STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2012-213295

THE STATE,

Respondent,

vs.

DARRYL L. DRAYTON,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar No. 4806

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT WILSON
Solicitor, 9th Judicial Circuit
101 Meeting Street, Ste. #400
Charleston, South Carolina 29401-2214
(843) 958-1900
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Rules

Regulations

STATEMENT OF ISSUES ON APPEAL

1. The trial court's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence?

II. In violation of Appellant's state constitutional right to privacy and statutory right to protection against defective search warrants, the trial judge erred in admitting the historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where Appellant had standing to challenge the search warrant and the trial judge required only a showing of a reasonable grounds to obtain the records.

III. In violation of Appellant's right to present a complete defense and to due process of law, the trial judge erred in limiting Appellant's cross-examination of the pathologist concerning the toxicology report relating to the deceased, which demonstrated the deceased had high levels of drugs in her system at the time of her death.

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge abused his discretion by denying Drayton's request to charge the Edwards "reasonable hypothesis" language in the circumstantial evidence charge where the Supreme Court of South Carolina has found the Edwards language is confusing to a jury and has directed that it should not be used?

II. Whether the trial judge abused his discretion by denying Drayton's motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone, because (1) neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the provider generates and keeps as a business record and which was based upon information voluntarily provided to the provider by Drayton; (2) the record supports the trial judge's finding that there were reasonable grounds to believe that the records and other information sought were relevant and material to an ongoing criminal investigation, in accordance with 18 U.S.C. § 2703(d); (3) S.C. Code Ann. § 17-13-140 (2003) is inapplicable because the warrant issued was construed as an order authorizing production of the disputed records and not as a warrant; and (4) the order issued to the cellular provider satisfied the Fourth Amendment's very limited requirements for compulsory process? Alternatively, is suppression required where the officers acted in good faith reliance upon the warrant that was issued? And, whether any error is harmless beyond a reasonable doubt?

III. Whether the trial judge abused his discretion in limiting Drayton's cross-examination of the pathologist concerning the level of drugs present in the victim's system, where the probative value of the proffered cross-examination was substantially outweighed by its prejudicial effect?

STATEMENT OF THE CASE

Appellant, Darryl L. Drayton (Drayton), is presently serving a sentence of life without the possibility of parole (LWOP) in Leiber Correctional Institution, for the Charleston County murder of Alexis Lukaitis. The Charleston County Grand Jury indicted Drayton on December 10, 2010, for murder. 2011-GS-10-8551. **R. pp. 572-74**. On October 1-5, 2012, he received a jury trial before the Honorable J.C. Nicholson, Jr.

Charleston County Public Defender D. Ashley Pennington and Assistant Public Defender Michael Cooper represented him. Ninth Circuit Assistant Solicitors Jennifer Kneece Shealy and Timothy Francis Finch prosecuted the case. The jury convicted Drayton of murder and Judge Nicholson imposed the LWOP sentence. Drayton filed a motion for a new trial on October 10, 2012 (**R. p. 569**), which Judge Nicholson denied on October 17, 2012. **R. p. 571**.

Drayton timely served and filed a notice of appeal.

STATEMENT OF FACTS

Although this was a circumstantial evidence case, the State established beyond any *reasonable* doubt that the victim was murdered and that Darryl Drayton murdered her. Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that Michael Bartley and his fiancé, Alexis Lukaitis, had lived together in Bluffton, South Carolina for seven or eight years before the 2010 trial. They had twin boys, who were less than two years old at the time of the August 8, 2010 murder. **R. pp. 65-67**.

Bartley admitted that Alexis had a drug problem and took prescription medications that had not been prescribed for her. She would get pills from Darryl or "D," whom Mr. Bartley identified as Drayton.[1] **R. pp. 68-69; 88-93**. Alexis was also friends with Shannon Hooper, a

[1] Drayton and his girlfriend had lived in the same complex as them at one time. However, he had moved out well before the murder.

neighbor, and a Tina Johnson. Drayton would often visit Shannon's apartment when Alexis was there and they "hung out" together. **R. pp. 69-70**.

When Mr. Bartley and his children went to visit his parents on August 8, 2010, Alexis stayed home because she had experienced an allergic reaction. **R. pp. 70-71**. She called Mr. Bartley around 6:00 p.m. and told him that she planned to take "D" to Charleston to get prescription pills. Alexis was to receive pills and gas money in exchange for driving. Alexis and Mr. Bartley last spoke at 8:19 p.m., when she said that she was on the road and would be home within an hour. However, she never came home that night and he never heard from her again. **R. pp. 72-74; 95-96**.

Even though he had called hospitals, jails and police stations "everywhere from Bluffton to Charleston," he could not find her. When he called Drayton's number, he did not get a response. He also called Alexis "every ten minutes," without an answer. Around 10:00 p.m., he called her phone and "it was ... muffled. ... I thought she was digging her phone out of the purse." Then, there was silence and no response to his, "hello? Hello?" **R. pp. 74-75; 97**.

Because he still did not know Alexis' whereabouts by the following morning, August 9, 2010, he reported her missing to the Beaufort County Sheriff's Department. However, he did not tell them about the prescription pills. **R. pp. 75-77**. Mr. Bartley finally spoke to Drayton by phone, on the 9th. However, Drayton claimed that Alexis had never showed. **R. p. 99**. After Mr. Bartley drove down Hwy. 17 without finding any trace of Alexis, he went home and called her brother, a Hardeeville, South Carolina, police officer.[2] When he got on his computer and learned

[2] Mr. Bartley did not tell his brother-in-law about the "whole situation."

that an unidentified body had been found in Charleston, he immediately called the Charleston County Sheriff's Office and reported Alexis missing.[3] **R. pp. 77-79; 83.**

The Charleston County Sheriff's Office had told him that they would call him back within three hours. Although he did not hear from them, officers with the Beaufort County Sheriff's Office came to his apartment and he gave them a statement, in which he told them about Drayton. He also provided them with both Alexis' cell phone number and his own. **R. pp. 79-80.** Mr. Bartley handed his phone to the officers and they viewed the recent calls and his list of contacts, which included the phone numbers of Shannon Hooper and Drayton. On August 10th, he gave a second statement to the Beaufort County Sheriff's Office, and he gave a statement to the Charleston County Sheriff's Office. In both statements, he disclosed the prescription pills and Drayton. He also voluntarily provided a buccal swab for DNA testing. **R. pp. 80-84.**

Mr. Bartley testified that Alexis drove a white Grand Prix automobile, which she always kept clean. She kept a cd case (**State's Exhibit 131**) in the car, as well as a diaper bag (**State's Exhibit 136**) containing diapers and wipes (**State's Exhibits 138-139**), an emergency road kit (**State's Exhibit 128**), a spare tire and a jack in the trunk. He identified two photographs, **State's Exhibits 1** and **2**, as depicting her car. He also identified **State's Exhibit 141** as the cover for the spare tire and **State's Exhibit 142** as the spare tire. Alexis had her pocketbook and her car keys when he last saw. However, he has not seen these items since August 8th. **R. pp. 84-88.**

Tina Johnson testified that she met Alexis through Shannon Hooper and they became friends. Tina last saw Alexis on Saturday August 7, 2010. **R. pp. 101-02.** Very early on Monday, August 9, 2010, Tina spoke to Mr. Bartley, who "really worried because he could not find his

[3] He described her as 5'2" tall, weighing about 105 pounds and having long, curly brown hair. Also, "[s]he had two tattoos, one in the back and one in the front." One tattoo was of a butterfly and the other, small tattoo was "a moon with a star." **R. p. 79.**

Alexis. He told Tina that Alexis was supposed to have gone to Charleston with Drayton. Tina subsequently relayed this conversation to her son, Bradley V. **R. pp. 102-04**.

Tina and Bradley went to "the Bluffton self-help," a store providing assistance to those in need of it and which is located near Drayton's Bluffton residence at the time. Bradley told Tina about something that he had seen while there, and she gave a statement to the police about the matter. **R. pp. 104-06**. Thirteen year old Bradley V. corroborated conversation that he and Tina had about Alexis, on August 9, 2010. Bradley also testified that he saw Drayton later that day at the self-help parking lot. Drayton "had [pink] scratches on his face and a bandage on his finger and a hospital bracelet." Bradley told his mother about what he had seen and he later told the police. **R. pp. 107-12**.

Jackie Seward testified that he was a professional logger and that he worked for a family business located at 7983 Old Jacksonboro Road, which is near where Hwy. 161 and Hwy. 17 meet, in Charleston County.[4] Between 7:00 and 7:15 on Monday morning, August 9, 2010, Mr. Seward and a fellow employee found a body along the dirt road. Neither man got out of the truck. Mr. Seward went back to the business and reported the body to the police. **R. pp. 114-18**.

Officer James Milz, a forensic investigator with the Charleston County Sheriff's Office, processed the area along Old Jacksonboro Road where the victim's body and her Grand Prix were found. He discovered some footprints near the victim's body. He also saw tire tracks that appeared to have swerved off of the dirt road near her body. It had rained within the past 48

[4] The road is only paved for about one half of a mile and the rest of it is a dirt road.

hours and the tracks were "good." He photographed the footprints and the tire tracks. Also, he made lifts of the tire tracks, using Plaster of Paris molds. **R. pp. 272-75; 278-81; 289-90.**[5]

Officer Milz found the victim's body "laying on her back and right side, in a slightly bent shape." Rigor mortis had already set in, and both "her right arm and left leg were elevated off [of] the ground." This indicated that she "had died in a different position." She was wearing a pair of white Nike shoes,[6] white shorts and a halter top. Moreover, someone had obviously tried to burn the victim's body because her arms, her legs, and her clothes were all charred. **R. pp. 287-88**. There was a butterfly tattoo on the body, which was consistent with the description that Mr. Bartley had given of Alexis. Officer Milz also found what appeared to be a bloody handprint near the victim's ankle, suggesting that someone with blood on his or her hands had moved the victim's body by grabbing her in the area of her ankle. He swabbed both of the victim's shoes because they had blood on them. **R. pp. 288-92; 303-05.**

Steven Edwards testified that he lives in Bluffton and that he is Drayton's cousin. Drayton knocked on his door and awakened him early in the morning of August 9, 2010. Drayton said that he needed a ride to the hospital. When Mr. Edwards told him that the car did not have any gas in it and that Mr. Edwards did not have any money, Drayton said "he'll be right back." **R. pp. 125-29.**

Drayton returned roughly an hour and a half later. He said that he needed to go to the hospital because he had injured his finger, his hand had bloody bandages on it and he had $5.00. Mr. Edwards agreed to take him. Edwards wanted to take Drayton to the hospital in Bluffton, but

---

[5] Subsequent testing by SLED indicated that the tracks had the same class characteristics as the tires on the victim's car, meaning that her tires or tires with the same class characteristics could have made these tracks. **R. pp. 339-46; 349.**

[6] Her shoes were inconsistent with the footprints that he found near her body. **R. pp. 315-16.**

Drayton was adamant that he wanted to go to Hilton Head. So, after stopping to get gas, they went to the emergency room at Hilton Head Hospital. Mr. Edwards waited while Drayton received treatment for his thumb and "a gash on top of his finger." **R. pp. 130-32.**

When they left the hospital, Mr. Edwards took Drayton to a jewelry store, so that Drayton could pawn a "class ring" that he did not show to Edwards. When Drayton came out of the jewelry store, he only said, "Let's go." From there, they went to a friend's house, where they drank beer and played video games. The men spent the night at the Economy Lodge motel in Hardeeville. Drayton paid for the room but he had Mr. Edwards sign for it. **R. pp. 132-35.**[7]

On August 10th, Mr. Edwards drove Drayton to an appointment with a plastic surgeon. He made another appointment while there. They next went to see Drayton's friend again, but they left early because Mr. Edwards was tired. They returned to the Economy lodge and stayed there that night.[8] Drayton wanted his cousin to take him to Florida but Mr. Edwards refused. **R. pp. 135-36.**

On August 11th, Mr. Edwards did not feel well because of problems caused by his diabetes. So, after he dropped off Drayton at the library, he went to a doctor in Bluffton. He was later was transported, by ambulance, to the emergency room at Hilton Head Hospital. While he was there, he saw a news alert that a "female with two kids, ... [was] missing in Bluffton." He did not think anything of this at the time and he went home. **R. pp. 136-37.**

When Mr. Edwards got home, he saw that someone had placed his trash on the porch and that there was a spare tire on his trash can. When he removed the tire (**State's Exhibit 14**) and looked into the can with the aid of a candle, he a found bloodstained items in his trash can that

---

[7] Drayton's excuse for not returning home was that "he was having problems" with the man on whose property he was sleeping in his car. The man's property was near the Bluffton self-help. **R. pp. 134-35.**

[8] Drayton sent his cousin to buy "a pack of cigarettes, a couple of beers." This was unusual because "he don't usually give nobody his money." **R. p. 135, lines 15-17.**

did not belong to him, including diapers and a CVS bag. He took these items in the house and then immediately walked to a neighbor's apartment where he called 911. Det. Todd Calhoun and other members of the Beaufort County Sheriff's Office responded and, after speaking with Mr. Edwards and obtaining his permission, collected these items from his home and from a shed behind it. **R. pp. 138-52; 158.**

Mr. Edwards later discovered other items that were not his. In his vehicle, he found a pair of size 9 and 1/2 tennis shoes (**State's Exhibits 171 & 172**) under his front seat, on the passenger's side, where Drayton had sat.[9] He also found a sock, which he gave to police. Dets. James Perkins and Derek Boyd, from the Charleston County Sheriff's Office, subsequently took a lengthy statement from him. **R. pp. 152-55; 164.** In their search, officers seized an emergency roadside kit; a diaper bag; and, from inside the bag, a cloth diaper; two disposable diapers; a child's blanket; and blue child's clothing. **R. pp. 241-50.** The officers also seized a spare tire; the spare tire well cover; the tire jack; a bag of clothing containing a pair of socks, shoelaces, and a yellow shirt; and a speaker box and its contents. **R. pp. 247-52.**

The State presented several witnesses to corroborate various aspects of Mr. Edwards' testimony. Dr. Luca Delatore, an emergency room physician at the Hilton Head Hospital, testified that he treated Drayton for a lacerated right index finger, at 7:47 a.m., on August 9, 2010. Drayton claimed that he had cut it with a saw around 10:00 p.m. on the previous night, and Dr. Delatore saw signs that were inconsistent with it being a fresh injury. **R. pp. 169-72.** Because the wound was too swollen to suture, an x-ray was taken of his finger. This revealed that "there was an open fracture of the second digit ... [or] index finger." This meant that the bone was exposed, and that he needed to see a specialist because of the high risk of infection. The wound

[9] He wears a size 12and 1/2. **R. p. 153, lines 6-13.**

was cleaned "[e]xtensively." Also, Dr. Delatore prescribed both "a pain medicine and an antibiotic as a preventative measure," in conjunction with the surgeon to whom he sent Drayton for a follow-up appointment. **R. pp. 172-74**.

Maggie Furchak testified that she is a friend of Drayton's former girlfriend. On August 10, 2010, Drayton came into the Bluffton CVS, where she worked as a pharmacy technician. He wanted to have two prescriptions filled that he had received at the emergency room. One prescription was for an antibiotic. "The other one was for pain medicine, hydrocodone tab 50." **R. pp. 176-78**. Drayton "seemed a little nervous, [and he] couldn't stand still." Ms. Furchak noticed that his hand "was wrapped up," and Drayton told her that "he had cut it that morning at work ... [o]n a piece of glass." **R. p. 178**.

Christopher Golis, testified that he is the owner of the Golis Family Jewelers in Bluffton, and that he purchased an engagement ring (**State's Exhibit 173**) from Drayton on August 9, 2010. Drayton's hand was bandaged. The ring was "definitely ... unique," and was worth between $800.00 and $1000.00, whereas Mr. Golis was only offering the value of the metal, which was "a few hundred dollars. So, Mr. Golis tried to convince him not to sell it. **R. pp. 181-86**.

Because Drayton told Mr. Golis that he had found the ring in a gas station, Mr. Golis told him to take it back to the gas station and see if there was a reward for it, in light of its value. However, Drayton did not care about getting more money, since had allegedly found it, and Mr. Golis bought it. When later questioned by police, Mr. Golis returned the ring and he selected Drayton from a photographic lineup. **R. pp. 186-90**. Mr. Bartley identified this ring as the victim's. **R. p. 66, lines 2-12**.

Det. Todd Calhoun, of the Beaufort County Sheriff's Office, testified that, on August 9, 2010, he was assigned to do "a follow-up investigation" on the missing person report that Mr. Bartley had filed on the victim. He then spoke to Mr. Bartley "to ascertain any further information that he could possibly give to aid us in locating [the victim]." Mr. Bartley provided him with Drayton's cell phone number, and Det. Calhoun was eventually able to speak with Drayton. By the time Det. Calhoun spoke to Drayton, he and another officer were at Drayton's residence and Det. Calhoun told Drayton this in their conversation. Although the officers waited long enough for Drayton to come home, he did not show. **R. pp. 239-41**. On August 11th, Drayton was picked up by the Beaufort County Sheriff's Office on unrelated charges and he was charged with the victim's murder by Charleston County authorities. Photographs of Drayton's injuries, following his arrest (**State's Exhibits 107-114**) show that he had "some [scabbed] scratches up around the neck area right in the center of [his] chest;" scratch marks on his forearm; "a scratch or a scar ... through the web of the hand;" and the injured right index finger that was bandaged.[10] **R. pp. 260; 262-64; 270-71**.

Drayton attacks the State's case because of the limited number of areas in and around the victim's car where the State found his DNA. However, his argument ignores the patently obvious: the presence of any of his DNA in the victim's car when he told her husband that the victim did not pick him up on August 9th is damning to him, in and of itself. Moreover, Former SLED Agent Kimberly Dinh, who processed the vehicle for blood on August 11, 2010, explained that the decision as to which swabs get sent to SLED for analysis is typically made by the on-scene investigator, who "prioritize[s] which swabs are the most important. The top five swabs would be then submitted to SLED for further analysis." Here, she discussed which swabs

[10] Another photograph was taken of his finger after the bandage had been removed.

to have analyzed with Detective James Perkins, from the Charleston County Sheriff's Office. In this case, the swabs sent for analysis were marker 1 (from the driver-side rear window); marker 13 (from the driver's side door); the two swabs of possible DNA on the steering wheel; and the swab from the door pull of possible touch DNA. **R. pp. 219-21.** [11]

Subsequent DNA analysis by SLED reflected that "the DNA profile developed from the [victim's left-hand] fingernail clippings" contained a mixture of at least two people." The DNA profile of the major contributor to this mixture matched the victim's DNA profile. Unfortunately, the partial DNA profile developed from the minor contributor was "insufficient for reliable interpretation." **R. pp. 357-60**. However, the swab taken from the victim's driver's side rear window (marker 1) contained DNA that matched Drayton's DNA profile. A swab from the driver-side doorframe likewise matched Drayton. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is approximately one in 1.9 quadrillion." **R. pp. 360-65**.

The swab from the marker 13, from the driver-side door panel contained a mixture of at least two DNA profiles. The DNA profile developed from the major contributor matched the victim's DNA profile, and "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to the mixture is approximately one in 50 quadrillion." Drayton could not be excluded as the minor contributor and "the probability of randomly selecting an unrelated individual who could have contributed to the overall mixture is approximately one in three million." **R. pp. 362-63; 385.**

[11] She further explained that if several swabs are from the same area, all will not be submitted for testing based upon the (rational) assumption that each of the swabs from the same source. She would select swabs from as many different areas of the car as possible. **R. p. 219, line 16 – p. 220, line 12.** Officer Milz had taken swabs from the spare tire cover and the CVS bag. **R. pp. 306-07.**

The DNA profile developed from the steering wheel is a mixture of at least two individuals. The DNA profile developed from the major contributor ... matche[d] ... Drayton." Also, the victim could not "be excluded as a possible minor contributor to this mixture." **R. pp. 365-66**. The DNA profile developed from the three cuttings taken from the diaper bag and the profile developed from the cutting from the tire cover matched the victim's DNA profile.[12] "The DNA profile developed from the swab from the [victim's] right shoe is a mixture of at least two individuals." Neither Drayton nor the victim could be excluded from this mixture. **R. pp. 366-69**.

The DNA profile developed from the swab of the victim's left shoe matched Drayton's DNA profile. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is, again, approximately one in 1.9 quadrillion." The DNA profile developed from the swab from the CVS bag was "a mixture of at least two individuals. The major contributor's DNA profile matched Drayton, and "the partial DNA profile developed from the minor contributor ... [was] insufficient for reliable interpretation. **R. pp. 370-74; State's Exhibits 234-235** (DNA reports).

Dr. Susan Presnell, a forensic pathologist, performed the autopsy on the victim, on August 10, 2010. The victim had an abrasion over the area of her right cheek, and one over her right temple. There was also bruising in this area. She had three abrasions over her forehead, two in the area of her left temple, one over the area of her left cheek and one "along the left-chin area." Also, her left cheek was "vaguely bruised." **R. pp. 434; 436-38**. There was another area of bruising around the victim's left upper arm; a "little bruise on the right forearm;" and bruises on both knees. The bruise on her right knee was abraded. She had four bruises on the front of her

[12] Again, "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately one in 50 quadrillion."

right, lower leg and "an area of bruising and abrasion" on her left, lower leg.[13] **R. pp. 439-40**. There were also "numerous facial petechial," which suggested efforts to strangle her, and the body was slightly charred. **R. pp. 436-48**.

The victim also had two superficial "puncture" injuries that were caused by a sharp object, such as a knife, an ice pick or a screwdriver, puncturing her skin in her right-lower chest. She had a superficial cut in the same area and she had defensive wounds on both hands. **R. pp. 440-42**.[14] Dr. Presnell opined that the victim died from two of three of incisions to her neck that transected her carotid artery, her thyroid gland, her trachea, her esophagus, and went to her backbone. **R. pp. 443-45; 447**.

Kenneth Aycock, an employee of the Army National Guard's counter-drug task force, testified that he was assigned to the FBI safe streets task force in Columbia, South Carolina, as a criminal intelligence analyst. For roughly ten years, he has performed "cell phone analysis and cell phone tracking for the FBI." Among his various duties, he takes individuals' phone numbers and determines whom the individuals are calling, when they're calling these persons, "who[m] they call most or least, [and] where they were when they made a phone call." **R. pp. 398-99**.

In this case, he was given the Verizon cell phone records for the victim's phone and Drayton's phone. (**State's Exhibits 236** and **237**, respectively). Additionally, the Ninth Circuit Solicitor's office told him the location where the victim's body was found. He can obtain cell site location data for any cell phone service provider by using an FBI database. With the aid of a

---

[13] Additionally, Dr. Presnell found a laceration on the victim's upper and lower left lip, as well as "a little aggregate of either abrasions, little scrapes, or little cuts, it's hard to tell which one, right there on ... the left upper-chest area."

[14] On the victim's left hand, Dr. Presnell found "a cut that goes through the skin ... on ... the web of the thumb. And so it continues on this side." This wound went "goes down to the bone." There was also a superficial injury on her left palm that could be a continuation of the same injury. On her right hand, Dr. Presnell found a small cut on the outside of the victim's thumb and "a little abrasion on the right index finger." There were "multiple incisions" on her palm. While most of these cuts were "pretty superficial" and merely penetrated "the outer layers of skin," some went deeper on the "first knuckle on the inside of the finger." **R. pp. 440-42**.

software program, he made maps of his work in this case, which were introduced as **State's Exhibits 227-33. R. pp. 399-05.**

His review of the victim's cell phone records reflected that her phone "started off" in the Bluffton area on the evening of August 8, 2010. The phone continued until it began hitting used cell tower 310, in Ravenel, (Charleston County) South Carolina. Her phone used a tower in that area from 8:19 p.m. until 9:49 p.m.[15] All remaining calls were unanswered or went to voice mail, and no cell site location data existed for any of those calls. **R. pp. 407-10.**

The records for Drayton's cell phone revealed that it used one of three different towers in the Bluffton area, from 9:08 a.m. and 6:36 p.m. on August 8, 2010. Then, the phone used towers along Highway 17 between Bluffton and Charleston. It took roughly "an hour and a half for the number in question to go from Bluffton to Charleston," which is the approximate driving time between those two locations. The phone used towers in the Ravenel area, including tower 310, "[b]etween 7:20 and 7:52 p.m. on August the 8th." **R. pp. 410-13; State's Exhibit 229; State's Exhibit 231-232.**

At 9:03 p.m. on August 8th, his phone used tower 310. By 9:13 p.m., the phone used tower 410, which is right above where the victim's body was found. It used tower 344 at 9:26 p.m. It went back to tower 310 at 9:40 p.m. and, "from 9:40 until 11:38 p.m. on August the 8th, all those calls are using tower 310." **R. pp. 414-15; State's Exhibit 233.** The phone did not show up back in Bluffton, until it was used at 6:48 a.m. the next morning. **R. pp. 415-16; State's Exhibit 233.**

For any text messages, the records will reflect when the text was sent, who sent the text, to whom it was sent and the contents of the text message. The records for Drayton's phone

[15] The 8:19 p.m. call was outgoing call to her husband's phone, and the 9:49 p.m. call was incoming call from her husband's phone. Before the final call, there were repeated calls from her husband's phone. **R. pp. 416-17.**

reflected that his phone used towers in the Hardeeville area on August 9th. On August 10th, the records reflected a text originating from Drayton's phone at 5:11 p.m. **R. pp. 417-20.**

The message in this text was, "[B]aby, do you have a credit or a debit card to get me a room over the phone. I have eighty bucks and I want to save that so I can get on the road in the morning." Seconds later, he sent another text to the same phone, which read, "Come up there in the morning. [(Sic)] I've got to get away from here." **R. pp. 420-21.**

ARGUMENTS

I. The trial judge did not err in declining Drayton's request to charge the outdated *Edwards* "reasonable hypothesis" language in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has directed that it should not be used. Instead, the trial judge properly charged the correct and current circumstantial evidence charge approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which the Supreme Court of South Carolina had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

The trial judge did not err in declining Drayton's request to charge the outdated "reasonable hypothesis" language from *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989), in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has directed that it should not be used. Instead, the trial judge properly charged the correct and then-current circumstantial evidence charge approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which the Supreme Court of South Carolina had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004).

A. The trial judge's circumstantial evidence charge and Drayton's request-to-charge.

The trial judge gave the following jury charge on circumstantial evidence:

> There are two types of evidence which are generally presented during trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a fact to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes

> collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

R. p. 516, line 10 - p. 517, line 3.[16]

Drayton objected to the trial judge's circumstantial evidence charge. He argued that there was a "trend" in then-recent cases, including *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009), to return to the "reasonable hypothesis" language for directed verdict issues, and that it was "patently misleading" to instruct jurors that there was no difference between direct and circumstantial evidence. He also did not think that his proposed instruction would shift the burden of proof to him. He further argued that ""it is incumbent on the jury to sift the circumstances to see if the circumstances are proven beyond a reasonable doubt and are they consistent with each other, taken together, and pointing conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." **R. p. 526, line 4 - p. 529, line 15**.

In support of the present argument, he submitted the following request-to-charge as **Court's Exhibit 14**:

> Every *circumstance* relied upon by the state [must] be proven beyond a reasonable doubt; and ... all of the *circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Court's Exhibit 14, R. p. 568. (Emphasis in original). The trial judge denied the requested instruction. **R. p. 529, lines 13-16**.

B. Discussion.

[16] The trial judge then defined the term "evidence" for the jury. **R. p. 517, line 4 – p. 518, line 5**.

Drayton is not entitled to relief based upon the trial judge's ruling. In reviewing jury charges for error, an appellate court considers the trial judge's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)). Further, a trial judge "is required to charge only the current and correct law of South Carolina." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (quoting *Sheppard v. State,* 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)).

In *State v. Cherry*, 361 S.C. 588, 601-602, 606 S.E.2d 475, 482 (2004), the Supreme Court of South Carolina held that the traditional circumstantial evidence charge served to confuse juries by leading them to erroneously believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence. As a result, the Court held "that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction."

The Court again approved that charge in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). Indeed, the Court in *Logan* addressed the very argument that Drayton raises here, *i.e.* that their recent cases referencing the *Edwards* charge signaled disapproval of the *Grippon* charge. In rejecting that argument, the Court found that its recent cases referencing the *Edwards* language did not address the jury instructions given. Rather, those cases – including *Hernandez*, and *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) - the cases upon which Drayton relies - as well as *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), had only made reference to the *Edwards* language in the context of the trial judge's ruling on a directed verdict motion.

In short, none of these recent Supreme Court cases citing the *Edwards* language addressed the *Grippon* jury charge at all. *Logan*, 405 S.C. at 91-94 & n. 7, 747 S.E.2d at 448-49 & n. 7. Thus, neither of the cases cited by Drayton announced a retreat from the *Grippon* charge. Instead, both *Hernandez* and *Odems* addressed the presence or absence of sufficient evidence to send the case to the jury, not the sufficiency or clarity of a charge to the jury. *See Logan*, 405 S.C. at 91-94 & n. 7, 747 S.E.2d at 448-49 & n. 7. *See also State v. Hernandez*, 382 S.C. at 625 n.2, 677 S.E.2d at 605-606 n.2 ("Although in [*Cherry* ...] the Court abandoned this charge and held that it may confuse the jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless *illustrates the lack of evidence* against Petitioners.") (emphasis added); *Odems,* 395 S.C. at 590, 720 S.E.2d at 52 ("Despite the Court's abandonment of the use of this particular definition as a jury charge in *State v. Cherry*, the definition *illustrates the lack of evidence* against Petitioner.") (emphasis added).

The evaluation of evidence for a directed verdict motion is not the same as the jury's evaluation of evidence in determining whether the State had met its burden of proof beyond a reasonable doubt. The "**trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis in original). *See also State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 453 (1984) ("The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court."). Critically, there is no mention in either *Hernandez* or *Odems* of the adequacy of the *Grippon* instruction. Thus, like the challenge in *Logan*, Drayton's argument fails for the same reasons.

Further, at the time of trial, relevant precedent dictated that only the *Grippon* charge be used. *Cherry, supra.* That charge does not include the "reasonable hypothesis language" requested here. (*See* **Court's Exhibit 14, R. p. 568**). The "reasonable hypothesis language" charge from *Edwards* was specifically rejected in *Cherry* and the Supreme Court had directed that the charge no longer be used. *Id.* Indeed, consistent with *Holland v. United States*, 348 U.S. 121 (1954), the Court in *Cherry* found that the "reasonable hypothesis" instruction merely served to confuse juries.[17] *Cherry*, 361 S.C. at 601-602, 606 S.E.2d at 482. *See also Grippon*, 327 S.C. at 85, 489 S.E.2d at 465 (Toal, J., concurring) ("Relying on *Holland...*, the federal courts and a majority of state courts have abandoned the 'reasonable hypothesis' language in favor of an approach that does not differentiate between direct and circumstantial evidence, but simply provides that a defendant's guilt must be proven beyond a reasonable doubt"); *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 374 (1991) ("In deviating from the *Edwards* charge, the charge given in this case turns the State's burden of proof on its head by requiring the jury find a 'reasonable explanation' of the evidence inconsistent with appellant's guilt before it can find him not guilty").

The Court in *Logan* reaffirmed both the correctness of the *Grippon* charge and its earlier disapproval of the "reasonable hypothesis" language in rejecting the claim that *Cherry* had been implicitly overruled. *Logan*, 405 S.C. at 94, 747 S.E.2d at 449 ("the trial court did not err in providing a circumstantial evidence charge consistent with *Grippon*"). This language remains

[17] In *Holland v. United States*, the United States Supreme Court, when considering a complaint that the trial judge failed to charge when "the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt," acknowledged that some jurisdictions allowed the charge, but concluded that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." 348 U.S. at 139-140. Given that the United States Supreme Court disapproves of the language, any possible constitutional argument, if ever made, would find no support in federal authority. *See also Logan*, 405 S.C. at 100-01, 747 S.E.2d at 453 (Kittredge, J., concurring in result).

disfavored. *Logan*, 405 S.C. at 98, 747 S.E.2d at 451-52 ("requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant").

Following the trial of Drayton's case, the Supreme Court provided in *Logan* that the following alternative charge may be given upon counsel's request:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Logan, 405 S.C. at 99, 747 S.E.2d at 452.

Respondent disagrees with Drayton's contention that he should benefit "from the *Logan* ruling as his case was pending on direct review and the issue was preserved for review." (**Final Brief of Appellant, p. 8**) (citing *State v. Belcher*, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009)). Aside from the previously stated reasons, Respondent submits that his reliance upon *Belcher* is misplaced because the Court found that the charge at issue in *Belcher* was erroneous and confusing. On the other hand, the Court in *Logan* upheld the charge given in *Grippon* and in this case. Respondent submits that the right to request the Court's alternative charge set forth in *Logan* is appropriate only in those cases tried on the date of that opinion or thereafter. *Accord State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 31, 328 (1991) (Toal, J., concurring in result and

joining Justice Chandler's concurrence in result) ("we hold a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review"). Yet, even if the Court disagrees with this position, he is not entitled to relief.

Again, the instruction in *Logan* is an alternative charge and was not designated as the sole or mandatory instruction, although a trial judge should **now** use the above charge when requested by the defendant. *Logan*, 405 S.C. at 100, 747 S.E.2d at 453 ("we modify *Grippon* and *Cherry* to allow the additional language"). Therefore, the charge given in this case was proper and the requested instruction was properly rejected because it contained inappropriate language repeatedly condemned by the Supreme Court. As a result, Drayton's argument is without merit and there was no error.

II. The trial judge did not abuse his discretion by denying Drayton's motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone, because (1) neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the provider generates and keeps as a business record and which was based upon information that Drayton voluntarily provided to the provider; (2) the record supports the trial judge's finding that there were reasonable grounds to believe that the records and other information sought were relevant and material to an ongoing criminal investigation, in accordance with 18 U.S.C. § 2703(d); (3) S.C. Code Ann. § 17-13-140 (2003) is inapplicable because the warrant issued was construed as an order authorizing production of the disputed records and not as a warrant; and (4) the order issued to the cellular provider satisfied the Fourth Amendment's very limited requirements for compulsory process. Alternatively, suppression is not required because the officers acted in good faith reliance upon the warrant that was issued. Finally, any error is harmless beyond a reasonable doubt.

The United States Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."

United States v. Miller, 425 U.S. 435, 443 (1976). Even though the Court's holding is some thirty-eight years old and has yet to be repudiated or overruled, Drayton claims that the trial judge erred by denying his motion to suppress the cell site location records of his cellular service provider, for Drayton's cellular telephone. Respondent submits that the trial judge did not abuse his discretion by denying Drayton's motion to suppress the records of his cellular service provider, for Drayton's cellular telephone, because (1) neither the Fourth Amendment nor S.C. Const. art. I, § 10 required a warrant, since Drayton did not have a reasonable expectation of privacy in the non-disclosure of the cell site location data that the provider generates and keeps as a business record and which was based upon information that Drayton voluntarily provided to the provider; (2) the record supports the trial judge's finding that there were reasonable grounds to believe that the records and other information sought were relevant and material to an ongoing criminal investigation, in accordance with 18 U.S.C. § 2703(d); (3) S.C. Code Ann. § 17-13-140 (2003) is inapplicable because the warrant issued was construed as an order authorizing production of the disputed records and not a warrant supported by probable cause; and (4) the order issued to the cellular provider satisfied the Fourth Amendment's very limited requirements for compulsory process. Alternatively, relief should be denied both because the officers acted in good faith reliance upon the warrant that was issued, and because any error in admitting the records was harmless beyond a reasonable doubt.[18]

[18] Respondent has not argued the question of standing in light of the Court's decision in *State v. McKnight*, 291 S.C. 110, 115, 352 S.E.2d 471, 474 (1987). In *McKnight*, the Court observed that, contrary to the protections of the Fourth Amendment, "the rights afforded by [S.C. Code Ann. § 17-13-140 (2003)] are not dependent upon a showing of an expectation of privacy in the searched premises." Therefore, "one contesting the legality of a search because of a defect under Section 17–13–140 need only show that the State is attempting to introduce the evidence against him." 291 S.C. at 115, 352 S.E.2d at 474. His standing is dubious, at best, under the Fourth Amendment. However, for the reasons argued, *infra*, the real issue before this Court is whether Drayton had a legitimate expectation of privacy in his location data captured by his cellular service provider, as opposed to whether he had a legal or possessory interest in the property. *See Rakas v. Illinois*, 439 U.S. 128, 148-49 & n. 17 (1978). He cannot escape that the indisputable answer to this inquiry is no.

A. The motion to suppress and the hearing thereon.

On September 30, 2012, Drayton filed a pretrial motion to suppress the records of his cellular service provider (Verizon Wireless), for Drayton's cellular telephone, based upon the absence of probable cause to support issuance of the warrant. (Court's Exhibit 2, **R. pp. 545-59**). The trial judge held a pretrial hearing on this motion to dismiss on October 1, 2012, and denied it. **R. pp. 3-48**.

The challenged warrant was for

> Any and all information in reference to the Verizon cellular telephone number 843-xxx-xxxx to include, but not limited to, subscriber information, account comments, billing records, outbound and inbound calls to include blocked call information from August 6, 2010 to August 10, 2010. Subscriber information on other numbers listed in the report, call origination location, physical address of cell sites and coverage map, all stored communications, or files including voice mail, email, digital images, text messages, buddy lists, and any other files associated with the cellular target number 843-xxx-xxxx.

Court's Exhibit 2, R. p. 558.

The affidavit in support of the warrant stated that:

> on July 9, 2010, Charleston County Sheriff's Office responded to Old Jacksonboro Rd near Hwy. 174 in reference to a deceased person. Upon arrival deputies discovered the body of a female victim on the side of Jacksonboro Rd. On August 9, 2010, Alexis J. Lukaitis was reported missing to the Beaufort County Sheriff's Office. The body of the deceased was later positively identified as being Alexis J. Lukaitis. Mike Bartley the fiancée of the victim stated that he last spoke to the victim on August 8, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D".
>
> A separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in which they discussed the murder of the victim.[19]
>
> Bartley provided the Verizon cellular telephone number 843-xxx-xxxx as a contact number for Darryl Drayton. It is believed that the call log and information contained therein will provide information that is pertinent to the death

[19] The trial judge redacted this sentence from the affidavit because it was "so ambiguous and so confusing," and he did not consider this sentence in making his ruling. *See* **R. p. 42, lines 3-25**.

investigation. All evidence being sought will be compared with evidence already obtained in the investigation.

Court's Exhibit 2, R. p. 558.

Drayton's trial counsel noted that his motion was "under the fifth amendment [(sic)] as well as Article I, Section 10 of the South Carolina Constitution, ... our search warrant statute, ... 17-13-140." Counsel amended his "motion to include ... the Interception of Communications Act, which is 17-30-10." (The Wiretap Act). He agreed with the trial judge that the Wiretap Act was very similar to the Federal Storage Communication Act, 18 U.S.C. §§ 2701-2712. **R. pp. 3-4.**[20]

The parties stipulated to the following relevant facts:

Shannon [Hooper] was an acquaintance of both the victim Alexis Lukaitis and the defendant Darryl Drayton at the time of Alexis' disappearance.

Alexis did not come home to Bluffton on the evening of Sunday, August 8, 2010. The next morning, Michael Bartley contacted Shannon [Hooper] to see if she had information about Alexis' whereabouts. Shannon had no information about where Alexis went on Sunday August 8 or where she was on Monday morning, August 9, 2010. ... Shannon [Hooper] had no information at that time about Alexis' movements or activities on Sunday August 8, 2010. Police interviews and phone records establish that Shannon was not contacted by Alexis Lukaitis on Sunday August 8, 2010.

...[I]n the calls and conversations between Shannon [Hooper] and Darryl Drayton on Monday August 9 and Tuesday August 10, 2010 that Darryl Drayton denied going to Charleston with Alexis on Sunday August 8 and denied any knowledge or involvement in Alexis' disappearance.

... [I]n a conversation between Michael Bartley and Shannon [Hooper] on Monday, August 9, 2010 ... Michael Bartley told Shannon that Bartley had been told by Alexis Lukaitis on Sunday August 8, 2010 that Alexis was going to Charleston on Sunday with "D" to buy pills.

Court's Exhibit 1, R. pp. 543-44. *See also* **R. pp. 4-9.**

[20] Because he does not challenge the trial judge's ruling that the Wiretap Act was inapplicable, Respondent has omitted from this brief much of the arguments at trial related to that Act.

Counsel argued that Drayton had a reasonable expectation of privacy in the cellular records and that, under *McKnight*, he did not have to establish standing to challenge the search because the results of the search were being introduced against him. He maintained that the records were protected because they contained both "a transaction record of calls in and calls out by the subscriber" and "specific information about cell tower locations for each call which then can be used to triangulate the location of the cell phone at the time that the call is made."[21] **R. pp. 10-12.**

Counsel further argued that there was no probable cause to issue a search warrant because there was nothing to establish the reliability of informant, Michael Bartley, the victim's husband. "Mr. Bartley ... was the fiancé of the victim, [he] had reported her missing and [he] was not immediately forthcoming to the law enforcement officers about the extent of her drug use." **R. pp. 16-17.**

The trial judge observed that this case did not involve a traditional confidential informant. Instead, this case involved a citizen who came forward without potential gain of possible bias. He further observed that the affidavit (**R. pp. 558**) "very clearly says Mike Bartley, the fiancé of the victim, stated that he last spoke with the victim on August the 8th, 2010, and she informed him that she was traveling to Charleston with Darryl Drayton, also known as 'D.'" **R. pp. 16-18.** Drayton claimed that this was insufficient to show probable cause because the affidavit did not indicate that the informant was reliable, the informant is not corroborated and the information he provided is not verified. **R. pp. 18-19.**

When trial counsel contended that law enforcement included false or inaccurate information to verify the information provided by the informant, the trial judge found that the

[21] He agreed with the trial judge that his motion was addressed to protected information related to the cell phone and not speech.

challenged portion of the affidavit[22] was "really almost innocuous." **R. pp. 19-21**.[23] However, counsel stated that he had interviewed the affiant, Det. Cooke, a week before trial and learned that "the source of this information never existed." **R. pp. 22-24**.

Rather, "it was some sort of rouse to mislead [Drayton] when he got the warrant ... insofar as judging how willing Ms. Shannon [Hooper] was to provide information to the police." Counsel noted that this statement "did not contain anything that was not public information coming from Mr. Bartley." Counsel asserted that this was materially false information that had to be redacted under *Franks v. Delaware*, 438 U.S. 154 (1978), and that, when redacted, there was no indication of the informant's reliability in the remaining portion of the affidavit. **R. pp. 22-24**.[24] Counsel further argued that the informant, Mr. Bartley, did not initially reveal the truth about the victim's drug use until a buccal swab was taken of his mouth, and that he remained a suspect at the time of the warrant and even forty-eight hours later when law enforcement took a second buccal swab for DNA testing. Also, the murder "involves the claim of that they were together and a murder occurred that would not have necessarily have implicated phone use in any way on its face." **R. pp. 24-26**.

---

[22] Drayton took issue with the following sentence of the affidavit: "[a] separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in which they discussed the murder of the victim. *See* **R. p. 558**. The trial judge correctly observed that this sentence did not state what Mr. Bartley and Shannon had discussed. **R. p. 20**.

[23] Counsel offered to present the magistrate as a witness but the trial judge declined his request because the magistrate apparently sought to have his subpoena quashed under *In re Whetstone*, 354 S.C. 213, 580 S.E.2d 447 (2003).

[24] Counsel maintained that "there was a level of indifference to the responsibilities of accurate swearing, truthful swearing, in this case, by this agency, that is bourne out by the murder warrant," since that warrant contained an untrue statement that "Shannon Johnson" had spoken to the victim on the night of the murder and the victim told Ms. Johnson that she was in Charleston with Drayton. Shannon Hooper and Tina Johnson had both been interviewed and their cell phone records examined, and neither woman spoke to the victim on the night she was murdered. Counsel suggested that this supported the defense's claim that there was no probable cause "in nexus as to his phone calls and as to providing reliable information that the magistrate would need to be able to reach a determination of probable cause." **R. pp. 27-28**.

The trial judge observed that, with the exception of communications, the standard was whether "there's sufficient reason to believe that evidence of criminal activity will be found in the location specified. Although the trial judge twice asked counsel how one could ever discover "evidence of a murder through a phone record and phone information," counsel dodged answering the question. **R. pp. 28-30**. Before hearing the State's response to counsel's motion, t the judge ruled that the Wiretap Act only applied to intercepted communications and that it was inapplicable to the facts of this case. **R. pp. 30-31**.

The Assistant Solicitor argued that *McKnight* was inapplicable because there was no search in this case and Drayton lacked standing to challenge law enforcement's acquisition of the records. She also cited to *Smith v. Maryland*, 442 U.S. 735 (1979), *superseded by statute*, as well as *United States v. United States District Court*, 407 U.S. 297 (1972). She noted that *Smith* explained that a proper Fourth Amendment analysis under *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967), requires a court to answer two questions. The first question is whether the individual has exhibited an actual subjective expectation of privacy, by his conduct. If so, the next question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. **R. pp. 31-32**.

The Assistant Solicitor pointed out that the Court in *Smith* concluded that even if the petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, his expectation was not one that society is prepared to recognize as reasonable. Also, the Court in *Smith* explained that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. **R. pp. 32-33**.

She likewise pointed out that, in *Miller*, 425 U.S. at 442-43, the Court had held a bank depositor did not have any legitimate expectation of privacy in financial information that he

voluntarily conveyed to banks and that was exposed to their employees in the ordinary course of business. She observed that similar reasoning was followed in by the Fourth Circuit Court of Appeals in *United States v. Bynum*, 604 F.3d 161 (4th Cir. 2010), where law enforcement had acquired the defendant's "internet information and phone subscriber information." *In Bynum*, the Court had held that a defendant does not have a reasonable expectation of privacy in this information. Further, she pointed to *United States v. Graham*, 846 F.Supp.2d 384, 389 (D.Md. 2012), which found that the defendants did not have a legitimate expectation of privacy in the historical cell site location records acquired by the government. She noted that the Court in *Graham* explained that "a majority of courts ... have concluded that the acquisitions of historical site-location data pursuant to the Stored Communications Act to specific and articulable fact standard does not implicate the fourth amendment regardless of the time period involved." **R. pp. 34-35**.

Turning to the warrant in this case, the Assistant Solicitor argued that the affidavit in support of the warrant "survives without that cumbersome sentence that we've been addressing." She noted that Mr. Bartley voluntarily allowed police to take his buccal swab; he had reported the victim missing; "[h]e told the police that she said she was going to Charleston with Darryl Drayton;" the victim's body was found in Charleston County; and Mr. Bartley had spoken to the victim on the phone. The Assistant Solicitor further argued that, when police are seeking records of telephone calls and cell tower information in the course of a murder investigation, the reason they are seeking this information "is obvious to a magistrate." Police were clearly "interested in knowing where he was traveling, if they are asking for cell tower information, ... [and] [t]he magistrate knows by the language in the search warrant that she was traveling from Bluffton to

Charleston with Darryl Drayton." Therefore, the warrant was supported by probable cause, even redacted. **R. pp. 35-36**.

The Assistant Solicitor also disputed trial counsel's representation of the interview of Det. Kip Cooke. She noted that "[w]e jointly spoke to Mr. Cooke and, Judge, he indicated that he can't explain why the sentence was written that way." She contended that the affidavit supported the warrant, even if the poorly written sentence was redacted, and she noted that the same magistrate had signed several warrants on the same day that did not have this sentence in them but that were otherwise identical. Further, "never in that sentence does it say Darryl Drayton told us he did it, Darryl Drayton has given details about the murder, or [said] anything ... inculpating himself." Additionally, she argued that the officers had acted in good faith and that the officers were not attempting to mislead the magistrate. **R. pp. 36-38**.

Finally, the Assistant Solicitor explained how the investigation occurred:

> this is a case where the investigation started out in Bluffton. He reports it to the local Beaufort County officers that his fiancé is missing, the last time he spoke with her was when she was in Charleston with Darryl Drayton, that she was going to be on her way back and thought she would be back in about an hour. She never returned. He fretted all night. In the morning, he started looking for her. The night before, however, he's calling jails, he's calling the hospital. The next morning, he does go over to Shannon Hooper's ... apartment, who's in the same apartment complex with him. He goes over to Tina Johnson's house. And those three people are communicating with each other: Mike Bartley, Tina Johnson, Shannon Hooper. And as you can imagine, they're having phone conversations with each other. So Tina is telling Shannon what Mike told her, Shannon is telling Mike what Tina told her. In the interim, Tina Johnson's child sees Darryl Drayton. He's got an injured finger and scratches.
>
> All of this is being relayed to the detective in Bluffton. That detective is relaying it to the detectives in Charleston and then they are relaying it to Kip Cooke, who is drafting the warrant. So if mistakes were made, they were not made purposefully, they were not made to deceive, and they were not made in an effort to contrive something to get this warrant that they absolutely were entitled to get. ... [T]here was no reason to lie in a warrant to get his records.

R. pp. 38-39.

In reply, Drayton's trial counsel argued that the contested sentence present in the affidavit supporting the warrant for Drayton's cellular telephone records was also present in a warrant issued for Shannon Hooper's records. He also argued that the Assistant Solicitor's discussion "of facts about other information that was potentially known and was known to Beaufort police officers" was not in the affidavit supporting the search warrant and was not presented to the magistrate. **R. pp. 39-41**.

When counsel indicated that was planning to call Det. Cooke to support counsel's position on his conversation with Cooke, the trial judge indicated that counsel could do so, but he was redacting the sentence Drayton challenged from the warrant because it was "so ambiguous and so confusing." Counsel then argued that, without that sentence, there was no probable cause to support the search warrant. Counsel also observed that, after the Supreme Court's decision in *Smith*, Congress had passed legislation that created an expectation of privacy for pen register records. **R. pp. 41-45**.

B. The trial judge's denial of the motion.

The trial judge denied the motion to suppress as follows:

> [T]his warrant was against Verizon, not the defendant in this particular case. Although it was [for] his own records ... I do think he has standing. And the reason I point that out is ... for this reason. Number 1, this Court finds -- and the Court is going to follow the long line of federal cases that have stated there's no expectation of privacy as to records. I'm not talking about conversations, now. I'm not talking about interception of conversation or storing those conversations and obtaining conversations. I'm talking about the records that specifically in this case the Court is going to find that there's no expectation of privacy.
>
> Now, having said that and referring to the [Miller] case, the United States District Court case and the Fourth Circuit cases, the Stored Communication Act... affects all of the carriers. ... whoever is providing the service. So even though this has not been addressed in South Carolina by the legislature or by case law, the Stored Communication Act I think is persuasive argument on this Court ...to this extent: we're not talking about probable cause in this search warrant, we're talking about reasonable grounds to believe that the records and other information sought are

relevant and material to an ongoing and criminal investigation. This Court is going to review that warrant in that light primarily because the provider of these records or the holder of these records [has] to be protected from the federal violation law, i.e., the Stored Communication law. So you've either got to go with a warrant in South Carolina or a court order.

There's no statute, there's no case, that provides that mechanism whether it's a warrant or whether it's an order[,] so this Court is going to look at this warrant as obtaining an order from the magistrate to obtain the records to determine ... I'll just read: the identification address of the cellular towers related to the use of the defendant's cellular telephone is relevant to the ongoing and criminal investigation as to this murder charge.

The language in the warrant that states Mike Bartley, the fiancé of the victim, stated he last spoke to the victim on August the 8th, 2010, and she informed him that she was traveling to Charleston, South Carolina, with Darryl Drayton, also known as "D". Bartley provided the Verizon cellular telephone number 843-xxx-xxxx as a contact number for Darryl Drayton. It goes on to say this -- it is believed that the call or and information contained in here will provide information as pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in this investigation.

They were trying to investigate a murder and with the persuasive argument of federal cases and the persuasive argument of the Stored Communication Act. The Court finds that the order obtained by the magistrate was sufficient to obtain the records and reasonable grounds were proven under that warrant. And this Court specifically finds probable cause is not necessary.

R. pp. 45-47.

C. **Drayton's further argument in support of the motion.**

Although the trial judge had denied Drayton's motion to suppress, trial counsel submitted additional argument to support it the following day. He stated that in *In re Application of the United States for Historical Cell Site Data*, 747 F.Supp.2d 827, 829 (S.D.Tex. 2010), *vacated, In re United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), the district court had reviewed the trends of how federal courts were construing the Stored Communication Act. While the district courts have been giving court orders on findings of reasonable suspicion, this was changing because of indications in United States Supreme Court cases such as *Kyllo v. United*

States, 533 U.S. 27 (2001) (police engaged in unlawful "search" by using thermal imaging device, without first obtaining a warrant, to scan home to determine whether heat emanating from home was consistent with use of high-intensity lamps employed in indoor marijuana growing operation), *United States v. Karo*, 468 U.S. 705 (1984) and *United States v. Jones*, 132 S.Ct. 945, 949 (2012) (attaching a global positioning system (GPS) tracking device to a car and monitoring the car's movements for twenty-eight days, without a valid warrant, violated the Fourth Amendment because placing device on car required Government to "physically occup[y] private property for the purpose of obtaining information"). Trial counsel claimed that the Court in *Jones* recognized that individuals have a reasonable "expectation of privacy when the level of surveillance gets so high." He added that the Court in *In re Application of the United States for Historical Cell Site Data* had concluded that "[t]hose refinements in technology where more and more information is now being gathered are having ... a decisive fourth amendment consequence" and that the protections of the Fourth Amendment therefore applied. **R. pp. 51-54.**

When the trial judge asked whether the cases counsel was relying on focused on "the GPS aspect of it," he conceded that they did and that in "those cases ... the level of specificity is greater than what we have here where you're looking at a couple of days of simply cell tower pinging data[,] as opposed to if he had had an iPhone and you could somehow reconstruct movement by movement." However, counsel again contended that the trend was to extend Fourth Amendment protections in this area, and he asserted that "we also have in South Carolina a unique provision about the right of people to be secure from unreasonable invasions of privacy, which is in Article 1, Section 10. While conceding that there was "no precedent," he contended that based upon the State Constitution and the warrant statute, the warrant requirement applied. **R. pp. 54-56.**

The Assistant Solicitor argued that the cases relied upon by trial counsel were not controlling because the warrant here was "not dealing with thermal imagery, ... with GPS monitoring, ... [or] with any type of protracted period [of time]." Rather, the Sheriff's Office was "seeking records from a very limited time period, August 6th through August 10th." Also, the warrant did not involve a can of ether with a beeper, and it did not involve "a high level of surveillance." As a result, "the [F]ourth [A]mendment's consequences do not exist."

Drayton later renewed the suppression motion during the testimony of Kenneth Aycock, the witness through whom the challenged evidence was admitted. The trial judge noted that he had overruled the motion. **R. p. 399, lines 14-22.**

D. Discussion.

1. Neither the United States nor State Constitution required a warrant.

a. The Fourth Amendment warrant requirement did not apply.

The trial judge's ruling must be affirmed. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." After *Katz*, "the touchstone of [Fourth] Amendment analysis has been whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *Oliver v. United States*, 466 U.S. at 170, 177 (1984) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring)). Under the approach taken by Justice Harlan's concurring opinion in *Katz*, a reviewing court must ask two questions. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' .... The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable,' ... —whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (citations to *Katz* omitted).

Here, Respondent submits that both United States Supreme Court precedent and the decisions of the majority of federal courts to consider the issue supports the trial judge's conclusion that there is no legitimate expectation of privacy in cell site location records. The Supreme Court " 'has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.'" *Smith*, 442 U.S. at 744 (quoting *Miller*, 425 U.S. at 443).

Applying *Katz*, the Court in *Miller* rejected a Fourth Amendment challenge to a third-party subpoena for bank records. The Court explained that the bank's records "are not respondent's 'private papers.' " Instead, they are "the business records of the banks," in which a customer "can assert neither ownership nor possession." *Miller*, 425 U.S. at 440. The records "pertain to transactions to which the bank was itself a party." *Id.* at 441. In rejecting the defendant's challenge to the subpoena, the Court held "that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.[25]

In *Smith*, the telephone company had installed a pen register, at the request of the police, to record the telephone numbers dialed from the petitioner's telephone. In rejecting the petitioner's challenge to the warrantless use of the pen register, the Court expressly distinguished collecting telephone numbers dialed from the listening device used in *Katz* to record "the *contents* of communications." 442 U.S. at 741 (emphasis added). The Court held that telephone

[25] The Court found that the mandatory record-keeping requirement of the Act did not create a Fourth Amendment interest in bank records "where none existed before" because the records contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 441-42.

users generally had no subjective expectation of privacy in dialed telephone numbers. "[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 742.[26] Moreover, the Court held that any subjective expectation the petitioner may have harbored "is not one that society is prepared to recognize as reasonable." *Id.* at 743. (Internal quotation marks omitted).

The Court added that "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and the Court held that the user "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." *Id.* at 743-44. The Supreme Court, itself, has applied the same principle to confidential statements made in the presence of an informant, *Hoffa*, 385 U.S. 293, 302 (1966), to financial and other records in the hands of third-party businesses, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and to electronic surveillance of conversations between defendant and informer, by means of radio transmitter concealed on the person of the informant. *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion);. *See also Donaldson v. United States*, 400 U.S. 517, 522-23 (1971) (holding taxpayer was not entitled to intervene in proceeding to enforce summons for his employment records, where "what is sought here by the Internal Revenue Service . . . is the production of Acme's records and not the records of the taxpayer").

Lower federal courts have applied this same principle in a variety of contexts, such as defendant's ISP subscriber information and IP addresses of websites, *see Bynum*, 604 F.3d at

[26] The Court expressly distinguished collecting the listening device used in *Katz*. As in *Smith*, the contents of the "communications" were not disclosed.

164,[27] and telephone billing records. *Reporters Committee for Freedom of Press v. AT&T*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) (rejecting Fourth Amendment challenge to subpoena for telephone records and holding that when an individual transacts business with others, "he leaves behind, as evidence of his activity, the records and recollections of others. He cannot expect that these activities are his private affair"); *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation"); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (email users have no reasonable expectation of privacy in to/from addresses of their messages or in IP addresses of websites visited).

Relying upon *Smith* and *Miller*, the majority of federal courts to consider the issue now before this Court have held that acquisition of historical cell-site records without a warrant does not violate the Fourth Amendment because there is no legitimate expectation of privacy in those records. *See, e.g., In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) ("Cell site data are business records and should be analyzed under that line of Supreme Court precedent. Because the magistrate judge and district court treated the data as tracking information, they applied the wrong legal standard. Using the proper framework, the SCA's authorization of § 2703(d) orders for historical cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not *per se* unconstitutional"); *United States v. Skinner*, 690 F.3d 772, 777-78 (6th Cir. 2012); *Graham*, 846 F.Supp.2d at 389-90, 397-99; *In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F.Supp.2d 76, 81 (D.Mass. 2007)

[27] The "subscriber information" at issue in *Bynum* included the "physical address" of the defendant. *Id.*

(no Fourth Amendment interest in prospective cell-site data).[28] Respondent submits that this Court should follow this majority of federal courts and hold that the warrantless acquisition of historical cell-site records without a warrant does not violate the Fourth Amendment because there is no legitimate expectation of privacy in those records.

This Court "must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U.S. at 442. *See also Smith*, 442 U.S. at 741. Here the State did not seek conversations, unlike in the situations before the Supreme Court in *Katz*, but cell site location data. Like the pen register numbers in *Smith* and the bank records in *Miller*, the State did not obtain Drayton's "private papers" without a warrant. Instead, it obtained the business records of a third party, Verizon Wireless, and only for a very limited period of time. A historical cell-site record is a phone company's own record of the cell tower and sector it used to handle a customer's call, in a transaction to which it is a party. It is a generated and stored by a cell phone company at its own discretion because federal law does not require phone companies to create or keep such records.[29] *Graham*, 846 F.Supp.2d at 398 & n. 11; *In re U.S. for Historical Cell Site Data*, 724 F.3d at 611-12.

---

[28] *See also United States v. Dye*, 2011 WL 1595255, *9 (N.D. Ohio April 27, 2011) (denying motion to suppress historical cell-site data); *United States v. Velasquez*, 2010 WL 4286276, *5 (N.D. Cal. Oct. 22, 2010) (same); *United States v. Benford*, 2010 WL 1266507, *3 (N.D. Ind. Mar. 26, 2010); *United States v. Suarez-Blanca*, 2008 WL 4200156, *8-*11 (N.D. Ga. Mar. 26, 2008) (same); *Mitchell v. State*, 25 So.3d 632, 635 (Fla. Dist. Ct. App. 2009) (same). *But see In re Application of United States*, 809 F. Supp. 2d 113, 2011 WL 3678934 *9-*11 (E.D.N.Y. Aug. 22, 2011) (holding a warrant is required to compel disclosure of historical cell-site records).

[29] 47 C.F.R. § 42.6 requires providers to maintain for 18 months "the name, address, and telephone number of the caller, telephone number called, date, time and length of the call." This requirement does not extend to cell-site information.

Because these records are created solely by the cellular providers, "individual customers do not generally have access to those records, and could not be expected to produce them in response to a subpoena." *Graham*, 846 F.Supp.2d at 398. Moreover,

> A cell service subscriber, like a telephone user, understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call. *See United States v. Madison*, No. 11–60285–CR, 2012 WL 3095357, at *8 (S.D.Fla. July 30, 2012) (unpublished) ("[C]ell-phone users have knowledge that when they place or receive calls, they, through their cell phones, are transmitting signals to the nearest cell tower, and, thus, to their communications service providers."). Cell phone users recognize that, if their phone cannot pick up a signal (or "has no bars"), they are out of the range of their service provider's network of towers. And they realize that, if many customers in an area attempt to make calls at the same time, they may overload the network's local towers, and the calls may not go through. Even if this cell phone-to-tower signal transmission was not "common knowledge," *California v. Greenwood*, 486 U.S. 35, 40, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988),

In re U.S. for Historical Cell Site Data, 724 F.3d at 613. *See also Smith*, at 742-43; *see also Graham*, 846 F.Supp.2d at 401.

Further, Drayton voluntarily used his phone, *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613-14 & n. 13; *Skinner*, 690 F.3d at 777 ("There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone"), and he voluntarily provided his cell site location information to Verizon. This is clear both from the reasoning of *Smith* and *Miller*, and from the provisions of his contractual agreement with Verizon. *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613;[30] *see also Graham*, 846 F.Supp.2d at 399.

[30] Verizon's privacy policy states that "[w]e collect information about your use of our products, services and sites. Information such as call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information, service options you choose, mobile and device numbers, video streaming and video packages and usage, movie rental and purchase data, FiOS TV viewership, and other similar information may be used … ." *See* http://www.verizon.com/about/privacy/policy/.

Moreover, as opposed to GPS or other forms of electronic monitoring, the information revealed by historical cell site location data "exposes to the government only where a suspect *was* and not where he *is*." *Graham*, 846 F.Supp.2d at 392. "The data gleaned from toll records or pen registers ... encompassed 'location' data with far more precision than the historical cell site location records at issue in the present case, and typically that location would be one in which the user had a Fourth Amendment privacy interest, such as a home or office." *Id.* at 399.

"At best, the records in this case identify the closest cellular tower, whereas the pen register records at issue in *Smith* indicated the physical address of the defendant's telephone. The concept of a legitimate expectation of privacy in one's location or movement simply was not contemplated in those early telephone cases." *Graham*, 846 F.Supp.2d at 399. Also, Drayton has not argued that these records revealed his movement in protected areas, such as his home, and he did not have any "subjective expectation of privacy that society is prepared to recognize as reasonable," *see Katz*, 389 U.S. at 361 (Harlan, J., concurring), either while traveling along the streets and highways or in committing his crime and the cover-up in an open area visible to the public.

> Unlike [*United States v. Karo*, 468 U.S. 705, 715 (1984)], where the electronic beeper concealed in the drum of ether disclosed not only the location of defendant's home, but also the fact that criminal activity was afoot (which featured prominently in the search warrant affidavit), there is nothing presumptively illegal about the possession of a cellular phone. The most that the "tracked" cell phone might reveal is that its owner might presently be found in the home (assuming that the phone had not been loaned to someone else). There is nothing, however, about that disclosure that is any more incriminating or revealing than what could be gleaned from the activation of a pen register or from physical surveillance. Moreover, outside of the home it is doubtful that the tracking of a cell phone has any Fourth Amendment implication whatsoever. *See Karo*, 468 U.S. at 713-72.

In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d), 509 F.Supp.2d at 81. *See also United States v. Knotts*, 460 U.S. 276, 281 (1983);

Skinner, 690 F.3d at 777-78 (defendant had no legitimate expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone and, since he was on public road before stopping at public restroom, police could have obtained same information by visual surveillance). [31]

Finally, and again unlike the GPS monitor surreptitiously installed in *Jones*, Drayton could have simply turned off his cell phone or not used it while committing the crime. At least one court has recognized that "cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy and such expectation would not be reasonable in any event." *In re Smartphone Geolocation Data Application*, 2013 WL 5583711, *16 (E.D.N.Y., May 1, 2013). Therefore, Drayton did not have a reasonable expectation of the cell site location records and the Fourth Amendment warrant requirement did not apply.

b. There was no violation of right to privacy protected by S.C. Const. art. I, § 10.

Nor does S.C. Const. article I, § 10 require a different result, even though the South Carolina Constitution extends greater protections than the Fourth Amendment because it specifically protects the people's right to privacy. *State v. Forrester*, 343 S.C. 637, 643-45, 541

---

[31] Drayton has abandoned his contention that *Jones*, *supra*, requires reversal by not arguing this in his brief. *See* Rule 208(b)(1)(D), SCACR (each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal). Further, and unlike *Jones*, here, the actions of the police were subject to judicial review. *See Graham*, 846 F.Supp.2d at 392. Also, the State did not record the information. *See In re United States for Historical Cell Site Data*, 724 F.3d at 609-10. Further, there was no trespass, the location data was far less precise and was not continuous or for an extended period of time, *see Graham*, 846 F.Supp.2d at 392; and, Drayton could have defeated the ability to so locate him by either turning off his cell phone or simply not calling anyone. Thus, there could be no Fourth Amendment violation under the theory of the majority in *Jones*, which focused upon the officers committed a trespass by attaching the device without a valid warrant, 132 S.Ct. at 949, as well as the concurring opinions, which included *obiter dictum* finding that "use of long[] term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *See Jones*, 132 S.Ct. at 955-57 (Sotomayor, concurring); *id.* at 961-64 (Alito, J., concurring in the judgment). *See also State v. Dykes*, 403 S.C. 49, 516-20, 744 S.E.2d 505, 514-16 (2013) (Hearn, J., dissenting).

S.E.2d 837, 840-41 (2001).[32] Art. I, § 10 was not infringed because, for the reasons set forth above, there was no legitimate expectation of privacy in Verizon's cell site location records to be protected by this state constitutional protection of his right to privacy. In other words, to the extent Drayton may have had a subjective expectation of privacy while voluntarily using his cell phone in public places, in and around the time that he murdered the victim, "this expectation is not 'one that society is prepared to recognize as 'reasonable.'' " *Smith*, 442 U.S. at 743 (citing *Katz*, 389 U.S., at 361. *See also Florida v. Riley*, 488 U.S. 445, 696 (1989) (officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required, because " '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"). There is simply no valid reason for extending the protections of the state constitutional right to privacy to protect the cell site location data. Also, for the reasons set forth in the preceding footnote, Respondent submits that the concerns expressed in the two concurring opinions in *Jones* and the concerns stated in the dissenting opinion in *Dykes* were satisfied.

2. The State complied with the provisions of the SCA.

Contrary to Drayton's argument, which is not supported by any authority other than a general citation to the SCA, *see* **Final Brief of Appellant, p. 15**, Respondent submits that law enforcement complied with the provisions of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. Specifically, § 2703(c)(1) provides, in pertinent part, that "[a] governmental entity may require a provider of electronic communication service or ... to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the

[32] It should be noted that the Court in *Forrester* refused to hold that the state constitutional right to privacy provision requires police officers to inform citizens that they have the right to refuse consensual searches and that, without such a warning, a search is involuntary. *Id.* at 645-48, 541 S.E.2d at 841-43.

contents of communications) only when the governmental entity" either (A) obtains a warrant "issued using State warrant procedures ... by a court of competent jurisdiction; ... [or] (B) obtains a court order for such disclosure under subsection (d) of this section." In turn, § 2703(d) provides that:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only *if the governmental entity offers specific and articulable facts showing* that there are *reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.* In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

Here, the record, including the redacted affidavit in support of the warrant (*see* **Court's Exhibit 2, R. p. 558; R. pp. 45-47**),[33] supports the trial judge's finding that the State complied with these requirements.

'The 'specific and articulable facts' standard is a lesser showing than the probable cause standard that is required by the Fourth Amendment to obtain a warrant." *In re U.S. for Historical Cell Site Data*, 724 F.3d at 606; *see also Graham*, 846 F.Supp.2d at 396. Respondent submits that this standard was satisfied. Further, a magistrate is a court of competent jurisdiction. Likewise, there is no merit to Drayton's contention that police "obtained a search warrant, not a court order, and must be held accountable to the chosen method for pursuing the historical cell site location information." **Final Brief of Appellant, p. 15**. His argument ignores that the trial judge did not find that the warrant lacked probable cause. Rather, he found that it was

[33] The redacted language in the warrant states that Mr. Bartley, the fiancé of the victim, last spoke to the victim on August 8, 2010. She informed him that she was traveling to Charleston, South Carolina, with Drayton, also known as "D". Bartley also provided the Verizon cellular telephone number of Drayton. Further, the affidavit stated that "it is believed that the call or and information contained in here will provide information as pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in this investigation."

unnecessary to obtain a warrant because Drayton did not have a legitimate expectation of privacy in the Verizon records, and he found that the magistrate's issuance of the warrant satisfied the order requirement of the SCA. Drayton's argument in this regard ignores that the warrant issued was an "order."

3. The provisions of § 17-13-140 were inapplicable.

Respondent further submits that the provisions of § 17-13-140 (2003) are inapplicable because neither the Fourth Amendment nor article I, § 10 required a warrant, and the warrant issued was construed as an order authorizing a subpoena for the disputed records under the SCA.

4. The Fourth Amendment compulsory process requirement was satisfied.

Also, the order, which was narrowly drawn and issued to the cellular provider, satisfied the Fourth Amendment's very limited requirements for compulsory process. A § 2703(d) order for cell-site records is a form of compulsory process, like a subpoena, and the Fourth Amendment sets a reasonableness standard rather than a warrant requirement for compulsory process. *Miller*, 425 U.S. at 444 & n. 6. The Supreme Court has long held that "the Fourth [Amendment], if applicable [to a subpoena], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946). *See also Miller*, 425 U.S. at 445-46.

Compulsory process authority is critical to the truth-seeking function of the criminal justice process. "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution

or by the defense." *United States v. Nixon*, 418 U.S. 683, 709 (1974).[34] Therefore, there was no violation of the Fourth Amendment and Drayton "lacks the requisite Fourth Amendment interest to challenge the [order]." *Miller*, 425 U.S. at 446.

5. Good faith reliance upon the warrant issued and harmless error.

Alternatively, this Court should deny relief both because the officers acted in good faith reliance upon the warrant that was issued, regardless of whether there was probable cause to issue the warrant, and because any error in admitting the records was harmless beyond a reasonable doubt. Although Respondent submits that there was probable cause to issue a search warrant based upon the supporting affidavit,[35] suppression of the records was not required even if there was no probable cause because law enforcement acted in objectively good faith reliance upon the order that was issued. In *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011), the Court explained that:

> The basic insight of the [*United States v. Leon*, 468 U.S. 897 (1984)] line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. [*Herring v. United States*, 555 U.S. 135, 143 (2009)]. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon*, *supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring*, *supra*, at 137, 129 S.Ct. 695, the " 'deterrence rationale loses much of its force,' " and

[34] *See also Wilson v. United States*, 221 U.S. 361, 376 (1911) ("there is no unreasonable search and seizure when a [subpoena], suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced").

[35] An affidavit supporting a warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of probable cause. *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis upon which to conclude that probable cause existed under the "totality-of-the-circumstances" set forth in *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *Baccus*, 367 S.C. at 50, 625 S.E.2d at 221. Respondent submits that this standard was met, notwithstanding Drayton's contention that Bartley's reliability was not set forth in the affidavit. To hold otherwise would preclude warrants based upon information provided by victim's or other individuals who do not have lives that immerse them into criminal activities.

> exclusion cannot "pay its way." *See Leon, supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting [*United States v. Peltier*, 422 U.S. 531, 539 (1975)]).

"Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." [*Leon*, 468 U.S. at 922–923]." *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012). A claim of good faith reliance on a warrant issued by a magistrate may be defeated only by a showing that the warrant was "based on an affidavit so lacking in *indicia* of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S., at 923.[36] In spite of Drayton's contrary position, Respondent submits that he cannot meet this standard because the officers did not act in "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights," *id.* at 909, as demonstrated. Thus, suppression was not required. *Id.*

Finally, any error in the introduction of the records or the information gleaned therefrom must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). First, the State presented DNA evidence that established his presence at the crime

[36] In *State v. Sachs*, 264 S.C 541, 559, 216 S.E.2d 501, 510 (1975), the Court found a good faith exception permits the introduction of evidence seized pursuant to a warrant that is defective under § 17-13-140, if the officers have made a good faith attempt to comply with the affidavit requirement. In *McKnight*, police officers orally recited the facts upon which the warrant was based, but no affidavit was ever executed. 291 S.C. 110, 112-13, 352 S.E.2d 471, 472. As a result, the Court found that there was no good faith effort to comply with the statute, but the Court declined to decide whether there is a good faith exception for officers who execute a search with objectively reasonable reliance on a warrant that is ultimately found to be invalid. *Id.* at 114 & n. 2, 352 S.E.2d at 473 & n.2. Other appellate decisions refusing to recognize a good faith exception to § 17-13-140 have - like *McKnight* - involved situations where either there was no effort to comply with the affidavit requirement or there was no effort to supplement a defective affidavit. *E.g., State v. Johnson*, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990); *State v. Weston*, 329 S.C. 287, 290-293, 494 S.E.2d 801, 802-804 (1997). That did not occur here.

scene beyond any reasonable, as opposed to chimerical, doubt. As noted, the presence of any DNA in the victim's car when he told her husband that the victim did not pick him up on August 9th is damning to him.[37] The DNA evidence more precisely pinpointed his location at the time of the murder than cell site location records or even the GPS monitoring device used in *Jones*.

Also, he attempted to destroy any forensic evidence by burning the victim's body; there was repeated evidence of flight to avoid prosecution.[38] *E.g.*, *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (evidence of a defendant's flight is admissible as circumstantial evidence of guilt); *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003) (evidence of flight constitutes evidence of defendant's guilty knowledge and intent). Further, he sold the victim's engagement ring and lied about how he acquired it; on the day following the murder, he was seen with the injured finger and fresh scratches on his face; he had a fractured and bloody finger; he told varying lies about how he was hurt; he was spending money, which was unusual for him; he placed a number of bloody items in his cousin's trash that had been in the victim's trunk; and he attempted to hide his own socks and shoes in his cousin's car. Therefore, any error was harmless.

III. The trial judge did not abuse his discretion by refusing to allow Drayton to cross-examine the pathologist about the fact the toxicology report, prepared by another person, reflected the presence of buprenorphine in the victim's blood.

Drayton's remaining argument is that the trial judge erred by refusing to allow him to cross-examine the pathologist about the fact the toxicology report, prepared by another person, reflected the presence of other drugs, including buprenorphine, in the victim's blood. Respondent submits that the trial judge did not abuse his discretion.

---

[37] However, there were two swabs of his DNA present in car. In other swabs containing a mixture of DNA donors, he was either the major contributor and the victim could not be eliminated as the minor contributor or vice versa. Also, neither he nor victim could be eliminated from the mixture in the blood found on victim's right shoe, or the mixture of DNA on the CVS bag seized at his cousin's residence. **R. pp. 357-69**.

[38] This included leaving both Charleston and Beaufort Counties and going to Jasper County, as well as attempting to flee South Carolina for Florida. Also, he paid for the motel in Hardeeville but had his cousin sign for the room, and he was spending money.

When the State objected to Drayton's cross-examination about the presence of buprenorphine as irrelevant, **R. p. 450, lines 15-23**, the trial judge heard *in camera* arguments, **R. p. 450, line 24 – p. 458, line 9**, and he permitted the State to proffer Dr. Presnell's testimony *in camera*. **R. p. 458, line 10 – p. 461, line 20**. The trial judge then ruled that the proffered cross-examination was inadmissible under Rule 403, SCRE:

> [E]ven though the evidence may have some relative value, I think that the probative value does not substantially outweigh the danger of an unfair prejudice. [(Sic).] And the unfair prejudice means the undue tendency suggests a decision on an improper basis; i.e., the use of drugs.
>
> And under 403 analysis, the Court is not going to allow the testimony concerning the toxicology report, especially in light of the fact that the doctor said those values will be elevated as a result of where the blood was taken from.

R. p. 461, line 23 – p. 462, line 7. There was no error.

"Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000). " 'As a general rule, a trial [judge's] ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion.' " *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000) (quoting *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998)). "The trial [judge] ... has wide discretion in determining the relevancy of evidence...." *Davis v. Traylor*, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct.App. 2000). Likewise, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403]." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003) (internal citation omitted).

Here, there was no abuse of discretion. First, the record is replete with evidence of the victim's drug use. Mr. Bartley admitted, on direct and cross-examination as a prosecution

witness, that she had a drug problem and that she took prescription medications, which had not been prescribed for her. Also, she would get pills from Darryl or "D," whom Mr. Bartley identified as Drayton. **R. pp. 68-69; 88-93**.

Mr. Bartley later gave similar testimony when presented as a defense witness. Specifically, Drayton established that Mr. Bartley was not concerned when the victim told him that she was going to go get some pills with Drayton because they were friends and he had previously furnished her with pills in exchange for taking him places; the victim had a drug problem; her drug problem included taking prescription medications, such as "a form of Percocet; that this was "[a] powerful drug;" the victim was known to take prescription medications that had not been prescribed for her; she would get those pills from "people she knew;" the victim would sell pills to the people whom she knew, but she did not sell them in large quantities or on the street; and Mr. Bartley did not feel good about her having a drug problem. **R. p. 89, line 24 - p. 93, line 8**.

Second and more importantly, Dr. Presnell's *in camera* testimony underscores the very limited probative value and extremely confusing nature of the proffered inquiry because the levels found in the victim's blood were derived from testing blood taken from the heart. When examined by Drayton, she testified that the toxicology report reflected the presence of the following drugs in the victim's blood: the opiate buprenorphine, and norbuprenorphine, which is the active metabolite; fluoxetine (Prozac) and its active metabolite, norfloxetine; adderall or Dexedrine, which are amphetamines; and the inactive metabolite for marijuana. THC. However, "these levels had the potential for postmortem redistribution." **R. p. 460, line 3 – P. 461, line 20; p. 462, lines 16-24**.

When questioned by the State, she testified that she would not feel comfortable testifying about when certain medications had been ingested by the victim based on the laboratory results that she received in this case. She explained that:

> My interpretation of the toxicology [report] shows that there are very high levels of the drugs Mr. Pennington was discussing. There's also a fair amount of metabolite of many of the ones that they were quantitated ... and at levels higher than the original drugs, indicating that they've been there for a while.
>
> Now, I don't know what that while is. Again, you're getting into half-lives and [pharmacokinetics] and whatnot.
>
> Now, the one other thing I'll point out about this is the toxicology was performed on cardiac blood. We could only get blood from the heart. Blood from the heart is subject to what we call postmortem redistribution, meaning that you can get falsely elevated levels. And there's no way to tell if that happened or not in that instance.

R. p. 458, line 22 – p. 459, line 20.

As noted by the State at trial, this line of inquiry would have a tendency to confuse the jury. It would have caused jurors to speculate about why the evidence was presented, as well as how and when the drugs at issue got into the victim's blood, and what effect that any drug(s) may have had on her. The proposed cross-examination would not tend to undercut the State's theory of the case, as Drayton contends, because addicts will seek drugs even when under the influence of the drug(s) to which they are addicted. However, it was potentially prejudicial to Drayton, since the State's evidence was that the ostensible purpose of the trip was for him to obtain prescription drugs and, in exchange, the victim was to receive pills and gas money for driving. Likewise, the jury may have drawn an inference that he provided the drug(s) to her to impair her ability to function properly and make her an easier person to victimize.

Further, according to Dr. Presnell's testimony and available literature, Buprenorphine is used for treating addiction to opiates with more dangerous effects and side-effects.[39] If the trial judge had permitted Drayton to elicit that this drug was found in the victim's system, then the State, in fairness, would have the right to present evidence that Buprenorphine is used to treat addiction to more serious opiates. This would further divert the jury's attention away from the issues that were properly before it. Thus, the proffered inquiry cannot survive a Rule 403 analysis. *See State v. Slocumb*, 336 S.C. 619, 627-628, 521 S.E.2d 507, 511-12 (Ct.App. 1999) ("Even if admissible under Rule 703 or Rule 705, however, the determination of whether an expert may testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

Finally, and for the reasons argued in connection with Argument II and those stated in this argument, Respondent submits that any error in the trial judge's ruling must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See Sherard*, 303 S.C. at 175, 399 S.E.2d at 596 ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

---

[39] Buprenorphine is an opiate, but "the maximal effects are less than other more dangerous opioid agonist like methadone and heroin." As a result, it has been FDA-approved for opioid addiction treatment. *See* http://www.buprenorphine-doctors.com/what-is-buprenorphine.cfm.

Respectfully submitted,

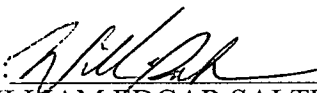
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar # 4806
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting St., Ste. 400
Charleston, SC 29401
(843) 958-1900

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

April 24, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2012-213295

THE STATE

RESPONDENT,

V.

DARRYL L. DRAYTON,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 24th day of April, 2014.

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge
Appeal Case No. 2012-213295

THE STATE

RESPONDENT,

V.

DARRYL L. DRAYTON,

APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan Hackett, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

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

This 24th day of April, 2014.

WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT