NO. 01-24-00662-CR;
NO. 01-24-00663-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

DARIUS JAMAL FRAZIER

Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Numbers 1813098 and 1813099
From the 183rd District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Appellant was charged by complaint with two counts of Aggravated Robbery with a Deadly Weapon on March 29, 2023. (C.R. 7-8 – Trial Court Cause No. 1813098; C.R. 6-8 – Trial Court Cause No. 1813099). He was indicted in both cause numbers on May 22, 2023. (C.R. 52 – Trial Court Cause No. 1813099; C.R. 25 – Trial Court Cause No. 1813099). Appellant entered a plea of not guilty on August 23, 2024, with punishment to be assessed by the jury. (2 R.R. 6; C.R. 144 – Trial Court Cause No. 1813098; C.R. 46 – Trial Court Cause No. 1813099). The jury found Appellant guilty as charged in the indictment. (5 R.R. 10). The jury assessed punishment at 7 years in the Texas Department of Corrections in cause 1813098 and 6 years TDC in Cause 1813099. (6 R.R. 35). Appellant filed a timely notice of appeal on the same day of his sentencing, August 28, 2024. (C.R. 244 – Trial Court Cause No. 1813098; C.R. 123 – Trial Court Cause No. 1813099).

This Court ordered Appellant's brief due by February 25, 2024, therefore this brief is timely filed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant requests oral argument in this cause.

ISSUE PRESENTED

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT WAS FACIALLY INSUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE.

STATEMENT OF FACTS

This is an appeal from a jury trial. Before trial, Appellant moved to suppress cell phone evidence in his case on June 6, 2024. (C.R. 150 – Trial Court Cause No. 1813098; C.R. 48 – Trial Court Cause No. 1813099). This evidence was obtained by a search warrant. *Id.* Appellant argued in the trial court that the four corners of the affidavit in support of the application for the search warrant failed to allege probable cause. *Id.* Appellant argued that the illegally seized evidence was obtained in violation of the United States and Texas constitutions, as well as several Texas statutory provisions.

Appellant briefed the issues more fully as the trial date approached, filing a memorandum in support of the motion to suppress on August 23, 2024. (C.R. 188 – Trial Court Cause No. 1813098; C.R. 67 – Trial Court Cause No. 1813099). In that memorandum, Appellant argued that the search warrant in this case was deficient because the affidavit on which it was based did not allege probable cause. *Id.* Specifically, Appellant argued the following:

> "The affidavit lists various facts and witness statements that, defendant concedes, establish probable cause to believe that he committed the aggravated robbery. There are also sufficient facts alleged to establish that

> Mr. Frazier's phone number is 773-418-6236. The second portion of the affidavit lists various speculative, boilerplate statements about the nature of cell phones . . . None of these statements allege anything particular to Mr. Frazier, instead they are general boilerplate statements. This affidavit fails to state probable cause because there are no facts in the four corners that establish any link between the crime committed and the data sought. There is no nexus between the phone and the offense." (C.R. 195 – Trial Court Cause No. 1813098; C.R. 74 – Trial Court Cause No. 1813099).

Appellant included the warrant application and affidavit in his filing, and it is in the Clerk's Record for this Court to review. (C.R. 198-209 – Trial Court Cause No. 1813098; C.R. 77-87 – Trial Court Cause No. 1813099). The affidavit, as Appellant argued in the trial court, establishes probable cause that Appellant committed the robbery through the reported testimony of the two complainants. (C.R. 200-01 – Trial Court Cause No. 1813098; C.R. 79-80 – Trial Court Cause No. 1813099). Neither witness, as reported by the affiant, mentioned Appellant's cell phone. *Id.* The witnesses reportedly recognized Appellant from past interactions with him. *Id.* One of the complainants gave the affiant, Investigator Cameron Pope of the Harris County Sheriff's Office, Appellant's phone number. (C.R. 201 – Trial Court Cause No. 1813098; C.R. 80 – Trial Court Cause No. 1813099).

The affidavit proceeds to lay out boilerplate statements about cell phones' ubiquity in the modern era. *Id.* The affidavit has one paragraph which summarizes the connection between the offense and the phone. It is quoted in full here:

> I believe that call detail records, including any and all cell site data records and any available geo-location information, for the dates of March 25, 2023 through March 26, 2023 for phone number **773-418-6236,** constitutes

> evidence of the offense of Aggravated Robbery that I am currently investigating. I know from speaking to the Complainants in this case that two black males held them at gun point while demanding money. I know from Complainant Gomes and Complainant Zelaya that they recognized one of the black males by sight and sound as "Dre" who they later identified in photo arrays as Darius Jamal Frazier. l also know from Complainant Gomes and Complainant Zelaya as well as from the TLO law enforcement database that around the time of this Aggravated Robbery, Darius Jamal Frazier used a cell phone with phone number **773-418-6236.** I believe a reasonable inference exists that Darius Frazier possessed his cell phone with said cell phone number at the time he committed this Aggravated Robbery. I therefore believe that a fair probability exists that the cell site data records and any available geolocation information for Darius Hamal [sic] Frazier's phone number that is held in storage by Verizon will help to establish his location before, during and after this Aggravated Robbery. Finally, I know from experience that suspects who commit Aggravated Robberies communicate with each other to plan and coordinate their crimes. I therefore believe that the records for **773-418-6236** will show who Darius Jamal Frazier communicated with before, during and after this Aggravated Robbery, which could assist me in identifying the other yet to be identified suspect. (C.R. 201-02 – Trial Court Cause No. 1813098; C.R. 80-81 – Trial Court Cause No. 1813099 (emphasis in original)).

There is no other information in the affidavit connecting Appellant's phone to the offense alleged.

On August 26, 2024, the trial court gave the following ruling and reasoning on the record:

> THE COURT: I read over the memorandum. I read over the affidavit. I find that the affidavit was sufficient and credible and the Motion to Suppress the search warrant is denied. (3 R.R. 6).

The jury was then sworn, Appellant was arraigned, and the State gave its opening statement. (3 R.R. 7-9). Defense counsel gave an opening statement, and immediately told the jury that his theory was that the State could not identify Appellant as the perpetrator of the offense beyond a reasonable doubt. (3 R.R. 16). Defense counsel pointed to the three pieces of evidence that he expected the State to use to establish identity: (1) the cell phone location records; (2) the eyewitness identification of the masked perpetrator as Appellant; and (3) that Appellant, two weeks after the robbery, pawned an item that was allegedly stolen in the robbery. (3 R.R. 17-18).

The evidence adduced at trial largely fell within these three categories. The State summarized the state of its identification evidence through the testimony of the investigating officer. (3 R. R. 138). The prosecutor asked the detective to list any evidence that "puts Darius Frazier inside that apartment for the robbery and not simply an accessory after the fact." *Id.* He answered, listing "the complainant identifying the defendant as being active and inside the apartment," a doorbell camera video which was "not very specific," and the "call detail records." *Id.*

The defense cross-examined the complaining witness extensively about her identification. (4 R.R. 18-28). The testimony established that the perpetrator was wearing a black ski mask which revealed only the eyes, and that on-scene, the witness said that the perpetrator was wearing dark sunglasses. (4 R.R. 22-23). There

was conflicting testimony about whether the lenses of the glasses were clear or not. (4 R.R. 22-23). On direct, the witness testified that the lenses were clear, revealing a distinctive, identifying lazy eye. (3 R.R. 184). On cross, the witness testified that she "told Detective Pope that night that the suspect was wearing large, black sunglasses." (4 R.R. 22). The witness addressed the conflicting statements, saying "in that moment I was in shock, so I thought that I had seen sunglasses but laying down and remembering everything that was happening, I was like he was not wearing sunglasses he was actually staring at my eyes." (4 R.R. 23). She also testified that she came to the realization that she had misremembered the glasses "months later, around June." (4 R.R. 23). The offense occurred in March. (4 R.R. 23).

The State's final witness was the cell phone expert. (3 R.R. 63-101). The witness was the District Attorney's Office's own forensic investigator. (4 R.R. 63). He testified that just before the offense, Appellant's phone was located near the scene. (4 R.R. 79-80). Further, the expert testified that between 12:30AM and 2:03AM Appellant's phone was "dark" with a period of inactivity. (4 R.R. 81). These "dark" periods, according to the State's expert, are indications that a defendant is intentionally hiding his location by disabling his phone. (4 R.R. 72). This "dark" period coincided with the expert's opinion on when the robbery took place, between 11:45PM and 1:50AM. (4 R.R. 81). The expert went on to testify that the call detail

records were consistent with the proposition that Appellant was "in the area to commit the robbery at the time." (4 R.R. 88).

In their closing arguments, both parties emphasized the evidence surrounding identification, including the call detail records. (4 R.R. 116-20; 125-26). The State called the cell phone evidence "pretty compelling stuff." (4 R.R. 125). The State went on to address the weaknesses and strengths of the eyewitness identification. (4 R.R. 129). The State emphasized the cell phone records as evidence corroborating the eyewitness identification, arguing that the pieces of evidence "layered together" to prove their case. (4 R.R. 129).

At the end of the first day of deliberations, the jurors were "at 5-7," and were "not close" to reaching a verdict. (4 R.R. 134-35). The following day, the jurors asked for a read-back of testimony, specifically asking when the complainant "100 percent realized that the eyes in the mask were [Appellant]'s?" (5 R.R. 4). The jury later returned a verdict of guilty as charged in the indictment. (5 R.R. 7). The jury assessed punishment at seven years in the Texas Department of Criminal Justice. (6 R.R. 34).

SUMMARY OF THE ARGUMENT

Appellant argues that the trial court erred by denying his motion to suppress. The Court of Criminal Appeals in *Baldwin* held that "generic, boilerplate language about cell phone use among criminals" is insufficient to establish probable cause to search a cell phone. *State v. Baldwin*, 664 S.W.3d 122, 134 (Tex. Crim. App. 2022). The Court in *Baldwin* held that there must exist some "nexus" between the alleged offense and the place to be searched.

Here, there is no such nexus. The search warrant affidavit provided facts connecting Appellant to the robbery, and connecting Appellant to Appellant's phone number. But the affidavit provided nothing to connect the phone (or the phone number) with the robbery besides boilerplate statements about cell phone use among criminals. This is insufficient to support a finding of probable cause, and the trial court erred in denying the motion to suppress.

The harm in this case is constitutional, arising under the Fourth Amendment of the United States Constitution, and Article I Section 9 of the Texas Constitution. The harm is shown by the jurors' stated disagreements over the identification testimony, the State's emphasis on the cell phone evidence, and the jury's stated vote of 5-7, either for guilt or acquittal, after the first day of deliberations. There exists a reasonable probability that the error contributed to the conviction and therefore reversal is required.

ISSUE ONE

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT WAS FACIALLY INSUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE.

Applicable Law

An adverse ruling on a pretrial motion to suppress evidence will ordinarily suffice to preserve error on appeal, and a defendant need not specifically object to the evidence when it is later offered at trial. *Thomas v. State*, 408 S.W.3d 877, 881 (Tex. Crim. App. 2013).

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Tex. Const. art. I, § 9; *State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013). The Fourth Amendment requires that "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation." U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex. Code Crim. Proc. art. 1.06. A search warrant may be obtained from a magistrate only upon the submission of an affidavit setting forth substantial facts establishing probable cause. Tex. Code Crim. Proc. art. 18.01(b).

Under the Fourth Amendment, an affidavit supporting a search warrant is sufficient if, from the totality of the circumstances reflected in the affidavit and the reasonable inferences it supports, the magistrate was provided with a substantial

basis for concluding that probable cause existed. *Swearingen v. State*, 143 S.W.3d 808, 811 (Tex. Crim. App. 2004). Specifically in the context of cell phones, the Texas Code of Criminal Procedure requires that a search warrant application must "state the facts and circumstances that provide the applicant with probable cause to believe that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A)." Tex. Code Crim. Proc. art. 18.0215(c)(5).

In *Illinois v. Gates*, the United States Supreme Court articulated the rule that a search warrant affidavit must be more than merely conclusory. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). A mere conclusory statement gives the magistrate virtually no basis at all for making a judgment regarding probable cause. *Id.* "[The magistrate's] actions cannot be a mere ratification of the bare conclusions of others." *Id.* The reviewing court's task is to determine whether a reasonable reading of the affidavit provides a substantial basis for the magistrate's conclusion that probable cause existed. *Gates*, 462 U.S. at 238–39; *Diaz v. State*, 632 S.W.3d 889, 892 (Tex. Crim. App. 2021).

To establish probable cause to search a cell phone, "specific facts connecting the items to be searched to the alleged offense are required." *State v. Baldwin*, 664 S.W.3d 122, 134 (Tex. Crim. App. 2022). Generic, boilerplate language about cell

phone use among criminals is insufficient to establish probable cause to search a cell phone. *Id.*

If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. Proc. 44.2(a). When a trial court erroneously denies a motion to suppress and admits evidence obtained in violation of the Fourth Amendment, the error is constitutional and subject to the harmless-error analysis under Rule 44.2(a). *Dixon v. State*, 595 S.W.3d 216, 225-26 (Tex. Crim. App. 2020) (Hervey, J., concurring).

In assessing harm under 44.2(a), the reviewing court is required to evaluate the entire record in a neutral manner to determine whether there is a reasonable possibility that the error might have contributed to the conviction. *Wells v. State*, 611 S.W.3d 396, 410-11 (Tex. Crim. App. 2020). The analysis should not focus on the propriety of the outcome at trial. *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). Rather, "the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected 'the integrity of the process leading to the conviction.'" *Id*. In deciding whether an error of constitutional dimension contributed to the conviction or punishment, factors to consider include,

but are not limited to, the nature of the error, whether the error was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to the error in the course of its deliberations. *Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011).

Argument

This case belongs in the line of cases following the Court of Criminal Appeals' decision in *Baldwin*. *Baldwin*, 664 S.W.3d at 122. In *Baldwin*, the Court held that "boilerplate language about cell phone use among criminals" is insufficient to establish probable cause that a nexus exists between the cell phone and a crime. *Id.* at 134. The facts in *Baldwin*, like the present case, stemmed from a home invasion and robbery. In *Baldwin*, the affidavit alleged that a specific vehicle, registered to the defendant's family member, was on-scene four days before the crime, and was also seen quickly leaving the area after the offense. *Id.* at 134-35. Additionally, the *Baldwin* affidavit stated that police recovered cell phone parts from the scene of the crime. *Id.* at 132-33. Even that connection of a cell phone to the offense was an insufficient nexus to support a finding of probable cause. The *Baldwin* Court summarized its reasoning thus: "there are simply no facts within the four corners of the affidavit that tie Appellee's cell phone to the offense." *Id.* at 134.

The Court in *Baldwin* specifically took issue with the "boilerplate language about cell phone use among criminals." *Baldwin* at 134. The language of the affidavit in *Baldwin* was:

> "Affiant knows from other cases he [sic] has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime." *Baldwin*, 664 S.W.3d at 126.

The affidavit's language in the present case is:

> "I know from experience that suspects who commit Aggravated Robberies communicate with each other to plan and coordinate their crimes. 1 therefore believe that the records for 773-418-6236 will show who Darius Jamal Frazier communicated with before, during and after this Aggravated Robbery, which could assist me in identifying the other yet to be identified suspect." (C.R. 202 – Trial Court Cause No. 1813098; C.R. 81 – Trial Court Cause No. 1813099).

Notably, the *Baldwin* case, like Appellant's, emanated from Harris County based on a similar affidavit procured by Harris County law enforcement and it would appear, if *Baldwin* is controlling, that the affidavit in Appellant's case similarly lacks probable cause.

However, several courts of appeals have now addressed the *Baldwin* opinion and the Court of Criminal Appeals has also revisited the issue. Specifically, in *Stocker v. State*, which is currently before this Court's sister on remand, the Court of Criminal Appeals held that cell phone search warrant affidavits do not necessarily

have to establish (1) use of the cell phone during, or immediately before or after, commission of (2) the specific offense on trial. 693 S.W.3d 385, 388 (Tex. Crim. App. 2024). To be sure, the import of the *Stocker* opinion is that Texas courts are still wrestling with the nexus requirements of cell phone search warrant affidavits. Nevertheless, the *Stocker* holding sheds little light on the validity of the search warrant affidavit in Appellant's case. Appellant is not disputing that there are factual scenarios which could connect a phone to an offense while not necessarily involving contemporaneous use of the phone during the commission of the offense. If a witness alleged that a suspect was texting about an offense a week after its commission, probable cause connecting the phone to the offense could exist. Similarly, if a witness saw the suspect's phone during the offense, even if it was not used, probable cause for searching the phone's geolocation information could exist. The *Stocker* opinion, though limiting *Baldwin*, maintained *Baldwin's* "nexus" requirement. *Baldwin*, 664 S.W.3d at 129. In Appellant's case, the affidavit alleges no facts--temporal or otherwise--connecting Appellant's phone to the crime. Thus, under both *Baldwin* and *Stocker*, the cell phone search warrant affidavit in Appellant's case is insufficient.

This Honorable Court applied the rule in *Baldwin* in a case called *Navarrete-Torres v. State*. 2024 WL 1265389, at *7 (Tex. App.—Houston [1st Dist.], Mar. 26, 2024) (Not designated for publication). In that case, the affidavit alleged that the

defendant communicated with the decedent's son, with whom the defendant worked. *Id.* at *8-9. The affidavit alleged that these communications occurred around the time of the offense and were inquiries to find out when the decedent's son would be home, and, ostensibly, when the decedent would be alone. *Id.* This Court found that such a nexus between the phone and the offense was sufficient to support probable cause. *Id.* The affidavit in *Navarette-Torres* serves as an excellent example in contradistinction to Appellant's case. Nothing in Appellant's search warrant indicates Appellant (or anyone else) used Appellant's phone to communicate about the offense. Nothing indicates that witnesses to the offense noticed the presence of Appellant's cell phone. But for the affiant's conclusory claim that "suspects who commit Aggravated Robberies communicate with each other to plan and coordinate their crimes," there is nothing to connect Appellant's phone with the offense. (C.R. 202 – Trial Court Cause No. 1813098; C.R. 81 – Trial Court Cause No. 1813099). The trial court therefore erred in denying Appellant's motion to suppress.

Harm

The harm analysis in this case is for constitutional error, and the standard is set out in 44.2(a). Tex. R. App. Proc. 44.2. Rule 44.2(a) requires that the judgment and conviction be reversed "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex. R. App. Proc. 44.2(a); *Hernandez v. State*, 60 S.W.3d 106, 106 (Tex. Crim. App. 2001). It is

incumbent upon the State to show the harmlessness of the error beyond a reasonable doubt. *Wells*, 611 S.W.3d at 411. In *Glover*, this Court reversed a conviction based on its post-*Baldwin* analysis of an insufficient phone warrant. *Glover v. State*, 695 S.W.3d 829, 836-38 (Tex. App.—Houston [1st Dist.], 2024). In that case, the Court quoted *Merrit* for the proposition that "the 'default' is to reverse unless harmlessness is shown," and "if neither party does anything, the case will be reversed." *Id.* at 838 (quoting *Merritt v. State*, 982 S.W.2d 634, 636 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

The Court of Criminal Appeals set out a non-exhaustive factor test for error in these cases in *Snowden*. *Snowden*, 353 S.W.3d at 822. Those factors include the nature of the error, the emphasis by the State, the probable collateral implications of the error, and the weight the jury would likely have assigned to it in the course of deliberations. *Id.* In this case, each of these factors favors reversal.

The Nature of the Error

The nature of the error in this case is the improper admission of evidence that bolstered a weakness in the State's case. Throughout trial, including in voir dire, the defense argued that the State's eyewitness was unreliable. The defense voir dired on the issue of cross-racial identification. 2 R.R. 123. Defense counsel also voir dired on the reliability of eyewitness testimony. 2 R.R. 121. Both of these themes carried through the trial, and were discussed in closing arguments. 4 R.R. 113-14.

Defense counsel's theory of the case was that the State could not prove identification beyond a reasonable doubt. 4 R.R. 118. The eyewitness said on-scene that the perpetrator was wearing a ski mask, a pulled up hood, and dark sunglasses. 3 R.R. 184. Three months later, the witness allegedly remembered that the glasses were clear, and that she saw a distinctive feature of the defendant's: a lazy eye. 3 R.R. 184. This contradiction, along with the rest of defense counsel's examination of the witness, served to undermine the quality of the State's identification. The improperly admitted cell phone data corroborated the identification, bolstering a weakness in the State's case that they could not have achieved through other means.

The Emphasis by the State

The cell phone expert was the State's last witness. He was on the stand for nearly an hour. C.R. 251 – Trial Court Cause No. 1813098; C.R. 129 – Trial Court Cause No. 1813099. His testimony occupies 38 pages in the Reporter's Record. 4 R.R. 63-101. The final witness, being the most recent source of evidence in a juror's mind, has been shown to be more persuasive than evidence appearing at another time. *See, e.g.*, Kimberly Schweitzer and Narina Nunez, *The effect of evidence order on jurors' verdicts: Primacy and recency effects with strongly and weakly probative evidence*, 35 APPLIED COGNITIVE PSYCHOLOGY 6 (2021) (Finding "recency effects" exist, wherein jurors are more likely to render a verdict of guilt when the last piece of evidence the jury hears is strongly probative.)

Also, the State emphasized the cell phone evidence in closing arguments several times. Shortly after conceding the complainant's identification was wobbly, the State maintained Appellant's identification could be assured based on:

> CDR data, putting him in the area of the robbery, around 12:30 before, and then again right after the robbery at 2:03 a.m. Then you've got the CDR showing that dark period conveniently during the window when the robbery happened. Then you've got the subscriber info of that phone number coming back to Darius Frazier at his home address. 4 R.R. 129.

The function of this evidence in the State's case was to shore up doubts that the jurors might have had following the eyewitness testimony. The State repeatedly emphasized the cell phone evidence in closing arguments as an independent source of corroboration. That the State emphasized the error to this degree, and used it in closing to convict Appellant of the offense weighs in favor of the error being harmful.

The Collateral Implications of the Error

The collateral implications of this error strike at the heart of the exclusionary rule. In *Mapp v. Ohio*, the United States Supreme Court applied the Fourth Amendment exclusionary rule to the states. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). The Supreme Court castigated prosecutors when "the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold." *Id.* at 657. As recently as 2011, the Supreme Court

further commented that the "sole purpose" of the exclusionary rule is to "deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 246 (2011).

The warrant in this case was obtained on April 28, 2023. (C.R. 199 – Trial Court Cause Number 1813098; C.R. 78 – Trial Court Cause Number 1813099). The Court of Criminal Appeals handed down *Baldwin* on May 11, 2022. *Baldwin*, 664 S.W.3d at 122. The *Baldwin* opinion arose out of a Harris County case, and illegally obtained evidence from a Harris County search warrant was at issue. This case arises out of a Harris County conviction, with Harris County law enforcement obtaining a faulty search warrant. Law enforcement had nearly a year to learn the lesson of *Baldwin* and cure their errors. The sole purpose of the exclusionary rule, which affirmed the suppression of the evidence in *Baldwin*, remains unfulfilled. This Court is permitted, under *Snowden*, to consider the collateral implications of the harm in this case. Until these boilerplate warrants with no nexus are routinely rejected, law enforcement will continue, as they have shown in this case, to flout the requirements of the Fourth Amendment. The collateral implication factor strongly favors a finding of harm.

The Weight the Jury Would Have Assigned the Erroneously Admitted Evidence

After the first day of deliberation, the jury was split 5-7. (4 R.R. 134.) The record is silent as to whether that was 5 votes for guilty or 5 votes for acquittal. Regardless, it is not the case that the jury was so immediately convinced by the force

of the evidence that this error should be disregarded. The jury was initially split, and proceeded to ask questions about the identification testimony. (5 R.R. 1-6.) These questions were directly related to the weaknesses of the eyewitness identification. *Id.* Thus, the evidence which the State used to bolster those weaknesses is more likely to have been given weight by the jury in resolved their doubts in favor of a guilty verdict. These factors indicate the error caused harm. But for the erroneous admission of improper cell phone evidence, the State likely would not have been able to prove its case.

Finally, Appellant would cite to *Hankston v. State,* a case with similar facts which was reversed by the 14th Court under the more deferential 44.2(b) standard. 656 S.W.3d 914, 917 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd). In that case, cell phone location data was obtained in violation of the Fourth Amendment, and a trial objection was made pursuant to only Article 38.23 of the Texas Code of Criminal Procedure. *Id.* at 918. Since the objection was statutory, the 14th Court reviewed the error for its impact on the appellant's substantial rights. *Id.* at 924. The *Hankston* Court observed that the State used the phone data for two purposes: "(1) to show appellant had the opportunity to commit the murder because he was in the area at the time of the murder; and (2) to show appellant's flight from the scene, thus establishing a consciousness of guilt." *Id.* The court noted, importantly, that "the State adduced evidence and made arguments for the jury to rely on the CSLI as

evidence that corroborated the child's eyewitness identification." *Hankston,* 656 S.W.3d at 924. Trial counsel for appellant had spent much of the trial arguing that the eyewitness identification was unreliable based on "several factors." *Id.* at 920-23. But the State prevailed, emphasizing the compelling nature of the "'circumstantial evidence" and "the importance of other corroborating evidence." *Id.* at 924. The 14th Court therefore held: "we cannot conclude from this record that the admission of the CSLI evidence—showing his flight from the scene, contradicting his girlfriend's testimony, and bolstering the child's identification—had no effect or only a slight effect on the jury's verdict." *Id.* at 925. The 14th Court reversed. *Id.*

The similarities of the facts between this case and *Hankston* are striking. In both cases, the State used illegally obtained cell phone data to bolster its relatively weak eyewitness. In closing, the State argued:

> That is the value of cases that are circumstantial evidence that we layer well. I'll give him the glasses and the eyes, but she knew what his eyes looked like and that was why she got confused, but everything else, everything else, guys. In our world, we do not believe in coincidences; and you're telling me that if you believe Defendant's version of this, then you believe all of this is just one big coincidence. You can't. It's too solid, guys. If you layered it enough, it's too solid. You can't dismiss how they all work together, okay? (4 R.R. 129.)

By the State's own admission, this is not a case where one piece of evidence is so overwhelmingly strong that the others may be ignored. The *Hankston* case was the same. In that case, the Court held that the harm issue was "so evenly balanced

regarding the effect of the error that we are in virtual equipoise as to the harmlessness of the error. Under these circumstances, appellant's conviction must be reversed." *Hankston*, 656 S.W.3d at 925 (citations omitted). It bears repeating that *Hankston* was decided on statutory harm grounds under 44.2(b). *Id.* at 919. The present case requires the stricter 44.2(a) analysis. With similar facts and a more sensitive standard of review, reversal is required.

PRAYER

For the reasons stated above, Appellant prays this Honorable Court will reverse the trial court and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via electronic service on the day the brief was filed.

/s/ Mark Hochglaube
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Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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