In the Supreme Court of the State of Vermont, Docket No. 2019-029

State of Vermont, Appellee

V.

Chavis Murphy, Appellant

Appeal from the
Superior Court of Vermont – Criminal Division
Chittenden County
Docket No. 4791-12-15 Cncr

Brief of the Appellant

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Statement Of Facts

When the police arrived on the scene of the shooting of Obafemi Adedapo, just after 2:00 AM, Sunday, December 27, 2015, it was "chaotic." According to the affidavit describing the scene, "multiple officers had to control the crowd who were yelling, traumatized and highly agitated about what had happened." P.C. 86.

Several officers responded quickly when they heard the gunshots because it was just after last call and police presence was heavy downtown. *Id.* One arriving officer "noticed masses of people running and a few of our officers running southbound on Church Street." 2/6/2018–TR–110. Lead Detective Thomas Nash followed Mr. Adedapo to the hospital, while at least four more officers chased after potential shooters or witnesses. Based on statements from the crowd, the police chased three Black men who were seen running from the area—Samuel Alexander, Leon Delima, and Quincy Alexander—and arrested them. P.C. 86–87.

Mr. Delima, who was a friend who had been out with the deceased, refused to cooperate with the police and said he did not know who the shooter was. Quincy Alexander said the same; he also thought that Mr. Adedapo had argued with someone at the Zen Lounge about a girl earlier that evening. Mr. Alexander, who was arrested at gunpoint after a foot chase, told the police he had been with a friend, Justin Reed, when they heard the shots but the two had split up. 2/6/2018-TR–35–36; 43–44; 51–52.

No effort was made to close the street, nor was there any effort to follow up on the officers' Axon footage later to look for additional witnesses or suspects, or to interview any other witnesses. Det. Nash said that they did not seek any descriptions of other people there as possible shooters because the people who were there said the shooter was a very tall Black man. 2/23/2017–TR–22. The police did obtain the surveillance footage from the cameras at the Flynn loading dock and various other businesses, including the bank across the street. P.C. 6; 92–93.

Twelve hours later, at around 2:00 PM on the 27th, Det. Nash got a

phone call from an unknown woman, Jean Loiselle, patched through to him from the state police in St. Alban's. Ms. Loiselle said that Chavis Murphy had called her and stated that "he did something really bad last night." P.C. 88. The State never called her as a witness because she turned out to be unreliable—neither her daughter, nor her daughter's boyfriend confirmed her story. Her cellphone records and call log did not show a conversation with Mr. Murphy. In addition, Ms. Loiselle suffered from brain aneurysms. She eventually died before trial, but the State did not call her at the bail hearing or the suppression hearing either. A.V. 1249–50; 2/5/2016–TR–3–98; 2/23/2017–TR–3–35; 2/8/2018–TR–148–150.

A. The Warrantless Ping and License Plate Reader Requests

On Monday, December 28, 2015, more than 34 hours after the shooting and more than 20 hours after he spoke to Ms. Loiselle, Det. Nash requested that AT&T ping Mr. Murphy's cellphone. 2/23/2017–TR–21–22 ("So I would say no later than noon on Monday.") At that point, Det. Nash did not have anyone who was out that night who could confirm that Chavis Murphy was the shooter or who had seen him with a gun. *Id.* Det. Nash testified at the suppression hearing, however, that "due to the circumstances that Mr. Murphy was a good, alleged suspect, we asked—we requested AT&T, that was his cell carrier, for an exigent emergency ping of his cellphone." *Id.* 9. A ping could locate the phone by showing what cellphone tower the phone was using to draw a signal. AT&T attempted to do so, but then told Det. Nash that it could not find Mr. Murphy's phone using cell site location information ("CSLI") because the phone was turned off. *Id.* 11. Det. Nash said that though Mr. Murphy was identified when he asked for the ping on Monday morning, "we had enough on Tuesday to apply for the warrant." *Id.* 21.

On Monday, Det. Nash also made a request to the Vermont State License Plate Reader System to see if the car that Mr. Murphy was driving had been picked up by any police cruiser cameras. *Id.* 12. Det. Nash did not seek a warrant for this information either. The Reader system placed Mr. Murphy's car in Colchester earlier in the day on December 26th, and then on Main Street in Burlington near the time of the shooting. *Id.* 12–13.

Det. Nash also said, "The next day on the 28th, with that name in hand, we talked to other witnesses, eye-witnesses, on the scene who previously on the 27th did not provide Mr. Murphy's name, but on the 28th, with exposing them to more evidence, they identified Mr. Murphy as being present and possibly the shooter." *Id.* 8.

B. The subsequent warrant applications for cellphone data and Mr. Murphy's arrest

The following day, on the 29th of December, Det. Nash applied for a search warrant for Chavis Murphy's cellphone records from AT&T requesting his subscriber information, contacts, call detail records, text messages, and all GPS coordinates and data from December 26, 2015 until present. Det. Nash asserted in the warrant application that Mr. Reed said that Chavis Murphy was possibly the shooter. P.C.102.

An hour or so after this warrant issued, but before it was served, AT&T contacted Det. Nash in response to his warrantless ping request from the day before. 2/23/2017–TR–14. Det. Nash learned from AT&T that the present location of Mr. Murphy's phone was narrowed to a commercial strip mall area in West Springfield, MA, based on the information from the cell towers nearby. *Id.* 14–15.

Det. Nash went back to court and requested and received an arrest warrant for Mr. Murphy. *Id.*18. He told the MA police to arrest Mr. Murphy if they found him. The officers arrested Mr. Murphy in the parking lot outside of a Five Guys restaurant in West Springfield, in the same area as the Residence Inn where he was staying. He cooperated, asking the officers "how did you find me?", but they did not tell him. Mr. Murphy had two new track phones that he had purchased with him, and he told the officers he was driving his girlfriend, Kim Baker's car, which was parked nearby. Mr. Murphy had placed a phone on the wheel well of the car, and it was ringing. The police answered the phone, but the person hung up. 2/7/2018–TR–146–191.

In the room, the officers found a black and gray sweatshirt matching

the one that Justin Reed said Mr. Murphy was wearing that night in a trash bin, and a ripped-up birth certificate, a ripped up high school diploma, and a torn social security card in a plastic bin. Id. In addition, there was a list of names and numbers that the State characterized as a list of debts that Mr. Murphy was trying to collect. There were also multiple plastic bins containing clothing in the room. 2/8/2018–TR–162–180.

C. The Suppression Hearing and Decision

After he was arraigned on the charged offense, Mr. Murphy moved to suppress his statement—How did you find me? Was it an anonymous tip?—at the time of arrest, and the personal items seized, as well as the fact that he was located in Massachusetts. He argued that he had a privacy interest in his location information that the police gained without a warrant that led to his arrest. Because the police conducted a warrantless search, by requesting and using AT&T's real-time ping of his cellphone to obtain present location information to arrest him, he argued that his statements, as well as the seized items required suppression as fruits directly connected to the unlawful search. P.C. 66–71. The State responded that he had no privacy right in his real time location information from the government, and that even if he did, exigent circumstances justified the warrantless search. P.C. 75–81

At the hearing on February 23, 2017, Det. Nash clarified the difference between the ping request he made on December 27 and the warrant request for AT&T records that he made the following day, once he had witnesses who placed Mr. Murphy at the scene with a gun. He said that with the ping, "There is no other information given because it's under exigency, and the ping is only solely to locate the phone because of emergency situations like if it's a runaway child or suicidal subject. Companies are willing to give that out, but they only give out location; they don't give out any other information without a warrant or subpoena." 2/23/2017–TR–16–17.

According to Det. Nash, the factors justifying the exigent request for arrest were that there had been a bar fight, an "active shooter," and a victim unfamiliar with the suspect, and that the suspect might be unreasonable, "or

in some sort of mental state," or might still have a gun. *Id.* 19. Detective Nash did not mention Jean Loiselle or her phone call in his testimony, nor did he discuss the video footage obtained from the surveillance cameras. *Id.* 3–35. Nor did the trial court consider Ms. Loiselle's statements in its decision. P.C. 59–62.

The court ruled that Mr. Murphy did not have a privacy interest in the West Springfield ping. *Id.* 46–59. In so finding, the court relied on the third-party doctrine—the principle that because AT&T had a record of his calls and location, Mr. Murphy surrendered any privacy interest in that information once it was shared. *Id.* 49–58.

The court further determined that even if Mr. Murphy had a privacy interest in his cellphone location information, the warrantless search was justified by exigent circumstances though the incident had occurred a day and a half prior to the search, and the police had subsequently applied for and received multiple warrants before this warrantless search was conducted. *Id.* 59–62. The court credited Det. Nash's testimony and cited the following in support of exigency: the police had an "active shooter," who, "given the seemingly random nature of the crime," was possibly suffering from a mental condition that made his dangerous. The court accepted the detective's conclusory assertion that Mr. Murphy was a "good alleged suspect" because he matched the description of a tall Black man. *Id.*

Finally, but critically, the court relied on the bail decision in the case, where a witness claimed to have seen Mr. Murphy with a gun in his hand to establish exigency P.C. 60. That finding was erroneous because that was not information that the police had at the time of the request to AT&T, and, in fact, it was not even included in the affidavit in support of the arrest warrant, which issued the next day. P.C. 85–92. At the bail hearing, Mr. Alexander said he saw Mr. Murphy with a gun, but he admitted that he did not tell the police that in his initial interview with them because he did not want to get in trouble. 2/5/2016–TR–35–36.

Finally, the court ruled that if the warrantless search was not an

exigency and the police violated the Fourth Amendment or Article 11, Mr. Murphy still did not have any remedy. P.C. 62–63. The court reasoned that the only remedy available was to pursue a claim in civil court under the Federal Stored Communication Act ("FSCA"). Though Mr. Murphy raised a violation under Article 11, the court further reduced the remedy analysis to the Fourth Amendment's good faith exception and viewed the police illegalities as harmless because they were acting in good faith when they knowingly tracked Mr. Murphy's phone location without a warrant. *Id.* 58–63. The court did not suppress the items seized from Mr. Murphy's hotel room—a torn high school diploma, W-2, a social security card, a sweatshirt, and a list of names and numbers—or the statement he made to the police. These all came in at trial. *Id.* 63.

D. The State's case at trial rested on thin, wholly circumstantial evidence: nobody saw the shooter

At trial, despite the hundreds of people out on Church Street that night, the State could not produce a single witness who saw Mr. Murphy shoot Mr. Adedapo. P.C. 6. There was no testimony that Mr. Murphy ever exchanged words with Mr. Adedapo at the bar, nor that he even knew Mr. Adepapo. No physical evidence linked him to the shooting, nor was any DNA evidence or gunshot residue ever recovered from the scene to tie him to the murder. *Id.*

The License Plate Reader put Mr. Murphy's car downtown that night on Main Street, but only the testimony of Mr. Murphy's friends tied him to the scene. Mr. Alexander testified that he saw Mr. Murphy bump shoulders with Mr. Adedapo outside the bar minutes before the shooting. He allegedly saw that Mr. Murphy had a "silver-blackish" gun. Mr. Alexander said that he did not see the shooting because it happened very quickly. When he heard gun shots, he took off running. 2/6/2018–TR–31–32. But, of course, Mr. Alexander did not tell the police about Mr. Murphy and the theoretical gun when the police took him into custody at gunpoint initially because he did not want to get in trouble himself. *Id.* 43.

Justin Reed, who was outside and with Mr. Murphy and Mr. Alexander allegedly saw Mr. Murphy make a forward movement shortly before he heard the five gunshots that sent he and Mr. Alexander running. *Id.* 76. Two additional "eyewitnesses"—Leon Delima and Anthony Farmer—who were with the deceased as they approached Mr. Murphy and his group, were too drunk to see or remember anything. They also took off running, but their trial statements were consistent with those that they gave the night that they were arrested—they did not see the shooter. *Id.* 164–165; 2/7/2018–TR–90–93.

The medical examiner testified. *Id.* 5–55. In addition, several police officers testified, and the State also presented some grainy security camera footage from that night. *Id.*146–162; 2/8/2018–TR; P.C. 6. The State argued that although no faces could be seen in the footage, the general number and movement of bodies could be matched up to suggest that someone tall in a sweatshirt similar to Mr. Murphy's could be seen running from the scene. In addition, the License Plate reader placed Mr. Murphy's car in Burlington at around the time of the shooting, and his cellphone data was used to plot his movements from Burlington to West Springfield. 2/8/2018–TR–211–252; 2/7/2018–TR–133.

After the State rested its case, Mr. Murphy moved for judgement of acquittal. The presiding Judge Pearson held that there was "just enough, marginally" to send the case to the jury and denied the motion. 2/8/2018–TR–224.

In its closing arguments, the prosecution leaned heavily on the purported evidence of flight and consciousness of guilt. The State's Attorney began:

> "Man on the Run." That's the phrase you heard my colleague, Franklin Paulino, use during his opening statement when we started the trial a couple of days ago. And it's a good way to put it, because on December 27th, 2015, this man, Chavis Murphy, became the man on the run when he committed the

> first-degree murder of Obafemi Adedapo—the execution of Obafemi Adedapo.
>
> Fleeing the state is some of the best evidence you might see of guilty conscience, of a guilty state of mind. Because who does that? Who takes all their property, packs it up in their car, drives all the way to Massachusetts or some other state? Who switches cars with their girlfriend? Who buys prepaid phones with case? Who tears up documents that can identify who they are—tears up their W-2 form, tears up their Social Security card, tears up their birth certificate?

2/9/2018–TR–56–57. The prosecution also reminded the jury that it really boiled down to whether they believed Justin and Sam. *Id.* 60. Of course, Mr. Alexander's testimony and Mr. Reed's did not match up, nor was their trial testimony consistent with their original statements to the police. P.C. 6–8 (summarizing).

The defense told the jurors to reject the so-called flight evidence as evidence of guilt: "It is impossible to be convicted of murder simply because of a torn-up Social Security card. It is impossible to be convicted of murder simply because of a torn-up W-2 statement. And yet the State wants you to look at such things and somehow project backwards that the incident that happened on Church Street in Burlington in the early morning hours of December 27th, 2015 are attributable to Chavis Murphy." Counsel argued that it would take "a tremendous amount of speculation, of assumption, to draw any connection like that." *Id.* 73.

Though the State had made the clear connection between flight and consciousness of guilt, and Mr. Murphy asked the jurors to reject this claim during closing remarks, defense counsel failed to ask the court to instruct the jury that flight has limited probative value because it is also consistent with innocent behavior, or that evidence of flight was insufficient by itself to return a guilty verdict consistent with the Court's mandate in *State v. Scales*, 2017 VT 6, ¶ 7.

During the day and a half of deliberations, the only witness testimony

that the jurors requested to hear again was that of Mr. Alexander and Mr. Delima concerning the moments before and directly after the shooting. P.C.107. After that, the jury deliberated for several more hours, and sent a note to the court saying that they were deadlocked. *Id.* 108.The court urged them to continue deliberations. 2/12/2018–TR–12. After an additional three hours the jury returned a guilty verdict. *Id.* 13.

E. Motion for Judgement of Acquittal and New Trial

After the verdict, Mr. Murphy renewed his motions under Rules 29 and 33. Specifically, defense counsel criticized the sufficiency of the evidence of flight. The trial court rejected the argument that the evidence did not support the verdict, though it found that the State's evidence of guilt was "somewhat confusing and not entirely reconcilable as to all details" and completely lacking concrete, physical evidence: There were no ballistics, or other forensic evidence. There was no gun or gunshot residue. P.C. 6.

Nevertheless, the court upheld the verdict, concluding that the jury could find that Mr. Murphy must have shot the gun that killed Mr. Adedapo based on Sam Alexander's testimony. If Mr. Alexander was believed, Mr. Murphy was the only person who had a gun in proximity, at least that the State knew about. In addition, the court confirmed that Mr. Murphy was indeed tall and Black and thus matched the vague and broad description of the shooter by witnesses on the scene. The court concluded that even without the evidence of flight, there was sufficient evidence to convict Mr. Murphy and denied the renewed motions. *Id.* 11–13.

F. New evidence comes to light that Mr. Murphy was not the shooter; a second motion for a new trial is filed

In 2019, Mr. Murphy filed another Motion for New Trial, presenting two new witnesses who said they were on lower Church Street on the night of the murder and believed that Chavis Murphy was not the shooter. This Court granted a motion for limited remand to permit the adjudication of this Motion. At an evidentiary hearing, Mr. Robert Robidoux and Mr. Jabez Bean each testified that they saw a different tall Black man, thinner than Mr.

Murphy, running from the scene. The trial court dismissed this new evidence after determining that Mr. Bean and Mr. Robidoux were not credible because both men had changed details of their accounts of the evening, and neither man saw the actual shooting. A.V. 1239, 1241, 1245–1246. The court found that Mr. Murphy could potentially have discovered the evidence before trial, and that the new evidence would have been cumulative or not material. *Id.* 1247–1248.

Mr. Murphy also argued in his motion that the State's failure to disclose impeachment evidence it had at the time it filed for the arrest warrant regarding Ms. Loiselle's lack of credibility was a *Brady* violation that misrepresented the strength of the State's probable cause to request the warrant. The trial court concluded that where the information was eventually disclosed before trial, and the witness was not called at the trial, Mr. Murphy could not prevail on a *Brady* claim. *Id.* 1249–1250.

This timely appeal followed. P.C. 118–119.

Standard Of Review

"A trial court's decision on a motion to suppress is a mixed question of fact and law, that is, whether the factual findings supported by the record lead to the conclusion that, as a matter of law, suppression of evidence was or was not necessary. *State v. Clinton-Aimable*, 2020 VT 30, ¶ 16 (quotation omitted). This Court applies a clearly erroneous standard to the trial court's factual findings and reviews de novo the legal conclusions. *Id.*

A jury charge will be upheld "[i]f the charge, taken as a whole and not piecemeal, breathes the true spirit of the law, and if there is no fair ground to say that the jury has been misled." *State v. Vuley*, 2013 VT 9, ¶ 41.

Review of the sufficiency of the evidence requires this Court to examine all the evidence de novo to protect against the possibility of wrongful convictions. *State v. Rounds,* 104 Vt. 442 (1932) ("In a homicide case, where the life or liberty of a citizen is at stake, and where the guilt of the accused must be established beyond a reasonable doubt, the causal connection

between the death of the decedent and the unlawful acts of the respondent cannot be supported on mere conjecture and speculation."). The evidence must be scrutinized to determine whether there is sufficient proof on each element of the crime to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Derouchie,* 140 Vt. 437, 442 (1981) (citing *Jackson v. Virginia,* 443 U.S. 307, 318–19 (1979)).

This Court will review the trial court's ruling on the new trial motion for abuse of discretion, and it will not overturn the trial court's decision unless the court abused or withheld its discretion. *State v. Bruno*, 2012 VT 79, ¶ 16.

Argument

I. Mr. Murphy had a privacy interest in the location data from his phone, no exigent circumstances existed, and the fruits of his arrest and the hotel search therefore should have been suppressed.

Det. Nash executed a tracking search for Mr. Murphy at a time when he did not have probable cause for an arrest warrant or a search warrant. That illegal search was an end run around the protections enshrined in the U.S. and Vermont Constitutions that led directly to Mr. Murphy's arrest and seizure of items that the State relied heavily upon in its case in chief. This Court must now reverse the suppression decision consistent with this Court's affirmation of the importance of the exclusionary rule.

A. The State's unreviewed obtaining of real time location information data from Mr. Murphy's phone was an illegal search under the Fourth Amendment and Article 11.

A request to a cellphone provider to "ping" a private individual's cellphone to obtain that person's real time location information between cell site towers, done at the request and for the purpose of the State's criminal investigation is a search triggering the protections of the United States and Vermont Constitutions. Here, whatever doubt the trial court had that Mr. Murphy had a privacy interest in his location information because of the

third-party doctrine, was settled by *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that location data, collected over two weeks without a warrant, was unequivocally a search. The trial court issued its suppression decision on May 5, 2017, but thirteen months later, on June 22, 2018, Chief Justice Roberts settled many of the trial court's questions. This Court must now summarily reject its analysis as no longer reflective of the law.[1]

Chief Justice Roberts compared the use of a person's phone to track location data to GPS monitoring, which the Court had previously determined was a search in *United States v. Jones*, 565 U.S. 400 (2012). In *Jones,* the Court held that secretly placing a GPS tracking device on an automobile to trace Mr. Jones' movements was a search. In *Carpenter*, the Court expanded that to CSLI because "much like GPS tracking of a vehicle, cellphone location information is detailed, encyclopedic, and effortlessly compiled." *Id.* 2216–17. The Court rejected the argument that a person who continuously revealed his location to his wireless carrier waived his right to claim an expectation of privacy against the government having the same data. Known as the third–party doctrine, the United States Supreme Court held that while this 1979 doctrine still applied to telephone numbers and bank records, its dated underlying premise was no longer applicable to these circumstances, given the ubiquity of cellphones and the power of modern technology.

What the Supreme Court arguably left open in *Carpenter* is how much data would constitute a search—would a single request to track a suspect in real-time implicate Fourth Amendment guarantees and necessitate a warrant, or is there a threshold where the implication for privacy might be slight enough that law enforcement could justify the decision not to request a warrant? Most courts addressing the situation here—where law enforcement asked for CSLI at a time when it did not have enough to request a warrant—have held that the nature and the power of the data require a finding that of

[1] Changes in constitutional law must be applied to Mr. Murphy, whose case is still pending on direct appeal. *State v. White,* 2007 VT 113, ¶ 8, (adopting "the common-law rule that changes in constitutional law must be applied to all defendants whose cases are still pending on direct appeal at the time of the change") (quoting *State v. Shattuck,* 141 Vt. 523, 529–30 (1982)).

course it is a search in light of *Jones* and *Carpenter*, and that the ping request implicates Fourth Amendment and state constitutional protections.

For example, the Florida Supreme Court's reasoning in *Tracey v. State*, 152 So. 3d 504 (Fl. 2014) presaged the Supreme Court's decision in *Carpenter*. In *Tracey*, law enforcement used location data obtained from a cellphone ping to track Mr. Tracey and arrest him on possession of cocaine and other charges. When the police arrested Mr. Tracy on a public road, they found a brick of cocaine in his car, and $23,000 cash in the car of a codefendant. *Id.* 507. The court found that the Government's nearly immediate access and ability to trace precise location data in real-time, by virtue of a person's decision to carry a cellphone, was a search. *Id.* 526. The court recognized a valid privacy interest in one's location that most smart phone users would not assume they were squandering simply by using their phones, particularly where data showed that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower." *Id.* 523 (quoting *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that police could not search a cellphone incident to arrest without a warrant)). The Florida Supreme Court held that the evidence ought to have been suppressed. *Id.* 526.

In *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 539 (D. Md. 2011) the magistrate rejected the authorization of a ping for CSLI when the police sought the information simply to execute an arrest warrant. Where the Government reported no attempts of the subject to flee and the requested location data was not otherwise evidence of any crime, the court rejected the application because even the subject of an arrest warrant maintained a privacy right in his movement and location. When Det. Nash requested the information from AT&T in this case, he did not even have an arrest warrant in place.

Post-*Carpenter,* the Massachusetts Supreme Court decided that under the Massachusetts Constitution a single request for real-time geographical

information was a search. In *Commonwealth v. Almonor*, 120 N.E. 3d 1183 (2019), the court stated "the decision to obtain a cellphone … does not in any way authorize the police to independently, and without judicial oversight, invade or manipulate the device to compel it to reveal information about its user." *Id.* 1194. The court focused on the awesome power of the surveillance tool created by the modern reliance on cellphones and determined immediately locating a person by compelling their phone to reveal its location contravenes the expectation of personal privacy. *Id.* 1195.

In 2020, a Pennsylvania intermediate court similarly declared that "obtaining real-time CSLI is the equivalent of attaching an ankle monitor to the cellphone's user; it allows the government to track the user's every move as it is happening." As such, that court reasoned from *Carpenter* that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through real-time CSLI." *Commonwealth v. Pacheco*, 227 A.3d 358, 370 (Pa. Super. 2020), *appeal granted in part*, 237 A.3d 396 (Pa. 2020), and *aff'd,* 263 A.3d 626 (Pa. 2021). See also, *Reed v. Commonwealth*, 2018-CA-001574-MR, 2020 WL 594084, at *4 (Ky. Ct. App. Feb. 7, 2020), *review granted* (Sept. 16, 2020), *not to be published* (Sept. 16, 2020) (warrant required to acquire real-time location from ping because of the significant, legitimate privacy concerns implicated); *United States v. Lambis*, 197 F. Supp. 3d 606, 611 (S.D.N.Y. 2016) (Absent search warrant, government may not turn a person's cellphone into a tracking device.); *United States v. Ellis*, 270 F. Supp. 3d 1134, 1145–46 (N.D. Cal. 2017) (defendant had a reasonable expectation of privacy in his real-time cellphone location, and use of Stingray device to locate his cellphone was a search).

This Court must recognize the same privacy interest here.

B. Under Article 11, obtaining the CSLI was a search that required a warrant.

The State's warrantless request to AT&T also triggered the separate and more expansive protections of Article 11 of the Vermont Constitution. Because Article 11 emphasizes both the need for the warrant from a neutral judicial officer and the value of personal privacy, a warrant was required.

This Court has specifically parted company with federal precedent in its emphasis on the requirement of a warrant, and the judicial supervision of searches and seizures. *See e.g., State v. Bauder*, 2007 VT 16, ¶¶ 15-20 (refusing to adopt holding in *New York v. Belton,* 453 U.S. 454 (1981), that officers may routinely search automobiles and containers in them incident to arrest irrespective of need to assure safety or protect evidence); *State v. Savva*, 159 Vt. 75 (1991) (prohibiting officers from searching closed containers whose contents are not in plain view following automobile stop, and refusing to adopt Supreme Court caselaw not requiring particularized showing of exigent circumstances); *State v. Kirchoff*, 156 Vt. 1, 13–14 (1991) (warrant required for search of posted "open fields"); *State v. Bryant*, 2008 VT 39 (warrant required for aerial surveillance); *State v. Blow,* 157 Vt. 513, 517 (1991) (warrant required for electronic transmission of suspect's conversation with police agent, from inside suspect's home).

And, this Court has also emphasized personal privacy in its Article 11 jurisprudence. See *Bauder*, 2007 VT at ¶ 10 (Although "the Fourth Amendment and Article 11 both seek to protect our freedom from unreasonable government intrusions into ... legitimate expectations of privacy, we have also long held that our traditional Vermont values of privacy and individual freedom—embodied in Article 11—may require greater protection than that afforded by the federal Constitution") (internal citations and quotations omitted). In keeping with its duty to enforce the state constitution, this Court has taken great pains to "discover and protect the core value of privacy embraced by Chapter 1, Article 11 of the Vermont Constitution." *Id.* ¶ 13 (citations omitted).

C. No exigent circumstances prevented Detective Nash from applying for a warrant in this case.

Because this was a search under the federal and state constitutions, Det. Nash needed a warrant to use Mr. Murphy's phone to track him. No exception to the warrant requirement applied; specifically, no exigent circumstances prevented law enforcement from applying for a warrant, despite the trial court's erroneous conclusion to the contrary. When the police conduct a warrantless search, the law presumes a constitutional violation. It

is the State's burden to show that the search here was not otherwise illegal. The State must establish that its officers' warrantless action was taken in "*the least intrusive manner* with respect to a defendant's expectations of privacy …" *State v. Birchard*, 2010 VT 57, ¶ 13 (emphasis added); accord *Savva*, 159 Vt. at 88–89 ("[I]n our prior cases on exigent circumstances, we have demanded that, when acting without a warrant, police operate 'in the least intrusive manner possible under the circumstances'") (quoting *State v. Platt*, 154 Vt. 179, 188 (1990)).

The State's burden to tie the exigency to the circumstances of the case is even greater under Article 11 than under the federal constitution. The State must show "*undue* risk to the evidence-gathering process or public safety." *Savva*, 159 Vt. at 91 (emphasis added). And, contrary to federal precedent, the exigencies must be narrowly tied to the circumstances that rendered a warrant application impracticable. *State v. Welch*, 160 Vt. 70, 78 (1991).

Detective Nash did not request a warrant before he made his request to AT&T thirty-four hours after the shooting on Monday, December 28, 2015. Likely the real reason he did not is that he did not have enough evidence to establish probable cause: he did not have a witness that put Mr. Murphy at the scene of the crime with a gun, only a sketchy and completely unverified tip from Ms. Loiselle.

At the suppression hearing, when asked if he had good information that Mr. Murphy was the shooter when he asked AT&T on Monday to use CLSI to track him, Det. Nash said, "He was identified, yes. *And we had enough on Tuesday to apply for a warrant."* 2/23/2018–TR–21 (emphasis added). Presumably, on Monday the police knew only that he was a tall Black man who was out that night and who was not with his grandmother, sister, or girlfriend when the police began to look for him as a suspect.

But whatever law enforcement's motivation was, the facts of this case do not demonstrate that it was necessary to proceed without a warrant. When Det. Nash spoke to AT&T, he was a day and a half into the

investigation. There were no exigent officer safety concerns at this point—the scene was cleared. Nor was the concern for loss of evidence sufficient justification where law enforcement and prosecutors had readily available to them speedy electronic means to apply for a warrant. See V.R.Cr.P. 41 (d)(4); *Missouri v. McNeely*, 569 U.S. 141, 154–155 (2012) (the speed with which electronic warrants are issued defeats a categorical claim of exigency based upon evaporation of alcohol in bloodstream).

The trial court cited to *State v. Petrucelli*, 170 Vt. 51, 61 (1999) for a non-exhaustive list of factors affecting whether exigent circumstances justified a warrantless search, but the Court cautioned there that the list was not finite. The trial court asked whether:

> (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect "is reasonably believed to be armed"; (3) police had "a clear showing of probable cause ... to believe that the suspect committed the crime"; (4) police had "strong reason to believe that the suspect is in the premises being entered"; (5) there is "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the entry was made peaceably.

Id., P.C. 59–60. The trial court relied on the fact that a murder occurred with little linking the supposed perpetrator to the victim—the random nature of the crime might have suggested that the perpetrator was somehow "suffering from some mental health condition which made him dangerous to the general public." *Id.* The court surmised that the police could reasonably have believed that defendant was armed and that he was not locatable at any of his known addresses. To that supposition, the court added another: "there was a distinct likelihood that he would escape if not swiftly apprehended." *Id.* Finally, the court concluded that the tracking request to AT&T was peaceable and non-intrusive.

But comparing the court's machinations to find exigency here to the facts of *Petrucelli* demonstrate how far off base the court's reasoning was. In *Petrucelli*, this Court concluded that the police warrantless entry into the

apartment was justified by the fact that the officers were responding to an allegation of violent crime that was unfolding. Mr. Petrucelli was still holding his partner and their five-week-old child at gunpoint when the police arrived. Here, the police waited *more than thirty-four hours* before asking for the warrantless tracking of Mr. Murphy's phone. During that time, they of course, had plenty of time to ask for a warrant—a process that took them all of an hour or so the following day.

In addition, there was no evidence that any delay would jeopardize the safety of officers or others. Where in *Petrucelli*, an emergency was unfolding, here there was only the trial court's supposition that there was a potential for more violence because there was no suspect in custody. This reasoning essentially eliminates the warrant requirement for any search where a suspect has not yet been detained.

Most egregiously, no one had identified Chavis Murphy as in possession of a gun when Det. Nash asked for the tracking information from AT&T. Mr. Murphy fit the description of a tall Black man who was out that night, and according to the trial court, that made him a "good suspect," who needed catching. The urgency of a baby at gunpoint is distinctly missing. And so too, obviously, is the probable cause. At the suppression hearing, Det. Nash acknowledged that *the following day,* he decided he had enough for a warrant, so he applied for and got one within the hour. By contrast, when he asked for warrantless cellphone tracking, he had no more than "a good suspect."

Here, the trial court observed it took a few weeks for AT&T to respond to the warrant that Det. Nash eventually obtained. But the warrant itself happened almost immediately—Nash waited for it to be signed. There was nothing preventing the police from attaching a warrant to their request to AT&T. And, there is simply no way to find that exigent circumstances justified their warrantless tracking without adding generalized inference upon generalized inference.

D. The federal and state exclusionary rules require suppression of both Mr. Murphy's statements and the items from his hotel room.

The federal exclusionary rule, and particularly, the Vermont exclusionary rule demand that Mr. Murphy's statements at the time of his arrest and the evidence from the hotel room be suppressed, because both his arrest and the hotel room search were the fruits of the warrantless search. This Court has long viewed Vermont's exclusionary rule as an essential feature of the Article 11 right itself rather than simply a judicially created remedy for a violation of that right. *See State v. Oakes*, 157 Vt. 171, 174-75 (1991). Indeed, this Court may have been the first state court to ever apply an exclusionary rule to evidence obtained in violation of the state constitution. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford Univ. Press 2018) (discussing *State v. Slamon*, 72 Vt. 212 (1901)). In light of such a strong tradition of vindicating personal liberty, it is unclear how the trial court could conclude that Mr. Murphy would have no remedy in Vermont.

As this court recently reiterated in *State v. Walker-Brazie*, 2021 VT 75, ¶ 37, evidence obtained in violation of the Vermont Constitution may not be admitted at trial in a state prosecution because such evidence "eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." (quoting *State v. Badger*, 141 Vt. 430, 453 (1982)). In Vermont, rather than consider the exclusionary rule a judicially created remedy meant to deter police overreaching, this Court focuses "on the individual constitutional rights at stake." *Id.* ¶ 37 (quoting *State v. Lussier*, 171 Vt. 19, 30 (2000)). Suppressing evidence obtained by federal agents lawfully under federal law was consistent with "other states that utilize a privacy rationale for their exclusionary rules." *Id.* ¶ 41. Finally, though it was passed after the State's illegal search here, Vermont's own Electronic Communication and Privacy Act explicitly preserves suppression as a remedy. See 13 V.S.A. § 8104 (a). Vindicating Mr. Murphy's privacy right requires suppressing his location data in West Springfield and the information and items that flowed from that.

The trial court also found that suppression was unavailable under the Federal Stored Communications Act, a federal statute that "assumedly"

applied, though neither party briefed it. P.C. 62. The FSCA is irrelevant under Article 11. The court also said that the Fourth Amendment's exclusionary rule would not apply because the police officers acted in good faith, but the court likewise ignored the fact that this Court has consistently rejected the good faith exception to the exclusionary rule as being fundamentally inconsistent with the Vermont Constitution. See *State v. Oakes*, 157 Vt. 171, 174 (1991) (rejecting good-faith exception to exclusionary rule for searches made in good faith under warrant later found invalid).

This Court must reach the same conclusion here and suppress Mr. Murphy's location and statements to the police upon his arrest, as well as the evidence obtained from the hotel room.

II. The trial court should have given a limiting instruction on evidence of flight where the State repeatedly referred to Mr. Murphy as a man on the run.

This Court has long expressed skepticism of consciousness of guilt evidence when the State presents evidence of flight at trial and argues that guilt can be inferred as the State did repeatedly in this case. In *State v. Unwin,* 139 Vt. 186, 193 (1980), defendant asserted a mistaken identity defense, much as Mr. Murphy did, and argued that the limiting instruction given was in error because of the circumstances of this case. Because others ran from the scene of the stabbing he was accused of, Mr. Unwin argued that the evidence should not have been allowed and that court's instruction placed too much emphasis on evidence of flight. This Court noted that "[e]vidence of flight is generally considered to have little probative value, see *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 … (1963), and is not sufficient by itself to support a conviction. See, e. g., *United States v. Caro,* 569 F.2d 411 (5th Cir. 1978)." *Id.* Nevertheless, this Court allowed the evidence because of the carefully worded instruction that was given, instructing the jury that if they found that defendant fled from the scene of the incident, it should not "raise any presumption of guilt because there are many reasons for such conduct including fear, ignorance, confusion or the like, which are consistent with the claim of innocence." The court tightly circumscribed how the evidence could be of value by telling the jury that it was "entitled to consider these facts if

you find such to be the case as tending to show a consciousness of guilt on his part. Weighing it along with his state of mind, mental capacity and reasoning powers, you are to give these matters such weight as you think they are entitled to under the circumstances." *Id.* 193. See also, *State v. Winter*, 162 Vt. 388, 392 (1994) (so-called consciousness-of-guilt evidence has little probative value even when relevant to a legitimate issue other than propensity) (quotation omitted); *State v. Giroux*, 151 Vt. 361, 366 (1989) (upholding a jury instruction that flight has "very, very limited probative value"). In *State v. Scales*, decided a year before this trial, this Court reversed Mr. Scales' conviction where the trial court should not have allowed the sketchy, inferential evidence of consciousness of guilt and compounded the error by refusing to give the requested limiting instruction. 2017 VT ¶¶ 19–23 (discussing the history of this Court's multiple well-reasoned decisions in this area).

Finally, in *State v. Welch*, 2020 VT 74, ¶ 9, this Court refined its guidance as to exactly what a jury instruction should say, clarifying that "[b]est practice would be to instruct the jury that evidence of flight does not raise a presumption of guilt and has very limited probative value because flight is also consistent with innocent behavior, such as fear, panic, unwillingness to confront the police, and reluctance to appear as a witness." *Welch*, 2020 VT at ¶ 16. Writing for a unanimous court, Justice Cohen said the trial court should "then instruct jurors that they should weigh flight evidence along with all other evidence in the case and assign the flight evidence and the other evidence the relative weights they think appropriate, *but that flight evidence is not sufficient by itself to return a guilty verdict.*" *Id.* (emphasis added).

The trial court's failure to give an instruction on evidence of flight as consciousness of guilt was plain error here where the State's case came down to two witnesses who both changed their testimony, some grainy video footage, and a repeated hammering that Mr. Murphy was arrested while he was on the run. The State provided evidence of flight and directly connected it to consciousness of guilt during both its opening and closing argument. Defense counsel did not ask for an instruction on consciousness of guilt, but

given the long-established principle at play, the trial court should have done so. *State v. Rounds,* 2011 VT 39, ¶ 32 (trial court's permissive inference instruction was plain error); *State v. Goyette,* 166 Vt. 299, 304 (1997) (recognizing reversible plain error where, "[a]lthough the alleged acts, taken together, could have supported the jury's verdict, the court's instruction required far less to convict defendant").

The court's failure to do so here was plain error. Plain error exists when: 1) there has been an error; 2) the error is obvious; 3) the error affects substantial rights, resulting in prejudice to the defendant; and 4) the Court must correct the error because it undermines the fairness, integrity, or public perception of the proceedings. *State v. Bolaski*, 2014 VT 36, ¶ 15; *State v. Gauthier*, 2016 VT 37, ¶ 10.

One key factor in the analysis is the "[o]bviousness of the error and prejudice to [the] defendant…" *State v. Weeks*, 160 Vt. 393, 400 (1993). An obvious error is "one that the trial court should easily recognize." *Id.* When this Court has exhaustively discussed and repeatedly decided a legal issue, a lower court is presumed to know the law, and the error is obvious. *Id.* This Court held several times that so-called consciousness of guilt evidence is, in and of itself, insufficient to sustain a conviction. In *Unwin*, *Giroux*, and a year before this case went to trial in *Scales*, which dealt specifically with the necessity of a jury instruction, it has said so again and again. 2017 VT 6, ¶ 16.

To show reversible prejudice, a defendant need only show a reasonable probability that the error affected the outcome of the trial. *United States v. Marcus*, 560 U.S. 258, 262 (2010); *State v. Nicholas*, 2016 VT 92, ¶ 19. The inquiry into prejudice is the same in a harmless error or plain error analysis, with one difference: the allocation of the burden. *United States v. Olano*, 507 U.S. 725, 734-35 (1993). In other words, a defendant need not suffer an especially prejudicial error to be entitled to reversal. The defendant merely needs to show a *reasonable probability* the error affected the outcome. *Marcus*, 560 U.S. at 262.

The State emphasized that Mr. Murphy was a man on the run in both its opening and closing and placed a great deal of emphasis on its evidence of flight. The trial court needed to give the instruction, even if defense counsel failed to request it. The first words the State said in its opening statement were "Man on the run. How did you know I was here?" 2/6/2018–TR–17. Then immediately, "The evidence will show that two days after the incident West Springfield Police officers found in that room, according to defendant's own words, everything he owned. And everything that has his name on it; his W-2, his birth certificate, his high school diploma, ripped up and in the garbage."

At closing, again, the State started with "Man on the run." 2/9/2018–TR–56. The prosecutor told the jurors:

> Fleeing the state is some of the best evidence you might see of a guilty conscience, of a guilty state of mind. Because who does that? Who takes all their property, packs it up in their car, drives all the way to Massachusetts or some other state? Who switches cars with their girlfriend? Who buys prepaid phones with cash? Who tears up documents that can identify who they are—tears up their W-2 form, tears up their Social Security card, tears up their birth certificate?
>
> And these are the things that you can see when you look at the evidence as you deliberate: State's 48, the birth certificate; State's 49, Social Security card, torn up; State's 44 and State's 45, the images that the police obtained when they went to Mr. Murphy's room showing the laundry basket, backpack, and underneath it, the large plastic bins full of his clothing and belongings. That's a lot of stuff to take if you're just going to be out of town for a day or two.

Id. 56–57. The State asked, "Who does these things? Someone who's afraid of being arrested. Someone who knows that they've committed a horrible crime and they're afraid of getting caught." The prosecutor also said that Mr. Murphy's statement when he was arrested—"How did you know I was here?" is "the comment of person who knows that they've done something, knows

he's been caught. He's not surprised. The person who hasn't done something would say something different, something like, why are arresting me? I haven't done anything wrong. You've got the wrong guy." *Id.* 57–58.

Here, it was plain, highly prejudicial error for the court not to instruct on consciousness of guilt. Mr. Murphy's purported flight and consciousness of guilt was the tentpole supporting the prosecution's case. Without an adequate jury instruction to guide the jurors' use of this evidence, and to instruct them that they could not rely solely on the flight evidence to convict, reversal is required.

III. The State's evidence was not sufficient to convict Mr. Murphy.

The Court assesses the quantum of evidence, both its quality and strength, to determine whether a reasonable jury necessarily reached "*a subjective state of certitude* of the facts in issue." *In re Winship,* 397 U.S. 358, 364 (1970) (emphasis added); *State v. Durenleau,* 163 Vt. 8, 10 (1994). This is a constitutional imperative because a defendant "is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing the crime." *Winship,* 397 U.S. at 363. That the Court examines the evidence in the light most favorable to the prosecution and excludes modifying evidence gives "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis added). But this Court must ensure that guilt was proved and not conjectured. *Id.*; see also *State v. Robar,* 157 Vt. 387, 391 (1991) (review of evidence includes determining "whether the evidence gives rise to mere suspicion of guilt or [leaves] guilt uncertain or dependent upon conjecture"); *Durenleau,* 163 Vt. at 14 (reviewing the rational inferences flowing from the evidence and determining that the meager evidence failed to bridge factual gaps).

There simply was not enough evidence presented in this case to convict Mr. Murphy, particularly when no limiting instruction was given on flight. When the defense moved for judgement of acquittal after the State presented

its case, Judge Pearson said there was "just enough evidence, marginally," to go to the jury. 2/8/2018–TR–224. The court characterized it as a "highly circumstantial case." *Id.* Circumstantial evidence alone can support a guilty verdict. *Durenleau*, 163 Vt. at 12. However, circumstantial evidence only works where the rational inferences from such evidence prove guilt beyond a reasonable doubt. If speculation is required to bridge the gap from the circumstantial evidence to a guilty verdict, the evidence is not sufficient. *Id.* 12–13; *State v. Robar*, 157 Vt. at 391.

Here, the State's evidence was paper thin. In addition to Judge Pearson's characterization of the case as "just enough, marginally" to avoid dismissal, the jury came back deadlocked. Taken together with the court's failure to instruct the jury that apparent consciousness of guilt was insufficient to convict, there is a real danger that Mr. Murphy was wrongfully convicted. There was no instruction to put the evidence—which should have been suppressed anyway—in context. That danger is exacerbated where no one saw the shooter, in a shooting that took place when the bars closed after two in the morning on Church Street and memories were foggy at best.

It is further exacerbated in a case where the police chased three Black men and operated on the presumption that the missing tall Black man was the one who must have pulled the trigger, and a jury was expected to make the "rational" inference that this was the right Black man. Across many metrics, Vermont has some of the highest rates in the country of racial inequity in the criminal justice system. *See, e.g.*, Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5–6 (The Sentencing Project, 2016) (Vermont has the highest rate of adult Black male incarceration in the Nation, the third-highest Black incarceration rate, and a rate of Black imprisonment that is more than ten times the white imprisonment rate). Decades of social science research demonstrate that one of the significant factors behind the racial disparities is "unconscious," or "implicit," bias. *See* L. Song Richardson, Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2630 (2013). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous in our society. For instance, the cultural stereotype of Blacks as violent, hostile,

aggressive, and dangerous persists within our society. Awareness of these stereotypes, without personally endorsing them as correct, activates unconscious stereotypes in a person's mind. In this case, defense counsel did not voir dire on race. *Id.* at 2630. As one study explained over a decade ago, social psychologists have documented [t]he stereotype of Black Americans as violent and criminal... for almost 60 years." Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 6, at 876 (APA, 2004). That association of Black people with criminality is "consistent and frequent," despite seemingly being automatic and unintentional. *Id.* In a "highly circumstantial" case involving a Black decedent and a Black defendant, extra care is warranted because some juror inferences might be automatic because of implicit bias.

This Court should reverse on sufficiency of the evidence because it cannot have confidence that the jurors did not make the impermissible guesswork leaps that resulted in wrongful conviction.

IV. The trial court should have granted Mr. Murphy's motion for new trial on the basis of newly discovered evidence.

After Mr. Murphy was convicted, two additional witnesses came forward who were on lower Church Street that night that Mr. Adedapo died. Had they testified at trial, Robert Robidoux and Jabez Beane would have rebutted both Mr. Alexander's and Mr. Reed's testimony that Mr. Murphy could have possibly been the shooter. Mr. Robidoux and Mr. Bean both believed that the shooter was not Mr. Murphy, but rather a different tall Black man—one who was much thinner than Mr. Murphy.

Vermont Rules of Criminal Procedure authorize a new trial on the basis of newly discovered evidence if motion is made within two years from final judgement. V.R.Cr.P. 33. To determine whether to grant the motion, the Court looks to five criteria:

> (1) the new evidence would probably change the result upon retrial;
>
> (2) the new evidence was discovered after trial;

> (3) the evidence could not have been discovered sooner through due diligence;
>
> (4) the evidence was material; and
>
> (5) the evidence is not merely cumulative or impeaching.

State v. Tester, 2007 VT 40, ¶ 14. After a two-day hearing, Judge Maley denied Mr. Murphy's motion for new trial finding that Mr. Bean and Mr. Robidoux's testimony was not credible and would not have changed the outcome of the trial. A.V. 1236–1250.

This Court should reverse the trial court's decision on the motion for new trial because State's case rested primarily on circumstantial testimony at the time of the shooting. By the State's own admission, its case for guilt ultimately came down to eyewitness testimony at the time of the shooting—but its witnesses did not see the actual shooting. The State argued, "It really boils down to whether you believe Justin and whether you believe Sam." 2/9/2018–TR–at 60. Yet both men were initially suspects in the case, whereas neither Mr. Robidoux nor Mr. Bean had any incentive to implicate anyone else. Mr. Robidoux's and Mr. Bean's testimony of a tall, thin man with his hand held out in the proximity of the muzzle flash *who was not Chavis Murphy* would have changed the outcome of this case.

Given that this case was riddled with reluctant witnesses changing their stories, Mr. Robidoux's and Mr. Bean's testimony should not have been dismissed as merely incredible or cumulative. Judge Pearson's footnote in his decision on a new trial highlighted the inconsistencies of the trial testimony that the jurors needed to resolve to convict Mr. Murphy—what direction people were moving in, as well as when and where any fight occurred that evening. That Mr. Robidoux and Mr. Bean were similarly inconsistent should not have been considered evidence of their lack of credibility—their testimonial discrepancies were remarkably similar to the trial testimony, thus it was an abuse of discretion to dismiss them out of hand as not credible. In addition, Mr. Robidoux and Mr. Bean were consistent that the person they saw and believed was the shooter was tall but much thinner than Chavis

Murphy. Mr. Bean saw this person with his hand extended and then he saw muzzle fire. This testimony—from witnesses who had no incentive to lie for Mr. Murphy—would certainly have made a difference in Mr. Murphy's trial.

Mr. Murphy was convicted based on Mr. Alexander's shifting testimony, and Mr. Reed's ambiguous statement, taken together with evidence that he was on Church Street that night and some weak evidence of flight. This Court must grant a new trial or risk that an innocent man is doing 20 years to life.

Conclusion

For the foregoing reasons, Mr. Murphy's conviction should be reversed and the matter should be remanded for a new trial.

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Certificate of Compliance

I certify that the above brief submitted under V.R.A.P. 32 was typed using Microsoft Word for Office 365 and the word count is 9,995, consistent with Appellant's 10,000 word count.

Dated at Montpelier, Vermont this 27th day of January, 2022.

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