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 *EN BANC* RECONSIDERATION

Craig W. Drummond, Esq.
Drummond Law Firm, P.C.
Nevada Bar No. 011109
810 S. Casino Center Blvd., Suite 101
Las Vegas, NV 89101
T: (702) 366-9966
F: (702) 508-9440
craig@drummondfirm.com
Attorney for Petitioner/Appellant

INTRODUCTION

Petitioner Donald Taylor ("Mr. Taylor") appears by and through his undersigned counsel, Craig Drummond, Esq., and hereby petitions this Honorable Court for *en banc* reconsideration of his appeal, pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40A. Mr. Taylor has petitioned the panel for rehearing, which was denied by order entered June 10, 2016. This Petition is timely pursuant to NRAP 40A(b) as it is being filed within 10 days after written entry of the panel's decision to deny hearing.

I. LEGAL STANDARD

NRAP 40A(a) provides that a party may petition this Court for *en banc* reconsideration of a panel decision under limited circumstances. First, a petition for *en banc* reconsideration may be made when "reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals." Second, such a petition may be made when "the proceeding involves a substantial precedential, constitutional or public policy issue." The issues raised in this case involve substantial constitutional principles and public policy issues that warrant reconsideration by this Court *en banc*.

II. POINTS & AUTHORITIES

As reflected in Mr. Taylor's prior briefing, the issues involved in this case implicate substantial and important issues. The issues raised by this appeal are

primarily of constitutional magnitude, the two most important of which are detailed below.

A. The panel decision misapprehended facts and law regarding the suspect identification procedures at issue in this case, warranting reconsideration *en banc*.

First, Mr. Taylor presented several arguments relative to the identification procedures in this case. Mr. Taylor challenged the show-up procedure as being unduly suggestive. Opening Br. at 12. Mr. Taylor also argued that his own identification resulting from the show-up was unreliable. *Id.* at 17. Lastly, Mr. Taylor argued that the sole eyewitness in-court identification should not have been allowed because it was not independently reliable and free from the tainted identification procedure. *Id.* at 25. The arguments outlined are of constitutional magnitude as they turn on whether certain eye-witness identification procedures violated the Defendant's due process rights.

The panel decision found that the show-up was justified by exigent circumstances, however that the resulting identification itself was unreliable based upon the *Biggers* factors. *Taylor v. State*, 132 Nev. Adv. Op. 27 at 13-15 (2016) ("Panel Opinion" hereinafter). [quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)] Nonetheless, the panel thereafter concluded that the in-court identification of Mr. Taylor as the perpetrator of the charged crimes had a sufficiently

independent, reliable basis, based upon the exact same *Biggers* factors. *Id.* at 15-17.

Mr. Taylor submits that the panel's conclusions are irreconcilable that the identification resulting from the show-up was unreliable but that the in-court identification was independently reliable. This is true since the panel was considering the exact same legal factors and set of facts. 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. Yet, the panel found that the sole eyewitness'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. Panel Op. at 15-16. In doing so, the panel relied upon several prior cases in concluding that the in-court identification had a sufficient independent basis, Panel Op. at 16, but those cases are distinguishable from the facts at issue here.

The panel 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." Panel Op. at 16. However, the "good look" 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, the witness was face to face with the suspect for only a few seconds in her apartment, in the evening hours, and thereafter returned to cooking food in the kitchen. AA VOL 3 at 651, 658, 715-716, 733.

The panel 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. Panel Op. at 16. However, *Boone* was decided in the 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 legal error that affected the panel decision.

Lastly, the panel 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." Panel Op. 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 onto the street and had a full viewing of him before he disappeared around a corner. 86 Nev. at 245, 468 P.2d at 12. Here, on the other hand, the eyewitness 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. The eyewitness simply did not have a sufficient amount of time to view the perpetrator.

Moreover, the panel 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. Panel Op. at 15. Taking that same analysis together with the fact that the eyewitness'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 because there were no additional facts that give rise to an alternative conclusion. The misapprehensions of law and fact relative to the identifications at issue in this case implicate important due process constitutional rights in future cases with an identical set of facts because, under the panel's analysis, two inconsistent conclusions can be reached. Therefore, *en banc* reconsideration is warranted.

B. The panel decision found no Fourth Amendment right in historical cell site location information, implicating serious future invasions of privacy if left intact.

Next, Mr. Taylor challenged the warrantless use of his historical cell site location data ("HCSLI") as violating his Fourth Amendment rights. Opening Br. at 35-49. This is an immensely important issue affecting not only Mr. Taylor's rights, but also important as to the impact on this decision for law enforcement practices used against countless Defendant's in the future. The continued and expansive use of cell phones makes both the constitutional and public policy implications of this decision one that impact's "the panel's decision beyond the litigant's involved." See NRAP 40A(c).

---

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

The panel's decision found that Mr. Taylor does not have a reasonable expectation of privacy in his HCSLI and, therefore, a warrant was not required in order to access that data. Panel Op. at 12. Other courts that have addressed this issue are divided on their conclusions. *See e.g.* Dennis J. Brathwaite & Allison L. Eiselen, *Nowhere to Hide? An Approach to Protecting Reasonable Expectations of Privacy in Cell Phone Location Data Through the Warrant Requirement*, 38 Am. J. Trial Advoc. 287, 288, n. 4 (2014) (listing cases). The fact that this issue is being decidedly differently throughout the country makes *en banc* review even more important as it relates to the rights of Nevadans.

It has been noted that the use of HCSLI "is a common practice among law enforcement agencies all over the country" in the conduct of criminal investigations. Kyle Malone, *The Fourth Amendment and the Stored Communications Act: Why the Warrantless Gathering of Historical Cell Site Location Information Poses No Threat to Privacy*, 39 Pepp. L. Rev. 701, 721 (2013). Indeed, statistics have shown that cell phone service providers responded to more than one million requests for CSLI in the year 2012. Eric Lichtblau, *Wireless Firms Are Flooded by Requests to Aid Surveillance*, N.Y. Times (July 8, 2012), http:// www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all.

At the same time, it has been noted that a great deal of private information can be gleaned from GPS location data. *See United States v. Jones*, 132 S. Ct. 945, 955-56 (2012) (Sotomayor, J., concurring) (noting that such "monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations"). While those observations have been made in the context of real-time GPS tracking, there is no reason to think that similar information cannot be pieced together from HCSLI. *See, e.g.*, Stephen E. Henderson, *Real-Time and Historic Location Surveillance After* United States v. Jones*: An Administrable, Mildly Mosaic Approach*, 103 J. Crim. L. & Criminology 803, 804-06 (2013) (describing a case involving two bank robbers who were eventually identified when police accessed the cell phone records of *all* users in the area of the various bank robberies and found that the two co-defendant's cell phones were in the area of each of the robberies).

Given the widespread and ubiquitous nature of cell phone data in American society[2] and the pervasive use of HSCLI in criminal investigations, the panel's decision finding no Fourth Amendment protection for HSCLI implicates future invasions of the privacy rights of not just Mr. Taylor but of the general public as a

[2] *See* Elizabeth Gula Hodgson, *The Propriety of Probable Cause: Why the U.S. Supreme Court Should Protect Historical Cell Site Data with a Higher Standard*, 120 Penn St. L. Rev. 251, 253-254 (2015).

whole. The federal constitution and public policy mandate *en banc* reconsideration of this constitutional issue.

CONCLUSION

It is clear from the above that this case presents substantial, far-reaching issues of constitutional importance. Reconsideration by this honorable Court, *en banc*, is therefore warranted to ensure those constitutional issues are properly resolved in future cases.

DATED this 20 day of June, 2016.

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

CERTIFICATE OF COMPLIANCE

I hereby certify under NRAP 40(b)(4) that I have read this Petition for *En Banc* Reconsideration, 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 Petition complies with the formatting requirements of Rule 32(a)(4)-(6).

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

DATED this 20 day of June, 2016.

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

CERTIFICATE OF SERVICE

I hereby certify and affirm that this Petition was filed electronically with the Nevada Supreme Court on 28 June, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
Nevada Attorney General
STEVEN S. OWENS
Chief Deputy District

Ely State Prison
Inmate Donald Taylor, 1117274
4569 Nevada 490
Ely, NV 89301
VIA US MAIL

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

An employee of Drummond Law Firm, PC