STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2019-UP-361 (S.C. Ct. App. Filed November 6, 2019)

2013-GS-23-04260;04261;04262;04263;04264

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

PETITIONER

APPELLATE CASE NO. 2020-000045

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

VICTOR R. SEEGER
Appellate Defender

LARA M. CAUDY
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEYS FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 13, 2019.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding the good faith exception applied when the state obtained Petitioner's cell phone records, including his cell site location information (CSLI), without a warrant and without properly complying with the Stored Communications Act, in violation of Petitioner's rights under the Fourth Amendment and his right to privacy under Article 1, Section 10 of the South Carolina Constitution, since the only alleged exigency was the investigation of a double homicide?

2.

Did the Court of Appeals err by holding the trial judge's error in admitting unreliable expert testimony concerning per call measurement data (PCMD), which is an estimate of the distance a cell phone is from a cell tower, was harmless when the evidence was extremely prejudicial to Petitioner and undoubtedly contributed to the verdict since it was the only evidence that placed Petitioner at or near the location where the murders occurred?

STATEMENT OF THE CASE

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

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

Neither Petitioner's DNA nor fingerprints were found in the Wells's house. R. 212, l. 20 – 213, l. 24. However, blood belonging to both Helen Wells and Gary Wells was found in Eric Cade's car, which was frequently driven by Petitioner. R. 469, l. 2 – 477, l. 21.

Curtis McLeod, an inmate who was incarcerated with Petitioner pretrial, testified as well. R. 498, l. 22 – 499, l. 20. He claimed Petitioner confessed to committing the murders. R. 501, l. 17 –

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

507, l. 6. McLeod was a career criminal with prior convictions for burglary, strong arm robbery, and distribution of drugs. At the time of trial, McLeod had both state and federal pending charges. The solicitor who prosecuted Petitioner promised to assist McLeod with his pending charges in exchange for his testimony against Petitioner. R. 510, l. 10 – 512, l. 7.

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

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

Petitioner timely filed a notice of appeal. After the record on appeal and final briefs were filed, oral argument was held before the Court of Appeals on March 14, 2018. By order filed January 17, 2019, the Court of Appeals directed the parties to serve and file supplemental briefs in light of the United States Supreme Court's holding in Carpenter v. United States, 138 S.Ct. 2206 (2018).

On February 15, 2019, the state filed the supplemental brief of respondent and on February 19, 2019, Petitioner filed his supplemental brief of appellant. In an unpublished opinion filed on November 6, 2019, the Court of Appeals affirmed Petitioner's convictions and sentence. State v. Rhodes, 2019-UP-361 (S.C. Ct. App. filed November 6, 2019); App. 1-8. Petitioner filed a petition for rehearing on November 21, 2019 requesting the Court of Appeals rehear his case. App. 9-16. The Court of Appeals denied the petition by order filed December 13, 2019. App. 17-18.

This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by holding the good faith exception applied when the state obtained Petitioner's cell phone records, including his cell site location information (CSLI), without a warrant and without properly complying with the Stored Communications Act, in violation of Petitioner's rights under the Fourth Amendment and his right to privacy under Article 1, Section 10 of the South Carolina Constitution, since the only alleged exigency was the investigation of a double homicide.

Relevant Facts

Petitioner moved pretrial to suppress his cell phone records, including the cell site location information (CSLI) and the per call measurement data (PCMD), obtained from Sprint and any testimony related to the records under the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution. R. 267, l. 25 – 268, l. 4.

Defense counsel explained that law enforcement obtained Petitioner's phone records from Sprint through 18 U.S.C. § 2702 of the Stored Communications Act (SCA), which allowed a provider to voluntarily disclose a subscriber's records to law enforcement if law enforcement had "a good faith belief that there is some exigent circumstance that risks danger, imminent danger to somebody's life and safety." Counsel stated that "law enforcement did provide an affidavit which indicated that was the case, and in turn they were provided the records [by Sprint]. The telephone company did choose to voluntarily disclose those." R. 103, l. 14 – 104, l. 2. The exigent circumstance listed by law enforcement to obtain Petitioner's records was "investigation of a double homicide." R. 270, ll. 13-16; R. 596.

Counsel argued there were no exigent circumstances that permitted a voluntary disclosure under § 2702. Before requesting Petitioner's records from Sprint, the South Carolina Law Enforcement Division (SLED) conducted a criminal profile and determined that "this was a

personal attack against the Wellses, that there was no broader danger to anyone else, that this was sort of a personalized thing." R. 213, l. 25 – 214, l. 6. Consequently, counsel maintained there was no "emergency involving danger of death or serious physical injury to any person" that required voluntary disclose of Petitioner's records under § 2702. He maintained that the "investigation of a double homicide" was not enough. R. 270, l. 13 – 271, l. 11.

Counsel argued law enforcement was required to obtain a court order for the records under 18 U.S.C. § 2703, "which governs compelled disclosures of subscriber information" and "call detail records." R. 269, l. 1 – 271, l. 2. He asserted, "[T]he government manipulated the cell phone companies in providing this information voluntarily by misrepresenting and exaggerating the exigency that did not exist. Therefore, the cell phone company was manipulated into acting at the government's behest. And that manipulation makes the cell phone company an agent of law enforcement, thereby triggering the Fourth Amendment." R. 271, ll. 3-11.

The state argued Petitioner had no "standing" under the Fourth Amendment to challenge law enforcement's acquirement of his phone records because he had "no contractual relationship with the phone company" since Eric Cade was the actual subscriber. R. 272, l. 23 – 273, l. 4.

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

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

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

Citing to Carpenter v. United States, 138 S.Ct. 2206 (2018), the Court of Appeals held Petitioner had a legitimate expectation of privacy in his physical location data compiled and stored by his wireless carrier, also known as cell site location information (CSLI), and could therefore challenge the seizure and admission of those records in his case. App. 4-5. Again relying on Carpenter, the court recognized that a search warrant supported by probable cause was required before law enforcement could obtain CSLI from a wireless carrier. Even though the police obtained Petitioner's CSLI without a warrant, the Court of Appeals held Carpenter did not require the exclusion of this evidence because the officers relied "in good faith" on the Stored Communications Act. App. 5 (citing United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018)). The court further held that the mere investigation of a double homicide in this case, with nothing more, presented an

exigent circumstance which allowed the police to obtain Petitioner's CSLI without a warrant. App. 4-5 (citing Carpenter, 138 S.Ct. at 2223).

Discussion

The Court of Appeals erred by ruling that the state had a good faith belief that there were exigent circumstances to obtain Petitioner's cell phone records without a warrant. The state had no reason to believe that the double homicide they were investigating posed a danger to a specific person or to the public at large. See R. 213, l. 25 – 214, l. 6. Accordingly, their belief that there were exigent circumstances to obtain Petitioner's CSLI and PCMD without a warrant was unreasonable.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466 U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

"Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." Weaver, 374 S.C. at 319, 649 S.E.2d at 482. The United States Constitution and the South Carolina Constitution provide that a search warrant may not issue except upon probable cause. U.S. Const. amend IV; S.C. Const. art. I, §10. South Carolina's search warrant statute permits a search warrant to search for and seize "property

constituting evidence of crime or tending to show that a particular person committed a criminal offense." S.C. Code Ann. § 17-13-140.

In United States v. Carpenter, 138 S.Ct. 2206 (2018), the United States Supreme Court was confronted with a case where law enforcement used the Stored Communications Act (SCA) to obtain from the defendant's wireless carrier historic information and data establishing the location of his cell phone for approximately one hundred and twenty-seven days. The Supreme Court held "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle" since "a cell phone—almost a feature of human anatomy—tracks nearly exactly the movements of its owner." Id. at 2218 (quoting Riley v. California, 573 U.S. 373, 385 (2014) (internal quotation marks omitted); See United States v. Jones, 565 U.S. 400, 430 (2012). "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." Id. The Court emphasized that "with access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years." Id.

After analyzing its prior precedent, the Court held that individuals maintain a legitimate expectation of privacy in the records of their physical movements as captured through cell site location information (CSLI). Id. at 2217. Accordingly, the Court concluded that gathering CSLI is a Fourth Amendment search and when police are collecting CSLI under these circumstances, the Fourth Amendment requires a search warrant supported by a judicial finding of probable cause. Id. Obtaining such information through the SCA is a direct violation of the Fourth Amendment.

Expectation of Privacy Under the Fourth Amendment

"The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" Carpenter, 138 S. Ct. at

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

The Supreme Court in Carpenter squarely rejected the application of the third-party doctrine to historical cell site location information. Id. at 2220. The Court reasoned, "Given the unique nature of the cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." Id. at 2217. Cell site location information is able to create a detailed chronicle of a person's physical presence compiled every day, every moment over a period of several years. See Id. at 2220. For these reasons, the Supreme Court ultimately held "that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI and that location information obtained from wireless carriers is the product of a search." Id. at 2117.

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

The state argued at trial and on appeal that Petitioner did not have an expectation of privacy because the actual subscriber of the cell phone was Petitioner's roommate, Eric Cade. The trial judge accepted this erroneous argument. However, it was undisputed that Petitioner was the exclusive user of this cell phone. It was his movements the phone was tracking, not Eric Cade's. Consequently, Petitioner had a legitimate expectation of privacy in the records obtained by law enforcement through the SCA.

A Warrant is Required to Obtain CSLI Under to the Fourth Amendment

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

"[E]ven though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Id. at 2222 (citing Kentucky v. King, 563 U.S. 452, 460 (2011)) (internal quotation marks and alterations omitted). "Such exigencies include the need to pursue a

fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." Id. at 2223 (citing King, 563 U.S. at 460). The Supreme Court made clear that while the police must get a warrant when collecting CSLI to assist in a criminal investigation, this requirement does not limit their ability to respond to an ongoing emergency. Id. The Court emphasized that lower courts "have approved warrantless searches related to bomb threats, active shootings, and child abductions. Id.

Petitioner's Fourth Amendment rights were violated when law enforcement failed to get a warrant supported by probable cause, and ultimately obtained his cell phone records through § 2702(c)(4). This section of the SCA authorized cell phone service providers to disclose, without a warrant, "a record or other information pertaining to a subscriber to or a customer of service . . . to a governmental entity, if the provider, *in good faith*, believes that *an emergency involving danger of death or serious physical injury to any person* requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4) (emphasis added). This subsection of the SCA is similar to the exigent circumstances exception to the warrant requirement outlined above.

However, there were no exigent circumstances present in this case to circumvent the warrant requirement, or to obtain the records pursuant to § 2702(c)(4). On the "exigent circumstances request" form submitted to Sprint to obtain Petitioner's cell phone records, Investigator Howard claimed the exigent circumstance requiring disclosure was the investigation of a double homicide that occurred on October 2, 2012 with an active suspect. R. 596. Howard did not allege there was "an emergency involving danger of death or serious physical injury to any person" and there was in fact no such danger. Consequently, law enforcement did not properly comply with § 2702(c)(4). Moreover, an investigation of a double homicide with an active suspect is not an exigent circumstance permitting law enforcement to circumvent the warrant requirement. Investigators knew this was a targeted attack on the Wellses and that there was no risk to the general public.

Because law enforcement violated Petitioner's Fourth Amendment rights by obtaining his phone records without a warrant and without properly complying with the SCA, and because no exception to the warrant requirement applies, the Court of Appeals should have suppressed the records and any related evidence. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); See also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).

Good Faith Exception

The "good faith" exception avoids the exclusion of the results of a warrantless search where the police conduct an objectively reasonable search based upon binding decisional law, or in reasonable reliance on an applicable statute, even if that statute is later held to be unconstitutional. See Davis v. United States, 564 U.S. 229 (2011) and Illinois v. Krull, 480 U.S. 340 (1987). The good faith exception does not apply in this case because law enforcement did not act in good faith when it obtained Petitioner's cell phone records through § 2702(c)(4) of the SCA. Again, this subsection of the act authorized providers to disclose, without a warrant a subscriber's records, "if the provider, *in good faith*, believes that *an emergency involving danger of death or serious physical injury to any person* requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4) (emphasis added). Investigator Howard claimed the exigent circumstance requiring disclosure under the Act was the investigation of a double homicide with an active suspect. However, Howard knew or should have known this did not satisfy § 2702(c)(4) because it was *not* "an emergency involving danger of death or serious physical injury to any person." Law enforcement knew this was a targeted attack against the Wellses and there was no risk to the general public.

In its opinion, the Court of Appeals relied on United States v. Chavez, 894 F.3d 593 (4th Cir. 2018), where the Fourth Circuit held the good faith exception to the warrant requirement allowed the state to obtain Chavez's cell phone records without a warrant. Id. at 608. However, the Court of Appeals failed to consider the surrounding circumstances in Chavez which distinguishes it from the present case, such that the officers here had no such good faith belief of an "ongoing emergency."

The most important distinction between this case and Chavez is the subsection of the Stored Communications Act relied on by law enforcement to warrantlessly obtain the CSLI. Id. at 608. In Chavez, the officers applied for and received a court order pursuant to § 2703. Id. Section 2703 allowed the police to compel the disclosure of the records if it offered "specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are *relevant and material* to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (emphasis added). However, in the present case, the state relied on § 2702, which required the police to show there was an emergency involving danger of death or serious physical injury to any person. The exigency needed to obtain an individual's phone records pursuant to § 2702 is the same type required to invade a home without a warrant. See Carpenter, 138 S.Ct. at 2222. Consequently, the standard to obtain the records pursuant to § 2702 is much higher than the standard required pursuant § 2703.

Many jurisdictions have held the good faith exception applied in situations like Chavez, where the government secured a court order pursuant to § 2703 before it obtained a suspect's cell phone records without a warrant. In such cases, the government had properly complied with the Stored Communications Act, which was still constitutional at the time, by obtaining a court order after showing the relevancy and materiality of the evidence sought. See U.S. v. Ashburn, 76 F. Supp. 3d 401 (E.D. N.Y. 2014); U.S. v. Ferguson, 508 F. Supp. 2d 7 (D.D.C. 2007); U.S. v. Warshak, 631 F.3d 266 (6th Cir. 2010). However, in this case, law enforcement did not properly

comply with the Act since it acted pursuant to § 2702 and alleged an exigency that simply did not exist.

Another distinction between this case and Chavez is the evidence of likely future criminal activity by Chavez that was not present in Petitioner's case. Chavez, 894 F.3d at 598-599. The police knew Chavez was part of MS-13, a large and dangerous criminal organization. Id. Chavez's involvement in a litany of crimes, as well as the participation of many other dangerous criminals, allowed the police to present enough information to obtain a *court order* for Chavez's phone records. Id. at 608.

Here, the investigators had no reason to believe that the at large suspect of the double homicide created an "ongoing emergency." See R. 213, l. 25 – 214, l. 6. Again, law enforcement knew the crime committed was personal in nature, limited to the Wellses. Accordingly, the investigators understood the perpetrator was *not* a threat to the public such that the case did not present an "ongoing emergency" at the time they requested Petitioner's cell phone records.

The exigent circumstance relied on by the state to obtain Petitioner's cell phone records was based solely on the serious nature of the crime committed. R. 270, l. 13 – 271, l. 11. The Court of Appeals cited U.S. v. Takai, 943 F. Supp. 2d 1315 (D. Utah 2013) in an attempt to explain how the investigation in the present case, on its own, presented an "ongoing emergency." App. 5. However, the Court of Appeals again failed to consider the differences in the investigation in Takai from the investigation in this case such that the case is inapplicable.

In Takai, the officers were investigating a string of armed robberies and a shooting at local convenience stores in Utah. 943 F. Supp. 2d at 1317-1318. After examining the surveillance footage of the armed robberies, investigators identified the perpetrator as Takai. Id. Gang unit investigators were brought in because Takai was known to participate in gang activity and was "considered to be armed and dangerous." Id.

Investigators made an emergency application under § 2702 to "ping" Takai's cell phone in order to track his movements in real time, in part due to the "violent nature" of the crime. Id. at 1318. However, and much more importantly, "gang unit detectives ... informed [the state] that [Takai] *was known to be violent and believed to be currently armed and dangerous...* [and] believed [that Takai] may be *in the process of preparing for or undertaking further such violent robberies.*" Id. (emphasis added). It was that legitimate fear of insipient criminal activity that made the warrantless tracking of Takai permissible. Id. This is an important distinction in Takai that is not present in Petitioner's case. In Takai, the officers knew Takai was likely to continue to commit the string of violent robberies *before* warrantlessly tracking him via his cell phone.

The crime alleged in Petitioner's case did not have any of the accompanying factors that were present in Takai which made the warrantless tracking of Takai proper. The Court of Appeals held that, because of the violent nature of the crime alone, officers were under a good faith belief that an "ongoing emergency" existed. App. 5. However, the dangerous nature of the crime was not the only factor that led the officers in Takai to have a good faith belief that an "ongoing emergency" existed. Takai, 943 F. Supp. 2d at 1318.

Here, the investigators had no knowledge of Petitioner's identity until after obtaining his cell phone records, and even after obtaining the records there was no reason to believe Petitioner would commit further crimes, unlike in Takai. See R. 213, l. 25 – 214, l. 6. Moreover, after its investigation in this case, law enforcement determined this was a targeted attack on the Welles and the perpetrator did *not* present a further threat to anyone else. R. 213, l. 25 – 214, l. 6.

The investigators in this case attempted to circumvent the warrant requirement by manipulating Petitioner's cell phone service provider to voluntarily disclose Petitioner's records. Not only did the state fail to obtain a search warrant, it also failed to properly comply with the

Stored Communications Act by obtaining a court order under § 2703. This conduct violated Petitioner's rights under the Fourth Amendment and his state constitutional right to privacy.

Accordingly, the differences in the facts in this case from Chavez and Takai, the exaggerated "exigency" presented by the state, and the state's prior knowledge that no such exigency existed, are evidence that the Court of Appeals erred when it held that state's warrantless taking of Petitioner's cell phone records under 18 U.S.C. § 2702 was done in good faith and that exclusion of the records was not necessary.

Respectfully, this Court should grant certiorari to review the Court of Appeals' opinion holding law enforcement acted in good faith when it obtained Petitioner's phone records without a warrant and without properly complying with the Stored Communications Act.

2.

The Court of Appeals erred by holding the trial judge's error in admitting unreliable expert testimony concerning per call measurement data (PCMD), which is an estimate of the distance a cell phone is from a cell tower, was harmless when the evidence was extremely prejudicial to Petitioner and undoubtedly contributed to the verdict since it was the only evidence that placed Petitioner at or near the location where the murders occurred.

Relevant Facts

Petitioner moved pretrial to exclude expert testimony from Special Agent Richard Fennern of the Federal Bureau of Investigations (FBI) concerning evidence of the estimated location of Petitioner's cell phone at various points in time surrounding the murders. Specifically, Petitioner objected to Fennern's testimony about the per call measurement data (PCMD), which is an estimate of the distance a cell phone is from a cell tower, as unreliable. R. 91, l. 25 – 92, l. 4.

The trial judge held a pretrial hearing on Petitioner's motion. The judge qualified Fennern, who is a member of the FBI's Cellular Analysis Survey Team (CAST), as an expert in historical call detail analysis. Petitioner did not object to his qualifications. R. 13, ll. 10 – 22; R. 90, ll. 24 – 25.

PCMD "is additional information Sprint began providing law enforcement a few years back regarding distance measurements from how far the phone is away from the tower when the transmission happens." R. 27, ll. 10 – 15. Fennern explained that PCMD is used by engineers at Sprint to help the company understand "their network capacity" and where cell phones are being used within their network "for planning decisions." R. 27, ll. 18 – 21. It is based on the amount of time in nanoseconds it takes the radio frequency, which travels at the speed of light, to travel from the cell tower to the cell phone and back. This figure is then used to calculate a distance from where the phone is located to the tower. R. 29, ll. 8 – 14. Fennern admitted PCMD has an error rate of approximately two hundred and forty-three meters. R. 29, ll. 15-19. Fennern further admitted

that there are variables that can affect the accuracy of PCMD. For example, if the telephone is "buried in a building" there will be "a slight variation in how long it takes that signal [radio frequency]" to reach the telephone and travel back to the tower "because there's obstacles in the way." R. 30, ll. 6-22.

The solicitor's office provided Fennern with cell phone records for Petitioner, including the subscriber information, the call detail records, and the PCMD. R. 378, l. 16 – 382, l. 24; R. 392, l. 9 – 395, l. 22. The Solicitor's Office also informed Fennern of the dates and locations relevant to the investigation. Specifically, Fennern was provided with the following addresses: 10 Terramont Drive, which is the location of the murders; 14 South Vance Street, which was Shirley Rogers' residence; 8205 Glen Forest Drive, which was where Petitioner was living at the time, and 101 Verdae Boulevard, which is the location of a BI-LO grocery store. R. 400, l. 3 – 402, l. 5.

Fennern testified about the location of Petitioner's phone at certain times on the night of October 1, 2012 and during the early morning hours of October 2, 2012, and the alleged distance of Petitioner's phone from the tower based on the PCMD provided by Sprint. R. 44, l. 20 – 45, l. 24. Most significantly, Fennern claimed that at 10:45 pm and 11:02 pm, Petitioner's phone communicated with towers consistent with the phone being at or near 10 Terramont Drive, which is the Wells' residence where the murders occurred. R. 44, l. 20 – 45, l. 24. At 10:45 pm, Petitioner's phone was allegedly 1.97 miles from the cell tower. At 11:02 pm, Petitioner's telephone was allegedly 1.88 miles and 1.89 miles from the cell tower. R. 45, ll. 11-24. The PCMD was supposedly accurate up to .01 of a mile.

On cross-examination, Fennern admitted that call detail records are not designed to be used by law enforcement. They are created by telecoms in the regular course of business for billing and network performance purposes. R. 55, ll. 1-13. Fennern does not create any new data. He merely relies on data and information provided by the cell phone provider to map out the location of a

phone based on the location of the towers utilized by the phone. Fennern admitted that the tower utilized by a phone is not always the closest tower to the phone. Instead, the phone utilizes the tower with the "strongest and clearest signal." R. 55, l. 20 – 56, l. 8.

Moreover, Fennern acknowledged that PCMD reports provided by Sprint contain a disclaimer which states, "Sprint Nextel will not guarantee the accuracy of the location information." R. 67, ll. 17-20. The disclaimer indicates that many variables affect the accuracy of the measurements contained in the PCMD. R. 67, ll. 4-16. Fennern further acknowledged that the manager of subpoena compliance along with other record custodians at Sprint "advised that they cannot testify to the accuracy of the PCMD data as it is only a rough estimate." R. 69, l. 6 – 70, l. 2.

Petitioner called Thomas Slovenski in support of his motion. Slovenski was qualified as an expert in historical cell phone analysis. R. 77, ll. 8-20. He was employed by various law enforcement agencies for over fifteen years before he became a private investigator. He owns and operates Cellular Forensics, LLC in Greenville and is certified in mobile forensics and historical call analysis. R. 72, l. 11 – 73, l. 20. He received extensive training at Purdue University and has over seventeen thousand hours of training. R. 76, ll. 17-18.

Slovenski testified that PCMD is "very inaccurate" and that it should not be relied upon. He explained, "Sprint actually says that their records are inaccurate in the PCMD realm. They won't testify to them." R. 8, ll. 13 – 24. Slovenski reached out to Sprint a few months before Petitioner's trial and a senior technical analyst told him Sprint "do[es] not guarantee the accuracy of the distance or latitude, longitude at all." This Sprint analyst admitted a representative of Sprint would testify that "those records are inaccurate." R. 80, l. 25 – 81, l. 14.

Defense counsel moved to exclude Fennern's expert testimony concerning PCMD. He argued that under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), this scientific evidence is unreliable and inadmissible. R. 90, l. 16 – 91, l. 24. He asserted that there are no peer reviewed

studies analyzing the accuracy of PCMD and that such studies are impossible. There was no way for experts to determine the accuracy of PCMD because the way in which it is calculated and determined is unknown. PCMD is a "closely guarded trade secret by the telecom companies," including Sprint. R. 90, l. 16 – 91, l. 24.

After considering the factors outlined in Council, the trial judge found the testimony concerning PCMD to be reliable and admissible. R. 95, l. 20 – 98, l. 20; R. 106, l. 10 – 110, l. 3.

The Court of Appeals ultimately held the trial judge abused his discretion by admitting Fennern's expert testimony concerning PCMD, which estimated the specific location of Petitioner's cell phone around the time of the murders, because the state "presented insufficient evidence of the reliability of the science underlying PCMD." App. 6-7. However, the Court of Appeals held the error was harmless "in light of the more general CSLI placing Rhodes's [Petitioner's] phone within the general vicinity of the murders and the additional evidence of Rhodes's guilt. App. 6-7.

Discussion

While the Court of Appeals properly held the trial judge abused his discretion by admitting Fennern's inherently unreliable expert testimony concerning PCMD, it erred by holding this error was harmless.

"The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (quoting State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993), *overruled on other grounds by* Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001)). "Whether an error is harmless depends on the circumstances of the particular case." Id. (quoting State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008)). "Error is harmless when it 'could not reasonably have affected the result of the trial.'" Id. (quoting Mitchell, 378 S.C. at 316, 662 S.E.2d at 499); See State v. Key, 256 S.C. 90,

180 S.E.2d 888 (1971)). Engaging in a harmless error analysis, "requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." Id. at 389-390, 728 S.E.2d at 475 (citing State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002)).

In State v. Brewer, 411 S.C. 401, 403, 768 S.E.2d 656, 657 (2015), Brewer appealed his convictions for two counts of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime, which stemmed from two separate shootings at a night club. Brewer argued the admission of an audiotape of his interrogation, where the interrogating officers referenced and quoted many eyewitnesses who identified Brewer as the shooter, was improper and unfairly prejudicial. Id. at 406-407, 768 S.E.2d at 659. This Court held the trial judge abused his discretion when he allowed the state to play the recording of Brewer's interrogation because the evidence was hearsay, offered solely to prove the truth of the matter asserted. Id.

The Court conducted a harmless error analysis as to the error's effect on Brewer's convictions for both shootings separately. In so doing, the Court emphasized, "The improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of trial." Id. at 408-409, 768 S.E.2d at 660 (quoting State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011)) (internal quotation marks and alternations omitted). The Court determined the admission of the hearsay statements was harmless as to the first shooting, but not harmless as to the second. Id. at 409-410, 768 S.E.2d at 660.

Concerning the first shooting, there were multiple eyewitnesses who claimed Brewer shot his gun inside the nightclub. Id. at 409, 768 S.E.2d at 660. However, in regard to the second shooting, which occurred outside the nightclub later that night, there were multiple shooters and no one could definitively conclude Brewer was among them. Id. at 409-410, 768 S.E.2d at 660.

Accordingly, this Court held the erroneous admission of the investigators' hearsay statements during Brewer's interrogation reasonably could have affected the outcome of Brewer's trial on the charges related to the second shooting and was not harmless. Id. at 410, 768 S.E.2d at 660.

In the present case, the Court of Appeals held the trial judge's error in allowing Fennern to testify as an expert about PCMD without presenting sufficient evidence of its reliability was harmless "in light of the more general CSLI placing Rhodes's [Petitioner's] phone within the general vicinity of the murders and the additional evidence of Rhodes's guilt." App. 7.

The additional evidence of Petitioner's guilt, according to the Court of Appeals, was that Shirley Rogers had "repeated contact" with Petitioner's phone around the time of the murders, the decedents' blood was found in Eric Cade's car, and that Curtis McLeod, a jailhouse snitch, testified Petitioner confessed to his involvement in the murders while the two were incarcerated at the same facility. App. 7. The Court of Appeals maintained the testimony from McLeod was particularly impactful because McLeod "recalled information unlikely to be known without Rhodes's confession." App. 7.

However, the Court of Appeals overlooked the inconsistencies in McLeod's testimony which undercut its effect on Petitioner's trial. McLeod gave a recorded statement on July 1, 2015 where he told Investigator Hammett that he saw newspaper clippings about the crime. However, at trial, McLeod claimed Petitioner's confession was his only source of information. R. 513, l. 12 – 518, l. 24. This discrepancy undermines the Court of Appeals' assertion that McLeod testified to things "unlikely to be known without [Petitioner's] confession." App. 7. Moreover, in McLeod's initial statement, he alleged the male decedent was the individual who was shot. However, at trial, he claimed it was the female decedent who was shot. R. 513, l. 12 – 518, l. 24.

McLeod was a career criminal with prior convictions for burglary, strong arm robbery, and distribution of drugs. At the time of trial, McLeod had both state and federal pending charges. The

solicitor who prosecuted Petitioner promised to assist McLeod with his pending charges in exchange for his testimony against Petitioner. R. 510, l. 10 – 512, l. 7. Consequently, McLeod had a lot to gain from his testimony in Petitioner's case. See State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014) (holding that self-interested testimony was "inevitably suspect"). Notably, McLeod's testimony was the only direct evidence of Petitioner's guilt.

The erroneously admitted PCMD evidence was not cumulative to Fennern's testimony about Petitioner's CSLI. See State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (holding that improperly admitted evidence "which is merely cumulative may be viewed as harmless"). Fennern's testimony about Petitioner's PCMD narrowed down Petitioner's alleged location on the night of the murders to within two miles of the Wells's home. Consequently, it was crucial in the state's case against Petitioner. R. 44, l. 20 – 45, l. 24.

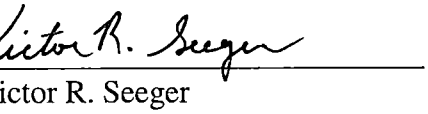
While the CSLI showed Petitioner's phone pinged off a specific cell tower, the PCMD pinpointed the exact location of the phone, with the alleged precision of one hundredth of a mile. R. 44, l. 20 – 45, l. 24. The PCMD was extremely prejudicial, and much more impactful than the CSLI evidence, because it essentially placed Petitioner at or near the Wells's house at the time of the murders. The CLSI merely showed Petitioner's phone was somewhere within a nearby cell tower's entire signal radius.

Thus, the erroneously admitted expert testimony placing Petitioner's phone at or near the Wells's house likely changed the outcome of Petitioner's trial. See Tapp, 398 S.C. at 389, 728 S.E.2d at 475. Accordingly, the admission of Fennern's testimony regarding Petitioner's PCMD was harmful and undoubtedly prejudiced Petitioner. Respectfully, this Court should grant certiorari to review the Court of Appeals' opinion holding the erroneous admission of Fennern's testimony was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the questions presented.

Respectfully Submitted,



Victor R. Seeger
Appellate Defender

Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 28th day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2019-UP-361 (S.C. Ct. App. filed 12/13/2019)
2013-GS-23-04260;04261;04262;04263;04264

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jonathan Donell Rhodes, #343817, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 28th day of January, 2020.

Victor R. Seeger

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of January, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029.