

STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2017-001846

THE STATE,

APPELLANT,

v.

JAVON DION GIBBS

RESPONDENT.

RECORD ON APPEAL

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803)734-3970

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

Post Office Box 1276
Conway, South Carolina 29526
(843) 915-5460

ATTORNEYS FOR APPELLANT

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 2015-GS-26-00847, 00848

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

August 20, 2017

JAVON D. GIBBS,)

Defendant. ()

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Jason S. Anders, Esquire
James Clayton Mitchell, III, Esquire
Attorney for Plaintiff (

Ralph James Wilson, Jr., Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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(No Exhibits were marked or admitted.)

1 BY THE COURT:

2 THE COURT: All right. I have a list here, Mr. Wilson,
3 and looks like all of the motions are yours, aren't they?

4 MR. WILSON: I believe so, Judge.

5 THE COURT: Okay. You want to let's just start and go
6 through them?

7 MR. WILSON: I believe that ---

8 THE COURT: Anything preliminarily? Have you worked out
9 of them?

10 MR. MITCHELL: I don't think we've worked any of them,
11 Your Honor. We've got one issue. We've got the investigator
12 here and he may want to testify as to a few of the motions.
13 He's got a child with him. He's got some childcare issues.
14 If we could start out with those and get him out of here that
15 would be great.

16 THE COURT: Well, then you'll just have to tell me which
17 ones they are?

18 MR. WILSON: Motion to suppress, Your Honor, for the
19 phone records. There was a search warrant issued for the
20 phone records for Javon Gibbs. My client is not here at this
21 point in time, but he's gonna be here.

22 THE COURT: Do they have him like on the way?

23 MR. MITCHELL: He was on the transport bus, Your Honor.

24 MR. WILSON: And we did confirm ---

25 THE COURT: That's sketchy at best. I mean, is he in

1 Horry County or is being -- where is he being transported
2 from?

3 DEPUTY: I'll find out. Supposed to be from J. Reuben.

4 THE COURT: Okay. He's at J. Reuben, okay; so, that's
5 something we can fix.

6 MR. WILSON: Yes, sir.

7 THE COURT: Mr. Palmer is gonna see if he's on the way.
8 So, we'll just be at ease until he gets here. The
9 investigator is needed for the one -- I see here a motion that
10 says motion in limine to exclude cell site locations; is that
11 one of them?

12 MR. WILSON: That may be one, Judge, but I think if we do
13 this motion first, it may determine whether or not we even
14 need him for that particular motion.

15 THE COURT: All right. Which motion is it?

16 MR. WILSON: Motion to suppress the phone records; do you
17 have it?

18 MR. MITCHELL: I do, Your Honor.

19 THE COURT: You know, I didn't even see that one. I
20 don't have one that's styled in that fashion.

21 MR. WILSON: May I approach, Your Honor?

22 MR. MITCHELL: I've got it, Your Honor.

23 THE COURT: Well, I have two that looked like they had to
24 do with telephones.

25 MR. WILSON: Yes, sir.

1 THE COURT: Cell sites and cell location.
2 MR. WILSON: Yes, sir.
3 THE COURT: Okay. Yeah, here they are right here. Right
4 there, phone records, okay. I got it.
5 MR. WILSON: Okay.
6 MR. ANDERS: And, Your Honor, just one thing before we
7 start, Mr. Wilson filed two motions I didn't even receive
8 until this morning via email.
9 MR. WILSON: Which motions.
10 THE COURT: Is this a no body case?
11 MR. ANDERS: This is, Your Honor. These two motions,
12 Your Honor, I did not even receive. I haven't even had a
13 chance to look at.
14 MR. WILSON: It's a motion in limine, Judge, and it can
15 be brought up anytime, even at trial. I was just trying to
16 get ---
17 THE COURT: It's a prior bad acts it looks like, right?
18 MR. ANDERS: That's right.
19 MR. WILSON: Yes, sir.
20 THE COURT: And these are just duplicates because there's
21 one for each charge, right?
22 MR. WILSON: Yes, sir. Well, and ---
23 THE COURT: Isn't it the same motion for ---
24 MR. ANDERS: For both charges?
25 MR. WILSON: Right. Yeah, pretty much, yes.

1 THE COURT: But you got a prior bad act over here anyway,
2 don't you; don't you have prior bad acts?

3 MR. WILSON: Yes, sir.

4 THE COURT: Already pending?

5 MR. WILSON: There is -- there are specific statements
6 that were made by some witnesses, which were hearsay and bad
7 acts and we don't want there to be any chance that it might
8 come in because there would be then obvious grounds for a
9 mistrial.

10 THE COURT: All right. Well just let's hang tight and
11 you can see if we need that one.

12 MR. WILSON: Yes, sir.

13 THE COURT: I think they're gonna be disposed of maybe
14 with the other motions.

15 MR. WILSON: Yes, Your Honor. Your Honor, I made contact
16 with the jail, they said he'd probably be here at 1:30;
17 they're on the way now.

18 THE COURT: Okay.

19 MR. WILSON: If, Your Honor, would like to do some of the
20 -- ones without the Defendant here?

21 THE COURT: Your Defendant has a right to be here, if he
22 hasn't waived it. Let's don't set up a PCR; let's go ahead
23 and ---

24 MR. WILSON: Yes, Your Honor.

25 THE COURT: I don't know why they think 1:30, but anyway

1 we'll just be at ease until 1:30 until we can get him here.

2 MR. WILSON: Yes, Your Honor.

3 (RECESS - 1:04 P.M.)

4 *****OFF THE RECORD*****

5 (On the Record - 1:17 P.M.)

6 THE COURT: Thank you. Please be seated.

7 All right, Mr. Wilson, I think we're about to hear your
8 motion to suppress certain phone records; is that correct?

9 All right.

10 MR. WILSON: Your Honor, this would be Defense's motion
11 to suppress the phone records based on a search warrant and
12 lack of probable cause at the time the actual search warrant
13 was issued, Judge.

14 THE COURT: I've read your -- I've read your motion and
15 although you make reference to other things, I am concerned
16 about the sufficiency of this search warrant. Go ahead and
17 put it on the record ---

18 MR. WILSON: Yes, Your Honor.

19 THE COURT: --- your objections to the search warrant
20 affidavit?

21 MR. WILSON: Yes, Your Honor. Well, Judge, my concern is
22 several things actually. Any times that you have -- you issue
23 a search warrant, the courts have already said in numerous
24 cases that there is a guaranteed expectation of privacy
25 guaranteed by the Fourth Amendment and cell phone records.

1 So, when they went and got this particular search warrant --
2 when they went and got this particular search warrant, this is
3 what the search warrant read -- and if I could publish it for
4 Your Honor?

5 THE COURT: Yes.

6 MR. WILSON: On 8/27/13, the mother of Zachary Malinowski
7 reported him missing from 2918 Highway 905 in the Conway
8 section of Horry County. Family and friends were interviewed,
9 including a close girlfriend and most recent contact they had
10 with him was 8/25/13 by phone. This is not normal for him and
11 it is believed something happened to him. A subsequent search
12 of the victim's phone showed activity up to 4:24 where the
13 phone completely shut off in the Aynor area. His vehicle was
14 located several days later completely burned and other
15 property was located on the side of different roadways. As of
16 11/5/13, the victim or his body have not been located. The
17 phone number that he searched belongs to Javon Gibbs, who had
18 been identified by many as being involved with his
19 disappearance based on drug related incidents before his
20 disappearance. The male denied the allegations and identified
21 that he did not want to provide a DNA sample or take a
22 polygraph to exclude him. It is my belief that searching the
23 records of Javon Gibbs will provide information regarding any
24 contact with the victim and his whereabouts during the late,
25 excuse me, during the date and time the victim went missing.

1 The concerns I have are this ---

2 THE COURT: Hold it right there.

3 MR. WILSON: I apologize, Your Honor.

4 THE COURT: Mr. Attorney General, who in the world got
5 this search warrant issued on that?

6 MR. MITCHELL: Investigator Jonathon Martin, Your Honor.

7 THE COURT: Well, tell me how?

8 MR. MITCHELL: Your Honor, you've got to kind of
9 understand a little bit of background in the case. At this
10 point -- you know, it started off as a missing person's case.
11 So, in this affidavit, we're going through and he's pretty
12 much summarizing what's been done and summarizing where they
13 are to that point in the investigation.

14 THE COURT: I think the interesting part is Jayon Gibbs,
15 who has been identified by many as being involved with this
16 disappearance based on drug-related incidents before his
17 disappearance. The fact that he may have exercised his
18 constitutional right not to speak to police, give a polygraph,
19 submit to polygraph or give DNA samples, that can't even be
20 considered here.

21 MR. MITCHELL: Right.

22 THE COURT: I want to know what information you had
23 because there's nothing, nothing else in this affidavit to
24 support the legal issuance of a search warrant.

25 MR. MITCHELL: And, Judge, and the part -- and that's

1 where we were relying on really is that he had been identified
2 by many as being involved.

3 THE COURT: What was told to the Magistrate; what
4 information did you have?

5 MR. ANDERS: Your Honor, if I may?

6 THE COURT: Yeah, somebody help me here.

7 MR. ANDERS: Your Honor, Detective John Martin is in the
8 courtroom.

9 THE COURT: Well, let's hear from him. Let's hear what
10 he told the Magistrate, what information was available.

11 MR. ANDERS: Detective Johnathon Martin to the stand.

12 CLERK: Please raise your right and place your left hand
13 on the Bible.

14 JOHNATHON MARTIN, HAVING BEEN SWORN
15 TESTIFIES AS FOLLOWS:

16 CLERK: Please be seated.

17 THE COURT: Anybody got a copy of that search warrant?

18 MR. WILSON: Yes, Your Honor.

19 CLERK: State your full name and spell your last name for
20 the Court.

21 MR. WILSON: May I approach, Your Honor?

22 THE COURT: Yes.

23 MR. MARTIN: My full name is Johnathon Martin, M-A-R-T-I-
24 N.

25 MR. ANDERS: Your Honor, may I approach the witness?

1 THE COURT: Yes.

2 DIRECT EXAMINATION OF JOHNATHON MARTIN BY MR. ANDERS:

3 Q: Investigator Martin, I'm handing you a copy of Mr.
4 Wilson's motion, the -- actually verbatim has the probable
5 cause listed that was given to the Magistrate from yourself;
6 does that appear to be the case?

7 A: Yes, sir. So, I mean, if you read through my report of
8 investigation, this as a summary, I -- at that point in time,
9 I was probably at 30 pages of actual investigation that had
10 occurred.

11 Q: I have a copy of that investigation; would that help you?

12 A: Yes, sir.

13 Q: As His Honor pointed out, really in this affidavit what
14 we're concerned about is it -- phone number in the search
15 warrant of Javon Gibbs, who has been identified by many as
16 being involved with his disappearance based on drug-related
17 incidents. Do you recall writing that and submitting that?

18 A: I do.

19 Q: Do you remember that?

20 A: I do. This does not have the ROI which was over 100
21 pages long. I don't know if you have that with you.

22 Q: Your Honor, I do not have a copy of the investigation
23 report.

24 A: I can summarize what ---

25 Q: If you could summarize for His Honor exactly how you came

1 to that conclusion of the incidents related to the
2 disappearance that involved drug activity?

3 A: We have numerous statements from people that Javon Gibbs
4 and Christopher Brown had been involved in a drug transaction
5 with Zachary Malinowski. I don't have their names in front of
6 me right now, but I did get witness -- I don't ---

7 THE COURT: Wait a minute. Wait a minute. Wait a
8 minute. I don't know who they were, I don't know what they
9 said. Mr. AG, I don't want to hear this. I hope you're not
10 going forward with those for me to verify a, a search warrant
11 in a murder case. We're here, this is the issue, and the
12 investigator is telling me I don't have my file, I don't know
13 who told me this, I don't know what they said. Is that where
14 we are?

15 MR. ANDERS: Your Honor, I apologize for him not having
16 his file, but I think -- I gave him a list of interviews. He
17 might be able to look back and identify those people who did
18 tell him that there was a drug-related incident, particularly
19 a robbery of the victim approximately two weeks prior to his
20 disappearance, which ---

21 THE COURT: Well, let's go on. Tell me what you got,
22 what we can recall.

23 A: Okay. There was approximately five different people who
24 were close acquaintances to the victim. There was ---

25 BY MR. ANDERS:

1 Q: Was one of those Samantha Hopkins.
2 A: Samantha Hopkins was his actual girlfriend.
3 Q: Okay. And did you interview her?
4 A: I did.
5 Q: What did she tell you?
6 A: She told me that Zach had an ongoing issue with
7 Christopher Brown and Javon Gibbs over ---
8 Q: What was the issue ongoing; what was the issue actually
9 ---
10 A: He had gone into a drug deal with Christopher Brown and
11 Javon Gibbs.
12 Q: If you could just be a little more specific and tell the
13 Judge exactly what the drug deal was?
14 A: It was like \$1400 that was supposed to be used towards
15 the drug purchase or sale. They had taken his half and
16 refused to give it up.
17 Q: So, he gave approximately \$600 to these two gentlemen?
18 A: Yes, sir.
19 Q: They never gave him drugs?
20 A: True.
21 Q: Okay. Anybody else you talked to?
22 A: Yes. There was a -- Jamal Fleming had provided that
23 information.
24 Q: Okay. And who was Jamal Fleming?
25 A: He was the last person that was with Zach Malinowski on

1 the night of the incident.

2 Q: Was a friend of Zach Malinowski?

3 A: Yes, he was.

4 Q: And that's information that Zach probably would've shared

5 with him?

6 A: Yes, sir.

7 Q: And how thoroughly did you talk to Mr. Fleming?

8 A: For numerous -- over twice and for over an hour each

9 probably, and then we also -- he submitted to a polygraph and

10 I had just talked with him on a trip up to Florence.

11 Q: Okay. And anybody else you recall talking about?

12 A: Marcus Smith.

13 Q: Okay, Marcus Smith. And Marcus Smith knew the victim

14 how?

15 A: A friend, a close acquaintance.

16 Q: And Marcus Smith was -- when was the last time that he

17 saw the victim?

18 A: The night before the incident -- or he went missing on a

19 Sunday into Monday; he had seen him on Saturday.

20 Q: They were hanging out together?

21 A: They were out at Broadway at the Beach together.

22 Q: Okay. And was Marcus one of the first people you talked

23 to, who came to you and told you about the background and, and

24 ---

25 A: He wasn't the first one we talked to, but -- Samantha was

1 the first one that kind of gave us a background on Zach
2 Malinowski.

3 Q: And do you recall when Marcus Smith initially talked to
4 you?

5 A: It was within the first week of the investigation.

6 Q: Okay. And at that point, did he tell you about the drug
7 deal that happened?

8 A: He did. He did.

9 Q: Okay. Did he tell you anything else that might've
10 happened before the drug deal?

11 A: Yes, there -- before the drug deal, Zach Malinowski had
12 been involved in a incident where Christopher Brown had been
13 arrested on a stolen -- a stolen gun. Zach was being blamed
14 for the arrest and there had been some animosity over that.

15 Q: And I think that's important. So, if you would, just
16 tell the Judge exactly what happened. The gun charge happened
17 approximately a month before he disappeared, correct?

18 A: Yes, sir, it was June, the end of June.

19 Q: Just describe exactly where, where this happened and what
20 happened.

21 A: On that date, the ---

22 Q: This was approximately July 31st?

23 A: That sounds -- that sounds right, I'm sorry, July. There
24 was an incident report in the -- included with the file. The
25 -- there were four people at the Conway park.

1 Q: Whittemore? Was it Whittemore Park?

2 A: Yes, I believe it was Whittemore. There were several

3 people, including Marcus Smith, Chris Brown, and Zach

4 Malinowski were at the park and there was a shots fired call

5 that the police responded to. They got on scene, acknowledged

6 that these boys appeared suspicious. They were kind of

7 standing around trying to stay away from the car that they

8 were standing next to when they pulled up. They had inquired

9 about the vehicle. They kind of -- everyone kind of distanced

10 themselves from the vehicle. And Zach Malinowski had

11 identified the vehicle belonged to his mother. With consent

12 from the mother, which the police department actually

13 contacted the mother because no one would really claim

14 ownership of the vehicle. The mother provided consent for

15 them to look in the vehicle. At that time, they looked in the

16 vehicle and found a gun under the driver's side seat which was

17 a stolen handgun. Through interviews with all parties on

18 scene, they had developed probable cause that, this is Conway

19 Police Department, developed probable cause that Christopher

20 Brown had been in that seat and would've been the one in

21 possession of that gun. Christopher Brown was subsequently

22 arrested. Zach Malinowski had no warrants or was not charged.

23 Marcus Smith was actually also charged, but that was for a --

24 he had an outstanding warrant, so he was taken to, to jail on

25 that one with Christopher. And because Zach was the only one

1 that actually walked away from that without getting, you know,
2 arrested, they had a belief that maybe Zach had ratted on
3 Christopher, or at least Christopher believed that.

4 Q: Chris Brown did believe he snitched on him?

5 A: He did, yes.

6 Q: And he was very good friends with Javon Gibbs?

7 A: He was. Javon Gibbs also had, during our interview with
8 him at the jail, had provided -- he wasn't in jail, he was
9 actually meeting his parole -- no, not probation and parole --
10 his bonding agent, he was on home detention. At that time, he
11 provided us a statement that he wasn't around Zach's house,
12 never been to Zach's house, you know, pretty much accounting
13 that he wasn't with Zach the night of the incident. The
14 search was not just to find out if he was the one with Zach,
15 but also to clear him that had he not been the one with Zach
16 or around Zach's residence, you know, that would've also
17 provided the information. So, it was more to confirm where he
18 was based on his statements.

19 Q: And there was another incident that happened at a store
20 in Aynor, I believe, that involved Marcus Smith, who was at
21 that point very good friends with Zach Malinowski and ---

22 A: It was -- that incident was reference to the drug deal
23 that had gone bad. There had been some words exchanged back
24 and forth and it was identified that Marcus went in Zach's
25 place to have a fight with Javon and Christopher. I believe

1 he had an actual fist fight with Christopher, which I believe
2 he did -- I guess you could say won. At that time Marcus
3 believed that Christopher and him were, you know, everything
4 had been worked out, but it was over Zach's case.
5 Q: Can you recall anybody else who had knowledge of this
6 drug deal gone bad?
7 A: His, his good friend, Shakeem Fore (spelled
8 phonetically), I believe is how you pronounce it.
9 Q: And Shakeem Fore was what to Zach?
10 A: One of his good friends.
11 Q: And in fact, he was one of the last people who saw him?
12 A: It was, yes.
13 Q: Okay.
14 A: And there was also Facebook communication between Zach
15 and Javon Gibbs regarding the drug incident, mainly talking, I
16 won't say smack, but saying things about Christopher Brown.
17 Q: And so, as a result of taking all of these interviews and
18 all of these histories, really to point towards the drug
19 incident being a main -- I guess the main ---
20 A: Yes, sir.
21 Q: --- for the affidavit?
22 A: Yes, sir.
23 Q: Okay. No more questions, Your Honor.
24 THE COURT: Mr. Wilson?
25 MR. WILSON: Your Honor, if it please the Court, Judge?

1 CROSS EXAMINATION OF JOHNATHON MARTIN BY MR. WILSON:

2 Q: Let me ask you this, you presented this particular -- may
3 I approach, Your Honor?

4 THE COURT: Yes, sir.

5 Q: --- affidavit to the Magistrate, correct?

6 A: This is the affidavit, yes.

7 Q: That's the affidavit. And does the affidavit say many
8 incidents? That's what you told the Magistrate when you asked
9 him for a warrant to go and get Javon Gibbs records, right?

10 THE COURT: Are you asking him what he said or what ---

11 A: The actual wording, I don't ---

12 MR. WILSON: Yes, sir. What the warrant said -- I mean,
13 what the affidavit says, Judge, to the Court.

14 A: It doesn't say many drug related incidents.

15 BY MR. WILSON:

16 Q: What does it say? Does it say plural incidents?

17 A: Or drug related incidents, yeah.

18 Q: So, it was plural, right?

19 A: It does have that -- yes.

20 Q: So, your presentation to the Magistrate that you actually
21 had information on several incidents where you allege my
22 client was involved in drug activity with Zach Malinowski,
23 correct?

24 A: I say drug related incidents.

25 Q: Okay. All right. Drug related incidents. All right.

1 Let me ask you this, you just testified under oath to this
2 court that on Page 3 of your report, which I do have a copy
3 of, you said that Marcus Smith told you that Javon Gibbs was
4 involved with a drug operation or some kind of drug
5 transaction with Zach Malinowski; was that your testimony
6 earlier when counsel was asking you the questions?

7 A: Christopher and -- was the one that mainly had the drug
8 interactions with Zach, but Javon and Christopher were best
9 acquaintances.

10 Q: Okay. But my question is this, did you just tell the
11 Court under oath that Marcus Smith, who is a witness in this
12 case, told you that Javon Gibbs had a drug transaction with
13 Zach Malinowski?

14 A: I'm not sure the exact wording I used. Christopher and
15 Zach, but Javon was involved with their -- what had been told
16 to me was Chris and Javon, yes.

17 MR. WILSON: May I approach the witness, Judge, briefly?

18 THE COURT: Yes.

19 BY MR. WILSON:

20 Q: Is this a copy of your report, the 100-page report that
21 you mentioned earlier?

22 A: Yes, sir.

23 Q: Okay. On Page 3.

24 A: Okay.

25 Q: Okay. Where you talk about specifically meeting with

1 Marcus Smith; do you see that, that paragraph?

2 A: I do.

3 Q: Okay. Tell the Court where in there that you put down

4 that Javon Gibbs had or Marcus Smith said that Javon Gibbs had

5 some transactions with Zach Malinowski?

6 A: I had noted Chris on this document.

7 Q: Okay. Is there anywhere on that document that says that

8 Javon Gibbs -- that Marcus Smith said that Javon Gibbs was

9 involved with Zach Malinowski in a drug deal?

10 A: I did not write it on here, no.

11 Q: Okay. Your Honor, may I approach briefly? Page 7, you

12 testified under oath in this Court that Mr. Fleming -- you

13 recall Jamal Fleming, correct?

14 A: I do, sir.

15 Q: Okay. And you testified that Jamal Fleming also gave you

16 information that Javon Gibbs was somehow involved with drug

17 activity with Mr. Zachary Malinowski; do you recall testifying

18 to that earlier?

19 A: Yes, sir.

20 Q: Okay. All right. If you'll look at Page 7 and let me

21 know if you see in your notes where Jamal Fleming told you any

22 of that?

23 A: I did not note that, no.

24 Q: Okay. All right. Let me ask you this, about the actual

25 park, you talked a lot about Chris Brown, right?

1 A: Yes, sir.

2 Q: This issue, this warrant was issued for Javon Gibbs',
3 phone records, not Chris Brown?

4 A: I had already done Christopher Brown's.

5 Q: I understand, but Chris Brown is not the issue here, is
6 it?

7 A: No, we're here for Javon Gibbs.

8 Q: Okay. Now, at some point in time, did you, at any point
9 in time -- strike that, Your Honor. Was Javon Gibb even at
10 the actual park when the park incident occurred?

11 A: No, sir.

12 Q: Okay. Did his name come up in your investigation during
13 that time?

14 A: For the park and stuff?

15 Q: Yes, sir.

16 A: I didn't investigate the park. Through the report now,
17 no, sir.

18 Q: Through the report, no. Okay. All right. And did Javon
19 Gibbs get into a fight with anybody at the gas station?

20 A: No, it was Christopher.

21 Q: Was he arrested?

22 A: Javon?

23 Q: Yes.

24 A: No, sir.

25 Q: Okay. All right. So ---

1 A: I don't believe there were police called to that
2 incident. It was probably the fight at the gas station, it
3 wasn't ---
4 Q: I understand.
5 A: It wasn't a police-investigated incident.
6 Q: Okay. All right. So, when you wrote the actual -- and
7 I'm gonna question or I'm gonna ask you this and I'm gonna
8 give this to you so you can have it.
9 A: Okay.
10 Q: I want you -- before you actually issued these warrants
11 or his warrant for the actual phone records, tell the Court
12 how many times any drug activity was mentioned about him and
13 Zach being involved in a drug deal other than that prior bad
14 act where you talked about saying that they had robbed him of
15 \$600 or took \$600 from him or didn't go through with
16 something, tell the Court any other incidents that he was
17 involved in with Zach Malinowski?
18 A: With Zach Malinowski?
19 Q: Yes. That will be any statements you took before
20 November 5th?
21 A: That indicate him specifically with ---
22 Q: Yes.
23 A: --- Christopher Brown?
24 Q: That's right. No, not with Mr. Brown, regarding Zach
25 Malinowski?

1 A: I don't see any immediately.

2 Q: Okay. Well, let me ask you this. In the warrant that
3 you actually wrote to the court, did you actually talk about
4 the reliability of these particular witnesses that were saying
5 these things about him?

6 A: No, I did not.

7 Q: Okay. Did you discuss with the Magistrate at all in your
8 conversation with him about the fact that you knew that these
9 people were reliable, that y'all had done with business with
10 them before, that they were confidential informants or
11 whatever?

12 A: None of them were confidential informants; they were all
13 witnesses to the acquaintance of Zach or ---

14 Q: Well, let me ask you this, did you give the actual
15 Magistrate the actual police report that you had?

16 A: For right there?

17 Q: Yes.

18 A: No.

19 Q: Okay. No further questions, Your Honor.

20 EXAMINATION BY THE COURT:

21 THE COURT: Mr. Martin, let me ask you this?

22 A: Yes, sir.

23 THE COURT: Did the Magistrate ask you to identify who by
24 many referred to in the affidavit; did he even ask you who
25 those people were?

1 A: He didn't ask me by names, no. I told him acquaintances
2 of Zach.

3 THE COURT: Well, precisely, precisely, what information
4 was given about drug-related incidents? What did the
5 Magistrate ask for; what did you give him?

6 A: I told him about the Christopher Brown incident. It does
7 not mention that I say Javon Gibbs is the drug-related
8 incident. I do say that it was Christopher Brown's drug deal.
9 Javon and Christopher were pretty much best friends and during
10 the night of the incident, through Christopher Brown's
11 records, it showed communication with Javon Gibbs at the same
12 times Zach Malinowski was going missing. So, that was the
13 information I provided. I did not ---

14 THE COURT: That's just it, that these two individuals
15 and some sort of contact between themselves; is that right?

16 A: Between each other, yes, and Christopher Brown's phone
17 was placed right at Zach Malinowski's house at the time of the
18 -- we believe that Zach Malinowski went missing.

19 THE COURT: Had you done anything, did you tell the
20 Magistrate anything about confirming any of the information
21 that any of these people had given you?

22 A: Like the -- the drug deal stuff?

23 THE COURT: Anything.

24 A: Yeah, the Facebook information. This is one -- we had
25 done numerous search warrants by this point. They were --

1 they were very briefed on the case. But the Facebook
2 communication actually corroborated the drug deal, where we had
3 actual Zach's words to Javon about the drug deal, talking
4 about you need to get away from Chris, he -- talking ---

5 THE COURT: Well, did you give that information to the
6 Magistrate?

7 A: I told that to him prior, yes, during the other search
8 warrants.

9 THE COURT: Okay. Now, we're getting somewhere. Had you
10 talked about this case with the Magistrate and given him
11 information in obtaining the other search warrants?

12 A: Yes, sir.

13 THE COURT: Okay. What kind of information did the
14 Magistrate have at his disposal concerning this case?

15 A: When we received this warrant?

16 THE COURT: Yes.

17 A: He had knowledge of the previous history between
18 Christopher Brown and Javon Gibbs, the relationship that Zach
19 had with both Christopher and Javon, the issues reference to
20 the drug deal, the communication between Christopher Brown --
21 and at that time, we had Javon Gibbs' phone number because he
22 provided it to us. I was able to show that Zach was actually
23 -- I'm sorry, not Zach, Chris was having communication with
24 Javon at the time of the incident. Javon denied being
25 anywhere near Zachary Malinowski's house or the Aynor

1 location, which helped corroborate that -- this was to help
2 clear him as much as it was to include him. The Facebook -- I
3 believe I touched Facebook, the stuff with the -- the ---

4 THE COURT: Okay. The Facebook things, you say that they
5 made reference to a deal of some kind between them; is that
6 right?

7 A: Yes, sir.

8 THE COURT: Okay. And that there was bad blood and it
9 involved the Defendant and Mr. Malinowski and the person we
10 referred to as Chris.

11 A: Christopher, yes.

12 THE COURT: Christopher. And it all involved them and
13 this had been provided to the Magistrate ---

14 A: It had.

15 THE COURT: --- earlier ---

16 A: Yes.

17 THE COURT: --- in other things?

18 A: Yes.

19 THE COURT: Was this your go-to Magistrate for these
20 warrants?

21 A: I went to numerous warrants. This one was Judge Butler.
22 I had been to him several times prior to that.

23 THE COURT: Had you given him all that information; was
24 he familiar with it?

25 A: He was familiar with the case; yes, sir.

1 THE COURT: Okay. All right. Anything further?
2 MR. ANDERS: Nothing further, Your Honor.
3 MR. WILSON: Briefly, Judge, I have to.
4 THE COURT: Go ahead. Go ahead.
5 MR. WILSON: Thank you, Your Honor.
6 RE CROSS EXAMINATION OF JOHNATHON MARTIN BY MR. WILSON:
7 A: Yes, sir.
8 Q: You issued -- may I approach, Judge?
9 THE COURT: Certainly.
10 BY MR. WILSON:
11 Q: You issued ---
12 THE COURT: You don't have to keep asking me that, Mr.
13 Wilson; I'm old school.
14 MR. WILSON: Thank you. Thank you, Judge.
15 BY MR. WILSON:
16 Q: You issued 26 warrants, didn't you?
17 A: On this case, yes, sir.
18 Q: You issued 26 warrants in a span of how many months?
19 A: These warrants go from August to November, so that's
20 what, four months?
21 Q: Okay. And you're telling the Court that you showed
22 Facebook messages and that you discussed this with the
23 Magistrate, correct?
24 A: Yes, I discussed this case. I actually -- yes, I'm
25 sorry, yes.

1 Q: Okay. All right. And tell the Court what your
2 conversation was with Judge Butler regarding Facebook messages
3 because you told the Court earlier that you went to several
4 different magistrates, right?

5 A: There were, yes.

6 Q: I understand. I understand. So I'm asking you to tell
7 the Court what your discussion was specifically with Judge
8 Butler about Facebook messages and this particular defendant?

9 A: It was more to reference the drug incident with -- the
10 victim had communication with Javon regarding the drug
11 incident.

12 Q: And when did you discuss that; when in your record do you
13 say you discussed that with Judge Butler?

14 A: I did not note that.

15 Q: Okay. All right. So, it's your -- your common practice
16 to go in and get these warrants signed by these judges, Judge
17 Mayers, Judge Butler, or whoever the magistrate is, and sit
18 down and have a conversation with them about what it is going
19 on in the case?

20 A: It is.

21 Q: Okay. All right. And your testimony is that you did
22 that in this particular case?

23 A: With Judge Butler?

24 Q: With Judge Butler?

25 A: I would have discussed everything with the case.

1 Q: Okay.

2 A: I mean, I -- with Butler, there are probably numerous
3 ones. I had gone through this case pretty far from start to
4 finish about, you know, what we were -- everyone wanted to
5 know about the case because it's a missing person case still.

6 Q: I understand.

7 A: There was a lot of interest.

8 Q: Did you tell Judge Butler about the reliability of these
9 witnesses?

10 A: I probably did not go through reliability. I did nothing
11 to gauge each person's reliability, but there were so many
12 different -- I mean, that was just a short portion of ones
13 that had talked about the issues between Christopher and Zach,
14 but Javon and Christopher were pretty much at the hip around
15 that time.

16 Q: Okay. And so basically, what you're telling the Court is
17 that because Christopher Brown's phone that you had already
18 searched for was at the scene, that you decided at that point
19 in time that you wanted to go ahead and get a search warrant
20 for his phone, correct?

21 A: Christopher Brown's phone was placed, prior to Javon
22 Gibbs, yes.

23 Q: What was the date of the search warrant for the actual
24 Facebook? Do you know what the search warrant date was? If I
25 told you 9/6/13, would that sound about right?

1 A: I have it right here; yes, sir.

2 Q: Okay. All right. Now, I'm just curious about one thing.

3 Did you talk to Judge Butler in between the time that you

4 actually issued the actual warrant for Facebook and the times

5 you got a warrant for Javon Gibbs?

6 A: I -- I would assume I had. I had been to him several

7 times between then.

8 Q: Okay. So, you would've talked to him about other

9 warrants between that timeframe, right?

10 A: I would've, yes, sir.

11 Q: Okay. But would you be surprised to know that the next

12 warrant you issued was for Javon Gibbs on 11/5/13 and that no

13 other warrants were issued between the timeframe between the

14 Facebook warrants and then the actual time that you talked to

15 Judge Butler you said about the Facebook?

16 A: With Judge Butler?

17 Q: Yes.

18 THE COURT: You just confused me, Mr. Wilson.

19 MR. WILSON: Well, Judge ---

20 THE COURT: The Facebook warrants and the time you talked

21 to him about Facebook is what you said.

22 MR. WILSON: Well, he's saying ---

23 THE COURT: Wouldn't it be the same?

24 MR. WILSON: No.

25 THE COURT: When you got the warrant and when you talked

1 with him about Facebook?

2 MR. WILSON: No, because what he said earlier, Your
3 Honor, was is that he talked with Judge Butler at some point
4 in time about the actual Facebook stuff.

5 THE COURT: Oh, okay.

6 MR. WILSON: Right.

7 THE COURT: And obtaining this warrant?

8 MR. WILSON: And obtaining this warrant; that's right.
9 And what I'm asking him is there was no other opportunity for
10 him to talk to him because he wouldn't have gone and talked to
11 him unless he's telling him he had some other conversation
12 with him. I'm asking him whether or not he had another
13 conversation with him.

14 A: I had presented a warrant to him on October 2nd.

15 BY MR. WILSON:

16 Q: Okay.

17 A: For the iPad that was found in Marion County.

18 Q: Okay. And y'all discussed ---

19 A: I guess it was before. It was right there ---

20 Q: And during that meeting, y'all discussed Facebook
21 messages?

22 A: I don't remember exactly what the -- was discussed on
23 that meeting, but ---

24 Q: Okay.

25 A: --- is it possible that we discussed the case in full,

1 yes.

2 Q: We're not talking about possibilities, officer, or
3 detective, we're talking about what really happened.

4 A: Yes.

5 Q: And that's important in this case. What I'm asking you
6 is, Do you recall specifically having a conversation with
7 Judge Butler about Facebook messages?

8 A: I had at some point, yes.

9 Q: Do you recall ---

10 A: I don't recall what day, no, sir.

11 Q: Okay. All right. Do you recall the conversation itself?

12 A: The exact conversation, no, sir.

13 Q: Okay. All right. Last question. Let me ask you this,
14 in your actual -- in your search warrant at the very end, you
15 say it is my belief that searching the records of Javon Gibbs
16 will provide information regarding any contact with the victim
17 and his whereabouts during the date and time of the victim
18 went missing, correct; is that about right?

19 A: That sounds right.

20 Q: Is that your statement at the very end?

21 A: Yes.

22 Q: And you said it's your belief?

23 A: Well, that's all I can go off is my beliefs.

24 Q: I understand. In that affidavit, after you say it's your
25 belief, do you say it's your belief he committed a crime?

1 A: No, I do not say I believe he committed the crime.

2 Q: Is there any allegation inside of that particular search
3 warrant that he did anything illegal or wrong?

4 A: No, sir.

5 Q: Okay.

6 A: And when I did present -- I presented this one to a
7 different judge, but when I did present the Facebook warrant
8 to Judge Benji Allen, I had discussed the Facebook messages
9 also. So, we had -- there was discussions going on with
10 judges because it even indicates the family had allowed me
11 access to his Facebook, Zach's Facebook, because he was -- you
12 got to look at this is a missing person first and foremost, so
13 we gotta prove there's a crime that someone has actually --
14 you know, Zach is not sitting at the beach, you know. So,
15 they allowed me access to his Facebook. At that point, I saw
16 messages reference to drug activities and stuff. So, that is
17 where there had been discussions through judges.

18 Q: Okay. Through judges?

19 A: Yes, sir.

20 Q: But you still can't tell the Court that you talked to
21 Judge Butler with any specificity ---

22 A: No, sir.

23 Q: --- about these Facebook messages?

24 A: No.

25 Q: No further questions, Judge.

1 THE COURT: All right. You may step down unless you have
2 ---
3 MR. ANDERS: Nothing, Your Honor.
4 A: This is his.
5 THE COURT: All right.
6 A: It may've been mixed up. I'm sorry.
7 MR. WILSON: That's okay.
8 A: This one is yours.
9 THE COURT: Anything further?
10 MR. WILSON: Your Honor, nothing further, Judge.
11 THE COURT: All right. I'll hear from you. Well, the
12 State. ---
13 MR. ANDERS: Judge ---
14 THE COURT: --- I'll hear your arguments on this.
15 ARGUMENT BY COUNSEL:
16 MR. WILSON: Judge, just a few things. The search
17 warrant is invalid and there are several reasons and I will go
18 through with them if the Court will indulge me. It does not
19 set forth any information as to the reliability of the
20 informant or informants, which is required by law. It does
21 not set forth the source ---
22 THE COURT: It doesn't even identify them.
23 MR. WILSON: --- yes, sir. And it does not also set for
24 the source of the facts that are alleged. It does not also
25 set forth the facts as to why the police believe the suspect

1 was a person who committed any particular crime. *State v.*
2 *Johnson*, Your Honor, the court, our supreme court in this
3 state found an affidavit defective because it did not set
4 forth any information as to the reliability of the information
5 or the informant, nowhere is the information corroborated,
6 Judge. Although the affidavit states that the informant in
7 this particular case saw that the evidence of Johnson's home
8 within 72 hours of the issuance of the warrant, it does not
9 set forth any information as to the reliability of the
10 informant, nor was the information corroborated.

11 The officer who had obtained the warrant testified during
12 -- the suppression hearing, that he had worked with the
13 informant on several occasions in that particular case. It is
14 not clear from the record, however, whether the information
15 was given to the Magistrate. In this particular case, Judge,
16 we don't even have that in this particular case. This officer
17 testified under oath in the actual, excuse me, *State v.*
18 *Johnson* case that, that he had actually had some sort of
19 relationship with the CI. We don't even have that in this
20 particular case.

21 Also, in *State v. Jenkins*, our Supreme Court found an
22 affidavit defective. The affidavit did not set forth facts as
23 to why the police believed the suspect was a person who
24 committed the crime. The affidavit did not set forth the
25 source of the facts alleged and merely included statements

1 which give the Magistrate no basis to make a judgment
2 regarding probable cause are insufficient based on this
3 particular case, Judge.

4 And I would also quote for the record ---

5 THE COURT: This warrant affidavit didn't even say a
6 crime has been committed.

7 MR. WILSON: It did not allege anything, no facts which
8 would suggest. And I believe in this case it's so deficient
9 that *Leon* would not apply. The facts of *Leon* would apply for
10 the exception to the good faith.

11 THE COURT: Tell me about *Leon*. Why do you think -- why
12 do you think *Leon* doesn't save it?

13 MR. WILSON: Well, Judge, a couple of things. One of the
14 things that the court says is that, again, you've got to have
15 one more than just scanty police corroboration. And the court
16 also, in this particular case says that the defense, according
17 to the Magistrate finding of probable cause, does not preclude
18 inquiry into the knowing or reckless falsity of the affidavit
19 on which that determination was based.

20 Second, the courts must also insist that the Magistrate
21 purport to perform his neutral and detached function and not
22 serve as a rubber stamp for the police.

23 Third, the courts will not defer to a warrant based on an
24 affidavit that does not provide the Magistrate with
25 substantial basis for determining the existence of probable

1 cause.

2 THE COURT: Probable cause for what?

3 MR. WILSON: For -- exactly. For any particular crime
4 that should be put inside of the actual affidavit. And I
5 would stress also to the Court that I'm not having a *Franks*
6 hearing in this matter. I don't think that's appropriate, but
7 I will say this. I believe that based on the number of actual
8 warrants that were issued, they were trying to find this kid,
9 I understand that, and I think that a reasonable detective
10 would do that. But the issue becomes when you try to then use
11 that evidence against them in trial. Okay. And now they're
12 trying to use it in trial against him in violating his rights
13 because this was a fishing expedition. There were 26 warrants
14 which issued based on copy and pasting, and Your Honor can
15 look through the records, copy and pasted statements from the
16 detective to the Magistrate to get the actual warrants for
17 cell phone records, Facebook records, et cetera.

18 And based on the findings in, excuse me, I lost my place,
19 Judge, in *Sikes v. State*, the Court has held several times
20 that again, police cannot engage in trying to go on a fishing
21 expedition, which is what this was. There were a number of
22 different theories out here that they had regarding to what
23 happened to this young kid. Some of them, people were calling
24 in saying, look, we saw him here, and they would issue
25 warrants. Some people were saying look, we saw him here, some

1 people said he was kicked in the head, some people said he was
2 hanged from a tree. They were getting psychics calling in
3 giving them information. And the report is very detailed, but
4 nowhere in the report -- when you look through the first, I
5 think it was 31 pages or 60 pages before he issued the warrant
6 for Javon Gibbs, there was almost no mention of Javon. Now
7 there was a lot of talk about Chris Brown, but there's no
8 mention of Javon Gibbs being this big drug dealer. There
9 weren't incidents. There was one accusation that, you know,
10 Zach said that, again, this man may have taken \$600 from him.
11 There was one person that said that. Otherwise, this other
12 stuff was not true. Jamal Fleming never said it, Marcus Smith
13 never said it, no one said this was happening. So, again, the
14 falsity of the affidavit concerns me, but also the fact that
15 it does not give me conclusions as to what they're looking at
16 this for other than to say, okay, we're looking at it for his
17 whereabouts. Well, if that's the case then, we don't need to
18 use it against him in a murder trial.

19 And, Judge, the last thing, too, it is prejudicial to us
20 because those records are kept for only a year. So, we
21 couldn't go back and prove -- and they have a record that's
22 just actually in his report that he was on home detention
23 living in Aynor at the time this all occurred. But, it's
24 prejudicial to us because we would've tried -- we went to
25 Verizon asking Verizon for the records for him.

1 THE COURT: And you didn't go soon enough, tough stuff.
2 That's how it goes, Mr. Wilson.

3 MR. WILSON: Well, I know, Judge, but -- they didn't
4 arrest him for a whole other year and they only keep the
5 records for a year. So, we went back and asked for it when I
6 was retained; we couldn't get the records.

7 THE COURT: Well, that -- that's how it goes sometimes.

8 MR. WILSON: It goes like that sometimes.

9 THE COURT: That's how it goes.

10 MR. WILSON: Yes, it does.

11 THE COURT: All right. Let me hear from you, Mr.
12 Attorney General?

13 MR. MITCHELL: You know, this is kind of -- you know,
14 this is a separate -- we look at the probable cause and then
15 we look at whether there's an expectation of privacy in these
16 records.

17 THE COURT: Well, let me just ask you this, probable
18 cause of what?

19 MR. MITCHELL: Your Honor, at this point in the
20 investigation, there was information provided to the
21 investigator that there's these prior drug incidents that you
22 have heard about with Chris Brown.

23 THE COURT: I mean, does the affidavit, does the search
24 warrant anywhere allege a crime?

25 MR. MITCHELL: Well it doesn't quite say ---

1 THE COURT: I mean, you know, you can have people -- Mr.
2 Wilson's wife finally kills him, somebody could say, yeah,
3 Judge Hyman and Mr. Wilson were back behind the courthouse
4 smoking weed the other day and they could put this same thing
5 in there and say many have involved -- said he's involved in
6 the disappearance because they had a prior drug incident.
7 What prior drug incident? How does it play? What crime is
8 the -- is the affidavit offered as probable cause of, I mean,
9 where we going with this?

10 MR. ANDERS: Your Honor, all of it's probable cause to
11 his disappearance. At this point, he's looking at it as a
12 kidnapping, possible murder. Since he's not been seen and
13 it's three months later after, after he had disappeared. He
14 mentions in there and this is not -- this is not normal for
15 him, he's always in phone contact. Right? So at this point,
16 he's trying to prove, you know ---

17 THE COURT: At this time, you don't even know a crime has
18 been committed.

19 MR. MITCHELL: Well, I think ---

20 THE COURT: Right? Right?

21 MR. MITCHELL: No, I wouldn't say that, Your Honor. I
22 think at this point, he's investigating what he's been told.
23 So, he's got ---

24 THE COURT: But he doesn't know a crime has been even
25 committed. Mr. Malinowski could just be off on a lark.

1 MR. MITCHELL: Right. And I think the portion in there
2 saying that it's not normal for him to not be in contact ---

3 THE COURT: So, what you're trying to do was establish
4 whether a crime had been committed.

5 MR. MITCHELL: And that's part of it and that's part of
6 what the investigation entails. You know what I'm saying? So
7 it's information about this drug deal, information that they
8 pulled this party together and our victim was ripped off by
9 Mr. Gibbs and by Mr. Brown, by the Defendant.

10 THE COURT: All right. Who were the many who gave him
11 that information?

12 MR. MITCHELL: The many I believe are Jamal Fleming ---

13 THE COURT: But didn't he just say that he did -- Jamal
14 Fleming didn't give him that information. Who were the many
15 that gave him that information?

16 MR. MITCHELL: I believe at this point it was Jamal
17 Fleming, Shakeem Fore ---

18 THE COURT: But that's contrary to what the investigator
19 said, just said under oath. So let's don't even go there.

20 MR. MITCHELL: Chris Brown's records ---

21 THE COURT: Chris Brown.

22 MR. MITCHELL: Yes, Your Honor.

23 THE COURT: That's ---

24 MR. MITCHELL: He's a co-defendant in this case, so he
25 had had his phone records. He had started to build a case

1 against Chris Brown as to the disappearance, kidnapping,
2 murder at this point. The -- but this may be the most
3 important part, that there is contact between the Defendant
4 here and Chris Brown at the time of the disappearance of when
5 Zach disappeared. So at this point, Mr. Brown's location, you
6 can see, is pinging near where Zachary was living with his
7 grandparents at that point. So, at that exact moment when
8 he's near the grandparents' house at the exact time we would
9 present that he was abducted, he's in contact with Mr. Gibbs,
10 the Defendant here.

11 So, at that point, we're starting to come together with
12 this kidnapping case.

13 THE COURT: It's all about what the Magistrate was
14 provided.

15 MR. MITCHELL: I understand that and I think, you know,
16 you made a great point showing that he had had prior contact
17 with this Magistrate in this case, and Mr. Wilson goes on
18 about how -- discussed how he had issued 26 warrants. I think
19 that shows ---

20 THE COURT: But I can't get any information, any
21 specifics that of what he did provide to the Magistrate. I
22 was unable to find out what the Magistrate did know with my
23 questioning.

24 MR. MITCHELL: Well, I think it's kind of -- it's
25 difficult to say exactly what he told the Magistrate.

1 THE COURT: But it's necessary to say it.

2 MR. MITCHELL: I understand that and at this point in the
3 investigation, that's information he had before. So, it's the
4 prior drug incident where he was ripped off, the incident
5 where Chris Brown was arrested for a drug charge where the
6 victim was involved and believed that the victim was ratting
7 on him. So, at that point, we kind of have a motive with
8 Chris Brown first and then Javon Gibbs as well into this.
9 That's where the case is going at that point.

10 He also talked to Shakeem Fore. At this point, this is
11 one of Zach's good friends. He was able to corroborate some
12 of this, especially the part about the ---

13 THE COURT: Who said the Magistrate was provided with
14 that?

15 MR. MITCHELL: The investigator did testify to Shakeem
16 Fore and that information that -- regarding the drug deal.

17 THE COURT: Let me ask you, counsel, why in the world in
18 a case of this magnitude would you submit an affidavit for a
19 search warrant that does not describe a crime and the only
20 thing it says that the Defendant has been identified by many
21 as being involved with his disappearance, not murder, not
22 kidnapping, disappearance based on related drug incidents
23 before his disappearance and not describe it, not put any
24 information as to who the many are, which we've now determined
25 not to be many, maybe one, or put in anything concerning the

1 reliability and the officer says he had no information
2 concerning their reliability, nothing to show any
3 corroboration. Who in the world goes before a Magistrate with
4 that kind of affidavit in a possible murder case? Please,
5 please, I've only been doing this 40 years. You know, I'm new
6 to it, I learn every day, but tell me about that.

7 MR. ANDERS: Your Honor, I point you to what I said
8 before and this is -- this is where the investigation is at
9 this point. They were tracking down as many leads as they
10 can. The Defendant's name came up. The defendant is in
11 contact with the co-defendant, and I note that this isn't like
12 at noon, this is very late at night of the date of the
13 disappearance, Zach's disappearance, in contact with him
14 through his cell phone -- well, after it was confirmed that
15 the Codefendant, Mr. Brown, was near the victim's
16 grandparents' house.

17 Judge, I can talk more on that if you like, but I can
18 move to the next part, which is even if this warrant -- even
19 if the warrant isn't valid because there is no probable cause,
20 it's very clear that there is no expectation of privacy in any
21 of these records. The records we're talking about here are
22 cell phone locational data. That is all provided to the phone
23 services, phone companies. Your Honor, I point you to ---

24 THE COURT: How about that part of it, Mr. Wilson?

25 MR. WILSON: Your Honor, if it please the Court, Judge?

1 THE COURT: Yes, sir.

2 MR. WILSON: If I could respond, Your Honor, there's a
3 supreme court case on this matter, Judge and this is, excuse
4 me, I apologize, *United States v. Maynard*, Your Honor, and
5 this is United States Court of Appeals for the District of
6 Columbia Circuit argued November the 17th, 2009.

7 THE COURT: That's almost as bad as California.

8 MR. WILSON: This is what is says, Judge, and I think
9 that this has been adopted over the years. I've done murder
10 cases before, they've always got to get a search warrant for
11 these phone records. Let me read this to Your Honor.

12 A reasonable person does not expect anyone to monitor and
13 retain a record of every time he drives his car, including his
14 origin, route, destination and each place he stops and how
15 long he stays there, rather, he expects each of those
16 movements to remain disconnected and anonymous. It further
17 goes to say, it does not follow -- excuse me -- because the
18 aggregation of Jones' movements over the course of a month was
19 not exposed to the public, his expectation of privacy in those
20 movements was reasonable. And, you can adapt that to this
21 situation. There's also gonna be more protection, even for
22 cell phone records. The courts have held in a number of cases
23 that this is intimate movements of one person, intimate calls
24 from one person to another. If Javon Gibbs wants to go and or
25 if I want to go and I want to be calling a girl at 3 o'clock

1 in the morning, the courts have held over and over again,
2 there's an absolute expectation of privacy and before you can
3 invade that privacy before you can invade those cell phone
4 records, you have to -- because it not only gives you the
5 phone calls, who they're calling, you can get text messages
6 from -- you can actually get the data of where you are or at
7 least where you might be located. Again, that's information
8 that's protected by the ---

9 THE COURT: Let me ask you this, Mr. Wilson?

10 MR. WILSON: Yes, Your Honor.

11 THE COURT: If I were to go to AT&T, Verizon, whatever,
12 and I were to tell them I want the records for a particular
13 tower, I didn't ask them about any phone, I asked them about a
14 tower, and they maintain the records of what's pinging off
15 that tower ---

16 MR. WILSON: Yes, sir.

17 THE COURT: Okay. And your client were to get caught up
18 in that web.

19 MR. WILSON: Yes, sir.

20 THE COURT: Do you think I would've had to have a search
21 warrant for that or could I have done it merely by subpoena?

22 MR. WILSON: That's an excellent question and it could be
23 answered by looking at Detective Martin's report, they tried
24 to get the phone records, they tried. As a matter of fact,
25 they called. They wouldn't give them all the information that

1 they wanted. They forced them to go through and issue a
2 warrant, which is why he got the warrant. They called and
3 tried to get Zach Malinowski's records that night when he
4 first ended up missing, but they couldn't do it because the
5 phone company said, look, we can't release these to you
6 without further -- further information to you without going
7 through you telling us that you have a warrant and issuing it
8 to us. So, that's why they issued all these warrants. So it's
9 required by the phone company. I might add this, we learned
10 this little bit and I've learned about cell phones, but the
11 phone company themselves say on the record, they can't
12 guarantee or warranty exactly that the stuff that they give is
13 reliable. As a matter of fact, they ended up giving wrong
14 information on their own -- their own analyst gave wrong
15 information to Detective Martin when he called trying to find
16 out where he last was. I think they said he was in Gresham or
17 somewhere other than where he was. So, they require that
18 information. They will not give it to you without having a
19 warrant issued, Your Honor.

20 THE COURT: All right. Let's move on to something else.
21 All right. I'm gonna think about that. You had something
22 else to say?

23 MR. ANDERS: Your Honor, if I could pass up this case.
24 This is -- I believe the cases that Mr. Wilson represented are
25 GPS tracking cases. They don't deal with historical data.

1 They deal with tracking of movements of several weeks and
2 months of an individual.

3 THE COURT: Well, you know, every -- it seems like every
4 time I turn around, the U.S. Marshalls are here before me. I
5 don't have to issue a lot of search warrants, but if it
6 involves U.S. Marshalls, I do, because they do not recognize
7 search warrants issued by Magistrate Judges, so I get into
8 that. And they never, never do a, a, a cell phone tracking
9 device or anything of that nature without coming to me for
10 search warrants. I think that's well recognized. I mean,
11 you're saying for some reason that that is different, that a
12 GPS as compared to the data that would be in a cell phone?
13 The GPS is historical; it's historical data.

14 MR. MITCHELL: Your Honor, there's a different standards.
15 These are non-content data or content data. And so content,
16 you would need a warrant; non-content you would not need a
17 warrant. That's very clear. There's a Fourth Circuit case
18 that we passed up, it's from last year, 2016 and it is very,
19 very clear in that the Fourth Amendment does not prohibit
20 government from obtaining records from businesses. These are
21 records kept by the phone company. This is third party
22 disclosure if there ever has been one. This *Graham* is
23 interesting because it came up through the district court.

24 THE COURT: Well, why did you issue a search warrant?

25 MR. ANDERS: I'm sorry?

1 THE COURT: Why did you go get a search warrant for it?

2 MR. MITCHELL: Well, I think at that point, you know, we
3 go get a search warrant and we think it's a valid search
4 warrant.

5 THE COURT: Because we didn't need one.

6 MR. MITCHELL: Absolutely, but it doesn't mean that we
7 do, Your Honor. I think there is isn't an expectation of
8 privacy in those records being held by a third party.

9 THE COURT: Okay. All right. Let -- let's move on and
10 go down the list. I'll come back to that. Okay?

11 MR. WILSON: Yes, Your Honor.

12 THE COURT: All right. I see a motion in limine for cell
13 site location, Mr. Wilson?

14 MR. WILSON: Yes, Your Honor. Again, these are motions
15 that the Court may want to take up at a later time. I was
16 just informed on yesterday that the, the State intends on --
17 intending to call an expert. I informed them, I sent a form
18 back to the State letting them know it's late in the game for
19 an expert and, if they do so, then I'm going to be forced to
20 ask for a continuance for two reasons. One, this information,
21 if it comes in -- it's contingent upon whether or not the
22 Court lets the records in, but if it does come in, this
23 information regarding the cell phone tower stuff, we consider
24 to be scientific information. Once I issued the motions
25 telling the State that I was going to actually object to them

1 having Detective Martin testify because he's not an expert ---

2 THE COURT: Are you gonna have somebody testify as to
3 where it was pinging and that sort of stuff?

4 MR. WILSON: Well they were trying to have someone
5 testify to that matter and now they want to bring in an expert
6 who can then put this stuff into a program that they have that
7 they say the FBI uses or CellHawk or whatever they want to do,
8 and then say that he was within that area at the time. Our
9 argument is gonna be that that stuff is unreliable and we
10 would actually need either the expert ---

11 THE COURT: Well, that's an entirely different argument.
12 That goes to the weight, effect, value of the testimony ---

13 MR. WILSON: That's right.

14 THE COURT: --- as opposed to admissibility.

15 MR. WILSON: That's right.

16 THE COURT: Now, what concerns me is what -- hadn't this
17 been pending for some time?

18 MR. WILSON: That's correct, Judge.

19 THE COURT: Why -- why are we -- when did they come up
20 with this expert? You're not doing like some lawyers who
21 would say, we just got it and we -- we just got it since the
22 first of the year is what I meant to say?

23 MR. WILSON: No, Your Honor. We've had this stuff now
24 years, two years, the information. That's not what they are
25 trying to put up. What they're trying to put up, and we

1 didn't find out -- I went to see Detective Martin, this was
2 this week, Wednesday, I believe, we saw him last Wednesday,
3 last Wednesday. They told me to come by and see what they
4 were trying to present. When I saw what they were trying to
5 do -- it's basically a program called, at the time, it was
6 called CellHawk or -- well, they put in the numbers that they
7 get the information from the actual records that they got and
8 then that actual program then will, if you will, triangulate
9 or give a location, if you will, for where he might be at the
10 time, where his cell phone was at the time.

11 THE COURT: I've had that in a trial before.

12 MR. WILSON: Yes, sir. And I've dealt with it, too, but
13 again, in this program, you know, and with the information
14 that's coming out, we're gonna make the argument that it's
15 scientific and that if you're gonna testify about conclusions
16 about where he was and what he was doing or, or where it was
17 pinging from, that is scientific information. One, we're
18 gonna argue that it's unreliable. But, if it's allowed in,
19 we're gonna argue that, again, the person needs to be an
20 expert before they can come in to make conclusion statements
21 to the jury absolutely about where he was at a given time.
22 And the reason is because, again, a number of factors affect
23 what happens with these cell phones. Again, I had to really,
24 and I thank my team for this ---

25 THE COURT: And that goes to weight.

1 MR. WILSON: Well, no, it goes to reliability, Judge, and
2 whether or not it's gonna mislead the jury, not to weight.
3 Because again, if you -- let's say this. If you plot one of
4 these things, they get the information from the cell phone
5 tower, you get the actual tower he was on, the placard that --
6 one of the placards that's on the actual triangle of the
7 tower, and then you get that ping. Okay. And then sometimes
8 if you get enough information, RTT, EVOD, EVDO, you'll get the
9 actual information that might tell you exactly, you know,
10 where someone was. They got some of that information for
11 Zachary Malinowski because they were able to get the records
12 early. Well, they didn't get the RTT for him. So, again,
13 they're trying to go in now and say we suspect he may be on
14 this tower. The problem is, the actual programs are out
15 there, all of them are lacking and the reason is, they don't
16 consider weather and they don't consider whether they're --
17 and they don't have the information. They don't consider
18 whether or not the actual towers were overloaded or on
19 maintenance. They don't have that information. So, when you
20 put it in there, it'll actually give you something, but you
21 can't see all the information. And there are websites and
22 then Verizon Wireless would say, our towers can feed out 22 to
23 45 miles depending on where you are. Well, he was living in
24 Aynor at the time. So, if he's 10 miles away from this tower
25 and he's pinging on that tower, they're gonna try to say he

1 was in a particular location. Well, that's not reliable. It
2 misleads the jury because, again, they don't have all the
3 factors to feed into the programs to take it into account
4 everything that -- and this is something that Verizon says,
5 which is the phone company that he has. The same company
6 that, that Zach Malinowski had. So, they're saying look, we
7 can't guarantee because there's so many factors.

8 THE COURT: Well, am I not gonna have to hear some
9 testimony concerning this issue before I can rule on that?

10 MR. WILSON: Yes, sir.

11 THE COURT: And do we have it today? /

12 MR. WILSON: We don't, Judge. And again, I just found
13 out -- I filed this motion before I found out they were trying
14 to present an expert. I just found out yesterday, Your Honor,
15 and I filed these motions a week ago or longer than that.

16 THE COURT: Well, it sounds like we need an expert to
17 explain it to me. Of course, I do understand that you can
18 always track someone with their cell phone; isn't that right,
19 Ms. Pogue? I'm always with my cell phone; isn't that correct?

20 MR. WILSON: Judge, I will -- if you want me to, I will
21 withdraw the motion for now and bring it up at the appropriate
22 time.

23 THE COURT: Okay. I'm gonna put pending on it because
24 we're gonna -- I want to hear what they -- what you got.

25 MR. ANDERS: Yes, Your Honor, and we'll do that next

1 week. But, Your Honor, in full disclosure, Mr. Wilson did
2 file a motion on Monday and, in response to that motion,
3 because we have given Mr. Wilson months to go to the Horry
4 County Police Department to look at this program and ask
5 Investigator Martin questions and then he goes in last week
6 and it stays around for two minutes and gets up and leaves.
7 And so he files the motion Monday.

8 THE COURT: It must've been lunch time.

9 MR. ANDERS: It must've been lunch time. So, I read the
10 motion where he's gonna argue that Investigator Martin lacks
11 certification, training, and specialized knowledge, et cetera,
12 and so I go to SLED. I go to ---

13 THE COURT: And I can see where you're going with this
14 and Horry County Police bought them a program and they were
15 gonna get somebody to run it and it's great as an
16 investigative tool, but it's not very good as an evidentiary
17 tool unless you got an expert and that's the issue, right?
18 You need somebody who can testify ---

19 MR. ANDERS: I ---

20 THE COURT: --- as to its reliability. That's what I'm
21 saying. That's what you see it as that. You're a lawyer; you
22 got to get in the record. The detectives just use it as an
23 investigative tool, right?

24 MR. ANDERS: That's correct.

25 THE COURT: So now, you propose to have someone who can

1 testify concerning that?

2 MR. ANDERS: That's correct, Your Honor.

3 THE COURT: It's reliability and how it works and what it
4 shows. And Mr. Wilson says you're throwing me a curve.

5 MR. WILSON: Well, and those are the -- there weren't
6 months when we had access to this program and I issued a Brady
7 to the State telling them that I want access to it, we want
8 it. We asked for it a while ago actually when the State
9 originally had it in the Fifteenth Judicial Circuit. They
10 didn't turn it over to us. And I think that, again, if we
11 have it and I could look, we're gonna tear it apart. And the
12 reason is, because we've done that with other programs that
13 are out there already. We've done mock runnings on this stuff
14 already. So again, I would have -- we want access to it. If
15 they're wanting to bring it up, we want to have the report and
16 I told the State this, I want to have the report.

17 THE COURT: You don't have the report from it yet?

18 MR. WILSON: No, because this again they just decided to
19 do because we attacked, again, Detective Martin being an
20 expert in this field. Once I issued that motion ---

21 THE COURT: Well, what's the report? I thought that
22 would be something that Detective Martin ran?

23 MR. WILSON: No. No, well, Detective Martin never ran a
24 report. What they did was they invited me out, and they did,
25 they invited me out to the Horry County Police Department, let

1 me sit down in the chair and said they were gonna show you
2 what we're going to present. That's not enough. We want
3 access to the program and we want to discuss the methodology,
4 because the methodology is what we're gonna attack, how they
5 did this and what factors they can't consider.

6 THE COURT: Well, how is -- how is the -- the program
7 available? I mean, can you -- you know, have you looked on
8 Amazon?

9 MR. WILSON: We have looked on every website. This was a
10 Dottie Melson (spelled phonetically) that came with those
11 program. And it actually would be a -- because Melson
12 actually entered the data into that program; it was not
13 Detective Martin. Detective Martin actually was then trying
14 to interpret it for me and we were sitting down talking about
15 again -- and trying to do the square root of pi. I mean,
16 that's how difficult this information is. So, again, that's
17 where we are, Judge.

18 THE COURT: So, is this like a homemade program, I mean
19 ---

20 MR. WILSON: It's a program, Judge, that's designed to
21 help people find people. It's not designed to pinpoint for
22 the jury where a Defendant was. And, again, I'm not trying to
23 -- I know ---

24 THE COURT: Who uses it? I mean, who uses this program?

25 MR. WILSON: That's what we -- that's what it's for.

1 MR. ANDERS: Law enforcement uses it and if I -- if
2 Investigator Martin can get up on the stand for five minutes,
3 I think he could ---
4 THE COURT: We're gonna hear this ---
5 MR. ANDERS: Right.
6 THE COURT: --- on this is one we're gonna have to defer
7 until we can get your expert and all to explain it to me and
8 tell me whether it's reliable and that sort of stuff.
9 MR. ANDERS: Yes, sir.
10 THE COURT: We're gonna have to do it. We're just
11 burning time right here.
12 MR. WILSON: Yes, sir.
13 THE COURT: We'll have to address this one later, okay?
14 MR. WILSON: Yes, Your Honor.
15 THE COURT: Because you want have your expert who can
16 tell me how it works and I'm not gonna rule until I hear it.
17 Okay?
18 MR. ANDERS: Yes, Your Honor. In full disclosure, my
19 expert, who I went to SLED to try to get and gave the raw data
20 to on Monday, he's going through a different program, and he
21 said once I'm done with my report, I will be report in the
22 hand with the program and we'll go to Myrtle Beach and sit
23 down with Mr. Wilson and he'll get everything I have.
24 THE COURT: When we gonna do that?
25 MR. WILSON: I don't know, Judge, I'm ---

1 MR. ANDERS: We can do it tomorrow if he's ready with his
2 report.

3 MR. WILSON: If he's got the report, I will look at it.
4 Again, it's not gonna change my attitude because we ---

5 THE COURT: You just got a bad attitude, Mr. Wilson?

6 MR. WILSON: Well, Judge, you know, I've got a job to do,
7 but I'll be glad to go meet with them tomorrow.

8 THE COURT: All right. Well, let's do that. Let's do
9 that. Okay?

10 MR. WILSON: Okay, Judge.

11 MR. ANDERS: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. WILSON: I'm gonna stand down then those other
14 motions related to the cell phone stuff. We'll deal with that
15 later.

16 THE COURT: Okay. So, that would be Numbers 3, 4, 5, 6,
17 right?

18 MR. WILSON: Yes, Your Honor.

19 THE COURT: Okay. Number 7 and 8.

20 MR. WILSON: All right.

21 THE COURT: 7 and 8, motion in limine, ultimate
22 conclusions to decide. What does that mean?

23 MR. WILSON: Your Honor, we're concerned about the
24 overuse of the word -- and, again, because of the nature of
25 this case, the word victim and then referring to Zach

1 Malinowski as being murdered. We want in this particular
2 case, because of the nature of the evidence, we want the Court
3 to issue an order ordering that he not -- I know, I understand
4 the Court's position, but I have to make the argument ---

5 THE COURT: Now, have I said a word, Mr. Wilson?

6 MR. WILSON: No, Judge not at all, not all, but we don't
7 want the word overused because I believe in this particular
8 case, because there's no body, there's no evidence really in
9 this particular case that would rise ---

10 THE COURT: Mr. Wilson, when I -- this sounds like some
11 of them Charleston lawyers coming down here. You know, we
12 have referred to people as defendant, we have referred to
13 people as victim for a million years.

14 MR. WILSON: We have.

15 THE COURT: And I'm happy at the beginning of the trial
16 to tell the jury that they should draw no conclusions from our
17 use of those words, it's just that the traditions of the Court
18 are those or that those are the words we're using, but I'm not
19 gonna have the lawyer stuttering when he's -- when we're --
20 you know, we've used those words for so long and if somebody
21 slips up and then you want a mistrial. We're not gonna do
22 that.

23 MR. WILSON: Judge ---

24 THE COURT: I have done this before and I take a time, a
25 moment before trial in my opening remarks and explain that to

1 them.

2 MR. WILSON: Yes, Your Honor.

3 THE COURT: It's like when we refer to you as a criminal
4 lawyer, you know, that has some real connotations. But, you
5 know ---

6 MR. WILSON: Yes, sir. Yes, sir.

7 THE COURT: It's just the way we do it.

8 MR. WILSON: Yes, sir. Yes, sir.

9 THE COURT: We're not gonna restructure the court and
10 traditions of this court and this State's jurisprudence over
11 something like that. I will tell them that they should draw
12 no conclusions from that.

13 MR. WILSON: Very good, Judge. And we would also ask the
14 same be said for the Defendant sitting further away from the
15 jury versus not being close to the jury.

16 THE COURT: You've been hanging around with Bill McGuire
17 too much.

18 MR. WILSON: Well, Judge, I'm just asking the Court for
19 an instruction, letting the Court know there is no favoritism
20 and that neither side is favored ---

21 THE COURT: I'll be happy to do that. In fact, I'll let
22 you write up what you want me to do.

23 MR. WILSON: Yes, Your Honor.

24 THE COURT: I have no problem with that, Mr. Wilson, but
25 we're not going to juggle things around and change them.

1 MR. WILSON: Yes, sir. Yes, sir. Also we have a motion
2 ---
3 THE COURT: Is that what you call fair trial procedures?
4 MR. WILSON: Yes, Your Honor. Yeah, and that was really
5 the main issue.
6 The other issue also is having him transported in his
7 plain clothes and in the alternative, Judge, to make sure that
8 he is not seen in a garment that is ---
9 THE COURT: See these fellows right over here; I don't
10 care if they take him home with them at night, but they are
11 responsible before he walks in that door.
12 MR. WILSON: Yes, sir.
13 THE COURT: Now, he's gonna walk through that door with
14 street clothes on.
15 MR. WILSON: Yes, sir.
16 THE COURT: He's not gonna come before this jury in any
17 kind of prison garb, anything of that nature. Y'all know
18 that, don't you?
19 MR. WILSON: Yes, sir.
20 THE COURT: But when they got him, he's gonna do like
21 they say. Right, gentlemen? See there.
22 MR. WILSON: I got no issue with that, Judge.
23 THE COURT: Okay. All right.
24 MR. WILSON: They good folks. All right.
25 There's also a motion to sequester the witnesses in this

1 case. If family members are gonna be testifying in this
2 matter, Judge ---

3 THE COURT: Isn't that pretty typical ---

4 MR. WILSON: It is.

5 THE COURT: Mr. AG? You know, I'm not even asking your
6 opinion on this stuff, but it's kind of ---

7 MR. ANDERS: It's pretty typical.

8 THE COURT: Okay.

9 MR. WILSON: And that was just for the record.

10 THE COURT: I will sequester witnesses on both sides.

11 MR. WILSON: Yes, Your Honor.

12 THE COURT: Okay. Now, let's get to something with some
13 meat to it, Mr. Wilson. Bad or similar acts, I want to talk
14 about those?

15 MR. WILSON: Yes, sir. I think the rule is 10 days and
16 we haven't received any notice that they're gonna use any ---

17 THE COURT: Has he got a prior or is there any prior bad
18 acts that you intend to use?

19 MR. ANDERS: There is the incident concerned with the
20 drug incident; that's the only prior bad act.,

21 THE COURT: Well, Mr. Wilson, I think that comes in under
22 the res gestae.

23 MR. WILSON: Your Honor, I would tend to disagree and let
24 me explain why. Again, if that prior bad act comes in and it
25 is not related, they haven't shown any sort of relation

1 between the nexus of this crime and this Defendant, I don't
2 see how it is even relevant.

3 THE COURT: Well ---

4 MR. WILSON: And the prior bad act ---

5 THE COURT: --- the way it is relevant is it shows the,
6 the connection between the parties, it shows motive. You
7 don't have to show motive but it is certainly evidentiary; it
8 shows bad blood between them. It comes down to not so much a
9 Lyle issue as it comes down to a 403 issue and that is to
10 whether or not it's, it's prejudice substantially outweighs
11 it's probative value.

12 MR. WILSON: Right.

13 THE COURT: Now, what's the probative value, counsel?

14 MR. ANDERS: Obviously, the ---

15 THE COURT: I'll let you argue it.

16 MR. ANDERS: Obviously, the probative value of that shows
17 the motive and the reasoning why the disappearance occurred in
18 the first place.

19 THE COURT: You haven't told me yet how these timewise,
20 how do they -- how do they relate, the alleged bad blood
21 incident and the disappearance and I understand the
22 disappearance was around April 24th of '13, right?

23 MR. ANDERS: August 26th ---

24 THE COURT: August ---

25 MR. ANDERS: Less than two weeks prior is when the

1 Defendant and Chris Brown took money and stole from, from the
2 victim and from that point on, there was bad blood, and it
3 looks like there wasn't ever any good blood again between
4 them.

5 THE COURT: Well, okay, Mr. Wilson, let me hear from you.

6 MR. WILSON: Judge, two things. One, it's rank hearsay,
7 Your Honor; it's rank hearsay. I've read over the record ---

8 THE COURT: Well, now we haven't even discussed that. I
9 don't know how it's coming in.

10 MR. WILSON: I know, Your Honor, but ---

11 THE COURT: I'm talking about the basic issue.

12 MR. WILSON: Right. Well, the basic issue for me in this
13 particular matter is simple, you know, again that prior bad
14 act, if it's explored, that is a robbery or they're saying he
15 committed a robbery or armed robbery or forcible robbery
16 somehow or theft. That's a crime of moral turpitude.

17 THE COURT: Well, if they believe it that it's between
18 drug dealers, they don't even think it's a crime.

19 MR. WILSON: Yeah, but again, I can't assume what the
20 jury is gonna think, and that concerns me because a prior bad
21 act obviously is highly prejudicial to my client in a murder
22 case with no body, no evidence of even a murder, and no
23 evidence of a kidnapping other than a person who lied and then
24 a person who now last year is saying he waited a year to come
25 and say my client said something to him. To me it's just

1 honestly gonna prejudice my client, it's gonna inflame the
2 passions of the jury, which is what it's for. It's not
3 serving a purpose of somehow going into what happened in the
4 actual murder and the kidnapping because it's so disconnected.
5 You know, if they had said, look, you know, they robbed him
6 that night and that was the allegation, that'd be one thing.
7 But there are no allegations that he robbed them that night.

8 THE COURT: Tell me -- tell me, Mr. Wilson ---

9 MR. WILSON: Yes, sir.

10 THE COURT: If we look at our rules at -- particularly --
11 what is it Rule 70, we refer to it as the *Lyle* rule.

12 MR. WILSON: The *Lyle* rule, yes, sir.

13 THE COURT: Where ---

14 MR. ANDERS: It's 404(b), Your Honor.

15 THE COURT: Yes. Okay. Okay. And we look at -- look at
16 *Lyle* and, you know, we departed from the federal rule on that.

17 MR. WILSON: Yes, sir.

18 THE COURT: And we've adopted or we made an exception
19 under 404(b) for this kind of testimony. And, if you look at
20 it, what does it say are the exceptions to the bad act? It
21 says may be admissible to show motive, identity, the existence
22 of a common scheme or plan, absence a mistake or accident, or
23 intent.

24 MR. WILSON: Yes, sir.

25 THE COURT: All right. Now, that is even different from

1 the res gestae, which has been recognized by courts here.

2 MR. WILSON: Yes, sir.

3 THE COURT: The issue is whether or not it comes under
4 one of these. The secondary issue is if it does -- now,
5 they're offering it to show motive.

6 MR. WILSON: Yes, sir.

7 THE COURT: It clearly comes under 404(b).

8 MR. WILSON: Yes, sir.

9 THE COURT: But the next test, 404(b) -- and the reason I
10 know it so good is I'm the one that the supreme court
11 reversed.

12 MR. WILSON: Yes, sir.

13 THE COURT: The next issue is 403, whether or not the
14 probative value is substantially outweighed by the prejudice
15 to the Defendant. I think it's that way if I'm not reading it
16 backwards. I know what the rule is. What other evidence --
17 what other evidence would they have to show any reason for the
18 Defendant to kill, kidnap, or want to kill or kidnap the
19 victim in this case?

20 MR. WILSON: There is none. And ---

21 THE COURT: There you go.

22 MR. WILSON: But I mean -- let me respond, Judge. With
23 the probative value -- and you're right, the next step on that
24 is the probative value. But again, no one is testifying. I
25 have not received on iota. There were stories that said that

1 this happened, that people were saying this was something that
2 occurred, but there's no one that's saying ---

3 THE COURT: And I'm not ruling on that.

4 MR. WILSON: That's motive.

5 THE COURT: I'm not ruling on how they get it in.

6 MR. WILSON: Yes, sir.

7 THE COURT: They may not be able to get it in.

8 MR. WILSON: And that's just ---

9 THE COURT: They've still got the issue of hearsay. You
10 got to understand, 404(b) goes to character or conduct of the
11 Defendant, not the issue of whether or not it is an exception
12 to the hearsay rule.

13 MR. WILSON: That's right.

14 THE COURT: They're still under the hearsay rule, but in
15 order to get evidence of a prior bad act, you've got to look
16 at 404(b) and 404(3).

17 MR. WILSON: That's true. But the courts have also said
18 that the actual -- you're gonna get that stuff in and Lyle is
19 something, that obviously I'm familiar with, but if you're
20 gonna get it in, there has to be a genuine issue, not simply
21 for the purposes of inflaming the jury or to get the jury to
22 say, okay, this guy is a bad guy, not for character evidence
23 which is not admissible. They can only do it if they want to
24 prove motive.

25 THE COURT: There you go.

1 MR. WILSON: And that's all I care about. If they have
2 somebody ---
3 THE COURT: That's where they're going.
4 MR. WILSON: Okay.
5 THE COURT: And that's what you were done -- if that's
6 what your issue is, you're offering it to show motive.
7 MR. WILSON: Okay.
8 THE COURT: Which is crucially important; it's not
9 required but it is crucially important in any case like this.
10 MR. WILSON: Right.
11 THE COURT: And that's why they're offering it and they
12 have no other evidence of it. It has great probative value.
13 I think it is prejudicial, but it still comes under 403. Now
14 whether or not they're gonna be able to get it in, I don't
15 know.
16 MR. WILSON: Yes, sir. And the other issue is the Chris
17 Brown stuff, Judge. There is a lot of talk about incidents
18 that occurred and that's what I'm really concerned about as
19 well, that occurred with Chris Brown only with Zachary
20 Malinowski, and those are bad acts pertaining to Chris Brown
21 unless Chris Brown is gonna testify ---
22 THE COURT: You're not gonna try them together are you?
23 MR. WILSON: No, sir; I don't think they are.
24 THE COURT: Well, why -- why ---
25 MR. ANDERS: We're not gonna try them together, Your

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2017-001846

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SC Court of Appeals

THE STATE,

Appellant,

vs.

JAVON D. GIBBS,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

for

J. CLAY MITCHELL
S.C. Bar #101443
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

ATTORNEY FOR APPELLANT