STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM LEXINGTON COUNTY
R. Knox McMahon, Circuit Court Judge

Op. No. 2019-UP-146 (S.C. Ct. App. refiled June 5, 2019)

THE STATE,

Respondent,

v.

JUSTIN ANTONIO BUTLER,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Appellate Case No. 2019-001071

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PETITIONER'S QUESTIONS PRESENTED

1) Did the Court of Appeals err by holding the trial judge properly denied Petitioner's motion to suppress evidence obtained through the use of defective search warrants that failed to comply with S.C. Code Ann. § 17-13-140 since the warrants were issued by a South Carolina magistrate who did not have jurisdiction over the area where the property sought was located, namely telephone records stored out of state, and were served on out of state entities?

2) Did the Court of Appeals err by holding the trial judge did not abuse his discretion when he qualified a state law enforcement witness as an expert in "street culture and language" and allowed him to testify concerning his extensive experience with street gangs and his interpretation of language allegedly used by Petitioner when this evidence was unfairly prejudicial to Petitioner in violation of Rule 403, SCRE, and suggested to the jury that Petitioner was affiliated with or involved in a gang, which likely led the jury to convict Petitioner on an improper basis, particularly where Petitioner was convicted under the hand of one theory of accomplice liability?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1) Is certiorari warranted where the Court of Appeals properly found Petitioner conceded at trial search warrants were not necessary to obtain cell phone records and the trial court did not abuse its discretion in denying Petitioner's motion to suppress the evidence, and where any error was harmless beyond a reasonable doubt because the records were cumulative to other evidence which established Petitioner's presence in South Carolina?

2) Should this Court grant certiorari where the Court of Appeals properly found the trial court did not abuse its discretion in allowing a witness to testify as an expert in street culture and language because neither he nor the State alleged Petitioner was a member of a gang or affiliated with anyone in a gang and the foundation information establishing the witness's expertise was not unduly prejudicial as it was accompanied by limiting instructions explicitly informing the jury Petitioner was not in a gang?

STATEMENT OF THE CASE

A Lexington County grand jury indicted Petitioner for murder, attempted murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. (R.pp.698-709). Petitioner proceeded to a jury trial on June 6, 2016. (R.p.1).

On June 9, 2016, the jury found Petitioner guilty. (R.p.589, line 25-p.590, line 14). The Honorable R. Knox McMahon sentenced Petitioner to fifty years for murder, a concurrent thirty years for attempted murder, a concurrent thirty years for burglary, and a consecutive five years

for the weapons charge. (R.p.599, line 17-p.600, line 11).

Petitioner timely filed a notice of appeal and after briefing by the parties, the Court of Appeals issued an unpublished opinion affirming Petitioner's convictions and sentences. (App.pp.1-6). On May 2, 2019, Petitioner filed a petition for rehearing. (App.pp.7-21). The Court of Appeals denied the petition by order dated June 5, 2019, withdrew its previously filed opinion, and refiled a substituted opinion. (App.pp.22-29).

On June 28, 2019, Petitioner filed a petition for writ of certiorari seeking review from this Court. This return follows.

STATEMENT OF FACTS

A man was left bleeding in the dirt in Pelion while his younger brother lay dead nearby, shot in the head. (R.p.122, line 22-p.123, line 13; p.126, line 10-p.127, line 3; p.129, line 25-p.130, line 9; p.377, lines 12-14). Vonkeith Toland (Vonkeith) lived to tell the jury about the two men who shot him, killed his brother, and ransacked his home. (R.p.112, lines 13-23; p.114, lines 1-9; p.123, lines 21-23; p.125, lines 9-23; p.127, lines 9-13; p.128, line 17-p.129, line 13; p.129, line 25-p.130, line 19).

Vonkeith testified he sold cars for a living at the time of the shooting and burglary.[1] (R.p.106, lines 11-24). Alonzo Walker (Zo) from California introduced Vonkeith and Petitioner, and the two men met three or four times prior to the deadly incident. (R.p.108, lines 14-24). Petitioner, who Vonkeith only knew by his nickname of "Jonah," called Vonkeith from Alabama and wanted to know if Vonkeith had any cars for him to see. (R.p.107, line 20-p.108, line 13). Petitioner and his co-defendant arrived at Vonkeith's mother's house on April 26, 2014, where several of Vonkeith's family members had gathered. (R.p.112, lines 13-23; p.115, line 1-p.116,

[1] Vonkeith admitted he previously sold drugs and been arrested for trafficking cocaine, but denied he was doing so at the time of the incident. (R.p.107, lines 6-19; p.134, lines 5-18).

line 20).

Petitioner, his co-defendant, Vonkeith, and Vonkeith's brother, Tycus Toland (Tycus), eventually went to Vonkeith's mobile home to look at a car. (R.p.106, lines 23-24; p.117, line 20-p.118, line 25). After a test drive, everyone stood around the car talking when the co-defendant "just reached on his side and instantly" shot Tycus "in the head." (R.p.120, line 22-p.121, line 18; p.122, line 22-p.123, line 13; p.124, lines 5-9). Vonkeith stated Petitioner ran to his rental car to search for something, as Vonkeith backed away from the co-defendant who pointed a gun at him and said, "[Y]ou know what this is, you know what we coming for, we want it, you might as well give it up." (R.p.125, lines 9-23).

The co-defendant shot Vonkeith, and he fell and crawled away. (R.p.126, line 10-p.127, line 3). Vonkeith got behind his home, looked up, and saw Petitioner and his co-defendant both with guns pointed at him, threatening to kill him. (R.p.127, lines 9-13; p.128, lines 17-24). Vonkeith testified:

> [Petitioner] asked me where the drugs and money are at. I mean I ain't got none. I was like – he was like man, I'm going to kill you if you don't tell me where to find them; I'm going to kill you. So finally I was like, well the money's in the house; you just got to go find it. My girlfriend hide it and he was like – and the other taller guy was like no, get up; you're going in the house with us and I was like man, you done shot me, I can't move; I can't go nowhere. And then finally he decided they both went to the back door and the [co-defendant] kicks the glass, sliding door glass and busts it out and then they enter the home.

(R.p.128, line 25-p.129, line 13). Vonkeith could hear the men going from room to room,[2] so he tried to call 911 on his cell phone, but the co-defendant walked outside and saw Vonkeith trying to call for help:

[T]hen he started shooting me again and he shot me like maybe three or four

[2] A crime scene investigator testified the men ransacked every room. (R.p.33, lines 15-21). Several security cameras were set up outside, but the suspects took the recording equipment when they left. (R.p.33, line 22-p.34, line 7).

> times. I think that's when I got shot in the neck and just kind of like fell down and I just laid there like I was dead and he grabbed the phone out my hand and when he grabbed it I like picked my hand up with it and I just let my hand drop. I couldn't hold my hand up; I just let it drop and make him think that I was done and then he goes back in the house and I can hear them like ransacking the house even more.

(R.p.129, lines 14-p.130, line 9). Vonkeith testified he was scared the men would return and kill him, so he crawled under the mobile home and hid behind some concrete blocks. (R.p.130, lines 10-19).

Petitioner and his co-defendant eventually returned and Vonkeith heard Petitioner demand, "where he at," and Vonkeith saw them briefly look for him before they "sped off" in the rental car. (R.p.130, line 20-p.131, line 19). Vonkeith waited a few minutes, and crawled out and to the car to get a second cell phone to call for help. (R.p.131, line 21-p.132, line 20). While on the phone with 911, Vonkeith was not sure if he would survive, so he told the operator to contact Zo from California to get the real names of Petitioner and his co-defendant because Vonkeith only knew their nicknames. (R.p.132, line 21-p.133, line 7).

Sergeant Roy Mefford (Mefford) testified Vonkeith's information to the 911 operator gave investigators a place to start looking for possible suspects.[3] (R.p.59, lines 17-18; p.64, line 13-p.65, line 15). Mefford looked for out-of-state phone numbers Vonkeith contacted around the time of the shooting. (R.p.65, line 16-p.67, line 1). Based on records from Vonkeith's cell phone and information from family members who saw Vonkeith and Tycus with two unknown men in a rental car with an out-of-state license plate, Mefford testified he wanted to know where the owner of an area code "404" cell phone number was during the incident. (R.p.67, line 23-p.68, line 17). Mefford got a search warrant, reviewed the phone number's records, and

[3] Following the shooting, Vonkeith was transported to the hospital and unable to communicate for several days. (R.p.40, lines 8-13; p.61, lines 17-22; p.86, line 22-p.87, line 11).

determined the person who used the phone was involved in the shooting. (R.p.72, lines 4-22). To figure out who the phone belonged to, investigators called an out-of-state number the "404" user contacted and the woman who answered linked that number and an area code "510" cell phone number to Petitioner, who lived in Muscle Shoals, Alabama and was the father of her child. (R.p.73, line 17-p.75, line 16; p.76, line 17-p.77, line 6; p.80, lines 18-23; p.198, lines 9-23). Further, an area code "707" cell phone number Petitioner contacted was later linked to the co-defendant. (R.p.82, line 20-p.83, line 23; p.85, lines 1-7). All of the cell phones were described as prepaid accounts, or "burner phones," so a name and address were not required to purchase the phone. (R.p.166, lines 7-16; p.182, lines 17-20).

Petitioner admitted to the jury he was in South Carolina at the time of the murder, but attempted to explain his presence by testifying he was in the state to perform at music shows in Greenwood. (R.p.422, lines 15-21). Petitioner's stage name was "Jonah McCoy." (R.p.453, lines 23-24). Petitioner testified his co-defendant participated in the shows. (R.p.422, line 22-p.423, line 5). Petitioner stated it was his understanding Vonkeith traded cars for marijuana, and he texted his co-defendant to inform him he was taking drugs with him to help make up the full purchase price of a car. (R.p.420, line 21-p.421, line 5; p.424, line 12-p.425, line 4; p.426, lines 5-10).

Petitioner testified he and his co-defendant were at Vonkeith's home to look at a car, and he did not know about the plan to rob anyone. (R.p.432, lines 5-20). Petitioner stated he got back from a test drive and went to the rental car to charge his cell phone, when he heard a gunshot. (R.p.440, line 10-p.441, line 23). Petitioner testified he saw Vonkeith run toward his brother and Petitioner's co-defendant, and Petitioner heard more shots. (R.p.442, lines 14-24). Petitioner stated he took cover and stayed at the car, and his co-defendant eventually returned

and they left. (R.p.445, lines 11-19; p.446, lines 15-19).

The trial court charged the jury extensively, including instructions on the theory of accomplice liability and mere presence. (R.p.563, line 14-p.586, line 24). The jury ultimately found Petitioner guilty. (R.p.589, line 25-p.590, line 14).

ARGUMENTS

I.

Certiorari is not warranted where the Court of Appeals properly found Petitioner conceded at trial search warrants were not necessary to obtain cell phone records and the trial court did not abuse its discretion in denying Petitioner's motion to suppress the evidence. Further, this Court should deny certiorari where the totality of the circumstances demonstrates the warrants were not defective under South Carolina's general search warrant statute and where any error was harmless beyond a reasonable doubt because the records were cumulative to other evidence which established Petitioner's presence in South Carolina.

Petitioner contends the Court of Appeals erred because the search warrants were issued by a South Carolina magistrate who did not have jurisdiction over the area where the cell phone records were located. Certiorari should be denied because the Court of Appeals properly found the issue was conceded at trial. The Court ruled:

> We disagree with [Petitioner] that [*State v.*] *McKnight* [291 S.C. 110, 352 S.E.2d 471 (1987)] is controlling in this case. [Petitioner] conceded at trial that the State did not need to send a search warrant in order to obtain the cell phone records. At trial, [Petitioner] stated records held by a third-party cell phone company did not belong to him and the company could choose to turn those records over to police. [Petitioner] conceded the State could have merely sent a letter requesting the records to the cell phone companies. However, [Petitioner] argues on appeal the records should have been excluded because the State chose to send an invalid search warrant. *McKnight* states the question of statutory compliance of a search warrant is different than the Fourth Amendment privacy considerations. *See id.* [at 115, 352 S.E.2d at 474]. In *McKnight*, the officer needed to first obtain a search warrant to search the mobile home because a search of a home implicates someone's privacy rights under the Fourth Amendment—whether it was the defendants' privacy rights or someone else's privacy rights. *See id.* However, in the instant case, [Petitioner] noted the owners of the cell phone records voluntarily turned the information over to the third party. Because [Petitioner] did not argue the State was required to send search warrants to obtain the cell

> phone records, [Petitioner's] argument regarding the validity of the search warrants has no merit. Therefore, we affirm the trial court's denial of [Petitioner's] motion to suppress and find the trial court did not abuse its discretion.

(App.pp.26-27); *see also State v. Butler*, 2019-UP-146 (S.C. Ct. App. refiled June 5, 2019).

Contrary to Petitioner's assertions, the Court of Appeals correctly found Petitioner conceded at trial search warrants were not necessary to obtain the cell phone records. Moreover, the totality of the circumstances demonstrates: (1) the affidavits attached to the warrants established probable cause supporting the search; (2) the cell phone records were for communications that either originated in or terminated in South Carolina; (3) the nature of the communications established jurisdiction; and, (4) while the records were held at out-of-state offices, the companies asked investigators to send the warrants to those out-of-state addresses and the State was, in good faith, complying with that request. Finally, any error in admitting the evidence was not prejudicial because it was cumulative to other evidence which established Petitioner's presence in South Carolina, including eyewitness testimony and Petitioner' own statements to the jury. Certiorari is not warranted.

How the Issue Was Raised

Prior to trial, defense counsel moved to suppress evidence from records obtained using search warrants issued by a magistrate judge in South Carolina, but sent to out-of-state entities, and argued the warrants violated South Carolina Code § 17-13-140. (R.p.4, lines 6-19). The warrants were for records of cell phones linked to Petitioner, Vonkeith Toland (Vonkeith), Tycus Toland, Petitioner's co-defendant, and other individuals. (R.pp.601-92). The search warrants were faxed to subpoena compliance and records offices for Verizon Wireless in San Angelo, Texas and Bedminster, New Jersey, Sprint in Overland Park, Kansas, T-Mobile in Parsippany, New Jersey, AT&T and Cingular Wireless in West Palm Beach, Florida, and MetroPCS Wireless

in Richardson, Texas. (R.pp.601-92). Counsel maintained the local judge did not have jurisdiction over the area where the "documents and records and other materials" being sought were located as the warrants indicated they were being sent out of state and there was "no exception in the enabling statutes or any other provision of South Carolina law providing for" the warrants validity. (R.p.4, line 20-p.5, line 4). Counsel argued the warrants were invalid on their face. (R.p.5, lines 5-13).

Defense counsel acknowledged cell phone companies voluntarily comply with similar records requests, but ask for documentation for their file. (R.p.5, lines 14-25). Counsel asserted investigators could have accomplished "the exact same thing" by simply issuing a letter asking for the records instead of using a search warrant. (R.p.6, lines 1-6). Counsel argued there was nothing in the warrant to put the recipient on notice it had "no force or applicability of law and compliance is strictly voluntary. (R.p.6, lines 7-15).

The State argued Petitioner did not have an expectation of privacy in the records from any of the cell phone companies. (R.p.7, lines 4-6). The State maintained once an individual purchased a phone, the company owned the phone's records and decided if they would be released. (R.p.7, lines 6-12). The State indicated investigators provided search warrants to the phone companies because the companies asked for them, and further sent the documents to out-of-state offices as requested rather than serve them on local agents. (R.p.8, line 3-p.9, line 5). Importantly, the State argued Petitioner lacked standing because he was attempting to assert the privacy rights of others as: (1) Petitioner *never* admitted the two cell phones the State could link to Petitioner were actually his, and (2) all of the other numbers belonged to the victims, Petitioner's co-defendant, and other individuals linked to the investigation. (R.p.9, line 7-p.10, line 12).

Defense counsel maintained he was not arguing the motion pursuant to the Fourth Amendment or any privacy right, but was instead asserting the warrants had no legal validity because the magistrate had no authority under law to sign the documents. (R.p.10, line 24-p.11, line 8).

Finding no precedent in South Carolina, the trial court relied on an unpublished case from Michigan to rule evidence from the cell phone records was admissible. (R.p.11, line 15-p.16, line 17; p.18, lines 3-17). In *People v. Wilson*, 2013 WL 2360239 (Mich. Ct. App. May 30, 2013), the defendant argued counsel was ineffective in failing to move to suppress cell phone records obtained pursuant to search warrants issued by a magistrate in Michigan, but served on a carrier in Texas. *Id.* at *9. The defendant argued the records should have been suppressed because the magistrate lacked jurisdiction to issue warrants to an out-of-state entity. *Id.* The court in *Wilson* noted the Fourth Amendment protections, indicated police treated the records as protected by the Fourth Amendment and obtained a search warrant, and found the warrants were valid because the evidence involved records of communications that originated locally, not in Texas. *Id.* at *9-10.

The trial court summarized *Wilson* and denied the motion to suppress based on its findings, stating, "These are just records held by a third-party out-of-state custodian. I don't think there's any expectation of privacy." (R.p.11, line 15-p.14, line 19; p.16, lines 11-17; p.18, lines 3-17).

Defense counsel never asked for a ruling based on his suppression motion as argued that the search warrants violated S.C. Code Ann. § 17-13-140 and were invalid "on their face." (R.pp.4-5).

At trial, investigators testified they obtained records for several cell phones using search

warrants, including numbers linked to Petitioner, his co-defendant, and the victims. (R.p.68, lines 8-17; p.72, lines 4-22; p.81, lines 9-18; p.82, line 20-p.83, line 8). Vonkeith confirmed during trial and to investigators Petitioner contacted him using the area code "404" number—both calling and texting him—before and after Petitioner arrived in South Carolina. (R.p.139, line 3-p.141, line 2). Without objection, screenshots of Vonkeith's cell phone were admitted into evidence which showed communications he had with Petitioner. (R.p.139, lines 3-14). A review of the cell phone records confirmed Vonkeith's testimony and revealed contacts between Vonkeith and Petitioner on the "404" cell phone. (R.p.196, lines 14-22; p.197, lines 4-8).

Records custodians from two cell phone providers testified at trial. Joseph Trawicki worked at Sprint and testified the records for the area code "510" number linked to Petitioner and the co-defendant's area code "707" number showed other numbers the users called or texted and cell tower locations, indicating the men were in the Columbia area around the time of the shooting. (R.p.158, lines 13-19; p.159, line 11-p.160, line 9; p.168, lines 12-25).

Michael Phipps (Phipps) worked in computer forensics with the Lexington County Sheriff's Department and testified he extracted information from the area code "510" cell phone after obtaining a search warrant. (R.p.306, lines 15-21; p.307, lines 6-18; p.309, lines 3-20; p.310, lines 6-22). Phipps also analyzed records from the area code "404" cell phone. (R.p.315, lines 1-13). Phipps showed the jury a map which indicated on the day of the shooting, the "510" phone and the phone connected to the co-defendant moved from Greenwood where the men were staying, into Lexington County, and back again. (R.p.370, line 12-p.372, line 22).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only and are bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. Baccus*, 367 S.C.

41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence is within the discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *Winkler*, 388 S.C. at 583, 698 S.E.2d at 601.

Analysis

Petitioner Conceded at Trial Search Warrants Were Not Necessary

Petitioner cannot demonstrate the prejudice necessary to entitle him to relief where he conceded the issue at trial. During the pre-trial hearing on his motion, defense counsel conceded search warrants were not necessary to obtain the cell phone records he was seeking to suppress. (R.pp.5-6). Counsel maintained wireless carriers voluntarily comply with similar records requests, sometimes when receiving only a letter from investigators. (R.p.6). That search warrants were not necessary became the law of the case at trial with counsel's concession and any argument on appeal regarding the validity of the warrants pursuant to S.C. Code Ann. § 17-13-140 is without merit. *See Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (providing a party cannot concede an issue at trial and then complain on appeal).

Probable Cause Supported the Search Warrants and They Did Not Violate the Statute

Regardless, the search warrants did not violate the statute. The wireless companies requested warrants from the State and further asked that they be sent to their out-of-state offices, so the State was complying with that directive. (R.pp.8-9). The warrants were supported by probable cause and involved communications which either originated in or terminated in South Carolina, satisfying the requirements of our general search warrant statute. *See* S.C. Code Ann. § 17-13-140 (providing, in part, search warrants may be issued to search property tending to

show a particular person committed a crime where affidavits establish probable cause and the magistrate has jurisdiction over the area where the property to be searched is located).

Investigators did not initially have a name for the owner of the area code "404" cell phone, having found the number in Vonkeith Toland's phone, but knew the person was likely involved in the deadly shooting. The affidavit in support of the first search warrant, dated April 28, 2014, was an attempt to determine subscriber information, as well as numbers contacted, cell tower locations, and some data, and reads:

> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUTH IS ON THE SUBJECT PREMISES
>
> On April 26, 2014 at 1624 hours, the Lexington County Communication Center received a 911 call in reference to a shooting incident at the residence of [ ], Pelion, SC. Upon arrival, Deputies found Tycus Toland a deceased Black male with an apparent gunshot wound in front of a vehicle, in the front yard of the residence. Also in the yard, was Vonkeith Toland who was transported by EMS with gunshot wounds as well. Tycus Toland and Vonkeith Toland, the two Black males that suffered gunshot wounds, were said to be selling a vehicle and were meeting the unknown individuals when the shooting occurred. In the initial securing of the residence, Deputies observed video cameras affixed to and around the residence. It is known that calls were made to the victim from this number leading up to the incident. This Search Warrant is to locate any and all evidence surrounding the circumstances of the shooting.

(R.pp.615-18). Witnesses, not the records obtained from Verizon, linked Petitioner to the cell phone. Investigators issued a second search warrant, hoping to obtain payment information to further connect Petitioner to the phone. The affidavit in support of the warrant dated April 30, 2014, reads:

> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES
>
> On 04-26-2014 at 1624 hrs the Lexington County Communications Center received a 911 call in reference to a shooting incident at [ ] Pelion, SC. Upon arrival, deputies found Tycus Toland deceased, with an apparent gunshot wound in the front yard of the residence. Vonkeith Toland was also located at that residence and transported by EMS with gunshot wounds. During the course of

> the investigation it was discovered that V. Toland lives at this address and had a vehicle for sale there. He and his brother, T. Toland, were going there with two unidentified subjects to show them the vehicle for sale. These individuals are believed to have committed the shooting. Witnesses indicate that V. Toland had telephone contact with the suspect(s) prior to them arriving. Phone records of the victim, V. Toland, indicate he had several conversations with an individual at phone number 404-***-****. This number is believed to be associated with Justin Antonio Butler. These records are needed to verify Butler's association to this phone by purchase and payment information.

(R.pp.610-13). As previously stated, the "404" number was a prepaid phone, and Verizon could not provide any subscriber information for the phone and Petitioner never admitted the phone was his.

Using a totality of the circumstances review, as mandated by our Supreme Court, it is clear the search warrants were properly issued. *See State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) ("When reviewing a magistrate's decision to issue a search warrant, we must consider the totality of the circumstances."). The warrants were supported by an affidavit establishing probable cause for the search, including specific facts learned from the investigation and why deputies believed Petitioner committed the crime. Further, while the records were held at the carrier's out-of-state offices, the records were for communications that either originated in or terminated in South Carolina and the companies asked that the warrants be sent to those addresses and the State was complying with that request. The magistrate had jurisdiction over the property. *See Wilson*, 2013 WL 2360239 at *9-10 (finding valid warrants issued in Michigan but served on a Texas wireless carrier where the evidence involved records of communications that occurred locally); *see generally State v. Drayton*, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015) (per curiam) (finding, in view of totality of circumstances, the affidavits in support of the warrants for historical cell site location data established probable cause for the search). Accordingly, the search warrants did not violate the statute.

Petitioner Had No Standing to Challenge The Admission of the Cell Phone Records

While not dispositive, Petitioner also argues the trial court's ruling on the motion pursuant to a Fourth Amendment analysis was error. Respondent maintains the lower court properly admitted the cell phone records as Petitioner had no standing to challenge their admissibility. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980) (discussing the facts considered in a standing analysis).

The records for the area code "404" cell phone had no subscriber information or name associated with it as it was a prepaid phone, or "burner phone." (R.pp.183-84). The area code "510" cell phone was registered under the name "John McCoy" and was also a prepaid phone. (R.pp.169-70). In his motion to suppress, Petitioner *never* acknowledged the phones were his, or that he was using them at the relevant times. In addition, the other cell phones at issue were linked to Petitioner's co-defendant and other people connected to the investigation, and were not Petitioner's phones. Petitioner's choice to disavow ownership of the cell phones makes it all the more important for this Court to enforce traditional rules governing the assertion of Fourth Amendment standing, as the trial court did in its ruling. Petitioner chose to distance himself from the phone with no subscriber information and from the one registered under the name "John McCoy." Petitioner should not then be allowed to later assert any privacy right in records pertaining to the phones.[4] *See McKnight*, 291 S.C. at 114, 352 S.E.2d at 473 ("The Fourth

[4] While this case was pending in the Court of Appeals, the United States Supreme Court issued an opinion holding users maintain a legitimate expectation of privacy, for Fourth Amendment purposes, in the recorded location information collected by cell phone companies. *Carpenter v. United States*, 138 S.Ct. 2206, 2219-21 (2018). At the time the trial court considered the issue, a person did not have a legitimate expectation of privacy in the third-party records, in part, because he voluntarily turned over the information. *United States v. Graham*, 824 F.3d 421, 424-25 (4th Cir. 2016) (en banc) (citations omitted). Because of the recent decision by the Supreme Court, Respondent abandons the privacy argument which was included in the briefs before the Court of Appeals.

Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches and seizures. One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated.") (citation omitted) (emphasis in original).

Therefore, while Respondent submits the issue was conceded at trial, the record demonstrates the trial court properly admitted the cell phone records. Certiorari should be denied on this issue.

Harmless Error

Any possible error in admitting the cell phone records was harmless beyond a reasonable doubt as other evidence conclusively established Petitioner's guilt. Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985); *see also Baccus*, 367 S.C. at 55-56, 625 S.E.2d at 223-24 (employing a harmless error analysis in the case of a defective search warrant). No definite rule of law governs the finding of harmless error; rather, the error's materiality and prejudicial character must be determined from its relationship to the entire case. *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151; *see also State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (listing the factors of a harmless error analysis, including the importance of the witness's testimony, whether the testimony was cumulative, the extent of cross-examination, and the overall strength of the State's case) (citation omitted).

The records were cumulative to other evidence that established Petitioner's presence in South Carolina and at the scene of the deadly shooting, including Petitioner's own testimony. Vonkeith Toland (Vonkeith) confirmed to investigators and during trial Petitioner contacted him using the area code "404" number before and after Petitioner arrived in South Carolina.

(R.pp.139-141). Vonkeith testified he sent his address to Petitioner via text. (R.pp.116-17). Without objection, screenshots of Vonkeith's cell phone were admitted into evidence which showed calls and texts with Petitioner. (R.p.139).

Vonkeith further testified Petitioner and his co-defendant were at his house to look at a car. (R.pp.115-16). Vonkeith also told the jury about his memory of the day of the shooting, Petitioner and his co-defendant threatening to kill him, and ransacking his home. (R.pp.126-31). Vonkeith identified Petitioner in a photo lineup prior to trial and again in the courtroom, and testified he was "[a] hundred percent" certain he recognized Petitioner as one of the two men involved in the incident. (R.p.141, line 3-p.143, line 18).

In addition, Vonkeith's family members also recognized Petitioner and could identify him. A cousin saw Petitioner and his co-defendant on the day of the murder and identified Petitioner in a photo line-up and later in court. (R.p.241, lines 12-16; p.243, lines 2-6; p.243, lines 12-16; p.246, lines 1-3; p.246, line 19-p.247, line 10; p.247, line 20-p.248, line 9). Vonkeith's sister was at her mother's home on the day of the shooting and saw Petitioner, and knew Alonzo from California was a friend of her brother's, so she looked on his Instagram page for a picture and found one to give to investigators to help them identify Petitioner. (R.p.220, lines 7-9; p.220, line 22-p.221, line 17; p.222, lines 4-17; p.225, line 7-p.226, line 2; p.231, line 10-13; p.232, line 9-p.234, line 2).

Finally, Petitioner admitted he was in South Carolina at the time of the murder, but testified he was in the state to perform music shows. (R.p.422). Petitioner's version of events to the jury was he was at Vonkeith's home to look at a car, but he did not know about any robbery plan and did not shoot anyone. (R.p.432; pp.440-42; pp.448-49). The jury ultimately did not believe Petitioner as it found him guilty of all indicted charges.

Therefore, while Respondent submits the issue was conceded at trial and trial court's ruling was not an abuse of discretion, any alleged error was harmless beyond a reasonable doubt. Certiorari is not warranted on this issue.

II.

This Court should deny certiorari where the Court of Appeals properly found the trial court did not abuse its discretion in allowing a witness to testify as an expert in street culture and language because neither he nor the State alleged Petitioner was a member of a gang or affiliated with anyone in a gang and the foundation information establishing the witness's expertise was not unduly prejudicial as it was accompanied by a limiting instruction explicitly informing the jury Petitioner was not in a gang.

Petitioner contends the Court of Appeals erred in finding the trial court did not err in allowing an expert witness to testify about his gang-related training and experience. Certiorari should be denied because the Court of Appeals properly found no abuse of discretion at trial, ruling:

> We find the trial court did not err in allowing [Brian] Zwolak to testify as an expert witness. The State presented no evidence that [Petitioner], [his co-defendant], or the crime itself was associated with a gang. The mention of gangs was only in relation to Zwolak's experience and training as a necessity to qualifying him as an expert witness. The only time Zwolak mentioned gangs outside of outlining his training and experience was when he indicated the term "blood" usually referred to a gang member. However, he clarified it did not mean the person who wrote the text was associated with a gang and later explained "blood" could also refer to a friend or family member. Furthermore, because of the danger of unfair prejudice associated with the word gang, the trial court gave three limiting instructions regarding Zwolak's testimony—after it qualified Zwolak as an expert witness, at the end of Zwolak's testimony, and during the jury instructions. Thus, any prejudice that may have arose because of the extensive use of the word gang in Zwolak's testimony regarding his qualifications would have been cured by the limiting instruction. *See State v. Young*, 420 S.C. 608, 624, 803 S.E.2d 888, 896 (Ct. App. 2017) ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986))); *id.* at 623, 803 S.E.2d at 896 ("We start by presuming the cure worked, for we also presume juries follow their instructions.").
>
> [Petitioner] does not point to any specific part of Zwolak's testimony that prejudiced him, other than the fact Zwolak said the word "gang" many times

> while explaining his qualifications. Because the trial court repeatedly instructed the jury that there was no association between [Petitioner] or [his co-defendant] and any gang, and the State did not attempt to connect [Petitioner] with a gang, we find the prejudicial effect of Zwolak's testimony was small. The State presented Zwolak's testimony to counter [Petitioner's] assertion that he was not involved in [his co-defendant's] plan to rob the victims and to show a scheme between [Petitioner] and [the co-defendant]. We find Zwolak's testimony had probative value and was not substantially outweighed by the mention of gangs during his testimony about his qualifications. Thus, the trial court did not abuse its discretion in allowing Zwolak to testify.

(App.pp.28-29); *see also State v. Butler*, 2019-UP-146 (S.C. Ct. App. refiled June 5, 2019).

Contrary to Petitioner's assertions, the Court of Appeals correctly found the expert's testimony was not an abuse of discretion because the witness's testimony regarding his experience obtained during years as a gang investigator was not unduly prejudicial where neither the expert nor the State ever alleged Petitioner was a member of a gang or affiliated with anyone in a gang and the limiting instructions cured any prejudice. Certiorari is not warranted on this issue.

How the Issue Was Raised

Prior to *voir dire* of the State's expert on street culture and language, the solicitor indicated that while much of the witness's experience came from working with gangs, the State was not making any claims Petitioner was affiliated with gangs or that the crime was gang-related, but instead it was utilizing the expert to help the jury understand some of the words used in text messages. (R.p.381, lines 9-25; p.382, lines 16-20). Defense counsel objected, arguing the word "gang" itself was prejudicial, as was "street culture," and the State could avoid prejudice by using the word "slang." (R.p.382, lines 4-14). The trial court found the witness would have to use the word "gang" to lay the foundation for his expertise, but the court would give the jury a limiting instruction to explain any reference to "gangs" should not be associated with Petitioner, was not at issue in the trial, and could not be discussed by the jury. (R.p.382,

line 21-p.383, line 15).

Brian Zwolak (Zwolak) testified he was a gang instructor at the South Carolina Criminal Justice Academy. (R.p.386, line 22-p.387, line 4). He previously worked with the gang unit at the Columbia Police Department and the Midlands Gang Task Force. (R.p.387, line 9-p.388, line 19). Zwolak also went through his training in street culture and language, and was offered as an expert, subject to a renewed objection by defense counsel. (R.p.388, line 20-p.391, line 22). Prior to qualifying Zwolak as an expert, the court told the jury:

> This witness will be qualified in the area of street culture and language to give opinion testimony in that area. That does not mean that you must accept the opinion, but it is evidence for you, the jury, to use in any way you deem appropriate.
>
> Additionally, ladies and gentlemen, I'm going to give you what is known as the limit[ing] instruction concerning this testimony: As you heard, the officer's background and history and training, you hear the word gang many, many, many times and, of course, that word can be a buzz word in and of itself. There is no association, no association whatsoever between this defendant, Mr. Butler and membership in or association with any gang whatsoever. The – the issue about whether or not Mr. Butler is a member of, or associated with any member of a gang is not relevant to the trial of this case, and that particular issue is not an issue.
>
> And that area of gangs should not even be discussed, Mr. Foreman, by you or any of the ladies and gentlemen in the jury room at the time of your deliberations.
>
> I'm allowing this evidence solely for the purposes of interpreting street culture and language and as you all know, being American Citizens of Lexington, South Carolina, people are tried based on evidence, not whatever their status may be. They're not tried because of a label whatsoever. Even if they were, Mr. Butler does not have that label whatsoever.
>
> So it's street culture and language and you give it the weight and the value, whichever you deem appropriate, during your deliberations and your determinations of the facts and in this case and no other purpose whatsoever.

(R.p.391, line 23-p.393, line 12). The trial continued without any objection to the sufficiency of the limiting instruction.

Zwolak then testified he reviewed some text messages sent to and from the area code "404" cell phone in the days before the murder. (R.p.393, line 18-p.394, line 6). Zwolak stated an incoming text to the number on April 23, 2014 asked, "Who's this?" and the response was "Jonah," which was Petitioner's nickname, and Petitioner responded it was his new number. (R.p.108, lines 9-13; p.395, line 24-p.396, line 7; p.396, line 22-p.397, line 5). Then, Petitioner texted with his co-defendant and firmed up their travel plans, before Petitioner told his co-defendant, "I got hammy with me" which Zwolak explained meant Petitioner would take a gun with him from Alabama. (R.p.397, line 6-p.399, line 20). During the exchange about their travel plans, Petitioner texted his co-defendant, "A blood have to come get me first from the bus station" which Zwolak stated could refer to someone in a gang, although he was "not saying anybody who wrote this has anything to do with gangs," and later explained "blood" could also mean a family or friend. (R.p.398, line 22-p.399, line 3; p.406, line 21-p.407, line 18). On April 24, 2014, two days before the shooting, a friend texted Petitioner and asked him, "Are you going to need a hamma to fix that or no?" which Zwolak testified was a second reference to a gun, and Petitioner responded, "Most likely." (R.p.403, lines 16-24; p.405, lines 5-8).

Following cross-examination, the trial court gave the jury a second limiting instruction. (R.p.409, lines 6-19). Defense counsel did not object to the sufficiency of the limiting instruction.

Standard of Review

The conduct of a criminal trial is left largely to the discretion of the trial court, and the appellate courts will not interfere unless the rights of a defendant were prejudiced. *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982); *see also State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) (holding appellate courts review Rule 403 balancing

determinations pursuant to an abuse discretion standard and give great deference to the trial court's decision). Accordingly, this Court reviews errors of law only and is bound by the trial court's factual findings unless they were clearly erroneous. *Baccus*, 367 S.C. at 48, 625 S.E.2d at 220.

Analysis

Foundation Testimony of Expert's Experience Was Not Unduly Prejudicial

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009).

Here, the background information establishing the expert's foundational knowledge of street culture and language was not unduly prejudicial. While the witness's experience was obtained during years as a gang investigator and courses about gangs, neither the State nor the expert ever alleged during trial Petitioner was a member of a gang or affiliated with anyone in a gang. The foundation information provided during *voir dire* was not itself evidence, but simply established the expert's qualifications. The expert's testimony during direct examination was limited to helping the jury understand particular words Petitioner used in text messages to his co-defendant and a friend and was not unfairly prejudicial under either case law or Rule 403. *See* Rule 403 (providing relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value); *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176 (explaining unfair prejudice meant a tendency to suggest a decision on an improper basis). Further, the trial court

gave lengthy and specific limiting instructions to the jury prior to and after the expert's testimony explaining to the jury gang affiliation was not an issue at trial and could not be considered by jurors during deliberations, and explicitly stating Petitioner was not alleged to be involved in a gang. Any possible prejudice was cured by the instructions, which defense counsel did not object to at the time they were given. *See Myers*, 359 S.C. at 48, 596 S.E.2d at 492 (holding appellate courts give great deference to a trial court's decision regarding Rule 403 balancing determinations).

The expert never asserted Petitioner was affiliated with any gang, and the trial court was careful to give two thorough limiting instructions to the jury. Therefore, the testimony during *voir dire* was not unfairly prejudicial, and court did not err in allowing the witness to testify as an expert in street culture and language to help the jury better understand the evidence. The Court of Appeals properly found the trial court did not abuse its discretion. Certiorari should be denied.

Harmless Error

Even if the Court were to find an error, it was harmless beyond a reasonable doubt. As previously noted, the State presented a strong case against Petitioner. The jury heard evidence from Vonkeith Toland (Vonkeith), who knew Petitioner from multiple previous meetings, about Petitioner texting and calling him to set up a time to meet to look at a car. (R.pp.107-08; pp.117-18). Vonkeith also testified about seeing his brother's murder, being shot himself, and both Petitioner and his co-defendant threatening him with guns. (R.pp.120-31). Finally, investigators testified about connecting Petitioner to the crime, and the efforts by the suspects to cover-up their involvement by using burner phones and taking surveillance camera recording equipment when they left Vonkeith's home. (R.pp.33-34; pp.65-68; pp.72-77; p.80; p.198; p.166; p.182). The

preliminary information from the State's expert during *voir dire* establishing his qualifications could not have reasonably impacted the jury's verdict. *See Mizzell*, 349 S.C. at 333, 563 S.E.2d at 318-19 (listing the factors of a harmless error analysis, including the importance of the witness's testimony, the extent of cross-examination, and the overall strength of the State's case).

Therefore, while Respondent submits the trial court's ruling was not error, any alleged error was harmless beyond a reasonable doubt. Certiorari is not warranted on this issue.

CONCLUSION

For the foregoing reasons, Respondent submits Petitioner has failed to show the questions presented warrant certiorari review. The Court should deny the petition and let stand the opinion of the Court of Appeals affirming Petitioner's convictions.

Respectfully submitted,

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July 29, 2019.

RECEIVED
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM LEXINGTON COUNTY
R. Knox McMahon, Circuit Court Judge

Op. No. 2019-UP-146 (S.C. Ct. App. refiled June 5, 2019)

THE STATE,

Respondent,

v.

JUSTIN ANTONIO BUTLER,

Appellant.

Appellate Case No. 2019-001071

CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Return to Petition for a Writ of Certiorari on Appellant by depositing two (2) copies of the same in the United States mail, addressed to her attorney of record: Laura M. Caudy, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 29th day of July, 2019.

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