

STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

*On Petition for Writ of Certiorari to the Court of Appeals*

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes, Circuit Court Judge

Appellate Case No. 2020-000045

Unpublished Opinion No. 2019-UP-361

THE STATE .....RESPONDENT

v.

JONATHAN D. RHODES .....PETITIONER

**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## **PETITIONER'S QUESTION PRESENTED**

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, 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?

Did the Court of Appeals err by holding the trial judge's error in admitting unreliable expert testimony concerning per call measurement data, 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?

## **RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED**

Did the Court of Appeals correctly affirmed the trial's court's decision regarding the denial of Petitioner's motion to suppress the evidence regarding the pinging of cell phone towers as to the location of his phone since law enforcement acted objectively and in good faith, and did the Petitioner's relinquishment of his cell phone to law enforcement meant he no longer had an expectation of privacy?

Did the Court of Appeals err in determining that the State did present insufficient evidence of the reliability of the science of PCMD but that error was harmless since there were sufficient evidence to convict?

## STATEMENT OF THE CASE

Petitioner and his co-defendant forced their way into the home of Helen and Gary Wells, armed with a .32 caliber pistol. Once inside they went to the kitchen, grabbed knives, and stabbed both victims multiple times. The Wells' died due to these stab wounds. After these murders Petitioner and his co-defendant stole jewelry and quickly left the premises. Petitioner was later charged with two counts of murder, two counts of kidnapping, burglary in the first degree (burglary 1<sup>st</sup>), and possession of a weapon during the commission of a violent crime. This case was called for trial before the Honorable John C. Hayes, III on November 30, 2015. The State was represented by Thirteenth Circuit Solicitor the Honorable W. Walter Wilkins and Deputy Solicitor Betty Strom, Petitioner was represented by Jake Erwin and Stuart Sarratt.

This trial came to a conclusion on December 3, 2015. Petitioner was found guilty by a jury of his peers to two counts of murder, burglary 1<sup>st</sup>, possession of a weapon during the commission of a violent crime, and two counts of kidnapping. At the conclusion of this jury trial the trial judge sentenced Petitioner to a term of incarceration for the remainder of his natural life for both counts of murder and burglary 1<sup>st</sup>; and five years incarceration for possession of a weapon during the commission of a violent crime. Since he was already sentenced for murder he received no sentence for kidnapping.<sup>1</sup>

After conviction, Petitioner immediately filed a notice of appeal before the South Carolina Court of Appeals. Within his appeal Petitioner alleged that the trial court erred in allowing into evidence cell phone data without a warrant in violation of his fourth amendment

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<sup>1</sup> Whoever shall unlawfully seize, confine, inveigle, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and upon conviction must be imprisoned for a period not to exceed thirty years unless **sentenced for murder as provided in Section 16-3-20**. S.C. Code Ann. §16-3-910 (2018)(emphasis added)

rights. Petitioner also argued that the trial court erred in allowing expert testimony concerning per call measurement data (PCMD) where there were insufficient data revealing its reliability.

On November 6, 2019, the South Carolina Court of Appeals issued an unpublished opinion affirming the decision of the trial court. Within their opinion the Court of Appeals decided that investigators acted in good faith in obtaining these records, and Sprint's voluntary disclosure of these cell phone records was appropriate given the violent nature of these murders. The Court of Appeals also determined that though they agreed with Petitioner that the State did provide insufficient evidence revealing the reliability of the science of PCMD, they were convinced that this error was harmless in light of the more general cell-site location information (CSLI) placing of Petitioner's phone within the general vicinity of the murders and additional evidence of Petitioner's guilt. *State v. Rhodes*, 2019 WL 5797528 (2019)

Petitioner now request a writ of certiorari seeking review from this Court. Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court rule 242, so this petition should be subject to dismissal. The return of Respondent follows.

### **WHY CERTIORARI SHOULD BE DENIED**

Pursuant to rule 242 of the South Carolina rules of the Appellate Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered:

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;

- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

#### Rule 242 SCACR

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly affirmed the decision of the trial court, which should not be subject to review.

Petitioner argues that law enforcement obtaining his phone records without a search warrant violates the Fourth Amendment of the United States Constitution and Article I Section 10 of the South Carolina Constitution. Petitioner contends that obtaining these records violated the United States Supreme Court decision of *Carpenter v. U.S.*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). Respondent argues that since these records were obtained prior to *Carpenter* and since they were obtained in good faith the exclusionary rule does not apply. Respondent will also argue a matter not raised by the Court of Appeals. The fact that Petitioner gave law enforcement his phone should be considered a consent to search, thereby waiving any right to privacy. He gave his phone to law enforcement after they made the request to Sprint; however, the phone records should be admissible pursuant to the doctrine of inevitable discovery.

Respondent further believes that this writ should not be granted due to the fact the Court of Appeals was correct, the reliability of PCMD was harmless error. With the amount of mounting evidence against Petitioner, the inclusion of this evidence did not affect the final result. There was more than adequate evidence provided proving his guilt beyond a reasonable doubt. The Court of Appeals was correct in determining this error as being harmless and affirming the decision of the trial Court.

## STATEMENT OF FACTS

On October 1, 2012, Petitioner along with his co-defendant Ms. Shirley Rogers force their way into the home of the victims armed with a .32 caliber pistol. Ms. Rogers was the victim's housekeeper and was recently accused of stealing money from Mrs. Wells. Once inside they grabbed knives from the victim's kitchen and stabbed both of them repeatedly. Mr. Gary Wells had a total of forty-four (44) stab wounds and cuts to his body, with approximately half of those delivered anti-mortem and the rest post-mortem. (R. p. 246 lines 12-21). A stab wound penetrating through his groin into his femoral artery was the cause of death. (R. p. 247 lines 2-5). Mrs. Wells had wounds to her leg, shoulder, and head. She also two gunshot wounds, one to the cheek that went through and penetrated her shoulder, and another in her left arm. (R. p. 251 lines 4-15). Ms. Wells had a total of seventy (70) anti-mortem wounds, twenty-seven (27) of them were lacerations that possibly coming from a heavy cylindrical object maybe a pistol. (R. p. 254 line 3 – p. 255 line 5). Her knife wounds were located on her thighs, hands, and torso. The fatal wounds were the ones that punctured her lungs and liver. (R. p. 256 lines 3-9). The pathologist determined that she had more than eleven (11) stab wounds delivered to her face post-mortem. (R. p. 257 lines 23-24).

Two days later on October 3, a neighbor by the name of Douglas Doughty was helping his father-in-law with yardwork. Defendant Rogers appeared requesting assistance. She informed them that as she looked through the window saw what appeared to be the foot of a man lying on the floor. Mr. Doughty went next door pounded on the backdoor and received no answer. He went to the front door and discovered it was unlocked. He went inside and down a hallway with Ms. Rodgers following behind him. He discovered the body of Mr. Wells lying in his office, he realized that he could possibly be dead so he decided they both should leave the house and call

the authorities. At that time Ms. Rodgers asked about Mrs. Wells so Mr. Doughty decided to go back into the house to find her whereabouts. Mr. Doughty found Mrs. Wells in a bedroom at the end of the hall. He left the house and contacted the authorities. A deputy with the Greenville County Sheriff's Department responded. He along with a member of emergency medical service personal entered the house and determined that both Mr. and Mrs. Wells were deceased. The deputy then close off the house, and called in investigators and crime scene technicians in order to process the scene.

The authorities discovered there were two newspapers dated October 2<sup>nd</sup> and 3<sup>rd</sup> found in the Wells' driveway. (R. p. 141 line 20 – 142 line 20). They determined that they were probably killed on the night of October 1. In the house investigators found a bloody telephone resting on a chair by the front door with its back removed. There was also bloody footprint impressions at different angles on the carpet leading down the hallway. There were blood on the doors of the bedroom and office. There was also blood located on the light switch to both rooms. On the floor near Mr. Wells were the contents of his wallet. The objects from his wallet appeared to be strewn about the room, and on a chair an opened jewelry box and a bloody knife. On the bed near where Mrs. Wells' body lay there were a box of checks and deposit slips. A pillow near her body was so saturated in blood the color of the pillow could not be determined. Investigators found shell casings and a live .32 caliber round in the room. A projectile was also recovered from a baseboard in the bedroom wall. The bloody knives found was part of a set of knives that was located in the kitchen.

During their investigation the authorities determined that Ms. Rodgers was a part of an ongoing investigation of identity theft involving Mrs. Wells. This investigation was initiated by BB&T bank upon receiving a complaint from Mrs. Wells. Two individuals from the bank

witnessed an argument between Mrs. Wells and Ms. Rodgers regarding the theft. That caused Ms. Rodgers to be the prime suspect, investigators began to check into her background including obtaining her cell phone records. Once they retrieved these records they noticed one frequent number was called to Ms. Rodgers cell phone. They decided to call this number and a man answered. The investigator asked if he knew a Shirley Rogers the man denied knowing her and hung up. They called back and the call went straight to the voicemail of a person who referred to himself as "Really Real." Upon investigating further it was determined that "Really Real" was the Petitioner. It was later determined that he was the boyfriend of Ms. Rodgers.

On October 17, 2012, investigators submitted a request with Sprint cell phone company for cell phone records. Under the Stored Communications Act (SCA) in order for Sprint to voluntarily give away this information without a warrant law enforcement had to reveal to Sprint the existence of an exigent circumstance. As an exigent circumstance law enforcement cited that they were investigating a double homicide with the suspects still at large. Records reveal that the phone was registered to an Eric Cade, Petitioner's roommate and mentor. Investigators got in touch with Mr. Cade who agreed to meet with them at the police station. Mr. Cade and Petitioner met with investigators on October 22. (R. p. 197 line 4). During this meeting they both gave investigators their cell phones. (R. p. 197 lines 12-15) Mr. Cade he had a close relationship with Petitioner, he brought him into his house to live, and added a cell phone to his plan for him to use. He also allowed Petitioner to use his vehicle while he was at work.

Mr. Cade testified that on the night in question Petitioner had his car informing him that he was going to a friend's house. After several hours he began to worry and became upset because Petitioner was not returning his calls nor texts. Petitioner did not return to their apartment until after 2:00am. At that time Petitioner told Mr. Cade that he was at his friends

Tyrone's house who Mr. Cade didn't know. Petitioner later changed his story stating that he was at his friend Brian's house whom he did know. After the men met with the authorities he questioned Petitioner again regarding any possible involvement in this matter. Petitioner informed him that he was at Ms. Rodgers house and fell asleep. The Petitioner then told Mr. Cade that Ms. Rodgers must have took his car with his cell phone inside because when he woke it was pointing in a different direction. (R. p. 316 lines 6-10)

Mr. Cade gave the authorities permission to search his vehicle. During this search they found the victim's DNA on the gear shift, front side passenger seat, and the center console. After this Petitioner was arrested and charged with two counts of murder, two counts of kidnapping, burglary 1<sup>st</sup>, and possession of a weapon during the commission of a violent crime.

Following his arrest Petitioner was detained at a correctional institution with an inmate named Curtis McLeod. They both worked together in the cafeteria. Mr. McLeod testified during the Petitioner's trial concerning information given to him by the Petitioner about his case.

Petitioner informed Mr. McLeod that he and Ms. Rhodes were in a relationship and that she had a grudge with her former employees. On the night in question he picked her up and drove her over to the Wells' house. Mr. McLeod testified that Petitioner told him that while he hid, Ms. Rodgers got into an argument with Mrs. Wells at their front door. Petitioner and Ms. Rhodes then forced themselves inside, separated the victims and began cutting them. Mr. McLeod also testified that Petitioner told him that they shot Mrs. Wells to make sure she was dead. They left the premises, disposed of the gun, and then went back to Ms. Rodgers house to clean up.

On December 3, 2015, Petitioner was convicted by a jury of his peers of each offense. Upon conviction he appeared before the Honorable John C. Hayes, III who sentenced Petitioner

to a term of incarceration for the remainder of his natural life for the offense of murder and burglary 1<sup>st</sup>; five years for possession of a weapon during the commission of a violent crime; but no sentence for kidnapping due to his conviction for murder. The trial Court ordered that these sentences are to be served concurrently.

### ARGUMENT

- 1. The Court of Appeals correctly affirmed the trial's court's decision regarding the denial of Petitioner's motion to suppress the evidence of the pinging of the cell phone towers as to the location of his phone since law enforcement acted objectively and good faith, the Petitioner also willingly relinquished the phone to law enforcement thereby no longer having an expectation of privacy.**

Petitioner argues that the trial Court and the Court of Appeals erred in allowing cell site location information in accordance with the (SCA). This information was collected in the ordinary course of business by Sprint in efforts to maintain and regulate its network. Law enforcement was allowed to obtain these records lawfully and in good faith and the court lawfully allowed this information into evidence. Petitioner also voluntarily gave his cell phone to law enforcement thereby, consenting to the searching of the phone and all records held by Sprint pertaining to its location, as well as all calls, and texts made. Since the Petitioner gave investigators access to his phone, it would have been inevitable that the locations of that phone during its activity would have been discovered in the ordinary course of the investigation. The records found falls under the doctrine of inevitable discovery.

The investigators made a request for phone location records of Petitioner's phone around the time the offense was committed pursuant to the SCA. The SCA generally prohibits disclosure of the contents of any communications stored electronically. A court order is required; however,

pursuant to the act a service provider can voluntarily disclose customer records, including CSLI.

Section 2702(c)(4) allows the following exception on the release of information:

to a governmental entity, if the provider, in good faith believes that an emergency involving danger or 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).

Law enforcement investigators submitted a form requesting this information stating that the “investigation of a double homicide that occurred on October 2, 2012 with active suspect,” (R. p. 596) as the exigent circumstance. Petitioner argued that he posed no threat to anyone other than Gary and Helen Wells at the time law enforcement made this request. They used as an example a South Carolina Law Enforcement Division criminal profile that determined, “this was a personal attack against the Wells, that there was no broader danger to anyone else, that this was sort of a personalized thing.” There is no mentioning in the record that the killer was not dangerous and will not kill again. During the motion to exclude this evidence the Court stated that, “he didn’t say on the stand that there was no exigency. He said that it was localized and personalized to the Wellses.” (R. p. 271 line 25 – p. 272 lines 1-2). The trial judge also correctly pointed out, “I don’t think law enforcement, based on the opinion of another agency, has to accept that.” (R. p. 272 lines 8-9). At the time law enforcement requested the records from Sprint, police suspected but did not know the extent of Ms. Rodgers involvement nor did they know the involvement of the Petitioner. However, they did know that there was a gruesome murder of an elderly couple and the persons involved were still at large. Looking at the crime scene law enforcement found the brutality in two different rooms. This made them aware that two individuals were responsible for these gruesome murders, both of whom were not yet in custody.

Petitioner has also made no showing that the application for the records pursuant to Section 2702 was done in bad faith. All of the information provided was truthful. Law enforcement investigators informed Sprint that this was an ongoing double homicide investigation. It was not unreasonable to determine that people who committed two murders in such a gruesome fashion was dangerous to the public at large. So it was in good faith that they obtain this information which falls out of the exclusionary rule. The balancing approach that has evolved in various contexts – including criminal trial – “forcefully suggest(s) that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.” *U.S. v. Leon*, 468 U.S. 897, 909, 104 S.Ct. 3405, 3413 (1984), *quoting, Illinois v. Gates*, 462 U.S. 213, 255, 103 S.Ct. 2317, 2340 (1983). Law enforcement was in pursuit of individuals who had conducted two murders in a horrific and gruesome fashion. It is reasonable to assume they could possibly hurt or kill someone else in the community if they were not apprehended.

Petitioner argues that law enforcement acted in bad faith because they asserted to Sprint that the exigent circumstance was the double homicide. They attest that a SLED psychological profile stated that the individual was targeting only the Wells so that person would not be a danger to the rest of society. The trial court was correct in determining that the Greenville County Sheriff's Department does not work for SLED. They are a separate law enforcement agency that has a duty to protect the citizens of Greenville County. If they think that the people who have committed this double homicide was dangerous there exist exigent circumstances to obtain phone records and location information. This was done in good faith, so the trial court was

correct in allowing this information into evidence. The Court of Appeals also correct in affirming the decision of the trial court.

Greenville law enforcement was aware that Ms. Rodgers knew the victims, and may have had a particular grudge, but her accomplice did not. Petitioner's assertion of the killer(s) as having posed no threat to anyone else in the community downplays the scope of the gruesome violent killing that had just transpired. Petitioner revealed no evidence of any bad faith that transpired within the request given to Sprint by law enforcement. So the request followed the guidelines of the SCA, and was admissible pursuant to case law.

Within his petition, the Petitioner strictly relies on the United States Supreme Court case of *Carpenter v. U.S.*, 138 S.Ct. 2206, 201 L.Ed2d 507 (2018) in which the Court ruled that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through CSLI. However, this request was made in 2012 and *Carpenter* was decided in 2018. The Court of Appeals was correct in deciding that their conduct was reasonable; therefore, the receipt of this information and the use of this information was also lawful. The exclusionary rule's "sole purpose is to deter future Fourth Amendment violations." Thus, when investigators "act with an objectively 'reasonable good-faith belief' that their conduct was lawful," the exclusionary rule will not apply. *U.S. v. Chavez*, 894 F.3d 593, 608 (2018), quoting, *Davis v. United States*, 564 U.S. 229, 236-37, 131 S.Ct. 2419, 180 L.Ed2d 285 (2011). This request was made in 2012 some six years before *Carpenter* was decided. Even in *Carpenter* the Court allowed the release of this information without a warrant if the request was done during an ongoing emergency.<sup>2</sup> Law enforcement informed

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<sup>2</sup> "While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency." *Rhodes*, 2019 WL 5797528, quoting, *Carpenter*, 138 S.Ct. at 2223.

Sprint in good faith that exigent circumstances exist. The exigent circumstances exception list states 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). The information disclosed was relating to an emergency. Law enforcement informed Sprint that they were currently working on a double homicide whose perpetrators were not in custody. Within the form they mentioned him as an “active suspect” (R. p. 596). That means that there is a possibility he can harm others as he did the Wells’. Petitioner argues that there were no danger due to the Wells’ being the only targets, however, the fact that these murders occurred in such a horrific fashion and the perpetrators were not yet apprehended makes this an exigent circumstance. If he was in custody when the request was made then Petitioner would have a valid argument as to the lack of danger; therefore, this not being an exigent circumstance. However, he was still at large in the community; therefore, the danger exist. Another person could have been harmed or killed if he was not apprehended immediately.

The Court of Appeals cited the case of *U.S. v. Takai*, 943 F.Supp.2d 1315 (2013) in support of law enforcement’s request for the voluntary disclosure of the cell phone records given the violent nature of these murders.<sup>3</sup> The Petitioner wishes to differentiate *Takai* to the current case. Petitioner fails to realize that exigency is determined by the investigative agency and if it the request is reasonable then the good faith exception applies. *See, Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed. 364 (1987)(extended good faith exception to searches conducted

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<sup>3</sup> Police’s warrantless tracking of suspect’s cellphone through GPS “pinging” technology pursuant to Stored Communications Act’s (SCA) emergency provision fell within scope of exigent circumstances exception to Fourth Amendment’s warrant requirement, where gang unit detective familiar with defendant had positively identified defendant as a prime suspect in a robbery and violent shooting of clerk in the face at point blank range earlier that day, and detective who applied for GPS pinging data has been informed that defendant was known to be violent and was believed to be currently armed and dangerous, and reasonably believed that additional robbery might be imminent. *Takai*, 943 F.Supp.2d at 1314

in reasonable reliance on subsequently invalidated statutes); *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed. 34 (1995)(Good faith exception applied when police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees.) Petitioner argues that the Court of Appeals erred in deciding that because of the violent nature of the crime alone officers had a good faith belief that an ongoing emergency existed. It should be considered reasonable that a person at large who has committed two homicides is dangerous. It was at the utmost importance that he be apprehended. If the information held by Sprint could assist in this apprehension then it was lawful that this information be volunteered to law enforcement.

The Respondent will also argue that Petitioner consented to the search of his phone and all records pertaining to its carrier due to the fact he willingly gave his phone to law enforcement. On October 22, 2012, Petitioner and Mr. Cade went to law enforcement in order to answer questions. At that time they both gave their phones to law enforcement as was testified by Investigator Hammett (R. p. 197 lines 12-14) and Investigator Howard. (R. 357 lines 24 – p. 358 line 1). It is equally well settled that one of the specifically established exceptions to the requirements of both warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043 (1973). Once Petitioner relinquished his phone he waived any right to privacy. At that time law enforcement was allowed to search any records that was available including any location data that was held by Sprint that could have determined his whereabouts at the time the crime was committed.

The phone was given to law enforcement on October 22, the records request made on October 17. The Respondent argues that this information would have been eventually discovered now that law enforcement had possession of these phones, so under the doctrine of inevitable

discovery the waiver of his right to privacy exist. The purpose of the inevitable discovery rule, i.e. that evidence would ultimately or inevitably been discovered notwithstanding constitutional violation, is to block setting aside conviction that would have been obtained without police misconduct. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984). It would have been safe to assume that law enforcement would have gotten these location records with the waiver of any right to privacy by Petitioner as soon as he relinquished his phone to law enforcement. Pursuant to SCA, a provider may divulge the contents of a communication with lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service. 18 U.S.C. §2702(b)(3). So pursuant to this act the relinquishment of this phone gave law enforcement the consent to request and obtain these records. There would have been no need to reveal exigent circumstances in order for Sprint to voluntarily relinquish these records. This information would have been eventually obtained by law enforcement so the exclusionary rule does not apply. Ultimate or inevitable discovery exception to the exclusionary rule is adopted and if prosecution can establish by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means then the deterrence rationale has so little basis that the evidence should be received. *Nix*. 467 U.S. at 444.

**2. The Court of Appeals did not err in determining that the introduction of PCMD was harmless error since there exist other sufficient evidence to convict.**

During trial the prosecutor presented evidence from FBI special agent Richard Fennern regarding PCMD. The Petitioner argued that this science was unreliable so it should have not been allowed as evidence, and the trial court erred in allowing this evidence before jury over his objection. The Court of Appeals agreed but determined that allowing this evidence was harmless error. There was sufficient evidence to convict even though this evidence was admitted.

During trial Agent Fennern explained PCMD to the Court. As part of his training Agent Fennern met with cell phone engineers to get an understanding of how their network is built and how it is maintained and how their records are created. (R. p. 21 lines 2-5) Sprint created a PCMD report which was additional information Sprint began providing to law enforcement. PCMD relates to distance measurements revealing how far a phone is away from a tower when the transmission occurs. (R. p. 27 lines 10-15). It is used by engineers to help understand their network capacity and where cell phones are used within the network for planning decisions. (R. p. 27 lines 17-21) Agent Fennern explained to the court that PCMD records identify the cell tower which would have a number associated with it, and this number would relate only to that specific tower. (R. p. 21 lines 14-19) Agent Fennern did admit that the PCMD error rate was approximately two hundred and forty three to two hundred and forty-four meters. (R. p. 28 lines 15-18)

In response to Agent Fennern's testimony Petitioner called to the stand Mr. Thomas J. Slovenski who is the owner of Cellular Forensics a mobile phone forensics firm which specializes in cell tower examinations and spyware discovery. He testified that PCMD is very inaccurate. He also testified that he had spoken to a Sprint representative and he was informed that they do not guarantee any accuracy of the distance or latitude, longitude at all. (R. p. 81 lines 5-7) Because of the testimony of the inaccuracy of PCMD the Court of Appeals decided that the State failed to present sufficient evidence as to the reliability of PCMD and the trial court did err in allowing this testimony into evidence. The Court of Appeals however correctly decided that this error was harmless beyond a reasonable doubt in light of the more general CSLI evidence that was provided placing Petitioner in the general vicinity of the crime scene.

Agent Fennern testified that records from Sprint revealed that not only the number called and the duration of those calls but also the cell tower used for that communication. This provides a general location where the phone was when the call was made or received. (R. p. 6 lines 23 – p. 7 lines 2) They also look at historical events as the location of where the murder occurred to determine if a phone was consistent in being in that area or not. (R. p. 7 lines 13-17) Agent Fennern testified that call detail records document the interaction with the cell phone company, cell phone and tower. This creates a record kept by the cell phone company. (R. p. 18 lines 15-19). They can then match this information with the cell phone towers provided by the cell phone company. (R. p. 18 lines 20-24) Towers are located through a website created for law enforcement where cell phone companies update the location of their cell towers. There is a running list of cell towers going back ten years. (R. p. 19 lines 2-5).

There is testimony that Petitioner's cell phone was near the scene of the murders due to the tower pings that occurred during the possible times of the murders. These location pings along with other corroborating evidence proved Petitioner's guilt. The determination of the Court of Appeals that allowing the PCMD into evidence was harmless error was correct and should not be subject to review by this Court.

When determining if an error is harmless jurisprudence requires not to question whether the State proved their case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict. *State v. Trapp*, 398 S.C. 376, 390, 728 S.E.2d 468, 475 (2012). There exist no definite rule that governs harmless error, rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. "Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Trapp*, 398 S.C. at 389, 728 S.E.2d at 475, quoting, *State v. Key*, 256 S.C. 90, 180 S.E.2d

888 (1971). In reviewing the entire record it is clear Petitioner committed this offense beyond a reasonable doubt. The admission of this evidence did not result in the Petitioner being found guilty since there was other overwhelming evidence proving his guilt.

There were corroborating evidence relating to the CSLI that was found in the Sprint records and testimony about the whereabouts of the Petitioner on the night of the murder. According to the CSLI records the Petitioner's phone was pinged at the cell tower near Verde Boulevard between 8:24 and 8:28 pm. This is the street where the Bi-Lo is located and Mr. Cade testified that he and the Petitioner went to Bi-Lo that night then returned home. (R. p. 302 lines 5-16) Mr. Cade further testified that the Petitioner was gone a long period of time and he attempted to call the Petitioner around 11:00 that night but got his voicemail. (R. p. 304 line 16 – R. p. 305 lines 18) CSLI records show that the Petitioner received two calls within forty or fifty seconds of each other at 11:02 at a signal at a tower near Terramont Drive the street where the victim's lived. There was also testimony that the phone calls lasted from four to five seconds. This is evidence of someone pushing their phone to voicemail since these calls ended so quickly. (R. p. 414 lines 14-16). That evidence refuted the story of the Petitioner who expressed Mr. Cade that he went to sleep at Ms. Rodgers home and she took his car with his phone inside. He had to have his phone with him to send it to voicemail that quickly.

Then there were the texts at 11:44, 11:45, 11:47 from Mr. Cade which the towers reveal that the phone was near South Vance Street the street where Ms. Rodgers lived. (R. p. 414 lines 23-25). This corroborates the testimony of Mr. McLeod who testified that the Petitioner told him that after the murder they went to Ms. Rodgers house to clean up. (R. p. 506 line 22 – R. p. 507 line 1)Then the testimony stated that the tower pings revealed activity at 2:03, 2:04 and 3:58

near Glen Forest Dr. which matched Mr. Cade story when the Petitioner got back home. (R. p. 306 lines 15-16)

The testimony also revealed that the pings from Mr. Cade's phone showing his phone activity at 10:57, 58, 59, and 11:02 located at Glen Forest Dr. matching his testimony that he was constantly attempting to contact Petitioner to find out the whereabouts of his car. His phone hits the tower again at 11:45, 46, and at 11:55 to 12:25 more evidence of him attempting to contact the Petitioner matching his testimony. (R. p. 303 line 12 - 304 line 12)

The car was owned by Mr. Cade, as per his testimony he gave the authorities consent to search. (R. p. 310 lines 14-17). There was the DNA evidence found inside the car that the Petitioner was driving the night of the incident. Investigator David Gamble testified that he took suspected blood swabs from the interior front passenger side door, front passenger side seat, buttons on the center console, lower side passenger seat, and gear shift. (R. p. 437 lines 6 – p. 443 line 2) Dr. Jagannadha Kandala DNA expert from the Department of Public Safety testified that both knives found at the scene had equal portions of DNA from both victims. She also testified that DNA on the gear shift belonged to both victim's and Petitioner, that the DNA from the side passenger seat belonged to both victims, that blood swab from the center console was a mixture of Mrs. Wells, Mr. Wells, Mr. Cade and Petitioner, another swab from the center console was DNA of both victims and Petitioner. (R. p. 469 line 2 – p. 475 line 15). There was never any testimony or evidence presented that revealed the victims ever knew Petitioner or Mr. Cade, so they would have never ridden in that vehicle. The only way their DNA was found in the vehicle driven by Petitioner the night of the murder was from traces of blood coming from the murder scene.

There was also the testimony of Mr. Curtis McLeod who served time with Petitioner prior to trial. He worked with Petitioner in the prison cafeteria. At the time of his testimony Mr. McLeod had a substantial criminal record including convictions for strong armed robbery, failure to stop for a blue light, possession of cocaine, and was serving a sentence for drug distribution. He also had pending federal felony charges for felon in possession of a weapon. (R. p. 497 line 7- R. p. 498 line 14). A circuit solicitor has no control of a federal case, so the solicitor could not make any promises regarding sentencing, Mr. McLeod's pending charges were out of his jurisdiction, so he received no benefits for his testimony.

Mr. McLeod testified that he worked with Petitioner at the cafeteria every day from 4:30am to 11:00am. (R. p. 499 lines 16-25) He stated that there was a lot of down time so they were able to talk and Petitioner told him about his case. (R. p. 500 lines 16-17) He stated that the Petitioner informed him that he was dating this older women and that she had a grudge with the people that she was working with because she got into trouble for stealing money. Mr. McLeod then testified that Petitioner informed him that they went to the house and as he hid Ms. Rodgers talked to Mrs. Wells. An argument ensued, and they forced themselves in the house armed with a .32 caliber pistol. Petitioner then informed him that they went into the kitchen grabbed some knives, stabbed them to death, then shot Ms. Wells to make sure she was dead. He finally stated to Mr. McLeod that they left the house and proceeded to Ms. Rodgers house to clean up. (R. p. 501 line 24 – p. 507 line 1). This matched the tower pings locating his phone at the location near Ms. Rodgers residence.

The Petitioner argues that Mr. McLeod cannot be trusted due to his prior record and pending charges. However he testified to things that only the killer would know. That the knives came out the kitchen, that a .32 caliber handgun with a pearl handle was used, that only Mrs.

Wells was shot, and that Mr. Cade needed his car back so he could go to work the next morning. Mr. McLeod testified he is from Hartsville (R. p. 496 line 9) the incident occurred in Greenville, a good distance away. He would not have heard about any of this in any report from the media. It is also up to the jury to believe Mr. McLeod. If the jury believed the truthfulness of his testimony and used this to determine Petitioner's guilt beyond a reasonable doubt that is all that was needed for a conviction.

The Court of Appeals determined that allowing evidence regarding PCMD is harmless error due to the enormous amount of evidence revealing that the Petitioner committed this crime beyond a reasonable doubt. The pings from the cell towers revealing that the Petitioner's phone was in the area of the murder when it possibly occurred, the corroborating evidence from Mr. Cade regarding the phone calls and the pings revealing the locations of Petitioner's phone, the DNA evidence found inside the minicooper driven by the Petitioner the night of the murder, and the testimony of Mr. McLeod detailing evidence that was told to him by the Petitioner of things only a person at the scene of the crime would know. All of this evidence reveals that the Petitioner guilt could have been proven beyond a reasonable doubt even without the PCMD evidence. Therefore, the inclusion of this evidence was harmless error, the Court of Appeals made the correct decision which should not be reviewed by this Court.

**CONCLUSION**

Based on the foregoing reasons, Respondent submits Petitioner has failed to show that the question presented warrants certiorari review. The Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court.

Respectfully submitted,

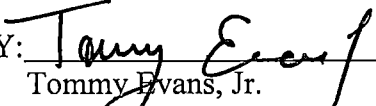
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February 27, 2020.

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
FEB 27 2020  
S.C. SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals  
APPEAL FROM GREENVILLE COUNTY  
The Honorable John C. Hayes, Circuit Court Judge  
Appellate Case No. 2020-000045

Unpublished Opinion No. 2019-UP-361

THE STATE .....RESPONDENT

v.

JONATHAN D. RHODES ..... PETITIONER

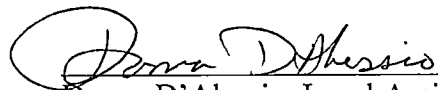
**PROOF OF SERVICE**

I, Donna D'Alessio, an employee of the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record:

Lara M. Caudy, Esq.  
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I further certify that all parties required by Rule to be served have been served.

This 27th day of February, 2020.

  
Donna D'Alessio, Legal Assistant to  
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