IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KENDRICK HERRING,

Appellant,

v. CASE NO. **1D13-5304**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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AND CIVIL REGIONAL COUNSEL
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STATEMENT OF THE CASE AND THE FACTS

I. Procedural Statement of the Case

The April 20, 2011 Indictment[1] in Leon County Case No. 2011-CF-949 charged Kendrick Herring with first degree murder, attempted first degree murder, aggravated assault on a law enforcement officer, possession of a firearm by a convicted felon, carrying a concealed firearm, and resisting an officer with violence. (R. 29-31.) This is a direct appeal from a judgment and sentence, after a jury trial,[2] for second degree murder with actual possession and discharge of a firearm causing great bodily harm or death; attempted second degree murder with actual possession of a firearm and actual discharge of a firearm "attempting to cause death or great bodily harm"; possession of a firearm by a convicted felon; and carrying a concealed firearm.

Mr. Herring was represented by Gregory J. Cummings, Esquire. The State was represented by Assistant State Attorney John Hutchins. Proceedings below were held before Judge Mark E. Walker (pretrial) and Judge Dawn Caloca-Johnson

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[1] This Indictment superseded the April 4, 2011 Information. (R. 27-28.)

[2] References to the record are by "R" followed by the page number, all in parentheses. References to the five-volume trial/sentencing transcript are by "T" and the volume number followed by the page number, all in parentheses. References to the jury selection transcript are by "J" followed by the page number, all in parentheses. References to the supplemental record of the Rule 3.800(b)(2) motion are by "M" followed by the page number, all in parentheses. References to the supplemental record of the hearing on the motion to suppress are by "S" followed by the page number, all in parentheses. References to the State's Exhibits are by "SE" followed by the exhibit number.

(pretrial and trial) in the Circuit Court for Leon County, Florida. On September 23, 2013, Defense counsel filed a Motion to Suppress Evidence Obtained through an Illegal and Unreasonable Search and Seizure. (R. 56-60.) On October 1, 2013, the trial court held a hearing on the motion, during which it was denied. (S. 194-294.) Jury selection took place on October 7, 2013. (J. 3-124.) Trial took place October 9, 2013 through October 11, 2013. At the conclusion of the trial, the jury found Mr. Herring guilty of the following offenses: second degree murder with actual possession and discharge of a firearm causing great bodily harm or death; attempted second degree murder with actual possession of a firearm and actual discharge of a firearm "attempting to cause death or great bodily harm"; possession of a firearm by a convicted felon; and carrying a concealed firearm. (R. 80-85; T5. 607-08.)

On October 11, 2013, the trial court sentenced Mr. Herring to Department of Corrections (DOC) custody for Life, as a PRR, for second degree murder; DOC custody for Life, under the 10-20-Life statute, for attempted second degree murder; fifteen years for possession of a firearm by a convicted felon; and five years for carrying a concealed firearm. (T5. 613-20.)

The notice of appeal was timely filed on October 30, 2013. (R. 128-29.) On February 28, 2014, the undersigned counsel filed a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), asserting that the

trial court had erred by imposing an illegal sentence of Life on Count II (attempted second degree murder), pursuant to section 775.087(2)(a)3., Florida Statutes, where the jury found that "the defendant actually discharged a firearm attempting to cause death or great bodily harm." (emphasis added). (M. 142-69.) On March 14, 2014, the trial court denied the motion. (M. 170-72.) This appeal follows.

II. Statement of the Facts

A. Motion to Suppress

On September 23, 2013, Defense counsel filed a Motion to Suppress Evidence Obtained through an Illegal and Unreasonable Search and Seizure. The motion requested that the trial court suppress the "Cell Phone, Firearm, Clothing, and all other physical evidence" as "a 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 the defendant's possession at the time he was approached and shot by police." It noted that the cell phone information "included real time location information." (R. 56-60.)

On October 1, 2013, the trial court held a hearing on the Motion to Suppress, with the Honorable Dawn Caloca-Johnson presiding.[3] The State provided the trial

[3] Portions of this hearing dealt with law enforcement's use of cell site simulator to confirm the location of the target phone after a rough location was determined based on GPS data from T-Mobile. (S. 195-99, 256-67, 270-71, 281-85.) See generally, Brett Clarkson, Who's tracking your cellphone now? Could be the cops, SunSentinal, May 17, 2014, http://articles.sun-sentinel.com/2014-05-17/news/fl-cell-site-simulator-surveillance-florida-20140507_1_stingray-cellphone-simulator.

court with a copy of United States v. Caraballo, 963 F. Supp. 2d 341 (D. Vt. 2013), and argued that "the Court held that the defendant had no reasonable expectation of privacy in his realtime cellphone location information. In that case, exigent circumstances justified a warrantless cellphone ping and the good faith exception to the exclusionary rule applied." He stated that Caraballo was the basis upon which the State was "going to ask that the Court deny the defendant's motion to suppress the evidence." (S. 194.) Defense counsel advised that he did not think exigent circumstances existed in this case and advised that he believed people had a reasonable expectation of privacy in their locations. (S. 194.) The State presented the testimony of Sergeants Vincent Boccio and Christopher Corbitt of the TPD.

Sergeant Boccio was the lead investigator in the March 18, 2011, Timmy Andrew homicide. Officers found a cell phone on Mr. Andrew. Sergeant Boccio determined that a "drug deal was set up at the location on Joe Louis Street where the shooting took place." The information he could get from Terry Eubanks, the witness who was in the vehicle with Mr. Andrew when he was shot, was "limited." Sergeant Boccio determined that a "black male suspect was standing on Joe Louis Street and waved in the car the victim was driving. He told him to park into the address where it was determined that we were going to have the meet location.

(last visited July 28, 2014). Discussion of this matter is excluded from this statement of facts because it appears to have been abandoned. (S. 290.) The trial court refers to this matter in some relevant portions of the record; the purpose of this note is to provide context for those references.

Once there, they talked, verbiage about a $20 deal for drugs and then the shooting took place." Mr. Andrew was shot multiple times; Mr. Eubanks was also shot. After determining the suspect's phone number, investigators were able to determine where the target phone was moving. (S. 208-12.) Sergeant Boccio had information that there had been a homicide; was concerned that the suspect was still at large; and was concerned that an officer might get hurt if he approached the suspect. He felt the person constituted a threat to the community. Sergeant Boccio determined the location of the target phone, set up an arrest team, and "got surveillance on that location." Officers then arrested Mr. Herring. (S. 212-15.)

On cross-examination, Sergeant Boccio testified that the Joe Louis Street shooting occurred at about 10:30 p.m. A phone number associated with the nickname "Black" was found in the victim's phone during the "first hour or so of the investigation." Sergeant Boccio checked the phone number in TPD's databases, but could not find anyone affiliated with it. TPD had exhausted its local resources at that point. (S. 216-23.) Sergeant Boccio contacted Sergeant Corbitt in the technical operations unit. He decided TPD was "going to do an exigent circumstance and go up on the cellphone to get the active GPS coordinates." Sergeant Boccio got contact information for T-Mobile, the carrier associated with the target phone, from Sergeant Corbitt and filled out an exigent circumstances

form. He identified a copy of the form[4] and testified that 1:52 a.m. was the time at which T-Mobile sent a blank copy to be filled out; he faxed the completed form to T-Mobile. Sergeant Boccio read the following portion of the form: "Note, if you are a dispatcher, a sworn officer must sign off on the exigent form." He agreed with Defense counsel that one could infer this meant that a sworn officer was required to sign the form. He acknowledged that the form said "I hereby certify" and that when he certifies something, he usually signs it. Sergeant Boccio listed the following as the "details of the emergency which exists: The police department 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." The form was not submitted until about three-and-a-half hours after the shooting. The following items were checked off on the form: current subscriber information, IMSI and IME; call detail record within the last 48 hours; and real-time location of the mobile device (E911 locator). (S. 223-28.) Sergeant Boccio believed this was an exigent circumstances situation based on his training and experience. He testified that the form was not signed or dated. He faxed the completed form to T-Mobile at about 2 a.m. He testified that there was a TPD policy in place for obtaining a court order or warrant from a

[4] The form is in the record as State's Exhibit 2, introduced at the October 1, 2013, hearing.

judge, but he did not believe that there was the need for a warrant to obtain this information. He testified that there is usually a judge on-call who could review and sign a warrant in the middle of the night; that was not done in this case. Investigator Corbitt served as the liaison between TPD and T-Mobile after the form was faxed. Officers located Mr. Herring sitting on the bench at "four-something in the morning[,]" which was two hours after the exigent circumstances form had been filled out and about five-and-a-half hours after the shooting. No officers were attempting to get a judge's signature at 3:00 a.m. (S. 229-33.)

On redirect examination, Sergeant Boccio testified that many officers were working on the case. He was concerned that the shooter might try to track down and shoot the surviving victim. No firearm was recovered from the scene of the shooting, so officers assumed the shooter was armed. He testified that to obtain a warrant, he would have had to find a judge, wake him up, explain to him what was going on, get something signed, and then go from there. (S. 234-36.)

Sergeant Corbitt testified that pursuant to section 934.09(7), Florida Statutes, he had been designated by State Attorney Willie Meggs to "declare an exigent situation if there is an imminent threat of death or great bodily harm, escape of a prisoner." He identified State's Exhibit 1 as a copy of his designation. The homicide unit contacted Sergeant Corbitt in the early morning hours of March 19, 2011; they provided a cell phone number for a suspect. The unit relayed that there

was “an immediate need to locate the suspect,” so he researched the phone number, determined the carrier was T-Mobile, contacted T-Mobile, and explained the situation. (S. 237-40.) He testified as follows regarding the factors considered by TPD in determining that an exigency existed as follows:

> Well, we look at a variety of factors. Of course, as it was relayed to me, we had a person engaged in a narcotics transaction. We have a pretty longstanding understanding that narcotics and violent crimes go together.
>
> We had a -- what was a narcotics transaction that turned into a shooting, as I was relayed, an unprovoked shooting. There was a surviving witness to that who was cooperating with law enforcement and may have been in danger for that cooperation. We had an armed suspect, as a weapon was not recovered on scene. We had an armed suspect in the community at loose.
>
> We did not know what would happen if that suspect was encountered by law enforcement. If they were aware that the reason they were stopped, maybe a passenger in a vehicle stopped for a taillight, and the officer pulling the vehicle over would not know that the person inside was a suspect in a homicide. So, all of those factors. Of course, any interaction with the community, any persons this -- citizens this person may encounter as they were fleeing the scene were obviously in danger. So, with all of those circumstances, we decided it was a[n] exigent necessity to find the suspect.

(S. 240-41.) Sergeant Corbitt testified that there was a blank for a signature on the exigent circumstances form, but that there was no statutory requirement for him to fill anything out or turn anything in; it was not an affidavit, and to his knowledge it did not need to be signed. Some carriers required only TPD letterhead for this type of request. (S. 241.)

T-Mobile provided GPS information via e-mail and the "very first two that [they] got" indicated the target phone "was in an area of Capital Circle Northwest, right at the entrance of Brittany Estates Trailer Park" at a city bus stop. Sergeant Corbitt testified that anyone who owns a cell phone would be aware that the cell phone was going to exchange information with the carrier; he stated that most carrier contracts contain a statement to that effect. He testified that "we understand that if you dialed 911 or in an emergency situation and you need assistance that that information is communicated to law enforcement so that we may find you and provide that assistance." (S. 242-45.) Sergeant Corbitt testified that "time was of the essence" and he did not want to delay submitting the form until he could arrive at the station; he contacted Sergeant Boccio and had him complete the form upon his direction, "telling him what to list, what to write out and requested that he complete the form for [Sergeant Corbitt], sign for [him] and submit the form to the carrier." (S. 246-48.) He testified that he received the first e-mail from T-Mobile at 2:51 a.m. and it gave him GPS location information for where the handset was located at 2:50 a.m.; he received the second e-mail from T-Mobile at 3:10 a.m. and it gave him GPS location information for where the handset was at 3:00 a.m. (S. 253-55.)

Defense counsel advised that he did not think exigent circumstances were present in this case and that officers had sufficient time to go to a judge and seek

prior approval. (S. 273-74.) The State argued that "this was not a search pursuant to the Fourth Amendment based on the Caraballo case." (S. 275.)

Sergeant Corbitt testified that E911 was the name of T-Mobile's precision location instrument. He testified that most cell phones have privacy settings. One has the option of sharing his or her GPS location "with apps or services or third party carrier or whatever, or you have the option to restrict that to only 911, to where that when you dial 911, your location is shared from the phone." Defense counsel asked if "E911 overrides the privacy settings in the phone, so it can communicate its location[,]" and Sergeant Corbitt answered as follows:

> In my training and experience, the privacy settings width of the phone [sic] are relative to the GPS chip that's within the phone. Such that if you had a navigation app and you wanted the navigation app to be able to access your GPS settings to help you get from Point A to Point B, you can restrict that. Or that GPS setting from the GPS chip that's within your phone, that GPS information is communicated only when you dialed 911.
>
> As we are using a difference in time of arrival from the radio signals to calculate the location, it's not utilizing -- based on my training and experience, it's not utilizing the GPS chip that's within the handset. So, the privacy settings relative to the GPS chip are not necessarily relative to the RF signals that are emitting from the handset.

(S. 277.) He testified that E911 would override GPS privacy settings. (S. 278-79.)

The trial court made several findings as follows:

> I mean, so far I will tell you this much. I mean, I -- if you all want to argue it, I guess, you could argue the exigent circumstances, but I'm hard-pressed to not find that there weren't exigent circumstances. They got -- I mean, there was a homicide, there was information that

there was a suspect on the lose [sic] 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 somebody, encountered the defendant unbeknownst to them. That they -- I mean, 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.

Again, I haven't -- I haven't heard the arguments that -- that you all are ultimately going to reach, Mr. Cummings, but -- so then the question is, well, okay so the two -- the two emails they get, before whatever this device is called is deployed, they get to an area where they know within X number of meters, I wrote it down, one was 88, one was 102, I think, or something in that neighborhood, the first two emails, pinpoint the defendant…. Pinpoints the cellphone that was the number that appeared on the victim's phone. Okay. 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 -- they arrive at that location. There is the defendant sitting at the 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 the defendant. He matches the description -- one of the descriptions of the suspect. There's information that the phone is in the vicinity and so they would have reasonable suspicion to at least approach him.

Of course, they never get that far, because the testimony is he stands up, some officer perceives he's going for something in his waistband. He is tazed [sic] and then he's shot.

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So, I just don't know if inquiry into whatever this device is going -- and I don't know if you can answer that question, Mr. Cummings, because we don't know what it does. We've just guessed at what it does.

***

> Sergeant Corbitt testified that they would have at least encountered the defendant regardless of having the top secret whatever it is device. They were going to get out of this car and walk up to him. So, if that was their intent, regardless of confirming that that indeed was -- which is what I took his testimony to be, instead of they were going to talk to him. They had this thing that could confirm his -- that that's who they needed to be looking at. They were going to go talk to him, anyway. And assuming the events were to have transpired the way they did, they never got to that point, because the encounter unfold [sic] the way it did. So they didn't get to walk up to him and say, Hey, you know, what's your name, or otherwise engage in any conversation with him before he was shot.

(S. 285-88.)

Defense counsel advised that he understood "what the Court would rule if we decided to let -- you know, end it right here and weigh the factors of delaying things and such like that." He stated that he understood where the trial court was coming from regarding exigent circumstances. He stated that he had "an idea where the Court's going." Defense counsel asked the trial court to rule on the motion to suppress and advised that he would "not take it up pending trial and we will be prepared to go to trial next week." The trial court asked the State if he felt the trial court needed to make any further findings and he advised that he did not. He advised that in United States v. Skinner, 690 F.3d 772 (6th Cir. 2012), cert. denied, 133 S. Ct. 2851 (2013), the court "concluded that there was no Fourth Amendment violation, because the defendant did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go

cellphone." The trial court stated that based on its "findings earlier, the motion to suppress would be denied." (S. 288-92.)

B. Trial

Trial began on October 9, 2013. On the afternoon of March 18, 2011, Timmy Andrew went to his friend Terry Eubanks' apartment at 759 Basin Street. (T1. 42-44.) In the evening, Mr. Andrew left to make a marijuana sale at an address provided by the buyer; he brought Mr. Eubanks with him, intending to drive him to the store. (T1. 44-46.) Mr. Eubanks saw a man "on the side of the road by the house that he told us to pull into." He was not paying attention, as he was "in [his] phone on Facebook." He heard the man ask for twenty-dollars-worth of marijuana and then he heard gunshots. Mr. Andrew backed out of the driveway and began to drive; Mr. Eubanks saw a person wearing black clothing firing at the car. (T1. 46-49.) Mr. Eubanks navigated the car back to his apartment, as Mr. Andrew was injured and was unable to. The house where the deal was to occur was on Joe Louis Street, which was a "couple" of blocks from Mr. Eubanks' apartment. When he arrived back at his building, Mr. Eubanks noticed he had been shot in his left arm. (T1. 49-51.) Mr. Eubanks provided TPD with as much information as he could. (T1. 52-54.) These events occurred at about 10:30 p.m. He told officers that the shooter had on a black hat. (T1. 56-61.) Mr. Eubanks testified that there was only one person near the car when the shooting occurred. (T1. 63-64.)

On March 18, 2011, Earlnetta McCormick was outside her house at 1024 Joe Louis Street when she saw a man in a "black T-shirt, jeans, and a baseball cap" fire four or five shots into a dark-colored Honda Civic. She went inside her house. She "looked outside, and they were having a confrontation." The Civic drove into her yard, hit her mother's and her grandmother's cars, and sped away. (T1. 67-70.) It appeared to Ms. McCormick that the shooter was pointing the firearm into the car and at the driver. She spoke with law enforcement that night and told them the shooter was wearing black. She did not see other people standing outside the car, and she did not see anyone shooting from inside the car. (T1. 71-72.) Ms. McCormick's attention was drawn to the Civic because "[t]hey were arguing[,]" but she did not hear what was said. (T1. 74.)

Aaronetta Frison was at 1028 Joe Louis at about 10:30 p.m. on March 18, 2011. She "heard pops which sort of sounded like gunshots." She ran out the door and saw "fire coming out of a gun…in front of the 1019 residence." She saw the shooter's silhouette; she heard about three shots from inside the house and "saw at least two more" after going outside. She saw a car trying to turn around, and then she went back into her house. Ms. Frison's car was parked at her mother's house; the car that was shot at hit her car and her mother's. (T1. 76-79.)

Mary Lewis was inside her house, at 1007 Joe Louis Street, the night of March 18, 2011, when she heard gunshots. She went outside and saw a dark-

colored car driving erratically; the car drove away and turned left onto Arizona Street. She did not see the shooter. (T1. 80-83.)

Clatiltra Ross arrived at her house at about 10:00 or 10:30 p.m. on March 18, 2011; she heard "male voices having an argument" and then went inside. A few minutes later, she heard four to six gunshots and then a crash. She looked outside and saw that someone had crashed into her neighbor's car. She saw a tall man looking into the passenger side of the car; he ran across the street into her yard and she closed the door. Ms. Ross heard footsteps in her carport and looked out. She could not see very well; the man had a dark shirt on and she believed he was wearing tan or khaki shorts. He had a white "beanie" on his head. She did not see his face. (T1. 85-88.) Ms. Ross did not see Earlnetta McCormick, Aaronetta Frison, or Mary Lewis outside. The man she saw had dark skin and a thin build. (T1. 89-92.)

Officer Richard Radcliffe of the TPD was working the night of March 18, 2011, when "a call went out on the radio of shots fired at 1700 Joe Lewis [sic]"; a few minutes later, there was another call about "somebody being injured in a car at 759 Basin Street." He responded to 759 Basin and saw a gray Honda Civic with people around it; Mr. Eubanks was on the ground and had a wound in his upper shoulder. The driver was not breathing. Officer Trent Sexton arrived and helped Officer Radcliffe pull the driver onto the ground. As they did this, "a spent bullet,

the actual projectile" was embedded in his shirt; Officer Sexton collected it. The car had fresh damage to the front left, two bullet holes in the hood, and one bullet hole in the windshield. (T1. 95-98.) After Mr. Andrew and Mr. Eubanks were placed into ambulances, Officer Radcliffe spoke with Mr. Eubanks, who provided as much information as he could. (T1. 98-99.)

Officer Trent Sexton of the TPD was working at 10:30 p.m. on March 18, 2011, when he received a call for service on Joe Louis. He drove to Joe Louis but did not find much there. Another call came in and he responded to Basin Street, which was nearby. His testimony regarding the Basin Street scene was consistent with Officer Radcliffe's. (T1. 101-06.) He identified SE2 as the projectile he collected from the driver, and it was admitted without objection. Timmy Andrew was pronounced dead at 11:03 p.m. (T1. 106-08.)

Sergeant Vincent Boccio of the TPD responded to the hospital and spoke with Mr. Eubanks the night of the shooting. During his investigation, he learned that Mr. Andrew had been communicating via cell phone with a person named "Black" regarding a drug transaction. He could not identify anyone based on the nickname. Officers contacted the cell phone company and obtained "cell records to include the GPS coordinates" for the suspect's phone. (T1. 111-14.) Officers determined the weapon used in the shooting was a .45-caliber. Projectiles and casings were recovered. They were concerned that there was a person in a

residential area with a .45-caliber weapon. Based on these circumstances, they were able to get phone records for Mr. Herring's cell phone. (T1. 114-16.) The phone number from the victim's phone that was attributed to "Black" was (XXX)XXX-1124, and Mr. Andrew's phone number was (XXX)XXX-1845. Once officers received the cell phone records, Sergeant Corbitt analyzed them. (T1. 117.)

Officers believed the phone was located in the "Capital Circle Northwest" area; they responded to that area at about 4:30 a.m.; Sergeant Boccio saw one person sitting at a bus stop. He and other officers were in an unmarked van. (T1. 117-22.) They pulled up to the bus stop, turned on the van's lights, and jumped out. They gave the man verbal commands to get down and show his hands; he "looked at [them], turned away from [them], and started fleeing." Sergeant Boccio testified that he "made a movement for his waistband[,]" which was a place that people commonly kept firearms. Sergeant Boccio used his TASER on the man and Investigator Mahoney shot the man. After he was on the ground, officers handcuffed him; they found a cell phone and a .45-caliber weapon. (T1. 123-26.)

Sergeant Boccio testified that the cell phone they found was the same phone that was used to communicate with Mr. Andrew's phone earlier that night. The suspect's gun was found by Lieutenant Fairfield; it was "facing upwards toward the defendant's face." Officers collected the firearm and collected projectiles from the victim; these were sent to FDLE for comparison and FDLE confirmed that the

firearm found on the suspect at the bus stop was the weapon that fired those projectiles. The rounds in the firearm also matched the projectiles and casings found at the scenes; they were "[f]orty-five Auto RP." Later, a search warrant was completed for the historical cell phone records of Mr. Herring'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. (T1. 126-29.) Sergeant Boccio identified Mr. Herring in the court room as the person taken into custody at the bus stop. (T1. 130-32.) During his arrest, Mr. Herring was shot in the groin and was bleeding profusely. Someone asked if he had a gun and he said yes. (T1. 146.)

Sergeant Chris Corbitt received a call from Sergeant Boccio on the night of March 18/19, 2011, regarding an investigation into the death of Timmy Andrew. He learned there had been communications between the handsets of two cell phones in this case, and he obtained records regarding these transmissions. (T2. 173-75.) When he requested cell phone data for the phone number XXX-1124, he was provided with GPS locations for the handset associated with that number. The first coordinates he received placed the target phone on Capital Circle Northwest, near the entrance to the Brittany Estates mobile home community; the second coordinates he received indicated it was in the same area, just on the other side of the road. The coordinates were not precise; the first coordinates indicated a radius of eighty-eight meters, within which the handset was located, and the second

coordinates indicated a radius of "a little over a hundred meters." Sergeant Corbitt identified SE22 as "the map [he] produced representing the first two GPS locate informations [sic] that we received from that handset and their air radius as far as how they plot on a map." Sergeant Corbitt indicated where the areas overlapped. (T2. 176-79.) He received e-mails containing GPS information at ten-to-fifteen-minute intervals. He received the first e-mail at around 2:50 a.m. (T2. 180-83.)

Sergeant Corbitt testified that the historical phone records showed "a date and the time of the event, the duration, if it's a phone call, how long that phone call may be, an indication of whether it's an incoming or outgoing phone call, and the number that's dialed or that's calling into the phone." The records also provided a beginning and ending cell site location for the event. When Mr. Herring was apprehended, he had in his possession the cell phone that corresponded to these phone records. There were eight events between the target phone and the victim's phone on March 18, 2011. There were twenty-six incoming calls from Laquandra Starks on that date. (T2. 183-86.) At around 10:30 p.m. on the night of the shooting, the target phone was "communicating with cell sites that are consistent with serving" the location of the shooting on Joe Louis. Prior to the shooting, it was communicating with cell sites within a half mile of the shooting. (T2. 187-90.) There was a call at 12:33 a.m. in which the target phone communicated with a cell site near North Monroe Street and I-10. The side of the cell site with which the

target phone was interacting for the 12:35 a.m. call was consistent with its being in the area indicated by the e-mails he later received from the carrier. (T2. 190-94.)

Sergeant Corbitt identified SE27 as cell phone records for the target phone. They showed that the target phone placed eight calls to Mr. Andrew's phone between 5:58 p.m. and 10:24 p.m. They showed that Ms. Starks' phone called the target phone four times between 7:48 p.m. and 8:53 p.m. They showed that the target phone placed calls to Ms. Starks' phone at 12:35 a.m., 12:50 a.m., and 1:26 a.m. (T2. 195-99.) There were additional incoming calls to the target phone from Ms. Starks' phone, which continued until 3:32 p.m. on March 19, 2011. (T2. 199-201.) There were four outgoing calls from the target phone between the 5:58 p.m. and 6:37 p.m. calls to Mr. Andrew's phone; Sergeant Corbitt did not know who those calls were to. (T2. 210-11.) The person in possession of the target phone called ten different numbers between 6:37 p.m. and 7:48 p.m. (T2. 212-13.) The real-time GPS e-mails Sergeant Corbitt received were sent within minutes of when the target phone was at the location indicated. (T2. 216-17.) Sergeant Corbitt later became aware that Ms. Starks' address was in Brittany Estates. (T2. 219-21.)

On March 18, 2011, Investigator Mahoney was a member of the team tasked with apprehending Mr. Herring. He had information that the phone that had been communicating with the victim earlier that night was in the Capital Circle Northwest area. He had a description of what the subject was wearing, and

Sergeant Boccio showed him a photograph of the person TPD suspected, which was a photograph of Mr. Herring. (T2. 226-29.) Investigator Mahoney's testimony regarding Mr. Herring's arrest was consistent with that of Sergeant Boccio. (T2. 231-40.)

On March 18, 2011, Lieutenant James Fairfield of the TPD was the "unit supervisor for the Career Criminal Unit," which consisted of five people. That night, the unit responded to an address on Capital Circle Northwest. The team members approached Mr. Herring in a van, and Lieutenant Fairfield was about thirty-five to forty yards away, in case he ran. When Lieutenant Fairfield saw that the subject was not immediately complying, he ran to the bus stop. (T2. 253-55.) When he arrived, the team was in a semicircle around the subject, who was face-down. Officer Mahoney was "very animated" and was "using the word gun." Lieutenant Fairfield rolled the subject over and ran his hand along the front of his shirt; he felt an outline of a firearm. The "weapon was turned fully inverted and was facing right up at his chin." (T2. 257.) Lieutenant Fairfield identified SE33 as the weapon recovered from Mr. Herring. SE33 was the weapon that was used to kill Mr. Andrew. (T2. 259-61.)

Officer Eric Halvorsen of the TPD was assigned to hospital guard detail on March 19, 2011. In the afternoon, Mr. Herring awoke while a nurse was attending to him; he asked what his charges were and Officer Halvorsen offered to call an

investigator to explain. Mr. Herring asked who shot him, and Officer Halvorsen said it was a police officer. Mr. Herring asked the following: "I didn't shoot a police officer, did I?" (T2. 268-70.)

Suzanne Livingston of the biology section of the Florida Department of Law Enforcement (FDLE) identified SE34 as a buccal swab from Mr. Herring from which she developed a DNA profile. Mr. Herring's DNA profile matched the profiles of DNA collected from the right and left sides of the firearm; he was included as a possible contributor to mixtures of DNA collected from the hammer and the magazine. (T2. 274-81.) Mr. Herring was "excluded as a contributor to the limited DNA results that [she] found on the trigger." (T2. 293.)

Trial continued on October 10, 2013. Vernon Henderson of the forensics unit of the TPD took photographs and collected evidence at the Joe Louis scene. He photographed and collected a "live round of .45-caliber ammunition" and several spent .45-caliber shell casings. (T3. 305-17.) He collected the following from the Capital Circle Northwest scene: a firearm; a cell phone; a cell phone charger; and a black and white bandana. (T3. 318-20.) When he photographed and collected the firearm, the safety was off. There was tape on the handle holding the magazine in place. He attempted to obtain fingerprints from the tape, but found none. (T3. 321-22.) The firearm had ten rounds marked "RP .45 auto." inside, which was the number it was designed to hold. (T3. 324-25.) Mr. Henderson

attended the autopsy of Mr. Andrew and collected projectiles taken from his body. (T2. 327-28.)

Jonathan Auclair, a TPD forensic specialist, responded to Basin Street on March 18, 2011. The locations of the bullet holes in the Honda Civic were consistent with someone standing in front of the vehicle and firing as it backed away. There was a spent .45-caliber casing between the driver door and seat. (T3. 347-52.) Mr. Auclair collected and photographed clothing from Mr. Herring at the hospital, which consisted of a black sweatshirt with markings on it, a black t-shirt, a white hat, and tan pants with suspected blood. (T3. 355-61.)

John Ryan, a senior crime laboratory analyst in the firearms/tool marks section of the Tallahassee FDLE lab, examined the firearm in this case and found that it was operational. (T3. 364-67.) He conducted an analysis of the firearm and SE66 through SE70, which were .45-caliber casings. He concluded that they were fired from SE33, the firearm in this case. (T3. 367-72.) Mr. Ryan identified SE65, SE80, and SE79 as "projectiles and projectile fragments" fired from SE33. (T3. 373-74.)

Doctor Lisa Flannagan, a medical examiner, conducted an autopsy of Timmy Andrew on March 19, 2011. The cause of death was "multiple gunshot wounds." Three gunshots entered his body; one was to his left shoulder, one was to his right thigh, and one was to his left upper back. The direction of travel for the

wound to the left shoulder was consistent with the victim's being in a seated position and being shot by a person who was standing. This was the wound that caused the most fatal injuries. (T3. 376-83.) Based on his wounds, Mr. Andrew "would not have been immediately unconscious." The injury to the heart would cause rapid blood loss and "once he lost enough blood where it was not reaching his brain, he would have passed out." (T3. 383-89.)

Thomas Balboni, of the criminal investigations section of the Office of the State Attorney, testified as to his training and experience in fingerprint analysis. (T3. 391-92.) He identified SE134. He obtained fingerprints from Mr. Herring on September 26, 2013, and compared the fingerprints to a judgment and sentence from the county clerk's office. One of the charges was possession of cocaine, which is a felony in Florida. Mr. Balboni concluded that the fingerprints in the judgment and sentence and the fingerprints he obtained from Mr. Herring came from the same person. He identified Mr. Herring in the court room as the person whose fingerprints he had taken and used for comparison. The trial court announced the following stipulation: The "parties have stipulated that the defendant has three additional felony convictions for a total of four." The State rested. (T3. 392-96.)

After the jury was excused, the trial court granted Defense counsel's motion for judgment of acquittal regarding only the felony murder aspect of the murder

charge. The trial court fully granted the motions for judgment of acquittal as to the charges of aggravated assault on a law enforcement officer and resisting arrest with violence. (T4. 404-17.) The jury returned to the court room. (T4. 427.)

Tyrone Harris testified that he was, at the time of trial, incarcerated. In March of 2011, he was living at 1019 Joe Louis Street with his brother. Around 10:30 p.m. on March 18, 2011, something happened in his yard, but when he talked to police that night he told them he was asleep and did not see or hear anything. At trial, he testified that he saw "J.B." shooting into a car that night. He did not know where J.B. lived, but had seen him in the neighborhood often. He had known J.B. for three or four years at the time of the shooting. J.B. had a reputation for violence. Mr. Harris was scared of J.B. that night. (T4. 428-34.) Mr. Harris saw J.B. looking for something in his yard the next day, and this made him concerned. He did not tell law enforcement because he did not want to endanger himself or his brother. Mr. Harris met Mr. Herring in jail in February of 2012; they were in the same pod. Mr. Herring was called "Bull" by others in the jail; he was not the person Mr. Harris knew as J.B. Mr. Herring was not in his driveway shooting that night. (T4. 434-36.) When law enforcement spoke with Mr. Harris, they did not tell him they were investigating a homicide. He told law enforcement he worked all day, came home, and went to sleep at 5:30 p.m. His brother and a friend were also

in the house. (T4. 437-39.) Mr. Harris testified that he and Mr. Herring were not friends; they were in the same pod for "two or three days." (T4. 441.)

In March of 2011, Kendrick Herring was living at 171 Sweet Street in Havana, Florida; he sometimes stayed with female friends in Tallahassee and was in Tallahassee on March 18, 2011. One of the women he stayed with was Laquandra Starks; they had a relationship. In 2010, Ms. Starks gave him a "flip phone[,]" because her mother bought her a smart phone. The phone was a prepaid T-Mobile. When he was at the bus stop, he had a firearm tucked under his waistband. He bought the gun about two weeks before the homicide at issue in this case and test fired when he bought it. On March 18, 2011, Mr. Herring was selling marijuana, crack, and cocaine on Dover Street on the North side of town, primarily at three houses. (T4. 445-50.) When he went to Dover Street, he had his phone and the loaded firearm. He remembered having put ten rounds in the firearm. He did not go to Joe Louis Street that night. He did not have his phone and firearm the whole day; he regularly loaned the phone to others; this was common and he had, in the past, used the phones of others. A man named Ryan, or "Joker," lived at a white house on Dover Street with his mother; he had a music studio there. Joker would not allow guns in his house, out of respect for his mother. People were also not allowed to bring their phones into the recording studio. (T4. 451-56.)

Mr. Herring met a man named J.B., or "Black," about a month before the shooting. On March 18, 2011, he gave his phone and firearm to Black because he wanted to go into the studio. He had never given Black his firearm before, but he had let Black use his phone "numerous" times. He believed he gave his phone to Black between 5:00 p.m. and 7:00 p.m. (T4. 457-60.) Mr. Herring did not know Timmy Andrew or Terry Eubanks. He got his phone back from Black between 11:00 p.m. and 12:30 a.m. When he gave Black the phone, he told him not to answer calls from Ms. Starks. Mr. Herring tried to call Black using other people's phones because he had told Black to not be gone for longer than forty-five minutes, but Black had not returned. (T1. 460-64.) Mr. Herring did not know Mr. Harris at all; they never had a conversation. He did not kill Timmy Andrew and he did not shoot Mr. Eubanks. He did not fire the gun that night. (T4. 464-67.) When Mr. Herring got the gun back from Black, it was fully loaded. He did not reload the gun. (T4. 472-73.) As he was sitting at the bus stop, he did not know that anyone had been shot with the firearm. Ms. Starks lived in the nearby trailer park; he tried to call her but she would not answer. Mr. Herring was at the bus stop waiting on Jeanine Webster to pick him up. (T4. 479-82.) After Mr. Herring got the firearm back from Black, he got a ride from some friends. He was wearing long pants that night; the jacket/sweatshirt he was wearing had bright markings on it. (T4. 483-84.) The Defense rested. (T4. 487.)

C. Jury Question Regarding Interrogatory in Count II

During its deliberations, the jury sent a note to the judge advising that they had "a concern about the wording of the Count II, question no. 3, under attempted second degree murder." The note advised that "[t]he jury instructions (page 9-10) first paragraph states, 'attempting to cause death' " or great bodily harm, but that "[t]he verdict form for Count II states, 'great bodily harm or death.' " The parties agreed that the jury was confused because the words "death" and "great bodily harm" were placed in a different order in the jury instructions and the verdict form. The parties agreed to send a new verdict form back that matched the wording in the instructions. (T5. 602-04.) After further deliberations, the jury sent another note, and the following discussion occurred:

> THE COURT: Okay. So the question that we answered by correcting the verdict form came back and says, "Forms still appear the same."
>
> And I don't know if at this point I should bring them in. But the, the juror -- I have the juror's question, their form. And the underline is attempting to cause death or great bodily harm. And the verdict doesn't have attempting in it. Do you-all understand what they're trying to communicate?
>
> MR. CUMMINGS: It probably makes more sense than the last question.
>
> THE COURT: Right.
>
> MR. HUTCHINS: So…
>
> THE COURT: So on question No. 3, it just says, discharged a firearm causing death or great bodily harm, and the attempt is left out.
>
> MR. HUTCHINS: Well, I think the evidence was that he was shot in the arm. So I think -- I don't know.

> THE COURT: They're hyper -- they're very hyper technical. So do you have any suggestions? My suggestion would be to put the attempting in and give it back to them.
>
> MR. CUMMINGS: They need to be identical to the instructions, one way or another, Judge.
>
> MR. HUTCHINS: Okay.
>
> MR. CUMMINGS: Protect the record.
>
> THE COURT: Okay. See you in a minute, Mr. Hutchins.
>
> MR. HUTCHINS: Attempting, Count II.
>
> THE COURT: Attempting.
>
> MR. HUTCHINS: All right.

(T5. 604-05.) The trial court sent the new verdict form for Count II to the jurors. (T5. 605.)

D. Verdict

On October 11, 2013, the jury found Mr. Herring guilty of the lesser included offense of second degree murder in Count I and found that in the course of committing the offense he actually possessed and discharged a firearm causing great bodily harm or death. As to Count II, the jury found Mr. Herring guilty of the lesser included offense of attempted second degree murder and found that in the course of committing the offense he actually possessed a firearm and "actually discharge[d] a firearm attempting to cause death or great bodily harm." (R. 80-83; T5. 606-07.) The jury found Mr. Herring guilty as charged of possession of a firearm by a convicted felon and carrying a concealed firearm. (R. 84-85; T5. 607-08.)

E. Sentence

At the sentencing hearing on October 11, 2013, the trial court stated as follows:

> And the jury did make a finding that the firearm was discharged and that Mr. Andrews, Terry Andrews [sic], died as a result of his gunshot wounds. And Mr. Terry Eubanks was injured as a result of his gunshot wounds. And Mr. Terry Eubanks was injured as a result of the one bullet wound in his bicep.

(T5. 613.) The trial court sentenced Mr. Herring to DOC custody for Life, as a PRR, on the second degree murder count; DOC custody for Life, under the 10-20-Life statute, on the attempted second degree murder count; fifteen years on the possession of a firearm by a convicted felon count; and five years on the carrying a concealed firearm count. All sentences were imposed concurrently. (T5. 613-20.)

F. Rule 3.800(b)(2) Motion

On February 28, 2014, the undersigned counsel filed in the trial court a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), asserting that the trial court had erred by imposing an illegal sentence of life on Count II (attempted second degree murder), pursuant to section 775.087(2)(a)3., Florida Statutes, where the jury found that "the defendant actually discharged a firearm attempting to cause death or great bodily harm." (emphasis added). The motion argued that the jury's finding does not support a sentence under section 775.087(2)(a)3., Florida Statutes; rather, the jury's finding only supports a sentence under section 775.087(2)(a)2., Florida Statutes, the

provision of the 10-20-Life statute regarding discharge of a firearm during the commission of an offense. (M. 142-69.)

On March 14, 2014, the trial court entered an order denying the Motion to Correct Sentencing Errors, reasoning as follows:

> Although it is generally error to enhance a defendant's sentence under section 775.087 without a clear jury finding regarding the factual basis for enhancement, a special jury interrogatory finding, while preferred, is not essential. *Lee v. State*, 130 So. 3d 707 (Fla. 2d DCA 2013), citing *State v. Iseley*, 944 So. 2d 227 (Fla. 2006). In the instant case, Defendant was charged in Count 2 with attempted first degree murder, in that he attempted to kill Terry Eubanks "by shooting with firearm." *Exh. 1 - Information*. Undisputed evidence adduced at trial established beyond a reasonable doubt that Terry Eubanks was shot in the arm during the commission of the offense. *Exh. 2 - Trial Trans., pp. 45-51*. That evidence, along with the jury's specific findings that Defendant possessed and discharged a firearm, demonstrates a clear jury finding that Defendant's discharge of the firearm caused great bodily harm to Terry Eubanks, as noted by the Court at sentencing. *Id. at 613.* Accordingly, Defendant was subject to sentencing under section 775.087(2)(a)3, Florida Statutes.

(M. 171.)

SUMMARY OF THE ARGUMENT

The expectation that one's location information will remain private where he or she has not initiated cellular phone activity is a reasonable expectation. No exigency existed in this case that would necessitate the collection of real-time GPS location information without obtaining a warrant from a neutral magistrate, as the Fourth Amendment contemplates. In this case, there was no immediate threat to any person that would justify circumventing the established process for obtaining a warrant. The time that law enforcement spent completing an application and requesting information from T-Mobile could have easily been spent obtaining a search warrant for the information they wished to obtain. The trial court erred by denying the motion to suppress in this case.

Mr. Herring was sentenced, in Count II, to Life in prison under the 10-20-Life statute; however, the jury's finding reflects only that Mr. Herring was "attempting to" cause death or great bodily harm in the commission of this offense. Because the jury did find, however, that Mr. Herring discharged a firearm in the commission of this offense, the twenty-year mandatory minimum sentence would apply, as to Count II.

ARGUMENT

I. Whether the trial court erred in denying the Motion to Suppress Evidence, where law enforcement sought and obtained real-time cellular location information from the carrier without seeking a warrant.

The trial court erred by denying the Motion to Suppress because there was no exigency that precluded law enforcement from obtaining a search warrant for real-time GPS location information of Mr. Herring's cell phone, information in which Mr. Herring had a reasonable expectation of privacy.

"The trial court's ruling on a motion to suppress is a mixed question of law and fact. The trial court's findings of fact are entitled to deference, but its application of the constitutional standard to the facts is subject to *de novo* review." Cooks v. State, 28 So. 3d 147, 149 (Fla. 1st DCA 2010) (citing Panter v. State, 8 So. 3d 1262, 1265 (Fla. 1st DCA 2009)). The appellate court must consider the evidence "in the light most favorable to sustaining the trial court's ruling." State v. Moore, 791 So. 2d 1246, 1247 (Fla. 1st DCA 2001) (citing Ikner v. State, 756 So. 2d 1116, 1118 (Fla. 1st DCA 2000)).

Florida citizens are protected from unreasonable searches and seizures by the Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights. Article I, section 12 of Florida's Constitution specifically provides that "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." "Thus, items obtained in violation of the Florida Constitution shall be excluded from evidence if the items would be excluded pursuant to the jurisprudence of the United States Supreme Court." Baptiste v. State, 995 So. 2d

285, 290 (Fla. 2008). "The exclusionary rule…excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well." Alderman v. United States, 394 U.S. 165, 171 (1969).

"[The] capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978). Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), provides that Fourth Amendment protection attaches where a person has "exhibited an actual (subjective) expectation of privacy" and that expectation is "one that society is prepared to recognize as 'reasonable.' " Justice Harlan's reasonable-expectation-of-privacy test has been relied on repeatedly by the United States Supreme Court in a variety of search contexts. See, e.g., California v. Greenwood, 486 U.S. 35, 39-43 (1988) (applying test to garbage placed at the roadside); California v. Ciraolo, 476 U.S. 207, 211-15 (1986) (applying test to law enforcement's aerial surveillance of defendant's fenced-in backyard). The United States Supreme Court has stated that the Katz analysis is the appropriate analysis in "[s]ituations involving merely the transmission of electronic signals without trespass." United States v. Jones, 132 S. Ct. 945, 953 (2012).

The United States Supreme Court has held that a person does not have a legitimate expectation of privacy in information he or she has voluntarily turned over to a third party. Smith v. Maryland, 442 U.S. 735, 743-44 (1979). In her Jones concurrence, Justice Sonia Sotomayor observed that "the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" is an approach that "is ill suited to the digital age." Jones, 132 S. Ct. at 957 (Sotomayor, J., concurring). Although lower federal courts have begun to address the matter of both real-time and historical cell phone location information, the United States Supreme Court has not directly spoken on the issue. Regarding historical cell site location information (CSLI) and Smith's application to such information, the Third Circuit Court of Appeals has stated as follows:

> A cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way. As the EFF notes, it is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information. Therefore, "[w]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he hasn't voluntarily exposed anything at all." EFF Br. at 21."

In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F. 3d 304, 317-18 (3d Cir. 2010).

However, the Fifth Circuit has reached a different conclusion, stating as follows:

> We understand that cell phone users may reasonably want their location information to remain private, just as they may want their trash, placed curbside in opaque bags, *Greenwood*, 486 U.S. at 40–41, 108 S.Ct. 1625, or the view of their property from 400 feet above the ground, *Florida v. Riley*, 488 U.S. 445, 451, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), to remain so. But the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable *expectations* of privacy.

In re U.S. for Historical Cell Site Data, 724 F. 3d 600, 615 (5th Cir. 2013). Although these statements may be instructive, they relate to historical and not real-time cell phone data, which is at issue in this case.

Very few courts have addressed the matter of real-time cellular location information. In Skinner, 690 F.3d at 781, law enforcement officers who were investigating a drug smuggling operation got a federal court order authorizing a phone carrier to provide, inter alia, "GPS real-time location" information from the suspect's phones. Id. at 776. The Sixth Circuit Court of Appeals held that "[b]ecause authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone." One Federal District Court appears to have distinguished cell phone location information "communicated for the purpose of making and receiving calls in the ordinary course of the provision of cellular phone service" and cell phone location information that is not "in the

ordinary course" of providing service. See Caraballo, 963 F. Supp. 2d at 360. In Caraballo, the Federal District Court of Vermont noted that the location information obtained in that case consisted "of the cell phone carrier surreptitiously accessing by satellite the cell phone's GPS location." Id. at 346. The court recognized that that under Smith, 442 U.S. 735, and United States v. Miller, 425 U.S. 435 (1976), a person did not have a reasonable expectation of privacy in location information "communicated for the purpose of making and receiving calls in the ordinary course of the provision of cellular phone service." Id. at 360. The court appeared uncomfortable, however, with the proposition that there could be no reasonable expectation of privacy in information obtained via GPS location secretly initiated by the carrier at the direction of the government. The court noted as follows:

> [D]isclosure of Defendant's cell phone data location did not occur in the ordinary course of providing cellular phone service. Rather, it occurred pursuant to a special, surreptitious procedure not available to the general public, initiated solely by law enforcement, without notice or any volitional activity by Defendant other than having his phone in the "on mode." As a general proposition, cell phone users do not expect their cell phones to be pinged in the ordinary course of business. In this respect, the instant case is distinguishable from *Smith* and *Miller* as pinging simply is not part and parcel of the provision of cellular phone service.

Id. (emphasis added). In the end, the Caraballo court did "not resolve the thorny question of whether an individual *generally* maintains a subjective expectation of privacy in his or her real time location data[,]" having found that the defendant in

that case "did not retain an actual subjective expectation of privacy in his real time location data in an exigent situation." Id. The court reached that conclusion based on Sprint Nextel's general terms and conditions, which provided that the carrier could use or disclose such data in the case of an emergency. Id. at 362.

At least one Florida court has recognized a distinction between historical cellular location information and real-time cellular location information. In Mitchell v. State, the Fourth District Court of Appeal held that "because historical cell site information discloses only the defendant's past location and does not pinpoint his current location in a private area, it does not implicate Fourth Amendment protections." 25 So. 3d 632, 635 (Fla. 4th DCA 2009) (citing United States v. Knotts, 460 U.S. 276 (1983)). This language suggests that Fourth Amendment protections would be implicated where real-time cellular location is used. Real-time cellular location information pinpoints a person's present location, whether it is on a public road or in a private dwelling.

In Mr. Herring's case, the real-time GPS location information was obtained without Mr. Herring's placing any call or affirmatively seeking to provide information to his cellular phone carrier. Officers found Mr. Herring at a public bus stop, but the uncertainty radiuses associated with the GPS coordinates[5] indicate that a portion of the residential area adjacent to the bus stop was included in the

[5] These uncertainty radiuses are mapped on SE22.

possible precise location of the handset. Given the fact that the two e-mails that led officers to the bus stop on Capital Circle Northwest showed the target phone's approximate locations at 2:50 a.m. and 3:00 a.m. and officers did not arrest Mr. Herring until approximately 4:30 a.m., it is impossible to know if the handset was surreptitiously pinpointed while inside a private residence or on a public road. Real-time geolocation of this type is incapable of distinguishing between a signal that is coming from inside a home and a signal that is coming from a public place. The undersigned submits that Mr. Herring had a reasonable expectation of privacy in his real-time cellular location information, which was obtained not as the result of any information he voluntarily provided to the carrier, but rather was obtained in secret as a result of law enforcement's and T-Mobile's overriding the privacy settings on his phone and making unjustified use of the E911 function of the phone. (S. 277.)

"Warrantless searches or arrests conducted in a constitutionally protected area . . . are *per se* unreasonable" unless they fall within an established warrant exception. Lee v. State, 856 So. 2d 1133, 1136 (Fla. 1st DCA 2003). "One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (citing Mincey v. Arizona, 437 U.S. 385, 394 (1978)) (internal

quotation marks omitted). "There is no exhaustive list of what constitutes exigent circumstances to permit a warrantless entry of a constitutionally protected space." Lee, 856 So. 2d at 1136. However, in Lee, this Court set out five factors to be considered:

> (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.

Id. at 1137; see also United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir.), cert. denied, 481 U.S. 1072 (1987); Wike v. State, 596 So. 2d 1020, 1024 (Fla. 1992). Exigent circumstances have been found to exist "where an officer is in peril, escape is likely, or the officer reasonably fears that evidence might be destroyed. Generally, however, "exigent circumstances arise only when there is a very short time between the incident giving rise to probable cause and the warrantless entry into the defendant's premises." Alvarado v. State, 466 So. 2d 335, 337 (Fla. 2d DCA 1985) (emphasis added).

"The sine qua non of the exigent circumstances exception is 'a compelling need for official action and no time to secure a warrant.' " Davis v. State, 834 So. 2d 322, 327 (Fla. 5th DCA 2003) (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)); see also Lee, 856 So. 2d at 1136 ("Some set of facts must exist that

precludes taking the time to secure a warrant."); Rolling v. State, 695 So. 2d 278, 293 (Fla. 1997) ("Of course, a key ingredient of the exigency requirement is that the police lack time to secure a search warrant."). Where officers have sufficient time to obtain a warrant but make a deliberate decision not to do so, some courts have found that the exigent circumstances exception does not apply. See Gnann v. State, 662 So. 2d 406, 408 (Fla. 2d DCA 1995) ("The officers' deliberate decision to forego a warrant did not provide them with exigent circumstances to make a warrantless search of a constitutionally protected area."); Alvarado, 466 So. 2d at 337 ("[L]aw enforcement officers cannot be permitted to convert self-imposed delay into a circumstance of exigency when the elapsed time is sufficient to seek a warrant."). In Alvarado, the victim identified Mr. Alvarado as her attacker "at approximately 11:30 in the evening." 466 So. 2d at 336-37. Police did not seek to obtain a warrant; rather, they arrested Mr. Alvarado at his home three-and-a-half hours later. Id. at 337. The court stated that "sufficient time elapsed between the officers' conversation with the victim and the arrest of Alvarado for the police to have made at least a minimal attempt to obtain a warrant." Id.

In Mr. Herring's case, the warrantless search was conducted in a constitutionally protected area, and the trial court held that the exigent circumstances exception permitted officers to obtain personal real-time location information of Mr. Herring's cell phone. It is clear from the record that officers did

not seek and at no point intended to seek a warrant for the cell phone location information associated with the phone number for "Black" that was on Mr. Andrew's phone.

Recently, in Riley v. California, 134 S. Ct. 2473, 2480 (2014), the United States Supreme Court addressed a different but somewhat related issue. The question in Riley was "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." The court concluded that when law enforcement officers make an arrest, they must obtain a search warrant prior to accessing digital information on a phone. Id. at 2494. In conducting its analysis, the court noted that although the search-incident-to-arrest warrant exception was inapplicable, a cell phone could potentially be searched without a warrant under the exigent circumstances exception. Id. The court stated that "[s]uch exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury." Id. Further examples cited in the opinion are "a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone." Id.

At the suppression hearing and during trial, officers suggested that exigent circumstances precluded the need to obtain a warrant because one man had been

killed, another had been injured, and the shooter was armed and at large in a residential neighborhood. (S. 228, 240; T1. 114-16.) Respectfully, these factors do not suggest that anyone was in immediate danger of harm or death. Mr. Eubanks was being treated at the hospital and could have been reasonably secured by law enforcement officers. There is no suggestion that the suspect had any motivation to seek out and harm any other person. Although it is possible that the factors law enforcement considered in determining the perceived need to conduct a warrantless search may have presented some reason for concern, the length of elapsed time in this case demonstrates that officers had ample time to obtain a warrant, but chose not to do so. Mr. Andrew and Mr. Eubanks were shot at approximately 10:30 p.m. Sergeant Boccio testified that the phone number associated with the nickname "Black" was found in the victim's phone during the "first hour or so of the investigation." (S. 222.) By midnight, officers had the phone number that was the target of their investigation. Although there was a judge on-call who could review and sign a warrant in the middle of the night, no officer sought a warrant. (S. 230.) Officers located Mr. Herring sitting on the bench at "four-something in the morning[,]" which was two hours after the exigent circumstances form had been filled out and about five-and-a-half hours after the shooting. No officers were attempting to get a judge's signature at 3:00 a.m. (S. 229-33.) Given that the target phone number was determined by midnight at the latest and officers did not send

the "exigency" form until two hours later, it seems clear that the level of exigency in this case is greatly exaggerated. During his suppression-hearing testimony, Sergeant Boccio acknowledged that there was a policy in place for obtaining a warrant after hours and acknowledged that he and other officers willfully failed to follow their own policy. (S. 230, 232, 235.) The two-hour delay between obtaining the target phone number and requesting the real-time location information could have been used to—as the Constitution contemplates—obtain a warrant. As was the case in Alvarado, "sufficient time elapsed between the officers' conversation with the victim and the arrest of [the suspect] for the police to have made at least a minimal attempt to obtain a warrant." 466 So. 2d at 337.

Furthermore, Sergeant Corbitt's claim that he could legally obtain real-time GPS location information in an exigent circumstance based on the authority vested in him through the operation of section 934.09(7), Florida Statutes is misplaced. Section 934.09(7), Florida Statutes, the section under which Sergeant Corbitt claimed authority to seek real-time GPS location information, reads as follows:

> (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer specially designated by the Governor, the Attorney General, the statewide prosecutor, or a state attorney acting under this chapter, who reasonably determines that:
>
> (a) An emergency exists that:
>
> 1. Involves immediate danger of death or serious physical injury to any person, the danger of escape of a prisoner, or conspiratorial activities threatening the security interest of the nation or state; and

> 2. Requires that a wire, oral, or electronic communication be intercepted before an order authorizing such interception can, with due diligence, be obtained; and
>
> (b) There are grounds upon which an order could be entered under this chapter to authorize such interception
>
> may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within 48 hours after the interception has occurred or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. If such application for approval is denied, or in any other case in which the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of s. 934.03(4), and an inventory shall be served as provided for in paragraph (8)(e) on the person named in the application.

To begin with, another portion of Chapter 934 makes clear that real-time GPS location information is <u>not</u> the type of information that this Chapter contemplates will be intercepted. Section 934.02(12), Florida Statutes defines "electronic communication" as follows (emphasis added):

> (12) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce, <u>but does not include</u>:
>
> (a) Any wire or oral communication;
>
> (b) Any communication made through a tone-only paging device;
>
> (c) <u>Any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object</u>; or

> (d) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

The location information at issue in this case does not even meet the definition of "electronic communication" in the Florida Statutes, as it is a class of "communication" that is specifically excluded from the definition. See § 934.02(12)(c), Fla. Stat. Real-time GPS location information may be something that is difficult to categorize, but the statute is clear that it does not fall within the category "electronic communication." Additionally, even if this type of location information did meet the definition of an electronic communication, section 934.09(7), Florida Statutes, the basis of Sergeant Corbitt's claimed authority, provides that information may only be sought without a court order in an emergency situation "if an application for an order approving the interception is made in accordance with this section within 48 hours after the interception has occurred or begins to occur." Of course, no such application was ever made in Mr. Herring's case.

Based on the totality of the circumstances and the ample time within which TPD could have followed their own policy and obtained a warrant, exigent circumstances did not exist in Mr. Herring's case; the collection of information relating to the real-time location of his phone violated his Fourth Amendment

right to be free from unreasonable searches and seizures. Evidence obtained as a result of this warrantless search should have been excluded.

II. Whether the trial court erred by sentencing Mr. Herring to a mandatory minimum of Life in prison, under the 10-20-Life statute, based on the jury's finding that in the commission of the attempted second degree murder offense he "discharged a firearm attempting to cause death or great bodily harm"

Because the jury's finding was that Mr. Herring was "attempting to cause death or great bodily harm" when he discharged a firearm in the commission of the attempted second degree murder of Mr. Eubanks, as to that count, there was no finding that great bodily harm or death actually occurred. A sentence of twenty years would more accurately reflect the jury's finding that Mr. Herring discharged a firearm in the commission of that offense. A sentence imposed by a trial judge, absent a misapplication of the law, is reviewed for an abuse of discretion. However, when a sentencing question involves interpretation of a statute, it is subject to *de novo* review. See Tasker v. State, 48 So. 3d 798, 804 (Fla. 2010).

Under the 10-20-Life statute, if the jury finds that a defendant, during the commission of an enumerated offense, including attempted murder, "discharged" a firearm and "as the result of the discharge, death or great bodily harm was inflicted upon any person" the defendant "shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." § 775.087(2)(a)3., Fla. Stat. If the jury finds that a defendant,

during the commission of an enumerated offense, including attempted murder, "discharged" a firearm, the defendant "shall be sentenced to a minimum term of imprisonment of 20 years." § 775.087(2)(a)2., Fla. Stat.

Because the jury found that Mr. Herring "discharged a firearm attempting to cause death or great bodily harm" in the course of committing Count II, and did not make any finding that death or great bodily harm was inflicted on a person as a result of Mr. Herring's discharge of a firearm in the course of committing Count II, he may not be sentenced under section 775.087(2)(a)3., Florida Statutes. That section is concerned with the jury's finding of actual great bodily harm or death and has nothing to do with what a defendant was or was not attempting to do.

Because the jury was not asked the question that section 775.087(2)(a)3. requires, it is impossible to know what the jury's answer would have been if the interrogatory had been correctly worded. The jury did, however, answer that Mr. Herring actually discharged a firearm in the commission of attempted second degree murder; therefore, on Count II, he may be sentenced to the mandatory minimum of twenty years under the 10-20-Life sentencing scheme. See § 775.087(2)(a)2., Fla. Stat. It is clear from the record that this was a typographical error in the written and oral jury instructions that was carried over onto the verdict forms after the jury expressed confusion regarding a discrepancy between the written instructions and the verdict forms. (R. 70; T5. 602-05.)

If the State charges and the jury finds that the defendant "carries, displays, uses, threatens to use, or attempts to use" a firearm in committing the second degree felony of attempted second degree murder, it is reclassified as a first degree felony. § 775.087(1)(b), Fla. Stat. A first degree felony, is punishable "by a term of imprisonment not exceeding 30 years." § 775.082(3)(b), Fla. Stat. Therefore, the statutory maximum for Mr. Herring's conviction of attempted second degree murder with discharge of a firearm, a first degree felony by reclassification, is thirty years. The interaction of the statutory maximum for a first degree felony and the mandatory minimum for discharge of a firearm in the commission of an offense enumerated in section 775.087(2)(a)1., Florida Statutes, left the trial court in a position—with regard to Count II—in which it was required to sentence Mr. Herring to the minimum of twenty years (under 10-20-Life) and had the discretion to sentence him to a total term of imprisonment not exceeding thirty years. See §§ 775.082(3)(b) & 775.087(2)(a)2., Fla. Stat. The undersigned counsel raised this issue in a motion to correct sentencing error, but the motion was denied. (M. 171.)

CONCLUSION

The appropriate remedy for claim I is reversal of the trial court's denial of the motion to suppress and remand to the trial court with instructions to dismiss the charges against Mr. Herring. The appropriate remedy for claim II is vacation of Mr. Herring's Life sentence in Count II and remand to the trial court for the entry of a legal sentence. Mr. Herring hereby requests all appropriate relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been electronically served on Trisha Meggs Pate, Assistant Attorney General, counsel for the State of Florida, crimapptlh@myfloridalegal.com, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; and has been furnished by U.S. Mail to Kendrick Herring, Appellant, DC# C02011, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this date, July 31, 2014.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Times New Roman 14 Point.

Respectfully submitted,

Office of Jeffrey E. Lewis
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