement violated Appellant's Fourth Amendment rights by obtaining his cell phone records, including the call detail records and the cell-site location information, without a warrant and without properly complying with the SCA, and because no exception to the warrant requirement applies, this Court should suppress the records and any related testimony and evidence, reverse Appellant's convictions and sentence, and remand for a new trial.

Good Faith Exception

The "good faith" exception avoids the exclusion of the results of a warrantless search where the police conduct an objectively reasonable search based upon binding decisional law, or in reasonable reliance on an applicable statute, even if that statute is later held to be unconstitutional. See Davis v. United States, 564 U.S. 229 (2011) and Illinois v. Krull, 480 U.S. 340 (1987). The good faith exception does not apply in this case because law enforcement did not act in good faith when it obtained Appellant's cell phone records through Section 2702(c)(4) of the SCA. Again, Investigator Howard claimed the exigent circumstance requiring disclosure under the SCA was the investigation of a double homicide with an active suspect. However, Investigator Howard knew or should have known this did not satisfy Section 2702(c)(4) of the Act because it was *not "an emergency involving danger of death or serious physical injury to any person.*" (emphasis added). Law enforcement knew this was a targeted attack against the Wellses and there was no risk to the general public.

Expectation of Privacy and Warrant Requirement Under the South Carolina Constitution

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I, § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1, § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" Id. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution established the ceiling." Id.

In State v. Forrester, our Supreme Court concluded, "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-645, 541 S.E.2d at 841).

In Carpenter, the United States Supreme Court held individuals maintain a legitimate expectation of privacy in the records of their physical movements as captured through cell-site location information. Id. at 2217. Accordingly, the Supreme Court concluded that gathering cell-site location information is a Fourth Amendment search and when police are collecting CSLI under these circumstances, the Fourth Amendment requires a search warrant supported by a judicial finding of probable cause. Id.

This Court should likewise hold that pursuant to Article 1, § 10 of our state constitution, law enforcement must obtain a warrant supported by probable cause to collect CSLI from an

individual's cell phone service provider. As demonstrated by our Supreme Court's opinions in Forrester, Weaver, and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), the Court has sought to guard the broader state constitutional right to privacy, but still give credence to the government's interest in conducting legitimate searches. Significantly, in Forrester, our Supreme Court explained, "[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." Forrester, 343 S.C. at 647, 541 S.E.2d at 842.[5] Without question, South Carolinians consider cell phone records, including call detail records, cell site location information, and PCMD, maintained by cell phone service providers to be private information. Obtaining such information without a warrant is an invasion of that privacy.

Recognizing how cell phones work and the increasing view that cell phones are necessary to social interactions and business, the Massachusetts Supreme Court held that "[c]learly, tracking a person's movements implicates privacy concerns." Commonwealth v. Augustine, 4 N.E.3d 846, 859-860 (2014). The Massachusetts court held the third-party doctrine was not applicable to historical cell site location information under the state constitution's protection against unreasonable searches and seizures. The court distinguished the historical cell site location information from the record of telephone numbers dialed as maintained by the telephone company. As explained by the court, the user knowingly provided the telephone numbers dialed to the telephone company. "No cellular telephone user, however, voluntarily conveys [cell site location information] to his or her cellular service provider" because such information "is purely

[5] In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that "the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013) (Hearn, J. dissenting).

a function and product of cellular telephone technology." Id. at 862. The court noted the police were "not seeking to obtain information provided to the cellular service provider by the defendant," but were looking "only for the location-identifying by-product of the cellular telephone technology – a serendipitous (but welcome) gift to law enforcement investigations." Id. at 863.

The Supreme Court of New Jersey held "individuals have a reasonable expectation of privacy in the location of their cell phones under the State Constitution." State v. Earls, 70 A.3d 630, 632 (N.J. 2013). It was settled law that the state constitution of New Jersey afforded greater protection than the Fourth Amendment and that individuals did not lose their privacy rights simply because they gave information to a third-party provider. Id. The court recognized that disclosure of cell phone location information was required by users in order to receive service and that such information "can reveal a great deal of personal information about an individual," including "not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate." Id. The court further recognized that "people do not buy cell phones to serve as tracking devices or reasonably expect them to be used by the government in that way." Id.

Using its state constitution, the Washington Supreme Court held a police officer's reading of text messages on a cell phone seized from an arrestee invaded the arrestee's right to privacy. State v. Hinton, 319 P.3d 9, 12-13 (Wash. 2014). The Washington court explained that its constitution provided greater protections than the federal constitution. Id. at 13. To determine that text messages were "private affairs" protected by the state constitution, the Washington court explained that "[t]ext messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically

been strongly protected." Id. According to the court, "text messages often contain sensitive personal information about an individual's associations, activities, and movements." Id.

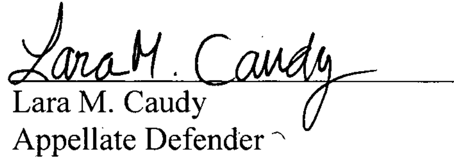
The ability of law enforcement to obtain cell phone records, including call detail history, cell site location information, and PCMD falls squarely within our state constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens. Appellant's right to privacy under our state constitution was violated when law enforcement obtained his cell phone records without a warrant. As argued, Appellant had a reasonable expectation of privacy in the cell phone records because he was the exclusive user of the phone and there were no exigent circumstances permitting law enforcement to obtain the records without a warrant.

It is apparent that the police in this case attempted to circumvent the warrant requirement by manipulating Appellant's cell phone provider to voluntarily disclose Appellant's records. This conduct violated Appellant's rights under the Fourth Amendment and his state constitutional right to privacy. Consequently, the trial court erred by failing to suppress Appellant's cell phone records and the related testimony and evidence. Respectfully, this court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument as well as the argument raised in Appellant's previously filed brief, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

Victor R. Seeger
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 19th day of February, 2019.