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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2020-000930

THE STATE,

RESPONDENT,

vs.

JUSTIN JAMAL WARNER,

PETITIONER.

BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred by holding the trial court's failure to suppress the cell phone evidence where that evidence was obtained pursuant to an invalid search warrant issued by a magistrate in Anderson for phone records in New Jersey was saved by the "good faith" exception where the record showed the solicitor and police had a custom of using invalid search warrants because they believed phone companies would nonetheless honor them, since the state was not relying on binding appellate precedent in good faith given that custom, and the phone records evidence should therefore have been suppressed?

2. Whether the Court of Appeals erred by holding petitioner was not entitled to a Neil v. Biggers hearing on the unduly suggestive nature of the identification by Probation Agent Nathan Goolsby, where Goolsby claimed he recognized petitioner from a surveillance video, even though the man in the video clip was wearing a hat and sunglasses, where Goolsby said he recognized petitioner from his "walk," and where the police asked Agent Goolsby if the man in the video was petitioner, since it was an abuse of discretion to deny petitioner an in camera hearing on identification where it occurred under these highly suggestive circumstances?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals properly affirm the trial judge's denial of Petitioner's motion to suppress the cell site location information from his cell phone because law enforcement acted in good faith reliance on the warrant that was issued.

II. Did the trial judge properly deny Petitioner's motion for a *Neil v. Biggers* hearing on the identification of Petitioner by his probation agent, Nathan Goolsby, because Agent Goolsby was not an eyewitness to the crime and his identification of Petitioner was not procured by needlessly suggestive state action.

ADDITIONAL SUSTAINING GROUND

Was any error in admitting records and testimony regarding Petitioner's cell site location information harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case for purposes of the Brief of Respondent follows.

STATEMENT OF FACTS

The Court of Appeals found the following facts that are supported by the record:

> At 10:13 p.m. on April 30, 2015, a surveillance camera at the BP convenience store at Exit 40 on Interstate 85 in Anderson County recorded a person entering the store. The person approached the cashier, Mradulaben Patel (who owned the store with her husband of thirty-eight years, Pravinchandra). The person appeared to ask about buying a cigar and can then be seen flipping open his wallet and presenting it to Ms. Patel, presumably showing his identification. When Ms. Patel presented the cigar, the person handed Ms. Patel payment, and, as Ms. Patel opened the cash register, the person pulled a handgun from his pants pocket, pointed it at Ms. Patel, and attempted to reach into the cash register drawer. When Ms. Patel tried to push the gun away, the person shot her. The person left the store and wiped down the front door handle with his shirt. The incident took less than three minutes. Ms. Patel died several days later.
>
> After releasing a portion of the video to local media, police received a Crimestoppers tip identifying Justin Jamal Warner as the perpetrator and relaying remarkable detail about the crime. Police discovered Warner's date of birth matched the date of birth Ms. Patel entered into the cash register seconds before the murder. Investigators also discovered Warner was on probation in Georgia, so they sent clips of the video to his probation officer, Nathan Goolsby, who identified Warner as the perpetrator. Warner's palm print from his probation file was matched to a latent palm print taken from the counter beside the cash register.
>
> Warner turned himself in to the probation office. He arrived in a silver Dodge Challenger, a search of which revealed a "flip" style wallet similar to the wallet seen in the video. Police also found cigar wrappers in the car bearing a purchase price of ninety-nine cents, the same price of the cigars the cash register receipt showed Ms. Patel sold moments before being killed. Police further determined the Challenger was similar to a car seen on a store surveillance video facing the parking lot shortly before the crimes occurred. They also noted the suspect in the surveillance video appeared to have markings on his upper arm consistent with tattoos Warner has in the same area.
>
> An Anderson County magistrate issued a search warrant to T-Mobile for Warner's cell phone records. At trial, the State offered FBI Special Agent David Church as an expert in historical cell site analysis and cell phone record analysis. .... Church gave opinion testimony that Warner's phone had "pinged" off T-Mobile cell towers

> near the crime scene shortly before and after Ms. Patel was shot. The jury deliberated a little over two hours before finding Warner guilty on all counts.

State v. Warner, 430 S.C. 76, 81-83, 842 S.E.2d 361, 363-64 (Ct. App. 2020).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Liverman*, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error." *State v. Smith*, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956).

"Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Liverman*, 398 S.C. at 137, 727 S.E.2d at 425 (citing *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)). "Generally, the decision to admit an eye witness identification is at the trial judge's discretion and will not be disputed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENTS

I. The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion to suppress the cell site location information from his cell phone because law enforcement acted in good faith reliance on the warrant that was issued. Also, any alleged error in denying his motion was harmless beyond a reasonable doubt.

The present case is part of a flood of appellate cases alleging law enforcement violated the Fourth Amendment in acquiring cell site location information, even though (1) the United States

Supreme Court's opinion in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), was decided after the trial of these cases and (2) *Carpenter* represented a radical departure from prior Fourth Amendment precedent holding that defendants' have no reasonable expectation of privacy in information they voluntarily convey to a third party. These current cases significantly downplay or completely ignore the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897, 921-22 (1984). Notwithstanding Petitioner's arguments to the contrary, Respondent submits that this Court should affirm the trial judge's denial of Petitioner's motion to suppress the cell site location information from his cell phone because law enforcement acted in good faith reliance on the warrant that was issued. Further, any alleged error in denying his motion was harmless beyond a reasonable doubt.

Following jury selection, Petitioner moved to suppress the CSLI that law enforcement acquired during the course of the investigation. ***R. 38-39***. He argued that the search warrant (Court's Ex. 3, ***R. 530-32***) was void *ab initio* because a South Carolina magistrate did not have the authority to issue a search warrant "directed to T-Mobile custodian of records in New Jersey." He contended that law enforcement in Anderson, South Carolina, were required to but did not follow the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, S.C. Code Ann. §§ 19-9-10, *et. seq*. (Supp. 2020), which he claimed "must be followed in order to obtain out-of-state witnesses or documents." He further argued that the search warrant did not allege that the phone was used in connection with the murder and that there was no explanation of how information provided to Crimestoppers was corroborated. ***R. 41-42***.

In response, the State observed that law enforcement was simply adhering to the requirements imposed by the cellular provider. Further, the State correctly noted that the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings only

applied to persons, not documents. ***R. p. 43-44***. When the trial judge observed that this Act did not appear to apply to documents, Petitioner contended that the Act had been held to apply to documents "because the idea of subpoenaing witnesses without being able to include documents." (Sic). However, he did not provide a citation. He again asserted that the warrant was void *ab initio* and that it did not set forth probable cause. ***R. 44-48***.

While conceding that the warrant could potentially be void *ab initio* if the issuing magistrate lacked jurisdiction, the State alternatively relied on the South Carolina Court of Appeals' unpublished decision in *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), *vacated in part, affirmed in result*, 415 S.C. 43, 780 S.E.2d 902 (2015) (*Drayton* II), which had followed reasoning identical to the Fourth Circuit's decision in *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc), *overruled, Carpenter v. United States*, 138 S.Ct. 2206 (2018). *Graham* held that the Government did not violate the defendants' Fourth Amendment rights in obtaining historical cell-site location information from their cell phone provider without a warrant because defendants' had no reasonable expectation of privacy in the historical location information, as they voluntarily conveyed such information to the cell phone provider. ***R. 48-49***.

After the trial judge found that the allegations contained in the affidavit accompanying the warrant sufficiently set forth probable cause (***R. 49, lines 17-21***), Petitioner contended that *Graham* should not control because there was a split in authority among the circuits on whether a warrant was required and he noted that the issue was before the United States Supreme Court. ***R. 50-51***. The trial judge stated that he understood Petitioner's argument but observed that:

> ... [M]y job is to apply the law in its current state and not anticipate what may happen on appeal. And at least, although it's nonpublished opinion, as pointed out by Ms. Huey, it appears that South Carolina has adopted through the court of appeals the opinion that currently you don't need to have a warrant to obtain this cell site, or whatever this acronym is, information, because it doesn't implicate the Fourth Amendment rightly or wrongly.

R. 51.

Petitioner argued that this Court had not adopted this reasoning, and he asserted that he had a privacy interest in the CSLI. However, he admitted that *Graham* was inconsistent with his position. Also, he again asserted that he would try to find a case holding that §§ 19-9-10, *et. seq.*, applies to documents. ***R. 52-58.***

Petitioner addressed the issue, once more, later in the trial. This time, he asserted that the search warrant was invalid under S.C. Code Ann. § 17 -13-140 (2014) because the magistrate did not have jurisdiction over the location where the CSLI were kept, since they were kept out-of-state. Although the trial judge agreed with Petitioner's argument as to § 17 -13-140, he ruled that a search warrant was not required under *Graham*. ***R. 100-03; 111-3.*** The trial judge subsequently allowed the State to introduce the CSLI during its case-in-chief. ***R. 233-36.***

On appeal, the Court of Appeals correctly observed that the United States Supreme Court decided *Carpenter* while the appeal of this case was pending and that *Carpenter* held a person has a legitimate expectation of privacy in his cell phone records held by a third party and that the "[G]overnment could only obtain them by complying with the Fourth Amendment." *Warner*, 430 S.C. at 92-93, 842 S.E.2d at 369 (citing *Carpenter*, 138 S. Ct. at 2217).[1] The Court of Appeals further found that "*Carpenter* applies retroactively to Warner's appeal." *Id.* at 93, 842 S.E.2d at 369 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). However, the Court correctly rejected Petitioner's argument as follows:

> Warner bases his claim solely on the Fourth Amendment, so the question becomes what remedy *Carpenter* provides him. The United States Supreme Court separates the retroactivity of a decision from the issue of the remedy. *Davis v. United States*,

[1] More specifically, the *Carpenter* majority held that "accessing seven days of CSLI constitutes a Fourth Amendment search" and, consequently, requires the Government to obtain the information. *Carpenter*, 138 S.Ct. at 2217 & n. 3.

564 U.S. 229, 243-44, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) ("[T]he retroactive application of a new rule of substantive Fourth Amendment law raises the question whether a suppression remedy applies; it does not answer that question."). In *Davis*, the Court faced the issue of whether the remedy of suppression should be applied where the search of the defendant was authorized at the time it was performed under the automobile exception to the Fourth Amendment recognized by *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), but became unconstitutional after *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The search of Mr. Davis occurred two years before *Gant* but while Gant's direct appeal was pending. In a 7-2 decision, the Court refused to apply the exclusionary rule to the retroactive Fourth Amendment violation. The Court noted the single purpose of the exclusionary rule is to "deter future Fourth Amendment violations." *Id.* at 236–37, 131 S.Ct. 2419. When the officer's actions are taken in objective good faith or involve only isolated simple negligence, the benefit of deterrence is dwarfed by the "heavy toll" the exclusionary system costs the justice system and society. *Id.* at 237–39, 131 S.Ct. 2419. The Court noted there is no deterrent effect when the Fourth Amendment error is made by judges rather than police, as the rule was designed only to redress the officer's misconduct. To apply the *Gant* rule to the search of Mr. Davis that was authorized by *Belton* when it was performed, the Court reasoned, would penalize police for the Fourth Amendment misreadings of appellate courts. The South Carolina Supreme Court has followed *Davis*. *See State v. Brown*, 401 S.C. 82, 96, 736 S.E.2d 263, 270 (2012). Although *Davis* has taken on withering criticism, mainly for what some perceive as its sabotage of retroactivity, *see* LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(h) (5th ed. 2012), we are obligated to follow it.

Although the officers exceeded the Fourth Amendment when they obtained Warner's cell phone records without a valid warrant, in light of *Miller*'s validity at the time of the search, their conduct was not a deliberate or reckless transgression. Like the search in *Davis*, the search of Warner's records was not wrongful at the time it was made, and no deterrent value accrues from suppressing the evidence under these specific circumstances. Our conclusion is in accord with many state and federal courts that have confronted the retroactivity of *Carpenter* and whether CSLI records obtained without a valid warrant before *Carpenter* should be subject to the exclusionary rule. *See United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018); *United States v. Goldstein*, 914 F.3d 200, 203–07 (3d Cir. 2019); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019). We therefore affirm the denial of Warner's motion to suppress.

Warner, 430 S.C. at 93-94, 842 S.E.2d at 369-70.

Petitioner contends that reliance on the search warrant issued in this case by the Anderson County Sheriff's Department and the Tenth Circuit Solicitor's Office "should not be found to be a

'good faith' exception to the exclusionary rule since obtaining a search warrant in this fashion was never legal, the solicitor knew that, and law enforcement was therefore not relying on that procedure being good law pursuant to existing case law at the time." However, his argument is not properly before this Court on certiorari because he never asserted at trial or his Initial Brief of Appellant that the officers failed to act in good faith. Rather, he has conceded in his certiorari petition that he only advanced this point in his rehearing petition. *See* Brief of Petitioner at 7.

Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). *See also State v. Daise*, 421 S.C. 442, 807 S.E.2d 710, 714 (Ct.App. 2017). "[T]o preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); Rule 103(a)(1), SCRE. See also *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground"); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial").

Also, the issue must be argued fully in the Initial Brief of Appellant to be preserved for the Court's consideration. *See* Rule 208(b)(1)(D), SCACR; *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 282 n. 3 (2003); *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994). While Petitioner made a belated effort to present this portion of his claim to the Court of Appeals, he did not preserve this argument. *Cf. Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct.App.1989) (an appellant may not use the reply brief to argue issues not argued in the initial

brief); *Continental Insurance Company v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App.1997). Thus, he failed to properly preserve this supposed error for appellate review.

Moreover, his assertion that the officers could not have acted in good faith must be rejected for a more fundamental reason and one that explains why this fallacious argument was not made at trial. In *Carpenter*, the Court held **for the first time** that a person has a legitimate expectation of privacy in his cell phone records held by a third party, that "accessing seven days of CSLI constitutes a Fourth Amendment search," and that, consequently, a request for seven or more days of CSLI requires the Government to have a warrant to obtain the information. *Carpenter*, 138 S.Ct. at 2217 & n. 3.At the time the State obtained the CSLI (some three years earlier), and even at the time of Petitioner's trial, a search warrant was not required to obtain these records in this jurisdiction because until the landmark decision *Carpenter*, neither this Court nor the United States Supreme Court had ever held that an individual retains a reasonable expectation of privacy over information that he voluntarily provides to a third party.

The reasoning in *Carpenter* was a stark and dramatic break from over fifty years of Fourth Amendment precedent. *See, e.g., Id.* at 2223 (Kennedy, J., dissenting) (referring to the majority's decision as a "stark departure from relevant Fourth Amendment precedents"); *id.* at 2224 (Kennedy, J., dissenting) ("In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id.* at 2235-36 (Thomas, J., dissenting) ("The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. Ante, at 2216 - 2217. I agree

with Justice KENNEDY, Justice ALITO, Justice GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents"); id. at 2247 (Alito, J., dissenting) ("Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent"); *id.* at 2261 (Alito, J., dissenting) ("The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce"). In fact, the Court was so sharply divided in this 5-4 decision that each dissenter wrote a separate opinion.[2]

As the four *Carpenter* dissents make abundantly clear, prior Supreme Court precedent supported the conclusion that an individual did not have any reasonable expectation of privacy in information voluntarily disclosed to a third party, such as CSLI, even if the individual was unaware of how the third party would use the information. *See, e.g., United States v. Miller*, 425 U.S. 435, 443 (1976) (noting the Court had "held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed"); *id.* at 442-43 (bank depositor did not have any legitimate expectation of privacy in financial information that he voluntarily conveyed to banks and that was exposed to their employees in the ordinary course of

[2] The *Carpenter* majority cautioned that its holding was "narrow," 138 S.Ct. at 2217, and even the majority wrestled with how to apply this "new phenomenon" under the Fourth Amendment, *id.* at 2216 (noting that governmental acquisition of CSLI "does not fit neatly under existing precedents" and that cell-site records "implicate the third-party principle" because "the individual continuously reveals his location to his wireless carrier"); *id.* at 2214 ("[t]his sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents."). *But see id.* at 2236 (Kennedy, J., dissenting) ("The Court says its decision is a narrow one ... But its interpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole").

business); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (distinguishing the listening device employed in *Katz* and holding that telephone users generally had no subjective expectation of privacy in dialed telephone numbers), *superseded by statute*; *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (applying same principle to confidential statements made in the presence of an informant); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) (principle applied to financial and other records in the hands of third-party businesses); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion) (applying principle to electronic surveillance of conversations between defendant and informer, by means of radio transmitter concealed on the person of the informant); *Donaldson v. United States*, 400 U.S. 517, 522-23 (1971) (taxpayer was not entitled to intervene in proceeding to enforce summons for his employment records, where "what is sought here by the Internal Revenue Service ... is the production of Acme's records and not the records of the taxpayer"). *Cf. State v. King*, 412 S.C. 403, 419, 772 S.E.2d 189, 197 (Ct.App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), *overruled on other grds, State v. Burdette*, 832 S.E.2d 575 (2019). Thus, by seeking and securing a warrant, law enforcement went beyond what they were required to do at the time.

Further, most American courts did not routinely grant similar protection to data revealing a person's location that was held by a third party, such as CSLI, before the *Carpenter* opinion. Indeed, as late as 2012, "*no circuit court had yet held the Fourth Amendment applicable* to CSLI data." *United States. v. Elmore*, 1068, 1078 (9th Cir. 2019) (collecting cases) (emphasis added); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (holding the Government did not violate the defendants' Fourth Amendment rights in obtaining historical cell-site location

information from their cell phone provider without a warrant because defendants' had no reasonable expectation of privacy in the historical location information, as they voluntarily conveyed such information to the cell phone provider), *overruled*, *Carpenter v. United States*, 138 S.Ct. 2206 (2018). *See also* cases cited in Final Brief of Appellant, pp. 9-14.

Additionally, neither this Court nor the South Carolina Supreme Court had held that an individual had a reasonable expectation of privacy in CSLI or that law enforcement had to comply with the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings to obtain CSLI. To the contrary, the Court of Appeals had issued two unpublished opinions that followed the Fourth Circuit's reasoning in *Graham*. See *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), *vacated in part, affirmed in result*, 415 S.C. 43, 780 S.E.2d 902 (2015) (*Drayton* II); *State v. Wallace*, 2016–UP–344, 2016 WL 3595792, at *1 (Ct. App., June 29, 2016) (*per curiam*) (unpublished) ("[W]e note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment") (citing *Graham* with approval).

There is likewise no merit to Petitioner's contention that this Court should reverse the trial judge's ruling because he erroneously relied on the Court of Appeals' decision in *Drayton I*. Rule 268(d)(2), SCACR, states that "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Yet, Petitioner certainly was not prejudiced by the trial judge's reliance on *Drayton*, since the Court of Appeals' decision in that case merely applied the well-settled Fourth Amendment principles just discussed to the facts before it. *See Drayton*, 411 S.C. at 547, 769

S.E.2d at 262 ("Under our analysis of the cases interpreting the United States Fourth Amendment, we find Drayton did not have a legitimate expectation of privacy in his historical cell site location records"). Also, this analysis tracked the overwhelming majority of cases from other jurisdictions to have considered the issue, including the district court decision in *Graham*. See *id.* at 547-48, 769 S.E.2d at 262. *See also Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("[a]n error is not reversible unless it is material and prejudicial to the substantial rights of the appellant"); *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter").

Also, in *Drayton II*, this Court did not disagree with the Court of Appeals' reasoning and conclude that the defendant had a legitimate expectation of privacy in CSLI. Rather, this Court concluded that it was unnecessary for the Court of Appeals to address the novel issue because "the affidavits in support of the warrants established probable cause for the search" for the CSLI and because any error in denying the motion to suppress was harmless beyond a reasonable doubt. *Drayton II*, 415 S.C. at 45, 780 S.E.2d at 903.

Indeed, Petitioner candidly admitted at trial that the circuit courts of appeal were split on the question of whether an individual had a reasonable expectation of privacy in CSLI, so that the prosecution needed a warrant to obtain these records, and that binding precedent in this Circuit, the Fourth Circuit's decision in *Graham*, was contrary to his position. Therefore, there is no plausible merit to Petitioner's *ad hominem* accusation that the Anderson County Sheriff's Department and the Tenth Circuit Solicitor's Office engaged in "a practice of deliberate conduct … in disregard of citizen's Fourth Amendment rights" and that claim does not justify reversal of the trial judge's ruling.

Furthermore, the Court of Appeals properly applied the United States Supreme Court's

good faith exception to the exclusionary rule. The Supreme Court adopted the exclusionary rule as a judicially-created remedy to effectuate the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution. *See Weeks v. United States*, 232 U.S. 383, 393-394 (1914); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure'"). Importantly though, adoption of the exclusionary rule did *not* create a personal constitutional right to the exclusion of evidence, and the rule itself was *not* designed to redress the injury caused by an unconstitutional search or seizure. *Davis v. United States*, 564 U.S. 229, 236 (2011); *see also Stone v. Powell*, 428 U.S. 465, 486 (1976) ("[T]he [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure"). Instead, the exclusionary rule was adopted and solely exists to deter *future* Fourth Amendment violations. *Davis*, 564 U.S. at 236-37 (citing *United States v. Leon*, 468 U.S. 897, 909, 921 n.22 (1984)); *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair").

In *Leon*, the Supreme Court rejected the contention that the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Leon*, 468 U.S. at 900. Instead, the Court adopted a "good faith" exception to the exclusionary rule and cautioned that the exclusion of evidence should only "rarely" occur in cases where officers reasonably relied upon subsequently-invalidated search warrants. *Id.* at 926.

The Court explained that suppression of evidence based on a subsequently-invalidated search warrant was *only* appropriate in four limited situations: (1) where the affiant misled the

issuing judge by including false or misleading information in the search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" and (4) when a search warrant was so facially deficient in some technical respect the officer executing the warrant could not reasonably have presumed it to be valid. *Id.* at 923 (citations omitted). Further, the Supreme Court has admonished that the exclusionary rule is to be a "last resort" and not a "first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). *See also Messerschmidt v. Millender*, 132 S.Ct. 1235, 1245 (2012) ("Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith'") (quoting *Leon*, 468 U.S. at 922-23); *Davis*, 564 U.S. at 236-37 (the exclusionary rule's "sole purpose ... is to deter future Fourth Amendment violations").

While *Carpenter* prohibits the warrantless seizure of CSLI from the date of the opinion forward, this case is not about what the State can do post-*Carpenter*. Instead, the question is whether the State acted in good faith considering the status of the law when it seized Petitioner's CSLI in 2015, and the State submits it did. Specifically, the State submits that the Fourth Circuit's decision in *Chavez* and a number of other cases support the finding that the officers in this case acted in objectively good faith reliance on the warrant. *See Chavez*, 894 F.3d at 608. *See also*, *e.g.*, *United States v. Zodhiates*, 901 F.3d 137, 143 (2nd Cir. 2018) (acknowledging the *Carpenter* decision issued during the pendency of that appeal, but holding that "when the Government "act[s] with an objectively reasonable good-faith belief that their conduct is lawful, the exclusionary rule does not apply"); *United States v. Goldstein*, 914 F.3d 200, 203–07 (3rd Cir.

2019); *United States v. Beverly*, 943 F.3d 225, 234 (5th Cir. 2019) ("We hold that the [*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)] strand of the good-faith exception properly applies to the [CSLI at issue], since it was obtained pursuant to a pre-*Carpenter* warrantless order authorized by statute"); *United States v. Carpenter*, 926 F.3d 313, 317-18 (6th Cir. 2019) (*"Carpenter II"*) (on remand from Supreme Court, finding that government agents reasonably relied on the SCA at the time they acquired certain CSLI), *sentence vacated on other grds and case remanded*, 788 Fed.Appx. 364 (6th Cir., Dec. 19, 2019); *Pembrook*, 876 F.3d at 823 (applying the good-faith exception to CSLI obtained under the SCA); *United States v. Curtis*, 901 F.3d 846, 847-49 (7th Cir. 2018) (same); *United States v. Davis*, 785 F.3d 498, 511, 518 n. 20 (11th Cir. 2015) (same); *United States v. Joyner*, 899 F.3d 1199, 1204-05 (11th Cir. 2018) (same). *See also United States v. Parrish*, 942 F.3d 289, 293 (6th Cir. 2019) ("[C]ourts will not exclude evidence from trial that was seized 'by officers reasonably relying on a warrant issued by a detached and neutral magistrate'") (quoting *Leon*, 468 U.S. at 913); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019); *State v. Burke*, 2019-Ohio-1951, ¶¶ 31-33, 2019 WL 2172718, *5 (Oh. Ct. App. 2019), *appeal not allowed,* 157 Ohio St.3d 140, 2019-Ohio-3731, ¶¶ 31-33, 6, 131 N.E.3d 75 (2019) (applying good-faith exception to CSLI acquired by grand jury subpoena); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019).[3]

Finally, as an additional sustaining ground, Respondent submits that the Court should deny certiorari because any error in denying the motion to suppress was harmless beyond a reasonable

[3] Respondent notes that on February 2, 2021, this Court heard oral arguments in another case in which a panel of the Court of Appeals held that the good faith exception to the exclusionary rule applied to the State's pre-*Carpenter* acquisition of CSLI and the Court dismissed certiorari as improvidently granted in that case on March 10, 2021. *See State v. Rhodes*, 2021-MO-001 (S.C. S.Ct., Mar. 10, 2021).

doubt.[4] "Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial." *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991). *See also State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). The CSLI evidence in this case "could not reasonably have affected the result of the trial" because it was merely corroborative proof of identity and the State conclusively established identity beyond any reasonable doubt through other evidence, much of which Petitioner did not challenge on appeal.

His left palm print was found on a mat or counter protector that had been cleaned roughly thirty minutes before the murder and the video shows him placing his left hand on it. ***R. 234-36.*** The video of the crime also showed a transaction for a tobacco product. It likewise shows him drop the cigarillo and pick it up. *See* ***R. 7-24; 172-204; 218-230; 253-76; 280-308; 318-63.***

The date of birth on the receipt for that transaction matched Petitioner's date of birth on his driver's license, which was found in his wallet that was recovered in a search of his girlfriend's gray Dodge Challenger that he had been driving and cigarillo wrappers similar to the one purchased at the BP station were found in the car as well. ***R. 11-13; 23; 261-62; 275-81.*** Also, a car consistent with her vehicle is seen on video passing the BP station. ***R. 273; 287-91.*** Moreover, Mr. Goolsby, Petitioner's probation officer, positively identified Petitioner as the person in the video. ***R. 224-27.*** Accordingly, the trial judge's denial of the motion to suppress must be affirmed.

II. The trial judge properly denied Petitioner's motion for a *Neil v. Biggers* hearing on the identification of Petitioner by his probation agent, Nathan Goolsby, because Agent Goolsby was not an eyewitness to the crime and because his identification of Petitioner was not procured by a pretrial identification procedure that was unduly and unnecessarily suggestive.

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[4] This was Respondent's issue IV in the Initial Brief of Respondent.

Respondent submits that the trial judge correctly denied Petitioner's request for a *Neil v. Biggers*, 409 U.S. 188 (1972), hearing on the identification of Petitioner by his probation agent, Nathan Goolsby, because Agent Goolsby was not an eyewitness to the crime and because Mr. Goolsby's identification of Petitioner was not procured by a pretrial identification procedure that was unduly and unnecessarily suggestive.

Petitioner moved to suppress Agent Goolsby's identification of him from the gas station video. Before the motion, the State stated that it would not refer to Petitioner being on probation in Georgia, during the course of trial. ***R. 4-5***. Petitioner thereafter argued that Agent Goolsby's identification of him was unduly suggestive and should be subject to the requirements of *Biggers*. ***R. 58-60***. The trial judge denied the motion to suppress, astutely concluding that "I don't believe, as I told you before, this is a *Biggers* situation. You don't have out-of-court identification as far as an eyewitness." ***R. 62***.

Agent Goolsby subsequently testified before the jury that he was an employee of the State of Georgia who worked in Clayton County. Also, he was familiar with Petitioner because he had spent time with Petitioner every month for eight or nine months, in 2014 and 2015. On average, they spent ten to fifteen minutes together on each occasion. ***R. 224-25***. He testified that an investigator with the Anderson County Sheriff's Office contacted him and he viewed a video from a BP gas station, State's Ex. 8.[5] ***R. 225-26***. After viewing the video, he was able to identify

[5] This was a portion of the surveillance video of the crime scene. Outside of the jury's presence, Inv. Matthew Voight testified that after receiving a Crimestoppers' tip with precise details of the crime, officers contacted Agent Goolsby, who was Petitioner's probation agent at the time. Agent Goolsby provided officers with palm prints and booking photographs of Petitioner. ***R. 7-9***. Also, officers sent Agent Goolsby a "snippet of the video" from the crime, and he positively identified Petitioner. ***R. 9***.

Petitioner as the person in it, even though the person depicted wore sunglasses and a hat. ***R. 226-27.***

Agent Goolsby explained that:

> You know, it was with the hat and the glasses, it was hard to see the face, but monthly visits with him and the time that we spent together, I was able to observe the way that he walked, the way he carried himself, and he exhibited the same signs. And then he was the same height same build. So everything that I was able to determine by watching it and looking at it, it did appear to be him.

R. 227, lines 2-9. When asked on cross-examination what he meant by Petitioner's walk, he further explained that:

> Every time he would come into our office, we would ask to make sure that he would empty his pockets, empty his belongings. And then he was able to walk in front of us and lead me back to my own office. So I was able to observe that every time.
>
> The way that he walked in, the way that he kind of reached over, bent down towards his pockets, the mannerisms that he was showing, it looked like the same sort of way that he would walk and act when he would enter into our office as well.
>
> *****
>
> ... I mean, I was able to meet with him once a month for almost a year. I think it was a little bit shy of that. And each time I was able to observe him, see the way he acted, see the way that he walked, and that's how I was able to determine that's him.

R. 228, line 13 – 229, line 8.

Asked about the mannerisms he recognized, Agent Goolsby testified that he recognized Petitioner's "stride, the way that he walked in, the way that he was able to use his shoulders when he walked in, the way that he used his hands." The manner in which the person in the video entered the store and "headed towards the counter, it appeared to be the same way that he would have walked and the way that I was able to observe him in person." R. ***230, lines 8-14.***

Agent Goolsby likewise was aware that Petitioner drove a silver Dodge Challenger and he testified that the vehicle depicted in a still photograph from an outside video of the BP station was consistent with the vehicle that Petitioner drove on at least one occasion. ***R. 227-28; 230.***

This was Petitioner's sixth issue on appeal and Respondent submits that the Court of Appeals properly rejected it as follows:

> **A. <u>Identification Testimony of Non-Eyewitness</u>**
>
> Warner next claims his due process right to a fair trial was violated when the State asked Goolsby to view the video and then used him as an identification witness at trial. Due process prevents the State from using evidence so unreliable that it offends fundamental conceptions of justice and ordered liberty. *Perry v. New Hampshire*, 565 U.S. 228, 237, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). When the police arrange a pretrial, out-of-court identification procedure where an eyewitness to the crime identifies the defendant, due process concerns are triggered only when the procedure is both suggestive and unnecessary. *Id.* at 238–39, 132 S.Ct. 716; *Neil v. Biggers*, 409 U.S. 188, 196–201, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Accordingly, when a defendant challenges a pretrial identification, the first matter the trial court must decide is whether the identification was the result of a police procedure that was both unnecessary and suggestive. If it was not, the inquiry ends. *State v. Wyatt*, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). But, if the procedure was unnecessary and suggestive, due process requires suppression of the eyewitness identification if the procedure created a "substantial likelihood of irreparable misidentification." *Biggers*, 409 U.S. at 198, 93 S.Ct. 375 (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). The trial court must therefore determine whether, despite the unnecessary and suggestive police conduct, the eyewitness identification is nevertheless reliable.
>
> Whether an eyewitness identification is reliable enough to be admitted is a mixed question of law and fact within the trial court's discretion, but where the evidence admits of a single reasonable inference, the question is one of law for this court. *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In *Perry*, the United States Supreme Court clarified that due process does not require pretrial screening of all eyewitness identifications, only those procured by needlessly suggestive state action. 565 U.S. at 232–33, 132 S.Ct. 716 (holding due process not implicated when eyewitness identified defendant on scene without police suggestion). Our supreme court has interpreted *Perry* as requiring a preliminary judicial inquiry (and generally a hearing) "once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (due process required pretrial

identification hearing where out of court identification procedure consisted of suggestive show-up, even though eyewitness had long known accused).

Like the eyewitness in *Liverman*, Goolsby knew the defendant before the crime. Unlike the witness in *Liverman*, Goolsby was not an eyewitness to the crime. This court has held the *Neil v. Biggers* due process inquiry does not apply to a non-eyewitness. *State v. McGee*, 408 S.C. 278, 286–87, 758 S.E.2d 730, 734–35 (Ct. App. 2014). Further, even if delivery of the surveillance video here amounted to "state action," we disagree it was unnecessary. The State did not create the video. The State's use of it was necessary under the circumstances. At the time of their contact with Goolsby, the police had just received the Crimestoppers' tip, and the investigation was at a critical point. The armed perpetrator of a violent crime was still on the run and had already traveled between at least two states. It would have been impractical for the police to produce an array of videos recreating the crime scene, casting different actors as the perpetrator, before sending them to Goolsby. *See Wyatt*, 421 S.C. at 314–15, 806 S.E.2d at 712 (questioning whether less suggestive procedures were realistic alternatives, as under the circumstances "a lineup would be unworkable"); *see also Simmons v. United States*, 390 U.S. 377, 384–85, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (police display of photos of bank robbery suspects to bank employee victims day after robbery necessary; it was "essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities"); *United States v. Sanders*, 708 F.3d 976, 987 (7th Cir. 2013) (holding single photographic "show-up" was necessary when armed felon at large as police "could not have produced a significantly less suggestive procedure without sacrificing critical time"); *see generally* LaFave, et al., *Criminal Procedure* § 7.4(b) (4th ed. 2003).

Even if sending the video to Goolsby was unnecessarily suggestive, we are confident Goolsby's identification was reliable. *See Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) ("[R]eliability is the linchpin" of the due process inquiry). Without disclosing he was Warner's probation officer, Goolsby told the jury he had spent time with Warner every month over the past nine or so months, usually for fifteen to thirty minutes each time. He testified he was sure of his identification because he was familiar with Warner's gait, the way he carried himself, and the way he held his hands and shoulders, and Warner had the same height and build as the person on the video. *See, e.g.*, *State v. Hall*, 940 A.2d 645, 650, 653–54 (R.I. 2008) (single photo of suspect shown to police officer who identified defendant as suspect was neither suggestive nor unnecessary; suspect was object of ongoing manhunt, and experienced officer was less likely to be affected by a "suggestive procedure"). As *Liverman* noted, a witness's prior knowledge of the accused "remains a significant factor in determining reliability" and mitigates even the extreme suggestiveness of a show-up. 398 S.C. at 135, 141–42, 727 S.E.2d at 424, 427–28 (concluding eyewitness's in-court identification had origins independent of suggestive taint of police orchestrated show-up, as eyewitness was acquaintance and former neighbor of defendant and had known him since

elementary school). We affirm.

See *Warner*, 430 S.C. at 89-92, 842 S.E.2d at 367-69.

Notwithstanding Petitioner's argument to the contrary, his claim that he was entitled to a *Biggers* hearing has absolutely no legal support in either United States Supreme Court or South Carolina jurisprudence. His constitutional claim is flawed in at least two significant respects. First, it ignores that for fifty-two years, all of the cases from the United States Supreme Court and from this jurisdiction concerning whether an out-of-court identification " 'procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification' " have been limited to the reliability of identifications by **eyewitnesses** to crimes. *See*, *e.g.*, *Simmons*, 390 U.S. at 384 ("... we hold that each case must be considered on its own facts, and that convictions based on **eyewitness identification** at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification") (emphasis added); *Perry*, 565 U.S. at 240-41; *Brathwaite*, 432 U.S. at 111-12 ("The driving force behind [*United States v. Wade*, 388 U.S. 218 (1967)], [*Gilbert v. California*, 388 U.S. 263 (1967)] (right to counsel at a post-indictment line-up), and [*Stovall v. Denno*, 388 U.S. 293, 302 (1967)], all decided on the same day, was the Court's concern with the problems of eyewitness identification"); *Biggers*, 409 U.S. at 193-94, 196-201; *Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970); *Foster v. California*, 394 U.S. 440, 441-42 (1969); *Wade*, 388 U.S. at 288 (pointing pointed to the " 'formidable' " number of "miscarriage[s] of justice from mistaken identification" in the history of criminal law and warning of the "vagaries" and "'proverbially untrustworthy'" nature of eyewitness identifications); *State v. Frazier*, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004); *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372

(1991) (exclusion of expert testimony on the issue of eyewitness reliability constitutes an abuse of discretion in cases where "the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability"); *Liverman*, 398 S.C. at 138-39, 727 S.E.2d at 426; *State v. Rogers*, 263 S.C. 373, 378, 210 S.E.2d 604, 607 (1974); *State v. Nelson*, 250 S.C. 6, 8, 156 S.E.2d 341, 342 (1967); *State v. Heyward*, 422 S.C. 488, 495, 812 S.E.2d 432, 436 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018).

Petitioner's heavy reliance on *Liverman* as a basis for reversal is misplaced because the identification testimony at issue in *Liverman* was by an eyewitness to the murders, Tyrone Smith. *Liverman*, 398 S.C. at 134-35, 727 S.E.2d at 424. More importantly, *Liverman* actually supports the trial judge's ruling. Although *Liverman* held that the trial court must hold a *Biggers* hearing even when the eyewitness knows a defendant prior to the crime, the Court nevertheless recognized "the fact that an identification witness knows the accused remains a significant factor in determining reliability" because "[t]he suggestive nature of [an identification procedure] is mitigated by the witness's prior knowledge of the accused." *Liverman*, 398 S.C. at 141, 727 S.E.2d at 427. Indeed, the Court went further and "concur[red] with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory" where the eyewitness knows the accused prior to the crime. *Id.* at 141-42, 727 S.E.2d at 427-28; *see also State v. Spears*, 393 S.C. 466, 481, 713 S.E.2d 324, 331-32 (Ct.App. 2011) (holding that photographic lineups were not unduly suggestive and that no substantial likelihood of irreparable misidentification existed when the witness was one "hundred percent sure" the defendant committed the robbery and the witness testified that she recognized the defendant "during the course of the robbery as someone she knew 'from the neighborhood' ").

Thus, the Court of Appeals correctly relied upon it in affirming the trial judge's ruling.

There is simply no authority from either the United States Supreme Court or from this Court for the proposition that the accused is entitled to a *Biggers* hearing when an out-of-court identification is made by a prosecution witness who was not an eyewitness to the offense. To the contrary, the Court of Appeals has previously and correctly held that the *Biggers* due process inquiry does not apply to a non-eyewitness. *See McGee*, 408 S.C. at 286-87, 758 S.E.2d at 734-35 (Ct. App. 2014). *See also Warner*, 430 S.C. at 91, 842 S.E.2d at 368 (citing *McGee*).[6]

The second and equally important reason a *Biggers* hearing on Mr. Goolsby's identification of Petitioner was not required is that the identification was not the product of an unduly suggestive and unnecessary identification procedure. *Biggers* created a two-part test. Under the first prong, the judge must determine whether the pretrial procedure was unduly suggestive. *See Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. This focuses on police procedure and not what happened to the eyewitness. See *Biggers*, 409 U.S. at 198. *See also Perry*, 565 U.S. at 238 ("Instead of mandating a *per se* exclusionary rule, the Court [in *Biggers*] held that the Due Process Clause requires courts to assess, on a case-by-case basis, **whether improper police conduct** created a "substantial likelihood of misidentification") (citing *Biggers*, 409 U.S. at 201 and *Brathwaite*, 432 U.S., at 116) (bold emphasis added). "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." *Wyatt*, 421 S.C. at 310, 806 S.E.2d at 710. *See also Biggers*, 409 U.S. at 198; *Moore*, 343 S.C. at 287, 540 S.E.2d at 447-48 ("Only if the procedure

[6] Throughout the appeal, Petitioner has attempted to analogize Agent Goolsby's identification of him to that of an eyewitness. Yet, "[a]n eyewitness is "[o]ne who personally observes an event." *Black's Law Dictionary* 667 (9th ed.2009)." *McGee*, 408 S.C. at 287 n. 4, 758 S.E.2d at 735 n. 4. Obviously, he was not an eyewitness because he was not present.

was suggestive need the court consider the second question–whether there was a substantial likelihood of irreparable misidentification") (internal quotation omitted). Here, there was no "identification procedure that [was] both suggestive and unnecessary." *Wyatt*, 421 S.C. at 310, 806 S.E.2d at 710 (citing *Perry*, 565 U.S. at 238-39 (citing *Brathwaite*, 432 U.S. at 107, 109; and *Biggers*, 409 U.S. at 198).

As the Court of Appeals correctly observed, "[t]he State did not create the video. *Warner*, 430 S.C. at 91, 842 S.E.2d at 368. Rather, the police used a "snippet of the video" from the crime (***R. 9***), or "a clip [from] a media release." ***R. 473, lines 7-8***. This is no different from videos of other crimes routinely shown in television news coverage. Likewise, law enforcement's use of the video "was necessary under the circumstances." *Id.*

> At the time of their contact with Goolsby, the police had just received the Crimestoppers' tip, and the investigation was at a critical point. The armed perpetrator of a violent crime was still on the run and had already traveled between at least two states. It would have been impractical for the police to produce an array of videos recreating the crime scene, casting different actors as the perpetrator, before sending them to Goolsby.

Id. (citing "*Wyatt*, 421 S.C. at 314-15, 806 S.E.2d at 712) (questioning whether less suggestive procedures were realistic alternatives, as under the circumstances 'a lineup would be unworkable'"). *See also Simmons*, 390 U.S. at 384-85 (upholding police display of photos of bank robbery suspects to bank employee victims day after robbery where it was "essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities"); *Sanders*, 708 F.3d at 987.

Further, any unnecessary suggestiveness in showing the video to Agent Goolsby was mitigated by the fact Agent Goolsby knew Petitioner from repeated contact with him as his probation agent. *Warner*, 430 S.C. at 91, 842 S.E.2d at 368; *see also Liverman*, 398 S.C. at 141-42, 727 S.E.2d at 427-28; *Spears*, 393 S.C. at 481, 713 S.E.2d at 331-32. Similarly, the fact Agent

Goolsby was his probation officer mitigates any possible suggestiveness. *Cf. People v. McKay*, 138 Ill. App.3d 446, 451, 485 N.E.2d 1257, 1260-61 (1985) ("Defendant also argues that the officers' identification of him does not meet the requirements of *Manson v. Brathwaite* .... In both *Brathwaite* and *Manion* the issue was the reliability of an eyewitness' identification of the offender when the initial out-of-court identification procedure had been suggestive. In the present case the officers were not eyewitnesses to the crime and were not asked to identify the offender. Rather, the officers were asked to identify whether the man they saw driving defendant's car that night was the man whose photograph they had been shown earlier at roll call. *Brathwaite* and *Manion*, therefore, are inapplicable"); *Brathwaite*, 432 U.S. at 108 ("He was a trained police officer who realized that later he would have to find and arrest the person with whom he was dealing"); *Hall*, 940 A.2d at 650, 653-54 (single photo of suspect shown to police officer who identified defendant as suspect was neither suggestive nor unnecessary; suspect was object of ongoing manhunt, and experienced officer was less likely to be affected by a "suggestive procedure").

Moreover, the Court in *Brathwaite* concluded that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations." *Brathwaite*, 432 U.S. at 114. For the previously stated reasons, Respondent submits the preceding discussion makes clear that "[e]ven if sending the video to Goolsby was unnecessarily suggestive, ... Goolsby's identification was reliable." *Warner*, 430 S.C. at 91, 842 S.E.2d at 369.

Finally, this Court should not needlessly and improperly unhinge *Biggers* and its progeny from its due process underpinnings and extend it to non-eyewitnesses who know the accused before they make an identification. Such a holding would be particularly inappropriate here, where identity was conclusively established by the presence of Petitioner's palm print on the counter at the crime scene. Indeed, Agent Goolsby's identification of him must be viewed as harmless

because that palm print and the other evidence discussed in Argument I conclusively established identity and any plausible flaws in Agent Goolsby's identification of Petitioner were fully vetted on cross-examination. ***R. 228-31***. See *Sherard*, 303 S.C. at 175, 399 S.E.2d at 596 ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and sentence of the circuit court should be affirmed.

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