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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2020-000049

The State of South Carolina — Respondent

Vs.

Royal Williams, — Appellant,

INITIAL BRIEF

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TABLE OF CONTENT

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT'S DENIAL OF APPELLANTS MOTION TO SUPPRESS THE USE OF APPELLANT'S DNA AND ANY PRODUCT BASED UPON THE USE OF APPELLANT'S DNA AT TRIAL TAKEN AS A RESULT OF A FEBRUARY 4, 2019 SEARCH WARRANT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE WARRANT VIOLATED *ILLINOIS V. GATES* AND *FRANKS V. DELAWARE*?

2. WHETHER THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE USE OF APPELLANT'S SPRINT CELL PHONE CALL RECORDS AND CELL TOWER LOCATION INFORMATION AND ANY PRODUCT BASED UPON SUCH INFORMATION PRODUCED AS A RESULT OF A FEBRUARY 19, 2016 SEARCH WARRANT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE WARRANT LACKED PROBABLE CAUSE AND THE WARRANT WAS UNCONSTITUTIONAL IN VIOLATION OF THE FOURTH AMENDMENT?

3. WHETHER THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE USE OF SPINT CELL SITE LOCATION INFORMATION AND ANY PRODUCT BASED UPON THE USE OF THE CELL SITE LOCATION INFORMATION AT TRIAL WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE INFORMATION WAS SECURED FROM SPRINT WITHOUT A WARRANT IN VIOLATION OF *CARPENTER V. UNITED STATES*?

4. WHETHER THE TRIAL COURT'S DECISION TO ISSUE A *SCHMERBER* ORDER FOR THE COLLECTION OF APPELLANT'S DNA WAS ERROR OF LAW AND AN ABUSE OF DISCRETION WHERE THE ORDER FAILED TO COMPLY WITH CONSITUTONAL GUIDELINES?

5. WHETHER THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR DIRECTED VERDICT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION WHERE THE FACTS AND CIRCUMSTANTES ONLY CREATED SUSPICION AND FAILED TO RISE TO THE LEVEL OF EVIDENCE OF GUILT?

6. WHETHER THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR DIRECTED VERDICT WAS AN ABUSE OF DISCRETION BECAUSE THE CIRCUMSTANTIAL EVIDENCE ONLY RAISED SUSPICION AND DID NOT RISE TO THE EVIDENCE OF GUILTY?

STATEMENT OF THE CASE

On March 3, 2016 Appellant was served with an arrest warrant for Murder. Appellant was indicted on one count of Murder on or about April 6, 2017 in Florence County, South Carolina.

Public counsel for Appellant was appointed by the trial court on or about March 23, 20217. Appellant retained private counsel on or about June 2, 2017, and a motion for discovery was filed on behalf of Appellant on or about June 22, 2017. On February 5, 2019, new counsel was retained, and the case was scheduled for trial the term of June 2019 in Florence Count.

On June 13, 2019 the trial court heard pre-trial motions, and a jury was selected on July 17, 2019. The trial court continued the trial on motion of Respondent and dismissed the jury on the same day of selection. A motion for a *Schmerber* order by Respondent was held on June 18, 2019 and granted.

On September 9, 2019 Appellant's case was call to trial. On September 14, 2019, the jury found Appellant guilty of murder. On September 24, 2019 Appellant filed a motion for new trial.

STATEMENT OF THE FACTS

On January 23, 2016 around 11 pm Sherilyn Joseph (hereinafter "Joseph) was found dead on the floor of her apartment by her mother in Florence County, South Carolina. Investigators with Florence County Sheriff's Office (hereinafter "FCSO") collected DNA samples from the headrest and interior door handle on the passenger side of Joseph's vehicle, which was parked in front of her apartment, and a used condom found in the trashcan of her apartment. FSCO Investigators obtained a search warrant for Joseph's cell phone call history, which reveal a large volume of communication between Joseph's phone and a cell phone number belong to

Appellant. Investigators were able to identify Appellant and began investigation him as a potential suspect.

FCSO investigators learned that an unidentified person (hereinafter "unknown guest) was pickup by a taxi from Joseph's apartment approximately eight hours before her body was discovered. Investigators were able to track down the taxi driver that pick up the unknown guest from Joseph's apartment. The taxi driver, and two other passengers in the taxi when the unknow guest was picked up, were shown photographs of Appellant. The taxi driver and the other passengers indicated that Appellant had similar feature as the unknown guest, but could not identify him as the unknown guest because the was wearing a hoodie cap over his head during the taxi ride. The driver dropped the unknown guest off on Donaraile Street, in Darlington, South Carolina.

The investigators learned that Appellant was associated with two addresses within close proximate to Donaraile Street; 225 Plum Street, Darlington, South Carolina, which is the home of an acquaintance of Appellant where had occasionally visited in the past; an 326 Orange Street, Darlington, South Carolina, a trailer park where Appellant's brother lived. Appellant sought and received a search warrant, dated February 19, 2016 to secure Appellant's cell phone call history and cell site location information from Sprint, his wireless carrier. In March 2016, Appellant was serve warrant for murder.

On February 4, 2019 Investigators sought and received a search warrant for taken of DNA by way of buccal swab. Appellant filed a motion to suppressed the use of his DNA taken as a result of the February 4, 2019 buccal swab warrant. The motion was heard on June 13, 2019. On June 17, 2019 the case was called to trial and a jury was selected. Prior to the start of the trial, the Respondent requested a continuance which was granted, and requested a *Schmerber*

hearing which was scheduled the next day. A *Schmerber* order granted and Appellant's DNA was collected by buccal swab a second time.

On September 9, 2019, Appellant case was called to trial. Prior to the start of the trial, Appellant made may pre-trial motions, including motion to suppress evidence collected as a result of the the February 4, 2019 buccal swab search warrant; motion to suppress evidence resulting from the February 19, 2016 Sprint search warrant for Appellant's cell phone records and cell site location information; motion to suppress evidence collected and produced as a result of the June 18, 2019 *Schmerber* order; motion to suppress the use of Appellant's Sprint cell site location information without a search warrant in 2019. All Appellant's motions were denied by the denied.

LAW AND ARGUMENT

I. THE TRIAL COURT'S DENIAL OF APPELLANTS MOTION TO SUPPRESS THE USE OF APPELLANT'S DNA AND ANY PRODUCT BASED UPON THE USE OF APPELLANT'S DNA AT TRIAL TAKEN AS A RESULT OF A FEBRUARY 4, 2019 SEARCH WARRANT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE WARRANT VIOLATED *ILLINOIS V. GATES* AND *FRANKS V. DELAWARE*

A. February 4, 2019 Search Warrant

i. *Illinois v. Gates*

"A search may be issued only upon a finding of probable cause." *State v. Baccus*, 625 SE2d 216, 221, 367 SC 41 (SC 2006), *citing*, *State v. Bellamy*, 519 SE2d 347, 348, 336 SC 140 (SC 1999). "The task of the issuing magistrate [in evaluating the existing of probable cause] is simple to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit [of a search warrant] before him [or her], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 US 213, 238,

103 SCt 2317 (1982). In further expanding the law, the *Gates* Court reviewed and reaffirmed the president the Court established in *Nathanson v. United States* and *Aguilar v. Texas*:

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."

Id at 239. "The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." *State v. Dupree*, 354 S.C. 676, 684, 583 S.E.2d 437 (S.C. App. 2003). "In determining the validity of the [search] warrant, a reviewing court may consider only information brought to the magistrate's attention." *Id.*

In *State v. Smith*, the South Carolina Supreme Court considered the sufficiency of the affidavit in a search warrant that stated the following:

> That on May 12th at approximately 11:45 p.m. Reginald Jerome Smith went into the Master Inn located at 1468 Savannah Hwy., Charleston, S.C. and he then robbed the manager at knife point. Smith has been staying at The Host of America Room 216 since Jan. 1, 1988 and there is every reason to believe the weapon and clothes used in the robbery will be located in the room. This information was confirmed in person by Sgt. Sherman on 05/13/88.

392 S.E.2d 182, 183, 301 S.C. 371 (S.C. 1990). On appeal, the *Smith* Court stated that, "[t]his affidavit is defective on its face. An affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause." *Id.* (Citation omitted). "Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. '[H]is action cannot be a mere ratification of the bare conclusions of others.'" *Id*., *citing*, *Illinois v. Gates*, 562 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527, 549 (1983) (sic). "Here, the affidavit sets forth no facts as to why police believed Smith robbed the Master Host Inn." *Id.*

In *State v. Baccus*, the affidavit of a search warrant seeking to search Baccus's residence stated that:

> At the time of the suspects (sic) arrest at 2616 Alligator Rd. in Florence County, by Investigators Barry Prosser and Von Dean Turbeville with Florence and Marion County Sheriff's Office. A pile of what appeared to be clothing was lying on the ground beside the residence smoldering in plain view, and a vehicle the suspect was apparently driving was located approximately ¼ of a mile from this residence with blood stains on the inside and outside of the vehicle.

625 S.E.2d 216, 221-222, 367 S.C. 41 (S.C. 2006). Reviewing the affidavit, the *Baccus* Court stated that, "[t]his affidavit fails to set forth any facts as to why police believed Appellant committed the crime. The language in the affidavit lacks specificity and contains conclusory statements. We concluded the issuing magistrate did not have a substantial basis to find probable cause for a search warrant of Appellant's residence, and the trial court erred in admitting evidence seized pursuant to the search warrant." *Id*. at 222.

In the case before the Court, the affidavit of the February 4, 2019 search warrant stated as follows:

> On 01/23/2016 the Florence County Sheriff's Office (FCSO) responded to 3618 Century Drive, Apt. A, in Florence County, to investigate the homicide of Sherilyn Joseph, who had been shot in the head. The investigation revealed that Joseph had been in the company of Williams in the hours leading up to the discovery of her body in her home. The investigation further revealed that Williams had taken a taxi from Joseph's home just before her body was discovered by her mother, and that Joseph had expressed fear of Williams and that he was attempting to remove text messages and records of phone calls involving Williams from her cell phone the morning of her murder. The investigation of the crime scene revealed the presence of a condom which contained semen, from which a DNA profile of an unknown male was extracted. The DNA profile of Williams, obtained from the buccal swab of his inner cheek/mouth, would be compared to the DNA profile of the unknown male, developed from the condom found at the crime scene.

(Search Warrant, dated 02/04/2019). All the informative sentences in the affidavit of the search warrant was started with the phrase the "investigation" "revealed" and followed by conclusory

statements that instructed the judge of conclusions and findings reached by FCSO investigators. The affidavit failed to provide the issuing judge with the raw facts discovered by the investigation and the source of those raw facts so that the issuing judge may draw her own conclusions from the raw facts and assess the reliability of the source of that information. See, *Illinois v. Gates*, 462 US 213, 238, 103 SCt 2317 (1982); *State v. Smith*, 392 S.E.2d 182, 183, 301 S.C. 371 (S.C. 1990); *State v. Baccus*, 625 S.E.2d 216, 221-222, 367 S.C. 41 (S.C. 2006).

The good faith exception to the exclusionary rule is inapplicable where the affidavit in a search warrant provides the issuing judge with insufficient information upon which a substantial basis for probable cause can be made. *See, State v. Robinson*, 758 S.E.2d 725, 729-730, 408 S.C. 268 (S.C. app. 2014); *State v. Robinson*, 335 S.C. 620, 518 S.E.2d 269 (Ct.App.1999).

ii. *Franks v. Delaware*

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments give an accused the right in certain circumstances to challenge the veracity of a search warrant affidavit after the warrant has been issued and executed." *State v. Gore*, 758 S.E.2d 717, 720-721, 408 S.C. 237 (S.C. App., 2014); See also, *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). "This challenge may be based on false information being included in the search warrant affidavit or exculpatory material being omitted from the affidavit." *Id.*

Franks outlined a two-prong test for challenging the veracity of a search warrant affidavit. *State v. Gore*, 758 S.E.2d at 721. First, the challenger must allege specific "'allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof.'" *Id.* at 721, *quoting*, *Franks v. Delaware*, 438 U.S. 154, 171 (1978). The challenger

must prove the allegations of deliberate falsehood or reckless disregard for the truth of the statements included in the warrant affidavit, or the omission of exculpatory material from the affidavit, by a preponderance of the evidence. *Id*. at 721. If the first prong is meet, next the court must consider whether the remaining portion of the statement in the affidavit is sufficient to establish probable cause after excluding the false or misleading statements. *Id.* at 721. If not, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 721.

On June 10, 2019, Appellant filed a motion to suppress the use of his DNA and any other fruits stemming from the February 4, 2019 search warrant that resulted in the taking of his DNA for comparative analysis with other DNA evidence collected during the investigation. Attached to the motion as exhibits were the buccal swab search warrant, dated February 4, 2019, and the investigative report of Investigator Thomas McFadden (hereinafter "Inv. McFadden") of FCSO.

The affidavit of the DNA search warrant states that, "[t]he investigation revealed that Joseph (the victim) had been in the company of Williams (Appellant) in the hours leading up to the discovery of her body in her home." However, Inv. McFadden's report reveals that their attempts to identify the unknown guest that left the Joseph's apartment by taxi hours before the discovery of her body on the floor of her apartment was unsuccessful. (See, Rpt. of McFadden).

Inv. McFadden's report chronical law enforcement's attempts to identify the unknown guest. The report revealed the following information in law enforcement's possession at the time the February 4, 2019 buccal swab Search Warrant was obtained:

> 1. Inv. McFadden interview six of the Joseph's co-works who worked with her the day of her death. Collectively the co-workers stated that the Joseph told them she had a male friend waiting for her at her apartment upon her return home from work; when she woke up that morning she discovered the unknown guest deleting messages and call records between the two of them from her cell phone, and he washed the bed sheets and

slept in his clothing; however, none of the co-workers could identify the unknown guest when asked.

2. Inv. McFadden interview a taxi driver, and her other passengers, whom picked up the unknown guest from Joseph's apartment hours before the discover of her body; however, when shown a photograph of Appellant the taxi driver and her other passengers could not identify Appellant as the unknown guest they picked up at Joseph's apartment. The taxi driver described the unidentified passenger as having "good hair" pulled back in a "ponytail," which was inconsistent with Appellant's description. Appellant was bald.

3. A composite sketch was prepared of the unknown guest from a description giver by one of the other passengers in the taxi. According to Inv. McFadden's report, Appellant's grandmother said that it "looked like" her grandson when shown the composite sketch.

4. Inv. McFadden also search the GPS tracking history in the Joseph's phone which resulted in the discovery of three addresses which Appellant had some connection: 225 Plum Street, Darlington, South Carolina, which belonged to an acquaintance of Appellants where he occasionally visited; 326 Orange Street, Darlington, South Carolina, which was a trailer park where Appellant's brother lived; and 113 Westwood Court, Bennettsville, South Carolina, which was the address of Appellant's grandmother.

5. The taxi driver informed Inv. McFadden that she dropped the unknown guest off on a street within close proximate to the two Darlington, South Carolina street addresses taken from the GPS tracking history of the victim's cell phone.

Although there was circumstantial evidence that gave law enforcement reason to believe the unknown guest could have been Appellant; there was no definitive evidence of the identity of the unknown guest. If fact, there was exculpatory evidence mitigating the conclusion reached in the affidavit of the February 4, 2019 buccal swab, DNA search warrant that the unknown guest had been identified as Appellant: All six of Joseph's co-workers stated that she never identified the unknown person, or they could not recall her identifying him; the taxi driver and her other passengers could not identify Appellant as the unknown guest after shown a photograph of Appellant; the taxi driver gave a description of the unknown guest that was completely opposite of Appellant; the taxi driver and her other passengers stated that they could not definitively

identify the unknown guest because he had a hoodie cap pulled over his head which partially obscured their vision of the unknown guest.

Therefore, when the affidavit of the February 4, 2016 DNA search warrant definitively told the issuing judge Appellant had been identified as the unknown guest, and "Joseph (the victim) was in the company of Williams (Appellant) in the hours leading up to the discovery of her body in her home;" that "Williams (Appellant) had taken a taxi from Joseph's home just before her body was discovered by her mother;" that "Joseph (victim) had expressed fear of Williams (Appellant);" and that "he (Appellant) was attempting to remove text messages and records of phone calls involving Williams (Appellant) from her (victim) phone the morning of her murder," were all a reckless disregard for the truth at best and deceptive falsehoods at worst. Law enforcement knew that none of these statements had been conclusively established when they made those states definitively to the issuing judge, without qualification or providing the judge with contradicting or exculpatory evidence, so that the judge could have drawn his or her conclusions.

The good faith exception to the exclusionary rule is inapplicable where a judge's decision to issue a search warrant was based upon false and misleading information. *State v. Robinson*, 785 S.E.2d 355, 359-360, 415 S.C. 600 (S.C. 2016).

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE USE OF APPELLANT'S SPRINT CELL PHONE CALL RECORDS AND CELL TOWER LOCATION INFORMATION AND ANY PRODUCT BASED UPON SUCH INFORMATION PRODUCED AS A RESULT OF A FEBRUARY 19, 2016 SEARCH WARRANT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE WARRANT LACKED PROBABLE CAUSE AND THE WARRANT WAS UNCONSTITUTIONAL IN VIOLATION OF THE FOURTH AMENDMENT

A. Lack of Probable Cause

The affidavit in the Sprint Search Warrant stated:

> On 01/23/2016 the FCSO responded to 3618 Century Drive apartment A in Florence County, SC for a report of a deceased female. Deputies and Investigators located a deceased female later identified as one Sherilyn Joseph. Per the coroner's investigation the death was ruled a homicide. During the investigation the victim's phone was located within the crime scene. A check of the victim's phone records indicated that the victim had contact with the number 843-468-6516. A comparison on the victim's phone records to the victim's phone revealed that the number 843-468-6516 had been deleted or removed from the pone. The phone information is crucial to possibly identifying the possible suspect(s) in this case. It would also be helpful in compiling a time line of events leading up to and including the time of the murder. FCSO case number 2016-01-0542.

(Sprint Search Warrant, dated 04/19/2016). A Search warrant affidavit must provide the issuing judge with sufficient factual information to give the judge a substantial basis upon which to justify conclusions reached. *State v. Baccus,* 625 S.E.2d at 221 (SC 2006). Given the totality of all the information provided to the issuing judge, he or she must be able to make a common-sense determination, upon the veracity and knowledge of the affiant, that evidence of a crime will be found in the place sought to be searched. *Id.* As a part of that common-sense assessment, the issuing judge must be able to determine why the information or item sought to be seized is evidence connected to the crime. *Id.* (The Court found that the affidavit of the search warrant was insufficient because it failed to set forth facts explaining why police believed Baccus committed the crime, and the affidavit lacked specificity and contained conclusory statements), *see also, Stat v. Smith*, 301 S.C. at 373 (The court found the search warrant seeking to search the defendant's hotel room for evidence of a robbery lacked probable cause where the affidavit failed to explain why the affiant believed the defendant committed the robbery).

Here, the affidavit in the Sprint Search Warrant provided the issuing judge the following information: the victim was found dead, and her death was deemed a homicide by the coroner; the victim's cell phone was discovered at the scene of her death; a check of victim's cell phone revealed the victim had contact with the number 843-468-6516; and a comparison of the victim's

phone records to the victim's phone revealed the number 843-468-6516 had been deleted or removed phone the phone. Then, affiant stated the cell phone information sought in the search warrant, including the identity of the owner/subscriber, call history, and cell site location information associated with the phone number, would be "critical" in possibly identifying the "possible suspect(s)" in the murder case, and "helpful" in compiling a timeline of events leading up to and including the time of the murder.

However, as in *Baccus* and *Smith* the affidavit failed to go further and provide the issuing judge with any information in which she could understand why there was probable cause to believe the owner/subscriber (Appellant) of the deleted cell number was connected to Joseph's murder. We know that the Joseph's co-workers informed Inv. McFadden on the day of her death the Joseph told them that the unknown guest at her home hours before the discovery of her body had been deleting text messages and call history records between the two from her cell phone the morning of her death; however, this information was shared with the issuing judge. Theoretically, this information could have given the issuing judge a reasonable basis in which to believe that the owner/subscriber (Appellant) of the deleted phone numbers and the unknown guest could be the same individual.

B. Unconstitutional

South Carolina's search warrant statute states in pertinent part: "Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize … (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense…" SC Code of Laws Ann. § 17-13-140 (20016). "[A] warrant purportedly authorizing a search beyond the jurisdiction of the

issuing magistrate judge is void under the Fourth Amendment." *United States v. Henderson*, 906 F.3d 1109, 1117 (9th Cir., 2018)

The trial court's denial of Appellant motion to suppress the use of Appellant's DNA taken as a result of the February 19, 2016 buccal swab search warrant was an error of law and an abuse of discretion because the warrant was unconstitutional. The search warrant was issued by Florence County, South Carolina magistrate judge for the seizure of Sprint cell phone records and cell site location information which was located outside the County of Florence, and outside the State of South Carolina.

Even if a search warrant is found to be unconstitutional, the exclusionary rule may not work to exclude the use of evidence collected from the execution of the defective warrant if the law enforcement officers acquiring and executing the warrant acted in good faith. *United States v. Henderson*, 906 F.3d at 1117 (9th Cir. 2018). However, it can not be said that law enforcement acted in good faith herein where the face of the search warrant's instructs the officer acquiring the search and the officer executing the warrant that its authority to search and seize is limited to "premises in this County." (Search Warrant, dated February 19, 2016). The affidavit page of the search warrants begins a following:

> Personally appearing before me, one C. Collins, who being duly sworn, says that there is probable cause to believe that certain property subject to seizure under the provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located in the following premises in this County:"

(Search Warrant, dated February 19, 2016). The officer requesting the search warrant swore under oath that the search warrant complied with South Carolina's search warrant statute, in which the first paragraph to the statute limits the reach of a warrant to the county of the issuing magistrate, and specific require the requesting officer to give oath in the body of the warrant that the property to be search is located within the county of the issuing judge.

"In *Davis v. United States*, the United States Supreme Court stated that the exclusionary rule does not apply in cases where 'the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful.'" State v. Adams, 409 SC 641, 650, 763 SE2d 341 (S.C. 2014), *quoting*, *Davis v. United States*, 564 U.S. 229 238, 131 S.Ct. 2419, 2427, 180 L.Ed.2d 285 (2011), *quoting United States v. Leon*, 468 U.S. 897, 909, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). "The Davis court explained, '[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules.'" *Id*. (Citations omitted).

III. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE USE OF SPINT CELL SITE LOCATION INFORMATION AND ANY PRODUCT BASED UPON THE USE OF THE CELL SITE LOCATION INFORMATION AT TRIAL WAS ERROR OF LAW AND AN ABUSE OF DISCRETION BECAUSE THE INFORMATION WAS SECURED FROM SPRINT WITHOUT A WARRANT IN VIOLATION OF *CARPENTER V. UNITED STATES*

Individuals have an expectation of privacy in the cell site location information collected and stored by wireless service providers, and the "government must generally obtain a search warrant supported by probable cause before acquiring such records." *Carpenter v. United States*, 138 S. Ct. 2206, 2221, 201 L. Ed. 2d 507 (2018). "Although the 'ultimate measure of the constitutionality of a governmental search is 'reasonableness,'' … warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'" *Id.* "'[I]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.'" *Id.*, *citing*, *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

Section 17-13-140 is the law governing search warrants issued in State of South Carolina. SC Code of Law Ann. § 17-13-140 (2016). Section 17-13-140 unambiguously states that, "[a]ny

warrant issued hereunder shall be executed and return made only within ten days after it is dated." Code of Law Ann. § 17-13-140 (2016).

On February 19, 2016, Investigator Collins secured a search warrant to obtain the call history records and cell site location information for Appellant's cell phone number from Sprint. The Sprint warrant was executed on February 23, 2016 and the call history records and cell site location information was received via email from Spring on the same day. (See, Return, Sprint Search Warrant, dated 02/26/2016). In March 2019, over three years later, investigators discovered that the cell site location information received from Sprint on February 23, 2016 was the wrong cell site location information. Investigators contacted Sprint and requested the correct cell cite location information without securing another search warrant. In March 2019, Sprint provided the corrected cell site location information to FCSO investigators without a warrant.

The February 19, 2016 search warrant expired on March 1, 2016, ten days after its issuance. The corrected cell site location information requested and received by law enforcement over three years after issuance of the February 19, 2016 search warrant was warrantless and in violation of the Fourth Amendment. Furthermore, the language of the February 19, 2016 search warrant specifically limited the life of the search warrant to ten days. The warrant warned that, "[t]his Search Warrant shall not be valid more than ten days from the date of issuance." (Emphasis added) (Sprint Search Warrant).

Therefore, Appellant's cell site location information an any product based upon that information was improperly admitted into evidence, and testify from Respondent cellular phone expert regarding Appellant's location at the time of the victim's death was an error or law and an abuse of discretion. The error was not harmless, and was highly prejudicial, because the case

against Appellant was circumstantial and weigh heavily on Appellant's physical location to the victim's residence around the time of her death.

IV. THE TRIAL COURT'S DECISION TO ISSUE A *SCHMERBER* ORDER FOR THE COLLECTION OF APPELLANT'S DNA WAS ERROR OF LAW AND AN ABUSE OF DISCRETION WHERE THE ORDER FAILED TO COMPLY WITH CONSITUTONAL GUIDELINES

The leading cases in South Carolina on the law of the government's procuring evidence from a person's body are *In re: Snyder* and *State v. Register*, 419 S.E.2d 771, 308 SC 534 (SC 1992). Any court order issued in compliance with Section 17-13-140 that allow the government to procure evidence from the interior of the human body constitutes a search and seizure under the Fourth Amendment; therefore, must comply with both statutory and constitutional guidelines. *State v. Register*, 419 S.E.2d at 772 (SC 1992). An intrusion into the human body is offensive to the principles of dignity and privacy protected by the Fourth Amendment; therefore, is limited to "minor intrusions beyond the body's surface only in stringently limited conditions…" *Id*. at 773.

Before issuing a *Schmerber* order for the penetration of the human body, a court must first show there is probable cause to believe a crime was committed and probable cause it was committed by a particular suspect. *Id.* If the probable cause requirements are met, next the government must show a "clear indication that material evidence relevant to the question of the suspect's guilt will be found," and that "the method used to secure this evidence is safe and reliable." *State v. Register*, 419 S.E.2d at 773 (SC 1992). The final step in the *Schmerber* process is a balancing testing:

> The court must balance the seriousness of the crime, the importance of the evidence to the investigation, and the unavailability of alternative, less intrusive means of obtaining the evidence, on one hand, against concern for the potential witness' constitutional right to be free from bodily intrusion on the other.

Id. Furthermore, "[t]he requirement that penetrations of the body be founded on strong showings of need are applicable equally to searches with and without a warrant." *Id.* The stringent requirements discuss her must be expressed in the *Schmerber* order. Id. (The Supreme Court vacated the issuing judge's *Schmerber* order because the order itself failed to find probable cause, a clear indication that the requested evidence is relevant to the question of Register's guilt, and failing to properly balancing the necessity for requiring the nontestimonial identification evidence against the constitutional safeguards prohibiting unreasonable bodily intrusions, searches and seizures.).

Here, the *Schmerber* order issued by the trial judge is void of any language finding probable cause or a clear indication that the request evidence is relevant to the question of Appellant's guilt, nor did the trial judge's oral ruling or *Schmeber* order balance the government's need for Appellant's nontestimonial DNA sample against the constitutional safeguards prohibiting unreasonable bodily intrusion. (See, *Schmerber* Order).

Furthermore, Appellant challenged the *Schmerber* order on the basis that the taking of him DNA by buccal swab was unreasonable because there was no need for a second body intrusion, because his DNA had been taken by buccal swab approximately four and one half months earlier as a result of a February 4, 2019 search warrant. The *Schmerber* order requiring Appellant to submit to a second buccal swab was issued before Appellant challenged the February 4, 2019 buccal swab search warrant. Moreover, Appellant's challenge was to the February 4, 2019 buccal swab search warrant was unsuccessful.

Therefore, the testimony of the government's DNA expert and his report comparing Appellant's DNA to DNA samples taken from the victim's car and a used condom collected

from a trashcan in the victim's apartment should not have been entered into evidence at Appellant's trial.

V. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR DIRECTED VERDICT WAS ERROR OF LAW AND AN ABUSE OF DISCRETION WHERE THE FACTS AND CIRCUMSTANTES ONLY CREATED SUSPICION AND FAILED TO RISE TO THE LEVEL OF EVIDENCE OF GUILT

A. No Evidence of Guilt

"When the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight." *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475 (S.C. 2004), *citing*, *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (S.C. 2004). "The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* (Citations omitted). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* (Citation omitted). "When reviewing a denial of a directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the state." *Id.* at 593, *citing*, *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999).

The case against Appellant was circumstantial, and only created a suspicion of guilty. There was not eyewitness to the crime. The State's case was based on DNA evidence collected from the passenger seat of the victim's car and a used condom found in a trashcan in the Joseph's apartment, and cell site location information used to place Defendant's phone within a one indeterminable distance to Joseph's apartment according to the State's cellular expert.

John Barron, the State's DNA expert, testify that a mixture of DNA was found on the inside and outside of the used condom. The DNA on the inside of the condom was a positive match for the victim, but Appellant was positively excluded as a contributor of the DNA mixture. The DNA on the outside of the condom was a mixture of DNA, and the victim's DNA was a positive match; however, the Appellant can't be excluded as minor contributor the mixture, nor can he identified as a contributor. The probability that Appellant was a minor contributor was 12.5 thousand times more likely than a random individual out of a population the size of the human race. Statistically, there were 11 other persons in Florence County that could have been a contributor of the DNA mixture, and 434 people in the State of South Carolina. In other words, statistically, Appellant was one of 12 people in Florence County that could have contribute the DNA mixture, and one of 434 people in the State of South Carolina who could have been a minor contributor.

Appellant could not be excluded as a minor contributor of the DNA taken from the headrest of the Joseph's vehicle. The probability that Appellant was a contributor is 2.8 thousand times more likely that a random person in a population the size of the human race. Statistically, there were approximately 66 people in Florence County that could have been a minor contributor to the mixture, and 2,701people in the State of South Carolina. Furthermore, the probability that Appellant was a minor contributor to the DNA taken from the door handle of the Joseph's car was 120 thousand times more likely than a random person out of a population of the human race.

The statistical probabilities that Appellant was a contributor to the DNA on the outside of the used condom and the headrest and door handle of the victim's vehicle are very low. This evidence is based entirely on statistical probabilities which might raise suspicion that Appellant

could have been a contributor to DNA mixtures collection from Joseph's home and car, however, it does not rise to the level of evidence of guilt.

VI. THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION FOR A NEW TRIAL WAS AND ABUSE OF DISCRETION

"South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions." Norton v. Norfolk Southern Ry. Co., 350 S.C. 473, 477, 567 S.E.2d 851 (S.C. 2002). "This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time … [the Court] have refused to abolish the doctrine. …[T]he Court have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror 'hangs' the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings." *Howard v. Roberson*, 654 S.E.2d 877, 882, 376 S.C. 143 (S.C. App., 2007).

The Respondent present no evidence in which a jury could find guilt beyond a reasonable doubt. The evidence present by was speculative, and only raised suspicion of guilt. (See, Motion for New Trial).

B. Jury Misconduct

"Traditionally, in South Carolina, circuit court judges have authority to grant a new trial upon the judge's finding that justice has not prevailed." Youmans v. Dept. of Transp., 670 S.E.2d 1, 5, 380 S.C. 263 (S.C. App. 2008). "Similarly, the judge may grant a new trial if the

verdict is inconsistent and reflects the jury's confusion." (Id.), See also, State v. Miller, Opinion 4965 (S.C. App. 2012) (The trial court's grant of defendant's motion for a new trial was affirmed where a juror intentionally fail to disclose information requested during voire dire); State v. Guillebeaux, 262 S.C. 270, 607 S.E.2d 99 (S.C. App. 2004) (The appellate found abused of discretion where the trial court fail to grant defendant's motion for a new trial where a juror failed to disclose a social relationship with the State's chief witness); State v. Smith, 679 S.E.2d 176, 383 S.C. 159 (S.C. 2009) (The South Carolina Supreme Court upheld the trial courts grant of the defendant's motion for new trial where the testimony of the victim was corrupted by coaching from the victim's aunt).

Appellant learned that Juror Melissa Black had a connecting to Appellant's family and failed to identify that connection. Melissa Black is the cousin of the Jennifer Turner (Turner), the fiancé of Appellant's brother. Turner was in the courtroom throughout the trial; however, he did not recognized Juror Melissa Black until after the trial was concluded. Affidavits of Rhonda Ard, Virginia Coleman, and Kelly Coleman are attached to Appellant's motion for a new trial based upon the juror misconduct. The trial court abused its discretion when it failed grant Appellant motion for a new trial under the circumstances.

CONCLUSION

Based upon the forging arguments and law, Appellant's conviction should be reversed, and the case remanded subject to the Court's findings.

Respectfully submitted,

Florence, SC

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/s/ Thurmond Brooker

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