IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE TAYLOR,

Petitioner/Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 65388
Dist. Ct. Case No. C-11-270343-1

PETITION FOR REHEARING

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INTRODUCTION: Petitioner Donald Taylor ("Donald Taylor") appears by and through his undersigned counsel, Craig W. Drummond, Esq., and hereby petitions this Honorable Court for rehearing of his appeal, pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40.

I. LEGAL STANDARD

NRAP 40(c)(A) provides that the Court may hold rehearing of a matter previously decided when "the court has overlooked or misapprehended a material fact in the record or a material question of law in the case." *See also McConnell v. State,* 121 Nev. 25, 107 P.3d 1287 (2005) (holding the State was not entitled to rehearing where, *inter alia*, it failed to demonstrate the Supreme Court had overlooked or misapprehended any material points of law or fact in the record or a material question of law).

Respectfully, this Honorable Court has misapprehended certain facts and questions of law relative to Petitioner's arguments that an in-court identification by Angela Chenault ("Chenault"), the sole eyewitness to the crimes, was unreliable and should have been excluded at trial. Further, that the Defendant, or in reality all Defendants, do not enjoy a reasonable expectation of privacy in their historical cell phone data under the Fourth Amendment. Thus, a rehearing is requested and warranted.

II. ARGUMENT

A. This Court found that the show-up identification was unreliable and, because the same factors apply to determine the reliability of a show-up identification and whether an in-court identification has a sufficient independent basis, it should have also found the in-court identification improper.

Petitioner presented several arguments relative to the identification procedures in this case. First, Petitioner challenged the show-up procedure as being unduly suggestive. Op. Br. at 12. Petitioner also argued that the identification resulting from the show-up was unreliable. *Id.* at 17. Lastly, Petitioner argued that Chenault's in-court identification should not have been allowed because it was not independently reliable and free from the tainted identification procedure. *Id.* at 25.

This Court's decision found that the show-up was justified by exigent circumstances, but that the resulting identification itself was unreliable based upon the *Biggers* factors. *Taylor v. State*, 132 Nev. Adv. Op. 27 at 13-15 (2016) ("Opinion" hereinafter). This Court thereafter disagreed that the in-court identification of Petitioner as the perpetrator of the charged crimes did not have a sufficiently independent, reliable basis, based upon the same *Biggers* factors. *Id.* at 15-17.

At the outset, Petitioner respectfully submits that the Court's conclusion that the identification resulting from the show-up was unreliable but that the in-court identification was independently reliable, based upon identical factors and set of

facts, is irreconcilable. In determining whether an impermissibly suggestive identification is reliable, this Court weighs the factors annunciated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), as adopted in *Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980). Those factors are: (1) the witness' view of the criminal at the time of the crime; (2) the degree of the witness' attention; (3) the accuracy of any prior description of the criminal as compared to the suspect; (4) the witness' certainty; and (5) the time elapsed between the crime and identification. *Gehrke*, *supra*, 96 Nev. at 584, 613 P.2d at 1030.

This Court found that Chenault may not have been paying attention to the suspect at the time of the crime, she was uncertain if Petitioner was the perpetrator at the time of the show-up, and the circumstances of the show-up, including the amount of time that had elapsed since Chenault viewed the perpetrators, were highly suspect. Opinion at 15. Those same considerations applied to Petitioner's challenge to the in-court identification, but this Court thereafter concluded that it had a sufficient independent basis. *Id.* at 16.

This Court found that "Chenault's observation of the suspects in her apartment likely constituted a sufficient independent basis for her in-court identification," focusing only upon the first *Biggers* factor. *Id.* In doing so, this Court relied upon several prior cases in concluding that the in-court identification

had a sufficient independent basis, Opinion at 16, however those cases are distinguishable from the facts at issue here and will be addressed in turn.

The Court first cited to *Banks v. State*, 94 Nev. 90, 96, 575 P.2d 592, 596 (1978) as a case in which a "similar opportunit[y] for observation[] constitute[d] a sufficient independent basis for an in-court identification." Opinion at 16. However, the "good luck" at the suspect in *Banks* arose out of observing Banks at close range for approximately ten minutes, in broad daylight. 94 Nev. at 96, 575 P.2d at 596. Here, on the other hand, Chenault was face to face with the suspect for only a few seconds in her small apartment, in the evening hours, and thereafter returned to cooking food in the kitchen. AA VOL 3 at 651, 658, 715-716, 733.

This Court also relied upon *Boone v. State*, 85 Nev. 450, 453, 456 P.2d 418, 420 (1969), finding that even a good look during a car chase provided a sufficient independent basis for an in-court identification. Opinion at 16. However, *Boone* was decided in the very specific context of a Sixth Amendment right to counsel challenge to a police identification procedure. 85 Nev. at 452, 456 P.2d at 419. The standard for such a challenge is whether "the identification had an *independent origin*," 85 Nev. at 452, 456 P.2d at 419, rather than whether the witness has a *sufficient independent basis* for the identification. The standard for an in-court identification made in the aftermath of an impermissibly suggestive and unreliable pretrial identification is more exacting and must take into account the *Biggers*

factors - not merely whether the witness had any independent origin for her in-court identification. This is a critical error of law that affected this Court's decision.

Lastly, this Court relied upon *Riley v. State*, 86 Nev. 244, 468 P.2d 11 (1970), noting that "an observation of seven seconds or less of the suspects was sufficiently reliable for the in-court identification." Opinion at 16. However, the witness in *Riley* did not only have a face to face viewing of the suspect for seven or so seconds when he took money out of a cash drawer - he also followed the suspect out onto the street and had a full viewing of him before he disappeared around a street corner. 86 Nev. at 245, 468 P.2d at 12. Here, on the other hand, Chenault came face to face with the suspect for only a few seconds and, otherwise, was preoccupied with preparing dinner and had her back to the suspects and drug deal occurring in her apartment. AA VOL 3 at 651, 656, 658, 660, 664, 715-716, 733. Chenault simply did not have a sufficient amount of time to view the perpetrator.

Moreover, this Court focused only upon the first *Biggers* factor in finding the in-court identification to have an independently reliable basis. It did not address the other factors in the context of the *in-court identification*, but it did conclude that they weighed against a finding that the *show-up identification* was reliable. Opinion at 15. Taking that same analysis together with the fact that Chenault's basis for viewing the suspect at the time of the crime was entirely insufficient, as

outlined above, it is clear that the *Biggers* factors also weigh against concluding that the in-court identification had a sufficiently independent, reliable basis. Furthermore, those factors must be "weighed [against] the corrupting effect of the suggestive identification itself." *Banks*, 94 Nev. at 96, 575 P.2d at 596. Given that the identification itself was highly suggestive,[1] the in-court identification was impermissible. Thus, due to the misapprehensions of law and fact relative to that identification issue as outlined above, Petitioner should be granting rehearing.

B. The legal and policy concerns underlying the third-party disclosure doctrine indicate that it should not been applied to historical cell phone location data.

Petitioner also made a Fourth Amendment challenge to the State's access and use of his historical cell phone location data at trial to establish his whereabouts at the time of and after the crimes. Opening Br. at 35-49. In its Opinion, this Court found that Petitioner has no reasonable expectation of privacy in such data. Opinion at 6-12. In so holding, this Court primarily relied upon *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015). *Id.* at 11.

The *Davis* opinion, as well as the other federal cases relied upon by this Court, are all premised upon the so-called third-party disclosure doctrine and hold that because historical location data is the property of the cell phone companies, the user has no reasonable expectation of privacy therein. *See, e.g.*, *Davis*, 785

[1] *See* Opening Brief at 12-17.

F.3d at 508-514. Indeed, this Court appears to have agreed with that contention. *See* Opinion at 11-12 (finding that "a defendant has no reasonable expectation of privacy in business records made, kept, and owned by his or her cell phone provider").

The issue with reliance upon the third-party disclosure doctrine is that its policy underpinnings indicate that it should not be applied in the context of historical cell phone location data. In *Smith v. Maryland*, 442 U.S. 735, 742 (1979), the Supreme Court found that there was no legitimate expectation of privacy to be found in landline telephone numbers dialed. In so holding, the high Court focused on several factors. First, the Court noted that registers have "limited capabilities," namely that they only provide telephone numbers dialed. *Smith*, 442 U.S. at 741-742. Second, the Court opined that no reasonable person could "entertain any actual expectation of privacy in the numbers they dial." *Id.* at 742. Lastly, the Court concluded that any expectation of privacy the defendant had in the numbers he dialed was not one that society was prepared to recognize as reasonable. *Id.* at 743.

Unlike pen registers, cell phone location data is not narrowly limited in its capabilities. It does not just provide a cell tower to which the subscriber's phone connects. It also provides the geographic location of that tower and, by extension, that subscriber. For example, the State here was able to determine that Petitioner

had been within several private residences across the city of Las Vegas on the day of the crimes. AA VOL 7 at 1504-1513. Furthermore, it is not so clear that cell phone users are intelligently and knowingly conveying this information to cell phone companies. *See In re Target Phone 2*, 733 F. Supp. 2d at 939 (stating that "[c]ell phones, unbeknownst (this court suspects) to many of their users, send out signaling information that can be used to identify the phone's physical location).

The unique characteristics of historical cell phone location data - namely, that it is not narrowly limited in the scope of information it may reveal and that users are likely unaware that they are conveying such information to cell phone companies - indicate that the third-party disclosure doctrine should not be applied in this case. Additionally, even the *Davis* court recognized that "[w]ithout question, the number of calls made by Davis over the course of 67 days could, when closely analyzed, reveal certain patterns with regard to his physical location in the general vicinity of his home, work, and indeed the robbery locations" but that there was no evidence in the record to support a conclusion that such a pattern could be gleaned. *Davis*, 785 F.3d at 516. Here, on the other hand, such record evidence does exist. For example, Petitioner's data allowed the State to track him across the Las Vegas area and to determine that he had been within several private residences. AA VOL 7 at 1504-1513. The Court's Opinion appears to indicate that it may have misapprehended, or overlooked, the legal and policy justifications for

the third-party disclosure doctrine and its application to this case. Petitioner should therefore be granted rehearing.

CONCLUSION

WHEREFORE, based on the arguments outlined herein and in the previous briefing and oral argument, the Petitioner respectfully requests a rehearing of his appellate case as the petitioner believes the Court has overlooked or misapprehended points of law or fact in consideration of his case.

DATED this 4 day of May, 2016.

By _____
Craig W. Drummond, Esq.
Nevada Bar No. 011109
Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition for Re-Hearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

The brief complies with the formatting requirements of Rule 32(a)(4)-(6).

The brief is formatted in Word, 14 point Times New Roman font, double-spaced, has ten (10) pages of argument.

DATED this 4 day of May, 2016.

By _____
Craig W. Drummond, Esq.
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Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 4 May, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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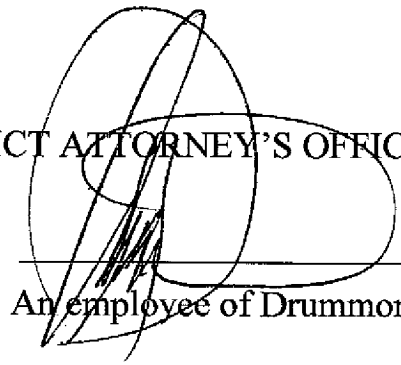

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