No. 16-_____

In The

Supreme Court of the United States

DONALD TAYLOR,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

On Petition For A Writ Of Certiorari To The Nevada Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the warrantless access and use of hundreds of data points showing Mr. Taylor's historical cell phone location over a weeklong period was a search that violated Mr. Taylor's Federal Fourth Amendment rights.

Whether the show-up of Mr. Taylor was unnecessarily suggestive, resulting in unreliable out-of-court and in-court identifications that violated his Federal Constitutional right to due process of law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Taylor respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court in case number 65388.

OPINIONS BELOW

The opinion of the Nevada Supreme Court denying relief and affirming the District Court decision was filed on April 21, 2016. Petition for rehearing was filed on May 5, 2016. Order denying rehearing was filed on June 10, 2016. Petition for En Banc Reconsideration was sought. Order denying En Banc Reconsideration was filed on July 14, 2016.

JURISDICTION

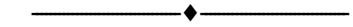
The Nevada Supreme Court denied review on July 14, 2016. This Court has jurisdiction pursuant to S. Ct. Rule 13, "A petition for a writ of certiorari seeking review of judgment of a lower state court that is subject to a discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Order denying En Banc Reconsideration was filed on July 14, 2016. Therefore, this petition is timely and this honorable Court has jurisdiction pursuant to S. Ct. Rule 13 and 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

The Fourteenth Amendment states in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



STATEMENT OF THE CASE

1. On November 18, 2010, Michael Pearson and his girlfriend's three-year-old son arrived at Angela Chenault's apartment. *Petitioner's Appendix* (hereinafter "PA") at 3. Chenault is the mother of Pearson's girlfriend, Tyniah Haddon. *Id.* After taking her grandson to the bedroom, Chenault went to the kitchen, where she cooked while she talked with Pearson. *Id.* Pearson told Chenault that he was meeting his friends at her apartment. *Id.* Pearson brought a black bag containing marijuana with him into the apartment and placed it on top of the refrigerator. *Id.* Chenault saw Pearson sit on the couch and talk to someone on his phone. *Id.*

At some point, Pearson left the apartment and returned with two men. PA at 3. Chenault never met either of these men before and neither introduced themselves to her. *Id.* One of the men walked around the apartment and went toward the bedroom. *Id.* To prevent the man from going inside the bedroom where her grandson was watching television, Chenault stood in front of the bedroom door. *Id.* She momentarily stood face-to-face with the man. *Id.* He asked who was in the bedroom, and Chenault replied that her grandson was in there. *Id.* Chenault noticed that the man was holding a gun. *Id.*

Chenault returned to the kitchen stove and resumed cooking. PA at 3. Pearson removed the black bag from the top of the refrigerator and placed it on the kitchen table. PA at 3-4. He asked for money from the two men in exchange for the black bag, but the men responded, "No, we taking this." PA at 4. Pearson then said, "Take it." *Id.* Chenault saw the men begin going through Pearson's pockets and saw Pearson attempt to grab a gun on his waistband. *Id.* During that time, Chenault turned back to the stove. *Id.* Shots were fired, and when Chenault turned around, she found Pearson lying in a pool of blood and saw that the men had fled with the black bag. *Id.* Chenault did not observe the actual shooting. *Id.*

2. Detective Martin Wildemann ("Wildemann") of the LVMPD responded to the scene of the shooting. PA at 4. After interviewing Chenault, Wildemann interviewed Haddon. *Id.* Haddon told Wildemann that Pearson was going to sell marijuana to someone that

she knew as "D." *Id.* She also informed the detective that she had met "D" at one of Pearson's coworker's houses. *Id.* Wildemann gave Pearson's cell phone number to the FBI and asked for their assistance regarding possible contacts that Pearson made just before the shooting occurred. *Id.*

The FBI provided Wildemann with a phone number to which Pearson had placed a call shortly before the murder. *Id.* Homicide detectives then processed the phone number through government records and were able to link it to an individual named Jennifer Archer. *Id.*

While conducting surveillance on Archer, Wildemann observed Archer exit her vehicle and enter a bar. PA at 5. When Archer returned to her vehicle, she was accompanied by an unknown male. *Id.* After initiating a traffic stop of Archer's vehicle, Wildemann arrested the male passenger, who identified himself as Taylor. *Id.* Taylor gave Wildemann his cell phone and cell phone number. *Id.* The detective dialed the phone number given to him by the FBI. *Id.* Taylor's cell phone rang. *Id.* Wildemann then contacted Chenault to come and identify Taylor. *Id.*

3. Wildemann arranged to meet with Chenault and bring her to the parking lot where Taylor was being held to "conduct a one-on-one." PA at 5. The time was 11:45 p.m., and it was "[p]itch black." *Id.* The lighting conditions were such that Wildemann had to "superimpose a bunch of lighting on [Taylor]" by pulling vehicles around Taylor and lighting up the spot where

Taylor was standing with a patrol car spotlight. *Id.* After explaining the process to Chenault, the detective drove her about 15 to 20 yards from where Taylor was standing. *Id.* Wildemann then drove closer so Chenault could see Taylor more clearly. *Id.*

Chenault told Wildemann that "she [did not] think that's him; she just [did not] recognize that to be him." PA at 6. Wildemann pulled the vehicle around and asked Chenault again for her thoughts. *Id.* Chenault told the detective that Taylor looked like the man from the apartment, but believed that Taylor was thicker than the man who was at the apartment. *Id.* Chenault said that Taylor was "just a bigger guy." *Id.* Wildemann asked Chenault to focus on Taylor's face, and at that point Chenault said, "[I]t looks like him." *Id.*

After driving Chenault home, Wildemann texted a photograph of Taylor to Haddon. PA at 6. He asked Haddon to tell him if it was a photograph of "D." *Id.* Haddon immediately responded, "That's D, that's him." *Id.* Haddon then showed the photograph to Chenault, who told Haddon that the man in the picture was the person who shot Pearson. *Id.*

4. On January 14, 2011, a Clark County grand jury indicted Taylor on the following charges: burglary while in possession of a firearm, conspiracy to commit robbery, robbery with use of a deadly weapon, and murder with use of a deadly weapon. PA at 6. After a six-day jury trial, the jury returned a verdict of guilty on all four counts. *Id.*

During the trial, the State accessed Mr. Taylor's phone records by obtaining a subpoena under the Stored Communications Act.[1] PA at 7, 9, 14. Mr. Taylor's cell phone records were admitted as substantive evidence at trial over Mr. Taylor's objection. PA at 29-30.

Mr. Taylor moved for a new trial due to various prosecutorial errors that violated his constitutional rights, which was denied on April 8, 2013. *Id.* A Judgment of Conviction was issued on March 7, 2014. PA at 6. Mr. Taylor filed a timely Notice of Appeal to this Court on April 4, 2014. PA. Decision denying relief and affirming the District Court decision was filed on April 21, 2016. PA. Petition for Rehearing filed on May 5, 2016. PA. Order denying rehearing filed on July 10, 2016. PA at 28. Petition for En Banc Reconsideration filed on July 20, 2016. PA. Order denying En Banc Reconsideration filed on July 14, 2016. PA at 34-35.

SUMMARY OF THE ARGUMENT

Identification procedures utilized in the course of criminal investigations can deprive criminal defendants of their right to due process of law where they are unnecessarily suggestive of identification. Certain

[1] 18 U.S.C. § 2703(d) allows disclosure of private communications data via subpoena "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

procedures such as a one-on-one show-up are, as a general matter unnecessarily suggestive. Mr. Taylor's due process rights were violated when the LVMPD conducted an unnecessarily suggestive show-up that was not justified by any exigent circumstances. Moreover, this identification cannot be saved from running afoul of the Constitution because it was unreliable, even independent of the suggestive procedure. Chenault had little time to view the perpetrators in her home, was inattentive and distracted at the time of the crime, and could not definitively identify Mr. Taylor as one of the perpetrators until ***after*** her daughter showed her a picture of Mr. Taylor. Furthermore, these same factors indicate Chenault's in-court identification of Mr. Taylor was likewise unreliable as her initial identification of the suspect differed dramatically from Mr. Taylor. Therefore, all identification evidence should have been excluded at trial and the failure to do so violated Mr. Taylor's fundamental right to due process of law.

The State also introduced Mr. Taylor's historical cell phone location data as substantive evidence to show Mr. Taylor was at the scene of the crime, which was admitted over objection. These records contained hundreds of location points over a weeklong period. They also allowed the police to determine Mr. Taylor was at several private residences across the Las Vegas area. The quantity and private nature of this data shows that the State's access and use of that data was a search within the meaning of the Fourth Amendment. Because the State did not have a warrant for

this data, it violated Mr. Taylor's Fourth Amendment rights and the cell phone location data should have been excluded at trial.

From the foregoing, it is clear that many pieces of evidence were improperly admitted against Mr. Taylor at trial. This evidence included eyewitness testimony as to the identification of Mr. Taylor as one of the perpetrators and evidence tending to establish that Mr. Taylor was at the scene of the crime. Considering the evidence that was *properly* before the jury, then, no reasonable juror could have found the elements of each crime proven beyond a reasonable doubt. There was essentially no properly admitted evidence establishing Mr. Taylor's identity as one of the perpetrators, in the absence of the identification and cell phone data. Moreover, the accumulation of the foregoing errors irreparably tainted Mr. Taylor's trial and stacked the deck against him. Such accumulation violated his fundamental Sixth Amendment right to a fair trial. Therefore, Mr. Taylor's convictions should be reversed.

REASONS FOR GRANTING THE WRIT

I. THE STATE'S WARRANTLESS ACCESS TO AND USE OF MR. TAYLOR'S HISTORICAL CELL PHONE LOCATION DATA CONSTITUTED A SEARCH IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE THERE IS AN OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN THAT DATA.

The Fourth Amendment to the United States Constitution provides that citizens have a right "against unreasonable searches" by the government, except with a warrant based upon probable cause. U.S. Const. amend. IV. The Fourth Amendment "protects people, and not simply 'areas.'" *Katz v. United States*, 389 U.S. 347 (1967). In other words, the Fourth Amendment protects any interest in which a citizen retains a "reasonable expectation of privacy." *Id*. at 360. The inquiry into whether a Fourth Amendment search has occurred, and thus required a warrant, depends upon whether there is an objectively reasonable expectation of privacy in the interest violated. *Id.* at 361 (Harlan, J., concurring).

In this case, the warrantless access and use of Mr. Taylor's historical cell phone location data was a search under the Fourth Amendment because Mr. Taylor had an objectively reasonable expectation of privacy in the access to and use of that data. Because the State did not have a warrant for this search, this Court should find that Mr. Taylor's Fourth Amendment rights were violated and reverse his conviction.

A. There is an objectively reasonable expectation of privacy in historical cell phone location data.

When applying the *Katz* test, this Court should "ask whether the use of [historical cell phone location or GPS data] in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Jones v. United States*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring). In this case, the access and use of Mr. Taylor's cell phone location data over a weeklong period was an intrusion a reasonable person would not have expected because the nature and quantity of that information is highly sensitive and revealing.

1. There is a reasonable expectation of privacy in historical cell phone data because the nature and quantity of information that can be gleaned from that data is highly sensitive and revealing.

Although it has not yet directly addressed the issue, the United States Supreme Court has confronted the Fourth Amendment implications of the use of cell phone GPS/location technology. In *Jones*, *supra*, the Court found a violation of the Fourth Amendment where law enforcement trespassorily placed a GPS locator on the defendant's car and used that device to track his movements over a month's time. *Id.* at 954. Concurring, Justice Sotomayor extensively noted the

privacy concerns implicated by the use of GPS surveillance. *Id.* at 956. In her opinion, Sotomayor noted the "quantum of intimate information [revealed] about any person" the government chooses to track. *Id.* She also took notice of the fact that the aggregate of such [location] data can enable the government "to ascertain, more or less at will, [a person's] political and religious beliefs, sexual habits, and so on." *Id.* Sotomayor's opinion clearly reveals to this Court two important qualities that should be considered when determining whether there is a reasonable expectation of privacy in historical cell phone location data under the Fourth Amendment: the nature and the quantity of information that can be gleaned from such data.

It is obvious that, in aggregate, the quantity of information that can be obtained from historical cell phone location data is interminable. This is especially concerning given that most modern day cell phones have GPS communicators and convey location data to providers, which is then automatically recorded and stored. *See State v. Earls*, 70 A. 3d 630, 638-639, 214 N.J. 564 (2013). Any given person would not reasonably expect to have their every single move available to the government for a mere modicum of justification. *Cf. id.* at 643 (holding that "most people do not realize the extent of modern tracking capabilities and reasonably do not expect law enforcement to convert their phones into precise, possibly continuous tracking tools"). Therefore, the massive amount of information that historical cell phone location data can provide shows there is a reasonable expectation of privacy in that data.

Furthermore, the nature of information revealed by historical cell phone location data can be highly intrusive. Justice Sotomayor hinted as much in her *Jones* concurrence, stating that one's "political and religious beliefs, sexual habits, and so on" could all be determined from this data. *Jones*, *supra*, 132 S. Ct. at 955. For example, had Mr. Taylor visited a church on one of the seven days for which the state obtained records, or a liquor store, or an STD clinic, all of these data points could easily be identified via historical cell phone records. Such data could also reveal whether Mr. Taylor was inside a private residence, around which the Supreme Court has drawn a "firm but also bright [line]" of Fourth Amendment protection. *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Indeed, the State was in fact able to ascertain that Mr. Taylor had been at several private residences via his historical cell phone data. PA [State's Exhibits 1-5] The nature of this information is highly private and "involves a degree of intrusion that a reasonable person would not anticipate." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

Based on the foregoing, it is clear that historical cell phone location data is unique evidence in the context of the Fourth Amendment. Both the massive amount of data that can be obtained at a whim and the highly sensitive and private nature of that information show that there is an objectively reasonable expectation of privacy in historical cell phone location data. Therefore, a warrant should be required in order to access it and, since the State here had no warrant, it violated Mr. Taylor's Fourth Amendment rights.

2. Despite the fact that historical cell phone location data reveals one's whereabouts upon public thoroughfares, there is still an objectively reasonable expectation of privacy in that data because it can reveal more than publicly observable information.

The United States Supreme Court, in its seminal case of *United States v. Knotts*, held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. 276, 281 (1983). This conclusion was partially based upon the fact that there is "a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Id.* at 281 (citations omitted).

Historical cell phone location data does show locations of a given person along a public thoroughfare. However, it also shows much more than that – it shows the location of a given person *no matter where that person is*. The New Jersey Supreme Court in *State v. Earls*, for example, in finding there to be a reasonable expectation of privacy in cell phone location data, concluded that such data "does more than simply augment visual surveillance in public areas." 70 A. 3d at 643. The *Earls* court noted that this data had been used to pinpoint the defendant to a motel room, which is not a public thoroughfare. *Id.* at 642. Something similar occurred here. Mr. Taylor's cell phone location data was

used to track his locations across the city of Las Vegas. PA at 4. Additionally, most of the locations to which Mr. Taylor had been tracked were private residences, which historically enjoy heightened privacy protection under the Fourth Amendment. It is clear from the foregoing that cell phone location data reveals information that cannot be otherwise lawfully ascertained. Thus, this Court should find there to be a reasonable expectation of privacy in that data.

3. The third-party disclosure doctrine is inapplicable to historical cell phone location data because the rationale underlying that doctrine is undermined when it comes to the nature and quantity of information revealed by cell phones.

Most of the courts that have specifically addressed challenges to the use of cell phone location data obtained via 2703(d) subpoenas[2] have found that there must be probable cause to support those subpoenas. *See In the Matter of the Application of the United States of America For an Order Relating to Target Phone 2*, 733 F. Supp. 2d 939, n. 1 (N.D. Ill. 2009) (collecting cases denying 2703(d) subpoenas for lack of probable cause, including twelve federal district courts). Many other courts have found there to be a reasonable expectation of privacy in cell phone location data. *See United*

[2] *See infra*, Part III.B, describing the procedure for obtaining such information via subpoena under the Stored Communications Act, the method used by the State here.

States v. Davis, No. 12-12928 (11th Cir. June 11, 2014); *Commonwealth v. Augustine*, 467 Mass. 230 (2014); *State v. Earls*, 214 N.J. 564 (2013). Only a few courts have held there to be no Fourth Amendment protection for cell phone location data. The leading case on this point is *In re Application of the United States of America for Historical Cell Site Data*, 724 F. 3d 600 (5th Cir. 2013). There, the Fifth Circuit primarily relied on the third party disclosure doctrine, as extensively discussed in the United States Supreme Court's decision in *Smith v. Maryland*, to find there to be no Fourth Amendment protection for cell phone location data. *Id.* at 610-614.

In *Smith*, the United States Supreme Court held there to be no Fourth Amendment protection for information that was voluntarily conveyed to a third party. 442 U.S. 735, 745-746 (1979). The government obtained the consent of a landline telephone company to install a pen register on the defendant's phone line, who was suspected of robbery. *Id.* at 737. This register then recorded all the numbers dialed from the defendant's phone, including obscene and threatening calls made to a witness to the robbery. *Id.* Using this data, the officers then arrested the defendant after a search of his home turned up a phone book marking the page containing the witness's phone number. *Id.*

The defendant sought to suppress all evidence obtained from the pen register. *Id.* The Supreme Court found that there was no legitimate expectation of privacy to be found in landline telephone numbers dialed.

Id. at 742. 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. *Id.* 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.

Lastly, the *Smith* Court concluded that any expectation of privacy the defendant could have had in the numbers he dialed was not objectively reasonable. 442 U.S. at 743. The Court supported this proposition by analyzing its other third party disclosure cases in which it held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-744. On this point, the Court discussed *United States v. Miller*, 425 U.S. 435 (1976) at length. In *Miller*, the government subpoenaed records of all of the defendant's accounts held at a local bank, which were produced. *Id.* at 437-438. These records were used to link the defendant to illegal alcohol production. *Id.* at 438. On appeal, the Fifth Circuit found a Fourth Amendment violation for compelling production of one's private papers without a warrant. *Id.* The Supreme Court, in reversing the Fifth Circuit's decision, focused on the fact that *Miller* had "voluntarily conveyed [this financial information] to . . . banks and exposed [it] to their employees in the ordinary course of business." *Id.* at 442.

It was this same rationale that led the Court in *Smith* to find no objectively reasonable expectation of privacy in landline telephone numbers dialed – because those numbers are knowingly and voluntarily revealed to third parties. 442 U.S. at 744-745. The same discussion above regarding whether subscribers knowingly convey location information to cell phone companies is equally relevant on this point and renders the *Smith*/third party disclosure rationale inapplicable to cell phone location data. Most phone subscribers are likely unaware of the fact that they are conveying historical location data to their service providers. *See In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F. 3d 304, 317 (3rd Cir. 2010). When making a phone call from a cellular phone, the "only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed." *Id.* Moreover, modern day cell phones convey this information to providers *even when they are not in actual use* – the only way to keep this from happening is to turn one's phone off. *Earls*, *supra*, 70 A. 3d at 637. Thus, there is an objectively reasonable expectation of privacy in cell phone location data, unlike the pen registers at issue in *Smith*.

From the foregoing, cell phone users obviously neither knowingly nor voluntarily convey location data to providers. Therefore, just as the reasonable expectation of privacy analysis did not work in *Jones*, the framework for the third party disclosure line of cases

does not work for challenges to law enforcement use of historical cell phone location data. This Court should apply the standard *Katz* test to this case to find that Mr. Taylor had an objectively reasonable expectation of privacy in his cell phone location data and that the State's access of this information was therefore a search under the Fourth Amendment.

B. The search that occurred here was neither done pursuant to a warrant based upon probable cause nor does it fall within an exception to the warrant.

Where a search occurs, the Fourth Amendment requires there to be a warrant based upon probable cause for the search to be valid. Warrantless searches are generally per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Where a search was not performed pursuant to a valid warrant and does not fall within an exception to the warrant requirement, a Fourth Amendment violation has occurred.

Here, the State obtained approximately one week of Mr. Taylor's cell phone records, including location data, near the time of the robbery-murder. PA at 7-8, 14. As outlined above, the State's access and use of Mr. Taylor's cell phone location data was a search under the Fourth Amendment. This information was obtained via subpoena under the Stored Communications Act, 18 U.S.C. §§ 2701-2712. PA at 7. Title 18, Section 2703(d) of that Act provides, in relevant part:

> "[a subpoena for such material] shall issue only *if the governmental entity offers specific and articulable facts* showing that there are *reasonable grounds* to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

18 U.S.C. § 2703(d) (emphasis added). This standard – that the government offer "specific and articulable facts" – is more akin to the *Terry* standard of reasonable suspicion and does not meet the Fourth Amendment's requirement of a warrant based upon probable cause. *See Terry v. Ohio*, 392 U.S. 1, 37 (1968) (stating that the "term probable cause rings a bell of certainty that is not sounded by phrases such as reasonable suspicion") (internal quotations omitted). Therefore, in order for the search in this case to be valid, it must fall within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Katz*, *supra*.

The Supreme Court has recognized seven exceptions to the warrant requirement to date. These are: (1) exigent circumstances, *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006); (2) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (3) consented-to searches, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); (4) automobile searches, *Carroll v. United States*, 267 U.S. 132 (1925); (5) evidence in plain view, *Coolidge v. New Hampshire*, 403 U.S. 443, 465

(1971); (6) special needs searches, *Camara v. Municipal Court*, 387 U.S. 523 (1967); and (7) a *Terry* stop and frisk, *Terry*, 392 U.S. 1. The facts of this case do not fit within any of these well-defined exceptions to the warrant requirement. Therefore, because the State had no warrant to access Mr. Taylor's cell phone location data and this search does not meet with an exception to the warrant requirement, Mr. Taylor's Fourth Amendment rights were violated. As a result, the location data and all evidence obtained from it should have been excluded at trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

II. THE SHOW-UP OF MR. TAYLOR WAS UNNECESSARILY SUGGESTIVE, RESULTING IN UNRELIABLE AND TAINTED OUT-OF-COURT AND IN-COURT IDENTIFICATIONS THAT SHOULD HAVE BEEN EXCLUDED AT TRIAL.

The Fourteenth Amendment of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. The United States Supreme Court has expressly recognized that the Due Process Clause protects criminal suspects against unnecessarily suggestive pre-trial identification procedures, where those procedures irreversibly taint a subsequent trial with the risk of mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301-302 (1967). This Court has fully adopted the *Stovall* standard for pre-trial identification challenges. *See Jones v. State*, 95 Nev. 613, 617 (1979). A court reviewing a challenge

to the constitutionality of a pre-trial identification procedure considers: "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is [nevertheless] reliable." *Bias v. State*, 105 Nev. 869, 871 (1989). The show-up utilized by the LVMPD in this case was impermissibly suggestive and produced a totally unreliable identification that violated Mr. Taylor's fundamental right to due process of law.

A. The LVMPD conducted an unnecessarily suggestive identification procedure when they brought Chenault to a one-on-one show-up where only Mr. Taylor was detained in front of a police car, and no exigency existed.

1. The LVMPD conducted a show-up between Mr. Taylor and the witness, an impermissibly suggestive identification technique that violated Mr. Taylor's right to due process of law.

The Nevada Supreme court has adopted the *Stovall* test for suggestiveness, "[c]onsidering [whether, in] the totality of the circumstances, the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law." *Bias*, 105 Nev. at 871 (internal citations omitted). Certain identification techniques have been categorized as inherently suspect and suggestive. *See, e.g.*,

Jones, *supra* (finding an on-the-scene show-up identification to be inherently suspect).

This Court has held, absent exigent circumstances, that a show-up (or a one-on-one confrontation) between a witness and suspect is just such an inherently suggestive technique. *Jones*, *supra*, 95 Nev. at 617. This Court opined that show-ups present the suspect to the witness in such a manner that communicates to the witness that the police have their man. *Id.* In *Bias*, this Court reiterated that show-ups are inherently suggestive but may be permissible under certain circumstances where there are sufficient countervailing policy considerations at play. 105 Nev. at 872.

In *Gehrke v. State*, this Court held a show-up to be unnecessarily suggestive. 96 Nev. 581, 584 (1980). Gehrke was charged with armed robbery of a gas station. *Id.* at 583. The police suspected Gehrke based upon the descriptions given by witnesses and mugshots each had independently chosen. *Id.* Police told the witnesses they "had a suspect in mind" and escorted them to the Gehrke house. *Id*. Gehrke had been placed in front of a police car's headlights when the witnesses identified him as the robber. *Id.* The Court held that, because no countervailing policy considerations were at play, the procedure was unnecessarily suggestive. *Id.* at 584. Almost identical factual considerations led the Court in *Bias* to hold a show-up impermissibly suggestive. *See Bias*, 105 Nev. at 872 (finding the circumstances of the show-up to be "similar to those in [*Gerhke*]," warranting reversal).

The factual circumstances surrounding Mr. Taylor's pre-trial identification are highly similar to those in both *Gehrke* and *Bias*, unequivocally showing it to be impermissibly suggestive. After apprehending Mr. Taylor, Detective Wildemann phoned Chenault to tell her that they had a suspect they wanted her to identify. PA. Like the police in *Gehrke*, Detective Wildemann suggested to Chenault they had their man when he told her he thought they "had him [the perpetrator] over here." PA. Upon arrival at the shopping plaza, he was standing outside near police cars for her to view. PA. As in *Gehrke*, he was the only person being detained and presented to Ms. Chenault and spotlights were shone directly on him because it was dark. PA. Chenault remained in the back seat of Wildemann's squad car for the duration of the show-up. PA. These circumstances unnecessarily indicated that Mr. Taylor was in fact the perpetrator. It is clear from these facts, essentially identical to those in *Gehrke* and *Bias*, that the show-up conducted here was therefore unnecessarily suggestive.

2. No exigent circumstances existed to justify the prompt, impermissibly suggestive show-up of Mr. Taylor and evidence of his identification should have been excluded at trial.

There were zero countervailing policy considerations or exigencies at play in the instant case to justify the unduly suggestive show-up of Mr. Taylor. Although show-ups are inherently suggestive, certain factual

circumstances can justify using such procedures to identify suspects as the perpetrator of a crime. *Gehrke*, *supra*, 96 Nev. at 584, n. 2. *See also Bias*, *supra*, 105 Nev. at 872 (reiterating this conclusion). These policy considerations are related to the presence of an exigent circumstance making quick identification imperative. *See Gehrke v. State*, 96 Nev. 581, 584, n. 2 (1980). Exigencies sufficient to justify a show-up include: (1) ensuring fresher memory, *Jones*, *supra*, 95 Nev. at 617; (2) the sole eyewitness' inability to attend a line-up, *Stovall*, *supra*; (3) an eyewitness fortuitously being at the scene at the time of arrest, *Moss v. State*, 88 Nev. 19 (1972); and (4) ensuring that those committing serious felonies are swiftly apprehended, *Simmons v. United States*, 390 U.S. 377 (1968). Where these exigencies are absent, however, courts should be reluctant to find a show-up permissible. *See, e.g.*, *Bias*, 105 Nev. at 872. *See also Gehrke*, 96 Nev. at 584. None of these exigencies were present in the instant matter to justify the unnecessarily suggestive show-up of Mr. Taylor.

In *Jones*, for example, the defendant had been charged with robbery of two hotel guests in their room. 95 Nev. at 616. Hotel security had apprehended the defendant and his accomplice before they left the hotel and escorted the victims to the hotel's security office to identify the suspects between thirty and forty-five minutes after the robbery occurred. *Id.* This Court held that, although the procedure was unnecessarily suggestive, an exigency existed to justify it. *Id.* at 617. This Court focused on the short amount of time between the crime and the show-up, stating that even show-ups

conducted in close proximity to the commission of the crime tend to be more reliable than a later identification because memory is fresher. *Id.*

This exigency does not exist for the show-up of Mr. Taylor, however. The show-up was conducted around 11:45 P.M., over eight hours after the crime had occurred. PA at 5. This is nowhere near the small timeframe present in *Jones* and therefore ensuring Chenault's "fresh" memory cannot justify the show-up of Mr. Taylor. There was also no indication that Chenault would be unavailable for a later line-up identification. *See Stovall*, *supra* (finding an unnecessarily suggestive show-up justified where it was speculative as to whether the sole remaining eyewitness to a murder, stabbed 11 times by her assailant, would survive to identify her attacker). Furthermore, Chenault was clearly not at the scene at the time of Mr. Taylor's arrest, since Detective Wildemann had to escort her to the scene so she could identify Mr. Taylor. *Compare Moss*, 88 Nev. at 21-22 (finding an unnecessarily suggestive show-up justified because it occurred in the course of a sting operation, using the victim who immediately identified the defendant as the con artist that scammed her). No exigency existed here to justify the highly suggestive show-up of Mr. Taylor.

Mr. Taylor was allegedly involved in a robbery-turned-homicide, a dangerous felony and that show-ups can be justified if there are exigent circumstances requiring such a show-up of dangerous criminals. *Simmons*, *supra*. For instance, in *Simmons*, the defendant

was convicted of participating in an armed bank robbery. 390 U.S. at 381. Federal Bureau of Investigation ("FBI") agents showed bank employees various pictures of only the defendant and his accomplice, akin to a show-up. *Id.* at 382, 384-385. The United States Supreme Court held that because a dangerous felony had been committed, the show-up was justified so that the FBI could quickly apprehend the felons. *Id.* at 384-385.

Here, there was no indication that whomever committed the robbery-murder would continue to commit other similar crimes in the Las Vegas area. This is in contrast to the bank robbery at issue in *Simmons*, which is typically not committed in isolation. *Cf. Simmons*, 390 U.S. at 385 (discussing how the FBI agents needed to promptly determine whether they were on the right track so they could alert officials in other cities). Thus, the exigent circumstances were the stopping of future crimes, and not just based on one criminal act. Based on the foregoing, therefore, it is clear that there was no exigency at play to justify the impermissibly suggestive show-up of Mr. Taylor. As a result, the failure to suppress evidence of the identification at trial violated Mr. Taylor's fundamental right to due process of law.

B. The unnecessarily suggestive show-up of Mr. Taylor was highly unreliable because it was conducted in a dark parking lot at night, from within a police car with tinted windows, utilizing the headlights of the various marked police vehicles and uniformed officers holding beams, and several yards from where Mr. Taylor was standing.

Mr. Taylor's unjustified, unnecessarily suggestive show-up was not reliable, independently reliable, and evidence of his identification should have been excluded at trial. An impermissibly suggestive identification might not run afoul of due process constraints where it is nevertheless reliable in the totality of the circumstances. *Bias*, 105 Nev. at 871. The United States Supreme Court has outlined several factors to be considered when determining the reliability of unnecessarily suggestive identifications, including: (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 at the confrontation; and (5) the time elapsed between the crime and confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). This Court has expressly adopted the *Biggers* standard. *Gehrke*, *supra*, 96 Nev. at 584. Under the totality of the circumstances of this case, Chenault's identification of Mr. Taylor was totally unreliable and unnecessarily suggestive.

1. Chenault had minimal face-to-face view of the perpetrator at the time of the crime that lasted mere seconds.

First, Chenault's opportunity to view the criminal at the time of the crime was suboptimal for reliability purposes. Chenault did not have extended contact with the perpetrators in her apartment. Chenault testified that she was frying chicken at the time of the crime and had her back turned to the situation. PA at 3-4. Even during the ensuing scuffle, Chenault was still facing her stove and away from the scene. *Id.* Chenault did testify that at one point she came face-to-face with one of the assailants (alleged to be Mr. Taylor) when he was walking around her home. *Id.* She testified that when he attempted to open her bedroom door, where her grandson was watching television, she stood between the door and the assailant, facing him. PA at 3. However, this was for an extremely short amount of time and it must be considered in light of Chenault's other extensive testimony that she had her back to the situation at the time of the crime. PA at 3-4.

Mr. Taylor's case is distinguishable from others where a witness was found to have more than sufficient time to view the criminal. In *Biggers*, for example, the court found that the witness, a victim of a rape, had more than an optimum amount of time to view the criminal given the intimate nature of the crime. 409 U.S. at 200. In *Gehrke*, this Court found sufficient opportunity to view the victim because the witnesses were victims of a face-to-face hold-up. 96 Nev. at 584. Here, however, the crime at issue was not intimate in

nature and did not require close, continuous face-to-face contact between Chenault and the criminal. Chenault herself was not the victim of the crime, making it less likely she would have had sufficient opportunity, or motive, to view the criminal. *See Biggers*, 409 U.S. at 200 (noting that crime victims have special motives to closely note characteristics of the perpetrator) (internal citations omitted). Because she had little opportunity or motive to view the criminal, Chenault's identification of Mr. Taylor was highly unreliable, and indeed her initial identification of the suspect differed dramatically from Mr. Taylor.

2. Chenault was focused on preparing dinner at the time of the crime, rather than the drug deal leading to the robbery and murder.

Chenault was also too inattentive during and just before the crime to have reliably identified Mr. Taylor as the man from her apartment. The facts outlined above with regard to the first factor are equally applicable here. Chenault's back was turned toward the two strange men at two key points – just after the two entered her apartment and during the crime itself. She testified that when they knocked to come back into her home she unlocked the door and left it for them to open themselves, turning away and back towards her frying chicken. PA at 3-4 Furthermore, Chenault had never met either of these men before and neither introduced himself to her. *Id.*

Moreover, Chenault's only encounter with one of the perpetrators was for a few seconds, when she stood between him and her bedroom door. PA at 3. Again, this situation is highly different from that in *Biggers*, where the victim of a rape was subjected to intimate interactions with the criminal and paid close attention to what was going on around her. 409 U.S. at 200. Furthermore, Chenault was not the victim of a crime that required close contact, such as a hold-up, so the likelihood that she was paying close attention is minimal. *Gehrke*, 96 Nev. at 584. The facts here show that Ms. Chenault was entirely inattentive to the criminals in her home at the time of the crime and her subsequent identification is therefore unreliable.

3. Chenault was entirely uncertain that Mr. Taylor was the perpetrator when Detective Wildemann conducted a show-up.

Chenault was not certain that Mr. Taylor was the man she claimed to have seen in her apartment earlier in the day at the time of the show-up. Chenault viewed Mr. Taylor from behind tinted windows, at night and in a car that was stopped several yards from where Mr. Taylor was standing. PA at 5. Even after Detective Wildemann moved closer, Chenault still could not definitively state that Mr. Taylor was the man in her apartment earlier that day. *Id.* Indeed, Wildemann testified that "[s]he [took] a look and she [said] that she [didn't] think [it was] him; she just [didn't] recognize that to be him." *Id.* While Detective Wildemann drove

Chenault away from the show-up, she again expressed uncertainty about whether Mr. Taylor was the man from her apartment. *Id.* Significantly, Chenault never definitively and unequivocally identified Mr. Taylor as the man from her apartment until *after* the show-up, when her daughter showed her a photograph of Mr. Taylor that Detective Wildemann sent to her. PA at 5-6. At best, Chenault passively acquiesced to Wildemann's questions that suggested Mr. Taylor was the man from her apartment, without ever stating definitively that she recognized Mr. Taylor.

Chenault's total lack of certainty stands apart from that in other cases. The rape victim in *Biggers*, for example, gave a thorough description of her assailant and later stated that she had "no doubt" that Biggers was her rapist. 409 U.S. at 200. She also testified at trial "that there was something about his face 'I don't think I could ever forget.'" *Id.* at 201. In *Browning v. State*, this Court found an unnecessarily suggestive identification reliable and therefore admissible where one witness stated she was fairly certain the defendant was the perpetrator of a robbery turned murder, the other witness positively identified him as the perpetrator, and one of them had totally rejected another suspect presented. 104 Nev. 269, 273, n. 3 (1988).

Here, even assuming Chenault gave a thorough description of the assailant, her statements following the show-up were riddled with uncertainty. She never unequivocally and definitively identified Mr. Taylor as the man from her apartment until she was shown a photograph on her daughter's cell phone. There is a

complete lack of definitive, positive identification of Mr. Taylor as the assailant, unlike in other cases such as *Biggers* and *Browning*. Because she was entirely uncertain as to whether Mr. Taylor committed the crime, her show-up identification of him was unreliable.

4. A great deal of time – more than eight hours – had elapsed between the crime and the show-up.

Lastly, the amount of time that elapsed between the crime and the show-up here undermines any indicia of reliability there may have been in Chenault's identification of Mr. Taylor. In *Gehrke*, *supra*, the identification of the gas station robber was made within one hour of the crime and this Court found such a small amount of time indicative of reliability. 96 Nev. at 584. In *Bias*, the robber was identified about four hours after the crime had occurred and this Court found the identification to be reliable. 105 Nev. at 872. Here, the robbery-murder was reported around 2:30 in the afternoon and the show-up was conducted after 11 o'clock that night, a period of over eight hours. Based on prior cases, such as those above, this might normally weigh in favor of reliability. However, this period of time brings in substantial questions as to the reliability of Chenault's identification of Mr. Taylor in light of her equivocal statements that reveal her level of certainty.

As the amount of time between the crime and the identification increases, courts typically focus on a witness' other statements relating to the identity of the perpetrator to determine reliability. The show-up in *Biggers*, for example, occurred more than seven months after the rape. 409 U.S. at 201. The Court recognized that this factor would normally weigh heavily against finding the identification reliable, but the victim's prior record of certainty and thoroughness outweighed it. *Id.* The victim had given no other identifications of the perpetrator and she was unequivocally certain that the man she identified was her rapist. *Id.* This Court in *Bias* focused on the facts that the witness was "100 per cent sure" that the defendant was the perpetrator after hearing his voice, had identified him as wearing the same clothes as the perpetrator, and positively identified the robbery weapon. 105 Nev. at 872.

Here, at least eight hours had elapsed between the crime and Chenault's identification of Mr. Taylor. Unlike in the above cases, Chenault was at all times equivocal in her identification of Mr. Taylor as the perpetrator. She was uncertain that Mr. Taylor was the assailant initially, and remained uncertain even after Detective Wildemann moved his patrol car closer to Mr. Taylor. PA at 5-6. Her initial response to seeing Mr. Taylor was that she did not think he was the assailant. PA at 6. Moreover, as stated above, Chenault had minimal opportunity or motive to closely observe the assailant at the time of the crime and she was entirely inattentive during the altercation. Based on these

facts, it cannot be said with any degree of certainty that the fact that the show-up occurred on the same day of the crime made the identification wholly reliable.

5. Overall, the reliability factors point to the conclusion that Chenault's identification of Mr. Taylor was wholly unreliable.

The *Biggers/Gehrke* analysis makes clear that the ultimate question with regard to unnecessarily suggestive identifications is whether, "under the 'totality of the circumstances,' the identification retains strong indicia of reliability." 409 U.S. 202. Thus, the factors above must be weighed and, as detailed, they tip in favor of finding that the identification here was unreliable. As stated, Chenault had very little opportunity or motive to closely view the men in her apartment at the time of the crime. She was also totally inattentive, focused more on not burning her dinner than the drug transaction going on in the background. She at all times expressed uncertainty as to whether Mr. Taylor was involved, except when shown a highly suggestive photograph by her daughter. Moreover, eight hours had elapsed between the crime and the show-up and, in light of her overall uncertainty, this shows her identification of Mr. Taylor to be unreliable. Because of the unreliability of the show-up identification here, Mr. Taylor's due process rights were violated and the identification evidence should have been excluded at trial.

C. Chenault's in-court identification of Mr. Taylor should have also been suppressed because it was unreliable and not free from the initial tainted identification.

The United States Supreme Court has held that even where an unnecessarily suggestive pre-trial procedure occurs that produces an unreliable identification, a subsequent in-court identification by the same witness is not necessarily excluded where the in-court identification itself is found to be independently reliable. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The factors to be considered in this analysis are identical to those enunciated in *Biggers*. *Id.* This Court has adopted the same standard. *See Browning*, *supra*, 104 Nev. at 273-274.

At trial, Chenault made an in-court identification of Mr. Taylor as the perpetrator of the crime that occurred at her apartment. PA at 5. However, as extensively detailed above, the *Biggers* factors in this case tip heavily in favor of finding her identification of Mr. Taylor entirely unreliable because they show that the in-court identification was tainted by the impermissibly suggestive show-up and also by Chenault's daughter showing her a photographic text of Mr. Taylor. As well as the fact that Chenault's initial description of the suspect to the LVMPD differed dramatically from Mr. Taylor. Thus, in addition to the show-up identification, Chenault's in-court identification should also

have been excluded at trial and failure to do so violated Mr. Taylor's right to due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
STATE OF NEVADA

DONALD TAYLOR, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 65388

(Filed Apr. 21, 2016)

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Affirmed.

Drummond Law Firm and Craig W. Drummond,
Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City;
Steven B. Wolfson, District Attorney, Steven S. Owens,
Chief Deputy District Attorney, and Nell E. Christensen,
Deputy District Attorney, Clark County,
for Respondent.

BEFORE HARDESTY, SAITTA and PICKERING, JJ.[1]

OPINION

By the Court, SAITTA, J.:

This opinion addresses whether the State's warrantless access of historical cell site location data obtained from a cell phone service provider pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d), violates the Fourth Amendment. We hold that it does not because a defendant does not have a reasonable expectation of privacy in this data, as it is a part of business records made, kept, and owned by cell phone providers. Thus, the "specific and articulable facts" standard set forth at 18 U.S.C. § 2703(d) is sufficient to permit the access of historical cell phone information, and probable cause is not required.

This opinion also addresses the alleged violations of appellant Donald Taylor's right to due process of law and his right against self-incrimination, as well as alleged insufficiency of the evidence and cumulative error.

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[1] Subsequent to the oral arguments held in this matter, The Honorable James W. Hardesty, Justice, was administratively assigned to participate in the disposition of this matter in the place and stead of The Honorable Mark Gibbons, Justice. The Honorable James W. Hardesty, Justice, has considered all arguments and briefs in this matter.

FACTUAL AND PROCEDURAL HISTORY

The robbery-murder

On November 18, 2010, at approximately 2 p.m., Michael Pearson and his girlfriend's three-year-old son arrived at Angela Chenault's apartment. Chenault is the mother of Pearson's girlfriend, Tyniah Haddon. After taking her grandson to the bedroom, Chenault went to the kitchen, where she cooked while she talked with Pearson. Pearson told Chenault that he was meeting his friends at her apartment. Pearson brought a black bag containing marijuana with him into the apartment and placed it on top of the refrigerator. Chenault saw Pearson sit on the couch and talk to someone on his phone.

At some point, Pearson left the apartment and returned with two men. Chenault never met either of these men before and neither introduced themselves to her. One of the men walked around the apartment and went toward the bedroom. To prevent the man from going inside the bedroom where her grandson was watching television, Chenault stood in front of the bedroom door. She momentarily stood face-to-face with the man. He asked who was in the bedroom, and Chenault replied that her grandson was in there. Chenault noticed that the man was holding a gun. During the trial, Chenault identified that man as Taylor.

Chenault returned to the kitchen stove and resumed cooking. Pearson removed the black bag from the top of the refrigerator and placed it on the kitchen

table. He asked for money from the two men in exchange for the black bag, but the men responded, "No, we taking this." Pearson then said, "Take it." Chenault saw the men begin going through Pearson's pockets and saw Pearson attempt to grab a gun on his waistband. During this time, Chenault turned back to the stove. Shots were fired, and when Chenault turned around, she found Pearson lying in a pool of blood and saw that the men had fled with the black bag. Chenault did not observe the actual shooting.

Incidents leading to Taylor's arrest

Las Vegas Metropolitan Police Detectives Christopher Bunn and Marty Wildemann responded to the scene of the shooting. After interviewing Chenault, Detective Wildemann interviewed Haddon. Haddon told Detective Wildemann that Pearson was going to sell marijuana to someone that she knew as "D." She also informed Detective Wildemann that she had met "D" at one of Pearson's coworker's houses. Detective Wildemann gave Pearson's cell phone number to the FBI and asked for their assistance regarding possible contacts that Pearson made just before the murder occurred.

The FBI provided Detective Wildemann with a phone number to which Pearson placed a call shortly before the murder. Homicide detectives then processed the phone number through government records and were able to link it to an individual named Jennifer Archer.

While conducting surveillance on Archer, Detective Wildemann observed Archer exit her vehicle and enter a bar. When Archer returned to her vehicle, she was accompanied by an unknown male. After initiating a traffic stop of Archer's vehicle, Detective Wildemann arrested the male passenger, who identified himself as Taylor. Taylor gave Detective Wildemann his cell phone and cell phone number. Detective Wildemann dialed the phone number given to him by the FBI. Taylor's cell phone rang. Detective Wildemann then contacted Chenault to come and identify Taylor.

The out-of-court identification procedure

Detective Wildemann arranged to meet with Chenault and bring her to the parking lot where Taylor was being held to "conduct a one-on-one."[2] The time was 11:45 p.m., and it was "[p]itch black." The lighting conditions were such that Detective Wildemann had to "superimpose a bunch of lighting on [Taylor]" by pulling vehicles around Taylor and lighting up the spot where Taylor was standing with a patrol car spotlight. After explaining the process to Chenault, Detective Wildemann drove her about 15 to 20 yards from where Taylor was standing. Detective Wildemann then drove closer so Chenault could see Taylor more clearly.

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[2] A one-on-one, or show-up, is a procedure where the police officer brings the witness to the location where the suspect is being held in order to determine whether the witness can make a positive identification of the suspect.

Chenault told Detective Wildemann that "she [did not] think that that's him; she just [did not] recognize that to be him." Detective Wildemann pulled the vehicle around and asked Chenault again for her thoughts. Chenault told Detective Wildemann that Taylor looked like the man from the apartment, but believed that Taylor was thicker than the man who was at the apartment. Chenault said that Taylor was "just a bigger guy." Detective Wildemann asked Chenault to focus on Taylor's face, and at that point Chenault said, "[I]t looks like him."

After driving Chenault home, Detective Wildemann texted a photograph of Taylor to Haddon. He asked Haddon to tell him if it was a photograph of "D." Haddon immediately responded, "That's D, that's him." Haddon then showed the photograph to Chenault, who told Haddon that the man in the picture was the person who shot Pearson.

Taylor's indictment and conviction

On January 14, 2011, a Clark County grand jury indicted Taylor on the following charges: burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. After a six-day jury trial, the jury returned a verdict of guilty on all four counts. Taylor filed a motion for a new trial, which was denied by the district court. The judgment of conviction was filed on March 7, 2014. This appeal followed.

DISCUSSION

The warrantless access and use of Taylor's historical cell phone location data did not violate Taylor's Fourth Amendment rights

Taylor contends that a person has an objectively reasonable expectation of privacy in the access to and the use of his or her historical cell phone location data. He further contends that his Fourth Amendment rights were violated because the State did not have a warrant for his historical cell phone location data.

A search warrant is not required to obtain historical cell site location information

Pursuant to a subpoena under the Stored Communications Act, Sprint-Nextel provided the State with a call-detail record with cell site information for Taylor's phone.[3] The records covered November 11, 2010, through November 18, 2010. Although they do not provide the content of calls or text messages, the records

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[3] "The [Stored Communications Act] was passed in 1986 as part of the Electronic Communications Privacy Act of 1986" and is contained in 18 U.S.C. §§ 2701-2710. 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, 716 & n.103 (2013). Section 2703(d) of the Stored Communications Act allows for disclosure of private communications data via court order "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (2012).

do provide certain information about those communications. For example, the records show various incoming and outgoing calls. They also demonstrate the time[s] and dates of the calls or text messages, along with the duration for each, as well as the location of the cell towers routing the calls.

Generally, the phone seeks the cell tower emitting the strongest signal, not necessarily the closest tower. This was relevant at trial because the cell phone tower records indicated that a phone call was made using Taylor's phone close to the time of the murder and the Sprint-Nextel cell tower closest to the location of the murder routed the call.

There are two types of cell site location information (CSLI) that law enforcement can acquire from cell phone companies. 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, 710 (2013). Law enforcement can either obtain records that a company has kept containing CSLI, known as "historical CSLI," or it "can request to view incoming CSLI as it is received from a user's cell phone in 'real time,'" known as "prospective CSLI." *Id.* Generally, courts have held that prospective CSLI requires a warrant before disclosure may be granted. *Id.* However, only a few courts have addressed the issue of whether historical CSLI requires a warrant. *Id.*

A warrant is not required under the Fourth Amendment to obtain historical CSLI

The phone records received by the State were obtained based on the "specific and articulable facts" standard set forth in 18 U.S.C. § 2703(d).[4] Federal appellate courts that have reached this issue appear to agree that this "specific and articulable facts" standard is sufficient for obtaining phone records. *See In re Application of U.S. for an Order Directing Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 313 (3d Cir. 2010) (holding that "CSLI from cell phone calls is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination"); *see also United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (holding that CSLI data may be constitutionally obtained without a warrant); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 612-13 (5th Cir. 2013) (holding the same). However, the circuit courts are not consistent when defining the types of phone records that are obtainable under the "specific and articulable facts" standard.

For example, the United States Court of Appeals for the Third Circuit in *In re Application of United States for an Order Directing Provider of Electronic Communication Service to Disclose Records to Government* held that magistrate judges have discretion to

[4] Taylor does not dispute whether the State had "specific and articulable facts" to obtain a subpoena under the Stored Communications Act but, rather, argues that the standard for obtaining historical CSLI should be probable cause.

require a warrant for historical CSLI if they determine that the location information sought will implicate the suspect's Fourth Amendment privacy rights. 620 F.3d at 319. In reaching this conclusion, the court rejected the argument that a cell phone user's expectation of privacy is eliminated by the service provider's ability to access that information:

> A cell phone customer has not "Voluntarily" shared his location information with a cellular provider in any meaningful way. . . . [I]t 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.

Id. at 317-18 (alteration in original) (internal quotations omitted). However, the court also held that "CSLI from cell phone calls is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination." *Id.* at 313. Judge Tashima's concurrence notes that "the majority . . . appears to contradict its own holding." *Id.* at 320 (Tashima, J., concurring). Therefore, while the court held that a cell phone user does not lose their expectation of privacy simply by making or receiving a call, it

is unclear whether the Third Circuit's decision requires the specific-and-articulable-facts standard or the more stringent probable cause standard, which would require a warrant, before historical CSLI can be obtained.

In *In re Application of United States for Historical Cell Site Data*, the United States Court of Appeals for the Fifth Circuit determined that cell phone users, by and large, do not have an expectation of privacy with regard to CSLI, as they are aware that their phones must emit CSLI to cell phone providers in order to receive cell phone service but continue to use their cell phones to place calls and, thus, voluntarily convey CSLI to cell phone providers. 724 F.3d at 612-13. The Fifth Circuit stressed that the telephone company, not the government, collects the cell tower information for a variety of legitimate business purposes. *Id.* at 611-14. The court explained that a cell phone user has no subjective expectation of privacy because: (1) the cell phone user has knowledge that his or her cell phone must send a signal to a nearby cell tower in order to wirelessly connect the call; (2) the signal only happens when a user makes or receives a call; (3) the cell phone user has knowledge that when he or she places or receives a call, there are signals transmitted through the cell phone to the nearest cell tower and thus to the service provider; and (4) as such, the cell phone user is aware that he or she is conveying cell tower location information to the service provider and voluntarily does so when using a cell phone for calls. *Id.* at 613-14.

In spite of this, the court's holding is limited. *Id.* at 615. The court only decided the narrow issue of whether § 2703(d) "orders to obtain historical cell site information for specified cell phones at the points at which the user places and terminates a call [were] . . . unconstitutional." *Id.* (emphasis omitted). The court held that § 2703(d) orders are not unconstitutional, thereby allowing for the lesser standard of "specific and articulable facts" in such cases. *Id.* The court did not address

> orders requesting data from all phones that use a tower during a particular interval, orders requesting cell site information for the recipient of a call from the cell phone specified in the order, or orders requesting location information for the duration of the calls or when the phone is idle (assuming the data are available for these periods). Nor do we address situations where the Government surreptitiously installs spyware on a target's phone or otherwise hijacks the phone's GPS, with or without the service provider's help.

Id. Therefore, the court's decision implies that the specific-and-articulable-facts standard is sufficient for historical CSLI, to the extent that the information obtained relates to phone calls that were made and/or terminated by the cell phone user specified in the order.[5]

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[5] The United States Court of Appeals for the Sixth Circuit has also ruled on whether a person has a reasonable expectation

In *United States v. Davis*, the Eleventh Circuit Court of Appeals held that a defendant "ha[s] no reasonable expectation of privacy in business records made, kept, and owned by [his or her cell phone provider]." 785 F.3d 498, 517 (11th Cir. 2015). These records included telephone numbers of calls made by and to the defendant's phone; whether the calls were incoming or outgoing; the date, time, and duration of the calls; as well as historical cell site location information. *Id.* at 503. The court noted that historical cell site location information reveals the precise location of the cell phone towers that route the calls made by a person but do not reveal the precise location of the cell phone or the cell phone user. *Id.* at 504. The court rejected the argument that cell phone users retain an expectation of privacy in the data because they do not voluntarily convey their location information to the service provider. *Id.* at 517. The court also held that "[t]he stored telephone records produced in this case, and in many other criminal cases, serve compelling governmental interests." *Id.* at 518.

Thus, while federal courts generally agree that probable cause is not necessary for obtaining a cell phone user's historical CSLI, the information that can be obtained without probable cause does vary from circuit to circuit. The position taken by the Eleventh

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of privacy in the data transmitted from a cell phone, thereby requiring a probable cause standard. *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012). The court's holding implies that the probable cause standard is not required for a cell phone user's CSLI, at least where the cell phone user is on a public thoroughfare. *Id.* at 781.

Circuit Court of Appeals is persuasive, and we hold that the "specific and articulable facts" standard under § 2703(d) is sufficient to obtain historical cell phone information because a defendant has no reasonable expectation of privacy in business records made, kept, and owned by his or her cell phone provider.

Taylor's Fourth Amendment rights were not violated

Here, the police obtained a § 2703(d) order by meeting the "specific and articulable facts" standard. The order allowed them to obtain Taylor's historical CSLI, including his location – within 2.5 miles of the murder scene – at the time he placed a call, shortly before the murder occurred, and the call and text message records between his and Pearson's cell phones leading up to the robbery-murder. Because Taylor does not have a reasonable expectation of privacy in business records made, kept, and owned by his provider, Sprint-Nextel, a warrant requiring probable cause was not required before obtaining that information. Thus, we hold that Taylor's Fourth Amendment rights were not violated.

The out-of-court and in-court identifications did not violate Taylor's constitutional right to due process of law

Taylor challenges Chenault's identification of him during the show-up as the person in her apartment

during the crime, as well as her positive identification of Taylor during trial.[6]

In deciding whether a pretrial identification is constitutionally sound, the test is whether, considering the totality of the circumstances, the identification procedure "'was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'" *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (alteration in original) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). "First, the procedure must be shown to be suggestive[] and unnecessary [due to] lack of emergency or exigent circumstances." *Id.* If the procedure is suggestive and unnecessary, "the second inquiry is whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Id.* "Reliability is the paramount concern." *Jones v. State*, 95 Nev. 613, 617, 600

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[6] Although Taylor alludes to the impropriety of the photograph that was sent to Haddon, he fails to argue in his appellate briefing that the single photograph was unnecessarily suggestive and unreliable. Although an argument can be made that the photograph was unnecessarily suggestive and unreliable because Chenault was shown a single photograph by her daughter that had been sent via text by Detective Wildemann, *see In re Anthony T.*, 169 Cal. Rptr. 120, 123 (Ct. App. 1980) ("[I]f appellant was wrongfully identified and convicted it matters not to him whether the injustice was due to the actions of the private citizens or the police."), Taylor does not cogently argue this claim or provide relevant authority in support of it. Therefore, we need not reach the merits of this issue. *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (stating that "an appellant must present relevant authority and cogent argument; issues not so presented need not be addressed by this court" (internal quotations omitted)).

P.2d 247, 250 (1979). As long as the identification is sufficiently reliable, "it is for the jury to weigh the evidence and assess the credibility of the eyewitnesses." *Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980).

Exigent circumstances justified the show-up identification procedure

A show-up "is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Jones*, 95 Nev. at 617, 600 P.2d at 250. However, countervailing policy considerations may justify the use of a show-up. *Id.* Countervailing policy considerations are related to the presence of exigent circumstances that necessitate prompt identification. *See Gehrke*, 96 Nev. at 584 n.2, 613 P.2d at 1030 n.2. Examples of exigencies sufficient to justify a show-up include: (1) ensuring fresher memory, *Jones*, 95 Nev. at 617, 600 P.2d at 250; (2) exonerating innocent people by making prompt identifications, *id.*; and (3) ensuring that those committing serious or dangerous felonies are swiftly apprehended, *Banks*, 94 Nev. at 95, 575 P.2d at 595. Where exigencies such as these are absent, however, show-ups are not justified. *See Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

In this case, exigent circumstances justified the show-up identification procedure. Specifically, the show-up was necessary to quickly apprehend a dangerous felon. *See Banks*, 94 Nev. at 95, 575 P.2d at 595-96.

In *Banks*, the victim picked up hitchhikers who proceeded to rob him at gunpoint. *Id.* at 92, 575 P.2d at 594. The court stated that "[i]t was imperative for the police to have a prompt determination of whether the robbery suspects had been apprehended or were still at large." *Id.* at 95, 575 P.2d at 596.

This case is similar to *Banks*. Here, two suspects who had just committed a murder during the course of an armed robbery were at large after fleeing Chenault's apartment. Like *Banks*, anyone near the suspects was a potential victim. *See id.* at 95, 575 P.2d at 595-96. Furthermore, the suspects took the marijuana from Chenault's apartment and thus could have likely committed further illegal acts by either selling the marijuana in their possession or committing additional robberies. Therefore, it was essential for the suspects to be swiftly apprehended. Since exigent circumstances existed in the present case, we hold that the show-up identification procedure was justified.

The show-up identification was unreliable

Nevertheless, when dealing with pretrial identification procedures, "[r]eliability is the paramount concern." *Jones*, 95 Nev. at 617, 600 P.2d at 250. In deciding whether a show-up identification procedure is reliable, we consider factors including: (1) the opportunity of the witness "to view the [suspect] at the time of the crime," (2) the degree of attention paid by the witness, (3) "the accuracy of [the witness's] prior description of the [suspect]," (4) "the level of certainty

demonstrated at the [show-up]" by the witness, and (5) the length of time between the crime and the show-up. *Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

Here, although the record suggests that Chenault may have had ample opportunity to view the suspects while they looked around her apartment and conducted the drug deal, the record also suggests that she may not have been paying sufficient attention to them. The record suggests that Chenault appeared uncertain during the show-up, as her description of the suspect was inaccurate with regard to Taylor. Furthermore, the circumstances of the show-up – which occurred nearly eight hours after the crime occurred – were highly suspect. Therefore, we hold that the identification of Taylor was unreliable for purposes of a show-up.

The in-court identification by Chenault was independently reliable

The United States Supreme Court has held that even where an unnecessarily suggestive pretrial procedure occurs that produces an unreliable identification, subsequent in-court identification by the same witness is not necessarily excluded where the in-court identification itself is found to be independently reliable. *Manson v. Brathwaite*, 432 U.S. 98, 112-14 (1977). The factors to be considered are identical to those enunciated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* This court has adopted the same standard. *Browning v. State*, 104 Nev. 269, 273-74, 757 P.2d 351, 353-54 (1988).

Here, Chenault's observation of the suspects in her apartment likely constituted a sufficient independent basis for her in-court identification of Taylor. The suspects were in her apartment for some time, and she got at least one good look at the suspect she identified as being Taylor when they stood face-to-face. Indeed, we have held that similar opportunities for observations constitute a sufficient independent basis for an in-court identification. *Banks*, 94 Nev. at 96, 575 P.2d at 596. In *Banks*, "a good look" at the suspects was enough to allow the in-court identification. *Id.*; *Boone v. State*, 85 Nev. 450, 453, 456 P.2d 418, 420 (1969) (holding that "one good look" during a car chase was sufficiently reliable). Similarly, in *Riley v. State*, 86 Nev. 244, 468 P.2d 11 (1970), an observation of seven seconds or less of the suspects was sufficiently reliable for the in-court identification.

The error was harmless

Where an error is preserved and is of a constitutional nature, the prosecution must show, "beyond a reasonable doubt, that the error did not contribute to the verdict." *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008).

Here, although the district court erred by allowing the out-of-court identification into evidence, the error was cured by the later in-court identification because it had a sufficient independent basis. Thus, it is clear beyond a reasonable doubt that the error did not contribute to the verdict.

The prosecutorial conduct during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

The PowerPoint slide with "GUILTY" superimposed on it did not violate Taylor's right to a fair trial

The purpose of closing arguments is to "enlighten the jury, and to assist . . . in analyzing, evaluating, and applying the evidence, so that the jury may reach a just and reasonable conclusion." 23A C.J.S. *Criminal Law* § 1708 (2006) (citations omitted). However, "counsel must make it clear that the conclusions that he or she urges the jury to reach are to be drawn from the evidence." *Id.* Importantly, a prosecutor may not declare to a jury that a defendant is guilty. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985). In the context of PowerPoints used during trial, "a PowerPoint may not be used to make an argument visually that would be improper if made orally." *Watters v. State*, 129 Nev., Adv. Op. 94, 313 P.3d 243, 247 (2013) (reversing where PowerPoint slide with "Guilty" superimposed over defendant's image was displayed extensively during opening statement). However, this court has held that a photograph with the word "guilty" across the front shown during closing arguments is not, on its own, sufficient for a finding of error. *Artiga-Morales v. State*, 130 Nev., Adv. Op. 77, 335 P.3d 179, 182 (2014).

The State used the PowerPoint presentation to make an improper oral argument visually – namely, to

declare to the jury that Taylor was guilty by superimposing "GUILTY" on a PowerPoint slide. However, the slide was displayed briefly only at the very end of the prosecutor's closing arguments, and the defense did not object to the slide. Accordingly, the PowerPoint slide, on its own, was not sufficient for a finding of error.

The comments made during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

Taylor argues that the prosecutor made comments during closing arguments that could only be construed as the prosecutor's improper personal opinion that Taylor was guilty. Taylor also argues that the prosecutor impermissibly commented on his decision not to testify during trial.

The prosecutor's comments during closing arguments were permissible

The "injection of personal beliefs into the argument detracts from the unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom." *Collier*, 101 Nev. at 480, 705 P.2d at 1130 (internal quotations omitted). Therefore, prosecutors are prohibited from expressing their personal beliefs on the defendant's guilt. *Id.* However, "[s]tatements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt

of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." *Domingues v. State*, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996).

Here, one of the prosecutors stated, "The defense suggests that it's not [Taylor's] phone . . . , [and] I would submit to you [that the defense suggests this] because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't."

This statement was preceded by a review of the text messages between the cell phone recovered from Taylor and Pearson's cell phone. This was after the evidence tied Taylor to the phone number used to text Pearson. Therefore, in this instance, the prosecutor's comments were reasonable conclusions based on the evidence presented and were not improper. *Id.* Furthermore, the record substantiates the prosecutor's statement that the phone was Taylor's and that Taylor texted Pearson prior to the robbery-murder.

On rebuttal, the prosecutor said, "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed . . . Pearson."[7] Like the statement addressed above, this statement followed a summation of evidence. The statement reflects the prosecutor's conclusions based on the

[7] The first prosecutor handled the State's closing argument, and the second prosecutor handled the State's rebuttal to the defense's closing argument.

evidence regarding the cell phone records and Archer's testimony regarding Taylor's behavior that day. Therefore, we hold that the prosecutor's statement was not improper. *Id.*

The prosecutor did not comment on Taylor's decision not to testify

The Fifth Amendment requires that the State refrain from directly commenting on the defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965); *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). A direct comment on a defendant's failure to testify is a per se violation of the Fifth Amendment. *Harkness*, 107 Nev. at 803, 820 P.2d at 761. However, an indirect comment violates the defendant's Fifth Amendment right against self-incrimination only if the comment "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Id.* (internal quotations omitted).

Taylor contends that the prosecutor's statements were similar to those made in *Harkness* and thus deprived him of his Fifth Amendment rights. In *Harkness*, the defendant chose not to testify in his defense, and the prosecution commented on gaps in the evidence, intimating that the defendant was the only one who could resolve those gaps: "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case?"

Id. at 802, 820 P.2d at 760 (internal quotations omitted). This court held those comments to be indirect references to the defendant's failure to testify. *Id.* at 804, 820 P.2d at 761. We also held that these comments violated the defendant's Fifth Amendment rights because, when taken in full context, there was a likelihood that the jury took those statements to be a comment on the defendant's failure to testify. *Id.*

In the present case, the prosecutor made the following comments:

> There has to be a rational explanation for the evidence. . . . I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor. . . .
>
> . . . I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed . . . Pearson. And I submit to you if you're doing your duty and you're doing your job, you'll go back in that room and you'll come back here and you'll tell that person you know, too.

Although the comments by the prosecutor indirectly referenced Taylor's failure to testify, unlike the comments in *Harkness* that blamed the defendant for the lack of information about what had happened in that case, neither comment here "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Id.* (internal quotations omitted). Therefore, there was no error

and Taylor's Fifth Amendment right against self-incrimination was not violated.

There was sufficient evidence at trial to support the jury's finding of guilt

In reviewing the evidence supporting a jury's verdict, the question is not "whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to [consider]." *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). "Moreover, a jury may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her." *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

The evidence here indicated that, prior to the murder, Taylor and Pearson had discussed and planned a sale of marijuana. Chenault's identification of Taylor placed him at the scene of the crime with a gun. She also testified that Taylor stated that he and the other suspect were "taking [the marijuana]" after Pearson demanded payment. Chenault further testified that she heard gun shots and saw Pearson lying in a pool of blood. Finally, Chenault testified that she saw the men take what she believed to be the marijuana before fleeing the scene.

In addition to this evidence, cell phone records connected Taylor and Pearson with calls and text messages prior to the offense and placed Taylor near the crime scene around the time of the murder. Evidence also showed that Taylor subsequently engaged in furtive behavior after the offense, telling Archer to delete text messages, that "it's all bad," and that he had to get out of the state.

We conclude that the evidence was sufficient to establish that Taylor entered Chenault's apartment with the intent to commit a felony, that he conspired to commit a robbery, that he unlawfully took property from Pearson by use of a deadly weapon, and that he committed the unlawful killing of a human being during the commission of a robbery. When viewed in the light most favorable to the State, there was sufficient evidence for the jury, acting reasonably, to have been convinced beyond a reasonable doubt that Taylor was guilty of these crimes. *Edwards*, 90 Nev. at 258-59, 524 P.2d at 331.[8]

CONCLUSION

The district court did not err by allowing access to historical cell phone information obtained without a warrant because a defendant does not have a reasonable expectation of privacy in business records made, kept, and owned by his provider. Thus, the "specific and

[8] Because we hold that only one error was committed by the district court, we do not reach the issue of whether there was cumulative error.

articulable facts" standard set forth in 18 U.S.C. § 2703(d) is sufficient to obtain historical cell phone information. Although the district court erred by admitting the out-of-court identification, the error was harmless beyond a reasonable doubt and the subsequent in-court identification of Taylor had a sufficient independent basis. Additionally, there was no prosecutorial misconduct during closing arguments because the PowerPoint slide, on its own, was not sufficient for a finding of error, and the prosecutors' statements were reasonable conclusions based on the evidence presented at trial. Furthermore, neither comment by the prosecutors was of such character that the jury would naturally and necessarily take them to be comments on Taylor's failure to testify. Lastly, there was sufficient evidence at trial to support the jury's finding of guilt. Accordingly, we affirm the judgment of conviction.

/s/ Saitta, J.
Saitta

We concur:

/s/ Hardesty, J.
Hardesty

/s/ Pickering, J.
Pickering

IN THE SUPREME COURT OF
THE STATE OF NEVADA

DONALD TAYLOR, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 65388

ORDER DENYING REHEARING

(Filed Jun. 10, 2016)

Rehearing denied, NRAP 40(c).

It is so ORDERED.

/s/ Hardesty, J.
Hardesty

/s/ Saitta, J.
Saitta

/s/ Pickering, J.
Pickering

cc: Hon. David B. Barker, District Judge
Drummond Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1] **RTRAN**

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
Plaintiff,	)	CASE NO. C270343-1
vs.	)	DEPT. NO. XVIII
DONALD TAYLOR,	)	
Defendant.	)	

BEFORE THE HONORABLE DAVID BARKER,
DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 15, 2013

RECORDER'S TRANSCRIPT OF STATUS CHECK: TRIAL

APPEARANCES:

For the State: NELL E. CHRISTENSEN
MARC DiGIACOMO
Chief Deputies District Attorney

For the Defendant: JOHN S. ROGERS, ESQ.

RECORDED BY: CHERYL CARPENTER, COURT RECORDER

* * *

[4] [THE COURT:] There's a defense motion to suppress physical tracking information and a motion to suppress the identification. I've already ruled on those as a function, and there's a minute entry that

were part of the original decision. And I'm not changing my mind on those, I've reviewed them and I don't believe there's sufficient grounds to support the suppression of the tracking information or the identification. That witness, I can't recall who she is, but she'll be subject to cross-examination, and her ability to perceive and relate that information will be an issue for the jury to decide.

* * *

[1] **RTRAN**

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DONALD TAYLOR, and TRAVON D. MILES, Defendants.	CASE NO. C270343-1 C270343-2 DEPT. NO. XVIII

BEFORE THE HONORABLE DAVID BARKER,
DISTRICT COURT JUDGE

WEDNESDAY, MAY 16, 2012

RECORDER'S TRANSCRIPT
OF PENDING MOTIONS

APPEARANCES:

For the State:	NELL CHRISTENSEN MARC DiGIACOMO Chief Deputies District Attorney
For Defendant Taylor:	DAVID LEE PHILLIPS, ESQ.
For Defendant Miles:	SCOTT L. BINDRUP ROBERT ARROYO Deputies Special Public Defender

RECORDED BY: CHERYL CARPENTER, COURT RECORDER

* * *

[2] THE COURT: All right. C270343, State of Nevada versus Donald Taylor and Travon Miles. The record should reflect the presence of Mr. Miles, Mr. Taylor in custody with counsel and a representative of the State. We have pending a series of motions. I note procedurally Defendant Taylor has filed motions in joinder on the balance of the motions filed on behalf of Mr. Miles through Mr. Phillips' efforts.

* * *

[13] [THE COURT:] * * * All right. So what we have left are the motion to suppress suggestive out-of-court identification, motion to exclude defense noticed expert, this is a State's motion; and State's motion to strike alibi. True? Are there any other motions that are out there that I am – of which I am not aware? And I've granted all the joinders. The joinders, everybody's just moving along kind of –

* * *

[25] THE COURT: All right. I think I understand the request. This is historical business records maintained by a service provider. I don't see the methods by which to say State secured the information to be a violation under the Fourth Amendment, so I'm going to deny that motion to suppress.

MR. PHILLIPS: On that – on that issue?

THE COURT: On that issue, yes.

MR. PHILLIPS: Okay.

THE COURT: You're going to brief and we'll save for another day, any challenges to suppression on identifications involving Mr. Taylor. So, as I understand it, that's the singular motion that we can address on behalf – at your request today; is that true, Mr. Phillips?

MR. PHILLIPS: Correct.

* * *

IN THE SUPREME COURT
OF THE STATE OF NEVADA

DONALD TAYLOR, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 65388

ORDER DENYING EN BANC RECONSIDERATION

(Filed Jul. 14, 2016)

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

/s/ Parraguirre, C.J.
Parraguirre

/s/ Hardesty, J
Hardesty

/s/ Douglas, J
Douglas

/s/ Cherry, J
Cherry

/s/ Saitta, J
Saitta

/s/ Gibbons, J
Gibbons

/s/ Pickering, J
Pickering

cc: Hon. David B. Barker, District Judge
Drummond Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk