IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KENDRICK HERRING,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 1D13-5304

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Kendrick Herring, was the defendant in the trial court. This brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal will be referenced by "R." followed by the page number(s). The transcript of jury selection will be referenced by "JS" followed by the page number(s). The transcript of the jury trial consists of five volumes, which will be referenced by "JT" followed by the volume number (in Roman numerals), followed by the page number(s). The supplemental record consists of two volumes which will be referenced by "Supp." followed by the volume number (in Roman numerals), followed by the page number(s). The 3.800 supplemental record will be referenced by "3.800 Supp." followed by the page number(s). "IB" will designate Appellant's Initial Brief and "AB" will designate the State's Answer Brief.

STATEMENT OF THE CASE AND FACTS

Appellant's statement omits material facts and is not cast objectively in a form appropriate to the applicable standards of review. [1] (IB 1-31). Therefore, the State provides the following supplementation and corrections:

Count II charged Appellant with attempting to murder Terry Eubanks "by shooting with a firearm[.]" (R. 30).

Appellant filed a motion to suppress all evidence, claiming that the evidence was "the product of an unreasonable search and seizure by the failure of law enforcement to obtain a warrant for the location information of the cell phone in [Appellant]'s possession at the time he was approached and shot by police[.]" (R. 56). More specifically, Appellant asserted "[t]he seizure of the cell phone data and real time location data through the third party cell phone carrier were obtained from [Appellant] in violation of his right to be free from unreasonable searches and seizures . . ." (R. 59). Appellant's motion to suppress further asserted, "Although in a public place at the time . . . [Appellant] had an actual expectation of privacy in the cell phone location information and this expectation of privacy is one society is prepared to recognize as reasonable." (R. 59).

[1] Appellant's duty is to provide this Court with "a full and fair statement of facts." *Thompson v. State*, 588 So. 2d 687, 689 (Fla. 1st DCA 1991). "An appellant's statement of facts must not only be objective, but must be cast in a form appropriate to the standard of review applicable to the matters presented." *Id.*

Investigator Boccio testified at the suppression hearing that he had been a member of the Tallahassee Police Department (TPD) for 13 years. (Supp. 208). Shortly after a shooting that took place in a residential neighborhood, the victim who survived (Mr. Eubanks) advised TPD about the drug deal that was set up between the victims and the shooter. (Supp. 208-11, 235). The other victim (Mr. Andrews) was shot multiple times and died as a result. (Supp. 211-12). Mr. Eubanks was shot once and managed to escape. (Supp. 211-12). TPD found a cell phone on Mr. Andrews, and found a recently contacted number in that phone. (Supp. 210-11). TPD checked their databases for anyone affiliated with the phone number and could not find anything. (Supp. 223).

Investigator Boccio was concerned about the armed suspect in the community. (Supp. 212-23). He was concerned for the safety of the community and for the safety of any law enforcement officers who might have approached the suspect unknowingly. (Supp. 212-13). He was also concerned about the safety of the surviving victim who witnessed the shooting. (Supp. 235). The suspect was presumed to still be armed with a firearm because no firearm was recovered at the scene of the shooting. (Supp. 235).

Sergeant Corbitt of TPD testified at the hearing that he had been with TPD since 1995 and a member of the Technical Operations Unit since 2004. (Supp. 237). At the time of the shooting, Sgt. Corbitt supervised the Technical Operations

Unit. (Supp. 237). His primary assignment was to analyze cell phone records related to criminal investigations. (Supp. 237). Sgt. Corbitt had been declared an expert in this area in the past. (Supp. 237-28).

Sgt. Corbitt was familiar with Florida Statute section 934.09(7), which authorized the designation of certain law enforcement officers to intercept communications in specified situations. (Supp. 238). Sgt. Corbitt was one of those specially designated law enforcement officers. (Supp. 238). State's Exhibit 1 was entered into evidence without objection (Supp. 238-39), which was a copy of a signed document entitled "DESIGNATION OF LAW ENFORCEMENT OFFICER TO AUTHORIZE THE EMERGENCY INTERCEPTION OF COMMUNICATIONS." This document stated:

> Pursuant to Section 934.09(7) and 934.31(4), Florida Statutes, the following named investigative or law enforcement officer, INVESTIGATOR CHRISTOPHER CORBITT, of the TALLAHASSEE POLICE DEPARTMENT is specially designated by the undersigned State Attorney to authorize and implement the interception of wire, oral, or electronic communications, and the installation and use of a pen register or trap and trace device, subject to the following conditions:
>
> The law enforcement officer reasonably determines that:
>
> (a) An emergency exits that:
>
> 1. Involves the immediate danger of death or serious physical injury to a person, or the danger of the escape of a prisoner; and
> 2. Requires that a wire, oral, or electronic communication be intercepted, or a pen register or trap and trace device be installed and used, before

an order authorizing such interception can, with due diligence, be obtained;

(b) There are grounds, under Chapter 934 of the Florida Statutes, upon which an order could be entered to authorize such interception of communications, or use of a pen register or trap and trace device; and

(c) An application for a court order approving the interception is made, in accordance with Section 934.09(7) and 934.31(4), Florida Statutes, within 48 hours after interception occurred, or began to occur.

TPD contacted Sgt. Corbitt and advised him of the homicide that had just occurred. (Supp. 239, 246). Sgt. Corbitt researched the suspect's phone number, determined the carrier was T-Mobile, and then made contact with T-Mobile to advise them of the situation. (Supp. 240, 246).

Sgt. Corbitt explained that he looked at a variety of factors in determining whether an exigent circumstance existed in this case. (Supp. 240). First, the shooting occurred during a narcotics transaction, and there was a "longstanding understanding that narcotics and violent crimes go together." (Supp. 240). Second, the shooting was unprovoked. (Supp. 240). Third, the surviving victim/witness to the shooting was cooperating with law enforcement and may have been in danger from the suspect. (Supp. 240). Fourth, an armed suspect from a deadly shooting was loose in the community. (Supp. 240). Fifth, Sgt. Corbitt was concerned about what would happen if the suspect encountered law enforcement. (Supp. 240).

Sgt. Corbitt instructed TPD to send T-Mobile an exigent circumstances form in order to obtain the location data of the phone. (Supp. 224-25, 246). State's Exhibit 2 was entered into evidence without objection, which contained a copy of the faxed "EXIGENT CIRCUMSTANCE REQUEST" that was sent to T-Mobile for the cell phone's location data. The emergency was described in the form:

> The Police Dept is currently investigating a Homicide where one victim was shot multiple times and a second victim once. The suspect is currently armed and loose in a residential neighborhood. The neighborhood is in danger as well as the second victim that survived if the suspect is not located.

(St. Ex. 2, p.3).

The suspect's phone was determined to be a pre-paid phone. (Supp. 249). The location data of the suspect's cell phone was obtained, and its GPS location data was sent to TPD via email from T-Mobile. (Supp. 241-42). This included the latitude and longitude for the handset of the phone and an accuracy determination radius. (Supp. 242). The first and second GPS coordinates from T-Mobile indicated the phone was in the area of Capital Circle Northwest near the entrance of Brittany Estates Trailer Park. (Supp. 242). A Google earth map with these coordinates was entered into evidence as State's Exhibit 3. (Supp. 243).

Appellant was found sitting at a bus stop in this area. (Supp. 242). The area in which Appellant was found was described as "very small." (Supp. 263). Sgt. Corbitt explained: "The overlapping field of this information is extremely small.

We go to that area . . . drive-through, we see somebody sitting at a bus stop that matches the clothing description, the physical description of the suspect." (Supp. 263). The surviving victim identified the suspect as a black male and advised law enforcement officers what the suspect was wearing. (Supp. 211, 213). Once TPD obtained the location data of the cell phone, they found a person matching the description sitting at a public bus stop at 4:30 in the morning. (Supp. 213). No one else was in the area. (Supp. 213-14). TPD officers then seized that person. (Supp. 215). Later on, an application for a search warrant was done for the cell phone records of the phone Appellant was carrying. (JT I. 128).

The trial court found that exigent circumstances existed for law enforcement to obtain the phone's location data without a warrant. (Supp. 285). The trial court found:

> [T]here was a homicide, there was information that there was a suspect on the loose with a gun. They are looking for that suspect. I think it's reasonable. And even the case cited by the State, that they needed to find the suspect, that there was a victim that was taken to the hospital, there was one person dead, that they were concerned about law enforcement safety should they encounter . . . [Appellant] unbeknownst to them. . . . I understand the time frame the defense is arguing, but I think under the analysis which is the totality of the circumstances the Court has to look at were these exigent circumstances such that they needed to try to locate this defendant as quickly as possible. . . . So we know that the phone is reported to be communicating with cellphone towers within the area of Brittany Estates, one on one side of the road, one on the other, as Detective Corbitt talked about.

> They . . . arrive at that location. There is [Appellant] sitting at a bus stop. I understand that the evidence is there were several types of descriptions of clothing, but one of the descriptions was consistent with him at the bus stop. It's . . . a little after four o'clock in the morning, unusual for anybody to be – no one else is around. There's no other testimony that there were people anywhere within eyesight of [Appellant]. He matches . . . one of the descriptions of the suspect.

(Supp. 285-86).

The State cited to *United States v. Caraballo*, 963 F. Supp. 2d 341 (D.Vt. 2013) for the proposition that there was no reasonable expectation of privacy in realtime cell phone location data in emergency situations. (Supp. 194, 291). The State also cited to *United States v. Skinner*, 690 F. 3d 772 (6th Cir. 2012) where the Sixth Circuit found no Fourth Amendment violation because the defendant did not have a reasonable expectation of privacy in the data given off by his voluntary procured pay-as-you-go cell phone. (Supp. 290-91).

Defense counsel declined the trial court's invitation to provide any case law or argue any other legal authority. (Supp. 291). Appellant also failed to present any evidence or testimony at the suppression hearing.

During trial, the surviving victim/eyewitness testified that the shooting occurred during a drug deal. (JT I. 46-48). The shooter was wearing black and continued shooting at the victims inside the vehicle as they attempted to flee. (JT I. 49). The surviving victim was shot in his left arm during the shooting, and went to the hospital for treatment. (JT I. 51-52, 60).

When Appellant woke up in the hospital, he asked: "I didn't shoot a police officer, did I?" (JT II. 269).

After the trial court denied Appellant's motions for judgment of acquittal, Appellant called a fellow inmate to testify that the shooter was a man by the name of "J.B." (JT IV. 431). Appellant's witness could not give any further identifying information about "J.B." and "J.B." never testified at trial. (JT IV. 431-32). This witness' testimony was later impeached by his prior inconsistent statements to law enforcement. (JT IV. 489-96).

Appellant testified that he was selling crack cocaine around the time period of the shooting and that his girlfriend lived in Brittany Estates. (JT IV. 446, 450). Appellant sold a number of different drugs as soon as he was released from prison because he could not find a job. (JT IV. 450).

The pre-paid cell phone was originally Appellant's girlfriend's mother's phone. (JT IV. 447-48). Appellant's girlfriend then had the phone in her name, and subsequently gave it to Appellant. (JT IV. 447-48). When asked if he had the cell phone the entire day of the shooting, Appellant answered: "Not the entire time. Never the entire time. Almost every day I never had possession of the phone." (JT IV. 454-55). This was because he lent the phone to other people. (JT IV. 455). Appellant explained: "It's a, it's a buddy and pal thing, friend thing, or whatever. Far as the phone go, it, it might come across – you know, he may need to use my

phone or she may need to use my phone, or whatnot. It's, it's no big deal. I mean, it's a flip phone. I mean, it's been times when I got out of prison that I had to use everybody phone, . . ." (JT IV. 455-56).

This phone was also primarily used to sell drugs. (JT IV. 455-56). Appellant explained that phones like this are used to sell "dope" because they cannot be traced. (JT IV. 455). Appellant explained: "it's what we call a trap phone on the streets. And that's simply because you could [s]ell dope off it and, you know, not get caught up with it, or whatever, or whatnot. . . . And that's pretty much what I used to do off it." (JT IV. 455).

Appellant bought the firearm "from the streets." (JT IV. 449). He had the cell phone and the firearm in his possession on the day of the shooting. (JT IV. 453). Appellant claimed he gave his gun and phone to "J.B." a.k.a. "Black." (JT IV. 457-59). According to Appellant, J.B. "used the phone numerous of times." (JT IV. 459). He gave his gun and phone to J.B. sometime between 5 p.m. and 7 p.m. on the day of the shooting. (JT IV. 460). He received the gun and phone back from J.B. between 11 p.m. and 12:30 a.m. (JT IV. 461).

When asked why he ran upon sight of police, Appellant explained: "Because – I mean, I mean, I'm, I'm, I'm – I mean, at the time – well, at the time because I'm different from where I was then. But at the time, it's, it's my mentality to get up and run and not get caught." (JT IV. 480).

Appellant's defense theory was that someone else ("J.B.") committed the shooting of the victims. (JT V. 568-87). As defense counsel explained, "All you need to decide is who was there at 10:30 in possession of a firearm. Who pulled the trigger seven times?" (JT V. 574). There was no dispute that Mr. Eubanks (the victim who survived) was shot as a result of the discharge of the shooter's firearm. (JT V. 568-87). Defense counsel conceded this point during closing argument. (JT V. 573).

For Count II, the jury was instructed: "If you find that [Appellant] committed attempted murder and you also find beyond a reasonable doubt that during the commission of the crime he discharged a firearm, and in doing so, shot Terry Eubanks, you should find [Appellant] guilty of attempted murder with discharge of a firearm attempting to cause death or great bodily harm." (R. 69-70; JT V. 532).

During a discussion about a jury question as to Count II, defense counsel again conceded: "Well, I think the evidence was that [Mr. Eubanks] was shot in the arm." (JT V. 604).

For Count II, the jury found Appellant guilty of attempted second degree murder while having actual possession of a firearm, actually discharging a firearm, and actually discharging a firearm attempting to cause death or great bodily harm. (R. 82-83).

After the jury was dismissed, a discussion was held about whether Appellant should be sentenced for Count II under the Prison Releasee Reoffender (PRR) enhancement or the 10/20/Life enhancement. (JT V. 614). Defense counsel affirmatively requested that Appellant be sentenced under 10/20/Life rather than PRR. (JT V. 614-19). As a result, the trial court sentenced Appellant under 10/20/Life for Count II. (JT V. 619).

In denying Appellant's motion to correct sentencing errors, the trial court found that Appellant was charged in Count II with attempted first degree murder, "in that he attempted to kill Terry Eubanks 'by shooting with [a] firearm.'" (3.800 Supp. 171). The trial court also found: "Undisputed evidence adduced at trial established beyond a reasonable doubt that Terry Eubanks was shot in the arm during the commission of the offense." (3.800 Supp. 171). Accordingly, the trial court held that Appellant was subject to sentencing under the 10/20/Life Statute for Count II. (3.800 Supp. 171).

SUMMARY OF ARGUMENT

Appellant failed to show that he had a reasonable expectation of privacy in the location data of the phone. Appellant's testimony at trial further established why he had no standing: the phone was generally shared with others and was primarily used to sell drugs. Even if Appellant had standing, exigent circumstances existed to obtain the phone's location data without a warrant. A murder and attempted murder had just been committed during a drug deal in a residential neighborhood. The armed shooter was still at large, which created a legitimate concern for the safety of the community, the safety of the surviving victim/witness who was cooperating with police, and the safety of any law enforcement officers who might encounter the suspect. Concerns about the destruction of evidence further added to the exigency. Even if a Fourth Amendment violation occurred, the exclusionary rule would not apply because officers were reasonably relying on the controlling legal authority that existed at the time of the search. Therefore, the motion to suppress was properly denied.

When viewed in the proper context of the specific jury instruction tailored for this particular enhancement, the jury made a clear finding that the discharge of the firearm resulted in great bodily harm to any person. Any error was harmless based on the overwhelming and undisputed evidence that the discharge of the firearm resulted in great bodily harm to any person.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Standard of Review

Where the inquiry involves mixed questions of law and fact, appellate courts use a two-step approach, deferring to the trial court on questions of fact, but conducting a *de novo* review of the constitutional issue. *See Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001).

Burden of Persuasion and Presumption of Correctness

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the evidence and reasonable inferences and deductions derived therefrom must be interpreted in a manner most favorable to sustaining the trial court's ruling. *Pilieci v. State*, 991 So. 2d 883, 893-94 (Fla. 2d DCA 2008). Appellant has the burden to convince this Court to vacate the presumptively correct judgment. *See Savage v. State*, 156 So. 2d 566, 568 (Fla. 1st DCA 1963); § 924.051(7), Fla. Stat. (2000). In support of the presumptively correct judgment, the appellee can present any argument supported by the record even if not expressly asserted below. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). "A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." *State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011).

Merits

A. Appellant lacked standing to challenge the warrantless search of a cell phone's location data where the phone was shared with others and was primarily used for selling narcotics.

Although the State did not expressly challenge Appellant's standing at the trial level, the issue of whether Appellant had a reasonable expectation of privacy in the area searched may be properly raised for the first time on appeal. *State v. Fernandez*, 36 So. 3d 120, 123 (Fla. 2d DCA 2010) (citing *McCauley v. State*, 842 So. 2d 897, 900 (Fla. 2d DCA 2003) ("Although this point was not argued by the State at the hearing on the motion, the concept of standing has been subsumed into Fourth Amendment issues and can be raised for the first time on appeal."); *State v. Lennon*, 963 So. 2d 765, 769 (Fla. 3d DCA 2007) ("Although not presented below by the State, the issue of standing may be properly addressed for the first time on appeal.")); *see also Dade County Sch. Bd.*, 731 So. 2d at 645 (Appellee can present any argument supported by the record even if not expressly asserted below); *Hankerson*, 65 So. 3d at 505 ("A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment.").

When Appellant filed a motion to suppress, the burden was placed on him to establish that his "own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). The Fourth Amendment, which guarantees citizens to be free from unreasonable searches and

seizures, "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). The United States Supreme Court has held that "an illegal search only violates the rights of those who have 'a legitimate expectation of privacy in the invaded place.'" *United States v. Salvucci*, 448 U.S. 83, 91–92 (1980). Fourth Amendment protections are "personal rights which . . . may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134. Accordingly, "only defendants whose Fourth Amendment rights have been violated [can properly] benefit from the [exclusionary] rule's protections." *Id.*

This Court has also adhered to the well-established principals from the United States Supreme Court in placing the initial burden on defendant's to establish standing to object to an unreasonable search or seizure. *See State v. Bostick*, 745 So. 2d 496 (Fla. 1st DCA 1999). Florida Rule of Criminal Procedure 3.190(g)(3), requires the defense to present evidence in support of the motion, after which time the State may offer rebuttal evidence. The initial burden requires the defense to make some showing that a search occurred and was invalid. *State v. Mobley*, 98 So. 3d 124, 125 (Fla. 5th DCA 2012). Allegations in the motion to suppress **are not evidence** and will not shift the burden to the State. *Id.*

"If the court hears the motion on its merits, **the defendant shall present evidence** supporting the defendant's position and the state may offer rebuttal evidence." Fla. R. Crim. P. 3.190(g)(3) (emphasis added). The trial court must make its ruling "upon the basis of the evidence adduced" at the hearing on the motion. *See Foster v. State*, 255 So. 2d 533, 535 (Fla. 1st DCA 1971); *see also Mobley*, 98 So. 3d at 125 ("Allegations in the motion to suppress are not evidence and will not shift the burden to the State."); *State v. Hinton*, 305 So. 2d 804, 807 (Fla. 4th DCA 1975) ("Clearly, a motion to suppress (and the allegations therein) are not 'evidence' nor do they comply with the necessity of defendant to 'present evidence supporting his position'").

Before a criminal defendant can invoke the Fourth Amendment's protection, the defendant "must establish standing by demonstrating a legitimate expectation of privacy in the area searched or the item seized." *Young v. State*, 974 So. 2d 601, 608 (Fla. 1st DCA 2008); *see Smith v. Maryland*, 442 U.S. 735, 739 (1979); *Terry v. Ohio*, 392 U.S. 1, 9, (1968). A two-pronged inquiry must analyze first, whether an individual has "exhibited an actual (subjective) expectation of privacy" and second, whether the individual's expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 351, 361). Here, Appellant failed to offer any evidence to establish either of these two prongs. (Supp. 199-291).

Appellant was given a full and fair opportunity to present evidence at the suppression hearing. (Supp. 199-291). Appellant called no witnesses and submitted no evidence. (Supp. 199-291). In fact, the State alerted defense counsel to Appellant's initial burden, to which defense counsel merely replied: "Judge, I think our motion is sufficient to shift the burden to the State. The officers are out there. Whose ever burden it is, we can just bring them in and start – start their testimony." (Supp. 199). Because Appellant never established that he had a reasonable expectation of privacy in the location data of the phone, the trial court did not err in denying Appellant's motion to suppress based on the search/seizure of that data.

Appellant's sworn testimony at trial further established why he never had a reasonable expectation of privacy in the phone's location data. First, the phone was shared by a number of different people. Second, the phone was primarily used to facilitate illegal activity.

According to Appellant, the pre-paid cell phone at issue was originally his girlfriend's mother's phone. (JT IV. 447-48). Appellant's girlfriend then had the phone in her name, and she subsequently gave it to Appellant. (JT IV. 447-48). When asked if he had possession of the phone during the entire day of the shooting, Appellant answered: **"Not the entire time. Never the entire time. Almost every day I never had possession of the phone."** (JT IV. 454-55)

(emphasis added). This was because he lent the phone to other people. (JT IV. 455). For example, J.B. "used the phone numerous of times." (JT IV. 459). Appellant explained: "It's a, it's a buddy and pal thing, friend thing, or whatever. Far as the phone go, it, it might come across – you know, he may need to use my phone or she may need to use my phone, or whatnot. It's, it's no big deal. I mean, it's a flip phone. I mean, it's been times when I got out of prison that I had to use everybody phone, . . ." (JT IV. 455-56). Thus, Appellant did not have a reasonable expectation of privacy in a phone that was generally shared by others.

More specifically, Appellant claimed he gave the phone to "J.B." on the day of the shooting. (JT IV. 457-59). He gave the phone to J.B. between 5 p.m. and 7 p.m., and received the phone back from J.B. between 11 p.m. and 12:30 a.m. (JT IV. 460-61). The shooting occurred around 10:30 p.m. (Supp. 217).

Appellant had no reasonable expectation of privacy in the location data of a phone that he shared with other people and only temporarily possessed on the day of the shooting. "[T]emporary visitors or short-term invitees . . . are generally unable to advance a position of privacy with success.'" *Watson v. State*, 979 So. 2d 1148, 1151-52 (Fla. 1st DCA 2008) (quoting *Hicks v. State,* 852 So. 2d 954, 959 (Fla. 5th DCA 2003)). It is well established that standing cannot be asserted vicariously, and even if it could, Appellant failed to make such a claim. *See Rakas*, 439 U.S. at 133-34. Therefore, Appellant lacked standing for this reason alone.

Appellant also lacked standing because the phone was primarily used to sell drugs (JT IV. 455-56) which effectively made the phone contraband, which is illegal to possess. *See* § 932.701(2)(a)(1), Fla. Stat. (2011) (Defining contraband as any device "that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893 . . . whether or not the use of the contraband article can be traced to a specific narcotics transaction."); *see also* § 932.701(2)(a)(5), Fla. Stat. (defining contraband as any personal property, including, but not limited to, any item, object, tool, device, machine, or records, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony). It was unlawful for Appellant to possess a contraband article such as this self-proclaimed "trap phone." (JT IV. 455); *See* § 932.702(2), Fla. Stat. (2011).

Here, Appellant explained that pre-paid phones like the one in this case are used to sell "dope" because they cannot be traced. (JT IV. 455). Appellant explained: "it's what we call a trap phone on the streets. And that's simply because you could [s]ell dope off it and, you know, not get caught up with it, or whatever, or whatnot. . . . And that's pretty much what I used to do off it." (JT IV. 455). Thus, Appellant's own testimony established that the phone – used for primarily for selling narcotics – was contraband.

There are no legitimate privacy interests in contraband under the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed 'legitimate.'") (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). Here, any subjective expectation of privacy in the location data for this "trap phone" that was passed around to various drug dealers for the purpose of selling "dope" on the streets cannot possibly be a "legitimate" one that society is prepared to recognize. Appellant's motion to suppress could have been denied on this basis alone.

The Sixth Circuit could not have said it better:

> When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them. This is not a case in which the government secretly placed a tracking device in someone's car. The drug runners in this case used pay-as-you-go (and thus presumably more difficult to trace) cell phones to communicate during the cross-country shipment of drugs. Unfortunately for the drug runners, the phones were trackable in a way they may not have suspected. The Constitution, however, does not protect their erroneous expectations regarding the undetectability of their modern tools.

United States v. Skinner, 690 F. 3d 772, 774 (6th Cir. 2012). "If a tool used to transport contraband gives off a signal that can be tracked for location, certainly

the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools." *Id.* at 777.

Because Appellant failed to establish standing, the most basic and fundamental prerequisite to asserting a Fourth Amendment violation in the first place, Appellant's motion to suppress was properly denied.

B. Exigent circumstances existed to obtain the cell phone's location data without the need for a warrant.

As a threshold proposition, in 2011, cell phone users like the telephone users in *Smith v. Maryland*, 442 U.S. 735 (1979) and *United States v. Miller*, 425 U.S. 435 (1976) were generally aware that their cell phones may contain a location device that can be accessed by law enforcement and other first responders in the event of an emergency. *United States v. Caraballo*, 963 F. Supp. 341, 360 (D. Vt. 2013). In fact, by 2011, federal law mandated that cell phones provide enhanced location services whenever 911 services were accessed. *Id.* In turn, in 2011, 18 U.S.C. § 2702(c)(4) of the Stored Communications Act authorized cell phone service providers to disclose without a warrant "a record or other information pertaining to a subscriber to or customer of [cell phone] service . . . to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." *Id.*

Congress thus deemed it reasonable to subordinate any individual privacy interest in cell phone location data to society's more compelling interest in preventing an imminent threat of death or serious bodily injury. *Id.* "Because there is a 'strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable,"' '[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional.'" *Id.* (quoting *United States v. Watson*, 423 U.S. 411 416 (1976)).

For example, in *Caraballo*, the "pinging" of the defendant's cell phone was found to be occasioned by an exigent situation. *Id.* at 362. At the time of the pinging, law enforcement had reason to believe that a homicide had just occurred and that whoever committed the "execution style" crime had recently left the scene with the homicide weapon. *See id.* Based on this and other information about the defendant's ongoing drug activity and prior violent behavior, law enforcement was found to have a legitimate, good faith belief that the defendant must be apprehended immediately. *See id.* Based on the totality of the circumstances, the defendant in *Caraballo* could not be deemed to have retained an actual subjective expectation of privacy in the phone's real time location data because he was on notice that such data was available to law enforcement in the event of an emergency. *See id.* at 363. The *Caraballo* court further found that even if the

defendant held such a belief, it would not be one that society is prepared to accept as reasonable. *Id.*

The *Caraballo* court went on to explain why exigent circumstances existed regardless of the defendant's expectation of privacy:

> Here, the exigent circumstances consisted of an "execution style" homicide (a violent and extremely serious offense) that appeared to have taken place that morning. The person whom committed the homicide was believed to be armed. Defendant had recently been identified by Ms. Barratt as a person who was likely to kill or harm her if he knew she was making statements to the police. Although law enforcement personnel believed they lacked probable cause to arrest Defendant for the Barratt homicide, Defendant remained law enforcement's "primary suspect." Law enforcement reasonably believed there was a serious public safety risk if Defendant was not swiftly apprehended. Cell phone pinging presented a peaceful and apparently lawful means of quickly discerning Defendant's location in order to maintain at least surveillance over him and to enhance law enforcement's ability to effect an expeditious and safe arrest. *See Dorman*, 435 F. 2d at 392 ("Delay in arrest of an armed [suspect] may well increase danger to the community meanwhile, or to the officers at time of arrest. This consideration bears materially on the justification for a warrantless [search].").
>
> At the time, law enforcement also had a substantial and legitimate interest in apprehending a primary suspect in the Barratt homicide when any evidence of the alleged crime (such as gun powder residue, the homicide weapon, DNA, blood traces, shoe imprints, tire imprints, and other evidence) could still be obtained. Courts, including the Supreme Court, have recognized that the need to obtain and preserve critical evidence in the investigation of a serious crime constitutes "exigent circumstances" which renders the failure to obtain a warrant reasonable under the Fourth Amendment. *See Kentucky v. King*, ––U.S. ––––, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011) ("[T]he need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search.") (quoting *Brigham City, Utah v. Stuart*, 547 U.S.

> 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)); *United States v. Moreno*, 701 F.3d 64, 74 (2d Cir.2012) (concluding exigent circumstances justified warrantless entry into motel room when suspect's "unusual behavior ... raised a legitimate concern that she would attempt to destroy or discard the drugs that the agents had probable cause to believe were inside"); *Simmons*, 661 F.3d at 157 ("An[ ] exigency is the need to prevent the imminent destruction of evidence."); *MacDonald*, 916 F.2d at 770 (affirming "district court's finding that the [government] agents were confronted by an urgent need to prevent the possible loss of evidence" in light of "the ease with which the suspects could have disposed of the cocaine by flushing it down the toilet, and the possibility that the prerecorded five dollar bill used ... in the undercover buy would be lost if the ongoing drug transactions were permitted to continue while the [government] agents sought a warrant"). Here, the warrant process would take days if not weeks to unfold.
>
> For the foregoing reasons, the court concludes that exigent circumstances alone rendered the warrantless search of Defendant's cell phone location reasonable, under the Fourth Amendment. *See MacDonald*, 916 F. 2d at 700.

Id. at 363-65.

The same safety concerns for the community, the surviving witness/victim, and law enforcement existed here. Shortly after the shooting, TPD learned that a drug deal was set up between the victims and the shooter in a residential neighborhood. (Supp. 208-10, 235). The victim who survived, Mr. Eubanks, advised TPD about the drug deal that was set up where the shooting occurred. (Supp. 211).

Mr. Andrews was shot multiple times and died as a result. (Supp. 211-12). Mr. Eubanks was shot once and managed to escape. (Supp. 211-12). TPD found a cell phone on Mr. Andrews, and found a recently contacted number in that phone.

(Supp. 210-11). TPD checked their databases for anyone affiliated with the phone number and could not find anything. (Supp. 223).

Investigator Boccio was concerned about the armed suspect in the community. (Supp. 212-23). He was concerned for the safety of the community and for the safety of any law enforcement officers who might have approached the suspect unknowingly. (Supp. 212-13). He was also concerned about the safety of the surviving victim who witnessed the shooting. (Supp. 235). The suspect was presumed to still be armed with a firearm because no firearm was recovered at the scene of the shooting. (Supp. 235).

Sergeant Christopher Corbitt of TPD testified at the hearing that he had been with TPD since 1995 and a member of the Technical Operations Unit since 2004. (Supp. 237). At the time of the shooting, Sgt. Corbitt supervised the Technical Operations Unit. (Supp. 237). His primary assignment was to analyze cell phone records related to criminal investigations. (Supp. 237). Sgt. Corbitt had been declared an expert in this area in the past. (Supp. 237-28).

Sgt. Corbitt was familiar with Florida Statute section 934.09(7), which authorized the designation of certain law enforcement officers to intercept communications in specified situations. (Supp. 238). Sgt. Corbitt was one of those specially designated law enforcement officers. (Supp. 238). State's Exhibit 1 was entered into evidence without objection (Supp. 238-39), which was a copy of a

signed document entitled "DESIGNATION OF LAW ENFORCEMENT OFFICER TO AUTHORIZE THE EMERGENCY INTERCEPTION OF COMMUNICATIONS." This document stated:

> Pursuant to Section 934.09(7) and 934.31(4), Florida Statutes, the following named investigative or law enforcement officer, INVESTIGATOR CHRISTOPHER CORBITT, of the TALLAHASSEE POLICE DEPARTMENT is specially designated by the undersigned State Attorney to authorize and implement the interception of wire, oral, or electronic communications, and the installation and use of a pen register or trap and trace device, subject to the following conditions:
>
> The law enforcement officer reasonably determines that:
>
> (a) An emergency exits that:
>
> 1. Involves the immediate danger of death or serious physical injury to a person, or the danger of the escape of a prisoner; and
> 2. Requires that a wire, oral, or electronic communication be intercepted, or a pen register or trap and trace device be installed and used, before an order authorizing such interception can, with due diligence, be obtained;
>
> (b) There are grounds, under Chapter 934 of the Florida Statutes, upon which an order could be entered to authorize such interception of communications, or use of a pen register or trap and trace device; and
>
> (c) An application for a court order approving the interception is made, in accordance with Section 934.09(7) and 934.31(4), Florida Statutes, within 48 hours after interception occurred, or began to occur.

TPD contacted Sgt. Corbitt and advised him of the homicide that had just occurred. (Supp. 239, 246). Sgt. Corbitt researched the phone number, determined the carrier was T-Mobile, and then made contact with T-Mobile to advise them of the situation. (Supp. 240, 246).

Sgt. Corbitt looked at a variety of factors in determining that an exigent circumstance existed in this case. (Supp. 240). First, the shooting occurred during a narcotics transaction, and there was a "longstanding understanding that narcotics and violent crimes go together." (Supp. 240). Second, the shooting was unprovoked. (Supp. 240). Third, the surviving victim/witness to the shooting was cooperating with law enforcement and may have been in danger from the suspect. (Supp. 240). Fourth, an armed suspect from a deadly shooting was loose in the community. (Supp. 240). Fifth, Sgt. Corbitt was concerned about what would happen if the suspect encountered law enforcement. (Supp. 240).

Sgt. Corbitt instructed TPD to send T-Mobile an exigent circumstances form in order to obtain the location data of the phone. (Supp. 224-25, 246). The emergency was described in the form:

> The Police Dept is currently investigating a Homicide where one victim was shot multiple times and a second victim once. The suspect is currently armed and loose in a residential neighborhood. The neighborhood is in danger as well as the second victim that survived if the suspect is not located.

(St. Ex. 2, p.3).

Under these facts, the trial court did not err in finding that exigent circumstances existed where the safety concerns of the community, the surviving victim/witness, and any law enforcement that might encounter Appellant were sufficiently demonstrated.

Likewise, the same destruction of evidence concerns as expressed in *Caraballo* were also present here. *See* 963 F. Supp. 341, 363-65. Evidence of the murder of Mr. Andrews and the attempted murder of Mr. Eubanks (such as gun powder residue, the murder weapon, DNA, blood traces, shoe imprints, tire imprints, and other evidence) could still be obtained. *See id.*

The trial court found that exigent circumstances existed for law enforcement to obtain the phone's location data without a warrant. (Supp. 285). The trial court found:

> [T]here was a homicide, there was information that there was a suspect on the loose with a gun. They are looking for that suspect. I think it's reasonable. And even the case cited by the State, that they needed to find the suspect, that there was a victim that was taken to the hospital, there was one person dead, that they were concerned about law enforcement safety should they encounter . . . [Appellant] unbeknownst to them. . . . I understand the time frame the defense is arguing, but I think under the analysis which is the totality of the circumstances the Court has to look at were these exigent circumstances such that they needed to try to locate this defendant as quickly as possible. . . . So we know that the phone is reported to be communicating with cellphone towers within the area of Brittany Estates, one on one side of the road, one on the other, as Detective Corbitt talked about.

> They . . . arrive at that location. There is [Appellant] sitting at a bus stop. I understand that the evidence is there were several types of descriptions of clothing, but one of the descriptions was consistent with him at the bus stop. It's . . . a little after four o'clock in the morning, unusual for anybody to be – no one else is around. There's no other testimony that there were people anywhere within eyesight of [Appellant]. He matches . . . one of the descriptions of the suspect.

(Supp. 285-86). These findings were supported by competent, substantial evidence.

Appellant claims the time period between the shooting and the search was too far apart for exigent circumstances to exist. (IB 40-41). In making this claim, Appellant cites to *Alvarado v. State*, 466 So. 2d 335 (Fla. 2d DCA 1985) for support. (IB 40-41). Appellant's reliance on Alvarado is misplaced for at least two reasons. First, *Alvarado* dealt with the search of a private dwelling, which has traditionally been afforded the most protection under the Fourth Amendment. *See id.* Here, the phone's location data revealed nothing more than the phone's location at a public bus stop. (Supp. 213-14, 241-43, 263). Second, the search in *Alvarado* occurred **14 hours** after the offense. *Id.* at 336-37. Here, the search occurred within only **5 hours** after the offense. (Supp. 217, 252).[2]

Finally, an application of each and every one of the factors set forth by this Court in *Lee v. State*, 856 So. 2d 1133, 1137 (Fla. 1st DCA 2003) support a finding

[2] The offense in this case occurred at 10:30 p.m. and the first GPS coordinates that law enforcement received from T-Mobile were sent at 2:51 a.m. (Supp. 217, 252).

of exigent circumstances here. *See* 856 So. 2d at 1137 ("Factors indicating exigent circumstances include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; and (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public.").

Here, (1) an unprovoked murder and attempted murder were committed in a residential neighborhood during a drug deal where one victim was shot and the other victim was shot several times, (2) there was a reasonable belief the suspect was armed because the firearm he used was never found at the scene of the shooting, (3) probable cause existed to believe that whoever had possession of the phone that set up the drug deal was most likely the shooter, (4) there was strong reason to believe that the phone's location data would assist in locating the suspect, and (5) there was a strong likelihood that any further delay would cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public. Therefore, exigent circumstances existed for law enforcement to obtain the phone's location date without a warrant, and the trial court did not err in denying Appellant's motion to suppress.

C. The good faith exception to the exclusionary rule applied because the officers were reasonably relying on controlling legal authority at the time of the search.

Even if exigent circumstances did not exist, the officers were acting in good faith by reasonably relying on the controlling legal authority at the time. The United States Supreme Court has explicitly held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011). In *Davis*, while the defendant's appeal was pending, the Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), which dramatically impacted the current state of Fourth Amendment jurisprudence. *Davis*, 131 S. Ct. at 2426. The Eleventh Circuit applied *Gant*'s new rule and held that although the search of Davis' vehicle violated his Fourth Amendment rights, penalizing the arresting officer for following binding appellate precedent would do nothing to deter Fourth Amendment violations. *Id.*

In affirming the Eleventh Circuit's decision, the United States Supreme Court examined the history and purpose of the exclusionary rule:

> The rule's sole purpose . . . is to deter future Fourth Amendment violations. . . . Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted." . . . Exclusion exacts a heavy toll on both the judicial system and society at large. . . . It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. . . . And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the

> community without punishment. . . . Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." . . . For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Id. at 2426-27 (internal citations omitted).

In applying these legal principals to the facts of Davis' case, the Supreme Court held:

> About all that exclusion would deter in this case is conscientious police work. Responsible 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. . . . when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "ac[t] as a reasonable officer would and should act" under the circumstances. . . . The deterrent effect of exclusion in such a case can only be to discourage the officer from "do[ing] his duty."

Id. at 2429 (internal citations omitted) (emphasis in original).

The same is true here. When the shooting occurred in March of 2011, neither *United States v. Jones*, 132 S. Ct. 945 (2012), *Riley v. California*, 134 S. Ct. 2473 (2014), nor *Tracey v. State*, 30 Fla. L. Weekly S617 (Fla. Oct. 16, 2014) had been decided. Instead, law enforcement officers in this case were reasonably operating under the longstanding and controlling legal principal that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979); *see also California*

v. Greenwood, 486 U.S. 35, 41 (1988); *Rehberg v. Paulk*, 611 F. 3d 828, 842-43 (Fla. 11th Cir. 2010).[3]

Additionally, law enforcement officers here reasonably relied on the statutory authorization of the interception of wire, oral, or electronic communications found Chapter 934 of the Florida Statutes. The good faith exception to the exclusionary rule applies even where "officers act in objectively reasonable reliance upon a **statute** authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 342 (1987) (emphasis added).

For example, in *Caraballo*, the Stored Communications Act had not been ruled unconstitutional, nor did the defendant challenge its constitutionality. 963 F. Supp. 2d at 365. The trial court found that law enforcement and Sprint Nextel acted reasonably and in good faith in relying upon the act's provisions authorizing cell phone pinging in an exigent situation. *Id.* Accordingly, the *Caraballo* court

[3] Appellant appears to suggest that he never voluntarily turned over any information to third parties because "the real-time GPS location information was obtained without [Appellant]'s placing any call or affirmatively seeking to provide information to his cellular phone carrier." (IB 38-39). Contrary to this claim, Appellant voluntarily communicated with the victims - using that cell phone - for the purpose of selling drugs (or setting up a fake drug deal for a robbery). (Supp. 208-11, 235). Thus, Appellant's voluntary use of the phone to set up the drug deal with the victims is exactly how law enforcement discovered the phone number. (Supp. 210-11).

found that even if a Fourth Amendment violation occurred, suppression would not have been warranted as it would serve no deterrent purpose. *Id.* at 365-66.

Here, Sgt. Corbitt, a member of TPD since 1995 and a member of the Technical Operations Unit since 2004 (Supp. 237), testified that at the time of the shooting, he was the supervisor of the Technical Operations Unit. (Supp. 237). His primary assignment was to analyze cell phone records related to criminal investigations. (Supp. 237). Sgt. Corbitt had been declared an expert in this area in the past. (Supp. 237-28).

Sgt. Corbitt was familiar with Florida Statute section 934.09(7), which authorized the designation of certain law enforcement officers to intercept communications in specified situations. (Supp. 238). Sgt. Corbitt was one of those specially designated law enforcement officers. (Supp. 238). State's Exhibit 1 was entered into evidence without objection (Supp. 238-39), which was a copy of a signed document entitled "DESIGNATION OF LAW ENFORCEMENT OFFICER TO AUTHORIZE THE EMERGENCY INTERCEPTION OF COMMUNICATIONS." This document stated:

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to the following conditions:

The law enforcement officer reasonably determines that:

(a) An emergency exits that:
    1. Involves the immediate danger of death or serious physical injury to a person, or the danger of the escape of a prisoner; and
    2. Requires that a wire, oral, or electronic communication be intercepted, or a pen register or trap and trace device be installed and used, before an order authorizing such interception can, with due diligence, be obtained;

(b) There are grounds, under Chapter 934 of the Florida Statutes, upon which an order could be entered to authorize such interception of communications, or use of a pen register or trap and trace device; and

(c) An application for a court order approving the interception is made, in accordance with Section 934.09(7) and 934.31(4), Florida Statutes, within 48 hours after interception occurred, or began to occur.

TPD contacted Sgt. Corbitt and advised him of the homicide that had just occurred. (Supp. 239, 246). Sgt. Corbitt researched the suspect's phone number, determined the carrier was T-Mobile, and then made contact with T-Mobile to advise them of the situation. (Supp. 240, 246).

Sgt. Corbitt explained that he looked at a variety of factors in determining whether an exigent circumstance existed in this case. (Supp. 240). First, the shooting occurred during a narcotics transaction, and there was a "longstanding understanding that narcotics and violent crimes go together." (Supp. 240). Second, the shooting was unprovoked. (Supp. 240). Third, the surviving

victim/witness to the shooting was cooperating with law enforcement and may have been in danger from the suspect. (Supp. 240). Fourth, an armed suspect from a deadly shooting was loose in the community. (Supp. 240). Fifth, Sgt. Corbitt was concerned about what would happen if the suspect encountered law enforcement. (Supp. 240).

Sgt. Corbitt instructed TPD to send T-Mobile an exigent circumstances form in order to obtain the location data of the phone. (Supp. 224-25, 246). State's Exhibit 2 was entered into evidence without objection, which contained a copy of the faxed "EXIGENT CIRCUMSTANCE REQUEST" that was sent to T-Mobile for the cell phone's location data. The emergency was described in the form:

> The Police Dept is currently investigating a Homicide where one victim was shot multiple times and a second victim once. The suspect is currently armed and loose in a residential neighborhood. The neighborhood is in danger as well as the second victim that survived if the suspect is not located.

(St. Ex. 2, p.3).

The suspect's phone was determined to be a pre-paid phone. (Supp. 249). The location data of the suspect's cell phone was obtained, and its GPS location data was sent to TPD via email from T-Mobile. (Supp. 241-42). This included the latitude and longitude for the handset of the phone and an accuracy determination radius. (Supp. 242). The first and second GPS coordinates from T-Mobile indicated the phone was in an area of Capital Circle Northwest near the entrance of

Brittany Estates Trailer Park. (Supp. 242). A Google earth map with these coordinates was entered into evidence as State's Exhibit 3. (Supp. 243).

Appellant was found sitting at a bus stop in this area. (Supp. 242). The area in which Appellant was found was described as "very small." (Supp. 263). Sgt. Corbitt explained: "The overlapping field of this information is extremely small. We go to that area . . . drive-through, we see somebody sitting at a bus stop that matches the clothing description, the physical description of the suspect." (Supp. 263). The surviving victim identified the suspect as a black male and advised law enforcement officers what the suspect was wearing. (Supp. 211, 213). Once TPD obtained the location data of the cell phone, they found a person matching the description sitting at a public bus stop at 4:30 in the morning. (Supp. 213). No one else was in the area. (Supp. 213-14). TPD officers then seized that person. (Supp. 215). Later on, an application for a search warrant was done for the cell phone records of the phone Appellant was carrying. (JT I. 128).

Appellant claims that law enforcement violated Chapter 934 by failing to seek a warrant within 48 hours after the interception of the data, as required by section 934.09(7). (IB 46) ("Of course, no such application was ever made in [Appellant]'s case."). This claim is rather inexplicable given Appellant's own statement of facts: **"Later, a search warrant was completed for the historical cell phone records of [Appellant]'s phone**; Sergeant Corbitt analyzed them and

found that they were consistent with the phone's being in the location of the homicide when it occurred." (IB 18) (emphasis added).

Appellant also claims that law enforcement's reliance on Chapter 934 was "misplaced" because "electronic communication" under Chapter 934 excludes "[a]ny communication from an electronic or mechanical device which permits the tracking of the **movement** of a person or an object[.]" (IB 44-46) (emphasis added). Here, the first two GPS coordinates received by law enforcement from T-Mobile were fixed historical locations. (Supp. 248). Sgt. Corbitt explained that even though they received subsequent information later on, these two GPS coordinates were what was used to locate Appellant at the bus stop. (Supp. 248, 251). These GPS coordinates can hardly be described as "real-time" data as they were not constantly updated by a live feed, and only revealed a fixed position where the phone was at a given time. As Sgt. Corbitt explained, "the cell cite locations were not realtime, they were historical . . ." (Supp. 248). Therefore, this data was not excluded under section 934.02(12).

Under the totality of the circumstances, the procedures followed by law enforcement above were done in reasonable accord with the law as it existed at the time of the search. Therefore, even if a Fourth Amendment violation occurred, law enforcement officers were acting in reasonable reliance on the applicable law at the time. Exclusion of the evidence would serve no deterrent purpose.

"It is one thing for the criminal 'to go free because the constable has blundered.' . . . It is quite another to set the criminal free because the constable has scrupulously adhered to governing law." *Davis*, 131 S. Ct. at 2434 (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.)). "Excluding evidence in such cases deters no such police misconduct and imposes substantial societal costs. When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Id.*; *see also Herring v. United States*, 555 U.S. 135, 140-42 (2009).

II. THE JURY'S VERDICT FOR COUNT II SUPPORTED APPELLANT'S SENTENCE UNDER THE 10/20/LIFE STATUTE.

Standard of Review

A trial court's imposition of a sentence that falls within the minimum and maximum limits "is a matter for the trial [c]ourt in the exercise of its discretion, which cannot be inquired into upon the appellate level." *Nusspickel v. State*, 966 So. 2d 441, 444 (Fla. 2d DCA 2007). The exception to this general rule is where the facts establish a violation of a specific constitutional right during sentencing. *Id.* at 445. The construction and application of a sentencing statute is an issue of law subject to *de novo* review. *Wiley v. State*, 125 So. 3d 235, 237 (Fla. 4th DCA 2013). In construing a statute, the goal of the appellate court is to "give effect to the Legislature's intent." *Id.*

Burden of Persuasion and Presumption of Correctness

Appellant has the burden to convince this Court to vacate the presumptively correct judgment. *See Savage*, 156 So. 2d at 568; § 924.051(7), Fla. Stat. In support of the presumptively correct judgment, the appellee can present any argument supported by the record even if not expressly asserted below. *Dade County Sch. Bd.*, 731 So. 2d at 645. "A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." *Hankerson*, 65 So. 3d at 505.

Merits

Under Florida's 10/20/Life statute, when a defendant is convicted of attempted murder and during the course of the offense, the defendant discharged a firearm and "as a result of the discharge, death or great bodily harm was inflicted upon any person," the defendant shall be sentenced to a minimum of 25 years and not more than life in prison. § 775.087(2)(a)3, Fla. Stat. (2014). This provision of the statute "does not require an intentional or knowing discharge but merely a 'discharge' that resulted in death or great bodily harm to any person." *Wiley*, 125 So. 3d at 238. Furthermore, "Section 775.087(2)(a)3. does not call for the sentencing judge to evaluate the level of a defendant's culpability when a firearm has discharged 'during the course of the commission of a felony.'" *Id.* at 238-39 (10/20/Life still applied where discharge causing death was accidental).

A. There was a "clear jury finding" that the discharge of Appellant's firearm resulted in great bodily harm to any person.

Appellant claims he should not have received this enhancement because "there was no finding that great bodily harm or death actually occurred." (IB 47). All that is required for the application of an enhancement statute is a "clear jury finding" of the facts necessary to the enhancement. *Sanders v. State*, 944 So. 2d 203, 207 n.2 (Fla. 2006). When viewed in the proper context of the jury instructions, the jury clearly found beyond a reasonable doubt **"that during the commission of the crime [Appellant] discharged a firearm, and in doing so, shot Terry Eubanks."** (R. 69-70) (emphasis added).

While a specific question or special verdict form is the clearest way a jury can make the finding necessary to support sentence enhancement, the only thing required is a "clear jury finding" for the enhancement. *See Tucker v. State*, 726 So. 2d 768, 772 (Fla. 1999). All that is required for the application of an enhancement statute is a "clear jury finding" of the facts necessary to the enhancement. *Sanders*, 944 So. 2d at 207 n.2 (quoting *State v. Iseley*, 944 So. 2d 227, 230 (Fla. 2006)). This requisite "clear jury finding" can be demonstrated either by (1) a specific question or special verdict form, or (2) the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty. *Iseley*, 944 So. 2d at 231.

Here, Count II charged Appellant with attempting to murder Terry Eubanks "by shooting with a firearm[.]" (R. 30). In order to find the particular enhancement at issue in this case, the trial court instructed the jury: "If you find that [Appellant] committed attempted murder and you also find beyond a reasonable doubt that during the commission of the crime he discharged a firearm, and in doing so, shot Terry Eubanks, you should find [Appellant] guilty of attempted murder with discharge of a firearm attempting to cause death or great bodily harm." (R. 69-70; JT V. 532). The jury made this finding. (R. 82-83).

Appellant's claim for this issue asks this Court to ignore the jury instruction that was specifically tailored for the enhancement. (IB 47-49). This approach is nonsensical. For example, if a jury only checked a box next to the letter "A" on the verdict form, without any other findings, there would be no way of knowing why they checked that box without reference to the jury instructions. Here, the jury made its enhancement finding based on the instruction that "If you find that [Appellant] committed attempted murder and you also find beyond a reasonable doubt that during the commission of the crime he discharged a firearm, and in doing so, **shot Terry Eubanks**, you should find [Appellant] guilty of attempted murder with discharge of a firearm attempting to cause death or great bodily harm." (R. 69-70; JT V. 532) (emphasis added). The State urges this Court to decline Appellant's invitation to read the verdict form in isolation.

Furthermore, defense counsel did not have any issues or objections to the fact that the discharge of the firearm resulted in Mr. Eubanks being shot. In fact, this point was conceded by defense counsel: "Well, I think the evidence was that [Mr. Eubanks] was shot in the arm." (JT V. 604). Thus, any error appears to have been waived, invited, and/or abandoned by defense counsel in this case. In any event, Appellant would still qualify for a life sentence under Count II based on his PRR designation. Defense counsel affirmatively requested that Appellant be sentenced under 10/20/Life rather than PRR. (JT V. 614-19). As a result, the trial court sentenced Appellant under 10/20/Life for Count II. (JT V. 619).

In denying Appellant's motion to correct sentencing errors, the trial court found that Appellant was charged in Count II with attempted first degree murder, "in that he attempted to kill Terry Eubanks 'by shooting with [a] firearm.'" (3.800 Supp. 171). The trial court also found: "Undisputed evidence adduced at trial established beyond a reasonable doubt that Terry Eubanks was shot in the arm during the commission of the offense." (3.800 Supp. 171). Accordingly, the trial court held that Appellant was subject to sentencing under the 10/20/Life Statute for Count II. (3.800 Supp. 171).

These findings were supported by competent, substantial evidence. Therefore, the trial court did not abuse its discretion or err in sentencing Appellant to life in prison for Count II under the 10/20/Life enhancement.

For example, in *Johnson v. State*, 53 So. 3d 360, 363 (Fla. 5th DCA 2011), the Information alleged that Johnson, "while in possession of a firearm, did actually and intentionally touch or strike [the victim] and in doing so, discharged a handgun. . . ." The jury found Johnson guilty of aggravated battery with a firearm "as charged in the information." *Id.* Johnson was the only person charged in the case and the "principal" instruction was not given. *Id.* The State did not make any allegations, present any evidence, or argue that anyone other than Johnson was the shooter. *Id.* "The only reasonable conclusion that can be reached from the jury's verdict and special findings is that the jury found Johnson was in actual possession of the firearm and he actually discharged same." *Id.* (citing *Allen v. State*, 799 So. 2d 284, 285 (Fla. 5th DCA 2001) ("Here, there was only one perpetrator involved in the carjacking. Use of the firearm was made an element of the offense. By finding appellant guilty as charged, the jury necessarily found that a firearm was used and that appellant used it.").

In *Roberts v. State*, 923 So. 2d 578, 580 (Fla. 5th DCA 2006), the defendant claimed that because the jury did not find that he "actually" possessed the knife, his convictions should not have been reclassified. The jury entered a special verdict finding that "during the commission of this offense, the Defendant **DID,** carry, use, threaten to use, or attempt to use a weapon." *Id.* (emphasis in original). The Fifth District reasoned that because there was no principal instruction given

and no evidence of anyone other than Roberts involved in perpetrating the crimes, "there was no possibility that the jury could have entered its special finding based upon anyone's use of the weapon other than Roberts." *Id.* at 581.

Just like in *Johnson* and *Roberts*, the "only reasonable conclusion that can be reached from the jury's verdict and special findings" is that Appellant (the only shooter involved in the offense) discharged a firearm during the commission of the attempted murder which resulted in Mr. Eubanks being shot. The gunshot wound was the victim's **only** injury. There was absolutely no evidence of any other kinds of force that would have caused his injury. There was no possibility that the jury found the victim's great bodily harm was a result of anything other than the discharge of Appellant's firearm. Therefore, the 10/20/Life enhancement applied.

B. Any error was harmless based the overwhelming and undisputed evidence that the discharge of the firearm resulted in great bodily harm to any person.

Even if the jury's findings were not specific enough, courts have found such an error to be harmless where the evidence overwhelmingly supported the enhancement. *See Lindsay v. State*, 1 So. 3d 270, 271-73 (Fla. 1st DCA 2009); *Lee v. State*, 130 So. 3d 707, 710-11 (Fla. 2d DCA 2013); *Knight v. State*, 6 So. 3d 733, 735 (Fla. 2d DCA 2009); *Gentile v. State*, 87 So. 3d 55, 58 (Fla. 4th DCA 2012) ("[A]ny error in the jury's failure to make a more specific finding was clearly harmless because of the overwhelming evidence that he used a deadly weapon.").

For example, in *Lee*, a 25-year minimum mandatory sentence was upheld even though the language of the jury's findings was not precise. 130 So. 3d at 710. The jury found that Lee committed attempted first-degree murder "with a firearm as charged in the information." *Id.* The information charged that he did "inflict upon [the victim] mortal wounds by shooting with a firearm." *Id.* The verdict form, however, did not require the jury to make express findings that Lee "discharged" a firearm or that he caused "great bodily harm." *Id.*

The Second District held that "[t]hese elements may be implicit within a 'shooting with a firearm' that causes 'mortal wounds[.]'" *Id.* at 711. Furthermore,

> even though the language is not precise, we are convinced beyond a reasonable doubt that the *actual* jury made a clear finding that Mr. Lee discharged a firearm causing great bodily harm. Thus, we are not relying upon what we believe every hypothetical 'rational jury' might have done under like circumstances.

Id. (emphasis in original). The Second District concluded that even under the recent decision of *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013), the error can still be harmless beyond a reasonable doubt. *Id.*

In *Knight*, the defendant argued with the victim over a bicycle and then shot the victim in the back. 6 So. 3d at 734. The defendant then continued shooting at the victim while he was lying helpless on the ground, and the victim was rendered a paraplegic. *Id.* The verdict form did not reference a firearm. *Id.* The Second District held that without a jury finding that Knight used a firearm, the

enhancement of the degree of the offense was improper. *Id.* at 735. However, "even if the trial court erred when it enhanced Knight's sentence, he is not entitled to relief because the error was harmless. No rational jury would have found that Knight did not use a firearm in his attempt to murder the victim." *Id.* Accordingly, the court found that the error was harmless beyond a reasonable doubt. *Id.* (citing *Galindez v. State*, 955 So. 2d 517, 523-24 (Fla. 2007)).

Finally, in *Lindsay*, this Court found the failure to submit the question of actual possession to the jury was harmless error. 1 So. 3d at 273. Under *Galindez*, this Court framed the issue as "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found [the fact necessary for the enhancement]." *Id.* at 272 (citing 955 So. 2d at 523). In applying this test, this Court found any error to be harmless, examining factors such as the verdict itself, the language in the Information, the evidence presented, and the other jury instructions:

> Three eyewitnesses testified that appellant had the gun in his waistband and that he pulled the gun out of his waistband to aim it at the victim. No testimony was presented to rebut this evidence and the jury found appellant "possessed" the gun. Further, the jury was informed in the charging document that the State intended to prove appellant was in actual possession of the firearm. In addition, the jury was correctly instructed that actual possession may be found where the evidence shows that "the thing [possessed] is in the hand of or on the person or that the thing is so close as to be within ready reach." . . . Last, the jury found appellant guilty "as charged."

Id. at 273.

This Court concluded that based on the underlying facts, "no reasonable jury could have found possession by appellant without finding appellant was in actual possession of the gun, regardless of whether the jury believed the gun to be in the appellant's waistband or in his hands." *Id.*

Here, the evidence that the discharge of a firearm resulted in great bodily harm to Mr. Eubanks was not only overwhelming – it was undisputed. The surviving victim's unrebutted testimony at trial was that he was shot in his left arm during the shooting and went to the hospital for treatment. (JT I. 51-52, 60). Appellant's entire defense theory was that someone else ("J.B.") committed the shooting of the victims. (JT V. 568-87). As defense counsel explained, "All you need to decide is who was there at 10:30 in possession of a firearm. Who pulled the trigger seven times?" (JT V. 574). There was no dispute that Mr. Eubanks (the victim who survived) was shot as a result of the discharge of the shooter's firearm. (JT V. 568-87). Defense counsel actually conceded this point during closing argument. (JT V. 573). During a discussion about a jury question as to Count II, defense counsel again conceded: "Well, I think the evidence was that [Mr. Eubanks] was shot in the arm." (JT V. 604).

Based on this overwhelming and undisputed evidence, any error was harmless.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to Melissa J. Ford, counsel for Appellant, by email on December 6, 2014 at mina.ford@rc1.myflorida.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210, as it was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,

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